

THE LEGAL BASIS FOR A HOLDING COMPANY'S LIABILITY FOR ITS SUBSIDIARY'S DEBT: COMPARATIVE ANALYSIS OF THE UAE AND THE EGYPTIAN LEGAL SYSTEMS

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ABSTRACT

Rapid changes have tested and will continue to test the limits of liability in tort law. To date, much pressure has been applied to the principles governing the liability of a holding company since the doctrine of veil piercing has fallen out of favor with many courts. This article studies the legal basis of the holding's liability for its subsidiary's debts in the light of two contradicting principles: The 'legal independence' and the 'economic dependence' of the subsidiary. The study concludes that it makes no sense to make the holding company carry out full custody of its subsidiaries, but meanwhile, parties injured by subsidiaries can make a claim on the holding if a direct duty of care has been breached. Therefore, much wisdom is needed to estimate the civil responsibility of the holding company. Thus, this article analyses the court decisions, laws, and policy considerations governing a holding company's liability in the UAE and Egypt.

Keywords: Group Company, Corporate Law, Liability, Holding Company, Subsidiary Company.

INTRODUCTION

Holding companies are among the most important ways of attracting investments, whether foreign or domestic. A holding company controls with its legal personality a group of independent companies known as subsidiary companies (Muchlinski, 2007). The subsidiary companies work on implementing the strategy assigned to them by the holding company, in the sense that the holding company issues all the major decisions and regulates the operations of the subsidiary companies.

The holding company is not a new form or type of company, but rather takes the form of a commercial company as defined by the UAE law in Article 266 of the Commercial Companies Law No. 2 of 2015, which stipulates "A holding company is a Joint Stock Company or a Limited Liability Company that establishes subsidiaries inside the state or abroad or has control on existing companies, by holding shares or stocks enabling such company to control the management of the subsidiary and to have influence on the decisions of the subsidiary. The name

of the company followed by the expression Holding Company shall appear on all the papers, advertisements and other documents issued by the holding company” (Law, 2015).

Accordingly, the UAE legislator considered any company to be a subsidiary company if a holding company influences its decisions, because the holding company owns controlling shares in the subsidiary company’s capital, and thereby has the authority to form its board of directors.

The UAE legislator limited the objectives of the holding company to holding shares or stocks in joint stock companies and limited liability companies, besides providing loans, guarantees and finance to its subsidiaries in addition to managing its subsidiaries. Moreover, the holding company cannot conduct its activities except through its subsidiaries (Law, 2015).

The Egyptian legislator thus contradicted the provisions of the UAE legislator, by permitting Egyptian holding companies to carry out investment activities by themselves, that is, to have their own economic activity (Law, 1991).

The Egyptian legislator in the law for the public business sector stipulates the following: that the activities of the subsidiaries of any holding company may be similar to, complementary to or differentiated from those of the holding company. Meanwhile, both the Egyptian and Emirati legislators agreed that it may be permissible for holding companies to carry out some of their operations in order to satisfy their own purposes (Law, 1991).

From the previous definitions, it is clear that the existence of a holding company is linked to the presence of another company called the subsidiary. This defines the legal relationship that governs these two companies, as represented in the control exercised by the holding company on the subsidiary company, while the independent legal personality of both companies is maintained and preserved (Witting, 2018).

If a holding company performs no economic activity (that is, if its purpose is limited to contributing to subsidiary companies, and managing their activity by influencing their decisions through its controlling shareholdings), this does not mean that it has no purpose, or has no economic purpose. It is still considered a real company that satisfies all the necessary elements and conditions of any company (Chaddad & Cook, 2004). Furthermore, it is distinguished by having a financial or administrative purpose which is considered legal and legitimate. A holding company has a legal personality, independent financial liability and legal independence from its subsidiary companies. Conversely, the latter also has a legal personality, independent financial liability and legal independence from the holding company (Law, 2015).

