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Natural Obligation in Bankruptcy Law: A Comparative Study in the Light of French Law

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Abstract:

Laws regulating bankruptcy - subject of this comparison - recognize what is known as a natural obligation in the cases of bankruptcy composition. However, the natural obligation did not go beyond this traditional field, as is the case in French law which also devotes a special case to natural obligation in the phase of judicial liquidation. The decision to close the liquidation business does not restore creditors' right to file individual claims against the debtor to collect the remainder of their debts, even if the debtor returns rich, meaning that the debt continues to exist without a claim protecting it.

Furthermore, the French decree of 12 March 2014 introduced debtor rehabilitation procedures without liquidation for very small enterprises. If the bankrupt is a natural person, the court must close the rehabilitation procedure within a short period, leading to the writing of some debts without liquidation. The study recommends giving more attention to natural obligation and enhancing confidence in the solutions it can offer. Moreover, this study tries to give more attention not only to the social consideration but also to the new economic consideration which encourages the concept of a fresh start.

Keywords: Natural obligation, Bankruptcy composition, Discharge, Judicial liquidation.

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Introduction

Bankruptcy law, especially in Arab countries, has undergone a remarkable development that shows a new social and economic trend aimed at preserving the commercial enterprise while balancing the interests of creditors and the bankrupt. There is no doubt that releasing the debtor from some debts, temporarily or permanently, can sometimes seem a necessary way to help the enterprise with difficulty. In this respect, the civil obligation can be transformed into a natural obligation or disappear by discharge. That's why it's important to determine the place occupied by natural obligation in this field and its impact on creditors' rights, a matter that had not previously been the subject of an independent study.

As is known the natural obligation is devoid of legal protection, but not without legal value. Indeed, voluntary execution is considered as an execution of what is obligatory, it's neither a gift nor an undue payment, and that's why, the debtor cannot return from his execution to get back what he had paid for. In other words, the natural obligation, on the one hand, is superior to the moral obligation, since its voluntary execution is not a gift, but rather produces all legal effects resulting from the execution of civil obligation, and on the other hand, the natural obligation does not rise to the level of the civil obligation (Vinculum juris) due to the non-application of binding force rule (Pacta sunt servanda) with a consequence that the debtor cannot be compelled to perform it.

Despite the importance of the natural obligation interference in bankruptcy law, there is a lack of judicial cases related to natural obligation in Arab countries (Shyyab, 2022), as well as a scarcity of research studies (Abu Saa'd, 1992; Hasan & Hussain, 2011; Abu Al-Majed, 2018; Abduh, 2006) confined generally to the theoretical field, and not sufficiently exposed to the applications of natural obligation in bankruptcy law, so this is what distinguishes this study, perhaps drawing attention to this important field, which has now a new philosophy based on helping troubled enterprises.

Research problem

When the enterprise stumbles, the merchant resorts to negotiating with the creditors through amicable settlement or through a preventive concordat under the supervision of the court. If the debtor does not succeed in obtaining an agreement by one of these two methods and is not able to overcome his financial difficulties, then he shall be declared bankrupt which may lead him to one of four solutions, namely the termination of the bankruptcy by the disappearance of the interest of it, the simple judicial composition, or the judicial composition by assigning his funds to the creditors, and finally, if none of these paths succeeded, the remaining solution will be the liquidation procedures. It is noted that all these stages involve reconciliation with the debtor and leniency which may lead the creditors to waive a part of their debts. If the debtor adheres to the terms of the composition and implements what he has pledged, then he is not obligated to pay the relinquished debts, but if he fulfills it later, he will not have paid what is not due, but rather fulfilled a debt that he owed as a natural obligation.

Therefore, in harmony with a remarkable development calling for the dedication of more ethics in the commercial world, the research question is summarized by studying the extent of the concept of natural obligation in bankruptcy law? The research reviews, according to the descriptive method, the evolution of French law, and then also investigates the emergence of this evolution in some Arab law, especially, Egyptian, Saudi and Bahraini law. Indeed, contrary to French law, Arab laws do not admit generally the existence of natural obligation in the phase of judicial liquidation. Thus, in an attempt to choose the best solutions, it is worth comparing and investigating, using an analytical method, the justifications given by both French and Arab laws. It is also worth asking the question if is it possible to imagine such a natural obligation in Arab laws in the phase of liquidation?

Therefore, the plan will be divided into two parts, the first will be enshrined to the natural obligation in the reconciliation phase, while the second will be dedicated to the natural obligation in judicial liquidation.

1. Natural obligation in the reconciliation phase

In the period prior to the cessation of payments, French commercial code (FCC) regulates several preventive and reconciliation measures with creditors (Conciliation, ad hoc mandate, Safeguard proceedings), often aimed at persuading creditors to release the debtor from certain debts. In the safeguarding phase, the remission of receivables is carried out under the control of the judiciary (article L.626-18 of FCC), which has led, under previous laws, to the stability of cases law because of the no conformity between the remission of debt in the interest of the bankrupt and the remission of debt provided for in the civil code (discharge), and this is confirmed by the judicial decisions which do not allow the surety to benefit from the release granted to the bankrupt, although it is made with the consent of the obligee and isn't imposed on him (Saint-Alary-Houin, Le dirigeant-caution, 1996). Currently, the surety benefits from released debts if the bankrupt is a natural person (Houin-Bressand, 2008), but the debt is not extinguished completely unless the bankrupt complies with all the conditions of the safeguarding plan(1). In any case, the end of the bankruptcy proceedings, without paying some debts, gives way to a natural obligation.

