



LEGAL ASPECTS OF THE ACTUAL COMPANY

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Abstract

We show through this research that the legislator has defined the pillars on which the company is based, as the company cannot become in a sound legal state in the eyes of the law without the availability of the general and specific substantive pillars as well as the formal pillars of the company. The company is invalid, and this invalidity varies according to the importance of the pillar on which the breach is located, just as the legislator does not consider the company unless it actually exercises its activity and enters into legal relations with others, so if the ruling is made to invalidate the company for one of the reasons that necessitate that, then this company is according to the opinion of the judiciary. In the period between its inception and the judgment of its invalidation, it is considered an already existing company, and therefore the effect of invalidation does not have a retroactive effect on its previous actions, i.e. it does not apply to the past, but rather to the future only.

Introduction

The development taking place in economic transactions in societies and their transformation from an economy based on agriculture and traditional crafts to an economy based on industry and trade made it imperative for countries to enact laws to keep pace with this development represented by the emergence of different types of companies, and the idea of the company is to collect human and material resources that can establish a specific project to achieve a specific goal of achieving profit and economic stability, through its legal system that embraces commercial and industrial projects and is characterized by multiple characteristics that distinguish it from other suspected systems.

Most of the legislators, including the Iraqi legislator, have regulated the procedures for the formation of the company and singled it out for the Companies Law, in which he specified the general and private substantive pillars as well as the formal pillars on which the company is based in order for it to be correct in the eyes of the law. and the demise of its legal status.

The type of nullity varies according to the importance of the backward element, it may be relative nullity or absolute nullity, but there are some problems that may arise due to the difficulty of applying the retroactive effect of nullity on the company contract and its impact on the rights and obligations of others, which leads to the emergence of a new description of the company called the actual company.

The importance of the study: The importance of the study appears in clarifying what the legislation came to clarify and organize the concept of the actual company to protect others in good faith and to stabilize legal positions, since the idea of the actual company is closely related to the issue of the invalidity of the contract and the extent of its application to the contract of the company that actually practiced its activity before ruling its invalidity.



Research problem: This study was conducted to answer two problems through researching the idea of the actual company. The first is to know the legal basis of the actual company or what is the content of this company.

Research methodology: To clarify this study, the analytical descriptive approach was relied on through some sources represented in books, letters, research and laws.

Research Structure: This research was divided as follows.

The first topic: what is the actual company, includes the legal qualification of the actual company in a first requirement, and the legal basis for the actual company in a second requirement.

The second topic: the provisions of the actual company, which includes the recognition of the actual company in a first requirement and the termination of the actual company in a second requirement.

The first topic

The nature of the actual company

It can be said that the emergence of the term actual company dates back to the nineteenth century in France, especially by the French judiciary, represented by the Paris court ruling issued on April 8, 1825, which rejects the content of the general rules regarding the application of the retroactive effect of invalidation after the ruling invalidating the company ⁽¹⁾, and limiting the effect of invalidity to the future Without extending to the past, in order to avoid the negative consequences resulting from that, including harming the bona fide third party who dealt with the company as a real company ⁽²⁾. Accordingly, this topic was divided into two requirements, the first includes: the legal qualification of the actual company, while the second deals with: the legal basis of the actual company.

The first requirement - the legal qualification of the actual company:

In order to apply the theory of the actual company, the company must have started its business before being judged to be invalid, but if the opposite happens, it will not have any legal or realistic existence.

The first section - the concept of the actual company:

First- the definition of the actual company:The company is a language taken from the word shirk, which involves polytheism. He said (People are partners in three things: water, pasture, and fire)⁽³⁾.

- As for idiomatically, the Iraqi legislator defined in Article 4 of the Companies Law No. 36 of 1983 the company as (a contract by which two or more persons undertake that each of them contribute to an economic project by providing a share of money or work in order to share the resulting profit or loss). To us, this definition coincides with the definition of the company in most Arab

(1) Judgment of the Paris Court on April 8, 1825 referred to in, Salim Abdullah Ahmed Al- Jubouri, The Actual Company Study Comparison, Al-Halabi Human Rights Publications, Beirut, first edition, 2011, pg. 38.

(2) The ruling of the French Court of Cassation on 6/16/1992, French Civil Code in Arabic, Dalouze, 2009, p. 1786.

(3) Lisan al-Arab by Ibn Manzoor, investigation and publication by Dar al-Maarif, Cairo, B-T, pp. 2249-2250.



legislations, in terms of obligating the partners to share profits and losses alike. A share of money or work in order to share the profits or losses arising from this project⁽¹⁾.

This is in contrast to what the French legislator went to in his definition of the company, as he emphasized the sharing of profits between the partners, leaving the matter of participation and contribution in the losses to the intention of the partners, which is proven when concluding the company contract. Article 1832 of the French Civil Code stipulates that the company is (an agreement contract between two persons or several persons to allocate funds or to manufacture them for a joint project in order to share the profit or benefit from the savings resulting from this contract)⁽²⁾. So, the company as an idea is based on a willful act represented in the contract, as this contract is the main reason for the existence of the company and giving life to it, as it determines the relationship of the partners among them in terms of rights and duties, and although the company contract does not differ in many respects from the rest of the contracts, especially in terms of Conditions⁽³⁾, however, the most important thing that distinguishes it from it is that it is based on the union of interests between its parties and not on their opposition or conflict. Therefore, this contract is distinguished by the fact that it has general objective elements and others that distinguish it from suspected contracts and regulations, in addition to the formal elements that are stipulated It has the law, such as writing and publicity⁽⁴⁾.

The company is considered legal whenever it is established in conformity with the law, by providing the necessary legal elements and conditions for that. It requires that invalidation of any kind leads to the disappearance of the contract and the return of the situation to what it was⁽⁵⁾, but the application of the retroactive effect of invalidity, especially after a period of time has passed since the establishment of the company, will lead to turmoil in legal centers and to ignoring situations and facts that actually existed, which causes harm to bona fide third parties. Who entered into legal transactions with a deceptive legal person who takes the form of an illegal commercial company.

Therefore, the judiciary decided that if the company's contract is invalidated, the effect of the invalidity is limited to the future without going back to the past, and thus the company has a realistic but illegal existence, and its activity is considered during the period between its inception and the ruling of its invalidity, and this is what is called the actual company⁽⁶⁾. So what is meant by

(1) Egyptian Civil Law No. 131 of 1948 amended for the year 2011, see also Article 582 of the Civil Code Jordanian No. 43 of 1976, Article 473 of the Syrian Civil Law No. 84 of 1949, Article 1 of the Saudi Companies Law for the year 1437-2015

(2) The French Civil Code in Arabic, Deleuze, *ibid.*, p. 1785.

(3) Abd al-Rahim al-Salmani, *Al-Wajeez in the Commercial Companies Law*, Top Press, Rabat, 2020, p. 5.

(4) Rabih Alioua, *The Field of Application of the Actual Company Theory in Algerian Law*, Journal of Communication in Political Science and Social, Annaba University, Algeria, No. 28, June, 2011, pp. 1-15. See also: Salim Abdullah al-Jubouri, *previous reference*, p. 22.

(5) Ahmed Ali Ahmad Khawaldeh, *Legal Aspects of the Actual Company in Jordanian Law and Judiciary*, Master Thesis, College of Graduate Studies, University of Jordan, Amman, 2012, p. 19.

(6) Nawal Qahmous, *The Legal Existence of the Actual Company, the Protection of Others and the Stability of Legal Positions*, Journal of Ijtihad Judicial, Algeria, Volume 13, Issue 1, March 2021, p. 401



the actual company is that all the legal effects, obligations, rights and duties that the company entails during the period between its inception and the judgment of its invalidity is considered true and actual and the retroactive effect of invalidation and cancellation cannot be applied to it.

This was confirmed by the Egyptian Court of Cassation in its decision, which stipulated (that the ruling to dissolve the company's contract, contrary to the general rules of termination, does not have a retroactive effect)⁽¹⁾.

Second- Distinguishing the actual company from the suspected one:

1- Distinguishing the actual company from the company that arises from reality: the actual company differs from the company that arises from reality or what is called the reality company, and this distinction is important under French law. During the conclusion of the company's written contract and the agreement on all matters of the contract, including elements, conditions, capital, and participation in the distribution of profits and losses ⁽²⁾.

