



University of El Oued
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Lectures in Commercial Law

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Introduction

Our decision to teach the subject of Commercial Law to the students of the Faculty of Law at the University of Martyr Hamma Lakhdar in El Oued, Algeria, was the direct motivation behind the idea of preparing this book. It is intended to be a helpful resource for students studying the first part of Commercial Law, which includes five chapters: an overview of Commercial Law, the aspects of its independence from Civil Law, the special provisions governing commercial transactions, the trader, and the commercial establishment.

Due to the scarcity of up-to-date resources explaining the provisions of the Algerian Commercial Law, we felt compelled to place this book in your hands. In its preparation, we have strived, as much as possible, for simplicity and clarity of style and expression, relying on the legal texts provided in Ordinance No. 75-59 of 29 September 1975, which comprises the Commercial Code as amended and supplemented, as well as other complementary laws and regulations, including Law No. 18-05 of 10 May 2018 concerning electronic commerce.

The reader will no doubt appreciate the importance of both the analytical and comparative approaches in legal studies. Therefore, we have, in several sections, highlighted differences between the provisions of the Algerian Commercial Law and those of other laws considered to be historical sources of influence, such as the French Commercial Code and the Egyptian Commercial Code, to the extent necessary for the study.

We hope that this book will be useful to those studying Commercial Law, and that it will serve students, professors, judges, lawyers, and researchers alike in deepening their understanding of this part of Algerian Commercial Law.

With God's help and guidance.

Chapter One

Commercial Law in General

Before delving into the rules concerning the main pillars of Commercial Law—commercial transactions, the trader, and the commercial establishment—it is essential to address the general concepts and principles associated with Commercial Law. This begins with defining its concept and distinguishing it from similar concepts, followed by an overview of its origins and development, as well as identifying its sources. These topics will be detailed in the following three sections:

Section One

The Concept of Commercial Law and its Distinction from Similar Concepts

Given the rapid and ongoing development characteristic of commercial life, scholars of Commercial Law have found it necessary to adapt its concept to keep pace with these changes. In fact, there are new concepts that were previously unknown compared to the narrower traditional notion of Commercial Law, such as Business Law, Economic Law, and International Trade Law. These concepts overlap and intertwine with Commercial Law, necessitating their distinction and the definition of each's scope through the following two subsections:

Subsection One

The Concept of Commercial Law

Commercial Law is a relatively modern branch of law, having only recently become independent from Civil Law. This separation was driven by practical considerations inherent to the nature of commercial transactions and their distinguishing features from civil transactions. Before discussing these characteristics, it is first necessary to define Commercial Law and determine its scope in the following two parts:

Part One

Definition of Commercial Law and Determination of its Scope

Traditional and modern legal scholars have differed in their definition of Commercial Law. Their perspectives and scope of the concept are based on two primary theories: the objective theory and the subjective (personal) theory. We will summarize these in the following two points:

First: Definition of Commercial Law

Classical commercial legal thought has settled on defining Commercial Law as the body of legal rules governing traders and commercial transactions related solely to commercial

establishments. In this sense,¹ it encompasses all intermediary activities between the producer and the consumer—that is, the exchange and distribution of wealth, excluding production itself. The latter, often referred to as industry, thus falls outside the scope of commerce and is not subject to the rules of Commercial Law.²

However, with the development of commercial life and the emergence of new types of commercial activities—such as stock exchange operations, financial markets, and the recognition of electronic commerce—it became clear that the traditional concept of Commercial Law was inadequate. A new understanding was thus required, one that aligns with these developments and the dynamism of commercial transactions. Consequently, the modern concept of Commercial Law has emerged, extending its provisions to cover significant aspects of production activities, particularly industrial production.

Modern commercial jurisprudence has settled on the view that Commercial Law is a branch of private law. It encompasses a set of legal rules governing a specific category of activities known as "commercial transactions" and a group of persons—whether natural or juridical—who are "traders," regulating their relationships with one another and with their clients.³

Second: The Scope of Commercial Law

Commercial law scholars have long debated how to determine the scope or domain of Commercial Law. This debate centers on whether Commercial Law is the law of traders or the law governing commercial transactions. As a result, scholars have divided into two groups, each based on a distinct theory: the personal theory and the objective theory. We will address each below.

The Personal Theory

Proponents of this theory argue that the scope of Commercial Law is determined personally, meaning it is linked to the trader as an individual and governs only those engaged in commerce. Thus, they argue that it is necessary to clearly identify the commercial professions, and that Commercial Law applies to anyone practicing such a profession, treating them as traders. According to this theory, therefore, Commercial Law is referred to as the "Law of Traders," with the trader himself as the focal point and criterion for determining the scope of this law.⁴ Critics of this theory have raised two main objections. First, a trader has a personal, civil life—such as marriage, inheritance, travel, or performing religious rites like Hajj or Umrah—and it

¹ Dominique Legeais, *Droit commercial et des affaires*, Édition N° 27, DALLOZ, Paris, 2021, P 03.

² See: Ahmed Mahrez, *Algerian Commercial Law*, University Publications Office, Algeria, 1980, p. 13.

³ See: Ahmed Mahrez, *op.cit.*, p. 14.

⁴ See: Nadia Foudil, *Commercial Law (Commercial Transactions, the Trader, the Commercial Establishment)*, 9th edition, University Publications Office, Algeria, 2007, p. 58.

would be illogical to subject these personal matters to the rules of Commercial Law simply because the individual is a trader. Second, it is difficult to exhaustively define what constitutes a commercial profession, and this standard does not align with the evolving nature of commercial life,¹ which has led to the emergence of new types of commercial professions previously unknown—such as stock exchange and financial market operations, and electronic commerce.

The Objective Theory

Advocates of this theory maintain that the scope of Commercial Law is determined by the subject matter of commercial transactions, and its rules apply to these activities regardless of who carries them out—whether a trader or a non-trader. According to this theory, Commercial Law is the law of "commercial transactions," not the law of traders, and the key factor is the nature of the activity itself, even if it is carried out only once. If the individual continues to engage in these transactions professionally, they acquire trader status. However, this status is only relevant, according to proponents of this theory, to subject the trader to certain obligations—such as registration in the commercial register and payment of commercial taxes. Proponents of the objective theory base their view on the principle of economic freedom, which seeks to eliminate the guild system that prevailed in ancient times and hindered the growth and development of commerce by restricting commercial activity to guild members only.²

Nevertheless, this theory has also faced criticism. Determining which activities constitute commercial transactions can be challenging and can even contradict the very principle on which this theory is founded—freedom of commerce. It also does not fully align with the continuous evolution of commercial life, which has led to the emergence of new commercial activities that were previously unknown. This is the same criticism leveled at the personal theory.³

Here, it is worth noting the approach taken by the Algerian legislator, who has adopted a dual approach. Some of its provisions are inspired by the personal theory, as evidenced by Article 1 of the Commercial Code, which states: "A trader is any natural or juridical person who habitually engages in commercial activities, unless otherwise provided by law." At the same time, the legislator has also drawn from the objective theory by enumerating commercial transactions based on subject matter in Article 2 and those based on form in Article 3 of the Commercial Code.

¹ See: Farha Zarawi Saleh, *The Complete Guide to Algerian Commercial Law*, Part One, 2nd edition, Ibn Khaldoun Publishing and Distribution, Oran, Algeria, 2003, p. 20.

² See: Ahmed Mahrez, *op.cit.*, pp. 15, 16.

³ See: Farha Zarawi Saleh, *op.cit.*, p. 18.

Part Two

Characteristics of Commercial Law

Commercial transactions rest upon two fundamental pillars that form the essence of commercial life. These two principles, *speed* and *credit*, have long been the foundation of commercial dealings and have been consistently recognized and applied by the judiciary.

First: Speed and Flexibility in Procedures

Unlike civil transactions, which are characterized by slow and complex procedures (such as formal writing and registration), the dynamic nature of commercial transactions demands speed and procedural simplicity. Time plays a critical role in achieving the profits and financial gains that traders pursue in their commercial dealings, which cannot tolerate delays. A trader always seeks to maximize profits by concluding the greatest number of transactions in the shortest possible time. Violating this principle would complicate the trader's transactions, impede their interests, and may subject their goods to price fluctuations, stagnation, or spoilage.¹

In response to the need for speed in commerce, traders required simplification of procedures. To achieve this, the rules of Commercial Law tend to facilitate proof in commercial transactions, making it free from all restrictions, shortening limitation periods, and other constraints. This freedom and simplification in procedures have made it easier for traders to carry out sales and conclude numerous contracts in short time frames, which positively impacts the trader's financial position and the flourishing of their trade.

In light of the rapid changes occurring worldwide and intense competition, it is clear that the requirements of speed and flexibility in commercial transactions have become even more urgent—especially with the economic development driven by technological progress. This progress has led to the emergence of electronic commerce and the recognition of electronic banking transactions, which demand greater speed and simpler procedures. It is now possible to conclude thousands of commercial deals within very short periods, saving traders from long distances, high costs, and complex procedures that previously hindered the interests of all parties.

Second: Trust and Credit in Commercial Life

Alongside the facilitation of procedures required for the speed of conducting and executing

¹ See: Mansour Daoud, Al-Aqoun Saad, *Commercial Evidence Between Speed and Credit*, *Journal of Law and Human Sciences*, vol. 10, no. 03, September 2017, pp. 08, 09.

commercial transactions, it was necessary to reinforce trust and credit and ensure the protection of established rights arising from these transactions.¹

One manifestation of supporting trust and credit in commercial life is the presumption of joint liability among multiple debtors. This rule is well established in commercial transactions and has been respected and applied by the judiciary. Thus, a trader may find themselves bound by obligations they were not originally party to—such as a joint partner whose liability for the company's debts is unlimited and joint, as stipulated by law.²

Commercial law also supports the principle of credit and trust through other provisions, including the bankruptcy system, which contains strict rules against anyone unable to fulfill their commercial debts or who has ceased payments when the debts become due. This system enforces strict respect for creditor rights and strengthens their guarantees, thereby increasing their chances of recovering what is owed and making them more willing to extend credit to those who request it.³

Traders also resort to using the bill of exchange as a credit instrument because it grants the debtor a grace period to fulfill the obligation. The bill itself suffices to establish and define the obligation, eliminating the need to seek other means to prove the right. The formal requirements imposed on this document by law serve to support trust and credit. These requirements do not contradict the principles of speed and flexibility in procedures but rather aim to facilitate swift execution without doubt or dispute over validity. Credit, as a characteristic of commercial transactions, requires a certain level of security and safety to facilitate exchanges and commercial dealings and to reduce disputes that might arise in such transactions. This objective is inevitably achieved by imposing certain formalities, even if they are relative.⁴

Second Section

Distinguishing Between Commercial Law and Economic Law

Economic law is also considered an uncodified law. Regardless of the doctrinal debates related to its content and boundaries,⁵ it encompasses a set of laws regulating economic activity.

¹ See: Fawzi Mohamed Sami, *Explanation of Commercial Law: Sources of Commercial Law, Commercial Transactions, the Trader, the Commercial Establishment, Commercial Contracts*, Part One, 1st edition, Dar Al-Thaqafa for Publishing and Distribution, Amman, 2006, p. 12.

² See: Mustafa Kamal Taha, Wael Anwar Bandak, *Principles of Commercial Law: Commercial Transactions, Traders, Commercial Companies, the Commercial Establishment, Industrial Property*, Dar Al-Fikr Al-Jami'i, Alexandria, 2006, p. 9.

³ See: Farha Zarawi Saleh, *op.cit.*, p. 14.

⁴ See: Mansour Dawood, Al-Aqoun Saad, *op.cit.*, p. 11.

⁵ Dominique Legeais, *op.cit.*, P 01

According to traditional doctrine, it is divided into two parts: private economic law (which is business law) and public economic law, which includes various laws regulating public economic activity such as economic planning law, the guiding law for public economic institutions, hydrocarbon law, monetary and credit law, finance law, tax law, and others.¹

In this sense, economic law has a broader concept than both commercial law and business law. It is a modern law that encompasses both of these laws, as well as the various laws regulating public economic activity.

Although they differ in content, commercial law overlaps with economic law in many areas. For example, Article 2 of Law No. 88-01 dated January 12, 1988, which includes the guiding law for public economic institutions, subjects these institutions to the rules of commercial law. This relationship is also confirmed in Article 13 of the monetary and credit law, which considers the central bank a trader in its dealings with third parties.²

Third Section

Distinguishing Between Commercial Law and International Trade Law

While commercial law focuses on regulating national commercial transactions without extending its scope to international commercial transactions, international trade law governs these international transactions. The latter is a result or product of international commercial dealings conducted by economic actors involved in international trade, including states as participants.³

International trade law includes a set of rules and principles derived from international agreements regulating international trade, the model law issued by the United Nations Commission on International Trade Law (UNCITRAL), standard contracts, customs, and principles applicable to commercial relationships of an international nature regardless of the legal system prevailing in each country.⁴

Section Two

The Origin and Development of Commercial Law

The origins of commercial law date back to ancient times, with some of its features gradually becoming established over time. The importance of the historical foundation of commercial

¹ See: Farha Zarawi Saleh, *op.cit.*, p. 6 and following.

² See: Lachsab Mahfoud, "The Authenticity of Economic Law in Algeria," *Annals of the University of Algiers*, Vol. 5, No. 1, June 1990, p. 171 and following.

³ See Article 13 of Order No. 03-11 dated August 3, 2003, concerning Monetary and Credit Law, amended and supplemented, *Official Gazette*, No. 52 dated August 27, 2003.

⁴ Jacquet, Jean-Michel; Delebecque, Philippe, *International Commercial Law*, 3rd Edition, DALLOZ, Paris, 2015, pp. 7-8.

law lies in reviewing the factors that influenced its emergence and development through successive eras. We will address the stages of the origin and development of commercial law in its three phases: ancient, medieval, and modern, followed by the stages of its emergence and development in Algerian law, in the two following subsections:

Subsection One

Stages of the Origin and Development of Commercial Law Throughout the Ages

The rules of commercial law did not emerge suddenly; rather, their origins go back to ancient ages, where they were born out of the needs of commerce and then evolved alongside it. This development began in ancient times, then the medieval era, passed through the modern era, and finally reached the age of electronic commerce. Below, we briefly review the most important aspects of the development of commercial law rules during these stages in the following four branches:

Branch One

The Development of Commercial Law in Ancient Times

The earliest traces of commercial law rules appeared in the Mediterranean region, which surrounded ancient cities and civilizations such as the Egyptians, Phoenicians, Babylonians, Romans, and Greeks, where the sea served as a venue for commercial operations between these peoples.

It is established that one of the Egyptian kings, named Bocchoris, issued a strict law prohibiting usury in the eighth century BC. However, commercial law as it is currently known did not exist among the Egyptians at that time, despite the active trade .¹

Among the Babylonians, the Code of Hammurabi was issued around 1700 BC, which included provisions regulating the maritime loan contract, partnership contract, commission agency, and the deposit of goods. Evidence also indicates their knowledge of banking operations in their primitive form.²

The Phoenicians developed the practice of jettison at sea, which is the basis of the system of general average losses in modern law. According to this system, if cargo is thrown overboard to lighten the load and avoid the risk of total shipwreck, the shipowner and the owners of the saved goods must compensate the owner of the sacrificed goods.

¹ See: Ahmed Mohrez, *op.cit*, p. 24.

² See: Farha Zarawi Saleh, *op.cit*, p. 23.

The Greeks were familiar with the maritime loan contract and the bottomry insurance on ships, whereby the lender assumed the navigation risks but received high interest if the ship safely reached its intended port.¹

Among the Romans, some banking operations became widespread, and they developed an accounting system and commercial bookkeeping that recorded income and expenses. They also established a bankruptcy system, under which creditors could use physical coercion to force the debtor to pay their debts²

Section Two

The Development of Commercial Law in the Middle Ages

These ages witnessed a qualitative leap and tangible progress in the development of commercial law rules. Many commercial activities and regulations emerged in forms similar to those known today. Commercial law initially developed as customary law arising from the commercial environment, based on rules mutually accepted by merchants themselves, until many of these rules became established as formal legal norms. The foundations of commercial law as a branch independent from civil law became more defined.

Starting from the 7th and 8th centuries AD, the Arabs played a significant role in commerce and introduced commercial systems such as partnerships, promissory notes, and bankruptcy law. The Prophet Muhammad (peace be upon him) was engaged in trade,³ and the Islamic system had a great impact on establishing some commercial law principles that remain firmly rooted today, such as the principle of freedom of proof in commercial matters. This principle is supported by verse 282 of Surah Al-Baqarah, which states:

"O you who have believed, when you contract a debt for a specified term, write it down... except when it is a trade between you conducted on your mutual consent, there is no blame upon you if you do not write it."

Furthermore, verse 283 of the same Surah emphasizes the principle of trust and credit, a fundamental pillar of current commercial transactions, stating:

"But if one of you entrusts another, let the one who is entrusted discharge his trust and let him fear Allah, his Lord."

Additionally, the principle of consensual agreement in commercial contracts is grounded in

¹ See: Ahmed Mohrez, op.cit, p. 24.

² See: Farha Zarawi Saleh, op.cit, p. 23.

³ See: Ahmed Moharez, op. cit., p. 26.

verse 29 of Surah An-Nisa, which says:

"Except when it is a trade between you conducted by mutual consent."

