

The Contradiction of the legal Provisions with the Nature of the Solidarity Company

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Abstract

This article is studying the contradiction of legal provisions provided by the Saudi Companies Regulation (No 6/M/1385H), and its amendments, and the Jordanian Companies Act (No 22/1997M), and its amendments, with the special nature that the solidarity company is characteristic with.

The dilemma of this study appears in the case that there are some sorts of provisions that are stipulated in the Saudi Regulation and in the Jordanian Law concerning the special nature of the solidarity company regarding the responsibility of its partners in addition to the situation 'where a partner shall grant a merchant or trader title'. Moreover, the application of these provisions is seen - in some cases - to lead to a critical situation that concludes to the existence of partners in the company who their responsibilities are not solidarity or personally for the company's debts and commitments, the matter that is seen contrary to the special nature of this company.

This article is divided into three sections; the first dealt with the identification of the special provisions related to partners in the solidarity company; while the second is dealing with the responsibility of partners in the company and the acceptance of new partners; finally, the timeframe of partner's responsibility.

This study has uncovered number of crucial results, where - for example - we concluded that both of the Saudi and Jordanian legislators have stipulated some provisions that do not correspond with the special nature of this company - such as the characteristic of a partner and his entry to the company. In addition, this study reached to number of recommendations, the most important of which were attributed with modification of some special rules in order to be corresponded with the special nature of this company, whether in regard to partners' characteristics or the number of partners in the company, in addition to the conditions required to the entry of new partners and their responsibilities.

Keywords: Solidarity Company, Solidarity responsibility, the role of a partner in the company, the entry of new partners, the withdrawal of partners, the joining of heirs.

Introduction

The solidarity company is seen to be one of two types of individual companies, which bases primarily on personal account and mutual trust, between partners, so it is usually composed by a small number of partners who linked with some sort of different relations, according to a special character attributed with how partners know each other's, in addition to the core aim, where partners aim to promote small and medium-sized projects.

This type of companies is characterized with several features, the most important of which are: the solidarity, personal and absolute responsibility, in addition to the resulted legal impact where partners shall gaining the feature of merchant if the partnership practiced any commercial work, which led to give some sort of exclusivity to the nature of this kind of companies, mainly, on the legal provisions governing its establishment, operation and termination.

This research deals with some of the legal provisions contained in the legislation, which will be taken in this paper, on the grounds that the personal, absolute and solidarity responsibility of the partners on the debts and obligations of the company have been stipulated by these legislations, since all of which are related to public order; which leads to state that there is no possibility to agree on the contrary, however, some legislations have stipulated number of special provisions that aim to govern this type of companies, with the consideration that in some cases there must be an exceptional rule, which is seen to be not corresponding to the special nature of this company.

The importance of this research is related to the type of companies that organized by the legislation - the subject of comparison - which is the company of solidarity that is considered to be one of the family companies frequently, which does not establish usually except by people who are well linked in which the entry of a new partner is seen not permitted or subject to their wish (1); so that the study is trying to detect and identify the legal Articles, (Texts or provisions), which are incompatible with the nature of the company, attempting to remove some of the issues which the legislations did not notice, consider or regulate.

The problem of this research is manifested in the provisions provided by the legislations, which stipulated some

of the legal provisions that do not correspond with the nature of the company of solidarity, and that in the application of some of these texts we may reach the stage that there is no partner in this company that has a full responsibility – personal, absolute and solidarity - of all debts and obligations of the company ; and the reason of which is due to the situation of partners leaving the Company or their withdrawal and entry of new partners, where there are previous debts that could not be request by new partners, but should be the obligation of ex-partners, in other words the current partners shall not be responsible for the previous debts and obligations of company at all, which is seen, as a result, to be the case of obviating the special nature of this company.

This research is trying to answer number of questions, as follow:

- 1- Do the qualities of partners and their eligibility or legal capacity in this company are consistent with the nature of the solidarity company?
- 2- Does the responsibility of partners, both current and who withdrew from the company is consistent with the nature of responsibility in the company of solidarity?
- 3- Do the provisions contained in the legislations with regard to the termination of this company are consistent with the nature of this company?
- 4- What is the extent of the compatibility of the legal provisions relating to the establishment of legal proceedings on the company and partners, and the implementation on them with the nature of this company?

This research is based on the qualitative research methodology, where the adopted methods to be used in achieving the objectives of research are the following:

- Descriptive research method.
- Analytical research method.
- And the use of comparative study.

Justifications of choosing the methods:

- Where the research is purposed to deal with legal provisions, the most reliable method to be adopted here is the analytical research method.
- The choice of the analytical method is attributed with the use of the descriptive research method, where one of the major aims that this research is typing to achieve is attached with the formal rules governing and organizing the chosen topic. And it also draws on the views of the scholars and the provisions of the judiciary in the positions of the relationship to the subject matter of the present research.

This research is divided into three to parts; the first dealt with, inter alia, the special provisions related to partners in the company of solidarity, which was divided into two parts, the first was allocated to deal with the characteristic of a partner in the solidarity company; while the second dealt with the legal capacity of partners. The second part investigated the responsibility of partners in the company and the acceptance of new partners; this part was taken into two parts, the first is allocated to study the entry of new partners to the solidarity company, and the second dealt with the prosecution of partners in the company of solidarity. The third part was allocated to study the timeframe of partner's responsibility; this part was divided into three parts, the first of which dealt with the extent of exemption of one of the partners from the responsibility, and the second handled the responsibility of the entered partner, and the third dealt with the responsibility of the withdrawing partner.

