

FEB 2023 | ISSUE NO. 1

**HEGAZY**  
AND PARTNERS

# EGYPTIAN LEGAL STREAM

The latest news and updates from Hegazy and Partners



## HEGAZYS MESSAGE

LAW REGULATES OUR LIFE,  
AND WITH HEGAZY &  
PARTNERS ALL THE LEGAL  
CONCERNS WILL BE EXPLAINED  
FRUITFULLY & WISELY TO  
GUIDE YOU AND YOUR  
BUSINESS WELFARE

*Regional Expertise*

*International Reach*

# AGENDA

The latest news and updates from Hegazy and Partners

## PAGE

**1**

*Acquisitions & their impact on the working employees.*

**3**

*Les Fluctuations du Taux de Change: Difficulté Monétaire ou Force Majeure?*

**5**

*The Board of Directors and their responsibilities in a joint stock company*

**7**

*Investment in Egypt between guarantees and incentives.*

**9**

*Become "Golden Licensed"*

**11**

*Establishing a company to operate within the "FREE Zone Scheme".*

**13**

*الشيك و القانون في المعاملات التجارية*

## Acquisitions & their impact on the working employees.

Mr. Mohamed Selim- Senior Corporate Associate



Due to the rapid growth of commercial transaction concerning companies within the Egyptian market whether through acquisitions, mergers or any other kind of transactions, there is a significant legal issue concerns with “employees”, and how such transactions affect the target company's employees.

Prior to the elaboration of how the applicable laws governed and organized the effects of commercial transactions on the target company's employees, we shall shed light on the legal definition of a "Merger and Acquisition transactions", then we will explain the legal frame that governs the effect of such transactions on the target company's employees.

### First: Merger & Acquisition Definitions:

An “Acquisition” means the purchase of a percentage, whether majority or minority, shares of a company's share capital by either natural or juridical person.

A “Merger” refers to the process in which two or more companies merge in an existing company or to form a new company.

Thus, the employees of the target company, the acquired or merged company, must be protected by the applicable laws. This what the *Egyptian Labor Law no. 12/2003 regulates in article no. (9)* which states that:

*“Merging a corporation in another or its ownership transfer by inheritance, will, gift, sale even if through public auction, assignment, lease or any other kind of disposals, shall not result in the termination of employment contracts of such corporation, and the successors shall be, jointly with the previous employers, liable for the executions of the obligations arising out of such contracts”.*

Further, the Companies` Law no. 159/1981 also stipulated stated in article no. (132) that: *“the merging company or the company resulting from a merger transaction shall be considered successor of the merged companies and shall be legally replace such companies with regard to their rights and obligations, within the limits agreed in the merger agreement, without prejudice to the creditors rights”.*

## **Acquisitions & their impact on the working employees.**

**Mr. Mohamed Selim- Senior Corporate Associate**

As stipulated by both the "*Companies Law and the Labor Law*", the obligations, liabilities and the rights of merged companies or acquired companies may not be affected or disappear due to change of ownership or change of the legal form of a company, but the new entity whether the merging company or the new company resulting from merger or acquiring entity shall be considered successor and the successor shall have all rights and bear all liabilities of their predecessors.

Further to the law's provisions as explained above, the *Egyptian Court of Cassation* stipulated some judicial principles emphasizing the same principle stipulated by the law, as the "*Court of Cassation case no. 5058 for the judicial year 62*" stated that: "the consequence of the transfer of an entity's ownership whether by merger or any other legal disposal shall be the continuation of employment contract with the new employer".

*The Court of Cassation*, moreover, in case no. 1881 for the judicial year 52 stipulated that the transfer of the ownership of a corporation shall result in the continuation of the existing employment contracts with the new owner.

Based on the above, it was concluded that *the Egyptian Laws and the Court of Cassation stipulated the rules and principles explained above to protect the employees from any transfer of ownership or legal disposal concerned with their employment entity, as the new owners shall be considered successors of their predecessors and the employees shall remain in their same legal positions based on their contracts.*

## LES FLUCTUATIONS DU TAUX DE CHANGE: DIFFICULTÉ MONÉTAIRE OU FORCE MAJEURE?

Lauren Williams- Counsel



Ça fait neuf mois que le taux de change du dollar américain face à la livre égyptienne a été 15.65. Après la dernière dévaluation, il a presque doublé, ce qui a rendu des entreprises incapables d'honorer leurs obligations contractuelles ponctuellement, quand elles en sont.