The Importance of the Research

A question arises regarding the legal responsibility of the holding company for the debts of its subsidiary companies, considering the independent legal personality known as the legal independence of both types of company. In view of the economic control that the latter has on its subsidiary companies through owning more than 51% of the subsidiary companies’ capital, should the subsidiary companies’ debt be considered the responsibility of the holding company? Or should the holding company not be deemed responsible for the subsidiary companies’ debt, due to the principle of its independent legal personality?

Most of the legislation, including that of the Emirati and Egyptian legislators, has failed to regulate the holding company’s responsibility for the subsidiary’s debts and therefore a question still unanswered is what is the legal basis for either approving or not approving the holding company’s liability for its subsidiary’s debts?

Accordingly, this article discusses the legal basis and the extent of responsibility in the light of two principles which seem to be contradictory, namely the principle of legal independence (the independence of legal personality) and the principle of economic dependence (the economic control of the holding company over the subsidiary). Moreover, the article analyses the holding company's responsibility if it uses the legal control that the legislator approved outside the framework of the legislator's will. Nevertheless, it should be emphasized that the word company refers to a legal concept and not an economic concept.

RESEARCH METHODOLOGY

The research is based upon the analytical method or what is known as the deductive method, which depends on the general material and the overall rules and their application on the various parts and branches in the light of the laws of Egypt and the UAE.

The Legal Foundation for the Legal Independence and the Lack of Economic Independence of the Subsidiary Company

The responsibility of the holding company is still subject to classical concepts, and the judiciary has done nothing except work on adapting the civil liability to the articles of association of the holding company (Grimonprez, 2009).

In fact, a legal framework that defines the dividing lines and the point of balance between the two principles, economic dependence and legal independence has hitherto been absent.

In accordance with the provisions of the Company Law, there is no doubt that independence is legally achieved by the provisions of law in both the UAE and Egypt, as previously noted. Both the holding and the subsidiary companies have a legal personality independent from each other. Their acquisition of a legal personality leads to the existence of a legal entity independent from its partners and shareholders; this entity, furthermore, has the rights of a "legal person", that is, it has its own capacity, financial liability, name and nationality (Petin & Choudhury, 2018). The legal person is similar to that of any natural individual, who acquires certain rights and discharges its obligations. Therefore, each company as an independent legal entity is responsible for its decisions and debts, in compliance with the legal principle stating that every person is responsible for his own actions (Muchlinski, 2010). Accordingly, both the holding and the subsidiary company are solely responsible for their debts and obligations to their creditors. Moreover, because the principle of legal independence between the two companies is achieved by the provisions of law, the creditors of the subsidiary companies cannot sue the holding company.

Given that the legal personalities of the subsidiaries makes it impossible for their creditors to sue the holding company, not recognizing the legal personality of the subsidiary has some benefits, but this can be done in exceptional circumstances. The French Court of Cassation has, on many occasions, consistently reaffirmed the subsidiary's full commitment to the principle of legal independence (Cannu & Bruno, 2009). The holding company and its subsidiaries constitute, in this sense, limited liability companies that are organized according to the principle of legal independence. Thus, the judiciary rarely considers the absence of a legal personality in subsidiary companies (Grimonprez, 2009).

In this regard, the Egyptian Court of Cassation in the session of February 1st, 2015 appeal no. 1436 of 80 BC, appealed the contested judgement. The court refused all arguments to file the case against anyone with no formal legal standing. Eventually, the judiciary refused to accept the case. The cassation decision was as follows: as stipulated by the provisions of Law No. 203 of 1991, to issue the law of public business sector companies, in which business sector companies affiliated by a holding company have an independent legal personality and are represented before the judiciary and any third party by a member of the board of directors. Its affiliation with the holding company has nothing to do with matters related to its actions, pledges and its resulting rights and obligations. The legislator has entrusted these matters to the company itself, which has an independent legal personality represented by its delegated board member who legally represents the company.