The special provisions related to partners in the company of solidarity

The participation in the establishment of solidarity company is deemed as an issue that is characterize of being has a special mission with regard to the persons who have the right to participate in the establishment of such kinds of companies; in addition to the acquisition of these persons some characteristics that are not earned by partners in other types of companies (AlMuhsin, 2005), so that it would be more efficient to deal with this subject by several aspects, as the following:

The status of the solidarity partner:

(Alghamedi, et al. , 2009), Article (16) of the Saudi Companies Regulation defines the Company of Solidarity as: 'the company, which founding by two partners or more, so that partners should be obligatory with solidarity by all their money for the company's debts'. Besides, (Taha, 2000), Article (9) of the Jordanian Companies Act defines the company as: 'A General Partnership shall consist of a number of natural persons, not less than two and not more than twenty, unless the increase is due to inheritance, provided that such an increase is subject to the provisions act (30) of this Law' (Aljaber, 1996). One can notice from these two Articles – Art (16) of Saudi Companies Regulation and Art (9) of the Jordanian Companies Act - that there are obvious differences that distinguish the views of each legislature, and which are attributed to several reasons, the most important of which are:

The solidarity partner 'between the natural and legal person'

When we reviewed what was stated in, (Alghamedi, et al. , 2009), Article (16) of the Saudi Regulation, we find

that it did not specify the nature of partners in the solidarity company, whether if that person was natural or legal, regardless of the decision issued by the Saudi Council of Ministers - (No. 17 Of 1402E) in 20/1/ 1402e - by requiring that the solidarity partner in any solidarity company shall be a natural person. Hence, the situation of not identifying the nature of the partner in the solidarity company as to be a natural person or moral has led to a conflict in the related doctrine in this regard, where a group of jurists went to assume that there is no problem if the partner in the company of solidarity was a legal person, and their justification herein derived from the Article's text where there is no restriction stipulated in the related Article that prohibited such case in (Alghamedi, et al. , 2009) and (Aljaber, 1996). Some of the jurists who went with this view sees that the partner even if it was a legal person (company), then this person - the company - is the body to which the character of merchant shall acquire, after entering the company of solidarity; however, the natural partners in this company, who entered the solidarity company as a partner, they do not acquire a merchant title if it was not been granted to them previously (Almuhesin, 2005).

The jurists who went with the previous view state, also, that what applies to the natural partner of provisions can be applied to the legal person, so they shall be personally and solidarity responsible about the debts of the company, and that the partner will grant the title or character of merchant, so that a civil company should not participate in the establishment of this type of companies (Alghamedi, et al. , 2009).

As seems to be here, the jurists of this trend went with permitting and support that a legal person can be a partner in this company, and this person is the one who is subject to grant the title of merchant, while the partners in this person – legal person or company - shall not acquire such status or title, except in the cases in which they gained previously, which means that the involvement of company in the establishment of a company of solidarity is deemed to be as a revealing process to the merchant status to those partners in the joint company and not as establishing it.

In this regard, we disagree with this view particularly in the participation of legal person in solidarity companies. The reason from our opposition to the participation of legal person in founding this type of companies is subject to the fact that this kind of companies is based on the personal account and mutual trust between the partners, so that the financial disclosures and the qualifications of these partners should be under consideration, which would lead to the collapse of the company in case of the presence of any reason affecting the personality of a partner, such as bankruptcy, insolvency or interdiction, so as it seems to us, it is necessary to prevent legal person to founding a solidarity company and to join it, based on the consensus that lawmakers have in this regard. And due to what this company has of advantages, features and nature that incompatible with legal persons, as that these companies – solidarity – are known as the family companies that bases on personal account, mutual trust between partners and the presence, mostly, of few of partners in it .

The number of partners in the solidarity company

Article (16) of the Saudi Companies Regulation did not determine the maximum number of partners in a company of solidarity, but it has rather set the minimum, as mentioned above. Contrary to what is stated in Article (9) of the Jordanian Companies Act, which stipulated a generic rule concerning the number of partners in this company, which stated that it is mandatory to founding this company with at least two and no more than twenty, which followed by an exemption attached to the rule of increasing the number of partners more than 20 - in the same article - in the conditions in which the increase was resulted because of inheritance.

Accordingly, it seems to be that the trend of the Jordanian legislature in this regard is fully appreciated as to set the minimum and maximum number of partners in this company. Considering that this company is based on the personal account, which requires the presence of relation between partners, and the possibility of prohibiting the assignment of shares to a person who joined to the company only after the approval of all partners, although this personal account does not relate to public order (Othman, 1996). The special nature that this company does have and the special features of it lead to state to the need to determine the maximum number of partners to ensure the features of this company as a family company founded on personal account, as by leaving the door open to add new partners, or to give a permission to founding this company of a large number is a matter that may lead to a conflict or problem associated with the case where partners could not know and communicate with each other, the matter of which its existence may collapse the features of this company; in addition, by leaving the door open for the entry of a large number partners to this company would consequently collapse the presence of the company or affecting the harmony between partners.

The legal capacity of a solidarity partner

The responsibility of partners in the company of solidarity about its debts and obligations is deemed to be a personal responsibility that extends to his/her personal money, where if the company was in debt, then the partner shall also be in debt, so that the partner shall not be asked only about his share in the company capital, where if his/her contribution did not satisfy the payment of debts, then his/her responsibility shall extend to reach his/her private property (Alswelmen, 2006).