It is possible to take the forms of all companies known in the law except for the joint venture company, but it is not considered a regular company from the point of view of French jurisprudence, because the parties do not follow the formal procedures prescribed by law, but it remains enjoying the moral personality from its formation until the time of its invalidity ruling ⁽³⁾.

- As for the reality company: - its establishment is the result of the participation of several people to achieve a specific economic goal without directing their will to establish an independent commercial company on legal grounds in terms of form, as it does not have a specific form of the companies specified in the law ⁽⁴⁾.

If there are several differences between them, they are as follows:

- In terms of the type of company, the actual company takes a certain form of the company, while the actual company does not tend to the will of the individuals in it to follow a specific form.

- The actual company enjoys the legal personality from the moment of its establishment until the ruling is issued for its invalidity and liquidation in accordance with what was agreed upon by the partners. Unlike the reality company, which does not have any legal personality, nor is it subject to bankruptcy, and the responsibility of its partners towards others is joint ⁽⁵⁾.

2- Distinguish the actual company from the joint venture company.

The joint venture company: It is a disguised company that takes place in secret and does not have a legal personality. It is concluded between two or more persons to participate in a project with money or work and share the resulting profits and losses ⁽⁶⁾.

(1)Appeal Decision No. 1198 of 52 BC, Session 6/20/1988), Ahmed Mahmoud Hosni, Commercial Cassation Court, Knowledge Manshaat, Alexandria, 2000, p. 422.

(2)Fatahi Mohamed, Darmash Ibn Azouz, The Actual Company in Algerian Legislation, Journal of Law and Human Sciences, University of Beirut Zian Ashour, Algeria, Issue 27, 2016, pg. 92.

(3)Salim Abdullah Ahmed Al-Jubouri, previous reference, pp. 74-75.

(4)Khaled Abdel Qader Eid, The Actual Company, Journal of Islamic Research, General Presidency for Scholarly Research and Ifta, KingdomSaudi Arabia, Issue 19, 2017, pp. 277-278.

(5)Fatahi Muhammad, Darmash Ibn Azouz, previous reference, pg. 92.

(6)Essam Hanafi Mahmoud, Commercial Law, Part One, without publishing house, without date, p. 442.



So, this company relies mainly in its formation on concealment and concealment, and only its members know its existence without others, as it represents a type of company of persons that was named by this name due to its reliance in its formation on the personality of the partners, whose number is often small⁽¹⁾.

This company was not mentioned in the Iraqi Companies Law, while some Arab legislation stipulated it, such as Article (49) of the Jordanian Companies Law and Article (43) of the Saudi Companies Law. There are several things that distinguish the joint venture company from the actual company, including:

1- Legal personality: The joint venture company does not have a legal personality, as it does not have a capital, an address, or a liability independent from the debts of the partners, unlike the actual company, which has a legal personality, capital, an independent liability, and a specific domicile.

2- In terms of proof: It is permissible to prove the joint venture company by all methods of proof, including presumptions and evidence, because its consensual contract is verbal, unlike the actual company, which is proven by a written contract ⁽²⁾.

3- In terms of concealment: the joint venture company enjoys a special status, as it is a hidden company that has no legal existence in front of others, because it is represented by one of the partners in it dealing with others in his name as if he is dealing for his own account, unlike the actual company that is known to others⁽³⁾. Also, this company is exempted from formalities such as writing, registration and publication ⁽⁴⁾.

4- In terms of liquidation: the joint venture company is not subject to liquidation procedures, because as we mentioned, it has no legal personality or independent financial liability⁽⁵⁾.

The second section - the actual pillars of the company:

First- Objective Elements: The company's contract does not exist unless it contains the general objective elements of any contract in addition to the special objective elements, and we will briefly explain them in the following.

1- General thematic elements:

A-Satisfaction: Consent is considered the first condition for the existence of any contractual relationship. The company's contract, like all other contracts, does not arise unless there are two compatible wills, the will of the offeror and the will of the acceptor. Article (73) of the Iraqi Civil Law No. 40 of 1951 stipulates that the contract is (a bond). The offer issued by one of the two contracting parties to the acceptance of the other in a way that proves its effect on the subject matter.

(1) Samiha Al-Qaloubi, *Commercial Companies*, Dar Al-Nahda Al-Arabiya, Cairo, first edition, 2011, p. 16.

(2) Musaed bin Hamad bin Abdullah Al-Shuraidi, *The Actual Company - A Comparative Study*, PhD Thesis, Higher Judicial Institute, Imam Muhammad bin Saud Islamic University, Saudi Arabia, 1433 AH, 2011 AD, pp. 53-54.

(3) Abdul Rahim Al-Salmani, *Al-Wajeez in the Commercial Companies Law*, previous reference, p.12.

(4) Fatahi Muhammad, previous reference, p. 93.

(5) Rumaisa Merabti, *Ferial Kana, The Invalidity of Commercial Companies*, Master Thesis, Faculty of Law and Political Science, University of Beirut May 8, 1945, Guelma, Algeria, 2020, p. 78



So the satisfaction should focus on the core issues of the contract, such as the type of company, the obligations of the partners, determining the shares in it, and the purpose of the company and its capital ⁽¹⁾. And if consent is sufficient for the existence of the contract until it is not sufficient for its validity, then it should be free from any defect of will, error, coercion, fraud and unfairness ⁽²⁾.

B-Capacity: Capacity generally means the capacity of a person to acquire rights and assume obligations. The capacity is the second pillar of the company's contract, as the partners must have the legal capacity in order for the contract to be valid, and that each person is qualified to contract unless the law decides that he is not qualified or limits it ⁽³⁾.

And capacity is of two types: capacity, obligation, which means the person's ability to acquire rights and assume duties, and capacity to perform, which means the person's ability to perform legal actions by himself according to which he acquires rights and assumes obligations, and therefore it is the ability of a person to carry out legal actions for himself ⁽⁴⁾. And the necessary eligibility for the company contract is reaching the age of majority, which was set by the Iraqi legislature at eighteen years, while the Egyptian legislator set the age of majority at twenty-one years⁽⁵⁾. And when a person has full capacity, it is proven that he has the ability to undertake legal actions and dispositions of all kinds, and there is no difference in that between the actions of administration or disposition⁽⁶⁾.

Provided that he is not afflicted by any of the symptoms of eligibility, such as insanity, dementia, foolishness, and negligence ⁽⁷⁾. Although the incompetence in European law is one of the reasons for the invalidity of the company, but this law necessitated that all partners be harmed by the ineligibility in order for it to be taken as a reason for invalidity ⁽⁸⁾.

C- The object: The object of the obligation is the thing that the debtor is obligated to do, such as transferring a real right or doing an act or refraining from doing an act ⁽⁹⁾.

And the place differs from one contract to another, so the place of the company's contract is the economic activity for which the company was established and allocated the necessary funds from the partners to achieve it ⁽¹⁰⁾.

(1) Musaed bin Hamad Al-Shuraidi, previous reference, pp. 171-172.

(2) For more information on defects of will, see: Abd al-Razzaq al-Sanhouri, *The Mediator in Explanation of Civil Law*, part The first, Sources of Commitment, Dar Al-Shorouk, Cairo, first edition, 2010, pg. 249 and beyond. See also: materials (112-125) of the Iraqi Civil Code No. 40 of 1951.

(3) Article (93) of the Iraqi Civil Code.

(4) Hisham Taha Selim, *Al-Wajeez in the sources of commitment in light of the provisions of both the Egyptian civil law and the civil law* Al-Bahraini, without a publishing house, 2015, pg. 93.

(5) Article (106) of the Iraqi Civil Code. And Article (44) of the Egyptian Civil Code.

(6) Ahmed Boukerzaza, *Civil Responsibility for a Minor, A Comparative Study*, PhD thesis, Faculty of Law, University of Constantine, Algeria, 2014, p. 25.

(7) Articles (107-111) of the Iraqi Civil Code.

(8) Nader Mohamed Ibrahim, *Protection of the legal personality of the commercial company from invalidity, a view of the French law from A Qatari Perspective*, *International Journal of Law*, College of Law, Qatar University, Volume 11, Issue 1, 2022, p. 74.

