

The Civil Liability of the Management Company Operating Hospitality and Other Services in the Iraqi Law

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Prof. Dr. Younes Salahaldeen Ali

Faculty of Law and International Relations - Cihan University-Erbil

younis888_sss@yahoo.com

المسؤولية المدنية لشركة إدارة وتشغيل خدمات الضيافة والخدمات الأخرى في القانون العراقي

أ. د. يونس صلاح الدين علي

كلية القانون والعلاقات الدولية - جامعة جيهان-اربيل

Abstract

Management companies play a considerable role in managing and operating various types of hospitality services, such as hotels, restaurants, tourist resorts, as well as managing medical serviced and institutions, in front of which come hospitals. The significance of these companies playing the role of the operator emerges clearly in the field of the hospitality industry, owing to their big experience or expertise in managing and operating their projects, which the hospitality business owner may not have. In that the success and prosperity of his project depend upon the expertise of the management company in operating his project. Particularly such huge and giant hospitality as hotels, restaurants and vast hospitals. The management company does not usually transfer its expertise in the field of management directly to the hospitality business owner, but it manages and operates the project and the services it provides on its behalf, by the so-called management contract. According to which the managerial powers hospitality business owner will be transferred to the management company which assumes the management by making operational decisions and concluding secondary or subordinate contracts, in the light of the main and complex management contract, subject to the private law rules. Therefore the civil liability of this type of companies is originally a contractual one arising from the breach of the duties generated by the main management contract, concluded between the operator and the business owner. or by other secondary or subordinate contracts which the operator concludes to guarantee the good management of the hospitality projects. Furthermore the non-contractual tort liability of the management company may also arise, either as a liability for the personal acts of the business manager, based on the wrongful or illegal act committed towards any one including the business owner, with whom the company contracted. Or as a vicarious liability of the acts of the employees and servants, with whom the management company as a master is connected by other contracts than the management contract. Neither the Iraqi civil code regulated the maxims of this contract within the chapter of nominate contracts, nor does the Iraqi law of companies No. (21) of 1997 regulate the rules of the management company.

Keywords: Civil Liability, Vicarious Liability, Operator, Management Company, Management Contract, Operational Decisions.

المخلص

تقوم شركات الإدارة والتشغيل بدور كبير في إدارة وتشغيل مختلف أنواع خدمات الضيافة من فنادق ومطاعم ومنتجعات سياحية، فضلاً عن إدارة الخدمات الطبية والمؤسسات الطبية وفي مقدمتها المستشفيات. وتبرز أهمية هذه الشركات التي تقوم بدور المشغل في مجال صناعة الضيافة لما تملكه من خبرات كبيرة في إدارة وتشغيل مشروعاتها، والتي قد لا تتوفر لدى رب العمل مالك مشروع الضيافة. فيتوقف نجاح مشروعه على ما تقدمه له شركة الإدارة والتشغيل من خبرة في إدارة مشروعه، ولا سيما مشروعات الضيافة الضخمة والعلاقة من فنادق ومطاعم ومستشفيات كبرى. ولا تقوم شركة الإدارة والتشغيل عادة بنقل خبراتها في مجال الإدارة إلى رب العمل مباشرة، ولكنها تتولى إدارة وتشغيل المشروع والخدمات التي يقدمها نيابة عنه. وذلك عن طريق ما يعرف بعقد الإدارة والتشغيل، الذي تنتقل بمقتضاه السلطات الإدارية لرب العمل مالك المشروع إلى شركة الإدارة والتشغيل التي تتولى الإدارة عن طريق إصدار قرارات تشغيلية وإبرام عقود ثانوية أو تبعية في ضوء عقد الإدارة والتشغيل الرئيسي المركب الخاضع لأحكام القانون الخاص. وعلى هذا الأساس فإن المسؤولية المدنية لهذا النوع من الشركات هي في الأصل مسؤولية عقدية تنترتب على الإخلال بالالتزامات الناشئة عن عقد الإدارة والتشغيل الرئيس المبرم بين المشغل ورب العمل، أو عن العقود التبعية أو الثانوية الأخرى التي يبرمها المشغل لضمان حسن إدارة مشروعات الضيافة. كما قد تنهض مسؤوليتها التقصيرية أيضاً وهي إما مسؤولية عن الأعمال الشخصية والتي تقوم على أساس الفعل الضار أو العمل غير المشروع الذي يرتكبه المدير تجاه أي شخص آخر بما في ذلك رب العمل الذي يرتبط مع بعقد الإدارة والتشغيل، أو على أساس مسؤولية شركة الإدارة والتشغيل عن أعمال تابعيها الذين ترتبط معهم بعقود أخرى غير عقد الإدارة والتشغيل، وهي مسؤولية