The Legal Basis for the Lack of Economic Independence of Subsidiary Companies

There are some accepted ideas and principles which are sufficient to make the holding company not responsible for the debts of its subsidiary companies, such as financial independence, as well as legal personality (Castanias, 1983). However, since limited liability can lead to undesirable consequences for claimants who were exposed to torts by subsidiaries, numerous efforts have been made to circumvent limited liability and gain access to the assets of the holding company (Pettrin, 2013) especially because the doctrine of veil piercing has fallen out of favor with many courts? It is not acceptable to make the holding company completely irresponsible for its subsidiary's debt, since this is inconsistent with the logic of making the principle of limited liability a way of making the holding company not responsible for its subsidiary companies and free of liability. Thus, the following question arises: What is the legal basis for the lack of economic independence between the holding company and the subsidiary?

This question will be answered in the light of the legal control derived from the absolute majority share of capital ownership in the subsidiary company's capital owned by the holding company within the laws of both the UAE and Egypt. Besides, the principle of the lack of economic independence can be realized only through the effective control of the holding company. Furthermore, the holding company's liability for the debt of the subsidiary is due to the control that the holding company has over its subsidiary company.

However, if the lack of economic independence is due to legal control, as stated in the Companies Law, the holding company should not be held accountable for the subsidiary's debts, because each of them enjoys legal independence. In addition, the subsidiary company is economically dependent, due to the need to put it under the control of the holding, as stipulated implicitly or explicitly in the Companies Law. This is because control is one of the pillars of the holding company that must be exercised legally, given the fact that the legislation did not stipulate the holding company's responsibility for the subsidiary's debts, knowing the nature of the holding's business. The holding company thereby is a shareholder like the rest of the shareholders, but it owns a majority share of the subsidiary's capital. Accordingly, as a major shareholder it has the right to participate in its management.

This logically leads to the legislator's having no intention to make the holding company accountable for the debts of the subsidiary company; because the will of the legislator insists on both its legal independence and economic dependence and the articles of legislation issued. If the legislator's intention had been to fully acknowledge the holding company's responsibility for

debt then he would not have adapted the principle of legal independence, or at least would have made this legal independence incomplete as far as the subsidiary was concerned.

The Courts Decisions Regarding the Economic Dependence

The Egyptian Court of Cassation, citing the text of articles Nos 2 and 6 of the Public Business Sector Law, has ruled that the holding company has the authority to do all the necessary work to correct the financial structures and the working path of its subsidiary companies, including providing funds for this purpose, since it is considered a parent company. Funds made to its subsidiaries are not considered grants or loans. All the subsidiary companies of the holding company, even if each has its own legal personality and an independent financial budget, together with the holding company, are considered a single investment system in a specific field.

Hence, this provision constitutes a judicial recognition of the status of legal independence and economic dependence, to the extent that the Court of Cassation said that:

“The funds that the holding company provides to its subsidiaries to correct its financing structures and non-performing tracks are not considered grants or loans”.

Eventually, the judgment ends with a judicial declaration of legal independence, and of limiting the responsibility of the holding company to the percentage of its ownership in its subsidiary as stipulated in law:

“Whereas, the holding company which owns at least 51% of the debtor company’s capital, being one of its subsidiary companies pursuant to Article 16 of the Public Business Sector Companies Law No. 203 of 1991 and receiving the funds left out from the liquidation process, is obligated, within the limits of the liquidation funds that it had acquired-according to its ownership in the company that was liquidated to pay the debts of the last company, including the debt subject to this lawsuit’.

Circumventing Limited Liability

When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web [i.e., veil] of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons (Wormser, 1912).

If a company was functioning as a tool for fraudulent purposes or engaging in fraud, such actions would justify the piercing of the corporate veil, considering such control outside the legislation’s framework. In this sense if an unlawful act was committed, the holding company would be held responsible in default.

There is no doubt that the legislator’s will that the holding company shall use its control over its subsidiary in a manner that preserves the legal personality of the latter-is implied, thereby applying the principle of legal independence. Likewise, the legislator wants the subsidiary and its assets preserved in good faith because they constitute a guarantee for its creditors. Otherwise, the holding company will be deemed responsible. The subordination of the subsidiary company to the holding company is not a legal mistake; indeed, subsidiaries are

created for this very purpose. Consequently, the responsibility of the holding company is not assumed unless it exerted any control that contradicts the current legislations (Petrin, 2013).

