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Joint liability when violating the procedures for incorporation of a joint stock company

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Abstract

This study aims to address the provision of joint liability decided by the Algerian legislator when violating the procedures for establishing a joint stock company, according to a critical analytical approach to the legal texts governing the provisions of the joint stock company. The study concluded that the Algerian legislator's goal in establishing this responsibility aimed at protecting others and subscribers still needs more scrutiny and clarity.

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1. *Introduction*

The joint stock company is considered the ideal model for capital companies and the most capable of accumulating huge capital, which can be the most appropriate framework for economic activity in capitalist systems, especially with its freedom in trading shares, which in fact explains the priority of these companies in comparative legislation by occupying the largest space in commercial law and monopolizing the attention of researchers and jurists.

This priority appears to the Algerian legislator, similar to comparative legislation, in intervening to define its various provisions clearly and accurately in a way that ensures the seriousness of its formation and continuity, so that the process of its establishment has been subjected to many detailed procedures and precise and peremptory provisions included in each of the provisions of the Commercial Code, especially articles 595 to 606, as well as the provisions of Executive Decree No. 95-438, as well as the general rules related to the establishment of companies contained in the Civil Code, these provisions aim in their entirety to ensure the establishment of Real for the joint stock company and preserving the rights of others for those dealing with the company at this stage and thus protecting the projects on the one hand and protecting the subscribers and encouraging them to join the company's project on the other hand. The Algerian legislator has deliberately tightened the liability when breaching the obligations of incorporation, whether in civil or penal terms, and approved detailed provisions indicating the limits of this liability and when it is achieved.

However, a careful reading of the joint liability provision as a result of breaches of the incorporation procedures revealed some shortcomings and ambiguities that require legislative intervention to prevent many difficulties that may hinder its application. This leads us to wonder about the success of the legislator in his report on joint liability when violating the incorporation procedures in achieving the required protection for the company and the subscribers? In order to answer this problem, we are required, within an analytical approach to the legal texts governing the joint stock company, to determine the scope of joint liability in the event of a breach of the incorporation procedures in accordance with what the legislator imposed within Article 715 bis 21 of the Algerian Commercial Code, which specifies, in addition to the nature of the civil liability resulting from the violation of the procedures for incorporation of a joint stock company as joint liability, the personal (1) and substantive scope of this liability (2).

2. *Personal scope of joint liability for breach of incorporation procedures*

Before determining the personal scope of joint liability for breach of the incorporation procedures, it should be noted that this liability is of public order that cannot be agreed to be violated or excluded under a clause in the contract, and it is also subject to the provisions of solidarity stipulated in the general rules, specifically related to the solidarity of debtors, and through the text of Article 715 bis 21 of the aforementioned Commercial Code, it appears that the legislator has expanded the personal scope of this responsibility, in addition to the founders (2.1) other persons can join them. of the shareholders of the company (2.2), and this expansion constitutes a clear departure from the general rules of limited and non-joint liability in this type of companies, justified by the protection required for the company in the future in terms of it reassures the hearts of those dealing with it or with the founders and thus facilitates the processes of incorporation, and it also ensures the seriousness of the founders and their keenness to complete the incorporation procedures for fear of the legal responsibility entrusted to them

2.*1 Founders of the joint stock company*

Both the Algerian legislator and the French legislator neglected a definition of the founder, although they were subjected to it with various provisions, such as specifying conditions related to the person of the founders and determining their obligations and responsibility in the event of a breach of them. Establishment is a crime punishable by the Penal Code the Algerian legislator was the first to define the founder in order to determine those who fit this description, and not to rely on the position of legislation that avoids defining the concept of the founder, such as the French and English laws, because jurisprudence and the judiciary in these two countries have made efforts to define this concept that spared the legislator from interfering in defining it.

The definition of the founder has conflicted with jurisprudence two positions, there is a position that narrows in its meaning so that it is limited to everyone who signed the initial contract for the establishment of the company, the signing of the contract is the one that earns the person the status of the founder, which indicates in itself according to this trend the actual participation in a positive and effective manner in the establishment of the company and the desire to establish this capacity in the person signed, and there are those who expand in its meaning so that it is considered the founder of everyone who took the initiative to establish the company and works in a positive, continuous and effective manner Therefore, he is responsible for raising partners and capital

and carrying out the necessary legal procedures to reach the establishment of the company, even if he is not a signatory to the company's contract.