La chute de la monnaie égyptienne était, dans une certaine mesure, imprévue – des économistes s'attendaient à ce que le dollar américain serait entre 26-27 livres égyptiennes au fin de cette année, mais cela s'est produit en son début. Donc, la question légale, c'est si la rupture d'un contrat ou même sa résiliation dont une partie soit responsable peut être considérée comme force majeure ou non.

### La Force Majeure en Droit Égyptien:

L'Article 165 du Code Civil Égyptien fait référence à la force majeure, en quoi elle exige que:

*“Si on démontre que les dommages se produisent d'une cause étrangère imprévue, comme un incident surprise ou la force majeure ou la faute de la partie endommagée ou la faute d'un tiers, on n'est pas obligé d'indemniser ces dommages, moins de disposition contraire d'une texte ou d'un contrat”.*

Donc, il y a quatre conditions qui doivent être remplies: les dommages, la cause étrangère imprévue, la causation entre les dommages et l'évènement imprévu et l'absence d'une clause contractuelle imposant l'indemnisation dans tous les cas. On a déjà établi que les variations du taux de change entre mars 2022 et 2023 étaient imprévues.

Ce qui fait l'objet d'un débat c'est la mesure de la causation, particulièrement quand elle a été indirecte. Par exemple, il y a des entreprises égyptiennes qui n'ont pas pu libérer leurs marchandises des douanes, ayant attendu un prix beaucoup plus bas que l'effectif. Il se trouve aussi ceux qui ont dû résilier les contrats d'approvisionnement ou de construction quand la tarification envisagée des matières premières a augmenté.

Cependant, il n'est pas nécessaire de mentionner les variations du taux de change dans le contrat tant que la liste des incidents de force majeure est non exhaustive.

## LES FLUCTUATIONS DU TAUX DE CHANGE: DIFFICULTÉ MONÉTAIRE OU FORCE MAJEURE?

Lauren Williams- Counsel

### Les Contrats Commerciaux et Civils:

Au sujet des contrats commerciaux et civils, il faut distinguer entre les cas dont il y a une clause de force majeure et ceux où il n'y en a pas. Si les parties du contrat n'ont pas permis l'autre, au sein des dispositions contractuelles, de s'exonérer de ses obligations lorsque se produite un évènement de force majeure, la partie endommagée a recours aux tribunaux et l'autre qui n'a pu honorer ces obligations a droit de fonder sa défense sur la force majeure, et le tribunal rend son jugement en conséquence.

D'autre part, on doit respecter le principe "pacta sunt servanda" si une provision contractuelle exclut les fluctuations du taux de change parmi les évènements de force majeure. Cela vaut également pour les délais de notification et les indemnités de résiliation. La coutume commerciale, particulièrement dans le domaine des créances hypothécaires est de fixer un taux de change maximum au dessus duquel le contrat est résilié sur la base de force majeure si l'augmentation empêche l'exercice des obligations contractuelles.

### Les Contrats Administratifs:

Les contrats administratifs se caractérisent par deux attributs clés – le premier, c'est l'obligation de l'état de garantir et maintenir l'ordre public et les services d'intérêt public et le seconde, c'est la position supérieure de l'état qui lui confère le droit de résilier les contrats administratifs unilatéralement quand l'état (à sa seule discrétion) estime que l'autre partie a commis une faute contractuelle.

L'Article 51 du Loi no 182/2018 exige que:

*"L'organisme administrative est permise de résilier le contrat ou l'exécuter à la charge de la partie contractante si elle enfreint aucune de ses dispositions principales"*

C'est un droit dont la partie du secteur privé ne bénéficie pas. Par contre, une entreprise privée qui résilie un contrat administratif doit indemniser le gouvernement pour les dommages résultants et le gouvernement peut aussi demander de l'entreprise qu'elle paie le coût de remettre le projet en oeuvre, même si l'Article 51 du Loi no 182/2018 interdit au gouvernement d'imposer la résiliation du contrat et l'indemnisation de la remise en oeuvre à la fois. Ainsi, il est plus difficile de soutenir que les fluctuations du taux de change constituent la force majeure en ce qui concerne les organismes privés.