Accordingly, the personal responsibility of a partner shall lead to consider him/her as a merchant, the matter of which stipulated clearly in Article (9/c) of the Jordanian Companies Act - (No. 22 of 1997) and its amends. And

since the partner in this company is a merchant, then its legal capacity must meet the requirements to practice commercial actions, particularly in case of company bankruptcy, which necessarily result the bankruptcy of a partner (Alsos, 2007).

Moreover, when one reviews the provisions govern the solidarity company under the Saudi Companies Regulation, we find that Article (35) had permitted the situation where a partner is a minor, due the fact that the Saudi Regulation did not require the transformation of company in such a case, where it has ruled the termination of company in case of death of one of the partners, or the withdrawal of a partner from the company that has no limited period, with the consideration that the Regulation has permitted the company's existence in case of death of a partner if the company's contract permitted such, in addition to the permission that have been given to carry on the company's existence with the presence of heirs even if they were minors.

This case as it seems to be is contrary to the personal responsibility of a partner and to the status of giving the partner the character of a merchant, on the basis that the person could not acquire the status of a merchant unless he/she can accomplish the trade capacity, and which the Regulation has determined by requiring that a person should be rational (mentally health) and attain majority - that is identified by the Regulation as 18 years of age (Abduraheem, 1978). Therefore, what the Saudi legislator has organized of provisions is deemed to be contrary to the special nature of this company concerning the specifications of partners and their roles or positions.

Furthermore, the decision of the Egyptian Court of Cassation is seen to contradict with what Article (35) of the Saudi Companies Regulation stipulates, where the decision ruled to terminating the solidarity company's contract by the death of one of the partners, and leaving heirs with a discretionary option between continue the work of the company or not, whether the contract's terms of the company provided such option or not, although the Court of Cassation did not give the trustee the right to continue in the company on behalf of the minors heirs, and ruled to give the partner's share the status of deposit in the hand of others thereon (Ganaym, 1989).

In this regard, a trend of jurisprudence sees that the joining of a person to a solidarity company shall lead to consider that partner as a merchant, as he has disclosed his desire in professionalize trade through the company, on the basis that his responsibility is deemed as a personal and solidarity responsibility in all his money, which makes him in the status of a person who is practicing trade on his own behalf, which mean that his personality here will merge with the company and will be seen as a part of it therefore, also in the cases where he is not the director of the company, this shall mean that he has authorized the person who is in charge of managing the company to trade on his behalf and to his account. Also one should take into consideration the status of acquiring the merchant title or status by a partner, since this status does not require a partner to take a place in administrating the company or to contract on its behalf, and thus a minor shall be prohibited to join this company unless he was permitted by a court, where his bankruptcy should be subject to the limits - of his own properties - prescribed by the court permission (Ganaym, 1989).

The responsibility of partners in the company and the acceptance of new partners

The process of the entry and exit of partners to solidarity companies is a very important issue; due to the resulting responsibility, particularly to identify partners' responsibility those who enter or leave the company. And since the solidarity company - as noted earlier - has its own distinctive nature, so the process of the entry of new partners and the withdrawal of existing partners in the company are surrounded by a group of special provisions, which also seems to us that both of the Saudi and Jordanian legislator have transcended this special nature, and which is the issue that will be addressed in this section as follows:

The entry of new partners to the solidarity company

One should consider the case that states the possibility of entering new partners to a solidarity company without the consent of its partners, which is seen incompatible with the special nature of this company, where in some cases there might be an entry of a partner who is not welcomed by the other partners because of the lack of confidence, or because of the lack of knowledge between partners and the lack of creditworthiness or financial adequacy.

What is referred to by the Saudi legislator, in this regard, in Article (35) of the Companies Regulation is seen compatible with the nature of this company, as the Article has approved the continuation of this company after the death of one of the partners with the heirs of that partner, but this Article has conditioned that there should be a term in the company's contract on such .

As for the Jordanian legislator, we find that it has provided a rule conflicted with the special nature of this company, despite the fact that this rule - that stipulated in the Jordanian Companies Act, which is Article (30) - is seen to be drafted in a weak formulation (Ya Miki, 2008), and which tolerate more than one meaning as it seems, since the Jordanian legislator has permitted the constantly of solidarity company between the partners in the case of the death of one of its partners in the first paragraph of Article (30), while the same paragraph has approved the joining of heirs of the deceased partner to the company as a solidarity partner, and the joining of a heir shall be subject to the share of the deceased partner in the cases which meet the conditions of a solidarity partner including attain majority, but if the heirs did not want to join the company, then they should notify the

controller in writing and within two months from death, also this paragraph conditioned to work on adjusting the company's contract in accordance with the provisions of the law.

The Jordanian legislator has, as well, ruled - in the same Article and precisely in the same paragraph - that if one of the heirs was a minor or was losing eligibility, then that heir can join the company as a limited partner, and then the company should be transformed into a limited partnership; accordingly the research in this subject will be divided in two aspects:

The entry of heirs to the company

The legislator has permitted - under article (30) of the Jordanian companies - the joining of heirs to the company without any request related to the consent of the other partners, which is seen to be not in harmony with the private nature of the company; where this article has given permission to the heirs of the partner to enter into the company, and which has not given to the partners the right to object on such. As it seems, this article has founded on a weak drafting, precisely in the beginning phrase stipulated in the first paragraph, which refers to "Unless the Partnership Agreement or any other agreement signed by all partners prior to the death of a partner...". In this regard, it seems to us that the legislature has occurred into a contradiction, where if the legislature has meant from the Article the continuation of the company and its existence after the death of one of the partners, one might state that this intention is permissible and acceptable; however, we believe that it would be better if the legislature herein has given a right to partners to refuse, object or accept the entry of partners' heirs, because it may not be accurate to force partners to accept any partner that they might not want his presence in the company, as if someone - a partner - died and left five sons, the participation of the partners is seen to be subject to and based on confidence between the partners, which might not be occurred when the heirs took the partner's share in the company, whether in relation to the five children, or one of them or more.

