

Mechanisms for saving commercial companies from bankruptcy in Algerian legislation

آليات إنقاذ الشركات التجارية من الإفلاس في القانون الجزائري

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Abstract:

In view of the importance of commercial companies in stimulating any economy, it was necessary to search for the measures stipulated in the Algerian commercial law to protect the debtor company from financial difficulties, and help it to carry out its economic and social roles. A look based on a good study and real diagnosis of the debtor company and its ability to regain its position in the market.

Keywords : rescue; bankruptcy; warning; conciliation; company.

ملخص:

نظرا لأهمية الشركات التجارية في تحفيز أي اقتصاد، اقتضى الأمر البحث في التدابير المنصوص عليها في القانون التجاري الجزائري لحماية الشركة المديونة من الصعوبات المالية التي قد تعترضها، ومساعدتها للقيام بأدوارها الاقتصادية والاجتماعية، وتوصلنا بالنتيجة لوجود خلل وتناقض يتطلب الانتقال من جمود وعجز النص التشريعي في هذا الشأن إلى نظرة تعتمد الدراسة الجيدة والتشخيص الحقيقي للشركة المديونة ولقدرتها على استرجاع مكانتها في السوق.

الكلمات المفتاحية: الإنقاذ؛ الإفلاس؛ الإنذار؛ الصلح، الشركة.

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Introduction:

The bankruptcy system led to the emergence of important legislation and a variety of practices that have evolved a lot since the ancient Roman law, which was in the field of settling disputes arising from the bankruptcy of debtors, the first step in the process of separation between enforcement on the person and assets, especially the distinction in treatment between merchants and non-traders, and the possibility Concluding agreements with the majority of creditors, which are binding on others, and procedures for liquidating the debtor's assets in case of his default, and excluding him from economic and even social life¹.

Romanian, Italian and European legislation share most of these features, even if they are partially different between them. However, French law witnessed a real structural shift in bankruptcy law and practice in the 19th century.

The bankruptcy proceedings drawn up in 1807, which have gained so much visibility because of their codification, were perhaps the most severe of the past three centuries for the debtor, but also the most economically costly. On the other hand, it fully corresponded to the political goal of preserving the then existing regime.

The insufficiency of the bankruptcy system necessitated that a balance be made between the creditors first, they are the victims, and they must be allowed to recover their money as much as possible, which is often not achieved when the assets of the bankrupt are liquidated or imprisoned², but rather through the continuation of exploitation through a judicial agent appointed by him Judge, and this was embodied under the reform of 1837 which reinforced this orientation of creditors towards future dividends when they began to view bankruptcy as a risk, which appeared with bankruptcy insurance schemes starting around 1848.

A part of the jurisprudence also considered that the debtor should also be able to benefit from the bankruptcy laws, considering that, in a certain way, he could be a victim of the recklessness of the creditors, and deserve some punishment for not assessing his situation better, measuring their credit and reducing the risks that the debtor bears.

In addition, creditors may sometimes stop lending without justification, under the influence of anxiety or circumstances that are largely uninformed and independent of the debtor's behavior, and this has created the possibility that the debtor may also be a victim of circumstances beyond his control, especially the circumstance that sees credit impediments becoming increasingly brutal. With its development, and those economic crises that result from wars or revolutions, hence the implementation of temporary

legislation in the years 1848 and 1870, which made it possible to experience the effects of settlement procedures of the consensual type, but simplified them and exempted them from the repercussions of bankruptcy.³

In 1889 finally, after 10 years of parliamentary debates and the real establishment of the liberal republic, a judicial liquidation was allowed, without declaring him bankrupt or forfeiting his civil rights and trying to establish a consensus, and the judicial liquidation allowed to keep the debtor in his administration, with the help of a liquidator. Depending upon the admitted good faith of the debtor, in 1903 the bankrupt was no longer fully reformed (including his full political rights) subject to the payment of principal and interest on all his debts, a condition which had hitherto rendered him almost inaccessible.

As for the year 1967, two different procedures were established: a judicial settlement and liquidation of assets, and the temporary suspension of claims, and a distinction was made between the fate of man and the fate of the company⁴, and then two major laws were issued: - The Law of March 1, 1984, which introduced a system to prevent commercial difficulties, - The Law of January 25, 1985, which established a single procedure for judicial reorganization, aimed at presenting a plan to protect the company's activity and preserve the positions of employment.