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المتبوع عن أعمال تابعه. وجدير بالذكر أن القانون المدني العراقي رقم (٤٠) لسنة ١٩٥١ لم ينظم أحكام عقد الإدارة والتشغيل في ثناياه ضمن العقود المسماة، كما لم ينظم قانون الشركات العراقي المعدل رقم (٢١) لسنة ١٩٩٧ أحكام شركة الإدارة والتشغيل. **الكلمات المفتاحية:** المسؤولية المدنية، مسؤولية المتبوع عن أعمال تابعه، المشغل، شركة الإدارة والتشغيل، عقد الإدارة والتشغيل، قرارات تشغيلية.

Preface

The preface encompasses the relevant items:

First: preliminary foreword: A hospitality management company is a firm or corporation highly specialized in managing or operating hospitality institutions and Services. By concluding a binding contract between the business owner and the management company. This contract is called as the management contract operating hospitality institutions and Services. The civil liability of the hospitality management company can be divided into two main types: the contractual and the tort liability. It should be mentioned that neither the Iraqi civil code organized the maxims of this contract within a chapter of nominate contracts, nor does the Iraqi law of companies No. (21) of 1997 regulate the rules of the management company.

Second: The significance of the study: The significance of this study is embodied by double-faced shortage vitiating the Iraqi law, due to the non-regulation of the both hospitality management company and the management contract with which it is combined with the business owner. which reflects in turn to the difficulty of determining its civil liability or that of the manager it selects or chooses.

Third: The objective of the study: The objective of this study is to ascertain whether the general maxims of the civil responsibility in the civil code are suitable for faults committed by this new types of companies and the project manager they select.

Fourth: The problematization of the study: The problematization to be resolved is that the necessity of regulating special rules of the civil liability of the hospitality management company and its personnel particularly the project manager, due to the special nature of this type of companies and the management contract with which they are connected with the business owner. And the research tries to ask some questions to be answered the most important of which: can the general maxims of both the contractual and tort responsibility of the Iraqi civil code be used on the responsibility of the management company or the project manager it selects?.

Fifth: Approach of the study: The study adhered to an analytical approach of law research, by investigating the concept of the hospitality management companies and the civil liability arising from their faults or those of the project managers they selects or chooses.

Sixth: The plan of the study: This study has been categorized into two themes. The first elucidates the concept of the civil responsibility of the hospitality management company, while the second one is tasked with studying the types of the civil responsibility of the hospitality management company and its project manager:

First theme: The Concept of the Civil Responsibility of the Hospitality Management Company

Second theme: The Types of the Civil Responsibility of the Hospitality Management Company.

First Section

The Concept of the Civil Responsibility of the Hospitality Management Company

In order to study the concept of the civil responsibility of the hospitality management company, we should be obliged to be focused on the definitions of some important term closely related to this topic. And the characteristic features of the hospitality management companies :

First Topic

The definition of the Civil responsibility of the Hospitality Management Company

The civil responsibility or liability in general is classified into two main sub-types: the contractual and the tort or negligent responsibility. The civil responsibility is defined⁽¹⁾ as the penalty of the encroachment of the duty created by the contract, or created by the act bringing about a harm to the third party. The contractual liability is being defined as the penalty of the encroachment or transgression of a contractual duty, which differs in conformity with several obligations contained in the contract. While the tort responsibility from unlawful act is defined⁽²⁾ as the penalty of the violation of one long-standing legal

(1) Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part one, sources of Obligations. a comparison with Islamic Jurisprudence. Baghdad. 1963, P.401.

(2) Abdul Razaq Al Sanhoury. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit in the Explanation of New Civil Law). part One. The theory of obligations in general. Sources of obligations. Contract-illegal act-Unjust enrichment-law. Al-Ma'arif Publishing house. Alexandria.2004. p.618.

obligation emerging from unlawful act, and referred to as the obligation not to cause harm on another person. As far as the definition of the management company operating Hospitality Services is concerned, the Iraqi companies law does not regulate this kind of companies within its texts. Therefore we are obliged to resort to or to have recourse to the juristic definitions of this new type of companies in the comparative laws. It is defined⁽¹⁾ as a firm or corporation highly specialized in managing or operating hospitality institutions and Services. By concluding a binding contract between the business owner and the management company. This contract is called as the management contract operating hospitality institutions and Services, and defined⁽²⁾ as a agreement between the business owner and the management company, by which the former engages and entrusts the latter with the management and day-to-day operation of his or her business, especially when it is a big firm, but neither a sole proprietorship nor a partnership. This contract enables the operator or the management company to make operational decisions. In order to realize more profits, by managing profitable businesses. It is to be noted that this type of companies are used to operate a wide-spectrum of projects, particularly the services of the private hospitals, universities, schools and hospitality services like hotels, restaurants and tourist resorts. The management company is also defined⁽³⁾ as a firm known as the operator, which is fully obliged to operate the project of the business owner, and provide a high-level of the professional management.

