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Civil Implications of Ultra Vires Actions in Iraqi and English Law

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Abstract

This paper examines the implications of ultra vires actions in Iraqi law that exceed a person or entity's legal capacity. It compares the approach taken in Iraqi civil law with the development of the ultra vires doctrine in English common law. The ultra vires doctrine framework focuses on the legal capacity of the person or entity and the good faith of a third party rather than strict adherence to the restrictions set out in constitutional documents. The ultra vires doctrine suspends the validity of transactions that exceed legal capacity until ratified, in contrast to the automatic nullity under the English ultra vires doctrine before 2006. This flexible approach based on civil law may provide a more adaptable framework for addressing such issues in Iraq, where the concept of ultra vires is not explicitly recognized. The paper also examines the position of Iraqi corporate law on directors' powers and highlights the need for clearer regulation of ultra vires actions to protect third parties.

Keywords: ultra vires, legal capacity, civil code, good faith, third-party protection

Introduction

The concept of ultra vires, meaning 'beyond the powers', is a fundamental principle in common law legal systems, particularly corporate law. The ultra vires doctrine holds that a company or other legal entity can only exercise powers expressly granted by its constitutional documents or enabling legislation. Any acts or transactions that fall outside the scope of this defined authority are considered ultra vires and, therefore, void and unenforceable. This doctrine, as we will see, has significant implications for corporate governance and the protection of third parties.

This doctrine has its roots in the landmark English case of Ashbury Railway Carriage and Iron Co Ltd v Riche (1875), where the court ruled that a company could only engage in the specific activities set out in its memorandum of association. Subsequent legislation, such as the Companies Act 1985 in the UK, further entrenched the ultra vires principle by requiring companies to have a defined statement of objects in their constitutional documents. [1] This strict interpretation of corporate capacity meant that any contracts or transactions that exceeded a company's stated objects could be challenged as ultra vires, even if the third party was unaware of the company's limited authority.

However, the rigid application of the ultra vires doctrine has been subject to extensive criticism over the years. The automatic invalidity of ultra vires transactions posed significant risks and potential injustice to third parties who had entered into such contracts in good faith. [2] Additionally, the requirement for companies to have narrowly defined objects was viewed as an impediment to corporate flexibility and adaptability in responding to changing market conditions.

In response to these concerns, the English legislature has introduced reforms to mitigate the harsh consequences of the ultra vires doctrine. The Companies Act 2006 (ECA 2006) represents a significant departure from the previous approach, shifting the balance towards a more flexible and protective framework for corporate

[1] Birds, John, ed. *Boyle & Birds' company law*. Jordans, 2014.
[2] Ferran, Eilís, and Look Chan Ho. *Principles of corporate finance law*. Oxford University Press, USA, 2014.

capacity and third-party transactions.[1] Under the ECA 2006, companies are presumed to have unrestricted objects and capacity unless they restrict their activities in their constitutional documents. Furthermore, the Act introduced provisions to protect third parties dealing with companies, even if the transaction exceeds the company's stated objects or the authority of its directors.[2]

These reforms have brought the English position closer to the approach adopted in the Iraqi Civil Code (CCI), which places greater emphasis on the legal capacity of the person or entity and the good faith of the third party rather than strict adherence to the limitations set out in the entity's constitutional documents.[3]

Under the CCI, the validity of a transaction that exceeds a person or entity's legal capacity is not automatically void but suspended until the valid owner ratifies it.[4]

This allows for a degree of flexibility, as the transaction may still be binding if the third party acted in good faith and was unaware of the limitations on the person or entity's legal capacity. This contrasts with the rigid interpretation of the ultra vires doctrine under the pre-2006 English common law and legislation, where transactions that exceeded a company's stated objects were deemed automatically void and unenforceable.

The CCI's focus on legal capacity and good faith may provide a more adaptable framework for addressing ultra vires-type issues in the Iraqi legal context, where the ultra vires doctrine is not explicitly recognized. By suspending the validity of a transaction rather than automatically invalidating it, the CCI allows for a more nuanced and contextual assessment of the situation, taking into account the third party's knowledge and intentions.[5]

Furthermore, the CCI's approach is rooted in the general principles of civil law, which emphasize the protection of individual rights and the promotion of

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[1] Hannigan, Brenda. *Company law*. Oxford University Press, USA, 2018.
[2] Prentice, D. D. (2007). The Companies Act 2006. The Company Lawyer, 28(4), 98-112.
[3] Stigall, Dan E. "Iraqi civil law: Its sources, substance, and sundering." *J. Transnat'l L. & Pol'y* 16 (2006): 1.
[4] Dr. Al-Hakeem, Abdul-Majid, Summary Explanation of the Civil Code of Iraq, Part One, Sources of Obligations, 3rd Edition, Al-Sanhouri Bookshop, 1969.
[5] Dr. Salih, Basim Mohammad; Dr. Al-Azawi, Adnan Ahmed Wali, Commercial Law: Commercial Companies, Qanooniya Bookshop, Baghdad, 1989.

commercial transactions rather than the strict adherence to the limitations set out in a company's constitutional document.[1]This philosophical underpinning may offer a more flexible and adaptable framework for addressing legal capacity issues in the Iraqi legal system, which has a civil law tradition.

