LEGAL FORM OF GENERAL PARTNERSHIP IN VIET NAM

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ABSTRACT

Objective: This paper researches the legal form of general partnership under the provisions of the Enterprise Law 2020 in Vietnam, therefore, points out the limitations, inadequacies and some recommendations proposals.

Method: To conduct a research about the legal form of general partnership in Vietnam, the authors have used a combination of traditional research methods of the social sciences and legal sciences such as legal analysis method, the legal efficiency evaluation method, and legal comparison method to achieve the objectives of the research.

Results: Currently, the legal form of general partnership in Vietnam's Enterprise Law 2020 has not yet been defined clearly. This not only causes difficulties and complications for the general partnership in the organizational and operational process but also makes many foreign investors feel hesitate to choose this type of company. It is unconditionally unreasonable to combine two types of human-based companies in a form of general partnership regulated in Enterprise Law 2020 in Vietnam. Therefore, in order to overcome the limitations of the legal form of the current general partnership, the authors suppose that the following solutions should be considered.

Conclusion: The regulations on the legal form of general partnership directly related to the efficiency of management and administration of this company. Simultaneously, the straightforward definition of the legal form of general partnership will advance the investors’ confidence to choose this type of company. However, the unclear regulations on the legal form of general partnership in Vietnam has been existing since Enterprise Law 1999, leading to limited space for the development of general partnership in Vietnam.

Keywords: legal form, general partnership, limited partnership, general partner, limited partner.

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FORMA LEGAL DE PARCERIA GERAL NO VIET NAM

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RESUMO

Objetivo: O presente documento analisa a forma jurídica da parceria geral nos termos das disposições da Lei Empresarial 2020 no Vietnã, portanto, aponta as limitações, inadequações e algumas propostas de recomendações.

Método: Para realizar uma pesquisa sobre a forma jurídica da parceria geral no Vietnã, os autores têm usado uma combinação de métodos tradicionais de pesquisa das ciências sociais e das ciências jurídicas, como o método de análise jurídica, o método de avaliação da eficiência jurídica e o método de comparação legal para alcançar os objetivos da pesquisa.

Resultados: Atualmente, forma legal de parceria geral na Lei de Empresas do Vietnã de 2020 ainda não foi definida claramente. Isto não só causa dificuldades e complicações para a parceria geral no processo organizacional e operacional, mas também faz com que muitos investidores estrangeiros se sintam hesitantes em escolher este tipo de empresa. É incondicionalmente irrazoável combinar dois tipos de empresas de base humana numa forma de parceria geral regulamentada pela Lei das Empresas de 2020 no Vietnam. Portanto, para superar as limitações da forma jurídica da atual parceria geral, os autores supõem que as seguintes soluções devem ser consideradas.

Conclusão: A regulamentação sobre a forma jurídica da sociedade em geral está diretamente relacionada com a eficiência da gestão e administração desta empresa. Simultaneamente, a simples definição da forma jurídica de sociedade em nome coletivo aumentará a confiança dos investidores na escolha deste tipo de sociedade. No entanto, os regulamentos pouco claros sobre a forma jurídica da parceria geral no Vietnam existem desde a Lei das Empresas de 1999, o que dá lugar a uma margem limitada para o desenvolvimento da parceria geral no Vietnam.

Keywords: forma jurídica, sociedade em comandita, sociedade em comandita, sócio, sócio comanditário.

