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FEATURES OF A SIMPLE PARTNERSHIP AGREEMENT IN THE ASPECT OF LAW ENFORCEMENT PRACTICE

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Introduction. The contract of a simple partnership, on the one hand, has been well known since Roman law, on the other hand, we see that clearly insufficient legal regulation creates gaps. The understanding of the features of the contract in research papers is very differ. The development of legislation providing for the possibility of creating investment partnerships, partnerships for the purpose of participating in regular transportation of passengers and baggage, in the provision of paid services at train stations and bus stations shows the expediency of studying this type of contract. The above creates the need for a deeper study of the features of the contract in order to identify the features of its application in civil turnover.
The purpose of the study is to identify the features of a simple partnership agreement that affect its legal qualification and law enforcement.
Methodology. In the course of the research, methods of generalization, description, analysis, synthesis, comparative, historical and formal legal methods were used.
Results. A simple partnership agreement is a multilateral transaction, the participants of which are not divided into active and passive parties. Their wills are co-directed to achieve a certain economic result. The contract of a simple partnership is organizational, since its content consists of the rights and obligations for interaction, information, and the procedure for carrying out the activities of the partners, which can be designated as an internal legal relationship of the participants. The contract historically refers to fiduciary, but for investment partnerships, and, de lege ferenda, for business partnerships, the degree of fiduciary is weakening.

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1. Introduction

The partnership agreement (societas) has been known since the time of Ancient Rome, it is believed that it arose due to Mediterranean trade [1, p. 388] Among the main provisions on a particular partnership in Digests are reflected: personal trust (D. 17. 2. 1); void contract if partnerships formed it with malicious intent or for the purpose of deception (D.17.2.3.3); distribution of risks of late withdrawal from the partnership (D.17.2.17.1); prohibition of the creation of societas leonina, in which one of the partners incurs exclusively losses without making a profit [2, p.123], etc.

The development of legislation providing for the possibility of creating investment partnerships, partnerships for the purpose of participating in regular transportation of passengers and baggage, in the provision of paid services at railway stations and bus stations shows the expediency of studying this type of contract. In the science of family law, there are also voices about the possibility of applying the provisions on non-entrepreneurial partnership to relations involving cohabitants [3, p. 49; 4, p. 15]. A.A. Goreva, noting the prospects of these contracts in the syndicate of creditors and the mining partnership [5, p. 31].

The study of any contract, first of all, involves the identification of its features, which establish a correspondence between the name and the content of the contract. It serves as the main basis for assessing and correlating a specific legal relationship with the legal understanding of this phenomenon.

Thus, T.A. Tereshchenko highlights the confidential (fiduciary) nature of the contract, the fact that it is primarily a multilateral contract, as well as the reimbursable basis and mutuality of the contract [6, pp. 803-804]. V.P. Kamyshansky classified it as mutual one [7, p. 384].

D.V. Zhernakov notes such characteristics of a classified partnership agreement as a consensual, organizational agreement, as a general rule fixed-term [8, p. 482]. M.I. Braginsky named such features as multilateralism, pecuniary, fiduciary [9, p. 629, 634]. There is an obvious lack of unity regarding the features of the agreement, which complicates the issues of its interpretation, interpretation of the text of the agreement in order to identify its content and may cause problems of law enforcement practice.

Let's consider these features in more detail in order to identify their applicability and expediency in relation to a classified partnership contract.

1. Particular partnership (contract on joint activity) as a consensual agreement

The classification of contracts into consensual and real ones and their differences are related to the specifics of their conclusion and the fixation of the moment of the obligation [10, p. 158].

In Article 307 of the Civil Code of Russia, which contains the legal definition of an obligation, among the actions that the debtor is obliged to perform in favor of the creditor is the contribution to joint activities. Contributions to a simple partnership can be both property-based, which can be transferred, and non-property [11, p.87], including expected benefits (restriction of competition, increase in creditworthiness, expansion of the customer base, obtaining information [5, p.35].

In German civil researches contribution in the broadest sense of the word means any actions and provision of committed for common purposes [12, p. 219], according to Section 705 of the German Civil Code, making a contribution is not the only possible way to promote the activities of the partnership.

And if there is no doubt that the moment of the legal relationship between the partners is the moment of the conclusion of the contract, then with regard to the obligation to make a contribution, the question arises about the admissibility of the requirement to compel the transfer of the contribution if the partner does not fulfill his duty, because the relationships of the participants has a personal confidential nature.