Then came Law No. 94-475 of June 10, 1994 on the prevention and treatment of corporate difficulties, less than ten years after the issuance of the law of January 25, 1985, which introduced the necessary corrections to a device that showed some glaring weaknesses, with regard to the stated goal of corporate recovery and its harmful effects. It was formed, in particular, by the artificial maintenance of the debtor's activity during the monitoring period, as well as by the lack of balance between the debtor's creditors.

This was followed by Law No. 2005-845 of July 26, 2005 on the protection of companies, which entered into force on January 1, 2006, and its implementation decree No. 2005-1677 of December 28, 2005, which created a profound picture of the law on companies in difficulties by the reorganization of the project, whose status is at risk, in order to allow the continuation of economic activity and the preservation of employment. This was followed by the issuance of Decree No. 1345-2008 issued on December 18, 2008 related to the Troubled Companies Law, which strengthened the system for dealing with the financial difficulties of the company, as well as Ordinance No. 326 issued on March 12, 2014 related to the prevention of the financial Commercial companies object, to be followed by Law No. 990-2015 of August 06, 2015 related to restoring the balance between the interest of creditors and the interest of shareholders of the debtor company, and supporting growth and activity and equal economic opportunities, as this law approved a set of mechanisms to assist financially troubled

companies represented in amicable settlement, judicial collective settlement, and judicial liquidation.⁵

Referring to Algerian law, Algeria was subject to French laws even after independence, and the same applies to the French commercial law, which included the bankruptcy and judicial settlement system, until the issuance of Ordinance No. 75/59 containing the Algerian commercial law, which included the bankruptcy and judicial settlement system. Consideration and bankruptcy, and other bankruptcy crimes, were mentioned within its legal texts. After that, Legislative Decree No. 93-08 was issued, in which amendments were stipulated that affected the system of judicial settlement and bankruptcy.⁶ On the one hand, and the repeal of Article 36 of Law No. 88-01 containing the directive law for enterprises⁷ which declared that the economic public institution should be subject to bankruptcy procedures if it lacked financial liquidity, and that the government could provide financial assistance to it if the judicial solution decision affected important interests in the economic field, national defense, regional balance and employment, in addition to that, the The Algerian legislator repealed Article 238 of the Commercial Code by Order No. 96-23 related to the acting judicial agent, to add Article 252 bis⁸ pursuant to Law No. 05-02 of 06/02/2005⁹

According to the aforementioned, the developments that took place in the field of bankruptcy laws or the law of companies that are going through financial difficulties in French law suggest the need for the Algerian legislator to rectify the laws of bankruptcy and judicial settlement that have become incompatible with the new course of the country's economic policy by focusing more on small enterprises and Medium - commercial companies - by supporting and preserving them in front of the financial risks that they may face.

The importance of this research is highlighted by showing the role of bankruptcy prevention measures in protecting and guaranteeing both the debtor company and the creditors.

And from this importance the research problem is reserved to answering the following question: What is the effectiveness of the mechanisms to save the debtor company from bankruptcy in the Algerian commercial law?

Finally, In light of the problem raised, we will rely on the analytical descriptive approach using the legal texts in force in this regard to try to uncover "the possibility of being able to restructure and save the company that is at risk of bankruptcy" as research methodology.

Obviously, to solve the research problem we will try presented this paper by dividing this research into two parts. In the first part, we deal with: monitoring the financial position of the company, and in the second part, maintaining the activity of the institution.

Section I: Monitoring the financial position of the company

To prevent the company from being subject to bankruptcy procedures, Algerian law created a warning procedure that would anticipate the financial difficulties that the company could face, and the purpose of this procedure is to provide information on the extent of the difficulties that could threaten the company's future in the long term.

Therefore, the aim of the alarm procedure is to enable solutions to be sought as soon as possible to avoid further difficulties, and in order to maximize its effectiveness, several devices can initiate this procedure, including:

Warning measures taken by the company's manager; where the manager of the company can trigger alarm procedures when he realizes that there are facts that are likely to affect the economic condition of the company in a way that gives rise to concern, or he notices a significant and permanent decrease in the number of applications in recent months. Through periodic reports containing the company's accounts and budget, inventory procedures, and the exploitation account General Assembly, and submits its report to the company's oversight body represented by the general assembly, the supervisory board, account managers or workers' representatives¹⁰ with the need to publish data related to the company's financial position and the range of activities practiced by it that may affect the stability of the company's capital¹¹.