Moreover, by analyzing the text of Article (35) of the Saudi companies Regulation, we find that the Article has not permitted the heirs to join or enter into the company, which is seen to be consistent with the special nature of such kind of companies. In this regard, it seems that the trend of the Saudi legislature is fully appreciated and adherent.

Here it is worth to note that there is a condition for the continuation of the company and its existence - after the death of a partner - which is attached to an existing agreement on such before to the death, in order to ensure the existence of this company and in which the heirs can join the company after the death of their inherited (1). In the absence of such an agreement, the company shall terminate by the rule of law (Alswelmen, 2006)

In addition, one should consider the decision of the Egyptian Court of Cassation, in this regard, which held that in case of the death of one of the partners in the Solidarity Partnership - who has a wife and branches - the company will continue with the partner's husband/wife and his branches, as limited partners.

Accordingly, it seems to us that the trend of the Egyptian judiciary is seen rather different, where it permits the heirs to join or enter the company without the need of partners' approval, but they shall join or enter the company as limited partners - not as solidarity partners; and which is seen different from that ruled by the Jordanian and Saudi legislatures, since the Jordanian law allows the joining of heirs, but it is seen distinguishing if they were attain majority or not, as if they were attain majority they will join the company as solidarity partners, while if they were minors then they will join the company as limited partners, the matter that the Egyptian judiciary did not consider or regulate, as it has given them the right to join the company as limited partners, whether they were attain majority or not.

The transformation of the form of Solidarity Company

The entry of new partners to the company - after the death of one of the partners without the permission of the partners, as mentioned in the previous section - is deemed as an issue that would limit the contractual nature of the company, where some of the jurists went to the direction of doctrine that the company, here, loses one of its characteristics that the company based on, even though this opinion went to say that a waiver of shares without a restriction or condition is deemed an issue that negate the nature of this company, as it is founded on personal account between partners (Taha, 2000, 1989).

In addition, other jurists stated that it is necessary to give partners of the company in case of a waiver of one of the partners for his share the right to recover this share after paying its price, and that the agreement between the partners on the waiver of shares without restriction or condition is seen void (Ganaym, 1989).

Article (35) of the Saudi companies Regulation has approved in the case of the death of one of the partners in the solidarity company the joining of heirs even if they were minors, if the company's contract was stipulated such, which is the matter that is being built on it the option to accept a partner to be a minor in this company as to the Saudi legislature, even though it did not stipulate on the necessary of transforming the company to another form.

But what is deemed to be our priority here to focus on is the opinion of Jordanian legislature in Article (30) of the Companies Act, which allowed the transformation of the Solidarity Company to a Limited Partnership by law power, since it gave the right to heirs of a partner to join the Solidarity Company without the consent of the other partners. This rule, as we noticed, did not just state to give the right to heirs to join such companies, without any concern to the other partners' opinion in this company, instead it went wider to approve the entry of

heirs who are minors; and since the Jordanian law does not allow the participation of minors in solidarity companies, Article (30) organized the transformation of solidarity company without the need of partners' will or consent on such, as the transformation is seen as a logical result, according to some jurists' opinions (Ya Mlki, 2008).

This issue, as we personally see, is deemed as a non-logical result, as the process of transformation of the form of solidarity company to a limited company had been taken without the will of the partners and their consent, the matter that is deemed not corresponding with the contractual nature that solidarity companies founded on, where such nature is seen more close to contract rather than legal rule or system; so, and as it seems, it is essential to prevent heirs from joining the company before the approval of all partners, because this accession will lead to important results that may affect the existence of the company as a company of solidarity. In this regard, some jurists went to state that the solution here lies in the need to terminate the company and liquidate its properties, where the share of heirs – minors - should be taken out, and then the other partners can establish a new company .

Suing partners in the company of solidarity

The partner in solidarity companies is asked about the company's debts and commitments as if such debts were his private or own debts, also partners are asked in this company in a way of solidarity in all their money about these obligations as if they were personal debts owed by each and every one of them.

This matter, responsibility, is deemed to be part of public order, which mean that no one can agree on its contrary, and if there was an agreement on its contrary, then this agreement or condition should not be forced - in the company's contract - in the face of others; and therefore, a third-party can claim each partner in the company about the company's debts, and the partner is asked as well about the fulfillment of these debts with all his money (Othman, 1996).

The research on this topic is based on two sections; the first will discuss the issue of referring to Partners for the company's debts, and the second will deal with the implementation on partners in this kind of companies, as the following:

Referring on the partners for the company's debts

The acquisition of partners - in this company - the trader character or title is the reason for the non-limited liability, as the partner cannot acquire a merchant features and in the same time his responsibility can be limited for the company's debts and obligations, and his obligations that arise from the acquisition of such a feature or character on only a part of his financial capacity is not accurate, where some jurists went to say that this partner must be asked in all of his financial capacity (Al-Akeli, 2008).