Opinions on the possibility of compulsory collection of contributions vary in the literature and judicial practice. Some believe that such a thing is impossible [9, p. 648], and a party does not have the right to demand compulsory recovery of the contribution from the other party in its favor. Others believe that if an agreement is reached between the participants and the contract is signed, then the parties cannot shy away from making their

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contributions [13, p.153]. This position was confirmed by the it.7 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 07/11/2011 No. 54, according to which, if a partner refuses to contribute to a common cause, other parties to the agreement have the right to demand the execution of the agreement in court and recognition of ownership of a share in the created immovable estate, the construction of which was a common goal, as well as to claim damages In connection with the non-fulfillment of the contract, the Supreme Arbitration Court proceeded from the binding nature of such an obligation [14, p.19].

However, this conclusion of the court refers to a situation when a real estate object has been erected, but the land plot is not registered in the common shared ownership of the partners (or leased with a plurality of persons on the tenant's side). In other words, the land was actually provided, but there was no legal registration, which, in accordance with paragraph 2 of Article 165 and paragraph 3 of Article 551 of the Civil Code of the Russian Federation, creates the possibility of filing a claim for registration of the right based on the principle of venire contra factum proprium.

It should be borne in mind that the contribution may be of an immaterial nature, and if a partner avoids activities that constitute the purpose of creating an association, given the personally confidential nature of the relationship, it is unlikely that it is advisable to maintain the partnership. In the absence of an indication in the contract of the possibility of its termination in this case, it is advisable to terminate due to a significant violation of the obligation (paragraph 2 of art. 450 of the Civil Code of the Russian Federation).

Other ways of solving the problem are also possible. M.I. Braginsky proposed that in cases of a participant's evasion from the realization of a common goal, if it is not achieved or deviated from it, the contract should be recognized as not concluded [15, p. 396].

Thus, a particular partnership agreement is a consensual causal transaction, since the moment when a legal relationship arises is the moment when an agreement is reached. However, the obligation to transfer the deposit has a "weakened" character in relation to the possibility of filing a claim for enforcement. This is permissible when ownership has actually been transferred or the owner himself exercises economic dominance in accordance with the contract, but legally no changes have been made in the register of real estate rights.

2. Partnership as a multilateral transaction.

Among the agreements named in Part two of the Civil Code of Russia, Chapter 55 occupies a separate place, since, regardless of the number of parties, a simple partnership is a multilateral transaction.

Bilateral agreements presuppose that the parties have their own interests, which are initially opposed to each other. The conclusion and subsequent execution of such an agreement is aimed at satisfying opposing interests [16, p. 199]. G.F. Shershenevich, speaking about partnerships, noted that each participant, being both an active and passive subject, interacts with others who are in the same legal position [17, p.123].

The will of the parties is aimed precisely at organizing interaction in order to achieve the desired goal through coordinated actions. And this goal is not opposite, as in bilateral agreements, but is the same, otherwise a contract on joint activity will not be concluded. As noted by D.S. Stepanov, it is rather not a conflict of interests here, but a "Brownian movement of preferences" of the parties to the treaty [16, p. 210].

The opinion has been repeatedly expressed in science researches that the content of a simple partnership agreement does not fit into the usual structure of a synallagmatic agreement [18, p. 84; 19, p. 40]. Mutual, synallagmatic and bilateral-binding agreements assume counterdirectional vectors of interests, which contradicts the nature of a simple partnership agreement, where interests are assumed to coincide and co-direct.

The unifying principle of the activity of comrades is the presence of a common goal as a constituent feature of the contract. V. I. Serebrovsky noted the "one-level" rights and obligations of the parties and their equality, which is emphasized by the very term "comrades" in russian [20, p.219]. There is no partnership without a common goal, which has been repeatedly noted in the literature

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[21, p. 278] and judicial practice.

The common goal and multilateral nature of the transaction presuppose the constant efforts of the participants to coordinate their actions, which implies the need to coherent the order of interaction, to prescribe the cases when a majority vote is possible to resolve the issues of interaction. Since the agreement can become the basis for subsequent agreements between the participants. Comrades are united by co-directed interests in achieving the goal of their activity.

If there are two participants, this does not mean that there is a transformation of the binding structure, the causa remains the same – the achievement of a common goal. Moreover, the purpose of the partnership and the personal goals of the comrades do not necessarily coincide. It is for this reason that the creation of societas leonina is allowed in Germany, based on the differentiation of personal goals and the common goal of the partnership [22, p. 417]. The various goals of the participants do not affect the overall goal of the partnership, but only serve as a manifestation of their interest in participating in the contract [5, p.59].

