

Legal Regulation of Investment Fund Parties

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Investment funds are one of the modern investment windows that provide people, who do not have the ability to manage their investments directly, the opportunity to participate in financial markets, whether global or local. The idea of investment funds is that a large number of investors pool their resources and have them managed by specialised financial institutions to achieve advantages. Investment funds are financial entities that accumulate the savings of those who wish to invest in securities in one container, and invest in buying and selling different securities. It is a legal system that creates a savings pot for a large number of investors to manage in the stock market through a specialised entity called the Investment Manager and through a diversified portfolio of securities to determine the best possible return on investment. The parties of the investment fund are the founder, investor and treasurer as well as the director of the investment fund. The subject of our research is about the regulation of the provisions of these parties.

Key words: *Funds, Investment, Investors, Founder, Manager.*

Introduction

The investment fund is established by the founding contracts that vary from one country to another according to the legal system of these countries; as these contracts are defined in the Anglo-American system as a trust contract. The Fund shall be healed from provisions related to its parties. The jurisprudence differs in the parties' number of the fund. Some of them believe that the fund is based on a tripartite relationship which is represented by the management company and the Secretary of Investment and Savers. While others believe that it is based on a bilateral relationship. Specialists believe that the fund consists of the founder and the manager (the first party), and investors (the second party). Further, the bank is the main party that creates and manages the fund at the same time. Also, others believe that the fund has four parties (Sinan Mohamed Said Assaf, 2013). Thus, the problem of the research



is embodied in the number of parties of the fund, and the statement of the provisions of each of these parties.

The Importance of the Research

The importance of research in organising the parties of investment funds increases with the greater need in establishing these funds in order to improve the economic reality of individuals and countries alike, as these funds are an important means of mobilisation and investment of money.

Research Methodology

The analytical comparative approach is the followed approach to this study moving between extrapolation from the texts of Iraqi laws comparing them with the necessity of objective interdependence and the necessity of the scientific research in order to take note of all aspects of the subject.

Fund Founder

In some countries, it is known as the trustee founder, while in others it is known as the management company, which establishes the fund. A certain legal form that must be available in the entity entitled to establish investment funds (Sinan Mohamed Said Assaf, 2013). The most important characteristic of investment funds in comparative laws is the so-called spontaneous incorporation, which means that there is an existing entity or legal person taking the initiative step to establish the fund to play the role of intermediary between savers willing to invest their savings in securities, and industrial and commercial companies issuing such securities, without the need to establish a fund in the form of a company, and without the need to recognise the moral personality. This role plays the engine in the comparative law company known as the management company, as it is taking the initiative step to establish the investment fund and to play the role of the mediator referred to, which is the management of starch. The management company here differs from the management company whose purpose is limited to the management of securities portfolios provided by others. Then, the company manages it for his account according to the principle of risk distribution. For its instructions, it also differs from management companies that are established for other purposes such as the management of real estate intended for housing and the acquisition of ownership and management of this property.

Some believe that the management company, as the company that establishes and manages the fund, has an existence as an inevitable mandatory presence. It is the driver of the fund and must be available in this company as a set of conditions including its form, purpose and money. Often, the Company Management in the Anglo-American system takes the form of constituted company. If the laws of the investment funds do not contain specific provisions in this regard, this company may not be established under English law only after the approval of



the Ministry of Commerce and Industry. Even if its management is controlled, this ministry has wide discretion. In the United States, the legislator puts investment funds under the supervision of the Federal Chamber of Commerce and the Stock Exchange Operations Committee. Although the English law did not impose a certain form of this company, it often takes the form of a joint stock company, as the German Investment Funds Act of 1970 required the management company to take the form of a joint stock company. This is the case in France under the Investment Funds Act of 1957 (Husni Al-Masri, 1995). In Egypt, Article (35/2) of Law No. 95 of 1992 stipulates that "the investment fund shall take the form of a shareholding company with cash". In Kuwait, article 6 of Law No. 31 of 1990 stipulates that "Kuwaiti shareholding companies whose purposes include funds on behalf of third parties may establish investment funds."