Accordingly, each creditor of the company's creditors can claim each partner of the company to fulfill the company's debts and commitments, and therefore it is not permissible to any one of the partners or their personal creditors to object on that (Al-Akeli, 1998).

It should be noted here that the lesson of the personal responsibility that is not limited to partners in the solidarity company purport to ensure a general guarantee to the company's creditors, in addition to the financial capacity of the company, which is here the financial capacity of the entire partners. So the first guarantee, for the creditor, shall be decided on the properties of the company as a legal person, while the second shall be decided on the properties of partners; as if one of the partners had personal creditors, then the company's creditors can compete with the personal creditors in referring on the private properties that owned by the partners, also the personal creditors shall not have the right during the existence of the company to refer on the company with a personal debts that belong to a partner, but they shall grant a right to get paid from the share of profits that refers to the debtor - who is a partner .

In addition, a trend in jurisprudence sees that creditors who are benefit from such protection shall have the right to waive this protection and accept the agreement held between the partners or the condition contained in the company's contract that determined the responsibility of the partner in this company, as partners in this company are deemed to be guarantors of solidarity, considering that solidarity is not only between the partners to each other, it is but between them and the company, and this solidarity is not only seen apply just to the presumption that its subject-matter the solidarity between debtors with a commercial debt in case of their plurality, instead it is deemed as a compulsory solidarity by law, as it is seen to be a legal rule that is not capable to prove the contrary, as it is related to public order, where the solidarity here is associated with the debts of third-party in the face of the company (Othman, 1996).

Back to the Saudi Companies Regulation, we may find the application of this principle in the text of Article (16) that defines solidarity company; nevertheless, the Saudi legislature in Article (20) of this Regulation came with a rule that is seen contrary to the solidarity between the company and partners, by expressly stipulating on the inadmissibility of claiming a partner in a solidarity company to pay from his own money any debt of the company, except with the availability of number of conditions, the most important of which are:

First: proven that a debt is owed by the company, which as this Regulation stipulated is not demonstrated except with the endorsement of those responsible for its administration or by a decision of the committee of settling the disputes of commercial companies.

As it seems, we note here that the Saudi legislature does not permit to refer on partners unless if the debt was proven to be the company's debt, which means that referring on the partners does not require at first to prosecute them, but it is a must first to prosecute the company if those responsible for its administration do not admit the debt, and then the debt should be proved by a decision from the committee of settling the disputes of commercial companies, and then the implementation on partners should take a place. This issue or process is seen to be contrary to the solidarity and personal character that this company is founded on.

Second: notifying the company about the fulfillment; here we note that the Saudi legislator did not specify the method of notification, how it is done, and whether an oral notification is sufficient? or it should be in writing? and if it was in writing is it required to be officially? or is it sufficient to be customary? The matter of which has been not considered by the Saudi legislator.

While regarding the position of the Jordanian legislator, in this area, the legislator has permitted in Article (27) of the Companies Act to the company's creditors to sue the company and its partners together.

In this regard, some jurists went to say that it is logically that the company's creditors start to refer on it first, as it is deemed to be the original debtor, since this would save time and effort, and as it would be more efficient to avoid the litigation that a partner may process to refer on the rest of his partners and the company when referring on him (Albustani, 2002).

As to us, we do not support this jurisprudential trend, as it seems contrary to the special nature of this company, in addition to the practical fact that a partner must know and acknowledge, from the beginning, when he/she participate in this kind of companies that he/she could be referred on at any time, and the saying that went to allow the referring on partners with the company would surprise partners who may not know about the existence of a debt, and by opening the way for malicious prosecutions that may be carried out by creditors against partners is seen as incorrect saying based on the special nature that the solidarity company has, and based on the nature of a partner's position in this company as well.

The execution on partners

A jurisprudential trend sees that solidarity in the Solidarity Partnership is based on the solidarity of partners themselves in order to fulfill the debts of the company, and that there is no solidarity between the partners and the company on its debts; the jurists of this trend relies, on their view, on what is meant to apply are not the provisions of agency stipulated in the Civil Code, and in which the original debtor is in solidarity with the guarantor in fulfilling the debts of the company (Alhamhuri, 1983). So a solidarity partner is seen to be in the guarantor position - who is not in solidarity here - and not in the position of the debtor of the original debt (Al-Akeli, 1995).

It should be noted here that the Saudi legislator did not mention, in Article (20) of the Companies Regulation, how the implementation on partner should be, since this Article did not address this issue except the situation of claiming only the debt, this Article does not allow to ask him about the debt except after claiming the company and proved the debt, whether by the endorsement of those responsible for its management, or by the decision of the committee of settling the commercial disputes and after notifying the company; and consequently we conclude that the possibility of implementation on partners is relied mainly on claiming the company at first, however this Article did not specify the possibility that implementation on partners is a contemporary issue to the implementation on company, which as we see is permissible here because of the ambiguity of this Article, in addition to that the Saudi legislator sees that the solidarity here is subject to be between the partners and the company, and not only between the partners.

Moreover, the Jordanian legislator, in Article (27) of the Companies Act, allows the company's creditor to sue the company and its partners, but it does not permit the implementation on the private properties owned by partners for the collection of his debt, unless when he/she implementing on the company's properties first, and if such properties did not cease to repay the debt, then he/she could be here refer, with what left to be paid, on the private properties owned by the partners; also the partner who the execution has exercised on by the creditor could refer on the partners according to the percentage he/she paid for each one of them out of the Company's debt.

In this regard, one might question the extent of separation of the financial disclosure for company from the financial disclosure for partners in Article (27) of the Jordanian Companies Act?