Given that French law has undergone a major evolution in this area, where the preventive concordat has been abolished and replaced by judicial settlement procedures (Judicial rehabilitation), the researcher will not dare to compare it to the Arab laws, which is not permitted by the scope of this study, but rather its objective recedes to study only some cases of natural obligation in the context of bankruptcy. So, hereafter, the existence of natural obligation will be discussed before (1.1) and after the declaratory judgment of bankruptcy (1.2).

1.1. Natural obligation before the declaratory judgment of bankruptcy

Not every conciliation, which includes a remission of debt, leaves the bankrupt with a natural obligation. It seems that the amicable settlement leads to the complete extinguishment of the debt, while the preventive composition leaves a natural obligation at the charge of the debtor.

(1) Cass. com., 9 May 2007, n° 06-12111, Rev. proc. coll. 2007, p. 131, n° 12, note C. Lebel. – Cass. com. 3 October 2006, D. 2006, p. 2734, obs. A. Lienhard.

1.1.1. Discharge resulting from amicable settlement

When the merchant senses signs of turmoil in his business or a financial crisis with a high probability of stopping to pay his debts, he may resort to reaching an amicable settlement with his creditors. As part of this amicable settlement, the creditors grant him an extension of time or even waive a part of their debts or both options. This settlement fulfills the interests of both debtor and creditors. For the debtor, he will continue to exercise his commercial activity and dispose of his money, hoping for relief from financial hardship, and also avoid him, and his creditors, the bankruptcy proceedings as well as its expenses and fees. It is worth noting that the merchant's right to seek an amicable settlement remains valid even after he has stopped paying his debts as long as the creditors have not filed a bankruptcy complaint against him (Al-Fiqy, 2008, p. 22).

Laws generally did not regulate out-of-court settlement, except the Saudi system, which mentioned it in the Bankruptcy Protective Settlement Act of 1416 AH and its provisions were governed by the implementing regulation of the law. As the amicable settlement is a valid contract, subject to the general rules, it does not have to be ratified by the court and only the creditors, who have accepted it, are bound to respect it (Taha, 1985, p. 309; Al-Fiqy, 2008, p. 23). However, the most important dilemma is that only one creditor can refuse the amicable settlement by insisting on filing for bankruptcy (article 4 of the implementing regulations of law No. 12, dated 04/14/1425 AH).

But if the debtor succeeds in reaching an amicable settlement, the creditors may include herein a remission of part of their debts. What is the nature of this remission and its effect? Does the bankrupt owe a natural obligation to pay the part released if he is able to do so later? Answering this question requires pointing out, for creditors, the objective of reconciliation is not to offer an advantage to the debtor, but rather, instead of obtaining a lower percentage in the case of following legal bankruptcy procedures, they seek to achieve their own interest by collecting the majority of their debts. Thus, law scholars, almost unanimously, agree not to consider reconciliation, which includes a reduction of debts, among gratuitous contracts, but rather among onerous contracts. However, it is noted that the remission of debts under the amicable settlement benefits the joint debtor as well as the guarantor by the implementation of

the general rules whereby the accessory shall be extinguished, according to the extinguishment of the principal (Abdel-Raheem, 1998, p. 1457; Al-Fiqy, 2008, p. 24). In this context, we do not see, despite the creditors' interest in this contract, that the debtor would owe a natural obligation, since it includes the meaning of discharge. However, the solution is not the same in the event of preventive composition exercised under the court's supervision.

1.1.2. Natural obligation resulting from preventive composition

If the merchant does not succeed in reaching an amicable settlement, he can resort to the judiciary, before the payment failure situation or during a certain period of this situation, in order to request a preventive composition. If it is impossible, for the debtor, to overcome his financial crisis except by freeing him from certain debts, the creditors can possibly grant a delay and a release of some debts, and therefore, these waived debts exist only as a natural obligation that can only be paid at the debtor's discretion (Al-Fiqy, 2008, p. 51; Taha, 1985, p. 555). This means that forgiving a part of debts is not considered as a donation, nor a discharge like the one foreseen by the civil code (See, articles 371-372 of Egyptian civil law No. 131 of 1948, and articles 362-363 of Bahraini civil law No. 19 of 2001), but rather as a simple means of obtaining the part that the debtor has committed to pay. This also means that the debtor, who subsequently pays the debt assigned voluntarily, is considered to be paying a natural debt that he actually has and which prevents him to claiming its recovery.

In this context, according to article 68 of the Egyptian Restructuring, Preventive Composition, and Bankruptcy Law (ERPCBL) of 2018, the preventive composition differs from the amicable settlement, on two essential points: On the one hand, the preventive composition is carried out under the supervision of the judiciary, voted only by the majority of creditors and imposed on those who didn't agree to it after its ratification by the court. On the other hand, the debt reduction does not discharge the guarantor or the joint debtor. If one of them pays the debt in full and within its original terms, they may not have recourse against the debtor except to the extent determined in the protective composition and at the time specified in it, so that composition does not lose its meaning and so that the debtor's obtained advantages, thanks to the composition, does not be loosed (Al-Fiqy, 2008, p. 52).