The comparison between the CCI's approach and the ultra vires doctrine in English law highlights the divergent philosophical underpinnings and practical implications of the two legal frameworks. While the ultra vires doctrine was firmly grounded in the concept that a company's capacity is strictly limited to its stated objects, the CCI emphasizes the legal capacity of the person or entity and the third party's good faith.

The reforms introduced by the ECA 2006 have sought to address the shortcomings of the ultra vires doctrine and provide more protection for third parties dealing with companies. However, the CCI's approach, rooted in the general principles of civil law, may still offer a more adaptable framework for addressing similar issues in the Iraqi legal context, where the ultra vires doctrine is not explicitly recognized.

1. The Concept of Legal Capacity and its Limits under the Iraqi Civil Code (CCI)

The concept of legal capacity is a fundamental principle in the Iraqi Civil Code (CCI), governing the ability of individuals and legal entities to engage in legally binding transactions and assume legal rights and obligations. The CCI's approach to legal capacity and limitations contrasts the ultra vires doctrine developed in common law jurisdictions, particularly corporate law.

Under the CCI, the general rule is that every natural person has total legal capacity from the age of majority, which is set at 18.[2]This presumption of total capacity is subject to certain exceptions, such as minors, the mentally incapacitated, and those under guardianship who may have their capacity restricted or suspended.[3] Similarly, legal entities, such as companies, are also recognized as having legal

[1] Al-Hakeem, 1969.
[2] Al-Hakeem, 1969.
[3] Salih, 1989.

capacity, with the ability to hold rights and assume obligations through their authorized representatives.[1]

However, the CCI acknowledges that the legal capacity of individuals and legal entities may be limited or constrained by various factors. Article 9 ٣of the CCI states that a person's legal capacity may be restricted "by law or a court judgment " (Iraqi Civil Code, 1951). This provision allows for imposing legal incapacity or restrictions on an individual's capacity based on specific circumstances, such as mental incapacity, bankruptcy, or other legal considerations.2

Similarly, the legal capacity of legal entities, such as companies, may also be subject to limitations. Article ٤٨of the CCI stipulates that the "legal person shall have the capacity to acquire rights and assume obligations to the extent determined by the law or its constitutional documents" (Iraqi Civil Code, 1951). This suggests that the legal capacity of a legal entity can be circumscribed by both statutory provisions and the entity's own internal rules or constitutional documents.[3]

The CCI's approach to legal capacity and limitations differs significantly from the traditional ultra vires doctrine developed in common law jurisdictions, particularly corporate law. Under the ultra vires doctrine, as exemplified by the landmark English case of Ashbury Railway Carriage and Iron Co Ltd v Riche (1875), a company's capacity was strictly limited to the specific activities outlined in its memorandum of association.[4] Any acts or transactions outside the company's stated objects were deemed ultra vires (beyond the powers) and, therefore, void and unenforceable.

This rigid interpretation of corporate capacity under the ultra vires doctrine was later enshrined in legislation, such as the Companies Act 1985 in the UK, which required all companies to have a defined statement of objects in their memorandum of association.[5]Transactions that exceeded the company's stated objectives could

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[1] Al-Hakeem, 1969.

[2] Salih, 1989.
[3] Al-Hakeem, 1969
[4] Hicks, Andrew, and Say H. Goo. *Cases and materials on company law*. Oxford University Press, USA, 2008.
[5] Birds et al., 2017.

be challenged as ultra vires, even if the third party was unaware of the company's limited capacity.

In contrast, the CCI's approach to legal capacity focuses more on the general principles of individual and entity capacity rather than strict adherence to specific limitations set out in constitutional documents. While the CCI acknowledges that the legal capacity of individuals and legal entities may be restricted by law or their own internal rules, the emphasis is on the capacity of the person or entity rather than the external limitations on their authority.[1]

Moreover, the CCI's framework for addressing transactions that exceed a person's or entity's legal capacity is more nuanced and flexible than the ultra vires doctrine. Under the CCI, the validity of such transactions is not automatically void but instead suspended until the valid owner ratifies it.[2]This allows for a degree of flexibility, as the transaction may still be binding if the third party acted in good faith and was unaware of the limitations on the person or entity's legal capacity.