However, the lack of economic independence may have been due to the holding company's actual control, that is, control outside the provisions of the Companies Law. Correspondingly, the control is due to reality de facto, far from the legislator's will as stated in the Companies Law. Such control may be created by the holding company's own decision or, in some cases, in association with the subsidiary. As a result, the holding company must be held accountable for the subsidiary's debt as long as it chooses to operate outside the provisions of the Companies Law. In accordance with the rules of private law, the holding company's responsibility may be broader if it has not adhered to the limits set by the legislator. In this case, the holding company shall not be economically independent in its relationship with its subsidiary, because this principle is limited to the company that has legal control, that is, the company recognized by the legislator as a holding company under the Companies Act.

All in all, it can be said that the holding company is responsible for the debt of the subsidiary whenever the subsidiary's moral personality was not recognized or was absent.

It should be noted that the holding company's responsibility for the subsidiary's debts is the holding company's personal liability for the total amount of debts, and not proportional to the extent of its ownership in the subsidiary's capital. In this regard, some legal foundations in which the holding company is fully responsible for the subsidiary's debt are as follows:

1. The holding company's responsibility for the subsidiary's debts can be due to violations of the legislator does will in exercising its control over the subsidiary, in accordance with the provisions of law that establishes this responsibility in specific cases. This can be evident by the latter's submission to the directives and organization of the holding company when conducting its operations, in a way that directly reveals the intention of the holding company to completely influence all decisions and actions (Dearborn, 2009).
2. The responsibility of the holding company for the debts of the subsidiary company may also be established in the case of the latter being a regular agent or apparent agent (Engrácia, 1994).
3. The holding company's responsibility for the subsidiary's debts can be due to the unity of appearance of both types of company, in which the holding company participates with the subsidiary to execute the subsidiary's projects, or even executes them instead of its subsidiary company.

The Level of Control that a Holding Company Exercises Over a Subsidiary Company

The holding company's intervention in the subsidiary's businesses is an indication of the strength of control that the holding company exercises over its subsidiary. This is especially apparent when the holding company conducts contracts between its subsidiary and third parties; whether the contracts were released by the holding itself, or the holding retained the option of approving the contracts before the subsidiary's approval, or if the holding intervened in negotiations between its subsidiary and third parties.

It is initially implied that the operations of the subsidiary shall be carried out in accordance with its own interests. The judiciary refuses to invoke the moral personality of the subsidiary, if the subsidiary's obligations were not intended for its own interest. In this case, the holding company has revoked the independence of the subsidiary. Thus, this concept is known as project mastery and is qualitative; it highlights the realistic approach to economic dependence and legal independence.

Moreover, the judiciary holds the holding company responsible, if it established a subsidiary company with weak legal financial structure, and meanwhile delegated it to conduct contracts and investments with huge funds (Bainbridge, 2001). In this case, the holding company shall be asked about the contractual obligations and the debts of its subsidiary (Hansmann & Kraakman, 1991), because the refusal to invoke its legal personality leads to disavowal of the obligations contracted. Similarly, it applies if it used the independent legal entity of the company to evade jurisprudence.

The holding company is also fully responsible for the subsidiary's debts if the former replaces the latter in decision-making. Furthermore, the responsibility of the holding company is established when it issues a goodwill letter that carries legal obligation; its responsibility in this case is contractual (Tadros, 2007).

Alternatively, however, if the opposite happened and the holding company delegated responsibility, authority and accountability to the subsidiary, the question now would be whether such authorization should be considered as enough to immunize the holding company against accountability for the subsidiary's debt. In other words, would the subsidiary company be considered an independent company in consequence of such delegation?

If the primary purpose of the delegation was to transfer the full managerial powers to the delegated company, without any obligation to provide an account statement of the operations that were executed, the subsidiary company would in this case be considered independent from its parent company. For the holding company not to hold itself responsible for the business and debt of the subsidiary, this authorization would permit the subsidiary to be independent in setting its own commercial, financial and technical strategy. Moreover, this authorization would reduce the progressive control of the holding company. However, partial delegation is not enough to make the delegated company independent.