This question has been answered by the Jordanian Court of Cassation, where it held that: 'what is contained in Article (27) of the Companies Act does not deny the separation of the financial disclosure for the company from the financial disclosure for partners in it'; which lead to the saying that it has given approval to the creditor to sue partners and the company at the same time, however, it did not allow the execution on partners' private properties before the execution on the company's properties, and that what Article (27) of the Jordanian Companies Act has come with is seen to support such separation .

In this point, some jurists had interpreted that the cause behind the legislature's intention from such a rule that the solidarity in the solidarity company is not that between the partners and the company, but it is only among the partners themselves, and if the solidarity was occurred between partners and the company forasmuch the

partner could be able to pay what has been allowed by Article (27) of the Jordanian Companies Act. (Almuhesin, 2005).

With this regard, we see that this trend and its justifications by the judiciary and jurisprudence in Jordan is not evidently accurate, since the private nature of the solidarity company require to proceed a debt lawsuit by creditors on each of the company and partners, in the view that leaving this matter as it is would raise a lot of problems in the future, so how the Jordanian law allows lawsuit on both of the company and partners, and therefore a rule will be issued to cover them, however it does not allow the implementation of this provision originally, and then the partners in the event of company's properties were not insufficient, and who will determine in the future when executing on the company's properties that it is unable to pay the debt and thus begin the process of implementation on the partners.

The timeframe for the partner's responsibility

The responsibility in the solidarity company is linked with the solidarity partner; as long as there is a partner in this company he/she should be responsible for the company's debts and commitments. However, this responsibility - in fact - is seen to be organized differently in the Saudi Companies Regulation comparing to the Jordanian Companies Act; where the Saudi Regulation has adopted a different approach from that of the Jordanian law, concerning the accession of a new partners to the company in addition to the determination of the responsibility of the joined partner, but the similarity is seen occurred in case of the withdrawal of one of the partners of the company. The research in this topic will be based on several aspects, as the following:

The extent of exempting one of the partners from responsibility

The agreement between partners on the exemption of solidarity responsibility is deemed as one of the important issues; where if this agreement has been stipulated in the company's contract, one can state that we are not - in this situation - dealing with a solidarity company, instead the form of this company shall be seen as to be a limited partnership, because the condition of exemption from responsibility that is contained in the contract would lead to the denial of the main characteristic of solidarity company; however, if this agreement happened to be formulated outside the company's contract - in a separate contract - and that this agreement held for the exemption of one of the company's partners from responsibility, then this agreement can be used as an evidence only between partners and not to be used in face of others (Alswelmen, 2006).

Therefore, the personal and solidarity responsibility to partners in the solidarity company is deemed to be a matter of public order, where partners should not agree on its contrary; and thus, the partner shall be seen responsible - personally and solidarity - for the company's debts and obligations, even in the situations where the establishment contract of the company stipulated and contained an exemption for one of the partners of this solidarity, or to determine the responsibility of this person by his/her share in the company's capital even if this condition was declared on the consideration that the responsibility here was listed for the benefit of company's creditors, so the creditor can conclude an agreement with one of the partners to identify its responsibility, so that the creditor cannot ask this partner no more than the limits of the amount that covers his/her responsibility, and that the creditor can waive this solidarity or exempting one of the partners from it (Na'em, 1989).

As it seems to us, here, the solidarity in a solidarity company is deemed to be one of the company's components and requirements, and thus any condition held on the waive of this solidarity or agreeing on its contrary - whether if the condition stipulated in the company's contract or in a separate agreement - should be null and void.

It should be noted that the Saudi legislator - in the Saudi Regulation - did not clarify its position from the possibility of exempting the partner of the solidarity responsibility in this kind of a company, the matter of which deemed to lead to a legislative shortage in this area.

However, with regard to the Jordanian legislator approach, we find that Article (26/a) considered the responsibility of the partner in the solidarity company as to be a symbiotic and solidarity responsibility for the debts and obligations of the company if such debts and obligations were resulted while he/she was in it, also his/her personal properties is seen to be as an assurance to fulfill the debts or obligations; but the Jordanian legislator - as same as the Saudi legislator - did not clarify the extent of the possibility of agreeing on the exemption from responsibility, the matter of which deemed as a legislative lack in the provisions of the Jordanian Companies Act.

The responsibility of the entered partner

The entry of a partner or more into a solidarity company is seen as a permissible issue - during its life - as long as the number of the existence partners allow that, and this entry might be subject to the relinquishment by a one of the existence partners of his share or a part of his share, or because of the death of one of the partners and the joining of his heirs to the company (Alswelmen, 2006). Also one should consider the situation 'when a new partner enter to the company', which is seen as a problem that related to the responsibility of this partner about the company's debts and its previous and later obligations to his entry.

With this regard, each of the Saudi and Jordanian legislators has taken a different approach in relation to

organizing the responsibility of the entry partner, as follows:

The position of the Saudi legislator

Article (19) of the Saudi Companies Regulation came with a supported rule - as to us - that attached with the entry of a new partner to the company, where this Article has deemed the admittance of a partner to the company as to make the partner solidarity responsible with the other existing partners in all his money – properties – concerning the company's debts - whether they were previous or later debts as to his entry; even that the Saudi legislator in this Article has considered the responsibility of the partner as to be that of public order, which mean that there is no possibility to agree on its contrary, and if there was such an agreement then it should not be forced in the face of others.