By the 11th century, trade flourished in some Mediterranean ports such as Amsterdam and Venice. In Venice, the largest guild of merchants gathered, enjoying significant influence and specializing in particular trades, like the silk merchants' guild. Each guild elected a leader called the consul, who settled disputes between merchants and between merchants and those engaged in commercial activities, even if they were not merchants themselves. Thus, the Italian city merchants established a commercial judiciary independent of ordinary courts, marking the first steps toward the independence of commercial law from civil law.

In the rest of Europe, the Church played a role in prohibiting usury. Wealthy investors developed the *commenda* system, whereby capital was provided to merchants in exchange for a share of the profits, with liability limited to the invested amount. The Church approved this system due to the risks to their money involved.¹

Section Three

The Development of Commercial Law in the Modern Ages

Starting from the 15th century, a significant commercial transformation occurred, especially following the discovery of America and the Cape of Good Hope. This period witnessed widespread codification of commercial law rules at the national level. Naturally, most codified rules were customary norms that merchants had long observed and which had stabilized in their transactions. Due to industrial development and the emergence of large capitalist companies whose influence extended into political and social spheres, the states where these activities were conducted resorted to establishing legal rules to regulate the operations of such companies.²

In the sixteenth century, large quantities of gold and silver arrived from America, which led to a decline in people's confidence in money. Large banks emerged, and depositing gold and silver coins in these banks became widespread due to fears of loss and theft, with the banks charging clients a commission for the services provided.³

The move to codify commercial law in France began during the reign of Louis XIV, who issued a royal decree in 1673 regulating land commerce, followed by another law in 1681 concerning maritime trade. When the French Revolution occurred, the French legislator, influenced by its principles, abolished the system of commercial guilds and established freedom of trade. A

¹ See: Nadia Foudil, op. cit., pp. 32–33.

² See: Fawzi Mohammed Sami, op. cit., p. 18.

³ See: Mustafa Kamal Taha, Wael Anwar Bendaq, op.cit, p. 32.

comprehensive codification was enacted in 1807, consolidating the provisions of both laws into one code, later known as the Napoleonic Code, which was the first legislative work of commercial law in the modern era.

In the nineteenth century, commercial law remained stable for a long period under the free capitalist system, with the principle of freedom of contract prevailing, facilitating the movement and investment of large capital in banks. This led to the emergence of joint-stock companies, which became a formidable economic force. In the latter half of the twentieth century, socialist principles emerged, calling for state intervention to achieve social justice and to restrict the absolute freedom previously enjoyed by merchants.¹

Indeed, all countries adopted the principle of intervention, starting to implement economic plans according to the legislator's will to ensure the achievement of specific economic policies. This internal regulatory character evolved into international regulation, as international treaties increased, setting unified legal rules agreed upon by the participating states.²

Section Four

The Era of Electronic Commerce

Given the rapid global changes and fierce competition, and due to the speed and flexibility required in commercial transactions, commercial law is no longer limited to traditional commercial transactions but has extended to electronic commerce. Electronic commerce has become a new way of life, especially with significant technological advancements allowing thousands of commercial deals to be concluded in very short periods and achieving profits that were impossible by traditional methods. It also spares merchants from long distances, high costs, and complex procedures that used to hinder the interests of all parties, while opening new opportunities for small and medium enterprises³

The term "electronic commerce" first appeared in the early 1970s with American companies using private networks linking them to their clients through electronic funds transfers and electronic data interchange. However, the application was initially limited to large commercial enterprises and some other companies. In the early 1980s, this expanded from financial institutions to factories, retailers, and some other service institutions.⁴

¹ See: Nadia Foudil, op.cit, p. 41.

² See: Ahmed Mohrez, op.cit, pp. 29–30.

³ See: Fawzi Mohamed Sami, op.cit, p. 12.

⁴ Najila Jaija, "E-commerce in the Arab World and the Main Obstacles Limiting Its Development," *Journal of Management and Economics Horizons*, Vol. 2, No. 2, December 2018, p. 276.

In the mid-1990s, e-commerce experienced rapid growth and presented new opportunities for economic development. It even became one of the key elements on the policy agenda of decision-makers at national, regional, and international levels. The UNCITRAL Model Law on Electronic Commerce, prepared by the United Nations Commission on International Trade Law (UNCITRAL) on June 12, 1996, was the first legislative text aimed at providing national legislators with a set of internationally accepted rules designed to overcome legal obstacles and enhance the predictability of legal developments in the field of e-commerce.

E-commerce was also recognized within the framework of the World Trade Organization (WTO) for the first time at the Second Ministerial Conference held in May 1998 in Geneva. At this conference, ministers adopted the so-called "Declaration on Global Electronic Commerce," which called for the establishment of a "comprehensive work program" to address all issues related to global e-commerce.

The European Parliament and the European Council adopted a directive on electronic commerce on June 8, 2000. This directive served as a model for many European national laws related to e-commerce, such as the French legislator who issued the first French e-commerce law on June 21, 2004.¹

Countries differ in their level of advancement and effective use of e-commerce. Certainly, the aspirations of Arab countries regarding the shift to e-commerce differ significantly from the needs and ambitions of developed countries. Although the legislation of some of these countries was pioneering in recognizing e-commerce, such as the Tunisian Electronic Commerce and Exchange Law dated August 9, 2000,² they still lag behind in the effective use of e-commerce and require further efforts.³

Section Two

The Origin and Development of Commercial Law in Algeria

A close examination of the origin and development of commercial law rules in Algeria reveals a critical phase in which the Algerian legislator shifted from a socialist approach in the late 1980s to a market economy and trade liberalization in the early 1990s. Therefore, we will

¹ Thibault Verbiest, *The New Law of Electronic Commerce*, LGDJ, Paris, 2005, pp. 07-08.

² See: Mustafa Kamal Taha, Wael Anwar Banduq, *Op.cit.*, p. 54.

³ See: Nabila Jaijae, *Op.cit.*, p. 282.

address the development of commercial law rules in Algeria before and after this shift in the following two subsections:

Subsection One

Development of Commercial Law Under the Adoption of the Socialist Management System in Algeria

After Algeria gained independence from France on July 5, 1962, and recovered its sovereignty and national resources, it found itself compelled to apply the systems and legislations that prevailed in France under Law No. 62-157 dated December 31, 1962, which renewed the application of French legal texts that had been in force in Algeria until July 3, 1962, provided they did not conflict with national sovereignty.¹

Subsequently, Algeria began building the material foundations of socialism by preparing structures intended to fundamentally change the previous social conditions, aiming to establish a new system governed by democratic laws.

Socialism, a complete set of legislations was issued, the most important of which was Order No. 75-23 dated April 29, 1975, which included the Model Basic Law for Socialist Enterprises of an Economic Nature.²

On September 29, 1975, the first Algerian commercial law was issued under Order No. 75-59, but it did not constitute a revolution in the prevailing legal situation at the time. Rather, the Algerian legislator retained most of the provisions stipulated in the French legislation, albeit readjusted to suit the country's conditions based on its policy and the socialist direction chosen after independence. Unlike French legislation, the new law did not explicitly state the principle of freedom of commerce. In the same direction, the Algerian legislator followed with a series of special laws, for example, Law No. 78-02 dated February 11, 1978, concerning the state monopoly of foreign trade³

The Algerian Constitution of 1976 followed the same approach, allowing the existence of a national private sector, but limiting it to activities subject to small and medium enterprises, as explicitly confirmed by the Algerian legislator in the first national charter issued under Order No. 86-22 dated February 9, 1986, which prohibited the private sector from engaging in parasitic activities⁴

¹ See: Farha Zarawi Saleh, *Op.cit*, p. 26.

² See: Ahmed Mohrez, *op.cit*, pp. 30–31.

³ See: Farha Zarawi Saleh, *op.cit*, pp. 29–30.

⁴ Same reference, p. 31.

Second Section

The Impact of Algeria's Transition to a Market Economy on the Development of Commercial Law

Undoubtedly, Algeria's transition to a market economy under the 1989 Constitution had to have repercussions on the development of commercial law rules in line with this new direction. The aim was to place the economy in an efficient state and enterprises in a competitive position to achieve good levels of growth with continuous improvement in living standards and expansion of the internal market — that is, transforming the economy into a productive and efficient complex capable of rapid interaction and adaptation to global developments ¹

Among the eagerly awaited reforms resulting from this shift was the reform of commercial law, culminating in Legislative Decree No. 93-08 dated April 25, 1993, amending the aforementioned Order No. 75-59 that contained the commercial law (1). It was followed by further amendments through Order No. 96-27 dated September 9, 1996, Law 05-02 dated February 6, 2005, and finally Law 15-20 dated September 30, 2015. Additionally, the Algerian legislator recognized electronic commerce under Law 18-05 dated May 10, 2018, relating to e-commerce.

Alongside these amendments, several decrees were issued in harmony with this shift, such as Executive Decree No. 89-45 dated April 11, 1989, abolishing the previous Basic Law for socialist enterprises of an economic nature converted to economic public enterprises, as well as Executive Decree No. 90-42 dated January 30, 1990, explicitly repealing the old Basic Laws of socialist enterprises converted to economic public enterprises.

The 1996 Constitution entrenched this approach by affirming in Article 37: "Freedom of commerce and industry is guaranteed and exercised within the framework of the law." This principle expanded to include freedom of investment under Article 43 of the 2016 constitutional amendment, stating: "Freedom of investment and trade is recognized and exercised within the framework of the law." It further extended to freedom of investment and enterprise under Article 61 of the 2020 constitutional amendment: "Freedom of commerce, investment, and enterprise is guaranteed and exercised within the framework of the law."

¹ See: Mokhtari Malouka, *The Transition to a Market Economy in Algeria: A Comparative Study*, Algerian Journal of Economics and Management, Vol. 8, No. 1, January 2017, p. 31.

Third Chapter

Sources of Commercial Law

Article 1 of the Civil Code provides: “The law applies to all matters to which its texts pertain in their wording or meaning. If there is no legislative text, the judge shall rule according to the principles of Islamic Sharia; if none exist, according to custom; and if none exist, according to the principles of natural law and rules of justice.”

Meanwhile, Article 1 (bis) of the Commercial Law states: “Commercial law applies to relations between merchants, and in the absence of a text, civil law and professional customs shall apply as appropriate”.¹

Reading these two articles together clarifies that custom, as an official source of commercial law, follows legislation directly and precedes Islamic Sharia, natural law principles, and rules of justice. Meanwhile, jurisprudence and doctrine form interpretative sources of commercial law, which will be addressed in the following two sections:

First Section

Official Sources of Commercial Law

The official sources of commercial law comprise four sources, including legislation and custom, as stipulated in Article 1 (bis) of the Commercial Law². The other two sources, Islamic Sharia and the principles of natural law and rules of justice, are mentioned in Article 1 of the Civil Code, as general law. Below is an explanation of these sources in the stated order:

First Branch

Legislative Texts

Legislation refers to all laws issued by the state, including the constitution, which occupies the highest rank. Undoubtedly, the primary legislative source of Algerian commercial law is Order No. 75-59 issued on September 29, 1975, containing the commercial law, as amended and supplemented.

The provisions of commercial law, in its broad sense, are not limited to Order No. 75-59 but include all special texts and regulatory decrees governing the commercial field, notably Law No. 90-22 dated August 18, 1990, concerning the commercial register, as amended and supplemented; as well as Law No. 04-02 dated June 23, 2004, which sets the rules applicable

¹See: Farha Zarawi Saleh, op.cit, p. 33.

² The text of this article was added pursuant to Order No. 96-27 dated September 9, 1996, which amended and supplemented Order No. 75-59 issued on September 29, 1975, containing the Commercial Law.

to commercial practices, as amended and supplemented; in addition to Law No. 04-08 dated August 14, 2004.

Related to the conditions for practicing commercial activities, as amended and supplemented, as well as Law No. 18-05 dated May 10, 2018, concerning electronic commerce.

Legislation as a source of commercial law is not limited to commercial texts only, but also includes civil law as the general law of private law. Although it is not necessary for the commercial law to explicitly refer to the application of civil law provisions—considered implicit—it is confirmed by Article 01 bis of the Commercial Law which states: “*In the absence of any provision therein, civil law shall apply...*”

Section Two

Commercial Custom (Trade Usages)

Commercial custom refers to every practice that traders have become accustomed to in their commercial transactions (the material element), accompanied by their awareness of its binding nature (the moral element). If the custom fulfills its essential elements, it becomes a binding legal rule equivalent to legislation, and disputants cannot claim ignorance of it, although they may prove an agreement to the contrary. Consequently, if a judge errs in its application, their ruling is considered flawed and is subject to review by the Supreme Court ¹

Previously, commercial custom as an official source of commercial law ranked after legislation and Islamic law in order of precedence. However, the Algerian legislator rectified this with the addition of Article 01 bis to the Commercial Law by Order No. 96-27 dated September 9, 1996, which placed custom above Islamic law and directly after legislation.²

This is due to the historical value of custom in commercial life, as commercial law originally emerged from customary practices within the trading environment, based on rules that traders voluntarily accepted for themselves, many of which later became formal legal rules. The foundations of commercial law thus crystallized into an independent law separate from civil law ³.

However, custom cannot contradict mandatory commercial provisions, regardless of its status. While mandatory provisions of civil law may be overridden by custom, it is important to note that the overriding of mandatory civil provisions by commercial custom does not mean giving

¹ See: Ahmed Mohrez, *Op.cit*, pp. 39.

² See: Ammar Amoura, *A Concise Explanation of Algerian Commercial Law*, Dar Al-Maarefa, Algiers, 2009, p. 22.

³ See: Mostafa Kamal Taha, Wael Anwar Bandak, *Op.cit*, p. 42.

precedence to custom over legislation. The general rule is that civil law applies only if there is no special provision in commercial law. The existence of commercial custom indicates the presence of a specific commercial legal rule, eliminating the need to apply general civil rules

¹The legislator placed both civil law and custom at the same level according to the apparent wording of the text .

This interpretation is further supported by civil law itself, which explicitly allows custom to override mandatory provisions in many of its articles. For example, Article 449 of the Civil Code states: *“The provisions of this chapter shall not apply to commercial companies except insofar as they contradict commercial laws and commercial custom.”* Also, Article 68 of the Civil Code provides: *“If the nature of the transaction, commercial custom, or other circumstances indicate that the offeror did not expect an explicit acceptance, the contract shall be deemed concluded if the offer was not refused within a reasonable time.”*

In this respect, it should be noted that the term “custom” in this context refers to special custom, that is, commercial custom, and not general custom, or civil custom, as the latter remains subject to general rules concerning its ranking among the sources of commercial law, following both legislation and Islamic law.

Commercial custom differs from commercial usage (conventional usage), in that the latter is considered an incomplete custom due to the absence of the moral element. Unlike custom, commercial usage only requires the material element, meaning that if people habitually follow a certain rule over a long period without developing a sense of obligation to respect it, it does not amount to custom but rather constitutes conventional usage. Such usage derives its binding force only from the explicit or implicit consent of the parties involved. Therefore, it is known as “conventional usage.”²

An example of this is the practice of traders including certain standard terms in their commercial commitments to the extent that these terms become familiar and implied between them, even if not explicitly mentioned, such as the practice of traders to reduce the price instead of canceling the contract if the goods delivered to the buyer are of lesser quality than usual or agreed upon. However, if it becomes clear that the parties did not intend to apply these terms, they will not be binding, and the judge is not presumed to know them unless the parties themselves invoke them, as they constitute a mere factual matter not subject to the supervision of the Supreme Court.³

¹ See: Nadia Foudil, *Op.cit*, p. 50.

² See: Ahmed Mahrez, *op.cit*, p. 36.

³ See: Nadia Foudil, *op.cit*, pp. 50–51.

Section III

Islamic Law (Sharia)

The noble principles of Islamic law constitute the third official source of commercial law, having been relegated in order to follow legislation and commercial custom according to Article 01 bis of the Commercial Code, mentioned earlier. This means that if a judge, in ruling on a commercial dispute, does not find a relevant provision in legislation or commercial custom, they must refer to the principles of Islamic law, which include rules derived from the Holy Quran, the noble Sunnah of the Prophet, analogy (qiyas), and consensus (ijma').¹

Section IV

Principles of Natural Law and Rules of Equity

The principles of natural law and rules of equity, as the last official source of commercial law, are intended to achieve justice through judicial discretion when the judge finds no legislative, customary, or Sharia rule (Islamic law) to apply. In practice, the application of this source is rare or practically nonexistent, given the comprehensiveness of Islamic law, which itself allows for the application of analogy and consensus. However, it is conceivable that this source would be applied in Western countries that do not recognize Islamic law as a source of law.²

In this situation, the matter is discretionary, allowing the judge to handle each case individually based on its circumstances, meaning the judge applies what they believe achieves justice in how the dispute is resolved. The principles of natural law and rules of equity encompass many undefined considerations that the judge must take into account to form their conviction, both moral and material, ultimately leading to the belief that they are achieving justice in resolving the dispute.³

¹ See: Fawzi Mohamed Sami, *op.cit*, pp. 30–31.