In Iraq, we did not find investment funds regulated by special legislation, and there was no legislative reference referred to except in the Law of Islamic Banks No. 43 of 2015. This referred to investment funds as stipulated in Article (5 / VII) as "the establishment of investment portfolios and investment funds ...". The establishment of investment funds is among the work of Islamic banks, but did not appear in the law other than this reference. Thus, remain the provisions of the investment funds remain as ambiguous in the system of Iraqi legislation including the form of a management company. But we can say that the institution under this law is always the bank, often a joint stock company and then the founder of the Investment Fund takes the form of a joint stock company under the Iraqi law as is often the trend in the legislation comparison shop. It may also be a financial investment company, the latter of course a joint stock company (Article (6) of the Financial Investment Companies Law for 2011). The purpose of the establishment of this company is mostly to play the role of intermediary between savers and industrial and commercial companies. Once the management company has taken the initiative to establish and manage the investment fund, it has generated a portfolio of securities, which means that the company's purpose does not exceed the formation and management of portfolios in accordance with the principle of risk allocation to the savers' account.

As for the conditions of the share capital of the management company, its capital must be an effective and sufficient guarantee to cover the costs of management on the one hand and the responsibility of the company before the savers on the other. French law requires that the minimum share capital of the company (100,000) French francs, and the English law the equivalent of (250,000) French francs, and in Iraqi law, since the founder of the investment fund is the Islamic Bank Article (4/1) stipulates that (the paid-up capital of any Islamic bank shall not be less than (250) two hundred and fifty billion dinars and the bank may raise the minimum in accordance with the Banking Law No. (94) of 2004). Article (3) of the Financial Investment Companies Law of 2011.

Investors

Investors or savers are the most important party in the formation of investment funds. The investors are the ones who provide their money to the fund, are subject to its rules and receive a percentage of the return commensurate with their shares in the capital; this leads to increasing their share capital invested. Investors diversify in investment funds. That is, if the investor is in ordinary individuals, the investment fund will be an investment port that allows participating in a minimum participation of that fund. Also, it may be considered as an investment outlet for small investors as well as for great investors. Investors may also be corporations, banks, or other investment funds, and countries may participate in giant global funds. But, despite the importance of investors in the fund, they do not participate in the management or at least their participation is not a real participation in management (Ali Fawzi Al-Musawi, 2008).

Treasurer

After finishing the preparation phase of the fund and obtaining a license from the supervising authority and before starting to offer the fund to the public, the issuer shall appoint a treasurer whose presence is essential to complete the elements of the investment fund. If the management company is the first key element in the structure of the joint investment formula, the presence of the trustee is the second key element, and then the secretary is the main pillar without which the fund will raise (Sinan Mohamed Said Assaf, 2013). Hence, the trustee is a main pillar without which the fund will not raise. An investment trustee is a financial institution specialising in the conservation and management of securities, often a bank (Khaled Saad Zaghoul Helmy, 2007).

The investment trustee is of great importance. This importance is confirmed through the state that all the regulated legislation to investment funds regulate its legal status except the Egyptian legislator which was not explicitly stipulated neither in the capital market nor in the executive regulations as a party to be appointed by the Fund. But we can say that the latter did not neglect its regulation, but only confined it to the bank, as stipulated in Article (38) of the Executive Regulation of the Egyptian Capital Market Law. It is stipulated that (the securities in which the Fund invests its funds should be kept with a bank controlled by the Bank Focus). Article (176) of the same law requires that the fund's management contract specify the relationship between the fund management company and the depositor bank with respect to the securities it holds. Then we can say that the Egyptian legislator did not neglect the organisation of the legal centre of the investment trustee, but limited it to the bank (Sinan Mohamed Said Assaf, 2013).

It should be noted that it is not required to appoint a treasurer at all in the case that the management company or the issuer is a bank, because in this case it performs the role of the company management and the bank at the same time. This is the way the legislation of some



Arab countries (Article (21) of the Saudi Investment Funds Regulations, 1427). Article (31) of the Jordanian Joint Investment Instructions for the year 1999 stipulates that "No one shall practice the activities of investment management and investment trust for the same project". Legislation differed in the nomination of the investment trustee, as the Jordanian and Qatari legislator called him the investment trustee, and the Lebanese legislator is called the depositary. The custodian of securities, and between the treasurer who defined him as a legal person licensed by the Commission to control the activities of the Fund and its obligations (Article (1) of the Palestinian Securities Law No. 12 of 2004). The Jordanian legislator defined the investment trustee as "the financial services company licensed to practice the activities of the investment trust in accordance with the law" (Jordanian Joint Investment Instructions for the year 1999). The Qatari legislator defined him as (the bank that acts as the trust fund investor) (Qatar Investment Funds Law No. 25 of 2002).