In this regard, some jurists went to say that the extension of partner's responsibility – a partner who entered newly to the company – about the previous debts as to his admittance and not just asking him about the later debts as to his admittance is a matter that is seen harsh and not justified; therefore, the jurists - who went with this view – stated that 'it is essential to permit the exemption of the entry partner from the previous debts to his entry, particularly in the situations where such agreement is declared (Aljaber, 1996).

The issue that deals with the responsibility of the entered partner about the previous debts is justified by the view that this partner has been agreed while entering to the company with its current status, which means that he was agreed on the advantages and disadvantages of the company's financial disclosure, on the consideration that what was resulted to its financial disclosure was made by its name and its characteristic for being a legal person, also the responsibility in this company is seen attached with the idea of participation that cannot be separated from it (Al-Akeli, 2008).

In this regard, we support here the view that went with the saying that the responsibility of the entered partner should cover both the previous and later debts as to the partner entry, and the reason of this sight relies on the connection of the idea of partners' responsibility in this company with the idea of contract and participation in it. In addition, the partner whilst entering into one of the solidarity companies he knows the nature of responsibility in it, and thus his joining shall be seen as to constitute proof that he declared his approval to handle all the obligations and receive all rights on and to the company.

The position of the Jordanian legislator

The approach that the Jordanian legislator has adopted is differed from that adopted by the Saudi legislator concerning the partner's responsibility of the entered partner to the company, whether he joined it or if the share was waived to him in whole or part, in the company; also Article (29) of the Jordanian Companies Act has stipulated a rule related to endorse responsibility on the entered partner concerning the later debts as to his entry, and which stipulate also that the partner should not be responsible about the previous debts as to his entry .

It seems to us that the Jordanian legislator has taken a different approach entirely to that taken by the Saudi legislator, where the Jordanian legislator has stated that the liability of the entered partner should be that of the later debts as to his entry; we believe herein that the approach adopted by the Saudi legislator is better than that of the Jordanian approach, considering that - and as a trend of jurisprudence saw - the legislator did not distinguish between old partners and the new ones as to the responsibility, the matter which might lead to state to support the view that went with asking the entry partner about the previous and later debts as to his entry and not only the later debts, since the responsibility of a solidarity partner is attached completely with the intention of participation that requires the handling of company's obligations since he accepted to enter in it in order to utility from its rights, where the debts and obligations are deemed the debts of a legal person and not that of a certain person in the company to assume such commitments as able to be individualized according to the date of entry of partners to the company (Abu Zaid, 1978).

Incidentally, we agree with the trend that bound the entered partner for the previous and later debts as to his joining; where the reason for such conclusion relies on the idea and origin of the solidarity company, which are the participation, solidarity and the personal and unlimited responsibility for all the commitments of the company and its obligations, and this idea requires that there must be a solidarity between the company and partners - and not only between the partners, because if the entered partner was asked only for the later debts, then that might lead to the situation where there might be no partner who is solidarity with the company for the debts attached to its financial disclosure. Therefore, if we assume that there is a company founded by two partners in 01/04/2012, and in 1/5/2012 one of the partners was withdrawn and another partner was joined to the company after the waiver of the share of the first partner to the new partner - and during that time there were debts that was resulted within the stated period - and in 1/7/2012 the second co-founder partner was withdrawn after the waiver of his share to another new person. So here the two new partners would not be liable for the debts of the company that arise within the period of 1/4/2012 and 1/5/2012 – according to the approach adopted by the Jordanian legislator - but they will be asked for the later debts to their joining; accordingly there would be a time that the company could not find a partner who is liable for the previous debts and obligations, which is deemed contrary to the special nature of this kind of responsibility; especially that when many people intend to deal with this company, this situation would be seen as a matter of this responsibility, and if we allow the

termination of solidarity between the existing partners in the company and the company, then we will be facing a matter that is affecting the origins that this company is founded on.

The Responsibility of the withdrawing partner

The withdrawing partner in the solidarity company is asked for the debts that arise in the company's financial disclosure before only his withdrawal, and therefore he will not be asked for the debts or commitments after his withdrawal, which is the matter that both of the Saudi and Jordanian legislator has agreed on .

It should be noted here that most of the jurists have supported this issue (Zyadat, 1996). Also a trend of jurisprudence has linked this withdrawal with the necessary of declaring in order to determine the liability of the withdrawing partner where he should not be asked for the later debts after his withdrawal, but in the situations when the withdrawing partner did not declare this withdrawal, the withdrawing partner should still be liable for all the debts of the company until the declaration is made (Othman, 1996).

It must be noted, here, that the withdrawing partner may expose himself to be responsible for the company's debts and obligations that occurred after his withdrawal in the case when he does not complete the total of the legal processes to his withdrawal from the company . According to the above, if the withdrawing partner left his name appeared in the company - in its address - then that should constitute proof that his responsibility shall remain and he shall be asked for all the damages that might affect the company, other partners and third-parties because he did not declare his withdrawal, and so he should be liable to compensate about that. The reason of this is associated with the requirement that the various legislations conditioned by requiring that the address of the company should be consistent with its current status, where the non-consistency between the company with its current status may give third-parties unreal impression about its status and the partners who still existing in it, which might lead a third-party to contract with it and formulate deals because of the trust and confidence that are given by the name of the partner to this company.