Achieving a goal changes the obligation and changes the direction of joint activities, which are already aimed at distributing the result among the participants [23, p.99].

The absence of a single purpose of the agreement may lead to its recognition as not concluded[1] or to the application of the consequences of the pretence of the transaction[2] .

The issue of the pecuniary (cumulativeness) of a simple partnership agreement is logically linked to the discussion of the issue of bilateral binding agreements.

In accordance with clause 1 of Article 423 of the Civil Code of the Russian Federation, a pecuniary contract is one under which a party must receive a fee or other counter-provision for the performance of its duties.

A contract on joint activity, as mentioned above, as a rule, does not involve such reciprocal obligations, they are co-directed.

Recognizing this feature of the contract, nevertheless, attempts are being made in the scientific and educational literature to "fit" joint activities into the framework of a traditional dichotomy, for example, explaining that the obligation to make contributions can be considered one of the types of mutual satisfaction when the fulfillment of an obligation to achieve a common goal is conditioned by similar obligations of other partners [24, p. 306].

O. S. Ioffe, arguing that a simple partnership agreement is not mutual, noted that the presence of benefits is not equal to the mutual satisfaction that is assumed in a compensation agreement, since benefits are derived by each partner from the joint efforts of all, including their own, and not by the actions of the counterparty [25, pp. 734-735].

In full agreement with the characterization of the relationship between the rights and obligations of the parties, we assume that the compensated-gratuitous dichotomy characterizes bilaterally binding agreements (bilateral), without in any way describing the essence of the relationship of a simple partnership.

The contributions of participants themselves, in accordance with Clause 1 of Article 1042 of the Civil Code of the Russian Federation, may be non–material (professional and other knowledge, skills and abilities, as well as business reputation and business connections), their assessment is rather an assessment of significance, given the non-monetary nature of intangible assets. The creation of a community of property and other assets, including knowledge and skills, pursues common goals and contributes to their achievement, otherwise the question arises about the validity or conclusion of a simple partnership agreement. Profit extraction is only in the future, i.e. it has a deferred [26, p.16] and probabilistic character.

However, it is necessary to take into account the legal possibilities provided by dispositive legal norms, so paragraph 2 of Article 1050 of the Civil Code of the Russian Federation assumes the permissibility of including in the contract of a simple

[1] Resolution of the Supreme Court of Russian Federation w.r.t. case № 306-ЭС17-7557 dated 3/07/2017, Resolution of the Arbitration Court of the Ural District dated 10.12.2012 № Ф09-11341/12 w.r.t. case № А50-3090/2012. ConsultantPlus.

[2] Appeal ruling of the Moscow Regional Court dated 24.09.2018 in case No. 33-29126/2018.

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partnership a condition on the transfer of things to the common possession and (or) use of comrades for remuneration, but it must be explicitly established in the contract. In this case, the lease provisions will apply to the relations related to the paid possession and (or) use of the thing. And it is precisely this kind of relationship that will be two–way (on the one hand, the owner of the thing, on the other, the rest of the comrades) and retaliatory.

3. Particular partnership as a fiduciary agreement.

Fiduciary transactions (from Latin. fiducia - trust) presuppose a special, personally confidential relationship between the parties, when trust acquires legal significance. Classifying a transaction as a fiduciary transaction presupposes special requirements for the actions of subjects (fiduciary duties), which include actions involving special care, dedication, timely information, etc.

The loss of personal trust between the participants presupposes their right to withdraw from the contract. The fiduciary nature of the relationship between the parties may exclude a change of persons, for example, the death or withdrawal of one of the partners has always meant the termination of the partnership. The entry of a new member into the union meant the emergence of a new partnership [18, p. 80].

D.V. Dozhdev, in relation to the Roman societas, notes the essential importance of the personal qualities of each participant in the contract [27, p.540]. P.E. Sokolovsky assumed that the parties to the contract took a sacred oath in the name of Fides (the ancient Roman goddess of harmony and fidelity) [28, p.71], which logically entailed the termination of the partnership after the death of one of the participants.

In the scientific and educational literature, the classification of a particular partnership agreement as a fiduciary agreement does not cause much disagreement, noting that it is a combination of not only property, but also persons, which implies a trust character.

The qualification of a contract as a fiduciary one presupposes the need to obtain the consent of all partners to the assignment of rights (Clause 2, Article 388 of the Civil Code of the Russian Federation) [29, p.33]; termination of the contract in the event of a partner's refusal to participate in an indefinite contract, changes in the scope of legal capacity, death, liquidation (clause 1, Article 1050 of the Civil Code of the Russian Federation), but the contract can provide the preservation of camaraderie.