As per Saudi law, it should be noted that it had reformed the effect of debt forgiveness in the phase of preventive composition. Formerly, article 10 of the bankruptcy protective settlement law of 1416 AH, had stipulated that the creditors who have not agreed to release their debtor remain entitled to claim all their debts, and, moreover, the decision that closes the settlement proceedings must specify the repayment dates of these debts. As for the new Saudi bankruptcy law (SBL) No. M/50 of 2018, it abolished the aforementioned law of 1416 AH, and regulated the provisions of the protective settlement procedure in chapter three. Under article 13 of the SBL, the debtor may file with the court an application form for the commencement of a protective settlement procedure if he is more likely to suffer financial difficulties leading to distress, or if he is distressed or bankrupt. Also, under article 14 of SBL "The application request for the commencement of a protective settlement procedure shall be registered with the court after filing such request together with the proposal, information and related documents". It clearly appears from article 16/l and article 39 of the bankruptcy law implementing regulations that the settlement proposal may include the reduction of some debts. Correspondingly, one of the effects of the court's ratification of the proposal is that the plan shall be binding upon the debtor, the creditors and the owners (article 37). This means that the released debt under the settlement proposal cannot be claimed in court, making it in the same rank as a natural obligation. This is then the same solution adopted previously by the UAE Bankruptcy Law No. 9 of 2016 (see, articles 40/f, 47/1-7 and 49/3), in which large importance is given to the preventive composition, whereas the Bahraini reorganisation bankruptcy law of 2018 regulates currently only two bankruptcy procedures, namely the reorganization and the liquidation.

Hence, although the aforementioned laws didn't use the term natural obligation per se, they enshrine it in the phase of preventive composition. Furthermore, to our knowledge, we are not aware of any court decision enshrining this natural obligation. However, Arab scholars, almost unanimously, agree that the subsequent payment is considered to be a fulfillment of a natural obligation.

Finally, it is possible that the debtor’s default may not lead to a preventive composition, as the debtor may not request a bankruptcy composition or maybe his request is rejected, nullified or rescinded. Also, in all of these

cases, the debtor, who has stopped paying his debts, just wait for a judgment declaring his bankruptcy, which is done either at his request, in order to prove his good intentions, at the request of any creditor, by a court ruling on its own, or at the request of any competent authority. This stage is also not without the recognition of natural obligation in some cases, which we will discuss now.

1.2. Natural obligation after the declaratory judgment of bankruptcy

If a debtor is declared bankrupt due to cessation of payment a number of effects will be produced (article 87 of ERPCBL). At first, the bankruptcy officeholders shall be notified by a registered letter with acknowledgment of receipt to undertake the bankruptcy procedures such as declaring the bankruptcy judgment in the commercial register and calling the creditors to submit their claims to be verified and recorded in a specific list (statement of claims). Then bankruptcy proceedings, and their effects, aim to achieve one of two objectives, which are either a judicial reconciliation either a judicial liquidation. Nevertheless, the following discussion will deal with the natural obligation resulting from judicial reconciliation in Egyptian law, and then, in Saudi and Bahraini laws.

1.2.1. Egyptian law

As per ERPCBL of 2018, article 178 allows the judge-commissioner, at the request of each stakeholder, and at any stage of the procedure, to initiate mediation procedures to reach composition and to invite creditors, whose debts have been definitively or temporarily accepted, to attend deliberation regarding the request of composition. The bankruptcy officeholder shall submit a report to the creditors' group including bankruptcy status, taken procedures in this regard, the bankrupt’s proposals for composition and his opinion thereon. As for the content of the composition, article 671/1 of Egyptian trade law (ETL) had stated that: "The composition may comprise granting the debtor a time for settling the debts. It may also comprise discharging him of part of the debt obligation". As for the ERPCBL, it did not explicitly stipulate the content of the composition, but it is implicitly understood from its provisions that the composition may include the reduction of debts (article 133/2 and article 187/1).

As for the nature of composition, there is no dispute that it is not a novation of debt and does not affect its nature or characteristics. Moreover, it cannot violate the public order especially the principle of equality between creditors. Since the composition may include a waiver of part of the debt, the question then arises whether this waiver is considered as a discharge or not?

Despite its use of the term "discharge", article 610 of the ETL also states that, in case of several obligors for one debt, the conditions of reached composition with the bankrupt shall not apply to the other obligors. This disposition has been completely repeated in article 133 of the ERPCBL of 2018. This indicates a fundamental difference between the discharge defined by the civil law, because the surety and the joint party benefit from it, while they do not in the case of release via judicial composition. For this reason, Egyptian legal scholars criticized the use of the term discharge (Ibra'a) in the aforementioned text (article, 671/1), and so, they considered that waiving debt pursuant to the judicial composition is not a "discharge" nor a donation, but rather a form of onerous contracts. Indeed, the creditor seeks to obtain part of his debt and, essentially, to avoid losing a larger part if the bankrupt's funds is sold judicially. In clearer terms, the discharge in civil law leads to a complete extinguishment of debt, while releasing part of the bankrupt's debt, by virtue of judicial composition, does not discharge the debtor because the debt remains stuck on the bankrupt's charge as a natural obligation devoid of compulsory execution (Abdel-Raheem, 1998, p. 1469; Basyuony, 2008, p. 202).

1.2.2. Saudi and Bahraini laws

At first, it should be noted the precedence of UAE law no. 9 of 2016 which introduces the restructuring procedure and the specificity of its rules which can avoid the debtor's bankruptcy. Indeed, the existence of natural obligation can be affirmed because of the debts' reduction accepted by the plan ratified by the court (see, articles 98, 101/f, 107/7, 108/3). However, the following discussion will be limited to the restructuring procedure in Saudi and Bahraini laws applied also on bankrupt or distressed debtors (article 42 of SBL and article 6 of BRBL).