This contrasts with the rigid interpretation of the ultra vires doctrine under the pre-2006 English common law and legislation, where transactions that exceeded a company's stated objects were deemed automatically void and unenforceable, regardless of the third party's knowledge or good faith.[3]

2. The Protection of Third Parties who Deal with a Person or Entity Acting Beyond their Legal Capacity under the CCI

The Iraqi Civil Code (CCI) framework critically protects third parties who engage in transactions with a person or entity acting beyond their legal capacity. Unlike the rigid application of the ultra vires doctrine in common law jurisdictions, the CCI adopts a more flexible and nuanced approach that seeks to balance the interests of the true owner and the legitimate expectations of third parties acting in good faith.

[1] Al-Hakeem, 1969
[2] Salih, 1989.
[3] Ferran, E., & Ho, L. C. (2014).

The CCI's provisions on the protection of third parties are primarily found in Articles 944 and 945, which address the scenarios where a transaction is concluded by an agent who exceeds their authority (Iraqi Civil Code, 1951). While these articles specifically deal with agency relationships, the underlying principles can be extended to broader situations where a person or entity purports to act beyond their legal capacity.

Article 944 of the CCI states that if a transaction is concluded by an agent who exceeds their authority, the transaction is suspended until it is ratified by the principal (Iraqi Civil Code, 1951).

However, the CCI goes a step further in protecting third parties through the provisions of Article 943. This article stipulates that if the third party was unaware of the agent's lack of authority, the transaction should be considered valid, even if the principal refuses to ratify it (Iraqi Civil Code, 1951). This protection of the third party's good faith is a crucial aspect of the CCI's approach, as it seeks to balance the interests of the true owner with the legitimate expectations of those engaging in commercial transactions.

The rationale behind this provision is twofold: First, it recognizes the importance of promoting commercial stability and predictability, which can be undermined if third parties are automatically exposed to the risk of invalidating their transactions due to the limitations on the person or entity's legal capacity.[1]Secondly, it reflects the CCI's underlying principle of protecting individual rights, which includes the rights of the third party who has acted in good faith without knowing the limitations on the person or entity's authority.[2]

This approach contrasts with the rigid application of the ultra vires doctrine in common law jurisdictions, where any transaction that exceeded a company's stated objects was automatically considered void and unenforceable, regardless of the

[1] Stigall, D.E., 2006. Iraqi civil law: Its sources, substance, and sundering. *J. Transnat'l L. & Pol'y*, *16*, p.1.

[2] Mohammed Hanoun Jafar, Iraqi Civil Code No. (40) of 1951 In light of the foundations on which it is based (a comparative study), Journal of Misan Comparative Legal Studies, 2022, Volume 1, Issue 7, Pages 27-45.

third party's knowledge or good faith. [1] The CCI's framework, however, acknowledges the potential for injustice and commercial disruption that may arise from the automatic invalidation of transactions, mainly when the third party is acting in good faith.

3. Comparison to the Ultra Vires Doctrine in English Law

The Iraqi Civil Code's (CCI) approach to addressing issues arising from a person or entity exceeding the limits of their legal capacity can be usefully contrasted with the development of the ultra vires doctrine in English common law and legislation. This comparative analysis provides valuable insights into the two legal frameworks' differing philosophical underpinnings and practical implications.

3.1 The Ultra Vires Doctrine in English Law

The ultra vires doctrine has a long and well-established history in English common law, tracing its origins to the landmark case of Ashbury Railway Carriage and Iron Co Ltd v Riche in 1875 (Ashbury Railway).[2]In this pivotal decision, the court ruled that companies incorporated under the Companies Acts could only undertake the specific activities set out in their memorandum of association. Any acts beyond those stated objects were deemed ultra vires (Latin for "beyond the powers") and, therefore, void and unenforceable.

The Ashbury Railway judgment was rooted in the principle that a company's capacity was strictly limited to the objectives outlined in its constitutional documents. The court reasoned that a company, as an artificial legal entity, could only exercise its powers expressly granted by its memorandum of association. Transactions outside the stated objects were considered unenforceable beyond the company's legal capacity.[3]

This rigid interpretation of corporate capacity was later enshrined in the Companies Act 1985 (CA 1985), which required all companies to have a defined statement of objects in their memorandum of association. Any contracts or transactions that

[1] Hicks, Andrew, and Say H. Goo. Cases and materials on company law. Oxford University Press, USA, 2008.
[2] Worthington, Sarah. *Sealy and Worthington's Text, Cases, and Materials in Company Law*. Oxford University Press, 2016.
[3] Birds, John, 2014.

exceeded the company's stated objectives could be challenged as ultra vires, even if the third party was unaware of the company's limited capacity.[1]The courts further reinforced this principle in cases such as Bell Houses Ltd v City Wall Properties Ltd (1966), where a company's capacity was strictly limited to its stated objects, and a transaction that exceeded those objects was deemed ultra vires and void.