Accordingly, if a partner withdrawn from the company and remain silent about his name being listed in the company's address, and when a third-party dealt with the company - in good faith – based on his belief that the withdrawing partner was still solidarity, and if the withdrawing partner was knew here about that, then he should be liable for all of the company's debts and obligations, because of that dealing that made on the basis that a third-party - who dealt with a good faith – has based on the appeared status of the company. However, if the name of the withdrawing partner, from the company, was still listed in its address without acknowledging that by that partner, or if the third-party - who was dealing with the company - knew about the withdrawal, then the withdrawing partner should not be liable in front of the third-party (Ganaym, 1989).

It is to be noted that a trend in jurisprudence went to state that the justification concerning the issue of the appearance of a partner and his responsibility for the company's debts and obligations is due the idea of mistake, since this partner did not take the necessary processes to remove his existence from the company, and therefore he caused a mistake in creating external appearance, where the outcome of his mistake was led third-parties to assume that he was still a partner in the company, so others had dealt with him on the basis of this appeared status, so if this mistake resulted any damage then he should compensate for this result, and that the best compensation for this damage shall be the enforcement of disposition that a third-party concluded with the company.

Conclusion

This study that researching the contradiction of legal provisions with the special nature of the solidarity company attains to group of results and recommendations, which monitored the most related provisions stipulated in the Saudi Companies Regulation (No. 6/M) of 1385E and its amendments, in addition to the Jordanian Companies Act (No. 22) of 1997 and its amendments, and what seems contradicting with the special nature of this company; and the outcomes and recommendations can be summarized as follows:

Findings

This study has concluded to the following results:

1. That Saudi legislator in the Companies Regulation did not indicate the need that a partner in this company should be a natural person; contrary to Jordanian Law, which stipulated that a partner should be exclusively a natural person. As the participation of a legal person in founding this company and joining to it is seen to be opposed with its special nature.
2. The Saudi legislator did not put a maximum limit as to the number of partners in this company, the matter that is seen contrary to what the Jordanian law stipulated, which state a clear maximum limit of 20 partners, with a consideration that this number may be increased only because of inheritance.
3. The Saudi legislator did not require the fulfillment of partners' legal capacity to practice commercial activities, on the consideration that the partner in this company is granted the characteristic of a trader or merchant that should make him consequently responsible – unlimitedly - for the company's debts and obligations; while the Jordanian legislator has expressly stipulated in the Companies Act that the partner should fulfill this legal capacity, where it conditioned that a partner should be attain majority

- that is stipulated to be 18 years old; however, the Saudi legislator has permitted that a partner in this company can be a minor, the matter that is seen contrary to the nature of this company.
4. The Saudi legislator has approved the entry of heirs to the company but after the approval of partners on that, the issue that is seen diverged to what the Jordanian provisions have provided, where the Jordanian legislator has approved the joining of heirs without requiring the approval of the rest of partners on this accession, which is deemed to be contradicted with the mutual confidence that is usually essential between partners in this company, the matter that is seen crucial for the existence of the company.
 5. The Saudi legislator did not permit the transformation of the solidarity company to any other form in the cases where minor partners might enter the company; while the Jordanian legislator has permitted the transformation of this company to a limited partnership, even that the legislator has approved this transformation without requiring the consent of the existing partners in the company.
 6. The Saudi legislator has authorized to refer to the company and partners for the obligations and debts by certain terms, which is the same rule that provided by the Jordanian legislator; nevertheless, the Jordanian legislator has stipulated a different rule that organized the situation of restricting the execution on partners before the execution on the company, the matter that is seen to create number of practical problems; although, the Saudi legislator did not organize the issue of executing on partners, and it did not distinguish between the issue of referring and proceeding a lawsuit with the execution on the company and partners.
 7. The Saudi regulator did not clearly indicate his position regarding the exemption of partners from their solidarity responsibility, which is the same case as to the Jordanian legislator, the matter that is deemed to create an obvious legislative lack.
 8. Each of the Saudi and Jordanian legislators have differed in regulating the responsibility of the entry partner to the company for its debts and obligations; where the Saudi legislator has deemed the partner responsible for the previous and later debts as to his entry, which is the rule that we support, while the Jordanian legislator has stated that the entry partner should only be liable for the later debts as to his entry.
 9. Both of the Saudi and Jordanian legislators have stated a single rule regarding the responsibility of the withdrawing partner from the company, where such a partner should be responsible for the previous debts as to his withdrawal, in addition to the condition that he should declare his withdrawal.

Recommendations

1. We recommend the Saudi legislator to state explicitly on the necessity that a partner in this company should be a natural person who attains full majority in order to be able to practice commercial activities.
2. We recommend the Saudi legislator to necessary set a maximum limit to the number of partners in this company; because that the minority of partners' number does match with individuals' companies, and by leaving the door open - as it is here - is deemed to be as a matter of the characteristics of financial companies.
3. We recommend the Jordanian legislator to state clearly on the necessity of considering the approval of partners during the entry of heirs to the company.
4. We recommend that the Jordanian legislator should not allow the joining of minor heirs unless the company's partners approve that, because this would lead to transform the company to another form without the consent of these partners, and which is deemed contrary to the special nature of the company.
5. We recommend the Jordanian legislator to allow the execution on partners' properties in the same time when executing on the company's properties, because the solidarity is seen to be between the company and partners, and not only among the partners.
6. We recommend both legislators to state explicitly on prohibiting the exemption of partner's responsibility, and to state that such responsibility should be a matter of public order, which means that no one can agree on the contrary.
7. We recommend the Jordanian legislator to make the responsibility of the entered partner as to cover the previous and later debts of the company, as to his entry, and not just for the later debts; similar to the rule stipulated by the Saudi legislator.

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