In Saudi bankruptcy law (SBL) of 2018, the financial restructuring procedure is described as more severe than the protective settlement procedure,

as it gives the court and creditors a broader power to intervene and take action, also it results, from its opening, the suspending of claims by force of the law and imposes on the debtor some restrictions in managing and disposing of his funds (Qurman, 2019, p. 341). The debtor is obligated, under article 75 of the SBL, to prepare the financial restructuring proposal. This law considered the financial restructuring proposal as a free agreement between the debtor and creditors under the supervision of the bankruptcy officeholder, so it may be agreed to reschedule the debts, distribute them, waive part of them or combine all these solutions (Qurman, 2019, p. 367). If the court ratifies the proposal, voted by a special majority (art. 79), the restructuring plan becomes binding on the debtor and creditors (art. 37, 91). However, the Saudi law did not indicate the ratified proposal's effect on whether it leads to the release of the debtor or not. However, it seems that the written off debts don't become obligatory in the judiciary, but rather become only a religious duty, a situation which is somewhat similar to natural obligation; It's an actual debt that does not allow the debtor to claim a refund if he paid it.

The same trend can be seen in the study of Bahraini reorganization and bankruptcy law (BRBL) No. 22 of 2018, which aims to preserve and protect the bankruptcy assets, maximize the value of the bankruptcy assets to the maximum extent possible, as well as to consider bankruptcy procedures fairly, transparently and effectively (article 2). It also attempts to reorganize the debtor and avoid its liquidation whenever reasonably possible. In any case, article 17 of the aforementioned law stipulates that "the court shall suspend the hearing of the application for the commencement of bankruptcy proceedings pending settlement of any demand presented to the court concerning starting the reorganization proceedings. When considering the application, the court shall accept reorganization where it will lead to a settlement more convenient to the creditors than liquidation or there are economic reasons for the debtor to resume his business". If the court approves the reorganization proceedings, the reorganization trustee must prepare a reorganization plan proposal (see, articles 96, 97, 106, 107). The aforesaid law did not explicitly indicate that the proposal content may include a creditors' waiver of part of their debts, but this is implicitly and clearly understood from the provisions of the law (articles 113 -116).

The ratified reorganization plan by the court is binding on all creditors, including those who didn't vote for it and those who did not approve it. Particularly, unless the plan stipulates otherwise, the ratified plan entails, by virtue of article 116/c, discharge the debtor's patrimony and exempting him from any other obligations or liabilities, of whatever nature, that arose prior to the ratification, whether the debt or right holder voted for or against the plan or submitted a claim in the case. However, the discharge or the exemption from some obligations or liabilities, under the said article, shall not affect the liability of any person responsible for this debt or obligation including any guarantor of another debtor's debt, or guarantor of an obligation under a letter of credit related to the debt or obligation (articles 116/c, d, f). In this context, we can make the same criticism that the Egyptian legal scholars had given to the use of the term "Ibra'a", by the repealed article (671/1) of ETL. It can also be said that the release stipulated by BRBL of 2018 does not lead to the complete extinguishment of the debt, but rather that, the debt remains at the debtor's expense as a natural obligation.

Although the natural obligation is envisaged by the academic analysis of legal texts, the rulings of Arab courts did not care about the enshrinement of natural obligation directly or indirectly. On the other hand, if we leave the field of composition and financial reorganization, we find, in the judicial liquidation phase, a modern movement enshrining not only a natural obligation but also welcoming a discharge for bettering the bankrupt's situation and serving social or economic purposes. Nevertheless, let's to explain, over and above that, the Arab laws position that did not follow this trend.

2. Natural obligation in judicial liquidation

If none of the composition procedures succeeded, the bankruptcy may end by liquidation without paying the entire debt, but it may be further closed due to insufficient assets. Then, what is about unpaid debts? Do they remain obligatory? Or do they turn into a natural obligation?

In French law, bankruptcy provisions underwent a long development, also this appears by observing many laws promulgated in their regard which ended up making commercial enterprise's rescue the first priority. If this is not possible, the enterprise must be liquidated. Hence the ruling that decides

to terminate bankruptcy by liquidation drops the terms of debts, restrains the debtor from disposing of his money and prevents him from practicing any independent activity (trade, craft, agriculture, free profession).

In this regard, article (L. 643-11) of FCC states that the final decree closing the judicial liquidation, due to an excess of liabilities over assets, shall not allow creditors to recover their separate right of action against the bankrupt. It's important to note that the term "their separate right of action" used in the said article explains the fact that the creditors own a right of action and were prevented from exercising it by the commencement order issued according to article (L. 622-21) of FCC. What is the basis for this approach, which undoubtedly leaves the bankrupt with only a natural obligation, seeing that the right exists, but there is no compulsion for its implementation, and therefore voluntary payment is legally valid (Jacquemont, Borga, & Mastrulla, Droit des entreprises en difficulté, 2019, p. 602). Is it possible to imagine such a natural obligation in Arab laws?

2.1. Judicial liquidation impact on creditors' rights in French law

In French bankruptcy law, now called the law of collective insolvency procedures or the troubled enterprises act, the winding-up proceedings is no longer a priority. In the face of a troubled enterprise, one of two measures is taken after a period of observation, either Safeguard proceedings or liquidation proceedings. If it is subject to safeguard proceedings, and within an amicable stage called the conciliation period, the judge can order to stay the claims against the enterprise, and try to urge some creditors to absolve the debtor of some debts, but he cannot force them to do so.

