



General Partnership in the Vietnamese Commercial Environment

Nguyen Vinh Hung^{1*}, Tran Cong Thinh¹, Nguyen Thi Khanh Ly²

¹ School of Law, Vietnam National University, Hanoi, VIETNAM.

² Faculty of Law, Vietnam Women's Academy, VIETNAM.

*Corresponding Author (Email: nguyenvinhhung85@gmail.com).

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Abstract

A general partnership is a type of company that is very popular in the world. In Vietnam, it has been introduced for quite a long time. However, many reports show that until now, the general partnership has not been developed in Vietnam. This can be explained for many different reasons, one of them is that the legal provisions on general partnership still exists a lot of limitations and inadequacies. Therefore, this research article pays attention to the relevance of general partnership in the Vietnamese commercial environment, and from that point, finds a way to overcome the limitations and inadequacies and help the general partnership to be suitably and strongly developed in Vietnam.

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1 Introduction

Since the Enterprise Laws of 1999, general partnerships in Vietnam are regulated by four articles of law (Articles 95 to 98 of the Enterprise Laws of 1999.). After that, the Enterprise Laws of 2005, 2014, and 2020 continued expanding and developing regulations on general partnerships with the expectation that this type of company will contribute to the economy and meet the needs of investors. Business practices show that general partnerships have contributed more or less to the effectiveness of the Vietnamese economy over the years.

At present, together with the flow of the global economy, Vietnam has been a member of organizations such as ASEAN, APEC, ASEM, WTO, CPTPP, EVFTA, etc. On the other hand, the market economy always requires the types of companies to be very effective and to meet the very

high requirements of the market. Thus, overcoming defects and perfecting company models are both objective rules and requirements of a modern market economy. Therefore, general partnerships need to be taken into consideration to find out the direction for this type of company to be more effective and suitable for the Vietnamese commercial environment.

2 Research Methods

To research the general partnership in the Vietnamese commercial environment, this work uses a combination of traditional research methods of the social sciences and legal sciences such as the legal analysis method, the legal efficiency evaluation method, and the comparative-legal method to achieve the objectives of the research.

3 Result and Discussion

3.1 The Advantages of General Partnership

First, legal security is ensured fairly well:

“General partnership is a typical type of human-based company” (Bui, 2012). It is regulated by the law, general partners are always jointly and unlimitedly liable for the company’s debts. Even if a general partner withdraws capital or is removed from the company, within two years, that member is still jointly responsible for the company's debts incurred before the date of status termination with all of his/her property (Clause 5, Article 185, Enterprise Laws 2020).

There is mutual understanding and trust between the members of the general partnership. The reason is that they are the ones who execute the joint guarantee obligation for all activities of a general partnership. In principle, the creditors of the general partnership have the right to require each member of the partnership to pay the debt on behalf of the company when the company can not pay its debts. Therefore, the legal and property security of a general partnership is very high. Also, general partnerships easily have the trust of bankers, creditors, and customers.

Second, the members of the general partnership always have a close relationship:

In the traditional business psychology of the Vietnamese, they always expect closeness and trust between the members. In fact, general partnerships are usually established in relatively small scopes like among groups of friends, brothers/sisters... On the other hand, since this is a human-based company, the nature of the joint and unlimited liability makes “the general partners to really understand about and believe in each other, share benefits and risks together” (Nguyen, 2018). Because of this, “general partners create the greatest distinctive characteristic between general partnerships and other types of companies” (Nguyen, 2011). In other words, personal identity is very important to a general partnership and it can be said that a “general partnership is created by general partners who understand well about the other partners’ identities” (Tran Ngoc Dung et al., 2017). This is also an important basis for forming a regulation on who can become a member of a partnership. It is an important platform to form a provision on who can become a general partner in the company as well. Thus, there is always trust and insights among general partners. On the other hand, "joint" and "unlimited" liabilities are the threads that tie general partners together with

the company and even between them by both psychological and legal factors. This creates favorable conditions for partnerships where there is always high trust and agreement among members.

Third, the organizational structure, executive management, representative mechanism of a general partnership is quite streamlined, convenient, and flexible:

As there always exist understanding and trust among the members, along with the nature of joint and unlimited liability of general partners, the law of most countries is very limited to intervening deeply in the organizational structure, executive administration, and the representative mechanism of a general partnership. Currently, the Enterprise Laws 2020 still gives the general partnership a great deal of autonomy in organization and management. The regulation by the Enterprise Laws 2020 includes only: the Board of Partners, Chairperson of the Board of partners, Director, or General Director. Regarding the other affairs, the general partners are free to agree with each other. The spirit of the Enterprise Laws in Vietnam 2020 is quite consistent with the laws of many countries in the world. “The organizational structure of the human-based company is often not as heavy as that of a capital-based company. Mandatory provisions on this type of company are very little ... Members absolutely have the right to create their own patterns that fit their needs” (Cozian et al., 1990).