The features of a fiduciary transaction also include: the risk of the creditor associated with possible difficulties in protecting his rights in the future; the obligation of the debtor to act based on the interests of the beneficiary; fiduciary responsibility often involves a redistribution of the burden of proof; they also note a more loyal format for proving causation and the amount of losses in case of violation of fiduciary duty [30, p.12].

I.I. Zikun identified three main criteria for fiduciary transactions: 1) the exercise of "someone else's right", for example, the disposal of the right to someone else's property; 2) the fulfillment of obligations in the best way for the creditor, which is associated with an increased standard of integrity and accounting; 3) the irreversibility of legal consequences [31, p.72].

Chapter 55 of the Civil Code of the Russian Federation does not specify the duty of reasonable conduct of business and loyalty, there is no indication of information disclosure (with the exception of the right to review documentation provided for in Article 1045 of the Civil Code of the Russian Federation), there is no obligation to refrain from competition with the partnership, to use information obtained in connection with joint activities only in the interests of the partnership, etc. As a result, a paradoxical situation arises: everyone knows that the contract is fiduciary, but there are very few norms that support the trusting nature of the relationship.

In investment partnerships, the fiduciary nature of the contract is weakened due to the ability of depositors to assign their rights (art. 15 of the Federal Law "On Investment Partnerships"[3]. A.A. Goreva suggests allowing the free assignment of rights in business partnerships [5, p. 39,61], which in fact implies a further weakening of the importance

[3] Federal Law No. 335-FZ dated 28.11.2011 (as amended on 02.07.2021) "On Investment Partnership". ConsultantPlus

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of trust relations of partners.

Given the initial premise of the existence of a trusting relationship between the partners, it is advisable in the contract to provide for the possibility of excluding a participant from the number of participants in a particular partnership contract if there is a common will of the other partners in relation to pre-established circumstances. Such circumstances may include failure to fulfill the obligation to transfer the contribution, disclosure of information, creation of competition to the partnership when using the latter's resources. Currently, the law does not provide for the possibility of expelling a partner due to his misconduct.

4. Particular partnership as an organizational contract.

O.A. Krasavchikov in his concept of the organizational relations described them as coordinating or subordinating social ties aimed at streamlining (normalizing) social relations, actions of participants, or the formation of social formations [32, p.56]. The purpose of organizational agreements is to coordinate future cooperation in the implementation of joint activities.

The result of the concluded contract is an internal organizational legal relationship, which forms the core of the contract, but it is clearly not regulated by law. The organizational agreement is aimed at future cooperation, coordination of the activities of the participants, so that their interaction has a better effect than with individual actions without a contract [33, pp.131-132]. For example, one of the court decisions noted that the contract does not define the terms of a specific obligation, but transfers agreements developing and specifying it into the future."[4]

The recognition of the contract as organizational and fiduciary implies the difficulty of proving the fact of a violation by a partner of duties related to good behavior. A.V. Andryushchenko rightly notes the limited protective and restorative means by which participants of the contract on joint activity can protect their rights, in contrast to the usual contractual relationship [33, p.79].

In chapter 55, the provisions on the responsibility of partners in the framework of an internal legal relationship are clearly insufficient: paragraph 4 of art. 1044 of the Civil Code of the Russian Federation provides for the possibility of claiming damages to a partner who made a transaction outside his authority, if the transaction was necessary in the interests of all the partners, the partner who made the transaction may claim reimbursement of expenses if they were at his expense.

If a partner demands termination of the contract for a valid reason (not related to significant violations of duties by other partners), he is obliged to compensate other partners for losses (Art.1052 of the Civil Code of the Russian Federation). It is obvious that the provisions on liability under the joint venture agreement are incomplete and need to be developed.

5. Conclusion

Having considered the specifics of the relations arising from the contract of a particular partnership, the structure of contractual relations, the following conclusions can be drawn. A contract on joint activity is an organizational one, since its content consists of the rights and obligations to interact, inform, and conduct the activities of the partners, which can be designated as an internal legal relationship of the participants.

Historically, the contract belongs to the fiduciary, but for investment partnerships, and, de lege ferenda, and for business partnerships, the degree of fiduciary is weakening. The agreement is consensual. The content of the obligation is not only the pooling of deposits, but also joint actions. Since the treaty is multilateral (even if there are two parties), it is not advisable to apply the classification of bilaterally binding and retaliatory to it.

[4] Resolution of the Arbitration Court of the Volgo-V'atskii District dated 13/01/2010 № A29-1803/2009. ConsultantPlus.

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