But if liquidation procedures are taken, the decision to close it, due to insufficient assets, does not restore to the creditors the right to file lawsuits against the debtor personally (article L. 643-11 of FCC). This means that the closing of judicial liquidation, due to insufficient assets, prevents the creditors from claiming their debts in the future (Daigre, 1999). So, in the same time, the debtor only would owe a natural obligation that is not compelled to fulfill it by the judiciary. Furthermore, the liquidation could end, in certain circumstances, with the final cancellation of the bankrupt's debts.

2.1.1. The natural obligation

It is self-evident that the philosophy of the troubled enterprises act aims at excluding failed enterprises. However, this analysis is only valid for the legal person who will be dissolved, liquidated and terminated. But if the debtor is a natural person, the law will preserve his existence as a human being. Therefore, it will be better to make him enjoy a new opportunity to create a decent life by clearing his previous debts, and so, this will qualify him to return to economic life (Jacquemont, 2000, p. 200; Vallens, 1997; Schiller, 2004).

In fact, article (L. 643-11) of the FCC, introduced by law n° 85-98 of 25 January 1985, has been criticized since then because it deprives creditors of the possibility to initiate their individual lawsuits against the debtor even after completion of the liquidation procedure without payment of bankrupt's debts. But it was justified on two sides (Saint-Alary-Houin, 2018, p. 909), on the one hand, before the law of 25 January 1985, there was no equality between the individual merchant who bears indefinitely the debt and the person who invests his trade through a company. Indeed, as a legal person, when the company is subject to bankruptcy, its director will not be pursued to pay any debt. On the other hand, the tendency to rid the bankrupt of his debts is based on social and economic justifications aimed to enable him to rise again and start a new economic or commercial activity without bearing the concerns of the defaulted debts due to his previous activity. This trend is inspired by Anglo-Saxon ideas known as Fresh Start (chapter 7 of the American bankruptcy code).

However, the guarantor and the other obligors are not exonerated since the suspension of individual lawsuits is only specific to the debtor, and thereby, the right exists and it is not related to an extinguishment of the obligation without fulfillment, but rather it is a simple application of bankruptcy rules that keep, in the same time, the debtor liable for a natural obligation towards creditors (Chaput, 1996, p. 285). On the other hand, article (L.643-11-II) stipulates that the surety or other obligors (the personal guarantor or the real guarantor) may sue the debtor if they have paid in his stead (Martin-Serf, 2015). Rather, article (R. 643-20) allows, in such a case, the guarantors and other obligors to obtain an enforceable title if they actually fulfilled the bankrupt's debt (Saint-Alary-Houin, 1996).

Also, under law No. 845-2005 of 26 July 2005, the French legislator also introduced simplified judicial liquidation, which, in principle, is subject to the rules of judicial liquidation, taking into account its own rules. The simplification aims to avoid the bankruptcy funds being overburdened with judicial expenses and, at the same time, allow the debtor to engage in a new activity. Simplified liquidation aims to avoid perpetuating bankruptcy in a way that prevents the debtor from practicing any activity except for salaried work. Likewise, it serves, at the same time, the interest of the creditors who wish to repay their debts as soon as possible. Also, article (L. 643-11) applies in the case of simplified liquidation, and hence the debtor is considered to be discharged from debts, since the ruling to close the bankruptcy, due to insufficiency of its funds, does not restore to the creditors the right to exercise their claims against the debtor. This situation leaves the debtor liable for a natural obligation. On the other hand, the guarantor is not acquitted, but he has the right of recourse against the debtor (Saint-Alary-Houin, 2018, p. 925).

With the exception of a few court decisions (Bellis, 2018, p. 697), French case law is stable on recognizing the existence of a natural obligation owed by the bankrupt after the closure of the collective proceedings when his product hasn't led to the payment of all debts. In particular, the court of appeal of Pau decided that the prevention of individual actions against the debtor, whose funds were liquidated, is closely related to the bankruptcy proceedings, but these proceedings do not lead to the extinction of the debt, which means that the fulfillment after the closure of the bankruptcy must be treated as the execution of a natural obligation totally valid(1). This is also the position of the Court of Justice of the European Union(2). Consequently, the bankruptcy proceedings make the bankrupt liable for a natural obligation in respect of outstanding debts, and therefore, the recognition of a natural obligation, without any intention to harm others, does not mean creating a new obligation on the charge of the

(1) CA Pau, 27 July 2015, 13/04047, rapp. Morillon. – In the same sense, Colmar, 30 September 2013, 13/0639, rapp. Scheider. – Colmar, 21 April 1999, 3B9704244, Juris-Data. – Cass. com., 3 december 1996, 94-21.010, rej. (Lyon, 21 octobre. 1994), prés. BÉZARD, rapp. Rémery. – See also (Bellis, 2018, p. 697).

(2) CJCE, 29 avril 1999, C-267/97, prés. J.P. Puissochet, rapp. D. A. O Edward, concl. M. Antonio La Pergola, Eric Coursier against Fortis Bank SA et Martine Bellami, épouse Coursier.

debtor, but rather the recognition of a pre-existing debt (Bellis, 2018, p. 701). As long as there is a separation between the right and the claim, and as long as the legislator recognizes the existence of the right, it leaves room for the existence of a natural obligation (Bellis, 2018, p. 702). Even more, the French Decree No. 2014-326 of 2014, in introducing the procedures for rehabilitating the debtor without liquidation, led to the cancellation of the debts.