Basically, the general partners decide together the management and operation of all the company matters. To facilitate the company and its partners, the law stipulates that all members of a partnership have the status of a businessperson. Therefore, all general partners have the right to do the business lines of the company in the name of the company; negotiate, conclude contracts and agreements... General partners can be proactive, creative, and flexible in their activities when they represent companies dealing with third parties outside the company. These are the advantages for general partners which help the general partnership to operate effectively.

Fourth, the general partnership has the ability to mobilize capital and change limited partners:

Pursuant to point clause 1, Article 177 of the Enterprise Laws 2020, the general partnership in Vietnam differs significantly from those of most countries in the world when limited partners are allowed to join the company. The Enterprise Laws 2020 also allows organizations to become limited partners (Article 177, Enterprise Laws 2020). Therefore, depending on the needs of each stage, the general partnership can easily scale up by expanding the participation of limited partners. In general partnerships, limited partners only play a secondary role because their involvement is primarily intended to provide additional funding to the partnerships. Also, the Enterprise Laws 2020 does not limit the number of limited partners in general partnerships. This is quite similar to some regulations in the United States, which allow “limited partners to transfer their stakes to anyone and at any time” (Clark et al., 1994).

3.2 Disadvantages of General Partnership

First, there is no clear separation between a general partnership and a limited partnership:

According to Article 177 of the Enterprise Laws 2020, the general partnership has two types of partners: general and limited partners. This is relatively good compared to the provisions of most countries in the world as in common sense, the laws of many countries clearly define that general partnership has only one type of membership and it is the general partner. When a general partnership has the participation of limited partners, it is considered a limited partnership. The two types of companies are quite different. In particular, the biggest difference is the existence or nonexistence of limited partners. Thus, it is clear that the legal form of general partnership regulated in the Enterprise Laws 2020 sounds quite similar to a limited partnership. To illustrate this, the study points out: “With this definition, a general partnership can be divided into two categories: the first includes companies that are the same as general partnerships under the laws of other countries: with only general partners and the second type are companies with both general partners and limited partners. In the laws of some countries, this type of company is called a limited partnership and is also a type of human-based company. It can be seen that the concept of general partnership under the Enterprise Law of Vietnam contains the definition of the human-based company under the law of other countries” (Bui, 2010). Or in the view: “With the regulations on members and liability regime of a general partnership, it can be said that general partnership under the Enterprise Laws includes both types of the human-based company under the laws of other countries, they are general partnership and limited partnership” (Nguyen, 2007). In fact, the Enterprise Laws of 1999, 2005, and 2014 still govern how general partnership and limited partnership are merged into a single type of partnership.

It is because the Enterprise Laws of Vietnam do not clearly distinguish the legal form of the two types of partnerships that leads to the lack of strict law for each type of company. In the past, there is a comment “the separation between the two types of partnerships has had an influence on the nature of investment relationships in a general partnership” (Dao, 2012). When broadening the scope of research to further understand, it can be seen that the law of other countries generally determined that general partnership and limited partnership are two different types of companies, so they must be governed by separate acts. Contrary to the laws of many countries in the world, the Enterprise Laws of Vietnam merge both two types of partnerships into one single type called general partnership. Hence, it can be said that this leads to the inaccurate legal perception of the two types of partnerships and the law can not fully and firmly regulate both of them.

Second, regarding tax liabilities of general partnership:

The 2009 Enterprise Law Income Tax continues to recognize general partnership as an entity that has responsibility for enterprise income tax as other enterprises. Besides enterprise tax, the 2009 Enterprise Law Income Tax also requires members of a general partnership company to pay personal income tax. Therefore, at the moment in Vietnam, “a general partnership enterprise must file an income tax return, regardless of whether it has made a profit or not. At the same time, members of general partnership enterprise must pay their personal income tax” (Tran et al., 2017).

However, unlike Vietnam, in other countries like Germany and France, enterprise income tax is not imposed on general partnership companies. The only members of the company have to pay the tax equivalent to the profit they make. A different case is in the United States where “general partnership companies, including the ones with a limited partnership, are not usually regarded as an enterprise, therefore, it is exempted from enterprise income tax” (Pham, 2002). Understandably, according to Professor Morrison (2007), in the United States, “a general partnership is not an entity that has legal liability for tax...since its loss and profit are transferred within itself, tax is only put on the owners”. Hence, “law imposing both taxes on general partnership enterprise and its members like in Vietnam has more or less weakened the competitive ability of this form of enterprise” (Nguyen, 2013).