1. Warning procedures related to account portfolios :

The Algerian legislator grants to the accounts governor¹² a distinguished role in detecting the financial crisis facing the company through the powers conferred on him in this framework, given that he is legally qualified to monitor the regularity of accounts and the validity of the information presented in the report of the Board of Directors and to approve them, and to study the impact of the financial crisis on the company in order to protect the company from bankruptcy¹³.

According to the annual accounts, accounting documents, and the management report that reflects the status of the company and its activity during the past year within a period of 4 months at most and following the close of the fiscal year submitted by the company's management, the accounts governor is obliged to carry out a warning procedure if he becomes aware of the existence of facts that may harm the continuity of the company's activity. During his general report within a period of at least 15 days before the convening of the general assembly called to approve the accounts, which meets within 6 months starting from the closing of the fiscal year¹⁴ hence, the managers and the shareholders should be informed of everything related to the results of the monitoring and investigation

operations that he carried out, as he may approve the accounts with reservations or without reservations or refuse approval¹⁵.

The accounts keeper also requests explanations from the chairman of the board or the manager's board of directors by means of a registered letter with acknowledgment of receipt. In case of urgency, the Extraordinary Assembly is called in order to present the results reached¹⁶.

For example: Informing shareholders of financial difficulties, trying to find possible solutions. However, if we go back to the French legislation, we find that the accounts governor is required to inform the president of the Commercial Court if he notices that the answers provided by the chairman of the board of directors or the board of directors are insufficient¹⁷.

2. Warning procedures related to account portfolios :

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Commercial Court if he notices that the answers provided by the chairman of the board of directors or the board of directors are insufficient²³.

3. Warning procedures related to partners:

The Algerian legislator authorizes partners in partnerships²⁴ the limited liability company has prior and permanent access to the information or documents related to the company represented by presenting the report issued on the operations of the fiscal year, conducting the inventory, general utilization account, calculating the results, and the annual budget of the company to take the appropriate decision before the convening of the general assembly and this is called He has the right to individual control²⁵

Knowing that for a limited liability company, the aforementioned documents, the account representative's report, trade records, accounts, contracts, invoices, correspondence, and minutes are granted²⁶.

This is with regard to the internal control of the financial position of the company. As for the external control, it is summarized in the task of the judiciary, which was authorized by the latter to investigate the financial position of the company by summoning the company's manager about the financial position of the company.²⁷ The Algerian legislator also provided for the establishment of the Banking Commission²⁸ Its mission is to monitor the work of banks and financial institutions, whether private or public, by asking them to investigate all clarifications and information about their budget and the company's assets and liabilities²⁹.

But if we go back to the French law, we find that it has developed a system for controlling the financial position of the company through a group of The various techniques represented in improving accounting and financial information related to legal persons, strengthening the supervisory role of the partners through written questions, as well as expanding the field of competence of the accounts expert in some management operations, creating the so-called approved groups for prevention, whose role is based on providing all The necessary instructions that contribute to getting the company out of its financial hardship. In addition, the president of the court is allowed, when questioning the president of the company about the financial position of his company, to use the expertise of this group³⁰.

Section II: Maintaining the company's activity.

The continuation of the debtor merchant in managing his trade is considered one of the important effects that arise after the issuance of the judicial settlement ruling by the force of law, which is considered an alternative system to bankruptcy, and this is confirmed by the Algerian legislator under Article 277/1 of the Algerian Commercial Code. However, the continuation of the activity of the debtor institution is compatible with a

set of procedures, namely reconciliation, stopping unique claims, and continuity of contracts.

1. Reconciliation:

Conciliation is a legal mechanism established to save the trader or commercial company from bankruptcy with the help of his creditors³¹.

Hence, acquiring the ratification ruling for the strength of the thing decided in it would return the debtor merchant to the head of managing his trade and his money to dispose of it freely, which means stopping the tasks of the bankruptcy agent who may be obligated to return to the debtor merchant his accounts in the presence of the delegated judge, and if the debtor merchant does not receive His papers and bonds, the latter remain under the responsibility of the bankruptcy agent for a full year starting from the presentation of the account, and thus the delegated judge writes a report whose duties are suspended, and if any dispute occurs in this regard, the court has the power to decide on it.

However, in order to guarantee the rights of creditors, the Algerian legislator authorized the delegated judge to appoint an observer or two³²They are chosen from among the creditors according to certain conditions, represented in the impermissibility of appointing him if he is a relative or relative of the debtor up to the fourth degree, or if he is a representative of a legal person. Their task is to study the accounts and determine the financial position of the debtor without receiving any remuneration creditors³³In addition, as a guarantee for the good implementation of the reconciliation, it was allowed to appoint one or three delegates, with defining their mission according to the ruling ratifying the reconciliation³⁴.