*En somme, les entreprises égyptiennes et ceux qui concluent des contrats avec elles doivent prendre les fluctuations possibles du taux de change en considération et décider les limites de force majeure et ce que ça signifie pour le contrat et son exécution.*

## THE BOARD OF DIRECTORS AND THEIR RESPONSIBILITIES IN A JOINT STOCK COMPANY

Omar ElTahawy-Intern



The board of directors (BOD) is appointed to manage the company and carry out all the work necessary to achieve its purpose for which it was established, except for what is excluded by a special provision in the law or the company's statute. In addition to commercial and financial matters, boards of directors must also deal with challenges.

The Chairman of the "BOD" is appointed by voting among the members of the Board, and the "BOD" shall be appointed by the shareholders.

The Companies' Law stipulated a new method for voting and electing the "BOD" which is the Cumulative Voting. It may be stipulated in the articles of association of the company for cumulative voting in electing the members of the "BOD" by granting each shareholder a number of votes equal to the number of his own shares, and the shareholder may grant all the votes he owns to one or more candidates, and the percentage of shares that he owns may vary.

The shareholder allocates it to each candidate, provided that it does not in all cases exceed his total share, provided that the one who counts the votes is obligated to record this in the minutes of the assembly.

### Responsibilities of the Board of Directors:

- The chairman of the board represents the company before the JUDICIARY Authority and others.
- Delegates one or more members for the actual management work. The board determines the responsibilities of the managing director, and the managing director is required to be full-time for management.
- The chairman of the board represented may appoint a general manager for the company among the non-members, and he may be invited to attend its sessions without having a counted vote.
- Implementation of the decisions is issued by the General Assembly, and they have no right to amend or cancel them.
- A 1/3 of the members of the board may submit a written request to the chairman of the board to hold a meeting of the board of directors for him. If the chairman of the board fails to invite him, the members of the board of directors may, after ten days from the date of the invitation, invite the board to convene a meeting and notify the General Authority for Investment and Free Zones "GAFI" of the date of the meeting.

### Resignation and Dismissal:

- The chairman of the board of directors is dismissed by the members of the board because he is appointed among its members and the general assembly has the right to dismiss the chairman of the board or one of its members at any time even if is not included in the agenda.



## THE BOARD OF DIRECTORS AND THEIR RESPONSIBILITIES IN A JOINT STOCK COMPANY

Omar ElTahawy-Intern

- Members of the Board of Directors have the right to resign at any time, provided that the resignation does not harm the interest of the company.
- The competent administrative authority "GAFI" and the partners holding at least 10% of the capital in relation to shareholding companies, may request an inspection of the company in respect of violations attributed to the members of the board of directors or auditors in the performance of their duties.

The General Assembly has the right determining the dismissal of the members of the "BOD" and file a liability suit against them, and its decision will be valid when approved by the partners holding half of the capital after excluding from it the share of those whose dismissal is being considered among the members of this Board.

The assembly may also decide to change the auditors and file a liability suit against them after proof of their mistakes.

### **If the number of members is less than the minimum:**

Due to either death or resignation and the number of members of the BOD became less than three members, then the Board's meetings or decisions are not valid and the remaining members, the company's general manager, or the auditor must notify the General Authority for Investment and Free Zones within a maximum of three working days from the date of the decrease in the number of members below the limit of minimum and invite the General Assembly to convene and consider of appointing a board member for those whose membership has expired.

In case of the position of a member of the "BOD" becomes vacant, it shall be replaced by the next member in the number of votes in the last election of the Board, and the period of appointment of the new member shall be complementary to the term of his predecessor. In other cases, the Board shall appoint someone to replace him until the first meeting of the General Assembly.

