

Legal Status of the Limited Liability Partnership by the Legislation of the Republic of Kazakhstan

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Submitted: Aug 15, 2013; **Accepted:** Sep 11, 2013; **Published:** Sep 18, 2013

Abstract: Along with the individual, the legal entity is one of the active participants of economic relations. Properties of the legal entity give founders such opportunities as collection of capitals, decrease of enterprise risk and realization of big projects, which is undoable for individuals. Founders of these legal entities not only benefit financially, but also realize many socially useful projects. Therefore, proper legal regulation of legal entities's activity is important for an economic turn. This article analyzes the legislations that regulate activity of the limited liability partnership in the Republic of Kazakhstan. In particular, it concentrates on the structure of founders of LLP, an order of alienation of a share in charter fund and possibility of transfer of the LLP to trust management.

Key words: Limited liability partnership • Charter fund • Founder • Gaps in the legislation

INTRODUCTION

According to requirements of article 34 of the Civil Code of the Republic of Kazakhstan a legal entity which is a commercial organization (enterprise) may be created solely in the form of a state-owned enterprise, business partnership, joint-stock company or production cooperative society. A legal entity, which is a non-commercial organization, may be created in the form of institution, public association, joint-stock company, consumer cooperative society, public foundation, religious association and any other form which is provided by legislative acts. As you see joint-stock company can be both commercial and non-commercial. The possibility of creating a non-commercial joint-stock company is criticized by Kazakhstani researchers [1, p.254].

The note 2 of article 58 of the Civil Code of the Republic of Kazakhstan establishes that business partnerships may be created in the form of a full partnership, partnership in commendams, limited liability partnership and partnership with additional liability.

The term "company" means association of persons united for common business activity. Respectively, the phrase "company law" means legal regulation of such activity [2, p.9]. What is the main purpose of corporate law? The main purpose is to protect interests of all third

parties including founders, workers and consumers appeared in a company's field of activity [3, p.28]. Importance of legal entities in the market is well-defined in Karl Marx's following words stated to describe the historical importance of joint-stock companies: "If we had waited accumulation of capital needed for the construction of the railroads from individual persons, the world would still be without railroads. On the contrary, accumulation of the capital that occurs in joint-stock companies allowed us to construct railroads very quickly" [4, pp: 17-18].

MATERIALS AND METHODS

In this article I tried to evaluate the current legislation of the Republic of Kazakhstan about limited liability partnerships. For this purpose, I used monographs and scientific articles of domestic and foreign researchers and analyzed the current legislation. A special attention was paid to scientific works of the Russian researchers. The reason is the similarity of legal systems and the close economic relations between our countries [5].

RESULTS AND DISCUSSION

LLP is one of widespread forms of corporation and was introduced into circulation in the 19th century. The

first law defining legal status of LLP was adopted 1890 in Germany [6, 3].

The note 1 of article 77 of Civil Code of the Republic of Kazakhstan and the note 1 of article 2 of Law of the Republic of Kazakhstan "On limited liability and additional liability partnerships" (further - the law on LLP) gives the following definition of LLP «*A limited liability partnership means a partnership which is established by one or more persons, the charter fund of which is divided into stakes, the size of such stakes is set forth in the foundation documents; copartners of a limited liability partnership are not to be held liable with regard to its obligations and bear the risk of losses associated with the partnership's operations within the size of their contributions. Exceptions to this rule may be provided in the Civil Code of the Republic of Kazakhstan and herein.*».

From this definition it is possible to draw a conclusion that, LLP can be founded by the following persons:

- Only individuals;
- Only legal entities;
- Individuals and legal entities at the same time.

Besides this, in the current legislation of the Republic of Kazakhstan there are other restrictions on the structure of founders. For example, in LLP offering security services founders can't be foreign legal entities and individuals [7]. The same demands are made to LLP functioning as mass media [8]. Researchers divide corporations either as "association of the capitals" or as "association of persons". In LLP signs of "association of the capitals" as most often meet:

- LLP can have one founder
- There is no duty of participants to participate in the administration of LLP
- There is no legislative ban on participation of the person in several LLP

Also in LLP there are signs characteristic to "association of persons". For example, special procedures are required to sell shares in the charter fund [9, p.264].