3.2 The Shortcomings of the Ultra Vires Doctrine

The strict application of the ultra vires doctrine under the common law and the CA 1985 was widely criticized, as it could invalidate bona fide transactions and pose significant risks for third parties dealing with companies.[2]In the case of Rolled Steel Products (Holdings) Ltd v British Steel Corporation (1986), the court acknowledged the potential for injustice to third parties but felt bound by the rigid application of the ultra vires doctrine.

The key criticisms of the ultra vires doctrine were threefold:

1. Injustice to Third Parties: The automatic invalidity of transactions that exceeded a company's stated objects could result in significant hardship for third parties who had entered into such contracts in good faith, unaware of the company's limited capacity.

2. Impediment to Corporate Flexibility: The requirement for companies to have a narrowly defined set of objects in their memorandum of association limited their ability to adapt to changing market conditions and engage in new, potentially profitable activities.

3. Increased Transactional Costs: The need to carefully scrutinize a company's memorandum of association and the risk of challenging transactions as ultra vires added significant transaction costs and uncertainty for parties dealing with companies.

In response to these criticisms, the English legislature introduced reforms to mitigate the harsh consequences of the ultra vires doctrine. The Companies Act

[1]Ferran & Ho, 2014

[2] Hannigan, Brenda. *Company law*. Oxford University Press, USA, 2018.

2006 (ECA 2006) represented a significant departure from the previous approach, shifting the balance towards a more flexible and protective framework for corporate capacity and third-party transactions.

3.3 The ECA 2006 Reforms

The ECA 2006 introduced several critical changes to the ultra vires doctrine:

1. Presumption of Unrestricted Capacity: Under the ECA 2006, companies are presumed to have unrestricted objects and capacity unless they restrict their activities in their constitutional documents.[1] This shift towards a more flexible approach was a fundamental departure from the rigid limitations imposed by the Ashbury Railway judgment and the CA 1985.

2. Protection for Third Parties: The ECA 2006 also introduced provisions to protect third parties dealing with companies, even if the transaction exceeds the company's stated objects or the authority of its directors. Section 39 of the Act states that a company is bound by the acts of its directors, regardless of any limitations in the company's constitution or any lack of authority on the part of the directors.[2] This was a significant change from the position before 2006, when the ultra vires doctrine could invalidate transactions that exceeded a company's stated objects.

3. Increased Corporate Flexibility: By presuming companies to have unrestricted capacity, the ECA 2006 removed the need for companies to maintain a narrow and potentially restrictive set of objects in their constitutional documents. This increased the flexibility for companies to adapt to changing market conditions and engage in a broader range of commercial activities.

The ECA 2006 reforms represented a fundamental shift in the English approach to corporate capacity and the ultra vires doctrine. Rather than automatically invalidating transactions that exceeded a company's stated objects, the new framework sought to protect the legitimate interests of third parties and provide companies with greater flexibility to pursue new business opportunities.[3]

[1] Havenga, Michele. "Directors' fiduciary duties under our future company-law regime." *S. Afr. Mercantile LJ* 9 (1997): 310.

[2] Worthington, Sarah. *Sealy and Worthington's Text, Cases, and Materials in Company Law*. Oxford University Press, 2016.

[3] Al-Hakeem, 1969

3.4. **The Ultra Vires Concept in the CLI of 1997**

Companies Law No. 21 of 1997, as amended (hereinafter CLI), replaced Companies Law No. 36 of 1983, which was issued with a socialist vision and adopted a planned economy methodology. The CLI of 1997 also promotes a planned economy.[1]and was legislated by the same socialist regime but at a time when Iraq was suffering from economic sanctions as well as the damages caused by a lost war in 1991, which all led to some devastating effects on all aspects of life, not the least of which is the economy and the prosperity of businesses and companies and the entire private sector.

As a result of the war and the invasion of Iraq in 2003 and the collapse of the socialist regime, The CLI was amended two times, the first of which was in 2004[2], which introduced numerous changes that influenced the trajectory of the business environment and potentially the whole of the economy. Those amendments included, *inter alia*, the expansion of the scope of the law to all "investors", the recognition of sole owner limited liability companies, facilitating the business registry process, as well as some other amendments that led to having more businesses registered, more business transactions and contracts and consequently more issues to address. A key issue not adequately discussed or addressed in these amendments is the *ultra vires* actions of a company in Iraq. The lack of regulation of this matter would eventually lead to more issues for foreign investors and may result in a reluctance to start any operations in Iraq.