Third, in terms of difficulties in enterprise transformation:

The spirits of law in many countries mutually agree that a general partnership has only one type of member which is the general partner. In terms of a limited partnership, simply requires at least one general partner and one limited partner. On the other hand, contrary to other systems' law, according to Article 177 of the Enterprise Law 2020 of Vietnam, it is obligated for a general partnership enterprise to have at least two general partners and may add more limited partners. Consequently, it is seemingly that the role of limited partners is hard of any significance. There is another major disadvantage for limited partners in a general partnership. Pursuant to point c, clause 1, Article 207 of the Enterprise Law 2020, if an enterprise fails to maintain the minimum number of general partners for 06 consecutive months, that enterprise shall be dissolved even though there may still be one (or a few) limited partner. Therefore, when a general partner suddenly leaves a company (dead, missing...), it may have a substantial influence on the limited partners. On the other hand, if Enterprise Law clearly distinguishes between a general partnership and a limited partnership, the solution for this issue will become very simple. In that case, a general partnership can still operate with only one general partner plus a limited partner with the condition that it follows the legal procedure to transform itself into a limited partnership. Therefore, a clear distinction between the legal form of a general partnership and a limited partnership makes the enterprise transformation more simple, convenient, and flexible.

Fourth, about the persons that can become general partners and the transfer of contributed capital within general partners:

The forming of Vietnamese general partnership enterprises is conducted based on fundamental knowledge imported from other countries. However, in analyzing-depth, there will be many weaknesses and shortcomings to be found in this form of enterprise. Typically, they are the instability of law in general and the limitation of law on general partners which accepts only individual persons in particular. Vietnamese lawmakers do not want to enable a “legal person” to be a general partner probably because “legal persons” usually have limited financial liability. This will break the common rule of general partners bearing unlimited financial liability. Nonetheless, in the studying of enterprise forms in the French Republic, “legal persons still use this form of

human-based company, therefore, there are cases when two or more companies get together to establish a general partnership enterprise. The unlimited liability of members also changes based on whether members are legal persons or natural persons. In the case when members are legal persons, the unlimited liability of members is still restricted by the limited liability of the company which joins the business with an unlimited liability enterprise as a member (for example, a limited liability company is a member of a general partnership enterprise)” (Cozian & Viandier, 1990). In the United States, “a general partner can be a company” (Jennings, 2006). In Vietnam, it once proposed to reconsider membership of general partners and the acceptance of general partners to be legal persons” (Do, 2005). Hence, the rigid regulation of Enterprise Law year 2020 of Vietnam has somehow created unfavorable factors for a general partnership.

Furthermore, in a human-based company, its general members face many difficulties in transferring their shares to others. In principle, general partners do not have the right to transfer a part of a whole of their contributing capital in a general partnership enterprise if they do not have the consent of other general partners (Clause 3, Article 180, Enterprise Law 2020). Thus, the leave of one general partner may have a great impact on the general partnership operation, which is a major disadvantage for other general partners.

Fifth, with regard to issues on legal person status of general partnership enterprise:

The Enterprise Law 1999 does not have any regulation on legal person status for a general partnership. The Enterprise Law 2005, 2014, and 2020 both grant legal person status for a general partnership. Nevertheless, the question of whether to grant legal person status for general partnership has raised many debates between jurists in Vietnam for years. The problem is with the conditions to be a legal person pursuant to Article 72 of the Civil Code 2015, a general partnership company is not qualified to become one. Until now, although a general partnership is legally considered to have legal person status for quite a long time, there are various opinions believing that “a general partnership company does not have legal person status” (Dao, 2012). Others claim “a general partnership company cannot be a ‘legal person’ since its partners have unlimited liability” (Nguyen, 2008) or “it is not definitely decided that a general partnership company shall have legal person status or not. It is an ambiguous, unintelligible and controversial issue even for the experts and causes doubts for the investors” (Van, 2002). The reason is Enterprise Law has always been regarded as specialized law of the Civil Code, therefore, it is understandably accepted that a specialized law has some specific regulation in its own field such as the legal person status of a general partnership. In other words, this is an exception to the Civil Code. Moreover, currently, many countries have changed their perception by launching laws on the legal person status of a general partnership. Nevertheless, the two important laws, which are the Civil Code and Enterprise Law, have contrasting regulations on the same issue which reflects an incoherent and inconsistent law system in Vietnam. This is the reason why the investors more or less become hesitant about the general partnership, which may contribute to the weak development of the general partnership in Vietnam (Nguyen, 2013).