Registration committee which is a part of the Ministry of Justice of the Republic of Kazakhstan states that throughout the republic there were registered 3891 joint-stock companies, 187 542 business partnerships

[10, p.65]. The majority of founders of the business partnerships choose a form of LLP. For example, from 1st January to 29th December, 2000 in the financial capital of Kazakhstan, Almaty, was registered 7024 business partnerships and 7021 of them were created in the form of LLP [11, p.3]. Such tendency is characteristic for other CIS countries too. For example, russian researcher L.Novoselova does such conclusions: «Limited liability partnership – the organizational and legal form of the legal entity most widespread today in which more than 50 percent of legal entities exist in Russia» [2, p.3]. Other russian researcher E.Sukhanov also concludes the similar data. He claims that, from among 4 million registered legal entities in Russia, more than 3 million or 75% were created in the form of LLP [12, p.85]. So, founders of LLP risk only the amount of capital they contributed to that LLP. For instance, LLP "A" is founded by two people, one of them contributed 100 dollars and other one contributed 150 dollars. If their LLP is in debt of 500 dollars, then founders lose their 250 dollars and are not responsible for the payment of the remaining 250 dollars. The legislations of CIS countries do not use the rule of «piercing/lifting the corporate veil». For example, in 2011 when in Russian Federation ship "Bulgaria" had sunk, the Russian government, not the founders, paid the compensation for the injured ones [13]. Because the company that owned ship "Bulgaria" was in the form of LLP. For this reason researchers offer to use rule of «piercing/lifting the corporate veil» [6, pp: 11-14]. Kazakhstani researchers also had discussed the implementation of additional responsibility to the founders of LLP [9, pp: 266-268].

Today the form of LLP is chosen not only by small businesses, but also by large companies with multi-billion turns. For example, "Tengizchevroil" which is the giant in the field of raw material resources is founded in the form of LLP [14].

According to requirements of the note 2 article 23 of Law of the Republic of Kazakhstan "On limited liability and additional liability partnerships" the initial size of the charter fund shall be equal to the amount of the founders' contributions and may not be less than 100 times the monthly calculation index (MCI¹) (approximately US\$ 1,170), while for small businesses² it is KZT 100 (approximately US \$0.7) as of the date the documents for the partnership's state registration have been submitted. Contributions to the Charter Fund of a limited liability partnership may be made in cash, securities, in kind, property rights, including the right to land usage and the

¹Law On the National Budget for 2013-2015 No 54-V dated 23 November 2012 sets the MCI for 2013 at KZT 1,731 (approximately US\$ 11,5)

²According to the Private Entrepreneurship Law, small businesses are companies employing no more than 50 people and whose assets are not valued at more than 60,000 times the MCI (approximately US\$ 678,823)

right to the results of intellectual activities, as well as other assets [15].

The same norms are enshrined and in the Russian legislation. In Article 14 of the legislative act of the Russian Federation "About LLP" it is established that, the size of charter fund of LLP has to be not less than ten thousand rubles (approximately US\$ 350) [16].

Researchers claim that such "limited liability has the price" in the form of obligatory requirements to charter fund [12, p.217]. Fixing demands made to charter fund in the legislation has to affect the corporate relations positively. Because, charter fund functions as protection of interests of creditors. Despite it, demands made to charter fund recently are weakened. For example, LLP being the subject of small business can be founded with charter fund in 100 tenges. And in Germany since November 1, 2008 it is possible to establish LLP with 1 euro [12, p.86]. Therefore, it is suggested to remove the necessity for charter fund. But this suggestion underwent venomous criticism in German media: it was equated to the advice to the athlete running on cold weather in a bathing suit to remove that bathing suit as it doesn't warm anyway [12, p.220].