### **The board of directors is prohibited to:**

- The company is not allowed to provide a cash loan of any kind to any of the members of its BOD or guarantee any loan that one of them concludes with a third party.
- To amend or cancel the decisions of the General Assembly.
- The meeting of the board is convened if the number of its members is less than three.
- To become a public servant.
- To vote on a project presented to the BOD and to have a personal mutual interest in the project.
- Any member of the BOD trades for his own account or for the account of others in one of the branches of the activity practiced by the company.
- It is not permissible for any member of its BOD at any time to be a party to any of the netting contracts that are presented to this board for approval.



## INVESTMENT IN EGYPT BETWEEN GUARANTEES AND INCENTIVES.

Dina Fahd-Intern



Hereunder, our focus will be on the effectiveness of investment guarantees and incentives for foreign companies located at in the Arab Republic of Egypt, while clarifying all the facilities the investor will have through the investment guarantees.

*Investment Law no. 72/2017* and its executive regulation set rules in the country for all local and foreign investments, which are placed under one of four regimes: *Inland Investment, Investment Zones, Technological Zones and Free Zones.*

### Companies and activities subject to Investment Law

There are certain companies and various activities subject to *Law no.72 for year 2017* stipulated in the law and its executive regulation. The companies subject to the law are capital companies, the partnerships and the sole proprietorships.

The activities under the Investment's Law jurisdiction are stipulated in *article (1) in the Executive Regulation* and they are: "*Industrial & Agricultural, Animal, Poultry and fish production, Trade Educational, Health, Transportation, Tourism, Housing, Construction & Building, Sports, Electricity & Energy, Petroleum & Natural resources, Water, Telecommunications & Information Technology Sectors.*"

### Investment Guarantees

Foreign investor's projects in Egypt are not subject to any arbitrary procedures or discriminatory decisions, as long as they are based in the country of domicile and subject to the same laws and regulations as those applied to the national investor. Investment projects also may not be nationalized by the state without equitable compensation.

Licenses issued for the projects may not be revoked or suspended by an administrative body, nor is real property allocated for the same (with some exceptions). Foreign investors can fund projects from abroad without any restrictions and with foreign currencies. Cash transfers in respect of foreign investment.

An Investment Project (IP) shall have the right to export its products without a license and without the need to be registered in the "Register of Exporters".

These projects have the right to employ foreign workers up to ten percent (10%) of the total number of the "IP" workers.

### Investment Incentives

They are measures that seek to influence an investment project through favorable tax treatments or other benefits that affect the relative cost of the project.

There are three types of investment incentives which include "*The Special, The General and The Additional Incentives.*"

## INVESTMENT IN EGYPT BETWEEN GUARANTEES AND INCENTIVES.

Dina Fahd-Intern

### Special Incentives

Projects set up in the form of a discount off the taxable net profits of a company will be subject to a range of discounts starting from 30% up to 50%, depending on geographic areas designated in the investment map.

#### *Conditions to enjoy special incentives:*

A new company or establishment is required to be incorporated to launch an Investment Project, and it must be incorporated within a period not exceeding three (3) years from the Executive Regulations enforcement date for such an investment project. New companies are required to keep regular accounts in accordance with the provisions of this Law.

A corporation that has been operating since the effective date of *Law no.72 for year 2017* has not had any tangible assets offered, contributed, or used by shareholders, partners, or establishment owners.

### General Incentives:

For five (5) years, companies incorporated in the Free Zone areas will be exempt from stamp duty and publicity fees. Customs fees will not apply to imports of casts, moulds, and other similar production requirements. The provisions on the collection of a uniform customs duty of 2% of the value of all imported machinery, equipment, and devices required for company formation.

### Additional Incentives:

Permission to set up special customs ports of entry for imports or exports related to Investment Projects, in accordance with the Minister of Finance. A 50% of the land value allotted for industrial projects should be refunded as well as there is a free land distribution for some strategic purposes under legally outlined conditions. Moreover, there may be a payment by the State for a part of the expenses incurred in course of providing personnel technical training.