Second Topic

The Characteristic Features of the Hospitality Management Companies

The hospitality management companies are characterized by many distinguishing features, the most important of which are:

First: These type of companies are characterized by the operating feature. Which means that this company is concerned with managing and operating the hospitality services on behalf of the business owner, by making effective operational decisions⁽⁴⁾.

Secondly: The hospitality management companies are considered as agents working on behalf of the business owner which is considered as a principal⁽⁵⁾. It is worth-mentioning here that the Iraqi Civil code regulated the agency or the agency contract, and defined it in the article (927) as (a contract by which a person employs another person in his place to implement a definite legal act).

Thirdly: These type of companies are characterized by the hospitality feature, because they are mainly involved in managing or administering the hospitality institutions, such as hotels, restaurants and tourist centers, as hotels, restaurants and tourist managing operators⁽⁶⁾.

Fourthly: They are also characterized by the service feature in general. This means that they are tasked with rendering services to the firms, institutions and companies other than hospitality ones. Such as private universities and hospitals.

Fifthly: They are also characterized by the experience feature. But this type of experience is limited or restricted to the operational experience in managing the institutions which are unable to manage their businesses successfully.

Sixthly: They are also characterized by the their non-governmental feature. Therefore they are engaged in managing, operating and administering non-governmental businesses, such as private sector projects⁽⁷⁾. Therefore the management companies are subordinated to rules of the private law. As opposite to the management of the governmental institutions which comes under the administrative law. This is the general rule, but sometimes these private sector companies participate with the governmental authorities in administering the governmental institutions by a type of contracts known as the private-public partnership. This contract enables the private sector companies, including the management companies to establish, finance and manage the public services, such as the public health and transportation services.

(1) Stephen Barth, David K. Hayes. Hospitality Law .Managing Legal Issues in the Hospitality Industry. Third Edition. John Wiley & Sons, Inc. 2009. P.١٣٣.

(2) Stephen Barth, David K. Hayes. Hospitality Law .Managing Legal Issues in the Hospitality Industry. Second Edition. John Wiley & Sons, Inc. 2006. P.32.

(3) Bob Brotherton. The International Hospitality Industry, Structure Characteristics and Issues. Butterworth-Heinemann . Oxford. 2003. P.١٤٥.

(4) Stephen Barth, David K. Hayes. Hospitality Law .Third Edition. op Cit. P.134.

(5) Clayton W.Barrows, Tom Powers and Dennis Reynolds. Introduction to Management in the Hospitality Industry. Tenth Edition. John Wiley & Sons, Inc New Jersey. 2012. P.377.

(6) Bob Brotherton. The International Hospitality Industry. op Cit. P.1٧.

(7) Bob Brotherton. The International Hospitality Industry. ibid. P.1٧.

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Seventhly: They are also characterized by the franchising feature⁽¹⁾. Therefore the management companies may sometimes play the role of the franchisor when they conclude franchising contracts with business owner as a franchisee, besides the management contract⁽²⁾. As well as managing the services of the business owner by their operational experiences, the management companies are obliged to sell to the business owner their trademarks and logos, to be used by the franchisee exclusively in a certain geographical zone or site⁽³⁾.

Second Section

The Types of the Civil Responsibility of the Hospitality Management Company and its project manager

The civil liability of the hospitality management company can be divided into two main types: the contractual and the non-contractual tort liability. The former always arises when the management company breaches its contractual obligations. Whereas the latter may arise in two cases: The first as a result of the personal illegal acts of the project manager selected or chosen by the management company. The second is the vicarious liability of the management company, as a result of the faults of their employees and servants, including the project manager it selects or chooses and as follows:

First Topic

The Contractual Liability of the management Company

We have mentioned earlier that the management company takes over the administration of the private institutions, by the management contract concluded with the business owner. Once concluded validly, this contract becomes binding and generates a lot of contractual obligations to both the contracting parties⁽⁴⁾. The most important of which is the obligation of the management company to manage the institution of the business owner and make effective operational decisions. Besides the obligations of exclusivity, confidentiality and the conclusion of subordinate contracts in the light of the primary management contract. If the management company breaches one of these obligations, its contractual liability will arise, as the penalty of the violation of a contractual obligation. The Iraqi civil code regulated the contractual liability within its general rules in the article (168) which states that (If it is inconceivable for the debtor of a contract to fulfill his duty specially he will be judged to pay compensation for non-fulfillment of his duty unless he proves that the inconceivability of the fulfillment was because of a uncontrollable reason; the judgment will be the same if the debtor has delayed (was late in) the fulfillment of his duty). The contractual liability can only arise, if three basic elements are available, that is to say the fault committed by one of the parties to a contract, the damage inflicted to the other party and the causation between them. An important point to be made here is about the type of the obligation the breach of which generates the fault in the field of the contractual liability⁽⁵⁾. In fact the Iraqi jurisprudence⁽⁶⁾ makes a distinction between the legal and contractual duties, in the scope of civil responsibility. In that the contractual duty, the violation of which will cause the contractual responsibility, can either be an obligation of result or a duty of conduct⁽⁷⁾. While the legal duty, the violation of which will cause to the tort non-contractual responsibility is often a duty of behavior. And whether the duty of behavior (duty to take care) is contractual or lawful, the debtor should take the reasonable care in fulfilling his duty. Which means the care of the reasonable person. Even if the object of the duty has not been fulfilled⁽⁸⁾. According to the article (251) of the civil code, which refers that: (1-In the situation of a duty to fulfill work: if the duty stated that the debtor will keep the object or if it was demanded of him to practice carefulness in fulfilling the duty the indebted person would have fulfilled the duty if he had practiced the carefulness of a reasonable man even where the object has not been realized. 2- The indebted person would however have fulfilled the duty if he had practiced the carefulness he would

⁽¹⁾ Stephen Barth, David K. Hayes. Hospitality Law .Third Edition. op Cit. P.111 and 136.

⁽²⁾ Stephen Barth, David K. Hayes. Hospitality Law .Third Edition. ibid. P.123 and 129.

⁽³⁾ Jagmohan Negi and Gaurav anohar. Hospitality Management Current Trends and Practices. University Science Press New Delhi. 2009. P.7.

⁽⁴⁾ Munther Al-Fadhel, The Medium Commentary on the explanation of the civil law, A comparative study between Islamic Jurisprudence and Arab and foreign laws, A study reinforced by opinions of both the jurisprudence and judiciary. Aras Publishing house, Erbil, 2006. p.180.

⁽⁵⁾ Abdul Majeed Al Hakim. The Medium Commentary on the theory of contract, with the comparison and balancing between the theories of the western jurisprudence and their equivalent theories in the Islamic Jurisprudence and the Iraqi civil law. Part one. Conclusion of the contract. Al-Ahliyyah company for printing and publishing. Baghdad. 1967. P.102.

⁽⁶⁾ Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, The concise of the general theory of obligations in the Iraqi civil law. Part one, the source of obligations, Baghdad, 1980. P.215.

⁽⁷⁾ Munther Al-Fadhel, op Cit. p.225.

⁽⁸⁾ Munther Al-Fadhel, ibid. p.224.

usually have practiced in implementing his own matters, if it could be disclosed from the situations that the intent of the contracting parties to a contract was guided to that objective). This means that the Iraqi civil code arranged an objective criterion to estimate the behavior of the tort-feasor, and it is embodied by the criterion of the careful man⁽¹⁾, deprived from his or her internal personal situations, and encircled by the same external situations of the unlawful act doer as to the first paragraph of the afore-said section.

Second Topic

The Non-Contractual Tort Liability of the Management Company and its project manager

As we have said previously the non-contractual tort liability can be classified into two types: The civil responsibility from the personal illegal acts of the project manager selected or chosen by the management company. And the vicarious responsibility or liability of the management company from the acts of their employees as follows:

First Theme

The Liability of the Project Manager from his Personal Illegal Acts

In order for the civil liability of the project manager for his or her personal illegal acts to arise, in line with the general maxims of the civil code, three basic elements should be available or gather together. These elements are: the fault in its material element, known as the encroachment, the harm suffered by the aggrieved party and the causation between them. Therefore we should focus on these three basic elements regulated by the civil code:

First: The component of the fault represented by the trespass or transgression: To begin with, the civil code is influenced by the Islamic legislation, especially, the journal of juristic maxims⁽²⁾, from which it takes most of its maxims. Besides its being influenced by the Egyptian civil code. Therefore it applies the encroachment as the basic component of the civil responsibility emerging from the unlawful act⁽³⁾, besides the harm and the causation between them. It does not apply the basic component of the fault explicitly or expressly⁽⁴⁾, as stated by the Egyptian civil code. This is clearly clarified from the text of the article (204) which mentions that (Every encroachment which triggers other than the types of damage stated previously, necessitates indemnification). The encroachment is explained as the divergence from the extent to which the man shall abide by his behavior. If we desire to understand the contrast between the fault and the encroachment, we can mention that encroachment is only the material component of the fault. Because the fault is composed of two components: the material component, , and the moral component, discretion. This divergence is determined by an objective standard, the reasonable person criterion. It is important to say that the encroachment in the civil code is classified into two components: the positive component which focuses on the divergence of limits, and the negative component focusing on the recklessness. The objective criterion is more appropriate than the subjective one. Because the latter, namely the subjective criterion takes into consideration the unlawful act doer, who will be liable, even if he commits the least divergence of behavior. In fact the criterion is wrongful, because it finds liable the cautious, watchful doer for the least divergence in behavior. Although it primarily attributes fault to the negligent perpetrator for significant deviant actions, the objective standard is considered more fair. This is because it assesses the extent of deviation or misconduct by the perpetrator of the illegal act, comparing their behavior to that of a reasonable person placed in similar external circumstances. It does so without accounting for the perpetrator's internal circumstances. The external situations include both temporal and spatial factors. It is worth noting that the Civil Code stipulates that intentional malice or willfulness, along with encroachment, must be present for tort responsibility to arise. In such cases, the transgressor is obligated to provide compensation, particularly when their actions result in damage to property or a reduction in its value. This is outlined in the first paragraph of Article 186 of the Civil Code, which states: "A person who intentionally or through encroachment has directly or indirectly caused harm to or reduced the value of another person's assets shall be held liable." Although the Civil Code draws significant influence from Islamic legislation—especially

(1) Munther Al-Fadhel, The Medium Commentary on the explanation of the civil law, A comparative study between Islamic Jurisprudence and Arab and foreign laws, A study reinforced by opinions of both the jurisprudence and judiciary. Aras Publishing house, Erbil, 2006. p.224.

(2) Dan E. Stigall. Iraqi Civil Law: Its Sources, Substance, and Sundering. Journal of Transnational Law & Policy. Volume 16. Number 1.2006. P.7.

(3) Ismat Abdul Majeed Baker. The general theory of obligations. Part one. in Arab civil laws. Al-Thakira Publishing house. Baghdad. 2011. P.613.

(4) Suleiman Morcos. A thorough commentary on the explanation of the civil law, on the obligations, the harmful act, and the civil liability. Part One. The general rules. Fifth Edition. Cairo university press. 1992. P.183.

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in taking principles of civil responsibility—it also reflects influences from the Egyptian Civil Code. However, the Iraqi approach differs from Islamic legislation in three notable ways. First, the Iraqi legislator mandates the presence of both willfulness and encroachment for compensation to be granted, unlike Islamic legislation, which does not require both factors. Second, the Iraqi legislator holds both the perpetrator and the abettor liable for compensation, whereas Islamic legislation places responsibility solely on the perpetrator, excluding the abettor. Lastly, the Iraqi Civil Code permits joint and several liability between the perpetrator and the abettor, a stance contrary to Islamic legislation, which does not recognize joint participation or shared liability between the two parties⁽¹⁾. All of these maxims are stated in the second paragraph of the article (186) of the civil code mentioning that (When two individuals—a perpetrator and an abettor—are involved in causing damage, the person who acted with intent or through encroachment will be held accountable. If both parties are deemed responsible, their liability will be joint and several). It is essential to note that, according to the perspective of the Iraqi legislator, intentional malice or willfulness refers to the deliberate intent of the perpetrator, meaning the will of the individual committing the unlawful act is specifically aimed at causing harm to the victim. Merely intending to commit the unlawful act is not sufficient; it also requires that the harmful outcome, represented by the damage inflicted on the victim, is consciously considered by the perpetrator⁽²⁾.