According to Article 715 bis 21, the founders are the first party concerned with joint responsibility when breaching the founding procedures as they are the ones concerned with their performance in the beginning, and we mean here the broad concept of the meaning of the founders, but we note through the text of the article that joint responsibility has been decided in the right of the founders in general and without discrimination, which prompted jurisprudence to question two important issues:

the first issue. For the founders who did not contribute to the occurrence of the defect of incorporation, in the sense that the founder who did not commit any mistake and was not responsible for any defect or violation in the incorporation procedures, is he also considered jointly liable with the founders who were violated or the defect occurred by their act? In fact, the text of the previous article, as mentioned above, came in general and absolute, did not distinguish between those who contributed to the occurrence of this defect or did not contribute, the joint responsibility falls on all of them once they take upon themselves the responsibility of establishing and establishing the company through the signing of its memorandum of association, they ask jointly among themselves for all defects and violations that occur in the incorporation processes from beginning to end, but the French judiciary had a different position with regard to this issue, as it went in Most of its provisions indicate that the liability is only on the founders who are attributed to the occurrence of the defect and not others who did not have a hand in its occurrence.

The second issue. Due to the serious consequences of joint responsibility, jurisprudence has raised the question about the status of the founder who carried out one or some of the incorporation operations without this process or operations being the main one in the establishment, is he considered jointly responsible with other founders or only responsible for the actions he has done? Therefore, in the same context, the Algerian legislator did not differentiate between a founder who intervened in all the incorporation processes and those who did not intervene only in one or limited operations, but the text was general and comprehensive.

2.2 *Shareholders who may be attached to the founders in joint liability*

In order to strengthen the guarantee granted to third parties at the stage of establishing the company, the legislator granted the discretionary power to the judge to extend the personal scope of joint liability resulting from the violation of the incorporation procedures to include, in

addition to the founders, other parties mentioned exclusively in Article 715 bis 21, namely the first managers and providers of in-kind shares whose shares provided were not investigated.

First: The first administrators. The first managers who are elected by the constituent general assembly held within the framework of completing the procedures for establishing a joint stock company are the managers who have the legal legitimacy to carry out the management work and represent the company before others, have the capacity of a shareholder in the company, who were in their positions at the time of the occurrence of invalidity due to the defect of incorporation.

The legislator has decided the joint responsibility of the first managers on the part of the founders when the joint stock company is invalid, as it may happen that there is an error in the incorporation procedures and the error continues in front of the elected board of directors and the board continues in this error, or the board of directors itself consists of the founders themselves and continued to work with this error. It seems clear that the legislator intended to hold the first managers together with the founders jointly responsible in order to increase the guarantee on the one hand, and on the other hand to push them to be careful as soon as they accept their appointment to verify the integrity of the incorporation procedures as representatives of the company and its agents, so that they can detect and remedy the invalidity. There is no difference with regard to the responsibility of the first members of the Board of Directors, between those who were appointed in the company's system or elected to the Constituent Assembly, as long as they accepted their jobs expressly, and this acceptance is recorded in the minutes of the meeting of the Assembly, they do not give a disclaimer of responsibility unless they refuse to be appointed by the Constituent Assembly.

Second: Providers of in-kind shares whose shares have not been investigated. In addition to the founders and the first managers of the administration, solidarity may also be assigned to the providers of the in-kind share, which is a departure from the principle of determining the responsibility of the shareholder to the extent of the value of his share in the company, and the legislator has stipulated in order to implement this responsibility against the shareholder providing the in-kind share that his share has not been investigated. In fact, this condition raises a lot of ambiguity about the legislator's intention in the matter of investigating the share?, logic requires that it is not intended in the case of estimating the in-kind share contrary to its reality, considering that it is legally established that the representative of the shares is the one who is responsible for estimating them as a guarantee to protect

third parties dealing with the company to grant him a fictitious credit with the difference of the company's actual capital from its real capital, in particular, and that the rights of third parties have no guarantee in the joint stock company except its capital.