² The judiciary in Anglo-Saxon countries plays an extremely important role, as these systems recognize what is known as “precedent judgments” (stare decisis). When a judge issues a decision on a disputed matter, other judges must follow the solution reached by that judge in similar cases. This is in contrast to Latin-based systems, which Algeria has adopted, where judges are not obliged to apply the decisions of other judges, even those of the Supreme Court. See: Nadia Foudil, *op.cit*, pp. 53–54.

³ See: Fawzi Mohamed Sami, *op.cit*, p. 29.

Section II

Interpretative Sources of Commercial Law

These are consultative, non-binding sources that the judge relies on to draw inspiration and derive rules from the official sources, understand and interpret them, determine their scope, and reconcile them with the development of commerce when the official sources fail to keep up with this evolution. These interpretative sources consist of jurisprudence (case law) and legal doctrine (scholarship), which we will briefly outline below:¹

Subsection I Judicial Precedent

Jurisprudence, as an interpretative source of commercial law, refers to the collection of decisions and rulings established by the judiciary in commercial matters similar to the cases presented to it for application of the law. While the effect of judicial rulings is limited to the parties to the specific dispute (applying the principle of “relativity of judicial decisions”) and the role of the judiciary is to apply the law rather than create it (which is the legislator’s responsibility), this does not preclude the possibility of the judge drawing inspiration from such precedents, especially if they are from higher courts.²

In Algeria, the publication of judicial precedents in commercial matters is among the core tasks of the Supreme Court, as stipulated in Article 05 of Organic Law No. 11-12 of 26 July 2011, which defines the organization, functioning, and jurisdiction of the Supreme Court. It states: “The Supreme Court works to publish its decisions as well as legal and judicial commentaries and research.”³

On 23 July 2012, Executive Decree No. 12-268 was issued, defining the conditions and procedures for publishing the decisions, commentaries, and legal and judicial research of the Supreme Court. However, the first paragraph of Article 02 of this decree states: “The Journal Council (Supreme Court Journal) is specifically tasked with: - Selecting decisions for publication.” This provision explains the scarcity of published judicial precedents in the Supreme Court Journal in Algeria, which hampers the ability to track the court’s jurisprudence and negatively impacts its use as an interpretative source of law in general and commercial law in particular.

¹ Same reference, p. 30.

² See: Ahmed Mahrez, *op.cit.*, p. 42.

³ See: Abdelhamid Al-Shawarbi, *The Theory of Commercial Transactions and the Merchant according to the Commercial Law No. 17 of 1999: Doctrine, Jurisprudence, and Legislation*, Al-Maaref Establishment, Alexandria, 2002, pp. 16–17.

Subsection II Legal Doctrine

There is no doubt that the interpretations of legal scholars contribute to enriching legal thought and enhancing the judge's ability to find fair solutions to the disputes brought before them. Moreover, the role of legal doctrine is not limited to guiding judges alone; it often serves to guide legislators as well.

In this respect, it should be noted that what is meant by "custom" in this context is the specific custom, i.e., commercial custom, and not the general custom, i.e., civil custom, since the latter remains subject to the general rules in terms of its ranking among the sources of commercial law, following both legislation and Islamic Sharia.

Commercial custom differs from "contractual commercial practice" in that the latter is considered a custom that has not fully matured because it lacks the moral element. In contrast to custom, contractual commercial practice only requires the existence of the material element. This means that if people have become accustomed to following a certain rule for a long time without developing a sense of obligation to respect it, there is no custom but rather a contractual practice. The binding force of the latter derives only from the express or implied consent of the parties. For this reason, it is called "contractual practice."

One example is the common practice among traders to include specific terms in their commercial commitments so that these terms become customary and implied between them without needing to be expressly stipulated, such as traders' habit of reducing the price instead of rescinding the contract if the goods delivered to the buyer are of lower quality than usual or agreed upon. However, if it becomes clear that the parties did not intend to apply this practice, it does not bind them, and the judge is not presumed to be aware of it unless the parties invoke it because it is considered a mere factual circumstance not subject to the Supreme Court's review.

Section Three: Islamic Sharia

The principles of Islamic Sharia constitute the third official source of commercial law, coming after both legislation and commercial custom, as per the aforementioned Article 01 bis of the Commercial Code. This means that the judge, when resolving a commercial dispute, must refer to the principles of Islamic Sharia—represented by rules derived from the Quran, the Sunnah (Prophetic tradition), analogical reasoning (qiyas), and consensus (ijma)—if no applicable rule is found in legislation or commercial custom.

Section Four: Principles of Natural Law and Rules of Equity

The principles of natural law and rules of equity, as the last official source of commercial law, aim to achieve justice through judicial reasoning when the judge finds no statutory, customary, or Sharia-based rule (i.e., principles of Islamic Sharia). Given the comprehensiveness of Sharia, which accommodates new circumstances through analogical reasoning and consensus, the application of natural law principles and rules of equity becomes rare or practically non-existent. However, this source may be invoked in Western countries where Islamic Sharia is not a source of law.

In this context, the matter is left to the judge's discretion, allowing them to address each case individually according to its surrounding circumstances. This means the judge should apply what they believe achieves justice in resolving the dispute. The principles of natural law and rules of equity encompass numerous intangible and material considerations that ultimately form the judge's conviction that justice is being achieved through their decision.

The **Civil Code** rules regarding proof of debts stipulate that its provisions do not apply to the proof of commercial debts ¹. and Article 449 of the Civil Code provides: "The provisions of this section do not apply to commercial companies except insofar as they conflict with commercial laws and commercial customs." Moreover, there are transactions linked to commercial dealings that the Civil Code has subjected to its own rules rather than those of the Commercial Code, as in Article 651 of the Civil Code which states: "The guarantee of a commercial debt is considered a civil act, even if the guarantor is a merchant."

Furthermore, commercial instruments and practices in transactions are no longer confined to merchants alone but have extended to non-merchants as well. For example, dealing in bills of exchange and securities, such as purchasing shares, has become accessible to all. This development has made unification closer to reality than independence²

As for the differences between the rules of civil and commercial transactions, they are either due to a statutory provision or a commercial custom that conflicts with the Civil Code's rule in a particular matter, or because the Civil Code itself excludes commercial matters from the general rule it establishes, or gives them a special treatment. Upon closer examination of these differences, it becomes clear that, in many cases, they are merely minor modifications intended to facilitate and expedite matters, without constituting a fundamental change³

¹ Paragraph 1 of Article 333 of the Civil Code provides: "In matters other than commercial matters, if the legal act exceeds 100,000 Algerian Dinars in value or is of indeterminate value, proof by witnesses is not admissible to establish or extinguish it, unless there is a provision to the contrary."

² Ahmed Mahrez, Op. Cit., p. 21.

³ See: Abdelhamid El-Shawerbi, Op. Cit., p. 18.

Additionally, many of the rules of commercial transactions are found exclusively in the Civil Code, not in the Commercial Code. These include rules governing commercial sales, loans, interest, deposits, and others. This greatly reduces the differences between the two sets of rules and confines the differences to a narrow scope, bringing them closer to the unity they are slowly but steadily moving toward¹

Section Two

The Opinion Advocating for the Independence of Commercial Law from Civil Law

Despite the soundness of the arguments put forth by the proponents of unification, they have not been warmly received by the opposing jurists. The unification of commercial and civil law appears to be a difficult, if not impossible, task, given the independent nature and distinct characteristics of each. It is not only unhelpful, but potentially harmful, to transfer the rules of commercial law—designed for speed and to support credit—into civil law, or vice versa²

In civil life, an individual is bound only by their absolute consent, free from any pressure or coercion. In contrast, in commercial life, the merchant finds themselves subject to mandatory obligations that they did not voluntarily assume, such as the joint and several liability of a general partner, for which the law holds them responsible for all of the company's debts without limit (Article 551 of the Commercial Code). Additionally, the Civil Code is primarily concerned with immovable property, particularly ownership rights and their accessories, whereas it does not address intangible assets such as securities (stocks and bonds), patents, trademarks, and other intangible goods that are instead regulated by the Commercial Code³

And even though it has become commonplace today for commercial means to be widely used by non-traders, and although commercial law is expanding to cover a larger portion of economic activity, there remain many fields untouched by commercial law and still governed by civil law provisions, such as agriculture, the liberal professions, and operations directly related to the consumption of resources. It is essential to maintain civil law rules in these areas of economic activity for the aforementioned considerations. However, this does not prevent commercial law from being open to applying its provisions against non-traders who wish to engage in specific commercial activities, even if they do not practice them professionally⁴

¹ Ibid.

² See: Mostafa Kamal Taha, Wael Anwar Bondaq, Op. Cit., p. 19.

³ Ahmed Mahrez, Op. Cit., p. 22.

⁴ See: Mustafa Kamal Taha and Wael Anwar Bendaq, op.cit, p. 21.

In conclusion, the distinct nature of commercial transactions compared to civil transactions has become strongly established, in a way that contradicts the unification of the rules of commercial law and civil law into a single, specific code. In fact, even if this unification were to exist, it would be merely formal and not substantive. It would still be necessary to allocate separate chapters and sections for the rules and regulations of commercial law, so that in the end, it would retain its autonomy within the unified general codification.

No matter the strength of the arguments on either side of this debate, both legal systems—civil and commercial law—affect and are affected by each other, due to the close relationship that ties civil law and commercial law together in both directions.

Section Two

The Position of the Algerian Legislator on the Subordination or Independence of Commercial Law from Civil Law

The Algerian legislator has adopted the principle of the independence of commercial law from civil law. However, he has maintained certain aspects of unity between the two legal systems in several areas. Below, we will address each of these aspects in the following subsections:

Subsection One

Aspects of the Independence of Commercial Law from Civil Law in Algerian Legislation

After Algeria gained independence from France on July 5, 1962, regained its sovereignty, and recovered its national resources, it found itself compelled to apply the French legal systems and legislations that were in effect, including commercial law. This was done under Law No. 62-157, dated December 31, 1962, which renewed the application of French legal texts that had been in force up to July 3, 1962, on Algerian territory, provided they did not harm national sovereignty¹.

On September 29, 1975, Algeria enacted its first commercial code by virtue of Ordinance No. 75-59, as amended and supplemented, following the example of the French legislator, which is considered a model among comparative legal systems that have recognized the existence of a distinct and independent commercial law separate from civil law.

The Algerian legislator established specific provisions regulating commercial life, separate and distinct from the provisions that apply in civil life. This includes commercial activities, the rules

¹ See: Farha Zarawi Saleh, op.cit, p. 26.

applicable to traders and commercial establishments, as well as bankruptcy and judicial settlement, and also provisions relating to commercial papers and commercial companies.

Section II

Aspects of the Unity of Commercial Law and Civil Law in Algerian Legislation

Britain, Switzerland, and Italy are examples of countries that have adopted the idea of unifying commercial and civil law within a single unified code whose provisions apply to both civil and commercial transactions alike. With the exception of England, where the unification of civil and commercial law is due to special circumstances, the Italian and Swiss legislations have been criticized by scholars, who considered that the unification of the two laws was merely superficial, not substantive. This is evidenced by the fact that both codes set aside specific sections and chapters for commercial regulations, which constitutes both a contradiction and a confusion between the question of unifying the two codes, as advocated by proponents of this theory, and the mere unification of private law provisions, which is what these legislations actually did ¹

If we look at the approach of the Algerian legislator, it did not follow these models completely. It recognized the existence of a commercial law that is distinct and independent from civil law, yet it maintained certain aspects of unity between the two in several areas. Unlike the French legislator, which established a specialized commercial judiciary to adjudicate commercial matters independently from civil courts, the Algerian legislator was content with creating commercial sections (at the court level) and commercial chambers (at the level of appellate courts or the Supreme Court), in addition to civil sections and chambers. However, this division is not considered a matter of public order, as the Algerian legislator allowed the civil judge to hear commercial matters if necessary. Article 32 of the Code of Civil and Administrative Procedures states:

“However, in courts where sections have not been established, the civil section remains competent to hear all disputes, except for social cases.”

Moreover, territorial jurisdiction is not considered a matter of public order when it involves traders, as stated in Article 45 of the Code of Civil and Administrative Procedures:

¹ See: Mustafa Kamal Taha, Wael Anwar Bandak, *supra*, pp. 20-21.

“Any clause granting territorial jurisdiction to an incompetent court is considered null and void, unless it is concluded between traders.”

Another aspect of the unity between the two laws is that legislation, as a source of commercial law, is not limited to commercial provisions alone; it shares this role with civil law as the general law of private law. This is confirmed in Article 01 bis of the Commercial Code, which states:

“In the absence of a provision in this code, the civil code shall apply...”¹

Thus, it becomes clear that Algerian commercial law has not completely separated itself from civil law; rather, it has preserved some aspects of unity, with a clear predominance of the aspects of independence between the two codes.

Second Topic

The Importance of Distinguishing Between Commercial and Civil Acts

The importance of distinguishing between commercial and civil acts appears in many legal aspects. Although the Algerian legislator recognized the existence of specific provisions governing commercial life that are distinct from those applicable to civil life, it did not set precise standards or criteria to distinguish between commercial and civil acts. This left it to the legal doctrine to find a suitable criterion for all types of transactions considered commercial. This distinction results in several legal consequences, which will be clarified below:

Section One:

Criteria for Distinguishing Commercial Work from Civil Work

Jurisprudence has made numerous attempts to identify a standard that determines the essence of commercial work and distinguishes it from civil work, putting forth various theories in this regard. The most prominent of these theories are as follows:

Subsection One:

The Speculation (Profit Motive) Theory

Proponents of this theory argue that the fundamental criterion for distinguishing between commercial work and civil work is the element of speculation — that is, the intention to achieve profit. Commerce, in their view, does not involve donation or gratuitous work. In fact, this theory is largely correct, though it is not entirely accurate. There are certain civil activities where the parties aim to achieve profit, yet these activities remain civil in nature —

¹ See: Ammar Amoura, *supra*, p. 19.

as in the case of doctors, lawyers, and engineers. Similarly, there are commercial activities whose practitioners do not necessarily aim to achieve profit, yet these activities remain commercial — such as pledging a commercial establishment or dealing with bills of exchange (Article 3 of the Commercial Code).

This means that applying this theory alone is not a sufficient criterion to distinguish commercial work from civil work, even though it does constitute a core element of this work.¹

Subsection Two: The Circulation Theory

Proponents of this theory argue that the essential distinction between commercial work and civil work lies in the circulation of goods from the moment they leave the producer until they reach the consumer.² Any activity aimed at moving wealth and stimulating its movement is considered commercial in nature, while activities involving wealth before circulation or after it reaches the consumer — that is, in a state of stagnation and stability — are considered civil in nature.³

However, this theory is not entirely accurate. While it may explain the commercial nature of some activities, it does not apply to others. Some activities fall within the movement of circulation but are universally accepted as not being commercial — such as the circulation of goods by charitable associations that do not aim to make a profit.

Subsection Three: The Project or Enterprise Theory

Proponents of this theory argue that the distinction between commercial and civil work does not stem from the nature or subject matter of the work itself, but rather from how it is carried out — specifically, from the aspect of it being practiced as a profession. Thus, work is considered civil or commercial not by its inherent nature, but by whether it is practiced as a project — that is, in a regular and repeated manner — regardless of the nature of the work or its objective, whether or not it generates a profit.

However, although this theory has some partial support in certain comparative legislative texts, it cannot fully distinguish between commercial and civil work in all cases. Many civil professions operate using project-based methods, yet they are not considered commercial, such

¹ Ahmad Mahraz, *op. cit.*, pp. 44, 45.

² See: Ammar Amoura, *op. cit.*, p. 39

³ Ahmad Mahraz, *op. cit.*, p. 46.

as medical practices, law offices, engineering firms, and others. Another criticism of this theory is its denial of what is called "single acts," even when such acts involve speculation and the intent to make a profit, such as buying goods with the intention of reselling them at a profit.¹ From all these theories, it becomes clear that it is difficult to establish an all-encompassing, definitive criterion for commercial work. However, it would be incorrect to assume that the above theories have no practical impact; in fact, comparative commercial legislations have drawn upon them all. Among them is the Algerian legislator, who incorporated the strengths of each theory in order to subject the largest possible range of activities — even those only remotely connected to one of these theories — to the rules of commercial law.²

Section Two

The Consequences of the Distinction Between Commercial and Civil Acts

The distinction between commercial and civil acts necessitates a difference in their legal regulation: commercial acts alone are governed by commercial law, while civil acts, by default, remain subject to the provisions of civil law. However, this distinction results in a set of consequences, the most important of which are as follows:

Branch One: In Terms of Jurisdiction

Many comparative legislations, following the example of the French legislator, tend to establish specialized commercial courts tasked with adjudicating commercial matters and separate from civil courts.³ This stems from the fact that commercial disputes are of a special nature, distinct from civil claims, and require swift resolution according to special procedures. As a result, it is permissible to raise a plea of lack of jurisdiction before a civil court in cases involving commercial disputes, or vice versa.⁴

However, the Algerian legislator did not adopt a specialized system of commercial courts. Instead, it established commercial sections (at the court level, pursuant to Article 531 of the Civil and Administrative Procedures Code) and commercial chambers (at the level of courts of appeal or the Supreme Court), alongside civil sections and chambers. Nevertheless, this division is merely an administrative one and does not allow for the raising of pleas of lack of jurisdiction

¹ Fawzi Muhammad Sami, *op. cit.*, p. 39.

² Ahmad Mahraz, *op. cit.*, pp. 46, 47.