1 INTRODUCTION

General partnership is the form of “company that appears very early and quite popular in the world” (Nguyen Vinh Hung, 2011, p. 29), but in Vietnam, it is said that this form of company “is not successfully imported to our country... For many reasons, this company has completely failed, most of Vietnamese entrepreneurs do not choose this form of company” (Pham Duy Nghia, 2015, p. 187). Recent research shows that “until now, general partnership has been barely developed in Vietnam” (Hung, N. V et al., 2022, p. 01). This is because, although it was regulated by the Enterprise Law 1999 and has now been more than 20 years, however the number of general partnerships established and operating is very small compared to the remaining types of companies of the Enterprise Law 2020. The reason for the lack of development of the general partnership
in Vietnam can be explained in many ways, but one of the most important reasons for the
general partnership to not develop in Vietnam is because of the uncleanness in the legal
form of this type of company. Many legal questions arise such as whether this is a general
partnership or what type of company is this? Should it be determined as a general
partnership or a limited partnership? However, it is affirmative that general partnership
under Vietnamese law now can be considered as a relatively special form of company
compares with other countries in the world. From there, to promptly overcome and correct
limitations and inadequacies in the legal regulations and contribute to the general
partnership's strong development in Vietnam, at the same time, provide domestic
investors and foreign investors an effective option when participate in Vietnam’s
investment and business market, it is very necessary and important to research the legal
form of general partnership under the provisions of the Enterprise Law 2020.

2 THEORETICAL FRAMEWORK

The general partnership is the subject of study in economic law. However, law
and economics are particularly intertwined with this subject matter. Therefore, the
theoretical basis of this research is predominantly rooted in the scientific theories of law
and economics. Furthermore, the research topic is shaped by the author's own
observations and evaluations of the legal framework governing the general partnership
within Vietnam's commercial environment, as well as the practical manifestations of
general partnership activities in this sector. It is worth noting that this research is also in
line with the Party and State's policy of judicial reform in Vietnam, highlighting its
relevance to ongoing efforts in enhancing the legal economic system.

3 LITERATURE REVIEW

General partnership in Vietnam has existed since the French colonial. Although
general partnership had a period of suspension, it has always been the type of company
that attract researchers’ attention. Since the Enterprise Law 1999, the general
partnership’s legal form has not been clearly defined, therefore there are many studies on
this issue. In particular, the following studies refer to the general partnership and its legal
form:

The group of articles on general partnerships such as: Nguyen Vinh Hung in 2011
with “General partnership - whether or not the legal personality?”; Dao Loc Binh in


The group of theses and textbooks can be mentioned: Hanoi Law University in 2018 with “Commercial Law textbook”; Nguyen Thi Thuy Giang in 2012 with “Vietnamese Law on general partnerships”.


These studies revealed important issues about the general partnership and its legal form. However, previous studies lacked an in-depth, detailed, and specific analysis of the legal form of general partnership in Vietnam. Therefore, the article on the legal form of general partnership in Vietnam is developed by the authors from previous studies and purely focused on the issue of legal form.
4 METHODOLOGY

To conduct a research about the legal form of general partnership in Vietnam, the authors have used a combination of traditional research methods of the social sciences and legal sciences such as legal analysis method, the legal efficiency evaluation method, and legal comparison method to achieve the objectives of the research.

In general, these above research methods are used in close and harmonious combination by the authors to achieve the research objectives of the paper.

5 RESULTS AND DISCUSSION

5.1 LEGAL FORM OF GENERAL PARTNERSHIP

General partnership is one of the types of companies causes some controversy since it was regulated by the Enterprise Law 1999. Many legal issues related to this company such as “determining the legal status of the general partnership is unclear” (Nguyen Vinh Hung, 2011, p. 29) or “converting the form of general partnership” (Hung, N.V et al., 2022_2, p. 02) have been discussed and debated for a long time. However, the main cause leading to the limitations and inadequacies of the general partnership is that the legal form of this company is still not clear.

As it is known, since the Enterprise Law 1999 (Nguyen Vinh Hung, 2022_1, p. 8 - 9), the general partnership has been restored by the legislator in Vietnam after a relatively long period of suspension. However, to include a general partnership in the Enterprise Law 1999 at that time, it was also a great effort of some individuals (Pham Duy Nghia, 2009, p. 20 - 21). It was believed that with attempts to get the general partnership back to Vietnam, according to the 12 Articles in the original bill of the general partnership, the drafting team had to cut many important content and finally this company is only regulated to cram to within only 04 articles of law. The legal form inconsistency of the general partnership began at this point when those responsible for drafting then tried to find ways to make the company more attractive by adding more limited partner types to the company. By promulgating the Enterprise Law 2005, realizing the importance of general partnership, the legislators expanded the provisions on general partnership to 11 Laws and later, the Enterprise Law 2014 and the Enterprise Law in 2020 are now almost unchanged in 11 articles from the Enterprise Law 2005.