In principle, the CLI of 1997 sets four fundamental goals for itself; two of which are to "protect creditors from fraud"[3]and to "protect shareholders from the conflict of interest and the abuse of the company's officials and majority shareholders who control its affair"[4]and this in itself is a major statement in terms of attempting to protect everyone and will always be a target to be achieved as this will provide a

[1] See the Laws of National Development Plan No. 70 of 1970 and No. 89 of 1977 for the years from 1970 onward and the Planning Commission Law No. 24 of 1994 (annulled by law No. 19 of 2009); See also the Coalition Provisional Authority (CPA) Order No. 64 of 2004, 1.
[2] Ibid, CPA Order No. 64 of 2004.
[3] The CLI of 1997, article 1 (2).
[4] Ibid. article 1 (3).

better environment and protection to investors and will positively reflect on the economy[1] However, the legislation provides very few provisions regulating the powers of directors and no provisions to regulate or abrogate the concept of *ultra vires*.

Article 13 of the CLI provided the registration requirements of companies and this included "The purpose for which the company was formed and the general nature of the business it will undertake"[2]. Article 13 has also required that the company provides a "name" for itself and that is, as well, a process where the founders of the company will have to select a name that is derived from its type of business or at least contains the general description of its business, which will be part of the name[3] such as "X for Auto Trading" or "Y for Tourism"[4] and that is not the same as ECA of 2006 where it had unrestricted the acts of the company unless the company chooses to. Although the CLI of 1997 was amended to remove the requirement of the name to be derived from its business, it does not mean the requirement under the Commercial Names and Commercial Registers Regulations No. 6 of 1985 is removed. This will continue to be required and applied and the name will have to be derived from the type of business the company undertakes.

Despite the attempts to have the company's business unrestricted, article 27 of the CLI of 1997 has cemented the intention of restricting the company's business that it had already set for itself when it was initially formed as this article obligates the company to use the capital for the "acts prescribed in its contract", which indicate the ambiguity, or at least the inconsistency, in addressing the issue of restricting or unrestricting the company's business.

It can be seen that CLI of 1997 has no reference to any situation where an *ultra vires* event may occur; where the company exceeds its authority and acts beyond the permissible business types prescribed in its contract (memorandum of association). This essentially refers any matters of *ultra vires* to the general

[1] Komani, Latif Jabir, *Commercial Companies*, Dar Al Sanhuri, Beirut, 2021, 13.
[2] See article 13 (Third) of the CLI.
[3] See Commercial Names and Commercial Registers Regulations No. 6 of 1985.
[4] Names were not included in this research paper as it provides for hypothetical company names and not actual companies and it is solely for research purposes.

principles stipulated in the Civil Code of Iraq (hereinafter CCI) No. 40 of 1951 and the rules governing such situations, which would leave the creditors and third parties with too much uncertainty and risk.

Accordingly, if directors conclude a transaction using the name of the company and the transaction is *ultra vires*, regardless of whether it is for the benefit of the company or the benefit of the directors themselves and although the reliance will be on the ostensible authority of the directors, the transaction will not be binding to the company[1]. Article 48 (4) of the CCI has clearly stated that “a juridical person has the capacity of performance within the limits set down in its deed of incorporation and which are prescribed in the law”, which will render such a transaction void and directors will be liable for their actions against the company as well as third parties. However, pursuant to article 135 (1) of the CCI “he who has disposed of what another person owns without his permission, his disposal is concluded subject to validation by owner”, thus rendering the transaction on hold until the company approves it[2]. This will not provide much protection for third parties acting in good faith, and certainly, there need to be some regulations for the actions of any uncommissioned directors. The CLI should be amended to reflect on this issue and ensure more protection is provided for third parties, in particular, where it can be seen that article 150 of the CCI has emphasized that transaction must be “…performed according to its contents and in a manner which conforms to the norms of good faith”[3].

Although it took the English Companies Act over a hundred years to evolve and regulate (or deregulate) the doctrine of *ultra vires*, we recommend that CLI No. 21 of 1997 is revisited to better address this issue and we recommend providing a change and better articulate the situations revolving around the *ultra vires* doctrine in clear terms.

[1] CCI of 1951, article 48.

[2] See Dr. Abdul-Majid Al-Hakeem, *Summary of the Explanation of the Civil Code of Iraq, Part one, Sources of Obligations*, 3rd Ed, Al-Sanhouri Bookshop, 1969. 312; Dr. Dhurgham Fadhil Hussein, *The Extent of the Company's Liability for the Acts of the Managing Director in the Face of Third Parties*, Basra Journal of Studies, 15th Year, Issue (38) , December 2020, 284.

[3] See the decisions of Court of Cassation (Tamyiz) no. (3456/Appellate Court/Movables/2022) dated November 23, 2022; and no. (1727) dated July 19, 2006.