³ See: Ammar Amoura, *Op. cit.*, p. 19.

⁴ Helou Abu Al-Helou and Zuhair Abbas Karim, *The Concise Textbook on Jordanian Commercial Law: Theories of Commercial Acts, the Merchant, the Establishment, and Commercial Contracts*, Part One, Saqr Student Services Center, Yarmouk University, Jordan, undated, p. 88.

in the strict sense, as it is not considered a matter of public order. In fact,¹ the Algerian legislator has permitted civil judges to hear commercial matters if the situation requires it. Article 32 of the Civil and Administrative Procedures Code states: “However, in courts where sections have not been established, the civil section shall hear all disputes except social matters.”

Despite this, there is a difference in determining territorial jurisdiction when a dispute is between merchants, as stipulated in Article 45 of the Civil and Administrative Procedures Code: “Any clause that assigns territorial jurisdiction to a non-competent court is deemed null and void, except if it is made between merchants.”

Another difference in determining territorial jurisdiction also arises when the dispute involves a commercial transaction. Article 39, paragraph 4, of the same law provides: “In commercial matters, excluding bankruptcy and judicial reorganization, the competent court shall be the one within whose jurisdiction the promise or delivery of goods took place, or the one where payment must be made. In lawsuits brought against a company, the competent court shall be the one within whose jurisdiction any of its branches is located.”

In contrast, in civil disputes, territorial jurisdiction belongs to the court in the jurisdiction of the defendant’s domicile, unless the defendant has an elected domicile or no known domicile, in which case jurisdiction lies with the court of the last known domicile (Article 37 of the same law).

It is worth noting that these provisions do not apply to certain commercial matters, such as bankruptcy and judicial reorganization, as well as disputes between partners. Paragraph 4 of Article 40 of the same law subjects these to the court within whose jurisdiction the bankruptcy or reorganization is opened or where the company’s registered office is located. The same provisions do not apply to disputes concerning leases of commercial real estate either. According to paragraph 1 of Article 40 of the same law, these disputes fall under the jurisdiction of the court within whose jurisdiction the property is located.

Branch Two: In Terms of Evidence

The Algerian legislator dedicated Articles 333 and onwards of the Civil Code to organizing rules of evidence in civil matters. These include the prohibition of proving by witness testimony for transactions exceeding 100,000 Algerian dinars, and the prohibition of witness testimony even if the transaction amount is below this value when contradicting the contents of an official document (Article 334).

¹ Nadia Foudil, *Op. cit.*, p. 63.

In contrast, evidence in commercial matters is not subject to such restrictions. It is “free and unrestricted,” allowing for proof by all means, including presumptions and witness testimony, according to Article 30 of the Commercial Code, unless the law provides otherwise (as in the case of incorporation contracts for companies, which the law requires to be in writing, as well as acts concerning a commercial establishment).

Moreover, the system of evidence in commercial matters allows, in deviation from the general principle in civil evidence, a merchant to use his own commercial books as evidence. It also permits the merchant’s adversary to “split the evidence” by extracting what supports his claim and discarding what does not if the books are irregular. All these considerations are dictated by the trust, credit, speed, and flexibility required in commercial transactions.¹

Section Three: In Terms of Bankruptcy

One of the most important consequences of the distinction between civil and commercial acts is that a trader who ceases to pay their commercial debts on the due date is subject to the bankruptcy system, in accordance with Article 215 of the Commercial Code and the articles that follow. This is a harsh system that ultimately leads to the trader’s assets being frozen and liquidated by a bankruptcy trustee, who sells the assets and distributes the proceeds among the creditors, each according to the value of their claim. In this way, equality among creditors is achieved.

In contrast, a debtor owing a civil debt, upon failing to pay it when due, is subject to a different system known as the “system of insolvency”², governed by Articles 188 to 202 of the Civil Code. This system is less harsh and less severe than bankruptcy: in civil matters, there is no freezing of the debtor’s assets, no collective liquidation and no distribution of the proceeds among creditors. More than that, the judge may grant the debtor a reasonable extension of time or a series of deadlines to perform their obligation if their situation so requires, provided that this does not seriously harm the creditor (a period of grace or a “view of solvency”), as provided for in Article 210 of the Civil Code:

“If it appears from the obligation that the debtor will only fulfill it when able or at leisure, the judge shall set an appropriate date for the due date, taking into account the debtor’s current and future resources and requiring the diligence of a person keen to meet their obligations.”

The Commercial Code, on the other hand, does not grant such power to the judge, given the serious harm that such extensions can usually cause the creditor. The nature of commercial transactions, based as they are on speed and credit, is incompatible with the granting of these

¹ Ahmed Mahrez, *Op. cit.*, pp. 49–50.

² See: Ammar Amoura, *Op. cit.*, p. 19.

judicial extensions and requires that the debt be paid on its specified due date, failing which the debtor's bankruptcy may be declared

Furthermore, in commercial obligations, the debtor need not be formally notified of default by official letter; it suffices to send an ordinary letter because of the speed and flexibility required by commerce. This is sufficient to declare the bankruptcy of anyone with the status of trader. This differs from the rules of default in civil law, which require an official notice served by judicial officers to the debtor after the due date, warning them of the need to promptly pay their debt¹.

Section Four:

Joint and Several Liability of Multiple Debtors

Unlike the rules of joint and several liability in civil matters, which cannot be established except by express provision or agreement, solidarity among multiple debtors is presumed in commercial matters. This is a well-established rule in commercial law, respected and applied by the courts in view of the need for trust and credit in commercial transactions. However, solidarity in commercial matters may be excluded by a contractual provision, unless the law expressly imposes solidarity². For instance, Article 551 of the Commercial Code states:

“The general partners have the status of traders and are jointly and severally liable without limitation for the debts of the partnership.”

Similarly, Article 432 of the same Code provides:

“The drawer, the acceptor, the endorser, and the guarantor of a bill of exchange are all jointly and severally liable to the holder.”

Section Five: Provisional Enforcement

Under general rules, judgments are not subject to execution until they become final—meaning they acquire the force of *res judicata*—and provisional enforcement is allowed only in exceptional cases. However, in commercial matters, judgments are always subject to provisional enforcement, even if they are subject to appeal or opposition; in other words, they can be executed before becoming final³

Section Six: The Status of Trader

The distinction between civil and commercial acts also leads to the acquisition of the status of trader by those who practice commercial activities. This is explicitly stated in Article 1 of the Commercial Code, which provides:

¹ Nadia Foudil, *Op. cit.*, p. 63

² Ahmed Mahrez, *Op. cit.*, pp. 49–50.

³ Nadia Foudil, *Op. cit.*, p. 63. Ahmed Mahrez, *Op. cit.*, pp. 49–50.

“A trader is any natural or legal person who engages in a commercial activity and makes it a habitual profession, unless otherwise provided by law.”

Whoever acquires this status is subject to certain obligations, most importantly, registration in the commercial register and keeping proper accounting records. In contrast, those engaged in civil activities do not acquire this status and are not subject to these obligations, as will be seen later.

Chapter Three

Commercial Acts in Algerian Commercial Law

A close examination of the approach adopted by the Algerian legislator regarding the enumeration of commercial acts reveals a clear intent to subject as many activities as possible to commercial law, gathering them in Articles 2 to 4. The legislator begins in Article 2 with acts considered commercial by their subject matter, proceeds in Article 3 to acts deemed commercial by their form, and finally codifies acts that are commercial by accessory in Article 4. This means that the legislator has explicitly determined the nature of these acts, leaving no doubt as to their commercial status, which has been expressly granted to them in the text of the law, thereby subjecting them to a specific legal regime—namely, commercial law.

On this basis, we will divide our study of commercial acts according to the provisions of Algerian commercial law into three parts, in the order provided in Articles 2, 3, and 4:

1. Acts of commerce by subject matter
2. Acts of commerce by form
3. Acts of commerce by accessory

A fourth section will address mixed acts, which do not constitute a distinct category of commercial acts but are considered commercial in relation to one party and civil in relation to the other.

First Section

Acts of Commerce by Subject Matter (By Their Nature)

Acts of commerce by their subject matter, also known as original or absolute commercial acts, are those acts that are commercial by their very nature, regardless of the person performing them—whether a trader or a non-trader, a natural or a legal person. Most of these acts are linked to economic activities involving the circulation of wealth across all its stages, from production to distribution until reaching the consumer. These acts are classified according to the classical criterion of commercial activity, namely, the pursuit of profit and speculation¹.

The Algerian legislator addressed this type of act in Article 2 of the Commercial Code, which begins with the statement:

“An act is considered commercial by its subject matter...”

¹ Nadia Foudil, *Op. cit.*, p. 63. Ahmed Mahrez, *Op. cit.*, pp. 49–50.

The legislator did not rely on a uniform standard in listing these acts. Sometimes, an act is considered commercial even if it occurs only once, while at other times, it must be carried out as a business venture.

Before delving into these acts, it should be noted that the enumeration in Article 2 is illustrative rather than exhaustive, based on prevailing doctrine and practice. This is confirmed by the general wording of the article, which allows for analogy, and by the repetition of some acts in different sections of the same article. If we closely examine the language, we see that terms like “other products of the earth” and “other agreements” indicate the possibility of adding similar acts that share the same purpose and objective. This interpretation aligns with economic and commercial developments driven by technological advancements, such as electronic commercial contracts and electronic payment systems¹ Consequently, it is permissible to draw analogies to include new commercial acts not explicitly mentioned by the legislator.

This interpretation is further reinforced by the fact that the Algerian legislator itself expanded on Article 2 through Article 4 of Legislative Decree No. 93-03 of March 1, 1993, concerning real estate activity, which states:

“In addition to the provisions set out in Article 2 of Ordinance No. 75-59 on the Commercial Code, the following acts shall be considered commercial by virtue of their purpose...”

If the enumeration in Article 2 were exhaustive rather than illustrative, the legislator would not have added new acts through special laws. Therefore, what is stated in Article 2 is merely an example, not a limit, and it must remain so. Commercial law is dynamic and evolving, and recognizing this characteristic enables it to keep pace with technological advancements that impact the development of “commercial acts,” which will be classified as such by analogy to Article 2 without needing to amend it.

Below, we will discuss acts of commerce by subject matter, whether carried out individually or as part of an enterprise.

First Requirement

Commercial acts carried out individually by their nature

According to Article 02 of the Algerian Commercial Code, “commercial acts carried out individually by their nature” refer to acts that acquire a commercial character even if performed only once, regardless of the status of the person carrying them out, whether they are a merchant or not. It is worth noting that the use of the term “individually” is purely doctrinal and does not appear explicitly in the provisions of Article 02 itself. Nevertheless, we see no objection to

¹ Stéphane Piedelièvre, *Commercial Law: Commercial Acts, Merchants, Business Assets, Competition, Consumption*, 12th Edition, DALLOZ, Paris, 2019, pp. 57-58.

borrowing the same term in the classification of commercial acts by form, as will be explained later.

In accordance with this concept, these acts can be divided, based on their objective criterion, into three distinct categories:

1. Purchase operations intended for resale and profit;
2. Financial and intermediary operations;
3. Operations related to commercial navigation and maritime fishing.

We will detail these categories in the following three sections:

First Section

Purchase operations intended for resale and profit

Paragraph 1 of Article 02 of the Algerian Commercial Code states that an act is considered commercial by nature if it involves “any purchase of movable property for the purpose of resale in its original form or after its transformation and adaptation.”¹

Paragraph 2 of the same article adds that an act is considered commercial by nature if it involves “any purchase of real estate for the purpose of resale.”

From these provisions, it becomes clear that the Algerian legislator requires three fundamental conditions to classify an act as commercial by nature:

First: The purchase operation must occur.

The term “purchase operation” in its broadest sense means acquiring or owning something in exchange for a consideration. In other words, it is the act of one person giving up money in exchange for acquiring a specific item. This condition is met regardless of whether the consideration is paid in cash, by electronic payment, by check, through account deduction or set-off, or even by an in-kind exchange such as barter. However, if there is no consideration, the purchase element is not met—such as acquiring assets through a gift, a legacy, or inheritance.

Moreover, the Algerian legislator did not require that the subject of the purchase be new; it can also involve used goods.² For example, someone may engage in buying used cars to resell them and earn a profit. While it is customary for purchase to precede sale, the reverse can sometimes

¹ ee: Bouafia Rachid, “The Role of Electronic Money in the Development of E-Commerce,” *Algerian Journal of Economics and Finance*, Vol. 2, No. 2, September 2014, p. 111.

² See: Abdelhamid El-Chouarbi, *Op.cit*, p. 40.
See also: Adel Ali Al-Muqaddadi, *Commercial Law According to the Provisions of the Omani Commercial Code No. 55 of 1990*, Vol. 1, 1st edition, International Scientific House for Publishing and Distribution and Dar Al-Thaqafa, Amman, Jordan, 2003, p. 49.

occur. For instance, a speculator might seize the opportunity to sell a particular good when its price is high, then wait for the price to drop before purchasing it later.¹

As a result of considering the purchase element as an essential condition for classifying an act as commercial rather than civil, the sale of products not preceded by a purchase is not considered a commercial operation—such as the exploitation of intellectual or physical labor.² The two French professors, Serandour Isabelle and Andreu Lionel, consider that the wording of the article (modeled on the French text) is misleading and gives rise to many interpretations. In this regard, case law has confirmed that the work of a farmer who sells his agricultural produce is not considered commercial due to the absence of the purchase element. This condition is not met even when the farmer buys seeds, as such transactions are considered secondary relative to the scale and nature of their work. Similarly, the work of authors, illustrators, and artists is not deemed commercial for the same reason, and thus this condition is not met when authors or illustrators purchase paper, or when artists buy musical instruments. Likewise, the work of some craftsmen is not commercial, such as plumbers, even though they purchase goods to reassemble them for their clients; therefore, their work is considered civil and not commercial.³

However, if a merchant receives goods or merchandise that fall within his commercial business through a gift, will, or inheritance, and then resells them, his work is considered commercial, not civil, and the purchase element is considered fulfilled because his main activity was preceded by a purchase. The funds he acquired secondarily are regarded as secondary to his main activity⁴

It makes no difference whether the subject of the purchase is tangible and movable, such as goods and merchandise, or intangible, such as stocks, debts, and bonds. The subject can also be real estate, where the Algerian legislator explicitly stipulated that every purchase of movable or immovable property for the purpose of resale either in the same state or after modification and processing constitutes a commercial activity. For example, one who buys wheat to mill it and sell it as flour or bake it into bread for resale, or one who buys real estate shares to rebuild and then sell them⁵

¹ See: Nadia Foudil, *Op.cit*, p. 69.

² Dominique Legeais, *op. cit.*, p. 29.

³ Serandour Isabelle and Andreu Lionel, *Commercial Law*, Gualino-Lextenso Edition, Issy-les-Moulineaux, Paris, 2019-2020, pp. 28-29.

⁴ Ahmed Mohrez, *Op.cit*, p. 58.

⁵ *Ibid.*, p. 61.

The Algerian legislator was right to depart from the French legislator and some other Arab legislations, which require that the purchase relate only to movable property for the work to be classified as commercial by nature. These legislations justify the exception concerning real estate from the category of commercial activities that are commercial by nature because the purchase or sale of real estate requires slow official procedures, which conflict with the most important characteristic of commercial law — speed and simplification¹. Although this justification seems valid from that perspective, it can be overcome if viewed from the angle of profit margins and the volume of money and speculation involved in real estate purchases compared to profit margins when the subject of purchase is movable goods, not to mention the number of investors attracted to the real estate trade. In our view, the second justification adopted by the Algerian legislator seems more correct because it relies on applying the most important criterion for classifying commercial activities according to their subject matter: the "intention to make a profit and speculate."

Second: The intention to resell.

Sale is the transaction corresponding to purchase conceptually; it means relinquishing something in exchange for money². Buying movable or immovable property is not a commercial act unless it is accompanied by the intention to resell.

The commercial character is acquired at the purchase stage as well as at the sale stage. If the commercial nature applies to the purchase — which is the means — it is logical that the same character applies to the sale as the result. The element of intention here is essential as it distinguishes commercial sales from civil ones. To have the intention to sell, this intention must exist at the time of purchase, not at the time of sale. It is not sufficient that the sale occurs after purchase if the intention is not proven. For example, if something is bought for consumption or personal use, and then the owner decides to sell it, the transaction is civil because the intention to sell was absent at the time of purchase.

Conversely, if a person buys something intending to sell it, then keeps it or it is destroyed after purchase, the purchase still retains its commercial character as long as the intention to sell existed at the time of the purchase³. Therefore, the commercial character does not depend on the actual occurrence of sale but rather on the psychological intention at the time of purchase⁴. Proving the intention to sell at the time of purchase is a factual matter subject to the court of first instance. The French professor Stéphane Piedelièvre notes that this issue is not very

¹ See: Nadia Foudil, *Op.cit.*, p. 68.

² Dominique Legeais, *op.cit.*, p. 29.

³ Mahmoud Mokhtar Briiri, *Commercial Transactions Law*, Part One, Dar Al Nahda Al Arabia, Cairo, 2000, p. 67.