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5 Article 95 to Article 98 of Enterprise Law 1999.
6 Article 130 to Article 140 of Enterprise Law 2005.
At the time of the Enterprise Law 1999, the general partnership was defined as follows: “General partnership is an enterprise in which: There must be at least two general partners; In addition to general partners, there may be limited partners”.

Although there were some relatively minor amendments and supplements on several issues, regarding the legal form of the general partnership, the Enterprise Law 2005, Enterprise Law 2014 and Enterprise Law 2020 continued to keep the provisions of the Enterprise Law 1999. However, the regulation that general partnership can exist both types of members with different legal status as general partners and limited partners, which contradicts the traditional legal form of the general partnership model is still commonly used in the world and even in Vietnam during the French colonial period. The general spirit of the laws of most countries in the world when regulating general partnership is very clearly defined that, the general partnership has only one type of member - general partner in all cases, and the company must have at least these two members. In case the company has a type of member who is a limited partner this must to be the type of the limited partnership. In other words, the fundamental difference and also the most important to delineate these two common types of companies, are very clearly shown when the company "has" or "doesn’t have" limited partner.

In addition, to distinguish between general partners and limited partners, it is also possible to rely on the mechanism of liability for their assets. In which, general partners have joint obligations and unlimited liability, but limited partners only have limited liability for assets. Therefore, to determine whether general partnership or limited partnership can be considered through the mechanism of liability for the assets of types of members. For the general partnership, there is only one type of property liability regime which is unlimited liability. The limited partnership has both unlimited liability and limited liability for two different types of members. According to the provisions of the Enterprise Law 1999 and now the Enterprise Law 2020, Vietnamese general partnership can allow both different types of partner companies:

- The first type is the company consisting of (at least two) general. This is a traditional general partnership in the world with common names such as "partnership", "general partnership", "ordinary partnership", "normal partnership", "simple partnership", etc. However, the name "general partnership" is often used in countries that are part of the civil law family (Germany, France). And "partnership" is used by countries belonging

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7 Point a, Clause 1, Article 95 of Enterprise Law 1999.
to the common law family (UK, USA). Because common law countries do not consider a partnership as a company, it is just a form of business association between merchants instead.

- The second type is the company with general partners (minimum of two) plus one (or more) limited. These company must be clearly and precisely identified as a limited partnership. The sole name of these companies is limited partnership and is used in both civil law and common law countries.

Also since the Enterprise Law 1999, there have been many comments on the legal form of general partnership, in which: “General partnership can also be classified into two types: general partnership and limited partnership. The limited partnership must have at least two general partners and limited partners. Thus, the determination of the legal form of general partnership in the Enterprise Law 2005 is not really clear, as there is no separation between the two forms of partnership: General partnership and limited partnership. This is not consistent with the requirements of practice because the separation between the two forms of partnership affects the nature of the investment relations in the partnership” (Dao Loc Binh, 2012, p. 24). Another view is that, “unlike Vietnam, the laws of many countries around the world consider general partnership and limited partnership as two completely different types of companies, so they are regulated by separate legislation. Vietnam's Law on Enterprises combines both types of companies into a single general partnership. The "two-in-one" company model has existed from the Enterprise Law 1999 to the Enterprise Law 2005, Enterprise Law 2014, and now the Enterprise Law 2020. This leads to incomplete and inaccurate perceptions on the legal nature of both types of companies and the law cannot fully and strictly regulate these two types of companies” (Nguyen Vinh Hung, 2016, p. 100 - 101). In addition “the regulation on general partnership under the Enterprise Law 2014 has specific characteristics that are not completely similar to the laws of other countries, etc and general partnership under Vietnamese law includes two types of the human-capital based company such as the laws of other countries, specifically: General partnership and limited partnership” (Hanoi law University, 2018, p. 137 - 139).