2.1.2. The discharge

By Decree (Ordonnance) No. 2014-326 of 12 March 2014, the French legislator introduced a procedure of business reinstatement without liquidation (Rétablissement professionel du débiteur), since the liquidation is financially costly and ineffective for very small enterprises (Currently see, article L. 645-11 of FCC). This decree aims to write off the debts (Effacement des dettes), for the debtor who has little money to allow him to rise again (Rebond du débiteur). However, the scope of this procedure is narrowly defined to avoid abuse in this area. Legal persons do not benefit from this procedure which is limited to natural persons who practice independently commercial, artisanal, agricultural or liberal professions. It is required that the debtor be in good faith and that the collected funds do not exceed five thousand euros. If the court accepts the debtor's request, it must close the bankruptcy business quickly within a short period not exceeding four months (articles L. 645-1 to 645-12 of FCC).

The closure of the business reinstatement procedure without liquidation, entails the cancellation of debts vis-à-vis creditors whose debts had arisen before the judgment opening the procedure. The matter pertains to the writing off debts without payment, which leaves the debtor owing only a natural obligation. Perhaps this is the most severe dedication to the theory so-called right not to pay his debts. However, the nature of the writing off debts has been the subject of debates, and some legal academics do not see that it entails the extinguishment of the obligation without performance, there is a non-legal reason to consider it as a release that cancels the existence of the right, but rather an act which leaves a natural obligation at the debtor's responsibility (Race, 2015). While another side of legal scholars sees writing off debts as a reason for the extinguishment of the obligation without payment (Macorig-Venier, 2014), as if the debt didn't exist before. In addition, the guarantor cannot have recourse against the debtor if he pays in his stead (Legrand, 2015). Undoubtedly this situation leaves the debtor with a natural obligation in confront of the guarantor.

On the doctrinal level, Ripert was one of the first who highlighted the term "the right not to pay his debts" in French academic doctrine (Ripert, 1936). There is no doubt that the consecration of such a right finds its justification due to the state of economic stagnation, which is no longer a transient state, but rather a continuous one with the succession of economic crises leading to the presence of people unable to pay their debts in the short and medium term (Rakotovahiny, 2015). Rather, social considerations give this right, a fortiori, an additional support by allowing the bankrupt to obtain another opportunity preventing him from falling into poverty or rendering him unable to meet his necessary and primary needs. (Oppetit, 1991; Dion-Loye, 1995). The creditor's right has entered then into a legal framework and has become subject to loss in being restricted by humanitarian and social considerations that protect the debtor against the risk of social exclusion (Rakotovahiny, 2015).

In fact, the justifications are not limited to social values, but are also based on economic justifications such as trying to save the commercial enterprise to maintain activity and jobs and to reduce unemployment, as well as encouraging the establishment of new enterprises (Saint-Alary-Houin, 2018, pp. 927-931). This trend, which prompted some to talk about the birth of a law for the poor in France (Guinchard, 1999), undoubtedly violates article (1234) of the French civil code, which requires fulfillment of the obligation, as it violates article (1134) of the same code establishing the mandatory force of the contract. Thus, this development leads to the transformation of the civil obligation, which is legally obligatory, into a natural obligation. As for the question that concerns us now, is it possible to imagine such a development in Arab laws?

2.2. Judicial liquidation impact on creditors' rights in Arab laws

What is the position of Arab laws about the bankrupt's remaining debts following the end of the bankruptcy through judicial liquidation or as a result of its closure due to the insufficiency of its funds? The answer to this question will be limited to dealing with some laws, which have a modern bankruptcy law, namely Egyptian, Saudi, and Bahraini law.

2.2.1. Egyptian law

If the bankrupt cannot reach a settlement with his creditors, the bankruptcy will end in liquidation, unless it is not closed due to the insufficiency of its funds. The question arises therefore about the remaining debts resulting after these two procedures.

A. Unpaid debts after closing liquidation procedure

At the end of liquidation proceedings, the bankruptcy judge summons the creditors to a final meeting to discuss the final account presented by the trustee in the presence of the bankrupt or after he has been officially appointed to attend, and then, a record is drawn up of everything that took place in the meeting. If the account is approved unanimously, by the bankrupt and the creditors, the union(1) shall be dissolved, and the bankruptcy shall be considered terminated by rule of law, after ratification of the account referred to therebefore (article 234 of the ERPCBL).

It is important to remember that, according to article 696 of ETL of 1999, the unpaid portions of the debt remain owed by the debtor as a payable civil debt, which allows each creditor to claim them separately and levy execution against the bankrupt's future funds without the need to obtain a final judgment for the debt from the trial court. However, it is not possible to declare bankruptcy because of these debts, it is not permissible, in fact, to declare bankruptcy twice because of the same debt (Abdel-Raheem, 1998, p. 1486). The same ruling was established in article (175) of the ERPCBL of 2018, which also applies to the case of closing the bankruptcy due to insufficient funds, but the matter needs further clarification.