It seems that the legislator intends the issue of investigation, the procedures for putting the in-kind share before the Constituent Assembly in order to examine the value decided by the accounts representative, either the report of its acceptance or the decision to reduce its value in accordance with certain procedures, as well as the decision to accept the sample share in itself, and therefore the in-kind share that was not subject to these procedures before the Constituent Assembly suspects that its owners are in collusion with the founders, as it is likely that it is a fictitious share provided by the founders in the company's capital with the intention of fraud and fraud. The subscribers must pay them to subscribe to companies that are doomed to nullity. It is worth mentioning that some jurisprudence believes that the providers of in-kind shares are responsible for violating the incorporation procedures related to in-kind shares only, so they are not responsible for other defects and violations of incorporation unless they have at the same time the status of founders.

3. *Substantive scope of joint liability for breach of incorporation procedures*

It appears from the text of Article 715 bis 21 that the legislator has determined the objective scope of joint liability resulting from the violation of the incorporation procedures, namely the issuance of a judgment invalidating the company (3.1), without addressing the type of liability in the absence of a judgment invalidating the company and for the various cases raised by the incorporation procedures (3.2).

3.1 Issuance of the judgment invalidating the joint stock company

Once the invalidity of the joint stock company is realized by proving its causes, any interested person shall be entitled to file a joint liability action against the founders and those in charge of management, as well as the providers of the in-kind share whose shares have not been investigated.

First: Reasons for the invalidity of a joint stock company Article 733/1 and Article 735 of the Algerian Commercial Code specified the reasons that can lead to the invalidity of a joint stock company, namely, which the Commercial Code stipulates for invalidity by its availability, as well as the invalidity that applies to the invalidity of contracts, the incapacity of all founders, in addition to the presence of invalidity if the

Assad condition is found in the Basic Law, the latter of which is mentioned exclusively in Article 733. With regard to the reasons stipulated in the Commercial Code, by examining the reasons for the invalidity of a joint stock company contained in the Commercial Code other than those mentioned in Article 733/1, we find hardly two reasons, the first reason stated in Article 735 related to the illegality of the subject matter of the company, and the second was stated in Article 601/3.4 related to the failure of the providers of the in-kind share to reduce the value of the share in the Constituent Assembly The subject of the company goes to the purpose of the company, which is the economic activity for which the company was established and the partners seek to achieve it, and the company's purpose must be legally permissible and not contrary to public order and morals. The purpose of the company is contrary to the law if it is one of the activities that the law attends for certain considerations, and it is not necessary that the activity is illegal in order to be contrary to the law, the activity can be legitimate but it is not legally allowed and vice versa, and in both cases the company's contract is absolutely null and void, and the lesson in determining the purpose of the company is the actual and real activity and not the legal activity. As for the lack of express consent to the reduction of the value of the in-kind share in the constituent general assembly, the legislator considered it not incorporated and therefore invalidates the establishment of the company if the owners do not approve such reduction

As for the reasons that came exclusively in Article 733, it first determined the invalidity that applies to the invalidity of contracts, and this reason is due to the contractual nature on which the joint stock company is based in the first place, and therefore the company is invalidated if the elements of its memorandum of association are not respected from objective conditions, both general such as lack of satisfaction, as well as special conditions such as failure to submit contributions and mention them in the company's articles of association and the lack of intention to participate, in addition to the formal conditions, which makes it a reason for not establishing the company and writing off Registration in the Commercial Register, and accordingly the joint liability of the founders shall take place. The article also mentioned the state of incapacity of all the founders, as the law required the full capacity of the founder of the joint stock company, and in the event that they do not have the capacity, the company is invalidated and the project fails, which is a reason for arranging joint liability.

Article 426/1 of the Algerian Civil Code stipulates that if the company's articles of association include a clause exempting one of the partners from losses or profits, the company's contract is absolutely null and

void, provided that article 733 includes an exception for the joint stock company and the limited liability company that the condition in the contract is null and void without the company's contract.

Finally, it is worth mentioning that the invalidity of the company due to the violation of the incorporation procedures, even if it is related to public order, so that every condition in the company's contract or articles of association that deprives the partners of the joint liability prescribed against them is null and void, but it is a special invalidity as it combines the characteristics of absolute invalidity and relative invalidity, as it approaches absolute invalidity because it is related to public order as it protects public saving, so it may not be waived and every interest has the right to uphold it, and it approaches nullity. The relative because the court cannot rule on its own, but it must be claimed by those who have an interest in it, and the founders cannot invoke it before others because the violation of the incorporation procedures was due to their negligence, and it may be corrected by completing the incomplete procedure.