3.3 The Fit between General Partnership with the Business Environment in Vietnam

There are many justifiable reasons for investors not being keen on a company form of a general partnership. Nevertheless, with particular characteristics of the absolute human-based company, general partners shall have joint liability for debts and other property duties of the company. Accordingly, to understand this in detail, “joint action” is “when a general partner in a process of conducting a service of the company does harm to a person, the harmed person has the rights to demand any of the general partners in the company to compensate for the whole damage” (Van Thieu, 2002). Hence, although not directly conducting the damaging behavior, general partners still have to bear the consequences caused by other general partners since there is a joint liability among them. With respect to the creditor of a general partnership, its debtor is the company and its general partners always have joint liability as they act as a guarantee for the debtor. Thus, the inability of sharing risks is a taboo for businessmen, which explains the restriction of their participation in the development of the general partnership. In addition, as the scale of general partnership companies is limited to small business domains, it is difficult to extend the company size and call for the exterior source of capital. On the other hand, “general partnership is a kind of closed company so the transfer of shares, even among the members, still needs the consent of all members” (Nguyen, 2006). Therefore, a general partnership is less likely to attract much attention from investors. This is the reason why in such a long time this form of company has still developed on a modest scale.

To reinforce the aforementioned argument: “There is another research claiming the unlimited liability of general partners to be one of the main reasons why investors refuse to choose general partnership as the form of their companies. So far, Vietnamese investors have been familiar with the limited liability when doing business” (Vu, 2004). The nature of “unlimited liability”, is understood as “the indefinite extent (and even permanent duration) of liability to pay a firm's debts or obligations” (Nguyen, 2011). “The terminal and indefinite liability are called unlimited liability” (Pham, 2009). In terms of economy, investing without the restriction of risks and even with the restraint of asset that is not contributed to the company to fulfill the financial obligations when the company is unable to pay its debt is unattractive and unsafe to the businessmen. Hence, it is reasonable that unlimited joint liability is a considerable obstruction for those who have an intention to establish or participate in a general partnership.

Nevertheless, from a positive perspective, general partnership as a whole is believed to possess many merits which are appropriate for the economy, society, and commercial tradition in Vietnam. Research on the development history of general partnership in Vietnam shows that this company form had appeared early, even before the Vietnamese Enterprise Law had any official regulation on it. Business forms are known as Business Households, Co-operative Groups, and other kinds of partnership contracts, etc... are also considered variants of today's general partnership companies. Other factors related to Vietnamese cultural traits like village culture and

the popularity of family-held businesses may also attribute to the way general partnership companies become appropriate and suitable for this society.

If history is based to prove the appropriateness of general partnership to the Vietnamese economy, society, and commercial tradition, there are a lot of footprints of this business form to be found back in years. Previous codes such as the Civil Code of Tonkin 1931, the Commercial Code of Annam 1942, and the Commercial Code of the Republic of Vietnam 1972 all identified general partnership. It seems that lawmakers of that period had grasped the actual situation and the relevant commercial business habits of the Vietnamese people, therefore this form of business has been quite familiar and close to the business psychology of businessmen.

At present, Vietnam is gradually establishing a market-oriented economy. Under the continuous development and movement of the world economic flow, the diversification and perfecting of all types of business entities are absolutely necessary and important tasks. It is the fact that the economy as an infrastructure always needs to have a form of superstructure which is the appropriate legal basis for it to be managed in the right direction, with the right purpose, and to be inspired to develop. Therefore, the continuous improvement of the business entities as the General partnership will help create conditions to open up capital, attract capital and attract the participation of many internal and external investors to participate in the business.

On the other hand, when the sanctions of the law are not enough to deter, punish those who intentionally do business in violation of the law, it is necessary to have the type of business which can ensure a high legal security level. When considering the general partnership with a very high legal security level, it is regarded as an ideal type of business when dealing in services and goods which can have a great impact on social life. The other pros of this company are that the intimacy between members always exists, and the law often gives the company more autonomy than other types of companies which is the attraction of the general partnership. Hence, this makes it attractive and suitable for less experienced investors in Vietnam.

Recently, the research added: “From beliefs, habits, institutions to management ... there are many fundamental factors to forecast that the main business model of the Vietnamese in the near future will still be small and medium-sized enterprises. Their strength mainly depends on the belief among family members, family, and friends” (Pham, 2004). This affirms the importance, role, and influence of small and medium enterprises in Vietnam and their development prospects in the coming time.