4. Analysis of Powers of Directors in Common Law vs. Civil Law

There Are certainly major differences in the way powers of directors are viewed in civil law and common law system and these differences may relate to the authorization given to these directors and we will discuss it as follows:

4.1 Powers of Directors in the Common Law

Directors are considered an extension of the company itself, and their actions matter to the members of the company and any parties dealing with the company. Additionally, the constitution of a company would list the acts that it may undertake, but, in addition to that, it will contain certain provisions that define, to a certain extent, the powers vested upon its directors. The company's members or shareholders will grant the directors the powers that they consider sufficient to properly manage and run the company. Furthermore, shareholders of a company may also entrust their directors with certain powers of major impact on the company such as borrowings, registration of transfer of shares, and possibly forfeit of shares in certain circumstances.

In normal commercial practice, the directors of a company may have the opportunity to go above and beyond the powers entrusted to them and make decisions that would go against the interest of the company. The decisions made by the directors that exceed the powers entrusted to them may be preapproved by the members of the company or at least validated afterward. In this situation, we would not have an issue. However, there will be an issue when the members of the company disapprove or not grant any approval for such transactions. How can the law protect those members and the company as well as any *bona fide* third parties?

4.2 Position of the CLI of 1997 on Powers of Directors

The CLI of 1997 set out a few controls over the qualifications for any person to be on the board of directors of a company. Some of these controls and requirements listed in article (106) of the CLI including, *inter alia*, having the legal capacity and not being banned from company management by a law or a decision issued by a competent authority, and they should at least be owners of at least a (2000) shares of the company. It goes on to state that the term is only (3) years subject to renewal. These types of requirements are meant to ensure that members of the board of directors have a major interest in seeing the company succeed and perform well, particularly, if they own at least (2000) shares of the company and as it is described in English law and literature provide some assurances that the director will seek "…to promote the success of the company…".[1] However, selecting suitable and more qualified directors to run the business may be a cumbrous process given these requirements.

In addition, it can be understood from the position of some Iraqi scholars and researchers[2] that article 106 (2) of the CLI refers to natural persons only in which they presumed that the legal capacity age is the completion of (18) years old, which may not be in agreement with the general rules of the law, because of the language used in this paragraph, which seems to be neutral and not specific to natural persons. This means juridical persons can be directors of a company because they possess the legal capacity to represent the company.[3] In addition to that, juridical persons will always have a natural person representing them in accordance with article 48 (1) of the CCI of 1951.[4] This is different from section 155 of the ECA of 2006 where it explicitly provided for the possibility to have juridical persons as directors.

Additionally, article (110)[5] of the CLI also provides for another set of controls to try to prevent any conflict of interests such as forbidding directors from the directorship of more than (six) companies at a time but can be a chair of (one) or (two), however, the CLI forbids them from being chairs or directors of (two) companies of the same type of business. This is in some way similar to the provisions of section 175 of the ECA of 2006. However, this does not seem to be

[1] See section 172 (1) of the ECA of 2006.
[2] Komani, (n. 31) 225.
[3] This position has not changed even under the previous CLI no. 36 of 1983, for additional details see Dr. Basim Mohammad Salih, Dr. Adnan Ahmed Wali Al-Azawi, *Commercial Law: Commercial Companies*, Qanooniya Bookshop, Baghdad, 1989, P 239.
[4] This is further emphasized by the Court of Cassation (Tamyiz) in its decision no. (198/Juridical Person/2012) dated April 24, 2012.
[5] Article 110 of the CLI

a preferable situation where limiting directors' ability in this manner, the details of these limitations are unnecessarily complicated especially taken into consideration that a director must own at least (2000) shares of the company he or she intends to manage. The best way possible would be either by removing such complicated requirements or by limiting directors to only one company and as an exception allowing them to be directors of a second company with an approval from an appropriate supervisory authority.

All these limitations and controls are meant to put some restraints on the directors and their powers to ensure they are focused on the company and its interests, and, consequently, to protect shareholders and third parties. It can be said that these controls may not prevent directors from abusing the powers conferred to them by the company or by the general assembly as they may still make decisions that go against the company's interests and may even fall in favour of their own interest, which they would be accountable for.

In addition, articles 117 and 123 of the CLI have stipulated and described the duties of the managing (delegated) director and the board of directors and those duties are brief and specific as they affect the performance and the life of the company. These duties would be much more powerful if they are identified as the company's duties and not as a part of the directors' duties. Additionally, supervisory authorities can always have the opportunity to examine these records and documents to determine the company's adherence to the law and regulations[1] ECA of 2006 has regulated matters related to financials, accounting and annual records in Part 15, which is much detailed and describes these requirements as obligations of the company and not the directors.