B. Closing the bankruptcy due to insufficient funds

Under the Egyptian trade law (ETL) of 1999, if the bankruptcy assets are not sufficient to cover the expenses of the urgent preparatory procedures, then it is impossible to continue the procedures to achieve their goal, which is either composition or union. Therefore, in line with the legislative orientation to simplify the bankruptcy procedures (Al-Fiqy, 2008, p. 308), the judge

(1) The creditors shall be legally deemed in a state of union after a deposit of the final list of uncontested debts: article 171 of the ERPCBL.

may, on his own or based on a report of the bankruptcy trustee, order, before ratifying the composition or before establishing the state of union, to close the bankruptcy procedures temporarily due to insufficient funds (article 658/2 of ETL). Contrary to composition and union, closing the bankruptcy due to insufficiency of its assets is neither a dissolution nor a termination of it. However, it is worth noting that the closure of the bankruptcy is temporary. The explanatory memorandum of article 658 of ETL had confirmed that if new funds appear sufficient to continue its procedures, or new funds sufficient at least to cover the bankruptcy's works and its urgent expenses have been transferred to the bankrupt, the bankruptcy shall be opened again to resume its progress from the last procedure in which it was interrupted (Awaḍh, 2010, p. 407; Al-Fiqy, 2008, p. 307). If the necessary funds are not available to resume the bankruptcy procedures, it may not be reopened even if the situation remains like this until the death of the bankrupt. Rather, the decision to close the bankruptcy due to the insufficiency of its funds is often the last action taken therein, and thus the bankruptcy works remain suspended indefinitely.

It is clear that ERPCBL of 2018, which canceled chapter five of the ETL of 1999 - articles (550-772) - responded to this doctrinal approach and decided in article (173/2-3) that the expiry of three months from the date of the bankruptcy closure decision, without establishing the existence of adequate funds to cover the bankruptcy work expenses, and without submission of application to cancel the closure order, the bankruptcy shall be considered closed by virtue of the law. Thus, one of the natural obligation cases may arise due to unfulfilled debts as a result of the bankruptcy closure decision for insufficiency of funds. However, the ERPCBL of 2018, did not adopt this solution, as stipulated in article (175/1) that: "The bankruptcy closure decision for insufficiency of funds shall result in restituting to each creditor the right to take proceedings and assume the individual cases against the bankrupt". This means that the debtor remains bound by a civil obligation and not a natural obligation. It appears that a similar position is adopted by Saudi law.

2.2.2. Saudi law

Due to the economic development, many legislative interventions were imposed in Saudi law to address bankruptcy issues with a constructive way in order to rescue the faltering projects and restore their productive efficiency.

The latest was the Saudi bankruptcy law (SBL) of 2018, under which article 125/2 stipulates the following: "A natural debtor, after the removal of his name from the bankruptcy register, shall not be released from a debt for which he remains liable save by a special or public release from the creditors". In this case, the "natural debtor shall be considered as bankrupt in relation to the outstanding rights of creditors, for a period of twenty-four months from the date of the termination of the liquidation procedure. During such period, the creditors shall not have the right to submit any request for the commencement of any procedures against the debtor" (article 125/3). Thus, in contrast to the French law, in which the debt turns into a natural obligation, under Saudi law the debtor is not exempt from the remaining debts he owes. Rather, these debts remain due as civil obligations.

Moreover, the SBL of 2018 introduced the administrative liquidation procedure, as the first article defines it as: "A procedure under the management of the bankruptcy commission, aiming to sell the bankruptcy assets which sale proceeds are not expected to cover the expenses of the liquidation procedure or the small debtors' liquidation procedure". Once the liquidation procedure has been completed, the individual debtor will be rehabilitated, but shall not be released from a debt for which he remains liable[(1)] save by a special or public release from the creditors (Al-Ahmad, 2019, p. 246). This position adopted by Saudi law contradicts the French commercial code according to which the final decree closing the judicial liquidation due to an excess of liabilities over assets shall not allow creditors to recover their separate right of action against the debtor (Article L. 643-11). So, the Saudi legislator thus did not allow the natural obligation to exist in the event of the liquidation and did not adopt the western theory of debt write-off which encouraged the merchant to return to commercial life. But it seems that a different position is adopted by Bahraini law.

2.2.3. Bahraini law

Unlike other Arab laws, Bahraini Reorganization and Bankruptcy Law (BRBL) of 2018 establishes one of the cases of debt acquittal in the event of liquidation. Article (150/a) states that "Where the debtor is a natural person and

(1) Explanatory memorandum of the project of bankruptcy law of 2016.

unless otherwise provided in this article, the court shall be entitled to release his patrimony from his debts and liabilities arising prior to the commencing the bankruptcy proceedings". According to article 150/a-b, such release shall take place, if several conditions are met, in case of insufficiency of assets to pay his liabilities on their maturity date. Subsequent to the court's release of the debtor's patrimony, no judicial or enforcement proceedings or such other procedure may be brought against the debtor to claim debts and liabilities arising prior to the commencing the bankruptcy proceedings. Thus, as in the French law, such a discharge does not lead to the complete extinguishment of the debt without payment, but rather the debtor owes, in such case, a natural obligation, and this is without prejudice to the general rules that allow the return of the guarantor or other obligors to the debtor if they fulfilled in his stead. It can be said that Bahraini law, based on the same justifications that give the debt a social tinge, is not devoid of economic motives to give the debtor another opportunity to contract and engage in trade again. However, Bahraini law didn't go further and didn't devote, along the lines of French law, a system of debtor rehabilitation without liquidation which enshrines the phenomenon of writing off debts which also benefits other debtors.

3. Conclusion

Despite the vital concept of the natural obligation leading to many cases in the French judiciary, it has not been able to impose its presence in modern Arab laws on a satisfactory scale.