A general partnership is a type of company that has a long-standing history in Vietnam. The general partnership has many advantages and the more important one is the suitability of this type of company with the natural, economic, social condition, business psychology, and commercial traditions of the investors in Vietnam.

4 Conclusion

In order to help the type of general partnership appeal to investors, have sustainable development, and be more appropriate, it is necessary to consider the following solutions:

First, the legal form of a general partnership in the Enterprise Law 2020:

Throughout the content of the article, the authors have mentioned many times the difference between a general partnership and a limited partnership. When compared with the law of many countries in the world, the general partnership in Vietnam seems to not have a very clear legal form. The laws of most countries have provisions on general partnerships, which clearly stipulate that general partnerships have only one type of general partner. The limited partnership will also have the participation of the type of limited partner. In other words, when a general partnership has the participation of a limited partner in any form, it will be considered a limited partnership. The regulation of general partnership and limited partnership in one company has long existed in Vietnam. So far, many articles mention the ambiguity in the legal form of the general partnership in the Enterprises Law. Therefore, the article proposed, there should be a clear separation of the legal form of the two types of companies are general partnership and limited partnership companies. It can make these companies fit their original legal form. Hence, it can help to develop these companies strongly in Vietnam. On the other hand, the clear separation of the legal form of a general partnership and limited partnership company also contributes to improving the corporate legal system of Vietnam and is in line with the common law of many countries in the world.

Second, on the orientation of implementing the general partnership:

In terms of principle, general partnerships can do business in all business areas permitted by the laws in Vietnam. However, it would be more effective and appropriate if the companies were only allowed to engage in business in areas requiring high legal and property liability. For example medical services (private clinics, drug stores, medical supplies, etc.), legal services (law office, law company, bailiff services, etc.) design consultancy groups (construction, architecture, etc.), auditing, pharmaceuticals, chemicals, etc. These are all important occupations and have a great influence on social life. They often affect directly the health of people or the order and safety of the whole society. If the owners of the business under the form of assets limited liability companies, it would be very risky for clients because of the subjectivity and shortage of responsibility. Because business owners are always predetermined, they will only suffer the consequences that arise in the number of capital contributions. In fact, in the past, when Vietnamese law was regulated, legal business was required in the form of law offices or law general partnership form, the same as the general partnership form in the Enterprise Law (Article 17 and article 19, Ordinance of Lawyers 2001). Or recently, in a bailiff office, if it is established by a bailiff, it is organized and operates in the form of a private enterprise and the form of a general partnership company model if it is established by two or more bailiffs (Paragraph 1, Article 17, Decree 08/2020/ND-CP dated January 08, 2020, *Operation and organization of the Bailiff*). Also, the current notary office is also organized and operates in the model of the general partnership (Article 22, Notarial law 2014). From that, it can be seen that lawmakers in Vietnam have also made effort to limit risks, losses to clients and society. Therefore, it is recommended that medium or small-scale businesses and a high degree of

legal responsibility businesses must have registered under the model of a general partnership. With clear stipulations, the specific business areas in the form of general partnerships do not completely limit the freedom of doing business of investors. It is only for the purpose of directing the business in order, to operate safely and effectively, and in accordance with the strength of the general partnership in Vietnam.

5 Availability of Data And Material

All information is included in this study.

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Dr. Hung Nguyen Vinh is a Lecturer at the School of Law, Vietnam National University, Hanoi. He got a Doctoral degree in Law from the School of Law, Vietnam National University, Hanoi, and a Master's degree in Economics from the University of Economics & Business, Vietnam National University, Hanoi. He also earned certificates in System and IT Professional from Microsoft Corporation. His researches are Commercial Law, Civil Law, Civil Procedure Law, Securities Law, Finance Law, Banking Law, Economics and IT System Security.



Thinkh Tran Cong is a Lecturer at the School of Law, Vietnam National University, Hanoi. He got his Bachelor's degrees & Master's degrees in Civil Law & Civil Procedure Law from Viet Nam National University, Hanoi. His research focuses on Civil Law, Civil Procedure Law, Commercial Law, Family Law



Ly Nguyen Thi Khanh is the Vice Dean of Law Faculty, Vietnam Women's Academy, Hanoi, Vietnam. She got her Master's degree in Law from the Graduate Academy Of Social Sciences, Hanoi, Vietnam. Her research focuses on Civil and Society laws such as laws on Marriage and Family, Gender equality Laws, Commercial Law