The Iraqi legislator did not regulate the provisions of investment funds as mentioned above and there was only one reference in the law of Islamic banks, which gave banks the right to form investment funds (Article (5/7) of the Iraqi Investment Law). Then, it can be said that the bank as the founder of the fund is the same investment trustee, and negates the need to appoint a new trustee since the bank is still the founder. The Investment Trustee is a legal person who practices the follow-up and management of the clients' investments to ensure their compliance with the investment principles and objectives of the client as stipulated in the investment agreement signed between the client and the investment manager.

The duties of the investment trustee differ from one law to another, as we find some legislation entrusted to it with multiple tasks, and others limited the role of the trustee to merely regard him as a guardian of the assets of the Fund, which means that the duties of the investment trustee narrow, and expand according to the legal regulation of each country, but it can be said that The main duties of the investment trustee are to preserve the assets of the fund and determine it from its own funds and be trustee or has the right to benefit from them. There is a type of banks that saves securities without management, which is known in England as custodian, but it is rare that the role of the investment trustee is limited to free. In addition, it has the physical management of the Fund's assets, such as receiving subscription amounts in the Fund's units, collecting revenues, any amounts due in favour of the Fund, any other party's dues on behalf of the Fund, and any other actions carried out pursuant to the instructions of the Management Company. The investment trustee of these tasks' drafts laws of the UAE investment funds for the year 2011, which regulated article (34) of these tasks, as well as the investment trustee in some laws control over the work of the management company. As this control is regulated by the contract between the investment trustee and the management company, and under this agreement the secretary refused to carry out instructions of the management company if they are contrary to the agreement, and the laws that mandated the Secretary-General of this important Jordanian law under Article 23 thereof



(Sinan Mohamed Said Assaf, 2013). The secretary also brings to the work a lot of legislation. That is, Article 24 of the Qatari Investment Law prohibits the investment trustee from combining the management of the fund with the investment trust. The Fund shall have common interests unless it is disclosed and shall have no effect on its neutrality and independence in the performance of the tasks entrusted to it. Deploy them according to the tasks assigned to him.

The Investment Trustee shall be responsible for any damage to the Fund's funds and the investors resulting from his negligence or negligence in the performance of his duties. This is regulated by most Arab investment funds legislation. (Sinan Mohamed Said Assaf, 2013) In Anglo-American laws, the responsibility of the investment trustee is subject to the general rules applicable to trustees.

Investment Manager

There are two types of investment fund management. It may be a general management of the fund, which is represented by representing the fund in front of others. The second type of management is the technical department, which means the development of the strategy necessary to implement the investment plans that have already been set by the company. If the strategy developed by the General Administration is to invest in stocks and bonds, it is the technical department that determines the contents of the fund portfolio in each of them. The proportion of securities deals in each activity, and since the technical department depends on the expertise and know-how in the field of investment funds, it should be assigned to a specialised person in this field (Ali Fawzi Al-Musawi, 2008). The conclusion of the management contract it that between the founding party of the Fund and the Investment Manager (Nazih Abdel-Maksoud, 2011). Some defined the management contract as a written contract between the fund company and the investment manager, stating the rights and obligations of the parties, including all the provisions required by law. In accordance with this contract, the investment manager is committed to the management of the fund, and exerts careful care to achieve the benefit of the fund and policyholders (Sinan Mohamed Said Assaf, 2013).

Legislation governing investment funds differed in regulating the legal status of the investment manager. The Kuwaiti legislator authorised the shareholding companies that are involved in the management of funds to initiate the establishment of the fund and authorised them to take over its management as a management company or assign management to another management company (German Investment Funds Law. - Kuwaiti Law No. 31 of 1990). Article (164/1) of the Executive Regulation of the Egyptian Law No. 95 of 1992 stipulates that the Investment Manager must be an Egyptian joint stock company not less than cash paid from its share capital about Millio pounds or a specialised foreign entity as determined by the Board of Directors of the Authority. It is worth mentioning that the



Egyptian text requires the distinction between assigning the investment fund management to a national company, and assigning it to a national company. Theoretically, it is possible to take any form other than the company (Hosni al-Masri).