#### *Conditions for additional incentives:*

The principal place of the products in which such companies specialize is in the Arab Republic of Egypt, and such companies depend on foreign cash transferred from abroad through an Egyptian bank. These companies export abroad no less than fifty percent (50%) of their products; The activity of such companies shall be conducted within the Arab Republic of Egypt as they shall also include operation in any cutting-edge modern technology field and its transfer into Egypt and support of industries supplying such field. In addition, the project's products must incorporate the local component.

## BECOME "GOLDEN LICENSED"

Eyad ElSamany-Intern



The Egyptian Cabinet recently issued *Decree no. 56/2022* stipulating the requirements and measures for investment projects to be considered strategic or national projects, implementing the provisions of *Article no. 20 of Investment Law no. 72/2017 and articles no. 42 – 43 of the Executive Regulations* which state that: *"The Egyptian Cabinet may issue an all-in-one license for companies establishing national or strategic projects or private-public-partnership projects (PPPs)"*. Such license has been called the **"Golden License"**.

### First: What is the Golden License?

The Golden License is a comprehensive approval for the set-up, operation and management of a project, including construction and allocation approvals necessary to execute the project. The Golden License shall be granted to companies fulfilling the standards and requirements directly by the Egyptian Cabinet with no need for obtaining any other approval or license from any governmental entity and also with the ability to benefit from the general, specific or additional investment incentives provided by the Investment Law.

### Second: Standards required for a project to be considered a strategic or national project

*In order for a project to be considered national or strategic, it must fulfill two or more of the following standards:*

- The project shall contribute in increasing exports by exporting at least 50% of its products annually, within maximum three years from the commencement date of business.
- The project shall be financed in foreign money which shall be transferred through an Egyptian bank.
- The local components of the products, from raw materials and production requirements, must not be less than 50% of the products components aiming to reduce importation and localize industries in Egypt.
- The project shall be set-up on one of the area's most in need for development as provided by the Cabinet decree no. 7/2020.
- The project shall contribute to the transfer and localization of modern and advanced technology to Egypt.
- To be one of the projects aim to secure strategic goods for Egypt and limit importation of such goods.
- The project shall be one of the projects that intensifies the use of national manpower, in accordance with article no. 11 of the Executive Regulations of the Investment Law.
- To contribute in reducing the environmental impact, reducing thermal and gas emissions, and improving the climate, as estimated by the competent Minister.

## **BECOME "GOLDEN LICENSED"**

Eyad ElSamany-Intern

### **Third: Fields and activities that grant the Golden License:**

*In addition of meeting two or more of the aforementioned standards, the project must be established for any of the following business sectors:*

- Electricity and Renewable Energy.
- Petroleum and Mineral Resources.
- Transportation Projects.
- Industry.
- Communication and information technology.
- Housing, Utilities and Urban Communities.
- Tourism.
- Sports.
- Environment.
- Agriculture.
- Military Production.
- Health.

### **Fourth: Conditions to be met by the applicant to obtain the Golden License:**

As per the provision of *article no. (42) of the Executive Regulations*, the following conditions shall be fulfilled to obtain the Golden License:

- It shall be a joint stock or a limited liability company.
- The issued capital of the joint stock companies and the capital of the limited liability companies shall not be less than 20% of the investment costs of the project.
- The company shall provide evidence of financial appropriateness required for the implementation of the project.
- The company must have been established after the Investment Law's entry into force.
- The company shall provide preliminary feasibility study for the project prepared by one of the licensed reputable national or international expertise firms.
- The company shall provide a framework for the implementation of the project.
- The company shall submit an acknowledgment to provide all infrastructure facilities (roads- sewage-electricity- communications- water treatment).
- The company shall submit an acknowledgment of compliance with all requirements related to its activity in accordance with the applicable laws and regulations.

## ESTABLISHING A COMPANY TO OPERATE WITHIN THE “FREE ZONE SCHEME”.

Nahla Mohsen-Intern



A Free Zone is part of the state’s territory, located within its borders which falls under the rule of state administration. Free zones are governed by special provisions on taxation, customs, and finance.