(9) Abd Al-Razzaq Al-Sanhouri, previous reference, p. 322.

(10) Ramisa Merabti, *Ferial Qana*, previous reference, p. 18.



There are several conditions that must be met in the object in order for it to be considered legally as one of the pillars of the contract, namely (the object of the obligation must be present and possible), that is, it should not be absolutely impossible, as it should be (the object should be specific and specific)⁽¹⁾, that is, it should be known and not unknown. Finally, the shop must be legitimate. That is, it should not be contrary to public order and morals, such as establishing a company to traffic in drugs or money that is prohibited to deal with, or human trafficking, otherwise the contract would be invalid, and this has been confirmed by Iraqi law and Arab laws⁽²⁾.

D- The reason: There must be a reason for every contract, otherwise the contract is invalid. Therefore, the reason is a pillar of voluntary commitment only, as it is linked to the will, as it exists with its presence and is non-existent⁽³⁾. The place of the contract is often confused with its cause in practice, and therefore it must be legal and not violate public order and morals, otherwise it is considered null and void.

This is confirmed by the first paragraph of Article 132 of the Iraqi Civil Code as follows: (The contract is void if the contracting parties commit themselves without reason or for a reason prohibited by law and contrary to public order and morals).

2- Special thematic pillars:

A- Multiple partners: The company is defined according to Article 4 of the Iraqi Companies Law as (a contract to which two or more persons are bound...), so the company is required to have at least two persons⁽⁴⁾. Some jurists have justified the necessity of this plurality to prevent the establishment of fictitious companies, but this justification is not correct because the plurality of partners does not prevent the establishment of fictitious companies, and that the necessity of this plurality is imposed by the contractual nature of the company, as it is not possible to imagine the existence of a contractual relationship except with the presence of two persons or More in the company contract, whatever its type, civil or commercial, especially in shareholding companies and partnerships limited by shares, as the number of partners in them is not less than five, and as for the upper limit, it is not specified except in the limited liability company, when it is not permissible to exceed 50 partners⁽⁵⁾. However, the Iraqi legislator took some exceptions from the general rule. As a result of which an actual company can be established without the multiplicity of partners, the Iraqi legislator has permitted the establishment of the company, even if all its shares are owned by one person, especially in state-owned public sector companies⁽⁶⁾.

B- Submitting shares: The shares represented by the shares that the partners are obligated to provide are among the essential issues necessary for the formation of the company, and they are of three types. They may be cash or in-kind shares or work shares.

(1) Aziz Al-Aqili, *Commercial Companies, Part Four*, House of Culture, Amman, Jordan, first edition, 2002, p. 34.

(2) Fatna Bu Omariya, Sonia Bin Daha, *The Invalidity of Commercial Companies*, Master Thesis, Faculty of Law and Political Science, Akli Mohand Olhaj University - Bouira, Algeria, 2017, p. 16.

(3) Samiha Al-Qaloubi, previous reference, p. 33. - Salim Abdullah Al-Jubouri, previous reference, p. 28.

(4) Samiha Al-Qalyubi, previous reference, p. 36 and beyond.

(5) Musaed bin Hamad Al-Shuraidi, previous reference, pp. 174-175. See also, Ashour Mujib, *The Objective Elements Concerning the company's contract in light of the provisions of Algerian law*, master's thesis, Faculty of Law and Political Science, Larbi Ben M'hidi University, Oum El-Bouaghi, Algeria, 2016, p. 6.

(6) Article (4) of the Iraqi Public Institutions Law No. 66 of 1965.



- And cash shares represent the prevailing situation, as it is a sum of money provided by the partner and he is responsible to the company for compensation if he is late in providing this amount at the specified time⁽¹⁾. - As for the in-kind share, it is represented by movable money or real estate such as a piece of land, a car, machinery or goods, or it may be intangible money such as a patent or a trademark presented by the partner instead of the cash share, and the in-kind share is presented to the company either with the intention of ownership and thus the relationship between the partner and the company is subject according to the rules of the sale contract, except that there is no price for offering the share as in the sale contract. Or that the share is provided for use, and here the relationship between the partner and the company is subject to the rules of the lease contract, but it is not matched by a fee⁽²⁾. The company must maintain the in-kind share provided for usufruct and return it to the partner on the agreed legal date⁽³⁾.

- As for the work share, it means that the partner offers work to the company to achieve material benefit for the company, such as providing technical expertise that contributes to the success of the company, such as the engineer, manager, and accountant. Achieving the objectives of the company in order to be accepted in it as a share, so what counts is the importance of the work and not its nature in relation to the company's activity⁽⁴⁾. The Iraqi legislator stipulated in Article 4 of the Companies Law the types of shares, including that the share be work.

C- Intention to participate: The intention to participate represents the moral element in the company contract, and it is one of the most important basic pillars on which the company is based, although most of the legislation did not provide for it, including the Iraqi legislator⁽⁵⁾. The jurisprudence, especially the French, differed in defining the concept of the intention to participate. Some went to adopt a unified concept of it as positive voluntary cooperation with the aim of the success of the project, and others went to adopt a pluralistic concept of it in its concept differs in their view from one company to another according to the goal and form of the whole company⁽⁶⁾.

The intention of participation means the willingness of the partners to cooperate with each other positively on an equal footing to establish the company, achieve its goals, and share in the profits and losses⁽⁷⁾. The intention to participate differs according to the type of company, as it is more prominent in companies of persons than in companies of funds. In companies of persons, especially partnership companies, the contractual idea based on mutual trust and positive cooperation between partners prevails. As for companies of funds, especially in joint-stock companies, the role of the partner is limited to employing His money is in the company's project without caring about the personality of the managers, except as an accessory⁽⁸⁾.

(1) Abd al-Rahim al-Salmani, previous reference, pg. 19. Also Musaed bin Hamad Al-Shuraiddi, previous reference, pg. 175.

(2) Salim Abdullah Al-Jubouri, previous reference, p. 100.

(3) Ahmed Ali Khawaldeh, previous reference, pg. 58.

(4) Ramisa Merabti, previous reference, p. 25.

(5) Article 4 of the Iraqi Companies Law, Article 416 of the Algerian Civil Code No. 75-58 of 1975 Amendment, Article 505 Egyptian civil, Article 1832 French civil.

(6) For more details on jurisprudential opinions, see: Hanan Mahdawi, *The Moral Pillar of Commercial Companies - Intention Subscription*, PhD thesis, Faculty of Law and Political Science, University of Lamine Debaghin, Setif 2, Algeria, 2020, pg. 10 and beyond.

(7) Fatna Bu Omariya, Sonia Bin Daha, previous reference, p. 23.

(8) Ashour Mujib, the previous reference, p. 16 and beyond.



D- Sharing of profits and losses: This pillar is represented by the desire of the partners to reap the profits resulting from the project, which must be material profits added to the debts of the partners, and each partner bears a share of the losses that may result from the exploitation of this project, but if the partner stipulated not to His participation in the profits or bearing the risks, or his exclusivity in the profits exclusively, or that he obtains a certain percentage of the profits whether the company achieves profits or losses, such conditions are considered null and lead to the invalidity of the company's contract, and these conditions are called (the lion's condition This is because one of the characteristics of the company contract is equality between the partners in profits and losses⁽¹⁾).

So, the general rule requires the absolute nullity of the company's contract if it includes this contract (the lion's condition). If this condition is mentioned in companies of persons, the contract and the condition together are invalid, but if it is mentioned in money companies such as joint-stock companies and companies with limited liability, then the lion's condition is considered null without the invalidity of the contract⁽²⁾. It is clear from the foregoing that the company's contract is considered an absolute or relative nullity if one of the general or specific substantive pillars of the company is left behind and according to the importance of each pillar, without the retroactive effect of nullity, but it has an immediate effect only and the company has a realistic existence in the period since its formation And even the ruling to invalidate it⁽³⁾.