Secondly: The second basic element of the of the tort civil responsibility emerging from personal acts, embodied here by the trespass or transgression committed by the project director or operator selected or chosen by the management company, is the harm from which the aggrieved claimant suffers. And this aggrieved or injured person may be the business owner or anyone of his or her employees, or even anyone dealing with the hospitality institution. The harm is regarded as the most essential component of the civil responsibility, whether it is contractual or tort responsibility. Therefore, no responsibility will arise, if no harm happens⁽³⁾. The harm is classified in line with the maxims of the civil code into material and moral harm. The material is the deterioration which hurts the person in his body, assets, right or a legal advantage. While the moral is the deterioration which hurts the person in his or her sensations, emotions, honor, fame, social situation, financial consideration, or other matters of moral significance. As to the first paragraph of the article (205) of the civil code, which states that (the right to compensation also includes moral harm: any encroachment (assault) on the liberty, morality, honor, fame, social prestige, or financial consideration of another person makes the unlawful act doer responsible for compensation). In order for the material harm to be indemnified three conditions are imperative, and should be available: 1- it must be certain: the certain harm means that it happens immediately, the instant harm. or it is on the verge to happen in the near future⁽⁴⁾. 2-it must hit or hurt a right or a legal advantage. 3-it must be a direct harm, no matter whether it is predictable or unpredictable. This means that it must be a natural outcome of the unlawful act⁽⁵⁾, in keeping with the first paragraph of the article (207) of the civil code, which states that (In all situations the court shall estimate or assess the compensation proportionately with the deterioration and the loss of benefit suffered by the injured on the condition that the same was a natural outcome of the unlawful act). The right to make up for the material harm can shift to another person, like the heir or successor without needing to an arrangement or a court's decision, because it is a right of a financial merit. The right to make up for the moral harm, as opposite, can not shift to another person, unless being decided by an arrangement or a final decision, in keeping with the third paragraph of the article (205) of the civil code, which states that (compensation for moral harm do not shift to another person, unless its value is determined in line with an arrangement or a final decision). This is because the indemnity or reparation for the moral harm is a right strongly combined with the personality of the injured claimant or the creditor, and it needs that an arrangement should be agreed upon or a final decision should be made, so that it can be shifted to heirs⁽⁶⁾.

⁽¹⁾ Abdul Majeed Al-Hakim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer. op. Cit. P.220.

⁽²⁾ Hasan Ali Al-Thannon. The extensive commentary on the explanation of the Civil Code. Second part on the Fault. First Edition. Dar Wael for printing and publishing. 2006. P.225.

⁽³⁾ Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part 1, op. Cit , P.455.

⁽⁴⁾ Samir Abd Al-Sayyed Tanaghrou. Sources of obligations, Contract, Unilateral Will, Illegal Act, Enrichment without Cause, law and Two New Sources of obligations: Judgment and Administrative Decision. First Edition. Al-Wafa'a Legal Bookshop for Publishing Alexandria. 2009. P.247.

⁽⁵⁾ Abdul Majeed Al Hakim. Abdul Baqi Al Bakry and Mohammed Taha Al Bashir, Obligation Theory in Iraqi Civil Law, part One. The Sources Obligation. Ministry of Higher Education and Scientific research. Baghdad University. 1980. P.213.

⁽⁶⁾ Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part 1, op. Cit , P.462.

Thirdly: The generalized maxim in the civil code as to the causation in the scope of the civil responsibility, whether it emerge from a contract or tort, is the maxim saying that no one is liable for the consequences of the acts done by another person, because this is neither admissible lawfully nor reasonably⁽¹⁾. The man is liable for indemnifying or remunerating the harm made only by his or her act. This maxim is included in the article (168) of the civil code, although mainly devoted to the contractual responsibility, but its provision about breaking the causation by the external cause may also relate to the tort responsibility. It states that (If it is inconceivable for the obligated party of a contract to fulfill his duty particularly he will be responsible for indemnifying non-fulfillment of his duty, unless he proves that the impossibility of the fulfillment was due to an uncontrollable cause; the adjudication will be the same if the obligated person was late in the fulfillment of his duty). This article indicates that the obligated person is usually shouldered with the burden of proving the break of the causation between the fault and the harm, or eliminating this causation by proving the external cause⁽²⁾. It also indicates that the claimant is concerned with the onus of proving the causation between the encroachment and harm in the civil code. And if he or she succeeds in this assignment, then the burden of proof will shift to the respondent, who tries to negate it⁽³⁾. And the respondent can eliminate the causation by two methods: the first is immediate, and according to which he can prove that his fault is not the reason which causes the harm to the injured claimant. The second is an indirect method by which the respondent can rule out the causation by proving the external cause which triggers the harm directly to the claimant. We believe that the civil law has also chosen the direct outcome criterion, to prove the causation between the unlawful act and the harm, when it stated that the harm suffered by the injured claimant, should be a natural outcome of the unlawful act⁽⁴⁾. In keeping with the article (207) which states that (1-In all circumstances the court will evaluate the compensation proportionately with the harm and the loss of advantage suffered by the aggrieved party provided that the same was a natural outcome of the illegal act). If the harm is a natural outcome of the unlawful act, it refers to the fact that it should be a direct outcome of the illegal act⁽⁵⁾. The scope of indemnity, remuneration or reparation of the civil responsibility emerging from the unlawful act in the civil code, contains the whole direct harm, whether it be predictable or unpredictable. In the contrary to the scope of indemnity within the extent of the contractual responsibility, which is limited to the predictable direct harm only. Unless the obligated person of the duty commits cheating or a serious fault, in which case he or she will be liable for indemnifying both the predictable or unpredictable types of the direct harm⁽⁶⁾. As to the article (168) of the civil code, which states that (Where the debtor had not committed cheating or a serious fault the compensation may not exceed the loss suffered or the amount of the lost advantage which had been usually expected at the time of the concluding the contract).