The scope of the research was expanded to learn about general partnership regulations in a number of countries, according to the United States' Uniform Partnership Act of 1997: “An association of two or more natural persons and as co-owners they do
business together for profit”. In Germany, general partnership is: “a company in which the members jointly carry out a commercial activity under a common firm and are jointly and unlimited liability for all debts of the company” (Friedrich Fubler et al., 1992, p. 31). In the French Republic (general partnership - Société en nom collectif): “is a company in which the members are all merchants having both jointly and unlimited liability for the company's debts” (Nguyen Thi Thuy Giang, 2012, p. 07). In the past, in Vietnam, general partnership and limited partnership were brought into Vietnam by the French colonialists to serve the colonial exploitation purpose. At that time, general partnership was called under names such as "cong ty dong danh" (Le Tai Trien, 1959, p. 50) or "hoi hop danh" (Le Tai Trien et al., 1973, p. 763) and was defined by law as “an association formed from two or more persons doing business under one name”; or according to Article 42, Central Commerce defines general partnership as follows: “an association operating under a partnership, in which all members have jointly and unlimited liability” (Le Tai Trien et al., 1973, p. 763). For a limited partnership, in the United States: “A limited partnership consists of two or more people, of which there must be at least one general partner and one limited partner. While a general partner has unlimited personal obligations, a limited partner's obligations are limited to the amount of his or her investment in the company” (Quickmba, 2023). In Germany, a limited partnership differs from a general partnership in the main point that: “in a limited partnership there is only one member with unlimited liability (the receiving capital member or general partners in the general partnership), while other members have limited liability (limited partner)” (Friedrich Fubler et al., 1992, p. 31). Or in France, “the limited partnership has two different types of members: the receiving capital member is the same type of member as the general partner of general partnership, so the rules regarding this member are similarly applied. Limited partner, does not have to bring out all his/her personal assets to be responsible for the company’s debts, they are only liable to the full value of their contributed capital” (Francis Lemeunier, 1993, p. 196). Or according to the regulations in Vietnam during the French colonial period: “an association established between one or more members called "hoi vien thu tu", who are jointly responsible, and if they provide capital they are called "hoi vien xuat tu", who are only responsible for the extent of their capital share” (Le Tai Trien et al., 1973, p. 800). In addition, "to ensure the stable growth and development of the world economy" (Garnov, A., Ordov et al., 2022, p. 02), more and more types of

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8 Clause 1, Article 6 of Uniform Partnership Act 1997.
partnerships have been developed in the world such as limited liability partnership, limited liability limited partnership, etc. However, the Commercial Code of 1972 of the Saigon government also introduced the concept of a "Hoi hop tu don thuong" (limited partnership) in the following direction: “Hoi hop tu don thuong is an association established to operate commercial activities between one or more members called a "hoi vien thu tu" (general partner) who has jointly and unlimited liability for all debts of the association, and one or more "hoi vien xuat tu" (limited partner) have liability only to his/her capital share”\(^9\). From there, it can come to confirm that the general partnership under the provisions of the Enterprise Law 2020 is now not a general partnership under the traditional model commonly seen in the world, but a hybrid company, shuffled, and crammed together with a limited partnership. Or the Vietnamese legislator has intentionally combined the characteristics of both human-based companies to form a general partnership.

It is possible that the original intention of the Vietnamese legislator when regulating general partnership in the Enterprise Law 1999 was to simplify and create convenience and flexibility for investors, so it has been regulated this type of company can exist in both different types of members. The basis for this statement also partly originates from the several similarities in the legal nature of general partnership and limited partnership, which are both types of human-based companies. Even is a limited partnership also considered a derivative company (formed) from general partnership. Therefore, the Vietnamese legislators have shown their creativity when combining both types of companies into a sole definition named partnership. Research shows the advantages and disadvantages of the regulation cramming two types of human-based companies into a type called general partnership as below:

* **Advantages when stipulating the combination of general partnership and limited partnership:**

- There is no need to have regulations for limited partnership because the general partnership has included the type of limited partner.

- To create attractiveness of general partnership, then help this type of business conveniently invite investors who have the right to choose to participate in general partnership as a general partner or a limited partner.