In 1995, the Court of Cassation set these principles in the following terms:

“It seems that resulting from the analysis conducted for the written authorization given to the regional manager of the subsidiary from the holding company, the court of appeal concluded that whenever an authorization has been given to the subsidiary to act in the legal and technical fields without indicating the exact size of the financial and economic independence of the subsidiary in addition to any lack in other evidentiary elements, the court of appeal cannot declare the subsidiary's independence”.

The Subsidiary Company is a Front Company or Acts as an Agent to the Holding Company

The holding company's liability for the subsidiary's debts may be due to fraud, when the main purpose behind establishing the subsidiary is to consider it a shell (front) company.

The judiciary does not consider a subsidiary company independent if it is merely a front for a holding company. The creditor, therefore, has the right to sue the holding company even if the creditor's transactions with the subsidiary appeared to make the latter an independent company (Dignam & Lowry, 2014).

The French Court of Cassation in the Civil Department on July 18, 1962 ruled (as evident in the documents presented) that there is one chairman for both companies, one of which pays the other its debts, and the directors of the two companies do their business under the cover of

the holding company. A deeper look shows that the subsidiary company is only a front company, in which the parent and infant companies constitute one project).

Wholly Owned Groups

The subsidiary company can only be a branch of the holding company. The French authorities do not hesitate to bypass the legal personality of the subsidiary and make the holding company responsible for its subsidiary's activities, if the subsidiary's role is limited to implementing the directions issued by the holding company. Moreover, the French authorities consider what is called "decisive effect pairing" when the holding company owns the entire capital of the subsidiary, without the need to verify whether the holding company is actually exercising control on the subsidiary.

Unity of Appearance

The previous situation can similarly apply to the case of unity of appearance of the holding and the subsidiary company, something that may deceive the subsidiary's creditors. For example, when the two companies operate from the same headquarters, or have the same administration, management, warehouses, or laboratories. This makes third parties rely on a general guarantee which includes the financial status of the two companies, even though it deals with only one of them. Accordingly, third parties contracting with the subsidiary may refer to the holding company based on the apparent situation.

The apparent theorem is not always the actual or the realistic theory; this applies when the holding company interferes with the subsidiary's business and as a result third parties may become confused regarding the debtor, which leads to the expansion of the circle of contracted parties. The responsibility of the holding company is also established if it uses the subsidiary's capital as if it consisted of its own funds, or if the holding company's control of the subsidiary extends so far that the latter becomes a mere fictitious company that does not exist due to the mixing and merging of the financial accounts.

The holding company's responsibility for the subsidiary's debts is also established in cases of misrepresentation and fraud in the united projects. The judiciary decision was established on the unity of the project and common interests with a view to securing others when there is a duplication between the holding and subsidiary companies that entails fraud, aimed at excluding part of the holding company's assets so that the creditors cannot claim such assets by smuggling them out, or for the purpose of obtaining credit from a third party. The subsidiary in this case is only an agent of the holding company.

The French competition authorities hold to the idea of the one project, whether financial or contractual, regardless of the links between the holding company and the subsidiary company, in order to hold the holding company also accountable, being an entity that carries out an economic activity independently from the companies that conduct the project. In this regard, the competition authority in France issued a report in year 2006 stating that it does not take into account agreements conducted between the holding and the dependent subsidiary company when it stated:

“There is no room to claim that there is conspiracy between a non-independent subsidiary company and a holding company, or even between two companies related by an agency contract. Conspiracy is only established between two independent companies as defined in the Competition Law and agreements between the subsidiary and the holding company do not follow the agreements law except when the subsidiary is independent”.

Furthermore, the legal personality of the company may not be recognized, when approving suspicious debt obligations and financial statements. The French tax law and the accounting plan expand the concept of the subsidiary in order to diminish its legal personality. Moreover, the judiciary allows third parties to refer to the holding company if it was proven that there was a confusion in the receivables due to inconsistency in considering the legal independence of the subsidiary (Oh, 2013); for example, if extensive cash flows were channelled between the two companies, or if the holding company completely owned the subsidiary.