Second- the formal elements of the company:

1-Writing: The company contract is no longer a consensual contract that is concluded by mere agreement between the partners. The Iraqi legislator and other legislators required the presence of formal elements without which the company contract cannot be concluded, such as writing and publicity. Article 13 of the Iraqi Companies Law stipulates the condition of writing, that is: The founders prepare a contract for the company signed by them or their representatives, which includes the company's information, such as the company's name, type, headquarters, purpose, number of its members and founders, and how profits and losses are divided among them⁽⁴⁾.

Writing means documenting the contract, i.e. emptying its content into a document represented by an official contract, and it is considered the most formal behavior imposed by modern law⁽⁵⁾. Legal jurisprudence differed on the legality and limits of the writing condition, as some believe that it is a condition for proving the company contract only, while the other opinion believes that it is a condition for the contract and not for proof only. This is what we support⁽⁶⁾. The canceled Article 628 of the Iraqi Civil Code stipulates that (the company's contract must be in writing, otherwise it is null). However, this nullity does not allow the partners to invoke it against others and has no

(1) Samiha Al-Qalyubi, previous reference, pg. 68 and beyond.

(2) Donia Alounas - Muhammad Taher Belisawi, Invalidity is a Threat to the Survival and Continuity of Business Companies, Journal of Studies and Research Legal, Faculty of Law, Setif University 2, Volume 7, Number 2, 2022, p. 248. See also: Article 733 of the Algerian Commercial Law No. 75-59 of 1975, as amended.

(3) Fatahi Muhammad, the previous reference, pg. 96 and beyond. Salim al-Jubouri, previous reference, p. 145 and beyond.

(4) See Article 15 of the Egyptian Companies Law No. 159 of 1981, and Article 584 of the Jordanian Civil Code.

(5) Khaled Abu Taha, Ahmed Husniyeh, Formalism in Commercial Contracts, An Analytical Study, Journal of Law and Human Sciences, University of Beirut) Dhofar, Sultanate of Oman, Issue 1, 2020, p. 110.

(6) Ahmed Ali Khawaldeh, previous reference, pg. 64 and beyond. Salim al-Jubouri, previous reference, pg. 164 and thereafter.



effect among the partners, unless the partner requests a judgment of nullity, and I have taken into account this. Governance many laws of the world⁽¹⁾.

2- Publicity: Although the condition of writing is sufficient for the company to acquire the moral personality with respect to the partners or others, it is not sufficient to prove the company contract and its acquisition of legal personality, as most comparative legislation requires the publication of this contract according to the procedures established in each company so that the company can invoke the personality *Morale* of the company in the face of others⁽²⁾.

Article 34 of the Iraqi Civil Law stipulates (the company must, within 30 days from the date of its establishment, submit an application for registration in the commercial register). In the special bulletin specified in the provisions of Article 606 of the same law, and the certificate of incorporation is issued within 15 days from the date of the last publication, and thus the company acquires the legal personality⁽³⁾.

As for the penalty resulting from the failure of this condition, it is nullity, but it is not an absolute or relative nullity, but rather it is a nullity of a special kind that does not lapse by statute of limitations, and the partners may invoke it among themselves from the date of pronouncing it, and therefore the company cannot have a legal or actual existence before documenting its contract and published⁽⁴⁾.

The Court of Cassation in Iraq has issued many decisions that support the inability to establish an actual company if the company is invalidated due to failure to write or not to declare, which indicates the stability of the Iraqi judiciary in this direction⁽⁵⁾.

The second requirement - the legal basis of the actual company.

The basis on which the actual company is based is due to several considerations, and these considerations are represented in several theories that we explain in three branches.

The first section - the theory of the continuous contract:

The contract, as it is known, is (it is the agreement of two wills to create or transfer an obligation)⁽⁶⁾. The contract has many types, including the time contract, which is a contract that depends on time, as time is an essential element in it so that it is the criterion by which the subject of the contract is estimated, unlike the immediate contract in which time is not an essential element in it, and examples of continuous time contracts for implementation are the lease contract, which is In which time is an essential element for determining the amount of

(1)Adnan Ibrahim Sarhan, *The apparent conditions and the extent of their protection in Iraqi and comparative law*, Legal Research Center, Ministry of Justice, Kurdistan Region, Iraq, first edition, 2022, p. 302

(2)Musaed bin Hamad Al-Shuraidi, previous reference, p. 190.

(3)Article 5 of the French Companies Law No. 66-537 of 1966, and Article 22 of the Egyptian Companies Law.

(4)Adnan Ibrahim Sarhan, previous reference, pg. 301 and beyond. Salim al-Jubouri, previous reference, pg. 171 et seq.

(5)Note the decisions of the Iraqi Court of Cassation, 640 / civil copied / 84/85 T. 914 on 22/5/1985, and 782 / civil Copied / 84/85 T 949 on 2/6/1985, unpublished, referred to in Adnan Sarhan, the same reference, p. 312.

(6)Abd Al-Razzaq Al-Sanhouri, previous reference, p. 115.



benefit, as well as the work contract in which time determines the amount of services provided by the worker during the work period⁽¹⁾.

Jurisprudence and jurisprudence went to consider the company's contract as one of the contracts of continuous implementation, and their argument in that is the effect of termination in these recent contracts, as the effect of termination does not apply to the past because it is not possible to repeat what has been implemented, so the benefit that the tenant obtains from the lease contract cannot Recovering it after the termination of the lease contract, and therefore this effect is naturally consistent with the idea of the actual company in which the effect of the invalidity does not extend to the past.

While some of the jurists went to criticize this view on the grounds that it is not possible to limit the idea of the contract to address all the causes of invalidity that may occur in the company's contract, and the concept of the company as a contract is confused with its concept as a legal person, so some see that the idea of the associated legal personality The contract is the basis for the existence of the actual company⁽²⁾.

The second branch - the theory of moral personality: A legal person is a virtual person represented by a group of people and funds that has a specific goal or purpose and has the power to acquire rights and assume obligations. So this personality has two elements, an objective element represented in people and money, and a formal element represented in the official state recognition of this personality⁽³⁾.

The moral personality is the most important feature that distinguishes the company's contract, as it is a result of this contract and is necessary for the company's advancement and progress and achieving its goals for which it was found. It is also independent of the personality of the founding individuals of the company in terms of financial disclosure, and the company's recognition of the moral personality gives the partners reassurance and tranquility and encourages others to contribute In the company⁽⁴⁾. This was confirmed by the Egyptian Court of Cassation, where it stated in its decision (that the commercial company has a legal personality independent of the persons partners in it, i.e. it has an independent existence from the partners and its money is independent of their money and is considered a general guarantee for its creditors alone, just as the share of the partner in the company goes beyond his ownership and becomes owned by the company After that, he will only have a right to a percentage of the profits or a share of the capital when the company⁽⁵⁾ is divided. In addition, the legal personality is established for all companies, except for the joint venture company, which remains hidden and does not exist at the legal level⁽⁶⁾.

(1) *Ibid.*, pp. 136-137.

(2) Salim al-Jubouri, previous reference, pg. 62 and beyond. Also: Musaed Al-Sharidi, previous reference, pg. 96.

(3) Amani Fadlallah Al-Zaher, the moral personality of the company in the Saudi system - a comparative study, Umm Al-Qura University Journal For Sharia Sciences and Islamic Studies, Umm Al-Qura University, Makkah Al-Mukarramah, Issue 74, October, 2018, pg. 237.

(4) Hadil Ezzedine Muhammad Al-Razi, The Corporate Personality and Legal Implications - A Comparative Study, Master Thesis, College Graduate Studies, Arab American University, Jenin, Palestine, 2019, pp. 9-10

(5) See the decision of the Egyptian Court of Cassation, (Appeal No. 471 of 49 BC, Session 2/9/1981), Ahmed Mahmoud Hosni, The previous reference, p. 492.

(6) Rashid Othman, Corporate Personality, Research Journal, Al-Tuhamy Al-Qaidi, Dar Al-Mandumah, Issue 14-15 For the year 2016, p. 54.



As for considering the moral personality theory as a basis for the idea of the actual company, some have argued that the company contract arises from the partners' agreement, and this contract in turn leads to the establishment of the company that is considered the result of this contract and that enjoys the moral personality from the moment of its formation, as it is independent of the personality of the partners. And just as this legal personality is established for companies with a correct origin, it is also proven for companies subject to invalidation, because invalidity does not prevent the formation of the company, but it is a reason for its collapse. in the manner of natural persons⁽¹⁾.