First, Arab legal scholars recognize that the remaining debt owed by the debtor after the reconciliation phase (preventive composition or judicial composition) is a natural obligation, and it is in spite of the absence of legal text, or any court ruling, enshrining explicitly the term natural obligation. The justification of this doctrinal position comes forth because of reconciliation approval is made, under the control of the judiciary, with a special majority and not unanimously. Also, the debt does not expire completely, but remains stuck in the hands of the sponsor and the other obligors. This is in contrast to the amicable settlement, which is concluded by the unanimous consent of the creditors and leads to the expiration of the debt for the guarantor and the other obligors.

Second, in Arab laws, the natural obligation did not go beyond this traditional field, as is the case of French law which also devotes a special case to the natural obligation in the phase of the judicial liquidation. In fact, the decision to close the liquidation business does not restore to the creditors the right to file individual claims against the debtor to collect their remainder of debts, even if the debtor returns rich, and even though the debt has not extinguished, meaning that the debt continues to exist without a claim protecting it.

Third, remarkably, and in contrast to Arab laws, article 150 of the BRBL has adopted similar solutions as those applied in French law. So, the liquidation did not lead to the complete extinguishment of the debt, but left the debtor with a natural obligation, and that is why the creditors may have recourse against the guarantor and other obligors, and if they fulfill instead of the debtor, they can recourse against him to the extent of what they paid. As for the relationship between the bankrupt and the creditors, especially in the absence of a guarantor or other obligors, there is nothing left in the debtor's liability except a natural obligation. Incidentally, it seems important to remember that these rules are limited to the natural person, since the legal person that is liquidated will cease to exist forever, while the natural person will retain its existence as a human being.

Finally, more daringly, the French decree of 12 March 2014 introduced debtor rehabilitation procedures without liquidation for very small enterprises. This procedure is considered the most severe and audacious, because it does not allow even the guarantor and the other obligors, if they have fulfilled, to have recourse against the debtor, the debt is extinguished therefore exactly as in the discharge. However, we believe that the debtor who subsequently fulfilled the cancelled debts, whether to the creditors, to the sponsor or other obligors, is considered to have fulfilled a natural obligation.

Recommendations:

The study recommends giving more attention to natural obligation and enhancing confidence in the solutions it can offer, not only at the ethical level, but also at the economic level by encouraging trade and urging many persons to engage in the commercial world. Likewise, we can give some recommendations:

At the legislative level, the Bahrain reorganization bankruptcy law No. 22 of 2018 is to amend article 116/c, to remove the term "discharge". Currently, article 116/c states that "Unless the plan otherwise provides, its ratification shall discharge the debtor's patrimony and release him of any other obligations or liabilities . . .". So, it's more accurate to delete the term discharge and redraft it to be as follows "its ratification shall release the debtor's patrimony of any other obligations or liabilities . . .". Redrafting this article will avoid the contradiction with paragraph (f) of the same article as with the Bahraini civil code (articles 362-363). Also, we can suggest deleting the term discharge from all the paragraphs of article 116, using only the term release or exemption (إعفـاء).

At the level of doctrinal studies, if the interest of this research is to determine the place of natural obligation in the legislations - subject to the comparison –, it is hoped that it was able to draw attention to the justification and the requirements that underlies. In this context, the position of French law, at the end of the liquidation phase, which give room to a different case of natural obligation, deserves to be discussed in another study in more depth, particularly, the harmony between article (L.643-11) of FCC and the adoption of a one-person company. More clearly, the question that arises in Arab laws is the following: why does the manager (sole partner), who exercises his trade via a single-person company, have a limited liability within the limit of the capital of the company (Yusef, 2021), while the individual trader, who has been liquidated of all his funds, remains obligated to the rest of the debt?

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الالتزام الطبيعي في قانون الإفلاس: دراسة مقارنة في ضوء القانون الفرنسي

فؤاد شياب[1]

ملخص البحث:

تعترف القوانين العربية – محل المقارنة، بما يعرف بالالتزام الطبيعي في حالات الصلح من الإفلاس. ومع ذلك، فإن الالتزام الطبيعي لم يتجاوز هذا المجال التقليدي، كما هو الحال في القانون الفرنسي الذي يخصص أيضًا حالة خاصة للالتزام الطبيعي في مرحلة التصفية القضائية. فقرار إغلاق أعمال التصفية لا يعيد للدائنين الحق في رفع دعاوى فردية ضد المدين لتحصيل ما تبقى من ديونهم، حتى لو عاد المدين ثريًا، مما يعني أن الدين لا يزال قائماً دون دعوى تحميه.

والأمر الأكثر جرأة هو أن المرسوم الفرنسي المؤرخ 12 آذار / مارس 2014 أدخل إجراءات إعادة تأهيل المدينين دون تصفية للمؤسسات الصغيرة للغاية. فإذا كان المفلس شخصا طبيعيا، فعلى المحكمة أن تغلق إجراءات إعادة التأهيل خلال فترة وجيزة، مما يؤدي إلى شطب الديون دون تصفية. وتوصي الدراسة بإيلاء المزيد من الاهتمام للالتزام الطبيعي وتعزيز الثقة في الحلول التي يمكن أن يقدمها. علاوة على ذلك، تحاول هذه الدراسة إيلاء المزيد من الاهتمام ليس فقط للاعتبارات الاجتماعية ولكن أيضًا للاعتبارات الاقتصادية الجديدة التي تشجع إعطاء الفرصة للتاجر بدخول سوق التجارة من جديد

الكلمات الدالة: الالتزام الطبيعي، صلح الإفلاس، الإبراء، التصفية القضائية.

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