2. The continuity of contracts concluded before the judicial settlement ruling:

The application of mechanisms to save institutions from bankruptcy is equivalent to entering the company to the hospital in order to "treat" or correct it, and staying in the hospital means appropriate treatment for the purpose of saving the patient, otherwise we lose him. Hence, the aim of this principle of continuity of current contracts is to preserve the activity of the debtor company on the one hand, but also to preserve contracts that are beneficial to the debtor company that would increase its chances of recovery. However, the application of the rule of continuity of current contracts depends on three things namely:

- 1- Avoid contracts whose cost is greater than the size of the trader's assets.
- 2- Ensuring the continuation of the contract with the bona fide contracting party.

3- That the contract is in accordance with the interest of the debtor company.

It is noted from the aforementioned that the terms of application of the principle of continuity of the contracts of the debtor company came in application of the general principle in the implementation of contracts embodied in the general commitment to implement them in accordance with the requirements of good faith, which requires according to Article 107 of the Algerian Civil Code that it requires the implementation of the contract in accordance with its contents and in good faith, and The contract is not limited to obligating the contracting party only to what is stated in it, but also deals with what is among its requirements in accordance with the law, custom and justice according to the nature of the obligation.

Exhausting for the debtor so that it threatens him with a heavy loss, the judge may, according to the circumstances and after taking into account the interest of the two parties, reduce the burdensome obligation to a reasonable limit, and every agreement to the contrary shall be null and void. What should be noted in this regard is that the Algerian legislator did not refer to the issue of the continuation of the contracts concluded before the opening procedures of the judicial settlement, as he only referred to Articles 273 and 277 of the Algerian commercial law states that the debtor merchant who is sentenced to a judicial settlement and is authorized to exploit his industrial and commercial enterprise, may, with the help and permission of the delegated judge, carry out all the necessary procedures for this exploitation.

Considering that logic requires that the continuation of the commercial activity of the trader, whether an individual or a commercial company, ensuring its effectiveness, and protecting the factors of its continuity, necessitates preserving the contracts that create a source of financing for the commercial project in order to promote it again, and as long as it results in the judicial settlement ruling remaining The debtor trader is at the head of his trade because of his experience and knowledge of his commercial project. Naturally, he is the one who decides, along with the acting judicial agent, the appropriateness of continuing the implementation of contracts in comparison to the size of the financial expenses that fall on him and his financial position, and the size of the profits that will enter his financial responsibility³⁵.

Referring to the French legislation, we find that the acting judicial agent has the power to decide on the continuity of the current contracts according to Article 622-13 of the French Commercial Code. In the case of the silence of the acting judicial agent for a period of more than a month, then he annuls the contract, which means that failure to respond to the warning is a refusal to continue executing the current contracts.³⁶ On the other hand, the delegated judge was allowed to order the acting judicial representative in a

short period of time or to extend for him the legally specified period before its expiry, which does not exceed two months, in order to decide on the subject of current contracts, and if the subject of the contract is to provide a service related to the payment of an amount of money, it must To be paid in cash, unless the agent can the judicial disposer of affairs is able to obtain the approval of the debtor's contractor by giving a deadline for payment in accordance with the documents granted, and the latter is considered a guarantor at the time he requests execution, but if it comes to a contract that must be executed and paid within certain deadlines, and it becomes clear to the judicial disposer of the agent that it is impossible to fulfill the established obligations In the contract, in view of the assets, it will be requested not to continue the implementation of the contract, and in the event of non-respect of the aforementioned conditions, the contract will be nullified by the force of law, and in the event that the disposing judicial agent is late in deciding whether or not to continue the contract, which causes the contracting parties to lose, then the contracting party is entitled to claim compensation.

3. Stop individual lawsuits:

In embodiment of the principle of the necessity of helping the debtor company to get out of its financial crisis on the one hand, and in order to ensure equality between creditors in the collection of their debts, Article 245 of the Algerian Commercial Code stipulated³⁷ similar to comparative legislation, once a judgment is issued for bankruptcy or judicial settlement, the members of the group of creditors cannot resort to the judiciary to claim their rights in a personal capacity³⁸.

This was confirmed by the French Court of Cassation, as it considered that the creditors, once they declared their debts to the judicial disposer of the agent, could not claim their debts individually³⁹.