The UAE legislator has stipulated in Law No. 9 of 2016 regarding bankruptcy and restructuring in Article 80- Federal Law by Decree No. (9) of 2016 on Bankruptcy that:

“Where the assets of a natural or a juridical person are integrated with the debtor’s assets in a manner that makes them difficult to separate, or if the court considers that it would not be practical or feasible, from a cost standpoint, to open separate procedures concerning such persons, the court may decide to join any natural or juridical person in the procedures provided for in this Chapter, in accordance with conditions that provide proper and sufficient protection for the creditors (Law, 2016).”

Tort Liability

There are three major types of tort leading to legal liability, namely, intentional torts, negligence torts, and strict liability torts. Negligence torts are not committed with the purpose of harming anyone. A case of negligence might occur if a person fails to take proper precautions, and someone else gets hurt in consequence. But strict liability does not consider whether an individual or a company was negligent or not. If the defendant's actions caused damage of some kind, the defendant is considered liable.

Tort liability of the holding company is established if it behaves in a manner that violates good faith in a way that harms the interests of the subsidiary company; for example, if the holding company was negligent when declaring the letter of intent. Besides, if it was proven that the subsidiary failed and was unable to fulfil its obligations due to the negligence of the holding company, then bankruptcy extends to the holding company. This is because the holding company is obliged to take into account when issuing its decisions and instructions to the subsidiary that these decisions should be in the subsidiary’s interests and it does not incur damages as a result of implementing them.

Furthermore, the tort liability of the holding company may also be established, if it meanwhile establishes a subsidiary with insufficient capital, entrusting it to carry out extensive activities that require huge amounts of capital. Thus, the subsidiary becomes unsurpassed, and the judiciary assesses the responsibility of the holding company, which was mistaken in creating a subsidiary with a financially weak legal structure and then pledging it to invest huge sums.

As for the responsibility of the members of the company’s board of directors towards third parties or the company’s shareholders, it is a tort liability because there is no contractual link that makes the board accountable to third parties or to every shareholder in the company

separately. The tort liability of the board of directors in this case is a joint liability shared by every member who has participated in causing damage, in accordance with Article 169 of the Egyptian civil law. There is no doubt that the holding company will be claimed against, if the responsibility of its representatives on the subsidiary's board of directors is established jointly with the other members of the subsidiary's board of directors, because of its financial solvency.

The Holding Company's Duty of Care

The responsibility of the holding company may be assumed by its representatives on the board of directors of the subsidiary company, because the holding company's representatives on the subsidiary's board of directors must work within the limits of their powers and authority; they should work in the interests of the subsidiary and under its name. If these two conditions are met, the subsidiary will be responsible for the behaviour of its members on the board of directors. In this case, third parties are invoked to protect the subsidiary because it is considered a company with an independent legal personality. Otherwise, third parties can hold the holding company accountable, if its representatives on the subsidiary's board of directors exceed the limits of their powers in managing the subsidiary, or if they do not pursue the objectives of the subsidiary or do not work to fulfil the subsidiary's purposes and under its name. However, it is a fact that the responsibility of the holding company should be made clear if it occupies all the managerial and supervisory functions of the subsidiary company. This is what has been taken into consideration as an essential sign of the absence of the subsidiary's independence from the holding company (Brahmadev & Leepsa, 2017).