As for the other opinion, it went to not adopting the idea of the moral personality as an alternative to the idea of the actual company, since the first idea is incapable of finding solutions to all the effects of others' denial of the moral personality of the company, because saying that the right and wrong companies enjoy the moral personality from its inception until its end in liquidation entails unfairness. With the right of third parties who are not left with the right to choose between the invalidity of the actions that the company has taken against them in the past and the recognition of their validity, since this company has a moral personality even if it is invalid, which makes it the correct company⁽²⁾.

In addition, the idea of the legal personality for the partners collides with the concept of the penalty resulting from the breach of one of the necessary pillars for the formation of the company or its violation of the legal rules necessary for its establishment, which obliges the partner whose protection was decided to be invalid to remain a creditor or debtor to the legal person as long as this person remains, and this is inconsistent with The logic of invalidation⁽³⁾.

The third section - the theory of appearance:

The apparent status theory is known as one of the means of protecting the contractor who concluded a legal act in good faith with the owner of an actual position whose existence is not based on the law, because it lacks one of the essential elements required by the law and is therefore called the actual position, such as the apparent heir, the apparent owner, and other apparent conditions, and a problem arises. The apparent situation is when the wrong interpretation of the law is invoked, where the apparent situation is the center that contradicts the truth⁽⁴⁾.

So, the apparent situation is a person's directing of the capabilities, advantages and powers of a position that he does not have, so he is characterized in an unreal capacity through the possession of a legal position that has not yet been established or has arisen contrary to the truth⁽⁵⁾, which leads to a confrontation between the owner of the apparent actual position and the owner of the legal position on the one hand and between them and the third party to whom it is disposed of on the other hand.

This situation can only be achieved by the availability of two material and moral elements. The material element is represented by the external evidence that generated in the same third party a

(1) Mufleh Awad Al-Qudah, *The Real and Legal Existence of the Actual Company in Comparative Law*, Dar Al-Nahda Al-Arabiya, Cairo, 1985, pp. 434-436. See also: Decision of the Egyptian Court of Cassation, (Appeal No. 1595 of the year 54 session 1/2/1993), Ahmed Mahmoud Hosni, previous reference, p. 486.

(2) Musa'ed bin Hamad Al-Shuraidi, previous reference, pg. 93.

(3) Salim Abdullah Al-Jubouri, previous reference, p. 66.

(4) Sarah Abdel Samad, *Theory of the apparent situation in the real estate records system*, Journal of Legal Guidance, College of Science Legal, economic and social, Agdal- Rabat, Issue 8-9, April-2020, pg. 220.

(5) Musa'ed bin Hamad Al-Shuraidi, previous reference, pg. 75.



common belief in the legality of the actual center with which the contract was concluded. As for the moral element, it is the goodwill of the third party when dealing with his opponent, believing in the legality of his apparent status⁽¹⁾. Most of the jurists have taken the theory of the apparent situation as a basis for the theory of the actual company, in order to converge the two ideas in terms of meaning and concept. It is necessary to approve the transactions that took place with others on the basis of the legal appearance of the company. The reasons for stability require the actions of this appearance despite its contradiction with the truth and considering it as producing the same effects. Which arise from a valid legal position, and all this is for the protection of bona fide third parties⁽²⁾.

This is because the third party who dealt with a company and documented the actions of its representatives without showing any negligence or negligence, and without knowledge of the defects in the company's actions, deserves protection for considerations related to legitimate trust. Trust is an essential element in legal, economic and financial transactions. It is enforceable by the disposal of the manager of the actual apparent position of the company, due to the confidence of others in this apparent situation⁽³⁾. This theory has not escaped some criticism. Despite its importance in interpreting the reality of the actual company⁽⁴⁾.

The second topic - Actual company provisions

The actual company, according to what was shown to us in the first topic, is a legal company that relied in its foundation on the basic pillars of each legal company, and it must have practiced its activity and appeared to others in the form of a legal person, and its general and specific objective conditions have been met in addition to the formal conditions, except that it had some defects as a result of the failure of one of the conditions that led to its invalidity relatively. In this section, we will discuss the scope of this theory and its implications in the first requirement, and the termination of the actual company or its settlements in the second requirement.

The first requirement - recognition of the actual company:

In this requirement, we will show the cases of recognition and non-recognition of the actual company, and then we will explain the implications of the establishment of the actual company, as follows:

Section I - Recognition Cases of the Actual Company:

First - The invalidity of the company due to non-compliance with the formal conditions: If the invalidity of the company arose from not writing or publicizing the company contract, then in this case the theory of the actual company is applied, although the writing is evidence of the existence of the company and a condition for its formation, but the invalidity of the company is due to the failure of the writing condition. It does not lead to the cancellation of the company as if it did not

(1) Salim Abdullah Al-Jubouri, previous reference, pp. 69-70.

(2) Rabeah Aliwa, previous reference, pg. 4.

(3) Esraa Abdel-Zahra Katea - Hassan Fadal Musa, Applications of the Apparent Status Theory in Commercial Law, Journal Faculty of Law, Al-Nahrain University, Volume 22, Issue 1, 2020, pp. 124-125.

(4) For criticisms of the apparent situation theory, see: Salim al-Jubouri, previous reference, pp. 71-72. Musaed Al-Shuraidi, previous reference, pp. 82-83.



exist, but rather its effects follow and are considered to be truly existing, especially in the period between its establishment and the ruling of its invalidity⁽¹⁾.

Although the partners have the right to uphold this invalidity among themselves, the court does not have the right to rule on it on its own, but rather it must be at the request of one of the partners, and the partners are not entitled to uphold it towards others due to the failure of writing, and this is what was stipulated in Article 507 Egyptian Civil and Article 628 canceled from the Iraqi Civil Code.

- In terms of publicity: The new French Companies Law of 1966 held that neglecting the registration of the company results in its not acquiring legal personality only⁽²⁾, contrary to what was held by the old French law, which was to nullify it. As for the Egyptian Companies Law, it supported what The new French law went to him, and therefore the effect of nullity here varies according to the type of company, as it is less effective in companies of funds than in companies of persons⁽³⁾.

Second: Invalidity due to defects of consent or lack of capacity:

If the judgment of invalidity was issued based on the lack of capacity of one of the partners, or if the will of the partner was marred by a defect of consent, such as coercion, fraud, and error, then the contract is considered invalid relative to the lack of capacity or the one whose will is defective⁽⁴⁾. That is, the effect of invalidity represented by stopping the impact of the contract and its non-enforcement is limited to the partner alone, and other partners are not entitled to adhere to it, but the contract is considered valid for them⁽⁵⁾. This partner also has the right to revoke the contract or approve it within three months.

The contract is considered valid if he does not revoke it during that period, bearing in mind that the validity of this period begins from the time when the reason for lack of eligibility ceases to exist, or from the time when the guardian becomes aware of the issuance of the contract⁽⁶⁾.

It is clear from all of this that this type of invalidity does not affect the entity of the entire company, but only affects the commitment of the partner who is incapacitated, and it is rare to occur from a scientific point of view in joint-stock companies, because it is not based on personal consideration and is not affected by the separation of the partner, and this is what he went to. Both the French and Egyptian legislators⁽⁷⁾.

Section Two - Cases of non-recognition of the actual company:

First- Invalidity based on the failure of the substantive elements of the company's contract: The penalty that results from the failure of the substantive elements of the company's contract in

(1) Nasima Bu Maaza, *The Legal System of the Actual Company (Partnership Company)*, Master Thesis, Faculty of Law and Science Politics, Larbi Ben M'hidi University - Umm El-Bouaghi, Algeria, 2014-2015, pg. 46

(2) Article 5 of the French Companies Law of 1966, Article 22 of the Egyptian Companies Law.

(3) Mufleh Awad Al-Qudah, previous reference, pp. 298-301.

(4) Nasima Bou Maazza, previous reference, p. 46.

(5) Khaled Abdel Qader Eid, previous reference, p. 273.

(6) Article (136) of the Iraqi Civil Code.