Second: The effects of proving the reasons for the invalidity of the joint stock company. If the incorporation of the company is illegal, any interested person shall be entitled to file, in addition to the nullity lawsuit, a joint liability lawsuit against the founders, the first members of the board of directors and the providers of in-kind shares whose shares have not been investigated. The nullity action shall be filed before the Commercial Court, whose territorial scope is located in the company's head office specified in its Articles of Association, and when the court finds that the reasons for the invalidity are fixed, it shall be adjudicated, unless there are reasons that lead to the non-acceptance of the lawsuit or its lapse, such as correcting the invalidated defect or the expiry of the lawsuit by prescription. If the company is invalidated before commencing any activity, its existence ceases and all shareholders return to the condition they were in before incorporation, and thus the shares that have been subscribed for are recovered and exempted from paying the promised shares that have not been paid their value.

With the issuance of the nullity judgment, the interested party has the right to file a joint liability action against the aforementioned parties, and this lawsuit is often filed with the nullity lawsuit, so one of them forms a pillar of the other. If the legislator stipulated for the achievement of joint liability the issuance of a judgment of nullity, but did not require that to achieve civil liability, then a civil liability lawsuit can be instituted even if no nullity judgment was issued, as it is sufficient for it to occur to achieve damage, and therefore the legislator did not specify the type of

such liability in this case, whether it is joint or not.

3.2 *Type of liability when no judgment is issued invalidating the company.*

The legislator imposed joint liability on the founders if the company was determined to be invalid as a result of violating the incorporation procedures, but omitted to specify the type of liability in the various cases posed by the incorporation procedures, the matter was related to the legislator's omission to specify the type of responsibility incumbent on the founders if the company is not established within six months, as well as the type of liability when the founders omitted to mention the mandatory data imposed by the legislator upon the establishment of the company, which does not result in invalidity, in addition to his omission to specify the type of liability for the procedures causing invalidity. which have been corrected and corrected.

First: Liability when the company is not established within six months. The text of Article 598 s. The funds resulting from the cash subscriptions and the list of subscribers, with the amounts paid by each, are subscribed to a notary or with a legally qualified financial institution, and in fact the founders deposit the funds paid by the subscribers before the establishment of the company in a final manner with the bank that took over the subscription in the form of an open account with the subscribers' schedule and the amount paid by each of them, and these funds may not be withdrawn until after the company's legal representative submits evidence of its incorporation. In the event that the company is not established within six months from the date of filing the draft articles of association in the Commercial Register, the subscribers shall be entitled to recover their funds through a representative assigned by the judiciary. In this context, it is clear that the legislator enabled the subscribers to recover their money when the company was not established or delayed in establishing it without holding the founders any responsibility, even if this delay or non-establishment was the result of the negligence or inaction of the founders or that it caused damage to the subscribers, although it is possible to resort in this case to the general rules and the application of the rules of civil liability, but in view of the reasons for protection envisaged by the legislator for the company and others and encouraging subscription, and in view of the sensitivity of this stage in The life of the company The Algerian legislator should not neglect to stipulate the need to compensate the subscribers when necessary, and to pay this compensation as a solidarity between the founders, that is, imposing joint liability on the founders when compensating the subscribers for the failure to establish the company or delay in its establishment, which is something that some legislations have realized, including

the Egyptian legislator in Article 14 of the Companies Law No. 159 of 1981 mentioned above, in order to ensure that the founders are not neglected and lax in completing the procedures for establishing the company, and avoiding The damage that may be caused to subscribers as a result of freezing their funds for a long time without investment, thus protecting the public of subscribers

Second: Responsibility when the basic data is omitted. The provisions of the Commercial Code require a number of necessary data that should be included in the Basic Law, such as those related to the distribution of profits, the formation of reserve capital, the distribution of the liquidation premium, or the valuation of in-kind shares, if any, and other mandatory data, and these provisions also provide for procedures for the establishment of the company that sometimes take precise details, as is the case with the provisions related to subscription, release of shares, deposit and withdrawal of funds, and all these provisions included in the Commercial Code or Executive Decree 95-438 previous. Dhikr is a peremptory and it is not permissible to agree to violate it. It may happen that the founders omit to include these data in the basic contract, or violate those procedures, and in this case, in light of the legislator's omission to determine the nature of liability, we certainly resort to the general rules and apply the rules of civil liability, which are based on legal liability in accordance with the civil law.