"The Free Zones Regime" is one of the fields subject to the *Investment Law no. 72/2017*, and the law provides special conditions, incentives, and governance regulations for the purpose of organizing the "Free Zones" companies and encourage investors to invest inside" Free Zones" in Egypt.

Upon defining the "Free Zone" as provided above, we will differentiate between both *Public and Private Free Zones* and the incentives granted by the Law to companies working in within that sector.

### Differences between Public & Private Free Zones:

#### **Public Free Zones:**

The general area includes a group of investment projects that are held to take advantage of the incentives and advantages of investment in this region and the state provides the necessary infrastructure to practice activity within this region.

There are nine Public Free Zones in Egypt; Alexandria (Amreya), Cairo (Nasr City), Port Said, Suez, Ismailia, Damietta, Shebin El Kom, and the Media Zone at 6th. of October City. The Egyptian public free zones are non-specialized areas except for the last zone, as each free zone includes several storage projects and industrial, service and financing projects without being limited to one activity.

#### **Private Free Zones:**

The project established in this system enjoys the same advantages, incentives and guarantees as the ones established in the public areas, with an administrative supervision from the nearest public free zone. Any project can be converted to operate within the "Private Free zone System"; provided that the project has already started its activity and its exports are not less than 50% of its production. There are about 164 projects in Egypt operating within the private free zones scheme.

*The Investment Guarantees and Incentives Law No. 72 of 2017* regulates the work of both public and private free zones, and one of the most important privileges provided by the law is exempting projects from customs taxes, general sales tax, and any other fees, as these projects are only subjected to an annual fee within the limits of 1% of the value.

Any project activities held under the Free Zones' regime shall provide the competent

## **ESTABLISHING A COMPANY TO OPERATE WITHIN THE “FREE ZONE SCHEME”.**

**Nahla Mohsen-Intern**

The Chairman of the board of directors of the competent free zone shall issue a decision licensing the activity of the project and approving its location, provided the license includes a statement of the purposes of the project, its validity period, its limits, and the value of the guarantee that is presented in exchange for the obligations that may be owned by the project to the authority.

***The Projects within the Free Zones and the profits they distribute are not subject to the provisions of the tax and fee laws in force in Egypt.***

It is not permissible for any person to practice a profession or craft in the public free zone for his own account on a permanent basis except after obtaining a permit to do so from the Chairman of the Board of Directors of the zone in accordance with the terms & conditions indicated by the executive regulations of this law and after paying an annual fee not exceeding five thousand pounds.

One of the most important advantages granted by the law for the "Free Zones" companies is the exemption from the VAT and customs duties for goods and products exported from the free zones to outside Egypt and the required materials for the use of the "Free Zone" company.

### **Benefits, guarantees and exemptions granted to the project:**

#### ***Advantages:***

Companies have the freedom to transfer invested capital and project profits abroad choosing the field of investment and the legal form of the projects, the freedom to set product prices and profit margins. In addition, there is neither minimum nor maximum capital limits for public free zone projects only. The existence of limits on the nationality of the capital, where the foreign investor can be unique or participate in any percentage in the investment, except for projects established in Sinai.

The possibility of operating for others to exploit the project's energies in accordance with the rules approved by the Authority in this regard granting foreign investors accommodation facilities while awarding foreign workers residence permits upon the project request.

#### ***Guarantees:***

It is not permissible to file a lawsuit against projects operating in the free zone system except after referring to the Authority. Furthermore, it is not acceptable to nationalize or confiscate projects and establishments. One of the beneficial guarantees too that it is not allowed by the administrative means to impose custody on projects, seize their funds, seize, freeze or confiscate them without judicial ways.

#### ***Exemptions:***

Exempting all capital assets and production requirements necessary for the practice of the project activity, except passenger cars, from any customs duties, sales taxes, or other taxes throughout the period of practicing the activity, even if the nature of the activity requires their temporary presence outside the free zone.

Exemption of exports and imports of the project to and from outside the country from any customs duties or taxes, whether sales taxes or other taxes or fees applicable within the country.

The project and its profits are not subject to the tax or customs laws or regulations in force within the country throughout the period of practicing the activity.