⁴ Stéphane Piedelièvre, *op.cit.*, pp. 57-58.

difficult when the person is a merchant. He argues that even if this merchant is not registered in the commercial register, an important objective criterion can establish his commercial character, namely the criterion of "commercial reputation," which can be inferred from the relationship between the merchant and his customers ¹In other cases, this intention can be inferred from the circumstances surrounding the purchase, such as the quantity and type of goods purchased. If a person buys a quantity of goods far exceeding his personal consumption needs, this may be evidence of the intention to sell at the time of purchase. Also, the number and frequency of transactions carried out by the person can make it possible to prove the intent to resell and thus infer commercial actions from their conduct. The burden of proof for this intention lies with the party claiming the commercial character of the purchase or sale, and it may be proven by any means, including presumptions and testimony ²

Third: The Intention to Make a Profit

The mere presence of the two previously mentioned conditions is not sufficient for an activity to acquire a commercial character; it must also be accompanied by another essential element, which is the intention to make a profit and speculate at the time of purchase. Article 02 of the Commercial Code does not explicitly include this condition, but there is no need for explicit wording, since the motive behind commercial transactions is profit-making. All commercial transactions, regardless of their variety, aim to generate profit for the actor. Whenever the intent to speculate is present, the act is commercial, even if the sale does not take place for some reason, or if the sale results in a loss — for example, if the goods are perishable and must be sold below cost, or if the price drops due to a shift in consumer taste.³

The intention to speculate may be either direct or indirect, such as when a merchant buys goods and then sells them below cost to gain fame, advertise, or attract customers. In this case, anyone engaged in “commercial dumping” is conducting a commercial activity, even if they flood the market with large quantities of goods below cost, only to raise prices later once competitors have withdrawn, creating a monopoly position that allows recovery of losses and greater profits. Although commercial dumping is a form of unfair competition⁴, this does not exempt the actor from the commercial classification of their work, as a means of protecting competitors and business partners⁵.

¹ Serandour Isabelle and Andreu Lionel, *op.cit.*, p. 28.

² See: Abdel Hamid Al-Shawarbi, *Op.cit.*, p. 40.

³ Mahmoud Samir El-Sharkawy, *Commercial Law*, Part One, Dar Al Nahda Al Arabia, Cairo, 1986, p. 63.

⁴ See: Salman Othman, “Combating Dumping and the Greater Arab Free Trade Area,” *Tishreen University Journal for Scientific Studies and Research*, Vol. 28, No. 02, 2006, p. 03. Also see: Jawad Kazem Darb Al-Janabi, *Commercial Dumping and Its Impact on the Market and Development in Islamic Countries*, Dar Al-Nafais, Amman, 2017, p. 06 and following.

⁵ See: Nadia Foudil, *Op.cit.*, p. 70.

On the other hand, the work of cooperative societies, unions, and private schools is considered civil and not commercial due to the absence of a profit motive when they buy goods and food to sell to their members, workers, or students at cost to make them affordable¹.

It should be noted that the intention to make a profit must be a primary objective in itself, not merely part of a broader goal. For example, if a certain merchant closes their commercial store as a waqf (endowment) with its proceeds dedicated to the benefit of a mosque or charitable cause, the activity is civil, not commercial, because the profit intention is not an end in itself but part of a higher and more comprehensive purpose beyond commercial activity.

In summary, the key to judging the nature of the activity is the intention at the time it occurs. If the intention to speculate exists at the time of purchase, the activity is commercial, and vice versa. Since Article 02 is phrased by way of example and not limitation, other activities may be analogized to the purchase for resale and profit-making. For instance, renting umbrellas on the beach for the purpose of subleasing and making a profit would be considered commercial by nature, even if the umbrellas were purchased for that purpose. Similarly, someone buying a party hall to rent it out for profit is commercial. This interpretation is supported by some Arab comparative legislations that explicitly consider such acts commercial, like the Egyptian legislator. Article 04 of the Egyptian Commercial Code states: “The purchase of movables of any kind with the intention to sell or rent them shall be deemed a commercial act”². It is unreasonable to classify these activities as civil simply because the Algerian legislator requires a sale to follow the purchase. If the legislator had explicitly listed these activities, that result would be correct. Therefore, it suffices to analogize based on the essential element of speculation and profit intention for an act to be classified as commercial, not civil.

Section Two: Financial and Brokerage Operations

This category encompasses two types of special commercial activities: the first relates purely to financial operations, and the second concerns commercial brokerage operations. Some legal scholars have grouped brokerage operations within financial activities due to the financial element involved; however, we prefer to distinguish between them because brokerage involves a clearer element of mediation. Nevertheless, we will discuss them together under the following points:

¹ Serandour Isabelle and Andreu Lionel, *op.cit.*, p. 28.

² Mahmoud Mokhtar Briiri, *Op.cit.*, p. 67.

First: Financial Operations

According to Article 02 (Paragraph 13) of the Commercial Code, financial operations refer to banking and currency exchange operations. Commercial doctrine has added stock market operations and insurance transactions as well.

Contrary to what the wording of Article 02 (Paragraph 13) might initially suggest, French professor Stéphane Piedelièvre argues that the banking operations referred to (by analogy to the French text) are those operations that private individuals may occasionally perform, as opposed to the usual services performed by banks¹. The interpretation that the legislator intended to consider all banking activities commercial by nature, even if performed solely by the bank itself, is, in our view, unsound for three reasons:

First, the commercial characterization in Article 02 (Paragraph 13) refers to the "services" or "material acts" performed by banks, not to the banks as entities. If otherwise, these would be classified under "commercial activities by form," not "by subject."

Second, the nature and scale of activities provided by banks, which they perform professionally with their material and human resources, would logically fall under commercial enterprise activities. It is illogical to classify these activities as those performed solely by the bank entity.²

Third, the legislator requires banks to be established as joint-stock companies according to Article 83 of the Monetary and Credit Law, and thus their activities are commercial by form. Moreover, these are listed exhaustively rather than by way of example, as we will discuss later. If we hypothetically accept that the legislator intended the broader interpretation, then Article 02 (Paragraph 13) would be redundant, since the commercial nature of banking activities is automatic regardless, making this provision unnecessary.

Therefore, the legislator's intent is understood to refer to banking operations that private individuals may undertake, not to banks themselves, even if these individuals act alone. Such acts are commercial if the individuals have the intention to speculate.

In reality, banks perform many diverse operations. However, the intended scope according to the above interpretation includes only those operations accessible to private parties, such as granting loans or purchasing debts at an agreed interest.³

Or installment sale services with certain interest rates, which individuals may also provide. Private parties may also offer safe deposit box rental services that are usually provided by banks. By analogy with deposit receipt services for interest, some have classified luggage

¹ Stéphane Piedelièvre, *op.cit.*, p. 62.

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³ Order No. 03-11 dated August 3, 2003, related to currency and credit, amended and supplemented, Official Gazette, No. 52 dated August 27, 2003.

storage services for a certain commission as commercial activities by nature as well. Among the operations that private parties may carry out, from our perspective, are foreign exchange transactions stipulated alongside banking operations in the same Article 02 (Clause 13) mentioned above, namely exchanging foreign currency for the national currency, exchanging foreign currencies among themselves, or exchanging gold for silver, etc. There is no doubt that these operations fall within the exclusive domain of banks as well; however, if private parties conduct these operations with the intention of speculation and profit-making, the activity is commercial by nature, even if performed individually. But if the exchange is conducted without speculative intent—for example, if a person arriving from another country wants to exchange leftover foreign currency for Algerian dinars—such an exchange would not be considered a commercial activity for that person.¹

Commercial doctrine has added to banking and exchange operations other activities not explicitly included in the commercial law texts, chiefly stock market operations (the bourse). The latter is a market but differs from other markets as it usually neither displays nor owns goods and merchandise; instead, trading occurs through brokerage and mediation companies via financial instruments or assets,² often in the form of shares or bonds. It may also be a venue for buying and selling currencies under numerous regulatory rules governing those markets. These markets have become a better alternative for investors and capital owners than placing their money and investments in banks.³

In fact, commercial doctrine has classified this type of operation as commercial based on the subject matter, by analogy to “purchase for resale” on one hand, and to “banking operations” on the other. However, doctrine holds that this type of modern commercial operation has increasingly imposed itself in the commercial and economic field, requiring independent regulation separate from other commercial activities due to the volume of money and speculation involved, as well as the number of investors attracted by these markets.⁴

Although some scholars distinguish between savers who use the stock market to save money without the intention of speculation, and others who use these markets with the intent of speculation and profit-making—classifying only the latter’s activity as commercial by nature—French professor Stéphane Piedelièvre considers this distinction artificial for two reasons: first, it is difficult to draw a clear line due to the challenge of proving intent, especially since

¹ Ahmed Mahrez, previously cited, p. 66.

² Ben Turkey Leila, "Crimes Committed on the Stock Exchange in Algerian Legislation," *Annals of the University of Algiers* 1, No. 32, Vol. 03, September 2018, p. 616.

³ Stéphane Piedelièvre, *op. cit.*, p. 62.

⁴ *Ibid.*, pp. 63–64.

speculators do not necessarily have the legal status of traders in all cases; second, it is presumed, according to prevailing commercial custom, that resorting to stock markets is for the purpose of seeking certain profits. Therefore, resorting to the stock market is considered commercial activity by nature in all cases.

Moreover, commercial doctrine has added to the above-mentioned operations all insurance activities by analogy to the texts mentioned by the Algerian legislator in Article 02 (Clause 10), which referred to insurance companies, and Clause 18 of the same article concerning insurance operations in contracts related only to maritime trade. Since these activities were mentioned by way of example and not exhaustively, doctrine holds that all insurance operations are commercial by nature if speculative intent and profit-making are present.¹

French professors Serandour Isabelle and Andreu Lionel argue that this classification relies on the assumption that the “insured” pays certain premiums in return for insurance to avoid a greater loss in case the risk materializes, receiving compensation from the “insurer” who undertakes to cover the losses caused by that risk (fire, theft, accidents, etc.). The professors consider the “intent to avoid loss” as an indirect form of “intent to make profit,” rather than speculation.

Social insurance, however, is not considered a commercial activity even if carried out by a company or organized project. In practice, social insurance is managed directly by the government or by a public or private institution empowered by the legislator with certain public law authorities or means to perform its duties. The absence of commercial character in social insurance operations is due to the fact that they do not aim at profit or speculation. Moreover, the technical foundations on which risk in social insurance is based differ from those of private insurance. The legislator determines the types of risks considered social, as well as the premium amounts and compensation payments when the risk occurs, taking into account considerations unrelated to insurance art or its commercial nature.²

Second: Intermediation Operations (Brokerage and Commission-Based Work)

Intermediation operations, according to Article 02 (paragraphs 13 and 14) of the Commercial Code, include all brokerage or commission-based operations, as well as any mediation for the purchase and sale of real estate, commercial premises, or securities.

Brokerage refers to an intermediation process carried out by a person known as a “broker,” whose role is to exert effort to bring the contracting parties closer together in order to conclude a contract or a specific deal, in exchange for a percentage of the value of the contract or deal,

¹ serandour Isabelle and Andreu Lionel, *op. cit.*, pp. 29–30.

²Ahmed Mahrez, previously cited, p. 85.

or another agreed-upon fee if a percentage is impractical or does not align with the nature of the contract, as in the case of “insurance brokers” who seek the best insurance offers for their clients. In this context, the broker is responsible for achieving a result, not just exerting effort; therefore, if the broker fails to reconcile the parties and the contract or deal is not concluded, no fee is owed.

Professor Ahmed Mahrez notes that although the Algerian legislator, through the specific provision in Article 02 (paragraph 14), classified mediation for the purchase and sale of real estate, commercial premises, and securities as commercial by nature, these activities still fall within the same prior concept—they are a type of brokerage activity. Accordingly, brokerage is always considered commercial in nature, whether related to movable or immovable property.¹ The broker’s role differs from that of a “commission agent” and an “ordinary agent.” The broker’s task ends when the contract or deal is concluded, and he bears no obligations towards the contracting parties, does not appear in the contract, and does not guarantee its execution. By contrast, the commission agent enters into the contract in his own name but on behalf of his principal, whose name does not appear in the contract, in exchange for an agreed-upon commission. Consequently, the commission agent acquires the rights arising from the contract and is directly liable to the other contracting parties, as if the business were his own.²

On the other hand, the ordinary agent—whose rules are provided in Articles 571 to 589 of the Civil Code—concludes the contract in the name and on behalf of his principal. His work is considered gratuitous by default, meaning that any rights or obligations arising from the contract accrue to the principal, not the agent. Of these three roles, only the first two (broker and commission agent) are considered commercial, while the ordinary agent’s work is considered civil in nature because of the absence of speculation.

From our perspective, if the ordinary agent agrees with the principal on an agency fee according to Article 581 of the Civil Code, his work should be treated in the same manner as that of the commission agent—thus qualifying as commercial, not civil, even if he acts in the name and on behalf of another. As with other commercial activities, the intent to speculate and generate profit is an essential element of a commercial act: when this intention exists, the act is commercial; when it does not, it is civil. This principle also seems to apply to the work of the ordinary agent if he agrees with the principal on a fee for the agency.³

¹ Iony Randrianirina, *Cours de Droit commercial*, Édition Gualino- Lextenso, Issy-les-Moulineaux, Paris, 2019-2020, p. 69. See also: Stéphane Piedelièvre, op. cit., p. 63.

² Ahmed Mahrez, op. cit., p. 67.

³ Ibid., p. 66.

Common examples of commission agency operations include “air transport commission agency contracts” between airlines (the principal) and travel agencies (the agent), as well as “hotel services commission agency contracts” between hotels (the principal) and travel and tourism agencies (the agent), where the agent earns a commission for each service provided to the principal. Typically, both parties resort to commission agency contracts when they are based in different countries and the principal must rely on the agent’s ability to reach clients who may lack the experience or time to deal directly with the principal. In some cases, a newly established principal may need to engage a commission agent to benefit from his positive commercial reputation with clients.¹

In conclusion, all brokerage, mediation, and commission-based operations are considered commercial by nature, even if they are conducted individually, whether the person conducting them is a professional or not, and regardless of whether the subject matter of the mediation is civil or commercial.²

Section Three:

Operations Related to Commercial Navigation and Commercial Maritime Fishing

The Algerian Commercial Code did not classify operations related to maritime commerce among the commercial activities until the issuance of Order 96-27 of 09 December 1996, which amends and supplements Order 75-59 of 26 September 1975, encompassing the Commercial Code. This order added six clauses to Article 02, five of which pertain entirely to maritime commercial navigation. As for maritime fishing operations, they were not covered by the Algerian Commercial Code but were instead regulated by Law No. 01-11 of 03 July 2001 on Maritime Fishing and Aquaculture, as amended and supplemented. This law classified maritime fishing operations aimed at speculation and profit-making as commercial activities, while excluding fishing operations that do not aim for speculation and profit from the realm of commercial activities. This will be addressed in the following sections:

First: Operations of Maritime Commercial Navigation

According to Article 162 (paragraph 01) of the Algerian Maritime Code, "commercial navigation" refers to activities "related to the transportation of goods and passengers carried out at sea and in internal waters by ships." Paragraphs 02 to 05 of the same article include pleasure and leisure navigation, scientific research at sea, auxiliary navigation for rescue and relief, and servitude navigation carried out by ships used exclusively for public purposes, as well as navigation for fishing and aquaculture. Among these paragraphs, only the activities listed in

¹ Stéphane Piedelièvre, *op. cit.*, p. 64.

² Ahmed Mahrez, *op. cit.*, p. 66.

paragraph one are considered commercial; navigation for fishing and aquaculture has specific provisions that will be addressed later.

It is notable that the five clauses added to Article 02 of the Algerian Commercial Code, if read alongside Article 161 (paragraph 01) mentioned above, indicate that all the activities listed therein fall within the scope of "commercial navigation" as defined by this article. They include all insurance contracts and other contracts related to maritime trade, such as mortgages, shipping, and maritime transportation contracts, as detailed in the second book of the Maritime Code entitled "Commercial Exploitation of the Ship," including all maritime voyages mentioned in the final clause of Article 02 of the Commercial Code. While it is unlikely in practice for maritime transport operations to occur in isolation, the Algerian legislator did not require them to be conducted as part of an enterprise, unlike other transportation activities. This was to account for all possible scenarios, including those involving illegal maritime voyages that may be undertaken individually. It is also conceivable that some tourist companies engage in maritime transport during certain seasons.¹

Moreover, according to this same article, these contracts include all agreements and arrangements related to crew wages and hiring, such as the captain, the equipment assistants, and all cleaning and maintenance workers, among others.² Therefore, the obligations arising from these contracts are considered commercial for the ship's operator. However, concerning the sailor's obligation, the prevailing view has been to grant a civil nature to the employment contract by applying the general rules that deem employment contracts as civil in relation to the worker. The rationale for granting a commercial character to these agreements and contracts is to provide better protection for workers and ship employees, given their status as the weaker party in the contract.³

Not only that, but Article 02 also refers to all purchases and sales of equipment or supplies for ships, including materials essential for the commercial operation of the ship, which are indispensable for completing the maritime journey, such as supplies, fuel, spare parts, lifeboats, and so on. The Algerian legislator did not require the sales operation to be linked to a preceding purchase or to involve an initial intent for speculation and profit at the time of purchase. It suffices that the intent for speculation and profit emerges at any time after the purchase. Any contrary interpretation would render the provision redundant in relation to the first paragraph

¹ Sami Abdel-Baqi, *op.cit.*, p. 128.