Second Theme

The Vicarious Liability of the management Company

The vicarious liability of the management company may arise from the illegal acts of its employees, including the project manager whom it selects or chooses. The general maxims of the civil law regulated the vicarious responsibility in the article (219), which narrowly determines the concept of the employer⁽⁷⁾, and states that (1-Government, municipalities and other organs or bodies which fulfill a public service as well as every person who accomplishes an industrial or commercial corporation or business are liable for the harm (impairment) caused by their employees if the harm resulted from a transgression they perpetrate in the course of their service. 2-The employer will be able to exonerate himself of the responsibility if he proves that he had taken the necessary carefulness to prevent the harm or that the harm would have taken place, had he taken the prerequisite carefulness). It has been established conspicuously that this archaic text does not mention the hospitality management companies as a new type of companies, therefore hardly can we include or insert them within this text, except for the phrase of (every person who accomplishes an

⁽¹⁾ Hasan Ali Al-Thannon. The extensive commentary on the explanation of the Civil Code. Third part on the causal link. First Edition. Dar Wael for printing and publishing. 2006. P.6.

⁽²⁾ Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, part One. op. Cit. P.170.

⁽³⁾ Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, part One. ibid. P.240.

⁽⁴⁾ Hasan Ali Al-Thannon, sources of Obligations, Baghdad, 1970. P.245.

⁽⁵⁾ Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem. The sources of Obligations, A comparative study with civil laws and Islamic jurisprudence. Second Edition. Zein juridique library. Beirut. 2017, P.283.

⁽⁶⁾ Hasan Ali Al-Thannon. The extensive commentary on the explanation of the Civil Code. First part on the damage. First Edition. Dar Wael for printing and publishing. 2006. P.314.

⁽⁷⁾ Munther Al-Fadhel, op Cit. p.361.

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industrial or commercial enterprise or corporation). Because this type of companies may sometimes be distinguished with its commercial nature, even though their main task is to make professional operational decisions, in order to manage hospitality institutions. Therefore the vicarious liability of the management company as a master or employer may arise as a result of the faults perpetrated or committed by its servants or employees, including the project manager it selects or chooses, for his or her personal illegal acts. The realization of the vicarious liability in the Iraqi civil code necessitates that three conditions or requirements should be available⁽¹⁾:

First: The existence of the relation of the subordination: this relation should exist between the employer and employee or the master and the servant, in order for the vicarious liability to arise. It is based upon the authority of the employer over the employee, empowering the former to impose the control and guidance on the latter⁽²⁾. This authority may either be legal or actual⁽³⁾. It is to be noted also that this relation may exist, whether it is based on a contract between the parties or not.

Secondly: The fault perpetrated by the employee or the servant: the second condition or requirement is the fault committed by the employee. This fault is embodied by the illegal act perpetrated by the employee⁽⁴⁾. The fault of the employee may either be rebuttable or irrebuttable. But it should always be rebuttable, in accordance with the second paragraph of the article (219) of the civil code.

Thirdly: In the course of employment: This means that the Iraqi law-maker restricts the realization of the vicarious responsibility to the case in which the commission of the fault by the employee or the servant must takes place in the course of his or her employment to the employer⁽⁵⁾. If the employee commits the fault or the personal illegal act, because of the employment, but not in its course or during it. According to the article (219) of the civil code, as opposite to the article (174) of the Egyptian civil code. Which considers the employee liable, even though the fault was committed due to the employment.