Furthermore, article 119 of the CLI further emphasized the expectation of a company's directors that they should *bona fide* act, in any business the company conducts, to benefit the company and for its interest and should treat its interests as if they were their own and it clearly stated that any transactions or contracts, where they have "direct or indirect interest" into, are impermissible, unless preapproved

[1] For example, see article 128 of the CLI of 1997.

by the general assembly.[1] It also stated they would be liable for any harm the company may sustain because of any breach to this article.[2] The CLI clearly put the burden on the directors themselves to obtain preapproval before attempting to exceed their powers or act against the interest of the company or even having a conflict of interest. However, it didn't regulate the cases where directors exceed their powers without any approvals from the company, which indicates that it will be governed by the general rules under the CCI of 1951. Although validation of such acts is plausible, these acts would be void if the shareholders do not validate them, and in case of any further damage or harm, the company can file a claim against the breaching director.[3] The CCI of 1951 has various rules discussed earlier for these situations and can address them as per the general rules pursuant to articles 135-136 although it may be unfair to third parties acting in good faith,[4] which shows that there is a lack of regulation in this aspect of the CLI.

Similarly, article 120 of the CLI provided that the chair and the directors shall operate the company for the benefit of the company as if they are operating their own business and they will be accountable before the general assembly for their acts.[5] This is very similar to what sections 172 and 174 of the ECA of 2006 have provided. However, the CLI did not set out any further details to determine the outcome of any breach of this article.[6] Equally, this indicates that such situations would be referred to as the CCI of 1951, hence why the Iraqi CLI needs to be amended to ensure better regulation of these aspects of the law. The efficacy of a law may be in jeopardy when it states the objectives of the law that it supports the protection of the rights of third parties and the rights of shareholders but lacks meaningful provisions to that extent.

[1] Section 177 of the ECA of 2006 required directors to declare any interest they might have in a transaction.
[2] See the decision of the Court of Cassation (Tamyiz) No. (1213/Civil Court/Movables/2013) dated July 3, 2013.
[3] This is similar to sections 261 – 263 of the ECA of 2006 where the shareholders can bring a derivative claim against the director.
[4] Hussein, (n 37), 287.
[5] Komani (n.31) 234.
[6] Ibid, 236.

5. The Protection of the Third Parties Under English and Iraqi Law

The English law probably was, and still, to a certain extent, the only common law jurisdiction where the implied duty of good faith between parties of a contract is not fully recognized and did not work in favour of any party to a contract as discussing any issues that are dependent on intentions and thoughts of people may lead to uncertainty. In *Wrexham Associ Football Ltd v Crucial move Ltd*[1], the court held that section 35 of the ECA of 1985 does not protect a third party dealing with the company who failed to inquire about the authority of the directors when the circumstances surrounding the transaction are leading to the conclusion that such an action should be approved by the board of directors and not by a single director.[2] Additionally, the conclusion that judge (Carnwath LJ) drew in *Smith v Henniker-Major*[3], when he stated that: "…if a document is put forward as a decision of the board by someone appearing to act on behalf of the company, in circumstances where there is no reason to doubt its authenticity, a person dealing with the company in good faith should be able to take it at face value", supports the position of having third parties inquiring about the director's authority to represent the company when circumstances indicate to the absence of such an authority, which is a very subjective test.

The perception of good faith has been shifting gradually for some time and it should be considered the backbone of contracts, otherwise, there is no point of entering into any business. In *Yam Seng vs ITC*,[4] (Mr. Justice Leggatt) acknowledged that "The general view among commentators appears that in English contract law there is no legal principle of good faith..."[5]; which he then argued against by providing reasons for reconsideration of this approach of English law including how English law, in general, contained acceptance of the good faith duty in certain contracts such as Employment contracts or any other agreement that contain a fiduciary

[1] [2006] EWCA Civ 237, CA.
[2] Ibid, 47.
[3] [2002] EWCA Civ 762, [2003] Ch 182, CA.
[4] Yam Seng PTE Ltd v International Trade Corporation Ltd [2013] EWHC 111(QB).
[5] Ibid, 121.

relationship. He went on to state that "…the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced"[1]and that's a major statement given that the general view considers the principle of good faith is a deviation from the certainty a contract should provide. The decision of the court determined that (ITC) was in breach of the contract as they acted in bad faith because they misled (Yam Seng) on pricing of retail prices in Singapore and did not take the appropriate steps required in such situations.[2] In the context of good faith duty and its application in English law, this can be described as a landmark decision.