(7) See Article 19 of the Egyptian Companies Law, Article 7 of Order No. 1176-69 of the French Law Issued on December 20, 1969 amending French Companies Law No. 66-537 issued in July 1966, referred to in Mufleh Awad Al-Qudah, previous reference, p. 293.



whole or in part is not the invalidity of this company, but rather the absence of the company's existence at all, so the company will not have any legal or actual existence, due to the loss of the constituents and foundations on which the company is based, the intention to participate, the multiplicity of partners and the provision of shares.

These pillars are left behind, so the company will not have any existence⁽¹⁾, with the exception of a limited liability company that can be established and consist of one person, and this is what was stipulated in Article Four of the Iraqi Companies Law, as for Egyptian law, it does not exist for this type of company, i.e. The one-person company, but the French law contains the phrase - that the company can be established by the will of one person in the cases stipulated by the law⁽²⁾.

Thus, we see that it is impossible for there to be any legal existence for other types of companies in which special conditions must be fulfilled, such as the multiplicity of partners and their intention to participate and provide shares, despite the differing opinions of jurists in determining what the penalty ensues from that⁽³⁾.

Second: Invalidity based on the illegality of the place and insult: It is well known that the object and the cause are among the general objective pillars of the company, and they should be legitimate, i. If the company's activity was contrary to public order and morals, such as trafficking in weapons and drugs or human trafficking, the recognition of the legal existence of the company means recognition of this illegal activity, and this is contrary to logic and the law⁽⁴⁾.

So, the penalty resulting from the illegality of the place and the reason is the absolute invalidity, that is, the company will be null and void, absolutely and retroactively, even with regard to third parties, whether the company begins to practice its activity or not. There cannot be a valid legal company that does not have any effects, and then there is no actual company⁽⁵⁾

The third section - the effects of recognizing the actual company:

The recognition of the actual existence of the company during the period between its formation and the judgment of its invalidity has important effects, whether for the company, the partners, or third parties who contracted with the company, which we will explain in this section.

First: With regard to the company: The company is considered, in the period from the date of its incorporation until the date of the ruling of nullity, an actual, valid company enjoying a legal personality independent of the personality of the partners. Thus, all its contracts and actions and the resulting rights and obligations with third parties are considered valid and valid. The pledges, obligations and rights of the partners are valid between them or with respect to others, unless the third party insists on invalidity.

(1) Nasima Bou Maazza, previous reference, p. 48.

(2) Article (1832) of the French Civil Code, Dalouz, previous reference, p. 1785.

(3) For more details about jurisprudential opinions in determining the penalty for defaulting on the objective conditions of the company, see Salim Abdullah al-Jubouri, previous reference, pg. 155 and beyond. Adnan Ibrahim Sarhan, previous reference, p. 296 and beyond

(4) Abd al-Razzaq al-Sanhouri, previous reference, pg. 322 et seq.

(5) Khalid bin Saeed - Othman bin Abdul Rahman, Dedicating the principle of protecting the apparent in the company - the actual company as a model, magazine Judicial jurisprudence, Faculty of Law and Political Science, Mohamed Kheidar Soukra University, Algeria, Volume 13, Special Issue, November 2021, p. 227. Also, Khaled Abdel Qader Eid, previous reference, pg. 273



And as soon as the judgment is issued to invalidate the company, this company must be dissolved and liquidated, and since the company remains enjoying legal personality during the period of its liquidation, it is permissible to declare its bankruptcy, after its inability to pay its debts that may arise before the judgment of invalidity or during the liquidation process, and the court's ruling is the bankruptcy of the company. It is absolutely authoritative and applies to all, and it is not permissible to adhere to invalidity with regard to the past to confirm the actual existence of the company by issuing a bankruptcy ruling that ultimately results in the bankruptcy of the joint partner⁽¹⁾.

Second- with regard to the partners: upon the judgment of the invalidity and liquidation of the company, the company's assets, profits and losses shall be divided among the company as follows:

- If the reason for the invalidity is a lack of capacity or a defect in the satisfaction of one of the partners, then the invalidity for this partner is considered a relative invalidity and therefore he recovers his share as soon as the ruling of invalidity is issued. As for the ordinary partners, their recovery of their shares and their share of profits and losses is dependent on the liquidation of the company in accordance with the terms of the founding contract. The fact that this defect is considered a defect subsequent to the valid company agreement, and the same is the case if the reason for the invalidity is the lack of publicity of the company contract.

- But if the reason for invalidity is illegality or the fulfillment of the condition of the lion, then the liquidation of the company takes place in accordance with the provisions of the law regarding the distribution of profits and losses and according to the share of each partner in the capital, and not in accordance with the terms of the founding contract, as it leads to wasting the rights of others⁽²⁾.

Third- with regard to third parties: the recognition of the actual company during the period of its activity and before the ruling on its invalidity entails the validity of all the dispositions, undertakings and rights pertaining to it and their validity towards third parties. This third person is a personal creditor to one of the partners or to the company⁽³⁾.

1- If a third party is a creditor to the company: If the partners have the right to invoke the invalidity of the company among themselves, then they are not entitled to invoke the invalidity against the company's creditors from third parties to get rid of their obligations if the company had a sound legal foundation, in order to favor the creditors from Third parties and submitting them to the personal creditors of the partners in obtaining their rights from the company's funds⁽⁴⁾.

So, all the actions that the company committed to in the face of others are considered valid after the judgment of their invalidity, as the company's creditors have the right to stick to its survival in order to avoid competition from the personal creditors of the partners and they have the right to implement on the company's funds, and they also have the right to claim its bankruptcy in order to

(1) Fatahi Muhammad-Darmash Ibn Azouz, the previous reference, pp. 98-99, also: Khaled Eid, the previous reference, pg. 274.

(2) Mufleh Awad Al-Qudah, previous reference, pg. 465 and beyond, too, Nasima Boumaza, previous reference, pp. 49-50, Rabeh Eliwa, previous reference, pg. 5 and beyond.

(3) Ahmed Saeed Shula, Court of Cassation in Commercial Matters, Manshaat Al-Maarif, Alexandria, 1999, pg. 62.

(4) Article (56) of the French Commercial Code issued on July 24, 1967 stipulates that (partners may not) That they invoke this invalidity against others, but it is for them to invoke it against each other) referred to in Salim al-Jubouri, the previous reference, p. 238.



collect their debts⁽¹⁾. But if the claims of the creditors of the company themselves conflicted, some of them adhered to the invalidity of the company as if they were personal creditors to some partners at the same time, and others adhered to the survival of the company, then the most correct opinion goes to the judgment of the invalidity of the company, because invalidity is the principle in this case⁽²⁾.

2- If a third party is a creditor of personal partners: The creditors of the personal partners have the right to uphold the invalidity of the company, which they often refer to in order to protect its interests represented in the implementation of the share of the debtor partner after the judgment of the invalidity and liquidation of the company. There are two ways in which creditors of personal partners may claim annulment.

- **The indirect lawsuit:** in which they claim nullity by using the right of their co-debtor, but they cannot do so if the company's creditors insist on its survival, because their debtor as a partner cannot uphold nullity in the face of the company's creditors, as their argument is stronger.

- The direct call: which they claim to be invalidated in their personal capacity as they are from a third party, and they are entitled to do so by a court ruling if the ruling was correct before the ruling invalidating the company⁽³⁾.

The second requirement - the termination of the actual company:

The termination of the actual company represented by its dissolution and liquidation is resorted to if attempts to convert it to a regular company fail, whether by converting its contract to another contract due to the availability of some elements in it, or by correcting and purifying its contract from the defects that marred it⁽⁴⁾, and that the termination of the actual company may be done by the will of the partners or For other reasons outside the will of these partners, which we will explain in this requirement.

The first section - direct reasons for the termination of the actual company:

The direct (involuntary) reasons for the termination of the company are represented in two things: the ruling to invalidate this company and the other to dissolve it by force of law.

First-The lawsuit for invalidity: Legal jurisprudence differed in terms of the necessity of filing a claim for invalidity. Traditional jurisprudence held that the claim for invalidity must be filed in order for it to be judged or dismissed if the invalidity is relative, but if the invalidity is absolute, there is no need to file a lawsuit in it, and this is contrary to what He went to the modern jurisprudence, which affirms the necessity of filing a lawsuit for invalidity to be judged whether it is relative or absolute invalidity, because invalidity is not achieved by force of law, but a main or subsidiary lawsuit must be instituted before the competent court⁽⁵⁾.