² Mostafa Kamal Taha, *Commercial Law*, Al-Dar Al-Jam'iyya, Alexandria, 1991, p. 126.

³ Helou Abu Al-Helou, Zuhair Abbas Karim, *op.cit.*, p. 140.

of the same article, as the subject of the sale is equipment and materials essential for commercial—not civil—operation.

Finally, paragraph 17 of the aforementioned Article 02 also includes all operations of leasing, borrowing, or bottomry loans (loans on maritime adventure). Leasing operations, as provided in the second chapter of the second book of the Algerian Maritime Code under the title “Chartering of Ships,” refer to any contract between the shipowner or its outfitter and the shipper or owner of the goods, whereby the former undertakes to place the ship or part of it at the disposal of the latter in return for a fee ¹.

As for the bottomry loan, or what is also called a “loan with great risk,” as its name suggests, it is considered an aleatory contract, whereby a sum is lent against the security of the ship or cargo, with the understanding that the loan is forfeited to the lender if the goods pledged for the debt are lost due to a force majeure maritime incident, and that the loan plus the agreed maritime interest (even if it exceeds the legal limit) will be repaid if the goods arrive safely. This is why it is called a “loan on adventure”². Essentially, it is a type of reverse insurance contract, where the insurer (the lender) pays the insurance amount before the occurrence of the risk rather than afterward ³In fact, the commercial nature of this transaction is self-evident when compared to paragraph 13 of the aforementioned Article 02, as this type of operation can be classified as inherently commercial by analogy with banking activities, which include loan operations with certain interests as their primary domain.

Given this, the five last paragraphs of the aforementioned Article 02 are illustrative rather than exhaustive, as evidenced by the general language used, encompassing all operations of commercial maritime navigation. Accordingly, in our view, the commercial nature of these transactions is not limited to contracts directly related to maritime trade but can extend to all obligations arising from other sources, whether their origin is legal or factual.

The close relationship between commercial law and maritime law helps to explain why the legislator included specific provisions for maritime navigation in the Commercial Code. Historically, maritime law was part of commercial law, but several factors led to its separation, such as the high monetary value of ships, the unique hazards they face, the volume of goods they transport, and the commercial exchanges they facilitate. As a result, the commercial

¹ Akram Yamkli, *Commercial Law: A Study on Commercial Activities, Merchants, Shops, and Commercial Contracts*, Dar Al-Thaqafa Publishing and Distribution, Amman, Jordan, 2010, pp. 98–99. See also: Aziz Al-Akili, *Commercial Law: Commercial Activities, Merchants and Shops, Commercial Companies, Commercial Papers*, Dar Al-Thaqafa Publishing and Distribution, Amman, Jordan, 1995, p. 84.

² Akram Yamkli, op. cit., p. 100. See also: Aziz Al-Akili, op. cit., p. 84.

³ Nadia Foudil, op. cit., p. 76.

character of these transactions derives from the speculative element that usually accompanies maritime navigation activities.

One might wonder why the legislator included maritime navigation operations among standalone commercial acts, given that in practice, such activities are usually carried out only by specialized companies. However, the legislator anticipated situations where an enterprise might engage in a maritime navigation activity without it being part of its usual operations. For example, a tourism company might need to charter a ship for a single voyage due to difficulties in contracting with a regular carrier. In such a case, the act of chartering the ship would still be considered a maritime commercial operation even if performed only once and would thus fall under the provisions of commercial law¹

From our point of view, what was mentioned in those five paragraphs can be extended by analogy to operations related to commercial air navigation. This is because the rationale and purpose of conferring the commercial character on maritime navigation activities are essentially the same for air navigation as well. Supporting this interpretation is what the Egyptian legislator stated in Article 6 of the Egyptian Commercial Law, which stipulates: “Also considered as commercial work is any work related to commercial navigation, whether maritime or aerial ...”². Just like a ship, an aircraft can be the subject of a charter or lease contract, as stipulated in Articles 121 to 123 of the Algerian Civil Aviation Law, and it can also be mortgaged in accordance with Article 32 of the same law, not to mention the insurance and transportation contracts governed by that law.

Secondly: Commercial sea fishing operations

In the understanding of the Algerian legislator, marine fishing refers to “any activity aimed at capturing, collecting, or extracting biological resources that permanently or predominantly inhabit water as their environment”³. In reality, marine fishing operations were not initially included among the commercial activities listed in the provisions of the Algerian Commercial Code. Instead, they were addressed in Law No. 01-11 of July 3, 2001, on Marine Fishing and Aquaculture, as amended and supplemented. This law classifies certain fishing activities as commercial if they are carried out with the intention of speculation and profit. On the other hand, fishing activities that are not intended for speculation and profit are excluded from the category of commercial activities.

¹ Sami Abdel Baqi, *Business Law: Commercial Activities, Merchants, and Commercial Premises*, Dar Al-Nahda Al-Arabia, Cairo, 2007, p. 17.

² Mohamed Farid Al-Areeny, Hani Doweidar, *Principles of Commercial and Maritime Law*, Dar Al-Jame'a Al-Jadida Publishing, Alexandria, 2003, p. 53.

³ Mokhtar Rahmani Hakima, Bousaada Saeeda, “The Reality and Mechanisms of Sustainable Marine Fishing in Algeria,” *Al-Mu'assasa Journal*, Issue No. 03, 2016, p. 58.

Specifically, Article 2 of the above-mentioned law includes several concepts, among them those found in paragraphs 10 and 12, which address fishing activities intended to achieve profit. Paragraph 10 defines commercial fishing as “any fishing practice for profit,” while paragraph 12 defines artisanal fishing as “any commercial fishing practice carried out traditionally near the coast,” making it a form of commercial fishing with a profit motive as well.

Paragraphs 9 and 11 of the same article, however, address fishing activities that do not aim to achieve profit. Paragraph 11 defines recreational fishing as “any fishing practice for sport or leisure without intent to profit.” Scientific fishing, as defined in paragraph 9, refers to “any fishing practice carried out for study, research, or experimentation to gain knowledge of a resource, area, technique, or fishing gear”¹. These activities do not involve any intent to speculate or make a profit and thus remain civil in nature rather than commercial.

Chapter VIII of the same law covers the various types of fishing. Articles 26 and 27 of the Marine Fishing Law make a crucial distinction between commercial foot fishing and recreational foot fishing. Article 26 defines commercial foot fishing as “fishing practiced using nets or other fishing tools besides hand-held fishing rods,” meaning that hand-held rod fishing is excluded from the scope of commercial activities aimed at speculation and profit. Meanwhile, Article 27 defines foot fishing without intent to profit as a form of recreational fishing. This distinction is further reinforced by Executive Decree No. 03-481 of December 13, 2003, which outlines the conditions and methods of marine fishing. Article 48 of this decree addresses professional foot fishing, while Article 64 addresses non-professional foot fishing². Unlike the former, the latter does not aim to make a profit.

It should be noted that the key criterion in classifying marine fishing operations as either commercial or civil lies in the element of “intent to speculate and make a profit.” In this sense, the classification of marine fishing operations deviates from the general rule of purchase for resale and profit set out in Article 2 of the Algerian Commercial Code. Specifically, it is not required that the products of marine fishing be preceded by a purchase transaction to be considered commercial. However, they must be obtained through marine fishing itself to be classified as commercial. If these products are obtained by other means—such as donation or gift—and then sold, the activity remains civil, even if it yields profit. On the other hand, general rules apply to individuals who purchase fishery products from a fisherman, a resource exploitation company, or an aquaculture enterprise for the purpose of resale and profit. These

¹ Abbas Samia, “The Role of Laws Regulating Commercial Sea Fishing in the Growth of the National Economy,” *Al-Nibras Journal for Legal Studies*, Vol. 5, No. 01, March 2020, p. 111.

² Abbas Samia, *ibid.*, p. 111.

activities are outside the scope of “marine fishing” and instead fall under the broader sphere of “wealth circulation and distribution,” governed by the general rule on purchase for resale in Article 2 of the Algerian Commercial Code.

Although all these commercial activities are listed by way of example rather than exhaustively and can be analogized to similar activities, we believe there are some emerging activities that now impose themselves strongly because of their immense commercial importance and significant profit potential—most notably, advertising and publicity operations. These activities merit explicit mention separate from other operations due to the volume of funds and speculation involved, as well as the number of investors they attract in their drive to capture clients and generate profit. Indeed, they have achieved worldwide success, generating substantial and rapid returns. It appears that the Algerian legislator is moving in this direction, as evidenced by its recognition of “electronic advertising” as a commercial activity in Law No. 18-05 of May 10, 2018, on Electronic Commerce, specifically in Articles 30 to 34. Since this type of activity aligns with the primary criterion underlying subject-based commercial activities—namely, the intent to generate profit and speculate—it is appropriate to classify it as a commercial activity by subject, even if carried out only once.

Section Two

Commercial Activities in the Form of an Enterprise

In addition to sole commercial activities, the Algerian legislator has regulated a second category of commercial activities that acquire this status when conducted in the form of a project or enterprise. No definition of the latter is provided within the provisions of the Algerian Commercial Code; rather, it is defined in Article 549 of the Civil Code, which states: *"An enterprise is a contract whereby one of the contracting parties undertakes to produce something or perform a work in return for a wage committed by the other contracting party."* It is noticeable that this definition does not correspond exactly to the concept of enterprise as intended by the legislator in the commercial domain. In civil law, the element of work is fundamental in the enterprise; therefore, using the same term may cause confusion between the two concepts. It would have been preferable if the legislator had used the term “project” directly instead of “enterprise,” as it aligns more accurately with the translation of the French term “*Entreprise*” used in the original text, on one hand, and fits the substantive meaning intended by the Algerian legislator, on the other hand.¹

¹ Nadia Foudhil, *op.cit.*, pp. 79-80.

Accordingly, the enterprises enumerated in Article 2 of the Commercial Code refer to that project or economic and legal unit that requires a certain degree of organization and combines material and human elements to engage in an economic activity aimed at speculation and profit-making through production, mediation, or distribution of wealth and services.

From this definition, it is clear that the concept of enterprise or project is based on the assumption of three conditions. The first is the professional element characterized by the activity being carried out repeatedly and continuously, whether by an individual (called an individual project) or a group of persons in the form of a company of any type. The second condition requires a certain level of organization, manifested by the provision of material means (capital) and human means (workers), and preparing them to carry out the commercial activity in a habitual and ongoing manner. The third condition is the element of speculation and the intent to generate profit, which constitutes the essential and primary condition of the enterprise. If this condition is absent, the activity loses its commercial character even if the first two conditions are met, and the person performing such activities is considered a craftsman engaging in a civil or collective activity that does not target speculation and profit-making.¹

Since the legal enumeration of commercial enterprises in Article 2 of the Commercial Code is given by way of example and not exhaustively, it seemed appropriate to classify them, according to the mentioned list of eleven enterprises, into three different categories. The first two categories are based on a formal criterion relating to stages of wealth circulation, where the first category includes production and manufacturing enterprises, and the second covers distribution and exchange enterprises. The third category is based on another substantive criterion that considers the content of these enterprises, distinguishing between enterprises producing and distributing wealth (which includes the first and second categories) and service-providing enterprises (which comprise the third category). Below, we will discuss, without strict regard to order, the commercial enterprises activities as follows:

First Branch

Enterprises of Industrial Activities

Industrial activities refer to those operations that process raw materials extracted from nature, as well as agricultural, plant, and animal materials, and transform them into another form that is usable. Article 549 of the Civil Code explicitly addresses this type of enterprise, stating: *"An enterprise is a contract whereby one of the contracting parties undertakes to manufacture something or perform work..."*²

¹ Brigitte HESS-FALLON, Anne-Marie SIMON, *Business Law*, 20th Edition, Dalloz, Paris, 2017, p. 54.

² Stéphane Piedelièvre, *op. cit.*, p. 65.

Within this scope fall three different types of enterprises mentioned in Article 2 of the Algerian Commercial Code, which we outline as follows:

First: Production, Transformation, or Repair Enterprises

This type of enterprise includes projects engaged in industrial activities at various stages, starting from production, then transformation, and finally repair. Thus, these activities include productive operations using raw materials, such as sugar and dairy industries, or transformative operations, like plastic and leather manufacturing. They also encompass modification or repair in any form that increases the value or creates new utility, such as dyeing, car repair workshops, and all after-sales warranty services.

The Algerian legislator addressed this type of enterprise in Article 2 (Section 4) of the Commercial Code, considering such activities commercial if conducted as an organized project aimed at speculation and profit. Since the article's wording is general, the production may be industrial or agricultural, such as raising cows for milk and its derivatives or growing fruit to transform it into juices.

This classification also allows distinguishing between manufacturers operating within an enterprise and artisans, since the latter fall outside the concept of the article as the project requirements do not apply to them. Their work is closer to selling production and personal skill rather than speculation and profit-making, which is confirmed by Article 21 of Order 96-01 dated January 10, 1996, defining the rules governing traditional industries and crafts, stating: *"A craft enterprise for producing goods and services is any enterprise established according to one of the forms stipulated in the Commercial Code..."*¹

Second: Construction, Excavation, or Land Preparation Enterprises

Construction enterprises are those engaged in building and erecting structures such as buildings, towers, residential complexes, bridges, dams, roads, railways, tunnels, canals, and others. Excavation or land preparation operations form part of the construction process, including leveling, backfilling, demolition, and restoration works—such as digging building foundations, wells, leveling agricultural lands, and preparing roads before construction.

According to Article 2 (Section 5) mentioned earlier, the Algerian legislator considers these operations commercial by nature if performed as an organized project aiming to make a profit and speculate, regardless of the type or significance of the work. According to the article's meaning, anyone who undertakes to provide materials or labor for any of these works under a

¹ Ahmed Mohrez, op.cit, p. 73.

contract is engaged in a commercial activity by nature, whether it is an individual project managed by a natural person or a collective project managed by a contracting company.

Accordingly, artisans such as masons, sculptors, carpenters, and others whose work does not meet the project requirements fall outside this article's scope, as their work is closer to selling production and personal skill than speculation and profit-making.¹

Third: Enterprises Exploiting Mines, Surface Mines, Quarries, and Other Earth Products

These enterprises specialize in all forms of primary exploitation of nature, whether surface mining—such as exploiting coastal salts, stone quarries, sand, gravel, and marble—or underground mining, such as oil and gas exploration, and extracting iron, coal, phosphate, and all other minerals.

Besides the repetition of the terms "mines and surface mines," the wording of Article 2 (Section 7) of the Commercial Code is general, ending with the phrase "or other earth products," which is a comprehensive term encompassing all exploitation of the earth and its subterranean or surface wealth, whether the exploiter owns the source of production or not, such as a beneficiary of a concession right to exploit a mine, mountain, or land for a specified period.²

This form of enterprise criterion allows for distinguishing between primary natural resource exploitation within an enterprise framework and individual exploitation operations, as the latter fall outside the scope of the provision because they do not meet the project requirements—for example, those who use water from artesian wells to irrigate their crops or livestock. These activities lack the element of speculation and do not possess the characteristics of an enterprise.³

Second Branch

Enterprises of Distribution Activities

French professors Serandour Isabelle and Andreu Lionel consider that the field of distribution activities includes the second stage of the stages of wealth circulation, which is related to buying and selling operations. Accordingly, commercial enterprises falling under this classification include two different categories: enterprises for wholesale auction sales of new goods and retail sales of used items, as well as enterprises for manufacturing, buying, selling, and reselling maritime navigation vessels. These will be discussed through the following two sections:

First: Enterprises for Wholesale Auction Sales of New Goods and Retail Sales of Used Items

¹ Same reference, p. 74.

² Ahmed Mohrez, *op.cit.*, p. 78.

³ Serandour Isabelle and Andreu Lionel, *op. cit.*, p. 30.

Auction sales, according to Articles 753 and 757 of the Code of Civil and Administrative Procedures, are defined as any sale that anyone can attend, even if the auction is limited to a specific group of people, and the sale is awarded to the highest bidder. Like other sales contracts, an auction sale contract consists of two parties: the seller and the buyer. However, the auction procedures are conducted through a third party called the “auctioneer,” who acts as an agent for the seller according to Article 4 of Executive Decree No. 96-291 issued on September 2, 1996, concerning the conditions for joining and practicing the profession of auctioneer, which states:

"The auctioneer is considered the agent of the person who wants to sell something or perform the sale."¹

Contrary to what may appear at first glance, auctioneers are not the parties intended by Article 2 of the Algerian Commercial Code. Although they may practice their profession independently or as a project, their work remains civil in all cases. This was confirmed by Article 5 of the aforementioned Decree No. 96-291, which states:

"An auction agency contract is a civil contract subject to the provisions of the Civil Code."

Meanwhile, Article 46 of the same decree affirms that:

"Two or more auctioneers belonging to the same judicial district, with the authorization of the Minister of Justice, may establish a civil company governed by the legal rules applicable to civil companies."