## الشيك و القانون في المعاملات التجارية Mr. Zaki Hassan- Senior Litigation Associate

ييمثل الشيك اهمية كبيرة من الناحية الاقتصادية فى كافة المعاملات التى تتم بين افراد المجتمع ، سواء المعاملات المدنية بوجه عام او المعاملات التجارية بوجه خاص ، وهو الامر الذى اوجب على المشرع سرعة التدخل التشريعى لأسباب الحماية القانونية عليه بإعتباره اداة وفاء استخدمها الاشخاص عوضاً عن النقود، ومن اجل استقرار التعاملات التجارية التى تعد عماد الاقتصاد وركيزة انتعاشه وازدهاره. فقد وضع المشرع شرائط شكلية وموضوعية اوجب توافرها فى صك الشيك حتى تتوافر له مقومات صحته ونفاذ اثره القانونى .

ونظراً لتلك الاهمية التى يتسم بها هذا الصك، نود ان نشير الى العديد من تلك الشرائط القانونية التى فرضها المشرع فى صك الشيك، وبيان طبيعة الشيك من الناحية المدنية والتجارية واثار ذلك قانوناً، وبيان المسؤولية القانونية لكلا من الساحب والمستفيد فى الشيك على السواء وفقاً لاحكام القانون واءاء فقهاءه وما انتهت اليه احكام محكمة النقض المصرية .

وفى البداية يجب الوقوف على طبيعة الشيك وهل يعد عملاً تجارياً خاصاً فلا يتم الا بين من انعقدت له صفة التاجر سواء كان شخصاً طبيعياً او شخص معنوى (شركه). ام انه ذا طبيعه مدنية يمكن من خلالها التعامل بموجبه بين الافراد فى كافة نواحي تعاملاتهم الشخصية، خاصة وان هذا الامر كان مثار خلاف بين فقهاء القانون تارة وما تتناولته المحاكم بأحكامها تارة اخرى .

وتجد الاجابة على هذا التساؤل غايتها فيما انتصر له **الدكتور على حسن يونس وهو احد فقهاء القانون**، من أن الشيك يعد عملاً تجارياً اذا كان سحبه مترتباً على عملية تجارية - أما اذا كان سحبه مترتباً على عملية مدنية فإنه يعتبر عملاً مدنياً ، فاذا كان ساحب الشيك تاجراً كان ذلك قرينة على أن السحب حصل بمناسبة عمله، ولكنها قرينة قابلة لاثبات العكس - وقد توج هذا الرأى الفقهى بأحكام محكمة النقض المصرية التى قررت مبدأ عاماً من أن الوصف التجارى للشيك يتحدد وقت انشائه، فيعتبر تجارياً متى كان تحريره مترتباً على عمل تجارى أو كان ساحبه تاجراً مالم يثبت أن سحبه لعمل غير تجارى.

### **ولكن يثور التساؤل بشأن الحماية الجنائية للشيك، وهل تختلف عما اذا كان الشيك تجارياً ام مدنياً؟**

فأن هذه المسألة تعد عديمة القيمة والاثار فى العمل فى المجال الجنائى، ذلك أن المشرع قد أسبغ الحماية الجنائية على الشيك أياً كان السبب أو الباعث على اصداره سواء كان عملاً مدنياً أو تجارياً؛ وإن كانت أهمية هذه الطبيعة تبدو فقط فى المنازعة المدنية أو التجارية للشيك من حيث الاختصاص القضائى بنظرها أو تحديد نسبة الفوائد القانونية المترتبة عليها، وقواعد الاثبات والنفاذ المعجل بشأنها، وهو الامر الذى يضىف بظلال من الامان والاطمئنان حال استخدام الشيك فى المعاملات التجارية والمدنية .