“Entrepreneurs may be more convenient when establishing and operating under general partnership because companies can accept limited partners or not regardless of registering to amend the type of member at the business registration agency” (Hanoi Law University, 2018, p. 139). In other words, general partnership can be flexible to change limited partners in an expeditious way without procuring procedures to change the type of model business to supplement limited partners. It is due to two types of member existing in general partnership.

* Disadvantages of the unclear separation between general partnership and limited partnership:

- If general partnership fails to maintain the minimum number of general partners (02) without another alternative general partner, the company shall be dissolved regardless of how many limited partners are available. There is one similarity between laws on partnership in Vietnam and other countries to require at least 02 general partners in a partnership. However, unlike Vietnam, in countries whose laws independently regulate general partnership and limited partnership, a general partnership only need to procure the procedures to transform type of business into limited partnership to be continuously active. Because there is only regulation of general partnership in Vietnam, the general partnership shall be dissolved in case of lacking the minimum number of general partners. “In Vietnam, the most significant drawback is that from the 1999 Enterprise Law to the ones of 2005, 2014, and 2020, the legislators have stipulated the existence of only one type of human-based companies as the general partnership, there are no other types for it to convert into” (Hung, N. V, et al., 2022_2, p. 02).

- To cause difficulties, and complications to clients and creditors because accompanied by “the establishment and operation of general partnership, the public shall investigate which general partnership whose members are general partners and which general partnership includes limited partners. In case general partnership is established by general partners who shall take on unlimited liability, its clients can make transactions with any member and ask any member to fully pay the company’s debts. If general partnership includes limited partners, the clients shall acknowledge whether members take on limited liability or unlimited liability to procure transactions and demand payment of debts (if any). The limited partners shall take on their liability with the company’s debt in the scope of their capital contribution only. The client impossibly requires the limited partner to cover the client’s debt which is larger than the extent of this member’s liability”
(Nguyen Thi Khe et al., 1999, p. 197). Obviously, it is more complicated for clients and creditors to deal with general partnership compared to the fact that there are general partners only.

- The management and operation of the general partnership become more complicated. It is due to the fact that “in case a partnership includes limited partners, and they are entitle to join the meeting, discuss and vote at Board of Partners which consists of all general partners and limited partners. Each member owns a vote and the resolution of the Board shall be ratified by at least three-fourth (3/4) of the general partners. Because “in cases, the general partnership has the participation of both limited partners and they may attend meetings, discuss and vote at the Members' Council. The Members' Council must include all members, including general partners and limited partners. Each member has only one vote and the decision of the Board is approved by at least three-quarters of the general partners” (Nguyen Manh Bach, 2006, p. 83). In case of a general partnership including general partners only under the traditional regulations, the Board of Partners consists of all these members. Therefore, the management is somewhat simple and convenient due to the mutual trust among general partners. The participation of limited partners causes the management of a partnership more challenging because according to legal principles, limited partners are not unlimitedly liable and jointly obliged as general partners, leading to slack in the relationship or engagement between limited partners and general partners.

- There are differences in regulations on general partnership between Vietnam and others. An opinion supposed that “general partnership in Vietnam is not exactly the same as general partnership in other countries, causing hindrance for Vietnamese entrepreneurs (Hanoi Law University, 2018, p. 140). From the foreign investor’s perspective, if they desire to establish general partnership model regulated in their own countries in Vietnam, they will meet a great deal of difficulties and complications. Simultaneously, foreign investors may lack confidence in the system of laws on enterprise in Vietnam.

In short, there is a difference between two types of companies: general partnership and limited partnership. The biggest discrepancy between these two types exactly is whether to exist the type of limited partner with a mechanism of limited liability for assets or not. Therefore, general partnership is unquestionably deemed human-based companies. As for limited partnership, human-based factor is somewhat faded, which is demonstrated by the fact that limited partners are entitled to enjoy limited liability for assets. The
inheritance of regulations on partnership from previous laws on enterprise of Enterprise Law 2020 continuously results in confusion in legal form of general partnership in Vietnam, which challenges the development and integration of this type of company.