The majority of legislation gives the authority to appoint the fund manager to the fund founder, or what is known in some legislation as the fund company. The law gave the founder the power to choose the manager who will manage the fund as the best known companies with experience and reputation in the field of fund management, which can yield high earnings (Sinan Mohamed Said Assaf, 2013). According to Article (19) of the Executive Regulations of the Qatari Investment Funds Law No. 25 of 2002, the Fund shall be managed by a Director appointed by the Founder after the approval of the Founder after the approval of the Bank and in coordination with the Market.

Regarding Iraqi law, there was no explicit regulation of the status of the fund manager, as the Iraqi legislator did not regulate the provisions of investment funds. It is primarily that the centres of parts remain shrouded in mystery, and we do not support them (Haifa Mezher Al-Saadi, 2014). That is, it dislocated the contract governing investment funds governing the provisions of the management of joint stock companies. The opinion represents a measure with the difference, and reflects a misunderstanding of the status of the authorised manager in the joint stock company, and the fund manager alike. The different legislations did not agree with each other that the fund is a company. On the other hand, the party that concludes the contract with the fund manager is the founder of the fund so that the first manages the fund to benefit from this management. The three-headed fund appears in terms of the parties, while the authorised director of the joint-stock company is represented directly without the presence of another person as is the case for investors in the fund. But the instructions for the establishment of Iraqi investment funds defined in Article (1) as (is the body specialized in the management of investment funds and contracted together with the Fund to manage its activity in full).

We believe that despite the absence of legal regulation of investment funds, we can note the position of the Iraqi legislator on the issue of the status of the fund manager. The founder of the fund under the law with the absence of precise identification can be a joint stock company or financial investment company or bank, as the reference was received under the law of banks. However, with this launch, the founder of the fund can manage himself or assign it to another person, especially since many legislations allow the founder of the fund to manage it or entrust the task of managing the fund to another person. The most correct view in jurisprudence is that the investment manager is an agent of the fund rather than investors, while another trend is that he is a commission agent for the fund (Haifa Mezher Al-Saadi, 2014). The investment manager has a set of rights, the most important of which is the right to manage, usually a percentage of the net assets of the fund at the same time. On the other



hand, the Fund Manager received a set of duties and obligations, the most important of which are the preparation of securities portfolios, the preparation of a system for the Fund, and the preparation of the prospectus, as well as the commitment to the management of the Fund. As stipulated in the prospectus, he shall draw up an internal regulation governing the work of the Fund and shall be committed to transparency and disclosure.

The Fund Manager shall be required to carry out some work. The Fund Manager may not lend to others or borrow from others or to the Fund. A type with the companies whose securities he deals for the account of the fund he manages. He also prepares him to invest the funds of the Fund in the documents of another fund he manages, and not to perform the main operations, including increasing his commission or the banks and fees he charges. Or buy securities for companies under Liquidation or in the case of bankruptcy or purchase of shares not listed in the Stock Exchange, and may not publish data or information is incorrect or incomplete or withholding important data or information.

It is well known that the Fund Manager during his administration may make a mistake that would trigger his contractual responsibility as a party to a contract. In the event of a breach of one of his legal duties or a failure to fulfil his duties towards investors, he may also be liable to act in the event of damage or negligence. Finally, the task of the Fund Manager shall be terminated upon the expiry of the Investment Fund, or upon its dismissal or removal, and its mission shall terminate in the event of the withdrawal of the license issued by the Supervisory and Management Authority (Sinan Mohamed Said Assaf, 2013).

Conclusion

Through the research, we find a number of conclusions and recommendations that we hope our Iraqi legislator will take into consideration as follows:

- 1. Results:** It appears that the investment fund in all laws under study consists of a group of people who are not considered to be the founder of the investment fund, including: investors, the treasurer and manager of the investment fund.
- 2. Recommendations:** We propose to our Iraqi legislator to legislate a special law on investment funds, not only the existing general rules and direct legislative reference contained in the law of Islamic banks for 2015.



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