

LEGAL ENTITIES AND JURIDICAL PERSONS: CONFUSION OF CONCEPTS AND COMPARATIVE LAW

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Abstract. The concepts of “legal entity” and “juridical person” are often confused in legal doctrine and translation. They are in fact not synonyms. The confusion creates legal risk and misleads readers as to what legal status a particular subject of law may have. This article explores the true meaning of each concept and the consequences of confusion.

Key words: juridical person, legal entity, comparative law, branch, representation, partnership.

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On 4 July 1991 the Russian Soviet Federated Socialist Republic (RSFSR) adopted a Law on Foreign Investments¹ in the RSFSR which determined who could be a foreign investor in Russia:

foreign juridical persons, including in particular any companies, firms, enterprises, organizations, or associated created and empowered to effectuate investments in accordance with the legislation of their location;

foreign citizens, stateless persons, and Soviet citizens having a permanent residence abroad, on condition that they have been registered to carry on economic activity in the country of their citizenship or permanent residence;

foreign States;

international organizations.

One day later, the Union of Soviet Socialist Republics (USSR) adopted on 5 July 1991 the Fundamental Principles of Legislation on Foreign Investments in the USSR, which enumerated among the possible foreign investors: “(c) foreign associations not having the rights of a juridical person”².

There are many criticisms that might be made of these early versions of foreign investment legislation, but one remains relevant down to the present day. The USSR Fundamental Principles

¹ See: *Braginskii M.I., Butler W.E., Rubanov A.A.* Foreign Investment Legislation in the Republics of the Former Soviet Union (1993). P. 379 (The Butler Commentaries): «... иностранные юридические лица, включая, в частности, любые компании, фирмы, предприятия, организации или ассоциации, созданные и правомочные осуществлять инвестиции в соответствии с законодательством страны своего местонахождения;

иностранные граждане, лица без гражданства, советские граждане, имеющие постоянное местожительство за границей, при условии, что они зарегистрированы для ведения хозяйственной деятельности в стране их гражданства или постоянного местожительства;

иностранные государства;
международные организации».

² Ibid. P. 18: «иностранное объединение, не имеющее прав юридического лица».

recognized that foreign “legal entities” might be foreign investors, whereas the RSFSR Law on Foreign Investments excluded them³.

This exclusion may not appear obvious at first, because many translations of Russian legislation share the misimpression that “legal entities” and “juridical persons” are synonyms in the English language and in the Anglo-American legal systems. The mistake is not one of legal translation, but is substantive legal error, in my view.

“Legal entity” in English – which does not translate well literally (юридическая единица), is immediately understood by anyone familiar with the socialist, post-socialist, or civil-law legal traditions as “subject of law” (субъект права). Indeed, most Anglo-American jurists will understand “subject of law”, although that term is not widely used.

In Common Law jurisdictions the term “legal entity” is a broad term that includes all subjects of law: natural persons⁴, juridical persons, legal formations without the creation of a juridical person, among others. Garner defined “legal entity” as “a body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents”⁵. This definition places emphasis upon the word “legal”, or “juridical”, and distinguishes a “legal entity” from a simple “entity”, which Garner defines as “an organization (such as a business or a governmental unit) that has a legal identity apart from its members”⁶. By way of example; Garner cites the “entity theory of partnership” – a partnership having a “legal existence apart from the partners who make it up”; this view finds support in the Uniform Partnership Act in the United States: “[a] partnership is an entity distinct from its partners”⁷.

³ As did most other post-Soviet republics. For the discussion (see: *ibid.* P. 24).

⁴ Whether natural persons are a “legal entity”, albeit undoubtedly a subject of law, is controversial; some definitions of legal entity include natural persons and others use the term “legal entity” to distinguish natural persons from other types of legal entity or subject of law.

⁵ *Garner Brian A.* Black’s Law Dictionary. 8th ed. 2004. P. 913.

⁶ *Ibid.* P. 573.

⁷ Uniform Partnership Act, § 201 (1994). Compare this definition with the “aggregate theory of partnership”, which holds exactly the opposite.

The fact that in Anglo-American law a “legal entity” embraces the classical partnership which does not enjoy limited liability means that, unless this formation is modified by specific legislative or contractual provisions, the partnership has unlimited liability jointly and severally among the partners for obligations of the partnership. There is no sharing of entrepreneurial risk between the partners and the legal entity called the “partnership”⁸. There are taxation implications as well, which vary from one jurisdiction to another. The ultimate outcome is that the classical partnership is no longer a popular option for the formation of a legal entity that is not a juridical person.

The 1991 Russian foreign investment law excluded, whether accidentally or deliberately, the Anglo-American partnership from the category of potential foreign investors. The practical result was that, at the time, most American and English law firms and auditing companies were excluded; they were required by law not to limit their liability by forming juridical persons which would permit them to be investors.

Russian legislation, on the other hand, has a number of legal entities which are not juridical persons; for example, the branch (филиал), representation (представительство), entrepreneur without the formation of a juridical person (предприниматель без образования юридического лица), labor collective (трудоустрой коллектив), among others. Some of these – survivals of the Soviet period – are attractive to foreign investors. These are each subjects of Russian law.

Other entities are not open to foreign investors. The “State Corporation”, for example, is founded by the State. Eight have been created in all, one of which served its purpose and is being liquidated and another has been transformed into an open joint-stock society. Of the six remaining State corporations, three are specified to be juridical persons and three are not. There is one State company, which is not specified to be a juridical person. All are “legal entities”; only some are juridical persons.

Conclusion

The confusion that exists in translations of “juridical person” as “legal entity” can create misunderstandings and mistakes; it is a source of legal risk – quite unnecessary – for legal practitioners and the world of commerce generally. The general term “legal entity” – best described as subjects of law – embraces juridical persons and “non-juridical” persons. In Russia these may be such formations

⁸ *Dolinskaia V.V.*, in: *Mozolin V.P. and Masliaev A.I. (eds.)*. Russian Civil and Commercial Law: General Provisions / ownership, transl. W.E. Butler. London, 2009. P. 109.

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as branches, representations, entrepreneurs without the formation of juridical persons, labor collectives, State corporation, State companies, and others. In Anglo-American law the classical American partnership is an excellent example of a legal entity which is not a juridical person. The legal status of the Anglo-American trust and its legal capacity would, in some cases, be another example.

The reasons for the confusion among knowledgeable jurists and legislators would appear to lie in the world of comparative law. In the case of the 1991 Russian foreign investment legislation, for example, the legislator assumed that foreign legal systems and foreign investors possessed the attributes of Russian juridical persons: limited liability, organizational unity, internal structure and functional differentiation, designated purpose; ownership or possession of property; legal capacity to operate in own name; and others. The Russian legislator, in other words, superimposed the indicia of the Russian legal system and Russian legal tradition on foreign legal systems and assumed that if the Russian concepts of legal personality and investors were used, the foreign legal systems were a mirror image of the same.

In fact, the precise opposite was necessary. Foreign investment in Russia would have been best served by identifying the legal formations abroad which under their respective legislation possessed the legal capacity to be foreign investors in Russia. This would have required the enumeration of legal formations, some of which were juridical persons and others which were not.

Similarly, certain Russian legal formations lack the legal personality and legal capacity to be investors outside Russia, although some might be useful vehicles to facilitate investment elsewhere in the Commonwealth of Independent States.

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