5.2 RECOMMENDATIONS

Currently, “human society is continuously developing” (Tolkachew, I. el al., 2023, p. 03), therefore, types of companies that need to constantly innovate to serve the needs of investors. However, it is unconditionally unreasonable to combine two types of human-based companies in a form of partnership regulated in Enterprise Law 2020. This combination is not only causes difficulties for a partnership’s operation but also makes foreign investors suspicious of the vagueness of general partnership. From the foreign investor’s perspective, what makes them confident to choose a type of business is the sense of similarity with their own countries. A general partnership with an unclear legal form will provoke challenges for foreign investors in operation and become a less attractive selection.

It is researched that “general partnership was considerably undeveloped in Vietnam” (Minh Ngoc et al., 2011, p. 224). “The general partnership proved to be quite lackluster and unattractive to businessmen” (Nguyen Vinh Hung, 2013, p. 35). As analyzed, one of the ultimate reasons leading to the aforesaid situation is the confusion in the legal form of general partnership. Therefore, in order to overcome the limitations of the legal form of the current general partnership, the authors suppose that the following solutions should be considered:

In fact, since the promulgation of Enterprise Law 1999, and now is Enterprise Law 2020, there have been a variety of recommendations on the necessity of legal form adjustment of general partnership. Thus, up to now, regardless of how many recommendations on adjustment of general partnership’s legal form were proposed (Nguyen Vinh Hung, 2017, p. 28) but the authors believes that the key issue is whether Vietnamese legislators would like to change or not. According to the authors, the urgency is to change the mindset of general partnership. In which, it must be affirmed that a type of business as general partnership is considerably suitable to apply in Vietnam. This statement is based on the finding of a research that “the foundation for a type of business be well-developed in Vietnam must satisfy the following condition: (i) The scale of enterprise is not too large but easily expanding in the long term; (ii) The mutual trust
among members must always exist; (iii) The assurance of enterprise on the safety of legal aspects in accordance with the law, which builds the clients’ confidence in structure, administration and management of the enterprise” (Nguyen Vinh Hung, 2015, p. 33). The aforesaid factors are suitable for general partnership because this type of company often exists on small and medium scale. Simultaneously, mutual trust always exists among general partners, which helps company administration becomes convenient, simple and uncomplicated. In addition, the joint obligation and unlimited liability also improve the trust of clients and creditors in transactions. Therefore, the authors suggest that the regulations on partnership should follow the way as regulated in countries with the advanced legal system. For instance, in Germany, “the national law regulates many forms of general partnership” (Nguyen Vinh Hung, 2022_2, p. 40), so there is significant separation among the types of partnership, which well adapts to the different demands of investors. Thus, Vietnamese laws must promptly exactly discriminate between general partnership and limited partnership. On the one hand, only by this solution can the limitations of legal form of the current partnership be handled, then easily to convert the legal form to each other if necessary. On the other hand, this solution also contributes to making the regulations on general partnership in Vietnam comprehensive, solid, and similar to the laws of other countries.

6 CONCLUSION

The regulations on the legal form of general partnership directly related to the efficiency of management and administration of this company. Simultaneously, the straightforward definition of the legal form of general partnership will advance the investors’ confidence to choose this type of company. However, the unclear regulations on the legal form of general partnership in Vietnam has been existing since Enterprise Law 1999, leading to limited space for the development of general partnership in Vietnam.
LIMITATIONS

The indefinite separation between general partnership and limited partnership causes many difficulties for this type of company in operation. Simultaneously, the indistinct specification of the legal form of general partnership also causes Vietnamese general partnership different from common international regulations. These aforesaid limitations can interfere the integration of general partnership in particular and law system on enterprise of Vietnam in general.

FUTURE SCOPE

This research has not covered many areas such as the representative mechanism of general partnership, bankruptcy, conditions of business registration of general partnership, rights, and obligations of general partners and limited partners, etc. The above-discussed uncovered areas of this article are known as the future research scope.
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COMMERCIAL CODE 1972, VIETNAM.