The Emirati legislator has tightened Article 147 of the bankruptcy law, stipulating 'If a judgment is issued declaring bankruptcy, the court may order the members of the board of directors or the managers, or the persons responsible for working on the liquidation in liquidation procedures that unfolded outside the framework of this law, to settle the amount covering the debtor's debts, if it is established that any one of them committed any of the following acts within the two (2) years following the date of the opening of the procedures pursuant to this Chapter:

1. Use of commercial methods without considering their risks, such as disposal of goods at lower rates than their market value for the purpose of receiving funds in order to avoid or delay commencement of bankruptcy procedures.
2. Entering into transactions with third parties for the disposition of assets without consideration or for insufficient consideration, without a confirmed benefit or a benefit that is disproportionate to the Debtor's Assets'

The Egyptian legislator stated in Article 198/2 of the new Egyptian bankruptcy law No. 11 of 2018 some provisions that result in the bankruptcy of the company's board members or managers due to the bankruptcy of the company and due to the unlimited liability of these persons to fulfil the debts of the subsidiary and the holding company. If a bankruptcy application is submitted for the company, the court may also issue a judgment declaring bankruptcy for each person, who under cover of this company, carried out commercial operations for his own account, and disposed of the company's funds as if they were his own funds.

Moreover, the Egyptian legislator approved in Article (198/1) in Law 11 of 2018, 'The court, sue sponte or upon application of the bankruptcy judge, may order the forfeiture of rights

under Article (111) of this law pertaining to the company's board members or managers who have committed serious errors leading to the distress of the company's works and cessation of payments' (Law, 2018). Moreover, Article (111) stated in its second paragraph:

"Any person declared bankrupt shall not become a member in commercial, or industrial chambers ... or undertake banking, commercial agency, export, import or brokerage in sale and purchase of securities, or sale via public auction activities, unless rehabilitated (Law, 2018)."

According to both the UAE and Egyptian law, the court may declare the bankruptcy (of any person) of the holding company if under the disguise of the subsidiary company, he/she did business for their own account and disposed of the company's funds; because the subsidiary here is merely a fictitious company, a "front company", that the holding company is hiding behind and working under the cover of its moral character. Moreover, the court may decide that the company's board members and managers jointly or severally, must pay all or part of the company's debt if the company's assets are inadequate to settle at least 20% of its debts, unless they prove that these members and managers in running the company's affairs exerted the caution of a careful person.

The third paragraph of Article 198 of the new Egyptian bankruptcy law No. 11 of 2018 laid down that if it transpires that the company's assets are inadequate to settle at least 20% of its debts, the court, upon the request of the bankruptcy judge, may decide that all or some of the board members or directors, jointly among themselves or severally, shall pay all or part of the company's debt, unless they establish that, in running the company's affairs, they exerted the caution of a careful person.

Similarly, the UAE legislator in Law No. 9 of 2016 regarding the provisions of bankruptcy and restructuring in Article No.144, states that:

"If it is found that the company's assets are insufficient to settle at least twenty percent (20%) of its debts, the court that declared the bankruptcy may order all or any of the members of the board of directors or the managers, whether jointly or severally, to pay all or any of the company's debts, where their respective liability for the losses of the company is established pursuant to the provisions of the UAE Commercial Companies Law (Law, 2016)."

In a recent ruling for the Cairo Economic Court in case No. 121 of 2009, the court refused to apply the ruling of Article 704/2 of the Trade Law corresponding to Article (198/2) of the Bankruptcy Law No. 11 of 2018 regarding bankruptcy, based on the fact that this article made the matter permissible for the court in accordance with the conditions and circumstances the court presumes suitable.

The Egyptian and Emirati legislators have stipulated (Law, 2017) that any decision issued by the general assembly does not result in terminating the civil liability case proceedings against the members of the board of directors, if they committed serious errors on conducting their work outside the limits of the law, the company's contract, or its internal regulations (Law, 1981). Accordingly, the responsibility of the company's board of directors is upheld for any action that runs counter to the legislative texts; for example, publishing financial statements that contain incorrect information to conceal the company's poor condition, or misusing and wasting the company's funds. The board members and the company directors, therefore, are responsible for fraud, the abuse of power, and any other violation of the provisions of law in addition to the

mistakes they commit during their management of the company, especially if these mistakes result in harming the company, the shareholders or others (Law, 1981).

Meanwhile, the shareholders or anyone suffering harm due to work done by the board members in violation of the provisions of law or the statute of the company may file a lawsuit against the board members. The company's articles of association must not include a text prohibiting the commencement or in certain cases restricting the filing of a lawsuit pursuant to this article of public order.