However, in view of the nature of the persons concerned with protection through the imposition of these procedures, namely the subscribers of the company in the first place and for the reasons of encouraging subscription, and in view of the sensitivity of this stage in the life of the company, the Algerian legislator should not neglect to determine the nature of civil liability, but rather to impose joint liability not only on the founders but on all actors at this stage of the company's life, as did the French legislator, which stipulated in Article 8-210L a general provision related to all types of companies. The founders of the company, as well as the first administrators, members of the board of directors, members of the board of directors and members of the first supervisory board, are jointly liable for the damage caused by the failure to include in the articles of association of the company a mandatory statement, or the omission of a procedure stipulated in this law in the chapter on the establishment of the company or not doing it correctly, and as a result of many comparative legislations, including the Iraqi legislator in accordance with the text of Article 40 of the Iraqi Companies Law No. 21 of 1998, As amended by Law No. 24 of 2004, which stipulates that " The founders are jointly liable for any damage caused to any subscriber if it results from an error or deficiency in the subscription

statement" which is the same provision stipulated by the Egyptian legislator in Article 14 of the Egyptian Companies Law No. 159 of 1981.

Third: Responsibility when correcting and correcting invalidity. The Algerian legislator did not specify the type of this responsibility, especially since it retained the right to claim compensation for those affected by the errors of incorporation even if they were corrected, which indicates that filing a claim for invalidity and not ruling on it as a result of correcting it does not prevent the filing of a claim for compensation when the plaintiff proves that the damage associated with it is related to the defect of incorporation, and confirms that the civil liability lawsuit for damage is not linked By invalidity for violating the incorporation procedures, any person who suffers damage as a result of a violation may file a claim of minimum liability without resorting to a nullity lawsuit, meaning that liability arises by force of law, provided that the causal link between the defect of incorporation and the damage is proved. The ruling on the right to claim compensation even if the invalidity is corrected prompts us to wonder about the type of responsibility placed on the founders, is this responsibility subject to the general rules or is it a joint liability given the privacy of its parties and the privacy of the joint stock company itself, or did the legislator leave the matter to the discretion of the judge in determining the nature of the joint liability or not? In view of the nature of the joint stock company, the sensitivity of this stage in its life and the statutory nature that characterizes it, it makes it necessary, in our opinion, to intervene legislatively to fill all these legal vacuums presented.

4. *CONCLUSION*

Based on the foregoing, it appears to us that the Algerian legislator, in order to protect the joint stock company and its subscribers from invalidity, enshrined joint liability in departure from the characteristics of the company, which is limited by liability as much as the value of the shares provided in it, and has expanded the personal scope of this responsibility to include, in addition to the founders of the company who are the first managers and providers of in-kind shares, in order to expand the guarantee granted, but by limiting this responsibility to the invalidity of the company, it makes it deviate from the purpose for which it was decided, similar to the type of responsibility if The founders exceeded the period specified for the establishment of the company and the subscribers were forced to recover their deposited funds, also in case of violation or failure to mention the required data in the declaration of incorporation, as well as responsibility for cases of invalidity that have been corrected and corrected,

especially since it retained the right to claim compensation for those affected by the errors of incorporation even if they were corrected. In fact, this omission may prevent the resolution of many of the problems that may be raised before the judiciary, so we hope that the Algerian legislator will pay attention to these gaps and work to remedy them.

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Article L210-8 "The founders of the company, as well as the first members of the management, administrative, management and supervisory bodies are jointly and severally liable for the damage caused by the absence of a mandatory mention in the articles of association as well as by the omission or irregular fulfilment of a formality prescribed by law and regulations for the incorporation of the company." **www.legifrance.**

Article 715 bis 21 Algerian commercial law. stipulates that "the founders of the company, to whom the invalidity has been assigned, and the administrators who were in their positions at the time of the occurrence of the invalidity may be jointly liable for the damage caused to the shareholders or third parties as a result of the dissolution of the company. The same joint liability may also be assigned to shareholders whose shares provided to the company or the benefits have not been investigated or approved."

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Article 733/1 stipulates. T.C. stipulates that "invalidity shall not occur in the company or a contract amending the Basic Law except by an express provision in the law or invalidity that applies to the invalidity of contracts, and with regard to limited liability companies or joint stock companies, invalidity shall not occur from a defect in acceptance or from a loss of capacity unless such loss includes all the founding partners, and this invalidity does not occur from the invalidity of the conditions stipulated in the first paragraph of Article 426 of the Civil Code."