In this case, the commercial character applies only to those who professionally engage in auction sales as a business, who are naturally one of the contracting parties, not the “auctioneer,” who merely acts as an agent in the sale process.²

Due to the unusual nature of this type of sale, with its enticements and promotion of goods, and given that the “auction” aims to achieve the highest possible profit, the Algerian legislator deemed it appropriate to confer a commercial status on it, so that the seller is subject to the strict provisions of commercial law. Meanwhile, the buyer in an auction remains engaged in a civil act unless they intend to resell and make a profit from the purchase, in which case the transaction is considered commercial for them.³

Thus, the term auction sale refers to voluntary sales by auction, not forced sales resulting from enforcement procedures. The latter do not aim for speculation or profit as in the former case. The Algerian legislator also requires that auction sales be carried out as a project — meaning

¹ Ahmed Mohrez, *op.cit.*, p. 78.

² Ahmed Mohrez, *op.cit.*, p. 88.

³ Iony Randrianirina, *op. cit.*, p. 72.

repeated, regular, and professional activity — for them to be considered commercial. If a person sells by auction only once, their act remains civil, unless preceded by a purchase aimed at reselling at auction for profit, in which case their activity is commercial, not civil.

Notably, the wording of Article 2 (Section 12) of the Commercial Code appears to establish a misleading and contradictory distinction by stating that “every enterprise for the wholesale auction sale of new goods and the retail sale of used goods” is considered commercial by nature. A quick reading of this text may give the initial impression that auction sales of new goods must be wholesale only to be commercial, which is illogical. Applying the rule “who owns the whole owns the part,” auction sales are commercial if practiced as a business project, whether wholesale or retail. Moreover, Article 2 is expressed by way of example, not limitation. It is also unreasonable for the Algerian legislator to classify retail auction sales of used goods as commercial, while classifying retail auction sales of new goods as civil acts. Logic dictates that new goods should have precedence or at least be placed on the same level and share the same commercial description. The same observation applies to auction sales of used goods, where the article’s wording suggests commercial status applies only to retail sales, not wholesale — which also should be described the same as new goods.¹

This deficiency in the wording of the article stems from poor drafting and inaccurate translation from the French text to Arabic. The Algerian commercial code is mostly a transplant of French law. Referring back to the French original, the correct meaning of the article is “every enterprise of auction sale of new or used goods, wholesale or retail,” meaning commercial status applies to auction sales in all cases, whether the goods are new or used, wholesale or retail. Therefore, the Algerian legislator is called upon to correct this drafting defect to avoid interpretations inconsistent with logical criteria distinguishing commercial from civil acts.

Moreover, the legislator should also address another form of auction sale called “electronic auction sale,” which French legal scholarship has recently mentioned due to the widespread use of the internet and technological advances that better support the speed essential to commerce.

Secondly: Enterprises Engaged in the Manufacture, Purchase, Sale, and Resale of Ships for Maritime Navigation

It is noteworthy that this type of commercial activity can be classified under three different categories adopted in this study, due to the general wording of Article 02 of the Commercial Code. Besides being part of commercial trading activities, it can also be classified within industrial activities based on the first term mentioned in paragraph 15 of the aforementioned

¹ Stéphane Piedelièvre, *op. cit.*, p. 67. See also: Iony Randrianirina, *op. cit.*, p. 72.

Article 02. Moreover, it can be included within maritime navigation operations according to the last phrase of the same paragraph. However, it is difficult to separate the study of this section into three different categories. Therefore, we have chosen to classify it under trading activities as the broadest category compared to the other classifications.¹

The "shipbuilding industry" is considered a collective activity performed by an integrated team sharing functions and specializations. Typically, the construction of ships is carried out by specialized factories, which are enterprises operating continuously and regularly, as they require specialized technical expertise from workers, engineers, technical experts, and others. Since this type of project relies on employing such expertise to engage in commercial speculation and profit-making, the Algerian legislator classified it within the category of commercial activities whether the builder supplies the raw materials and construction necessities such as ropes, wood, sails, etc., or merely provides technical expertise using workers, engineers, and experts. The legislator requires that these activities be conducted as a business project for them to be considered commercial by nature, according to paragraph 15 of Article 02 of the Commercial Code.

Paragraph 15 of Article 02 also considers the purchase, sale, and resale of ships as commercial activities by nature. The Algerian legislator did not require that the sale be accompanied by a preceding purchase or the intention to profit and speculate from the purchase operation. Accordingly, the sale of a ship is commercial even if the intent to sell was not present at the time of purchase, or if no purchase preceded the sale, such as when the ship is inherited. Furthermore, the act of purchasing itself is commercial by nature even if it is not intended for resale and profit; it suffices that the purchase takes place regardless of whether the purpose is other than resale and profit.²

In fact, classifying this type of operation as commercial by nature is a foregone conclusion when compared to commercial maritime navigation operations mentioned earlier, which were given as examples and not as an exhaustive list. From our point of view, this type of operation is commercial even if conducted individually, provided the intent to speculate and profit exists. This interpretation is supported by the classification adopted by the Egyptian legislator regarding this type of activity.³ Article 6 of the Egyptian Commercial Law states that "any activity related to commercial navigation, whether maritime or aerial, is considered

¹ Helou Abu Helou, Zuhair Abbas Karim, *op. cit.*, p. 139. See also: Aziz Al-Akili, *op. cit.*, p. 82.

² Aziz Al-Akili, *op. cit.*, pp. 82-83.

³ Muhammad Farid Al-'Arini, Hani Dawidar, *op. cit.*, p. 53.

commercial, especially: (a) ship or aircraft construction, repair, and maintenance, (b) purchase, sale, lease, or rental of ships or aircraft...”

Therefore, it would have been preferable, in our opinion, for the Algerian legislator to establish the commercial nature of these activities without requiring that they be practiced as a business project. As for ship repair and maintenance, these were not included in paragraph 15 of Article 02 of the Algerian Commercial Code, but they can be inferred by analogy with production, transformation, and repair enterprises mentioned in paragraph 4 of the same article, which covers all types of repair. The same rule applies to the leasing and renting of ships by analogy with the leasing of movable or immovable property stipulated in paragraph 3 of the same article.

Section Three

Service Activity Enterprises

It is difficult to precisely define the scope of service activities, as they are numerous and varied. However, it can be said that they include activities concerned with producing services rather than tangible goods. According to Article 02 of the Commercial Code, several commercial activities fall under this category, including: enterprises leasing movable or immovable property, enterprises operating transportation and transit services, enterprises operating public warehouses, enterprises operating public amusement facilities and intellectual production, insurance enterprises, and supply and service enterprises. Additionally, Article 04 of Legislative Decree No. 93-03 concerning real estate activity mentions another type: real estate development operations. Below is a brief overview of these activities:

First: Enterprises Leasing Movable or Immovable Property

Lease, according to Article 467 of the Civil Code, is “any contract that enables the lessor to allow the lessee to use something for a specified period in exchange for a known rent.” Article 02 (item 03) of the Commercial Code considers leasing of movables or immovables a commercial activity by nature if conducted as an organized business aimed at profit and speculation. Leasing may apply to movables, such as car rentals, rental of wedding and event supplies, or construction tools, or to immovables such as renting houses, hotels, event halls, warehouses, administrative offices, and others.

The Algerian legislator rightly diverged from the French legislator, who excluded real estate leasing from commercial activities even when conducted as a business, a distinction widely criticized by French scholars. These criticisms are based on two grounds: first, the contradiction between French legislative texts and jurisprudence, which generally classifies hotel operations as commercial rather than civil; second, the normative fact that many individuals specialize in

this work and have earned significant profits, justifying the commercial classification to protect the weaker contracting party.

Hence, the essential criterion for classifying leasing of movables and immovables as commercial depends on repetition and organized professionalism, which is what the Algerian legislator means by “enterprise.”

Second: Enterprises Operating Transportation and Transit Services

Undoubtedly, the commercial classification of activities related to the operation of transportation (goods) and transit (people), under Article 02 of the Commercial Code, largely relies on the vital role these activities play in both commercial and economic fields and their close interrelation. These activities are the backbone of commercial life and the movement of goods and services on land, air, and sea. Their importance also lies in facilitating the execution of the vast majority of commercial contracts and bringing consumers closer, thus aiding trade development nationally and internationally.

Accordingly, the Algerian legislator stipulated in Article 02 (item 08) that enterprises operating transportation and transit are commercial activities by nature if conducted through an organized business targeting speculation and profit, whether by road, railway¹, sea, or air. This implies that taxi services fall outside this provision because they do not meet the project requirements, whether individual, urban collective, or rural collective taxis, as these are artisan activities more related to selling personal effort, production, and skill rather than speculation.²

From our perspective, transport and transit operations may also extend to related or subsidiary activities, such as loading and unloading services, whether performed by the carrier itself using its machinery and equipment or by another person, provided that the project conditions are also met.³

Notably, this type of activity partially overlaps with the last item of Article 02, which considers “all maritime voyages” commercial, unquestionably conducted by maritime transport means. Thus, Articles 02 (items 08 and 20) complement each other, leading to the same conclusion: maritime transport operations are commercial.

Third: Enterprises Operating Public Warehouses

Public warehouses are large spaces, covered or open, where merchants deposit their goods in exchange for a fee, waiting to sell or withdraw them when needed—such as grain, cereals, and refrigerated warehouses. The owner of the goods is given a receipt called a warehouse

¹ Mohamed Brassi, *The Regulations Governing Land Transport Licenses in Algerian Law*, Algerian and Comparative Public Law Journal, Volume 4, Issue 1, January 2018, p. 44.

² Mohamed Brassi, op. cit., p. 57.

³ Ahmed Mohrez, op. cit., p. 73.

receipt, which is a document representing the goods and allows the sale or pledging of these goods to third parties by endorsement without the need to physically move them.

The Algerian legislator considered, within Article 02 (clause 11) of the Commercial Code mentioned above, enterprises operating public warehouses as commercial activities due to their close connection with commercial life, which is one of its fundamental pillars. Success in commercial activities cannot be imagined without relying on public warehouses. It is not required for the project to include several warehouses; one warehouse is sufficient, even though the text uses the plural form, provided the warehouse is sufficiently spacious and organized to meet customers' needs. It does not matter whether the warehouse is owned by its operator or rented.

The Algerian legislator was precise in choosing the terminology by using the phrase "public warehouses," which means that "private warehouses," attached to some public institutions, factories, or commercial stores, are excluded from the scope of Article 02 of the Commercial Code unless they are used in connection with another commercial activity, in which case they take the status of commercial activities by analogy and not by subject matter, as will be discussed later. Private warehouses used by hospitals, schools, or others to store food supplies, medical equipment, or textbooks retain their civil nature because they do not target speculation or profit-making.¹

Fourth: Enterprises Operating Public Amusement Facilities and Intellectual Production

Public amusement facilities refer to spaces designated for entertainment and amusement of the public in exchange for a fee, such as amusement parks, playgrounds, sports facilities, theaters, cinemas, circuses, and similar venues.²

The Commercial Code mentions this type of activity in Article 02 (clause 09), stipulating that to acquire the commercial status, the operation of the amusement facility must meet the elements of an organized project targeting speculation and profit-making. If these conditions are absent, such as when a singer performs at a wedding for a fee, the activity remains civil because it exploits personal talents. Also excluded from commercial activities are events like

¹ Same source, p. 87.

² Same source and page.

sporting matches held to honor a retired player, raise donations for hospitals or children, or provide aid during natural disasters, since these do not aim for speculation or profit.¹

Intellectual production refers to the results of mental or creative efforts, known as "intellectual property rights" or "copyrights and related rights," granting the owner the right to exploit their literary, artistic, or scientific works such as stories, books, artworks, musical performances, audio-visual recordings, computer software, databases, advertisements, maps, and more.

Like other production operations, intellectual property rights form part of the distribution chain and consumer access, attracting intermediaries such as publishers, artistic and cinematic production companies, and others, who purchase these rights to print, produce, and distribute them in a way that fits the description of speculation and profit-making.² Thus, the Algerian legislator has considered the exploitation of intellectual production as a commercial activity if done as an organized project.³ This differs from direct exploitation by the individual creator of their scientific, literary, or artistic talents, such as an author publishing their own work, a scientist presenting an invention, or an artist showcasing talents. These cases remain civil activities because their essence is linked to the creator's personal purpose, which is nobler than mere profit and speculation.⁴

Notably, there is a close connection between the exploitation of intellectual production and public amusement facilities, as many artistic and cinematic products and concerts are marketed in theaters, cinemas, and exhibition halls. This explains their combination in the same clause of Article 02 mentioned above.⁵

Fifth: Insurance Enterprises

Article 02 (Item 10) of the Commercial Code stipulates that "insurance enterprises" are considered commercial activities. The provision does not differentiate or specify particular types of insurance, whether land, marine, or air insurance, regardless of the type of insurance or the nature of the insured risk.

We have previously discussed insurance operations on two occasions: the first relates to the doctrinal classification of these activities as commercial from the perspective of the "insured" (the party paying premiums in exchange for coverage), and the second concerns marine insurance contracts. While insurance enterprises are considered commercial activities,

¹ Stéphane Piedelièvre, op. cit., p. 67.

² Ahmed Mohrez, op.cit, pp. 81–82.

³ Iman Brishi, "Legal Measures for the Protection of Intellectual Property under Algerian Legislation," *Al-Ustadh Al-Bahith Journal for Legal and Political Studies*, Vol. 3, No. 3, September 2018, p. 63.

⁴ Erzil El Kahina, "The Consumer's Impact by Intellectual Property Rights Protection," *Journal of Rights and Freedoms*, Vol. 3, No. 4, April 2017, p. 606.

⁵ Ahmed Mohrez, op.cit, pp. 82–83.

intersecting with marine insurance contracts in terms of this result, they differ from the first classification since the commercial nature is viewed from the perspective of the "insurer" rather than the "insured." Accordingly, the legislator requires that insurance operations be conducted as an organized enterprise aiming for speculation and profit.

Therefore, cooperative insurance operations, which are based on mutual assistance among groups exposed to similar risks (such as farmers agreeing to pay certain premiums among themselves to insure their crops or livestock), are excluded from this concept. Each participant in such schemes is both an "insurer" and an "insured" simultaneously. This type of insurance is not considered commercial because it does not aim for profit or speculation but rather for mutual solidarity among its members.

Thus, insurance operations acquire commercial status depending on their subject from two angles: the doctrinal classification viewing it from the "insured" perspective as in individual commercial operations, and the legislative classification viewing it from the "insurer" perspective, provided the activity is conducted as a business. In all cases, cooperative and social insurance operations are excluded from commercial activities as they do not aim to achieve profit or speculation.¹

Sixth: Supply or Service Enterprises

Supply operations refer to the commitment to provide customers with certain goods or services regularly and continuously, such as supplying water, electricity, gas, internet, telephone, and others.²

For supply operations to be considered commercial, according to Article 02 (Item 06) of the Commercial Code, they must occur repeatedly and regularly enough to be described as a business. These are ongoing contracts where time is a critical element. For example, if a person undertakes to provide cleaning services to hotels, wedding halls, and other venues for a certain period, this is considered commercial. However, the cleaners employed by this person perform civil (non-commercial) work since they lack the intent for profit and speculation. Likewise, if a livestock farmer delivers animals once to a slaughterhouse owner, this operation is not commercial. But if repeated regularly over time, it would then acquire the commercial character.

The goods or services supplied may either be produced by the supplier (like water, electricity, gas, internet) or preceded by a purchase for resale, such as a trader buying foodstuff to supply

¹ Oukil Nassima, Drar Ayash, *Islamic Cooperative Insurance as an Alternative to Traditional Commercial Insurance*, Algerian Journal of Globalization and Economic Policies, Vol. 3, No. 1, December 2012, pp. 118-119.

² Daniel Bert, Frédéric Planckeel, *Course in Commercial and Business Law*, 4th Edition, Gualino-Lextenso, Issy-les-Moulineaux, Paris, 2018, p. 48.

hospitals, schools, or restaurants. The legislator's wisdom in deeming supply operations commercial, even if not preceded by a purchase, lies in the fact that the activity does not only concern the sale process but also aims at speculation and profit.¹

It is noteworthy that the Algerian legislator used both terms "supply" and "services," whereas in reality, the latter is a form of supply that includes providing services alongside goods. This is evidenced by the French legislator's use of the term "supplies" alone without adding "services." Meanwhile, the Egyptian legislator in Article 05 of the Commercial Code uses the phrase "supply of goods and services," which is a suitable formulation consistent with the above interpretation.² Therefore, from our perspective, the addition of "services" by the Algerian legislator seems unnecessary and should be reconsidered for deletion or correction at the earliest opportunity.

Seventh: Real Estate Development Operations

In fact, this type of commercial activity was not included in Article 02 of the Commercial Code mentioned earlier. Rather, it was stipulated in Article 04 of Legislative Decree No. 93-03 dated March 1, 1993, concerning real estate activity, which states: *"In addition to the provisions set forth in this field in Article 02 of Ordinance No. 75-59, which comprises the Commercial Code, the following activities are deemed commercial by their purpose:*

- *All activities of acquiring and preparing real estate plots for the purpose of selling or leasing them,*
- *All intermediary activities in the real estate sector, especially selling or leasing real estate assets,*
- *All activities of managing and administrating real estate on behalf of others.*³

Some justify the inclusion of this provision as a necessity driven by the need to expand economic activity in the post-Cold War era, transitioning from a socialist-oriented economy to a free market economy, including the transformations in the real estate trade sector.