(1) Khaled Abdel Qader Eid, previous reference, pg. 275.

(2) Nawal Qahmous, previous reference, pg. 403.

(3) Salim Abdullah Al-Jubouri, previous reference, pp. 239-240. Nasima Bou Maazza, previous reference, pg. 51.

(4) For more details about the transformation of the actual company into a legal company, see Mufleh Awad Al-Qudah, the previous reference, P. 333 and beyond.

(5) Ibid., pp. 373-374.



- **The parties to the lawsuit:** It is known that each case requires the presence of two parties, a plaintiff or a defendant, and each party may represent another person or more. Companies⁽¹⁾. However, the new Iraqi Companies Law of 1983 did not include any provision for this issue and left the matter of regulating it to the general rules established in the civil law, which stipulate that the right to file a claim for nullity proves to everyone who has an interest, and according to the type of interest, whether public or private⁽²⁾. The persons who are entitled to file a claim for relative invalidity are the persons with a special interest whom the law decided to protect as incompetent and those whose consent is marred by a defect of consent. They alone have the right to uphold the invalidity based on their protected interest under the law, and third parties with a special interest may also be entitled to file a lawsuit for invalidity, if their right is threatened in the event of the invalidity of the company⁽³⁾.

Noting that this right is transferred naturally and according to the general rules to the heirs of the partner after his death as a general successor to him. As for those who have the right to file a claim for absolute invalidity, they are the public interest represented by every right affected by the validity and invalidity of the act, which results based on the illegality of the company's location⁽⁴⁾.

- **The court competent in issuing a judgment:** The competent authority to consider the invalidation lawsuit differs according to the type of company's activity. The civil invalidity lawsuit is filed before the civil courts and the commercial invalidation lawsuit is filed before the Commercial Court. Civil courts, being a civil party, or before commercial courts, as they have jurisdiction, and this is what the French law adopted⁽⁵⁾, in contrast to what both the Iraqi and Egyptian legislators went to, where jurisdiction was granted to consider the case to civil courts only in civil and commercial matters alike⁽⁶⁾.

- **The authoritativeness of the judgment of invalidity and its effects:** Although the issue of the authoritativeness of the judgment invalidating the company is a matter of dispute in legal jurisprudence, until the judiciary has gone to give the ruling rejecting the invalidity claim relative authority, but the ruling accepting the invalidity is considered absolute authority. As for the impact of the judgment invalidating the company, this company is considered void and terminated after the issuance of the judgment of its invalidity and does not have any effect in the future, unlike what it was in the past and during the period from its inception until the judgment of its invalidity is issued, it is considered valid and subject to the law of legal companies⁽⁷⁾.

Second- Termination or dissolution of the company contract by force of law.

Annulment, like nullity, is considered a penalty that leads to the termination of the company's contract and the restoration of the situation to what it was, but it differs from nullity in that it responds to a valid contract binding on two sides, one of whose parties breached his obligations,

(1) See Article (161) of the Egyptian Companies Law, Articles (360-366) of the new French Companies Law.

(2) Article (369) of the new French Companies Law stipulates that (... it is permissible to plead invalidity due to incapacity) Or the defect of consent, towards third parties on the part of the incompetent and his legal representatives, and the partner whose consent was marred by the defect such as error, fraud and coercion).

(3) Salim Abdullah Al-Jubouri, previous reference, p. 224.

(4) Mufleh Awad Al-Qudah, previous reference, p. 375.

(5) Musaed bin Hamad Al-Shuraiddi, previous reference, pg. 370.

(6) Mufleh Awad Al-Qudah, previous reference, p. 379. Salim Abdullah al-Jubouri, previous reference, pg. 226.

(7) Ibid. p. 384 et seq.



which led to the impossibility of implementation and thus the termination of the contract by the other party. It responds to a defective contract in the original⁽¹⁾. And since the termination of the company's contract is a reason for the termination of legal companies, it is also a reason for the termination of the actual company⁽²⁾. The company expires by virtue of the law based on general or private legal reasons. General legal reasons are the ones that, if available, are a reason for the termination of all types of companies. As for the special reasons, they are based on personal consideration, and these apply to companies of persons only.

- **General reasons for the termination of companies:** Most of the laws went to specify the reasons leading to the termination of companies⁽³⁾, which are:

1- The expiry of the term specified for the company: the company ends with the expiration of the period specified for it in the contract, and this period varies according to the type of each company and does not exceed the reasonable period of human life. Article (2) of the French Companies Law determined it to be 99 years, which starts from the day of registration in the register real estate⁽⁴⁾.

2- The end of the purpose of its formation: The company's formation contract stipulates the purpose for which it was formed. If this purpose or goal is achieved, the continuation of the company is no longer necessary because achieving the purpose of its establishment is one of the reasons for its dissolution and liquidation⁽⁵⁾.

3- The loss of the company's money: The loss of the company's money is one of the reasons leading to the termination of the company⁽⁶⁾.

4- Nationalization: Nationalization is the transfer of ownership of private projects to state ownership with compensation to the owners of nationalized projects⁽⁷⁾.

5- The meeting of the shares in the hands of one person: If all the shares are concentrated in the hands of one person, this leads to the dissolution of the company by force of law because the contract assumes the presence of at least two persons for the establishment of the company, except for companies with limited liability and one person⁽⁸⁾. 6- Merger: The company expires when it merges with another company, and this merger may be a new company with an existing company, or two companies with each other, and it takes place by agreement of the partners or by

(1) Abd al-Razzaq al-Sanhouri, previous reference, pg. 608 et seq.

(2) Fatahi Muhammad, Darmash Ibn Azouz, previous reference, pg. 99.

(3) See: Articles (601-605) of the Jordanian Civil Code, Article (253) of the Sudanese Civil Transactions Law For the year 1984, Article (15) of the Saudi Companies Law.

(4) Samiha Al-Qaloubi, Commercial Companies, previous reference, pg. 145 and beyond, also: Elias Nassif, Encyclopedia Commercial Companies - Transformation and Termination of Commercial Companies, Part 3, Al-Halabi Human Rights Publications, Beirut, first edition, 2011, p. 118.

(5) Abdel Aziz Ahmed Fattouh, reasons and procedures for the liquidation of joint-stock companies, the periodic newsletter of the Tax Association Al-Masria, Volume 27, Issue 107, August 2017, p. 38.

(6) Hanan Bakhit Sayed Ahmed, The Impact of the Termination of the Company on the Rights of the Parties in the Law, Sharia and Law Journal, College Sharia and Law and the College of Islamic Studies, Africa International University, Khartoum, Issue 24, August 2014, pp. 240-241.

(7) Nahla Mohamed Hamed, Reasons for the Termination of the Corporate Personality of the Company, Master Thesis, College of Graduate Studies, University of Beirut) Al-Neelain, Sudan, 2016, p. 54.

(8) Rania Bouziane Taher, Diablo Mohamed Naguib, Termination of Companies in Algerian Legislation, Journal of Business Disputes, Faculty of Law and Political Science, Djilali Al-Yabis University, Sidi Bel-Abbas, Algeria, Issue 55, July 2020, pg. 21



a decision of the General Assembly, as is the case in the merger of the shareholding company with another company⁽¹⁾.

7- The partners' agreement to terminate the company: the company ends if all the partners agree to terminate it and settle it among themselves, and it is stipulated that the company be able to fulfill its obligations, so this solution is not considered if the company stops paying its debts, and this solution is called the pasteurized solution⁽²⁾.

8- The termination of the company for a reason justifying this: Each partner has the right to claim in court the dissolution of the company before the expiration of its term in the event of reasons that require that, such as serious disagreements between the partners, or the failure of one of them to fulfill the obligations that he undertook⁽³⁾.

9- The bankruptcy of the company: The bankruptcy of the company is one of the general reasons for the expiration of all companies of all kinds, because the bankruptcy of the company means its inability to meet its commercial obligations⁽⁴⁾.