However, this article meant creditors whose debts originated before the judgment of bankruptcy or judicial settlement and all executive procedures in this regard, and the matter of stopping personal lawsuits is limited to ordinary creditors or general lien holders. that money.

Algerian legislation differs in its rulings on French legislation in this matter, as the latter extended the scope of application of the rule of stopping individual follow-ups, and did not distinguish between the ordinary creditor and the creditor with special privilege and the owners of possession mortgages and mortgages without transfer of possession, and official mortgages on real estate in front of this The principle, although they enjoy the right of precedence or the right of succession, with the aim of creating appropriate conditions that contribute to the recovery of the trader, a natural or legal person, from the financial difficulties he is going through. Also, no

distinction was made between whether the debt is of a commercial nature or a civil nature, by referring to the rule of the unity of the financial liability of the debtor, in addition to the aforementioned. The workers are treated exceptionally⁴⁰ Article 622-22 of the French Commercial Code provides for the suspension of every lawsuit related to the fulfillment of a specific debt that was filed before the issuance of a judgment of bankruptcy or judicial settlement on the one hand, and the prohibition of filing every new lawsuit aimed at forcing the debtor to fulfill a specific debt⁴¹.

Where the creditor is required to declare his debt to the judicial acting attorney, or the delegated judge to guarantee his financial right. unlike the Algerian legislator, which provides for stopping lawsuits only, and did not address the prevention of new lawsuits⁴².

Conclusion:

In general, the Algerian legislation took steps to strengthen the legal frameworks related to bankruptcy or judicial settlement, as it tried to find an alternative means for the bankruptcy of the debtor company, as well as the settlement of disputes between the latter and its creditors, and accordingly the following results and recommendations can be presented:

First: The results;

* The Algerian legislation in the field of saving companies from bankruptcy is still lagging behind compared to foreign legislation in this field.

*There is a lack of institutional measures across the region to prevent corporate bankruptcy, through mechanisms such as early warning systems.

The absence of any monitoring and evaluation of bankruptcy procedures remains an ongoing challenge.

Second: Recommendations;

* The Algerian legislator should reconsider the legal system of Algerian bankruptcy and judicial settlement

Creating effective legal procedures that ensure the continuity of every commercial activity that may be exposed to a transient financial crisis, and giving priority to the economic and social aspect through the bankruptcy system by considering that the consecration of legal texts related to the judicial settlement system are not just legal texts applied to a traditional dispute that each party seeks to protect its rights, but rather Rescuing the debtor merchant and finding appropriate solutions to continue his commercial activity is the primary goal that must be taken into account.

* The need to motivate banking institutions to help small and medium enterprises that are going through transient financial hardship in order to avoid their situation becoming stuck and their exit from the market.

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- 5 حنان عبد العزيز مخاوف ،اعادة هيكلة المشروعات المتعثرة وفقا لاحكام القانون رقم 11 لسنة 2018 بشأن تنظيم اعادة الهيكلة و الصلح الوافي و الإفلاس 9file:///C:/Users/hbunited/Downloads/eada.pdf, date and time of access: 04/ 08/2021 at: 17:49.
- 6 The Algerian legislator amended some legal texts related to the bankruptcy system or judicial settlement represented in the following: Articles 216 and 217, and the continuation of the fifth section of Article 317 of the Algerian Commercial Code according to Articles 1 and 2 of Legislative Decree No. 93-08 dated 3 DhulQi'dah 1413 Corresponding to April 25, 1993 amending and supplementing Ordinance No. 75-59 of September 26, 1975 containing the Commercial Code, J.R. No. 27.
- 7 Article 36 of Law No. 88-01, which includes the directive law for enterprises, dated January 12, 1988, O.N., No. 02, was repealed by virtue of Article 14 of Legislative Decree No. 08-93 aforementioned, which stipulated the following: Exceptionally, a public economic corporation may be subject to a judicial procedure that puts it in a state of bankruptcy if it permanently lacks financial liquidity due to insolvency, which is proven by a special legal rule enacted for this purpose under a special law. technical and economic preventive measures, or restructuring, or providing them with financial aid, if the judicial decision of dissolution affects important interests in the field of the national economy, national defense, regional balance, and employment, and these measures result in the termination of the ongoing judicial procedure.

- 8 252 bis states that “regardless of the contrary legal provisions, the payment and delivery of financial instruments carried out within the framework of interbank payment systems cannot be annulled until the end of which the judgment of judicial settlement or bankruptcy was issued against a bank or a legally qualified financial institution participating directly or indirectly in these systems, even if the existence of this judicial ruling is upheld.
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