In the Russian Federation's current legislation on LLP it is mentioned that the amount of charter fund is extremely low. Their legislation says that the conformity of legal entity's assets to the charter fund should be controlled by governmental officials. In case of unconformity between legal entity's assets and charter fund, the legal sanction should be drawn [17, p.113]. In addition to this, researchers raise the following question related to the charter fund. What should do registering authority if the founders value their contributed capital too high? This problem is left without solution in the current corporative law of the Republic of Kazakhstan. However, according to the German legislation in such case legal entity will not be registered and German researchers suggest assigning a presenting authority as a responsible one [18, 13].

In note 2 of article 77 of Kazakhstan's Civil Code it is said: «A limited liability partnership cannot have as its only member another partnership consisting of only one member». The main reason of including this item is to prevent the exclusion of liability of its founder, because it contradicts to the note 3 of article 44 of Civil Code [19].

Didenko and Nesterova state that during LLP's functioning if the prohibited case stated in note 2 of article 77 of Kazakhstan Republic's Civil Law and in the note 1 of article 10 of the law on LLP occur, then

Kazakhstan's laws are not able to solve the problems that may rise as a result of this prohibited case [20, p.237].

As an example Didenko and Nesterova suggest this scenario: LLP "A" is founded by two founders, one of them is individual "B" and the other is LLP "C" that consists of one person. If individual "B" is going out of LLP "A", then the founder of LLP "A" will be LLP "C" that consists of one person. In this case according to the note 6 of article 42 of Kazakhstan Republic's Civil Code LLP "A" should be reregistered. But registering authority cannot register LLP "A" because it is impermissible to register LLP whose founder is another LLP that consists of one individual. That is an easy case. We can advance this case by changing scenario a little bit. For example, LLP "A" is founded by another LLP "B" that consists of two people. After a while, one individual from LLP "A" excludes from LLP "B", therefore making this scenario as the one discussed above. However, in this case the note 6 of article 42 of Kazakhstan Republic's Civil Code is not implemented as the changes occur not in the founded LLP "A", but in the founder LLP "B". Therefore, reregistration should do LLP "B". For this case Didenko and Nesterova say that this gap in legislation may cause serious problems in law enforcement. It is therefore necessary to include in the Civil Code and the legislation on LLP an item according to which a court may make a decision on compulsory liquidation of a partnership in the event of violation of note 1 of Article 10 of the law on LLP, if within the certain period the violation is not corrected (by receiving a new member to LLP, voluntary liquidation, reorganization, etc.).

As the following problem question it is possible to lift procedures of alienation by the participant of LLP of the share. According to requirements of article 80 of the Civil code of the Republic of Kazakhstan the participants of a limited liability partnership shall enjoy a pre-emption right, as compared to third persons, with regard to the purchase a share, or its part. The same provisions are established in article 31 Law on LLP.

In what cases a pre-emptive right of primary purchase is considered broken? The legislator gives the answer to this question in note 6 of article 31 Law on LLP: «If a stake has been disposed to a third party at the price lower than that indicated in the notification, the purchase-sale agreement may be invalidated. The copartners shall have the right to repeat the pre-emptive right procedure to purchase a stake based on the actual sales price of the stake or a portion thereof». The legislator in this question gives a priority only to the price. Other conditions remains

out of regulation. In our opinion it is one of gaps in the legislation. Therefore it is necessary to make additions considering not only the price, but also other sale condition.

According to requirements of the article 56 of Law of the Republic of Kazakhstan "On limited liability and additional liability partnerships" a limited liability partnership or its assets may be transferred into trust management, unless otherwise is provided for in the partnership's foundation documents. LLP being as legal entity participates in a civil turn as the independent person. How can independent person be considered as object?.

CONCLUSION

All above-stated examples show that the law on LLP is not ideal. There has to be carried out improvements on current legislation. How to make it? Whether it is enough to make a slight correction of the current legislation? It will be not enough because in addition to the above-stated issues there are some other problems in the activity of LLP. According to the requirement of note 8 of Article 21 of the Law of the Republic of Kazakhstan "About Legislative Acts" if the volume of modification and/or additions to the regulatory legal act exceeds a half of the text of that regulatory legal act, its new edition must be accepted. Therefore, the current legislation about legal entities has to be completely reconsidered.

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