According to the Egyptian and Emirati law on regulating the restructuring, protective reconciliation and bankruptcy which was previously discussed, the directors and the board members may be held accountable for the subsidiary's debts and be declared bankrupt. This consequently leads to the bankruptcy of its representatives, including the holding company, but the terms of this article do not differentiate between those who legally manage the company and the company's actual managers.

In this sense, it is not necessary for the members of the board of directors (or the manager) to be held accountable only if they were being paid by the company. It is possible to hold them accountable even if their management was conducted without charge. Furthermore, there is also no distinction between the general and the silent managers. The holding company may not be represented by the board of directors in the subsidiary; however it can exercise an actual managerial control on the subsidiary through its representatives in the general assembly, through people who can influence the managerial businesses and decisions issued by the subsidiary's board of directors (Cai et al., 2019).

Consequently, the holding company is held responsible for the debts of the subsidiary, since the former is considered the manager of the latter, if it meets any of the following conditions:

1. The participation of the holding company in the management of the subsidiary;
2. The inability of the subsidiary to pay its debts;
3. The holding company commits an error or its management is arbitrary.

Arbitrariness in this case is the use of the board of directors' authority not in the best interests of the company. The holding company's arbitrariness of management can be summarized in three criteria:

1. If the use of that right is intended to harm others;
2. If the interests to which it is intended are of little importance and are totally incompatible with the ensuing harm that could affect others;
3. If the interests that it aims to enhance are illegal.

It is worth mentioning that the Egyptian legislator adapted the presumption of error in which the board of directors would be compelled to pay all or some of the company's debts. The presumption was extracted from the last phrase of Article 198/2 of the bankruptcy law. The members of the board of directors or the manager cannot be relieved of the responsibility, unless they prove that they did not neglect or ignore the position of the troubled company or its creditors. Rather, they must prove that they took all possible appropriate measures in good faith.

The responsibility of the members of the board of directors of the joint-stock company before the company that they manage is a contractual responsibility based on an agency contract

(Chen & Liu, 2011). The agency contract of the board of directors is a statutory agreement and not a legal agreement for which they take joint responsibility, according to the rules of the commercial law.

Accordingly, we can conclude that the representative of the holding company in the subsidiary can be legally described as a representative of the holding company, rather than an agent. This reflects the fact that the representative is considered part of the holding company, he is its tongue and mind, and represents its will as a legal personality in the subsidiary. At the same time, the representative acts as a member of the subsidiary's board of directors, meaning that the representative of the holding company in the subsidiary's board of directors is a representative of the former and an agent to the second.

But the question now is;

“What is the legal description of the representative of the holding company in the subsidiary, if the representative is a partner with a share of capital in the subsidiary?”

No doubt, the representative remains an agent of the subsidiary by virtue of his membership of its board of directors. However, if he was not formally appointed by the holding company but he was in fact a representative of it, he must be considered an actual representative, especially if he is a partner with a share of capital in the holding company, in this case the claimant must present evidence of such facts.

CONCLUSION

By reviewing the court decisions, it is apparent that the holding company's responsibility is limited to exceptional circumstances, because exaggerating the establishment of its responsibility makes its advantages and expected benefits below the magnitude of the negative effects that can be incurred. In addition, the creditors of the subsidiary companies may exaggerate their debts and seek to involve the holding company in a way that guarantees them the greatest possible benefit. At the same time, given the economic dependence of the subsidiary, implementation of the duty of care is mandatory when considering the liability of the holding company. It is important to recognize the duties of the holding company, if there is a breach, this may lead to the direct liability of the holding company. In this respect one should conclude that when control is within the framework of the legislator's will, the holding company is immune from responsibility for the debts of its subsidiary. However, the holding company must be held accountable for the subsidiary's debt if it chooses to operate outside the provisions of the Companies Law.

As a result, much wisdom is required when considering the civil responsibility of the holding company, especially when it makes no sense to say that the holding company has carried out full custody of all its subsidiaries.

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