The existence of some cases where the court sided with the good faith of contracting parties was considered a step forward;[3] but the enactment of ECA of 2006 and then the abovementioned *Yam Seng* case, was a game changer and made a massive difference. However, it can be said that it did not completely protect third parties when a company reject the *ultra vires* transaction. It can be seen from the relevant sections of the ECA[4]that there is a main criterion to avoid the *ultra vires* doctrine: the third party must be acting *bona fide* in the transaction. However, under the ECA of 2006, having a third party who knows that an action has been exercised beyond the directors' powers does not prevent that third party from considering that action as within the directors' powers, which would minimize the impact of the good faith factor. In addition, in reality, the responsibility of proving the nonexistence of good faith is on the company itself or any other concerned persons.[5] Nonetheless, the meaning of bad faith in the ECA of 2006 is ambiguous; the act provides that a person is "not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution".[6] However, this criterion of bad faith is not clear in terms of what action or conduct of the third party that would constitute bad faith. It can

[1] Ibid, 153.
[2] Ibid, 230.
[3] Davies; Gower, (n 23).
[4] The ECA of 2006, section 40; ECA of 1985 and 1989, sec 35.
[5] The ECA of 2006, section 40 (2) (b) (ii).
[6] The ECA of 2006 section 40 (2) (b) (iii).

be said that it is a combination of the subjectivity and the objectivity of the case in question, but its subjectivity is more important. It is the best approach to avoid any difficulties in ascertaining which act was in good faith and which was in bad faith leaving the matter in the hands of the court to make that determination.

In addition to that, it can be seen that section 322A of the ECA of 1985 and section 41 of the ECA of 2006 conceptually provide that the *Turquand* rule is not applicable and the "transaction is voidable at the instance of the company", when the third party is the director of the company or a person connected to him. In order to apply the *Turquand* rule, third parties should enter the contract in good faith, and there is uncertainty about whether the indoor management rules have been followed or not. Furthermore, it was held in *Smith*[1] that Mr. Smith knows that there was no quorum in the meeting that he claimed that he was given his powers from the board of directors. The *Turquand* rule would not apply if the third party knew of any internal irregularity.

As for the CLI in Iraq, there is no explicit reference to good faith of the third parties in CLI of 1997, and there is no reference as to how third parties are treated in case of an *ultra vires* situation or in case the directors exceeded their powers. This surely refers the issue to the CCI of 1951 where the general rules would apply. In this concern, the CCI stipulated[2] that the court may have the authority, through a lawsuit and within two years from the date of the act, to cancel the acts and transactions agreed to by the directors of the company who exceeded their powers, although it accepted that *bona fide* third parties who acquired some rights based on the aforementioned act or transaction may not have such an action brought against them. This provides some security to third parties, but the good faith factor will remain an issue to test and prove that the *bona fide* third parties were acting in good faith. Nonetheless, this was conditional on filing a lawsuit and a time limit of two years, as stated in the CCI. There needs to be more clarity in the CLI regarding the *bona fide* third parties, and it would be best if Iraq's legislature followed the

[1] See Smith vs Henniker-Major , (n. 67).
[2] See CCI of 1951, article 59.

footsteps of the ECA of 2006, which had limited regard for the good faith factor and obliged the company to take responsibility for the directors' act or the transaction.

Conclusion

This paper examines the implications of ultra vires acts that exceed a person's or entity's legal capacity in Iraqi law. It compares the approach taken in Iraqi civil law with the development of the ultra vires doctrine in English common law. The analysis highlights the divergent philosophical underpinnings and practical implications of the two legal frameworks, as well as the potential relevance of the ultra vires doctrine in the Iraqi context. Thus, several noteworthy findings and recommendations have concluded:

Findings:

The Iraqi civil law approach to addressing issues arising from a person or entity exceeding the limits of their legal capacity provides a more flexible and adaptable framework than the strict application of the ultra vires doctrine in English common law. The emphasis that the ultra vires doctrine places on the legal capacity of the person or entity and the third party's good faith rather than on strict adherence to the restrictions set out in constitutional documents allows for a more nuanced and contextually appropriate assessment of such situations. By suspending the validity of ultra vires transactions until ratified, the CCI seeks to balance the interests of the valid owner with the legitimate expectations of third parties acting in good faith.

This civil law approach contrasts with the automatic invalidity of ultra vires transactions under common law and English legislation before 2006, which imposed significant risks and potential unfairness to third parties. The reforms introduced by the Companies Act 2006 in England sought to address these shortcomings. However, the CCI framework may offer a more adaptable solution to the Iraqi legal context, where the ultra vires principle is not explicitly recognised.

Recommendations:

The lack of clear regulation of ultra vires actions in the Iraqi Companies Law (CLI) leaves the issue to be governed by the general principles of the CCI, which may not adequately protect third parties acting in good faith. Revisiting the CLI to address this issue better and provide clearer guidance on dealing with ultra vires transactions could significantly improve the legal environment for commercial activities in Iraq.

Addressing the shortcomings of Iraqi Law's handling of this issue would enhance the legal environment for commercial transactions in Iraq by adopting the more flexible and adaptable framework provided by Iraqi Law's approach to legal capacity and its limits.

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