The Egyptian legislator has specified the reasons for the termination of the company in Articles (526-530) of the Civil Code, both general and private that apply to partnerships of persons and related to the partner. This type of company depends on trust and depends on the personality of the partner, and therefore the company ends if this consideration collapses Personal due to the death, bankruptcy, insolvency, or withdrawal of one of the partners from the company if it is impossible for the company to be established and the good continuity of relations between the partners⁽⁵⁾.

As for the Iraqi legislator, he specified the reasons for the termination of the company in Article 147 of the Companies Law as follows:

1- The company's failure to start its activity despite the passage of one year since its incorporation, without a legitimate excuse.

2- The company stops practicing its activity for a continuous period of more than one year without a legitimate excuse.

3- The company's completion of the project for which it was established or the impossibility of its implementation.

4- Merger or transformation of the company in accordance with the provisions of the Companies Law.

5- The company's loss of 75% of its nominal capital, and the failure to take any other action within a period of sixty days from the date it was established in accordance with the budget.

6- The company's general assembly's decision to liquidate it.

It is clear to us from the foregoing that the actual company is dissolved and expires for any of the previously mentioned reasons, both public and private, and it is not permissible for it to continue to practice its activity in any way, and that is from the date of issuance of the court ruling to

(1) Nahla Muhammad Hamed, previous reference, pg. 53.

(2) Samiha Al-Qalyubi, previous reference, pp. 153-154.

(3) Rashid Fattoush, dissolution of the company for significant reasons, a reading of Chapter 1056 of the Dahir of Obligations and Contracts in light of Judicial Work, Publications of the Journal of Rights, Legal and Judicial Knowledge Series, Morocco, Issue 49, 2016, pp. 119-120.

(4) Samiha Al-Qalyubi, previous reference, p. 154.

(5) For more information on the reasons for the company's termination, see: Hanan Bakhit, previous reference, pg. 245. And beyond, Samiha al-Qalyubi, previous reference, pg. 210 and beyond.



dissolve the actual company, and after that it enters the stage of liquidation in accordance with its established provisions in the law while retaining its legal personality.

Section Two - Indirect reasons for the termination of the actual (voluntary) company:

First-The withdrawal of one of the partners: The withdrawal of a partner is one of the reasons leading to the termination of the actual company, especially in companies based on personal consideration, such as a joint partnership or a simple recommendation, and this was confirmed by the legislator in the Iraqi Companies Law, as well as most of the Arab legislation⁽¹⁾. This requires that the partner may request the court to dissolve the company for reasons he deems sufficient for that, and the judge must ensure the validity of the partner's claims submitted to dissolve the company. In the performance of work for the benefit of the company because of his illness or disability, as well as the existence of a major dispute between the partners, and the judge has a discretionary power to take into account these reasons⁽²⁾.

And the company that ends with the withdrawal of one of the partners may be for a limited period, and then the partner is not permitted in principle to withdraw in accordance with the general rules, and he is not entitled to do so except after the expiration of the period specified for the company, so if he has reasonable reasons for withdrawal and the partners are not satisfied with them, he may resort to the judiciary to remove him From the company⁽³⁾.

The court has the discretion to consider these reasons, and if it decides to remove him, then its ruling leads to the dissolution of the company unless the rest of the partners decide to continue it among themselves without the withdrawing partner.

But if the company is of an indefinite period, then the partner has the right to withdraw from it, provided that he notifies the rest of the partners of his intention to withdraw before that happens, otherwise his withdrawal is the result of fraud on his part or at an inappropriate time⁽⁴⁾.

Second- Reclaiming Shares: It means reclaiming shares (the procedure taken by one or all of the partners to request the recovery of their participation in the capital of the company before the completion of its incorporation procedures). This is often the case with companies that start practicing their commercial activity and have not been registered in the commercial register, meaning that the procedures for establishing them have not been completed. its founding. The recovery of the shares is an indirect voluntary reason on the part of the partners for the termination of the actual company⁽⁵⁾.

The Egyptian Companies Law regulated in Articles (14-25) of the executive regulations the cases in which the bank is obligated to return the shares to the subscribers, as an exception to the provision of Article (20/2) thereof, which does not allow this until after the company's statute is declared or registered in the commercial register. And the cases are:

1- If a judgment is issued by the judge of urgent matters appointing those who withdraw these amounts and distribute them among the subscribers, if the company was not established due to the fault of its founders within six months from the date of requesting a license to establish it to the competent committee.

(1)Article (190) of the Iraqi Companies Law stipulates that (the simple company expires if one of the two partners withdraws) In the two-person company), see also: Articles (35-39) of the Saudi Companies Law, Article (529) Egyptian civil, and Article (440) Algerian civil.

(2)Khaled Abdel Qader Eid, previous reference, p. 285.

(3)Musaed bin Hamad Al-Shuraidi, previous reference, pg. 388 et seq.

(4)See Articles (529-531 Egyptian Civilian), Article (192 Iraqi Companies), Articles (440-442 Civilian) Algerian), Article (1869 French Civil, Dalouze, previous reference, p. 1810)

(5)Mufleh Awad Al-Qudah, previous reference, p. 401.



2- If a period of one year has passed since the date of subscription without the founders or their representatives starting to take procedures to establish the company before the relevant committee.

3- If the period prescribed for subscription and the period to which it extends lapses without the subscription being covered in full, in application of Article (23 of the Implementing Regulations).

4- If all the founders agree to abandon the establishment of the company and submit to the bank their acknowledgment of that, certified by the signatures contained therein.

- As for the consequences of recovering the shares in the actual unrestricted company, as one of many cases that I cannot mention, it is the one whose existence is only achieved to the extent of the activity that it actually practiced. If the shares are withdrawn, the company loses all or part of the capital, and if it is unable to After that, the exercise of its activity and the completion of its incorporation procedures, it is permissible for every interested person to claim the dissolution of the company, provided that the representatives of the company are notified before that to carry out the correction or settlement, and this is supported by some legislations for the existence of the actual company, otherwise the disappearance and disappearance of the company and the actual⁽¹⁾. It follows from the recovery of the shares in the actual unrestricted company as one of many cases that I cannot mention, as it is the one whose existence is only achieved to the extent of the activity that it actually practiced. And the completion of its incorporation procedures, it is permissible for every interested party to claim the dissolution of the company, provided that the representatives of the company are notified before that to make a correction or settlement, and this is supported by some legislations for the existence of the actual company, otherwise the company and the actual company will disappear and disappear⁽²⁾.

Conclusion

In conclusion, it becomes clear to us that this study dealt with the issue of the actual company, starting from its inception by the French jurisprudence and judiciary, and the text and application thereof in France to protect the bona fide third party who deals with it on the grounds that it is a valid company despite the disruption of one of its pillars.

The study also dealt with distinguishing the actual company from what is suspected of it, such as the joint venture company, the de facto company, etc., as well as clarifying the general and private objective pillars, as well as the formal pillars of the actual company and its backwardness. He dealt with this theory and applied it, but the Iraqi legislator did not address it and the Egyptian legislator to a lesser extent.

The study also included the legal basis for the actual company, and it became clear to us that if the company becomes invalid after it has started its activity, the invalidity does not apply to the past, but rather extends to the future only, and the activity that it carried out and the obligations that resulted from it remain considered valid, and the company remains enjoying the legal personality that He was able to dissolve and liquidate it after ruling its invalidity or termination, and finally the study dealt with the legal provisions of the actual company and the methods of its termination, and we reached from all of the foregoing some results and recommendations.

1- We believe that the Iraqi legislator must establish a system for the actual company and stipulate it in the Companies Law.

2- Failure to apply the actual company theory in the case of absolute invalidity.

(1) Samiha Al-Qalyubi, previous reference, p. 654.

(2) Mufleh Awad Al-Qudah, previous reference, pg. 405.



3- We see that the theory of the actual company is represented by the principle of the apparent situation, as it bestows on it the actual character without the legal one.

4- All types of legal companies can be transformed into an actual company, except for the joint venture company, as it is characterized by the characteristics of concealment, which contradicts the general appearance of the actual company.5- All provisions related to liquidation related to legal companies apply to the actual company as well.

6- Determining the concept of the ill-intentioned third party and not widening the field for the bona fide third party to narrow the principle of the apparent situation.

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