Conclusions

The conclusion consists of both the outcomes and recommendations and as follows:

First: outcomes: The study has achieved the intended outcomes:

- 1- The hospitality management company is a firm or corporation which is highly specialized in managing or operating hospitality institutions and Services, by concluding a binding contract between the business owner and this company, called the management contract operating hospitality institutions and Services.
- 2- The management contract operating hospitality institutions and Services is an agreement between the business owner and the management company, by which the former engages and entrusts the latter with the management and day-to-day operation of his or her business, especially when it is a big firm, but neither it is a sole proprietorship nor is it a partnership. This contract enables the operator or the management company to make successful operational decisions.
- 3- The management company is used to operate and administer a wide-spectrum of projects, particularly the services of the private hospitals, universities, schools and hospitality services like hotels, restaurants and tourist resorts.
- 4- The hospitality management companies are characterized by many distinguishing features, the most important of which, they are operating companies concerned with managing the hospitality and other services. And doing their jobs as agents working on behalf of the business owner which is considered as a principal. As well as being characterized by the their non-governmental feature. Because they are involved in managing, and operating non-governmental private sector businesses and services. Even though they sometimes participate with governmental authorities in administering the governmental institutions by the private-public partnership.
- 5- The civil liability of the hospitality management company can be divided into two main types: the contractual and the tort responsibility.
- 6- The contractual liability always arises when the management company breaches its contractual duties contained in the management contract. While the tort responsibility may arise in two cases: The first

(1) Abdul Majeed Al-Hakkim, Abdul-Baki Al-Bakri, & Mohammed Taha Al-Basheer, part One. op. Cit. P.260 and 262.

(2) Munther Al-Fadhel, op Cit. p.362.

(3) Dara'a Hammad. The general theory of obligations. Part one sources of Obligations. Al-Sanhouri Publishing house Beirut. 2016. p.403.

(4) Sabri Hamad Khater, The general theory of the obligation, the sources of the obligation A comparative study, Second Edition, Hat-trick for distribution and publishing Erbil, 2024, p.377.

(5) Munther Al-Fadhel, op Cit . p.363.

as a result of the personal illegal acts of the project manager selected or chosen by the management company. The second is the vicarious liability of the management company, as a result of the faults of their employees and servants, including the project manager it selects or chooses.

- 7- The most important conclusion reached by this study is that the civil code No. (40) of 1951 did not contain the maxims regulating the management contract within the chapter of nominate contracts, nor did the Iraqi law of companies No. (21) of 1997 regulate the rules of the management company.
- 8- Another important conclusion reached by this research is that the first paragraph of the article (186) of the civil code is not suitable, in its current phrasing or formulation, for the civil tort responsibility of the project manager for his or her personal illegal acts. Because it restricts the scope of the liability to the acts committed by the person, who willfully or by encroaching has directly or indirectly triggered harm to or decreased the value of the property of another person, whereas the scope of the personal illegal acts of the project manager are wider than these provided for in this paragraph. Such as the mismanagement of the hospitality businesses and other services, by intentionally making unsuccessful operational decisions, which may inflict damage or injury to personnel or employees. The same is true for the article (219) of the civil law, which is not suitable, in its current phrasing or formulation, for the vicarious liability of the management company, for the damage caused by the illegal acts of its employee, whether he be project manager selected directly by the company, or any other employee connected with the company by subordinate contracts. Because it does not include a general rule or principle of determining the vicarious liability of the employer or master for acts of his or her employees or servants, but enumerates a lot of institutions, organs and services. Hardly can the management companies be included with them. Except for the phrase of the (commercial enterprises), within which scarcely have the management companies been classified or categorized.

Second: Recommendations: The study has put forward the following recommendations:

- 1- Given the special relations of subordination between the management company and the employees with which it is connected, due to the variety of contracts concluded in the light of the main management contract, therefore we recommend that the Iraqi legislator put forward a special text regulating the vicarious liability of the management company. Therefore, the study proposes the text to be added to the article (219) of the civil law: (The management company as an employer is liable for the damage triggered by the illegal acts of its employee, whether he be project manager selected directly by the company, or any other employee connected with the company by subordinate contracts).
- 2- The researcher suggests that the Iraqi law-maker amend the first paragraph of the article (186) of the civil law, to be suitable for all the personal illegal acts to be committed by the project manager, who is selected or chosen by the management company, to manage or operate the hospitality businesses and other services of the business owner. Therefore, the study proposes the following provision to be added as a third paragraph of the article (186) of the Iraqi civil law: (The project manager who willfully or by trespassing has caused damage to any other person, by his or her unsuccessful operational decisions, made during the management of the hospitality businesses and other services of the business owner, shall be liable).

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