ويظل للشيك طابعه القانونى المميز فيما يتعلق بكافة المعاملات التى تتم بموجبه، بأنه أداة دفع ووفاء مستحق الأداء لدى الاطلاع دائماً ويعنى عن استعمال النقود طبقاً لما هو معرف بقانون التجارة. ولكن الواقع العملى قد أظهر مايسمى **"بشيك الضمان"**،

## الشيك و القانون في المعاملات التجارية

Mr. Zaki Hassan- Senior Litigation Associate

**فما هو هذا الشيك وما اثره القانونى فى تلك المعاملات التى تتم بموجبه ؟ وهل تترتب المسئولية الجنائية بشأنه من عدمه.**

شيك الضمان هو شيك بالمعنى المعروف قانوناً ومستوفى لكافة شروطه واحكامه، ولكن قصد المتعاقدين فيه عدم استخدامه الا فى حالة اخلال المدين فيه بالتزامه المضمون بموجب هذا الشيك. وهذا الشيك واقعا لا يمكن تجاهله او الالتفات عنه، واصبح واقعا ملموسا بشكل ظاهر فى العديد من المعاملات التجارية والمدنية على السواء، اضطر الي اصداره العديد من ممثلى الشركات التجارية او التجار او حتى الاشخاص الطبيعيين اما لعدم توافر القدرة الماليه لديهم، او ضمانا لتنفيذ التزام تعاقدى.

والحقيقة أن هذا الامر كان محل خلاف كبير حال اصدار الاحكام الجنائية بشأنه، فهل يعد مصدر الشيك الذى لم يتعمد ارتكاب جريمة اصدار شيك بدون رصيد وإنما حرره ضمانا لتنفيذ التزامه مستوجبا للعقاب من عدمه، خاصة وان تلك الجريمة فى ظاهرها قد فقدت ركنا من اركانها وهو الركن المعنوى للجريمة او ما يعرف بالقصد الجنائى لارتكاب الجريمة.

الا أن **محكمة النقض المصرية** قد حسمت هذا الامر دراء للتناقض فيما يصدر من الاحكام قضائية، وارست مبدأ قانونياً موحدا استقر على "إنه لا عبرة بالأسباب الدافعة الى اصدار الشيك، إذ أنها من قبيل البواعث التى لا يعتد بها قانوناً ولا أثر لها على المسئولية الجنائية لساحب الشيك، بما يكون معه مصدر الشيك مسئولاً قانوناً عن اصداره، سواء قصد به الوفاء او حرره ضمانا لالتزام، وهو ما يوجب على كافة الاشخاص سواء تاجرا او غير ذلك - توخى الحذر الشديد حال اصداره لصك الشيك لما يتمتع به من الحماية الجنائية الخاصة التى افردتها له المشرع لأستقرار المعاملات وتوافر الثقة فى هذا السند، ولا يساق بحسن ظنه او عدم الدراية بالقانون الى اصداره الشيك لأيا من المتعاملين معه تحت ما يسمى بشيك الضمان، خاصة وان هناك العديد والعديد من الاشخاص الذى قد واجهوا عقوبات جنائية من جراء هذا الفعل، ويعد هذا المقال نبراسا هاديا لكافة المتعاملين فى المجال التجارى او المدنى."

وفى خضم الاحكام القانونية للشيك التى لا يمكن استيفاءها بمقال منفرد، فأنا سوف نوالى المقالات التى يمكن من خلالها استيفاء كافة النواحي القانونية والاجرائية والشكلية للشيك، وتحديد المسئولية الجنائية للساحب خاصة وفى شأن المسئولية المفترضة فى ممثل الشخص المعنوى، وما استقرت عليه احكام القضاء واءاء فقهاء القانون وما انتهت اليه فى هذا الشأن، وهو ما سنتاوله بإيضاح مستنير بالمقالات القادمة.



*Hegazy & Partners is committed to updating the community on the latest legal and business developments. All the published articles constitute the opinion of the writers and are not intended to be construed as legal advice.*

To learn more about us & our practices, Visit

[www.hegazylaw.com](http://www.hegazylaw.com)

For official representation, expert legal advice, or other business services, we would be pleased to address your inquiries via e-mail or by booking an appointment.

Please e-mail us at:

[info@hegazylaw.com](mailto:info@hegazylaw.com)

1095-Cornich ElNil- Garden City, Cairo- Egypt

Suites #35 & 45- 4th and 5th Floors

Call us on +202 2793 4939

*Regional Expertise*

*International Reach*