Although it might seem at first glance that these activities would fall under individually commercial activities by their nature, a closer look at the overall legal framework regulating them reveals that they are essentially part of the operations carried out by "real estate developers" (real estate agents). Practicing this profession requires obtaining accreditation and registration in the commercial register, according to Article 05 of Executive Decree No. 09-18

¹ Ahmed Mohrez, *op. cit.*, pp. 76-77.

² Daniel Bert, Frédéric Planckeel, *op. cit.*, p. 48.

³ Ahmed Mahrez, previously cited, pp. 76-77.

dated January 20, 2009, concerning the practice of the real estate agent profession. Consequently, the objective classification of this type of activity falls within the realm of commercial activities by way of an enterprise, rather than individually, because the legislator required a degree of professionalism, organization, and continuity.

It is worth noting that the three activities mentioned in Article 04 overlap with other commercial activities listed in Article 02 of the Commercial Code.¹ For example, the activities of acquiring and preparing real estate plots for sale or lease significantly overlap with the leasing operations of movable and immovable property mentioned in Article 02 (point 03). Similarly, intermediary activities in the real estate field, as set out in Article 04 (point 02), overlap with brokerage activities mentioned in Article 02 (point 13) of the Commercial Code.

As for the real estate management and administration activities on behalf of others mentioned in the last point of Article 04, they do not differ much from the previous examples in terms of being a form of management intermediation, as stipulated in Article 04 of Executive Decree No. 09-18 mentioned above. These include leasing premises for residential, professional, or commercial use, collecting rent and related charges, as well as carrying out repair and maintenance work, in exchange for a specific commission received by the real estate agent for these services.²

From our perspective, the activities listed in Article 04 of Legislative Decree No. 93-03 are provided as examples rather than an exhaustive enumeration. All activities carried out by real estate agents are considered commercial by their nature, whereas the legal nature of the activities of those dealing with them varies depending on the specific circumstances. If these individuals meet the criteria for professionalism, their work is also considered commercial by nature; otherwise, it remains commercial for the agent but civil for the other party.

Looking at the approach of the Algerian legislator in enumerating commercial activities by their nature, we find that all these activities—whether conducted individually or by way of an enterprise—are unified by a core criterion: the "aim of profit and speculation." Without this element, it is not possible to classify these activities as commercial.³

It should also be noted that the enumeration by the legislator is intended as illustrative rather than exhaustive, to ensure that as many activities as possible can be brought under the Commercial Code's provisions. Consequently, courts are permitted to analogize new cases to those explicitly listed, if they share similar characteristics and objectives. In this regard, Article

¹ Daniel Bert, Frédéric Planckeel, *op.cit.*, p. 48.

² Farha Zarawi Saleh, previously cited, pp. 98-100.

³ Nadia Foudil, previously cited, p. 74.

07 of the Egyptian Commercial Code is noteworthy, as it states: *"Any activity that can be analogized to the activities mentioned in the preceding articles due to its similarity in characteristics and objectives shall be deemed a commercial activity."* Thus, the Egyptian legislator has definitively resolved any debate over whether the listed commercial activities are examples or an exhaustive list. The Algerian legislator, in turn, is urged to follow the example of its Egyptian counterpart in any future legislative opportunity, thereby conclusively resolving this debate through explicit legal text.

Section Two

Commercial Activities by Their Form

These are activities that acquire the status of commercial acts by virtue of their form, meaning that they are considered commercial in themselves merely upon fulfilling certain conditions,¹ regardless of the person undertaking them or the civil or commercial nature of the obligations arising therefrom. The Algerian Commercial Code addressed these activities in Article 03, which states:

“The following are deemed commercial by their form:

- Transactions involving bills of exchange between persons.
- Commercial companies.
- Agencies and business offices, whatever their purpose.
- Transactions related to commercial premises.
- Any commercial contract relating to maritime and air trade.”

It is clear from this provision that the Algerian legislator did not adopt a single standard in enumerating commercial activities by their form. Sometimes, an activity is deemed commercial even if performed only once and without any requirement of regularity or continuity—such as transactions involving bills of exchange, operations related to commercial premises, and commercial contracts concerning maritime and air trade. In other cases, the legislator requires the activity to be carried out regularly and continuously, as in the case of commercial companies and agencies and business offices.

Before delving into these activities, it is important to note that the enumeration in Article 03 above is exhaustive rather than illustrative, unlike commercial activities by their nature according to prevailing practice and doctrine. Consequently, no analogy can be drawn to extend

¹ Iony Randrianirina, *op.cit*, P 73.

the scope of these activities to include other commercial acts not specifically identified by the legislator.

We will now address commercial activities by their form, distinguishing between those that do not require habitual practice and those that do, through the following two subsections:

Subsection One

Transactions Involving Bills of Exchange Between All Persons

The “bill of exchange” (also referred to as “draft,” “promissory note,” or “bill of order”) is a written instrument that contains an unconditional order from a person known as the drawer to another person called the drawee,¹ to pay a certain sum of money to a third party known as the payee, either on demand or at a specific or determinable future date. It thus serves as a credit instrument because it grants the debtor a period for payment, and as a payment instrument because it fulfills its function upon its maturity. One of its key features is its negotiability by endorsement or delivery until it is presented to the drawee for acceptance and then payment.²

The Algerian legislator did not provide a definition of the bill of exchange, but it devoted the first chapter of the first title of the fourth book of the Commercial Code (Articles 389 to 464) to its provisions under the heading “The Bill of Exchange.” Since the scope of this study does not permit a systematic analysis of all these provisions, only those relevant to this specific topic will be addressed here. In this regard, Article 390 stipulates that a bill of exchange must contain the following information in order to be considered valid:

1. The term “bill of exchange” in the body of the instrument and in the language in which it is drafted;
2. An unconditional order to pay a specific sum;
3. The name of the drawee (the person who must pay);
4. The due date;
5. The place where payment must be made;
6. The name of the person to whom or to whose order payment is to be made;
7. The date and place of issuance of the bill of exchange;
8. The signature of the drawer.

The same article further provides that:

¹ Abdelkader El-Bekirat, *Algerian Commercial Law: Commercial Papers—Bill of Exchange, Promissory Note, Cheque, Warehouse Receipt, Transport Document, Invoice Transfer Agreement*, University Publications Office, Algiers, 2016, p. 17. See also: Belaïssaoui Mohamed Taher, *A Brief Explanation of Commercial Papers*, Houma Publishing, Algiers, 2008, p. 11.

² Mahmoud Al-Kilani, *The Commercial and Banking Encyclopedia: Commercial Papers—A Comparative Study*, Volume III, Dar Al-Thaqafa Publishing and Distribution, Amman, 2009, p. 107.

“The said instrument is not deemed a bill of exchange if it lacks any of the above elements, except in the following cases:

- If it does not indicate the due date, it is payable on demand;
- If it does not specify a particular place of payment, the place indicated next to the name of the drawee is deemed to be the place of payment and at the same time the domicile of the drawee;
- If it does not specify the place of issuance, it is considered to have been issued at the place indicated next to the name of the drawer.”

It is clear from this provision that the bill of exchange consists of mandatory and optional elements. If the optional elements are missing, this does not affect its validity—as, for example, if the due date is not specified. However, if it lacks any of its mandatory elements, whether intentionally or by oversight, it may either be transformed into another commercial instrument if it meets the general characteristics of commercial securities, or it may lose its commercial character entirely and be treated as a simple document evidencing a civil debt if it does not include the term “bill of exchange.” In some cases, it may even lose all legal value and not qualify as even a simple document evidencing a civil debt—such as if it lacks the drawer’s signature.

While the legal nature of the bill of exchange as a negotiable instrument is similar to other commercial instruments, it differs in the legal nature of its transactions: the Algerian legislator has assigned it special provisions that recognize its commercial character regardless of the parties involved. In this sense, Article 389 reaffirms what was stated in Article 03 above, providing:

“A bill of exchange is considered a commercial act regardless of the persons involved.”

This means that all obligations arising from the issuance, negotiation, acceptance, or payment of a bill of exchange are considered commercial by form, regardless of the nature of those obligations or the status of the parties involved—whether they are civil or commercial persons. However, the Algerian legislator has introduced two exceptions to this rule. The first is found in paragraph 2 of Article 396 of the Commercial Code, which states:

“If the drawer includes in the bill of exchange the phrase ‘not to order’ or a similar phrase, the instrument is not negotiable except in accordance with the form and effects of an ordinary assignment.”¹

¹ In a ruling dated March 5, 2008, the Supreme Court held that a bill of exchange does not lose the character of a debt that can be recovered judicially, even if it was not presented for payment on time. See: Decision of the Commercial and Maritime Chamber No. 483562 in the case of the Public Economic Establishment for the Distribution of Electrical Equipment v. the Algerian External Bank, dated March 5, 2008, *Journal of the Supreme Court*, Issue No. 1, 2008, p. 169.

In this case, transactions involving the bill of exchange are considered commercial only in the relationship between the original parties (the drawer, drawee, and payee) and not beyond. Any subsequent transactions are subject to the rules governing ordinary documents evidencing civil debts under the general provisions of the Civil Code, not the Commercial Code.¹

The second exception is set out in Article 393 of the Commercial Code, which states:

“A bill of exchange signed by minors who are not traders shall be void in respect of them, without prejudice to the rights of the other parties pursuant to Article 191 of the Civil Code.”

Undoubtedly, the legislator’s aim behind this exception is to protect minors, as they are considered a vulnerable party in these transactions, without undermining the bill of exchange as an ordinary instrument that establishes a civil debt governed by the general provisions of the Civil Code, rather than the Commercial Code.

And since the legislator’s enumeration of these acts was exhaustive and not illustrative, the courts may not analogize them to other acts not mentioned in the texts in order to deem them commercial acts. These provisions apply exclusively to the bill of exchange and not to other commercial papers such as cheques and promissory notes, which remain governed by civil law if they are part of a civil transaction, and by commercial law if they are part of a commercial transaction, or are considered commercial by accessory nature for traders, as will be seen later.²

The strict application of the principle that these acts cannot be extended by analogy, since the enumeration is exhaustive, raises other parallel issues regarding the scope of their application. Does this mean that everything not mentioned in Article 03 does not possess a commercial nature by form? For example, one may refer to the so-called “electronic bill of exchange,” which has emerged due to modern technological advances. Does this latter instrument qualify as a “bill of exchange”³ in the precise sense laid down by Article 03, and thus acquire the commercial nature, or does it lack the conditions necessary to be characterized as such?

It is noteworthy that the Algerian legislator has not accounted for these developments affecting commercial papers, even though modern means of payment were introduced in Chapter IV concerning commercial papers under Law No. 05-02 of February 6, 2005. This law merely

¹ Mahmoud Al-Kilani, previously cited, p. 123 et seq.

² Ahmed Mahrez, previously cited, p. 92.

³ The electronic bill of exchange is a French-originated instrument, first used in France on June 2, 1973, as a result of reports by committees tasked with finding solutions to the financial and administrative issues arising from the use of the bill of exchange, particularly in cases where a bank is a party. This development was driven by the need to modernize payment methods to match the electronic clearing system employed by the French central bank.

See: Kirdi Nabila, "The Electronic Bill of Exchange," *Al-Nibras Journal for Legal Studies*, Vol. 2, No. 2, March 2017, p. 95.

referred to “electronic bills of exchange” indirectly when it provided for the possibility of payment of the bill of exchange electronically, as stipulated in Article 414.¹

In the absence of specific legal provisions governing their rules, the question of the legal nature of electronic bills of exchange remains. This is especially significant given that electronic bills of exchange are among the instruments that can be most effectively utilized in the information technology sector, which has permeated the banking sector, and most banks now prefer to use them due to the advantages they offer compared to traditional bills of exchange.²

Commercial legal doctrine has largely agreed that the concept of an “ordinary bill of exchange” does not differ greatly from that of an “electronic bill of exchange,” except that the latter is processed electronically, either partially or entirely. If it is partially processed, it is initially issued on a paper document, then electronically processed and integrated onto an electronic medium, thus termed a “paper-based electronic bill of exchange.”³ If it is entirely processed electronically, the paper aspect disappears altogether from the outset, and the bill’s data is recorded on a magnetic tape, at which point it is termed a “magnetic electronic bill of exchange.” This is a significantly more advanced form compared to the paper-based electronic bill of exchange.

Accordingly,⁴ the fundamental criterion for recognizing the legal nature of the “electronic bill of exchange,” in all its forms, as a commercial paper—and thus considering dealings in it as commercial acts by form—is linked to the recognition of the probative force of the data processed electronically, namely electronic writing and electronic signature.⁵

Referring back to the relevant legislative texts, we find that they equate the probative value of electronic and paper-based writing under Article 323 bis 1 of the Civil Code, as amended by Law No. 05-10 of June 20, 2005. This means that there is no legal requirement to assume that writing must be on a paper medium. The purpose of writing is to determine the content of the transaction, and thus the concept of sufficient formality is met in the case of an electronic bill of exchange. Moreover, the Algerian legislator has recognized the evidentiary value of electronic writing and electronic signatures through Law No. 15-04 of February 1, 2015, which sets out the general rules for electronic signature and certification. Accordingly, the term

¹ Mustafa Kamal Taha, Wael Anwar Bendaq, "Commercial Papers and Modern Electronic Means of Payment," 1st Edition, Dar Al-Fikr Al-Jamii, Alexandria, 2005, p. 345.

² See also: Merhishi Aqila, "The Electronic Bill of Exchange as an Alternative to the Traditional Bill of Exchange," *The Critical Journal of Law and Political Science*, Vol. 10, No. 01, June 2015, p. 201.

³ Naziha Ghazali, "The Electronic Bill of Exchange and the Rules of Exchange Law in Algerian Legislation," *Journal of Social Sciences*, Vol. 15, No. 25, December 2017, p. 162.

⁴ Mohamed Mahboub, "Fundamentals of Payment and Credit Instruments," 1st Edition, Dar Abi Rakraq for Printing and Publishing, Rabat, 2012, p. 137.

⁵ Iony Randrianirina, *op. cit.*, p. 76.

"instrument" mentioned in Article 390 of the Algerian Commercial Code includes both paper and electronic writing alike.¹

By analogy to the formal requirements of a conventional bill of exchange, dealing in an "electronic bill of exchange" is considered, according to the prevailing view in French jurisprudence, to be equivalent to dealing in a conventional bill of exchange only in one specific form: the "paper-based electronic bill of exchange," as it meets all the necessary conditions. It is well-suited to the nature of commercial life, which is based on speed and simplification, and it is most appropriate for its development. However, the "magnetic electronic bill of exchange" cannot be considered a substitute for the conventional bill of exchange according to the jurisprudence of the French Court of Cassation, as it does not meet the formal requirements of a conventional bill of exchange. It is issued on a magnetic medium without any possibility of paper-based consultation. Although it appears to be in line with modern technological developments, it does not serve as a credit instrument but rather as an instrument of payment only.²

In truth, the recognition of the commercial nature of the "paper-based electronic bill of exchange"—and thus the commercial nature of dealing with it—does not contravene the exclusivity rule in Article 03. It simply represents another developed form of the bill of exchange as outlined in the same article, similar to the evolution of other electronic payment methods. As for the possibility of forgery, it remains present in both "electronic" and "conventional" forms, especially in light of modern technological developments. Therefore, the Algerian legislator is called upon to address this gap to remove any ambiguity and avoid misinterpretations that could negatively impact the proper application of the law.

Section Two

Transactions Related to Commercial Premises

The Algerian legislator did not define the commercial premise explicitly but limited itself to mentioning its constituent elements in Article 78 of the Commercial Code, from which the following definition can be derived: "A commercial premise refers to the collection of movable assets, tangible or intangible, designated for conducting commercial activity, such as equipment, machinery, merchandise, trade name, trademark, patent, and all other assets necessary for operating the commercial premise."

Article 03 (Article 04) of the Commercial Code considers all transactions related to the commercial premise to be commercial acts by their nature, regardless of the status of the person

¹ Naziha Ghazali, previously cited source, p. 166

² Iony Randrianirina, *op. cit.*, p. 77

performing them, even if they are not merchants. Taking a contrary view would undermine the content of the aforementioned article and would render the prior transactions commercial only by association, rather than by their form, due to their connection to the merchant, as will be discussed later.

It is not required that these transactions concern the commercial premise as a legal unit including all its elements for the act to be commercial by its form. It is sufficient that the transactions concern any of its tangible or intangible elements, such as goods, trademarks, or others.¹

The Algerian legislator did not specify, though it would have been preferable to do so, the nature of these transactions related to commercial premises in the aforementioned article explicitly. This has left room for various doctrinal and judicial interpretations regarding the scope of these transactions. Referring back to the second book (Articles 78 to 214) of the Algerian Commercial Code, a set of transactions applicable to the commercial premise is stipulated, such as its sale, pledge, or lease. Article 79 of the Commercial Code lists several transactions that are treated as equivalent to the sale of the commercial premise, such as a promise to sell, transfer by partition, auction, or contribution of the premise as capital in a company.²

There has been debate over the legal nature of other transactions not explicitly mentioned in the second book of the Commercial Code but which may also apply to the commercial premise, such as when the premise forms part of an inheritance liquidation, or is frozen as a waqf (endowment) asset with its revenue dedicated to a mosque, charitable association, or similar transactions. Since the wording of Article 03 mentioned earlier is intended to be exhaustive rather than illustrative, the provision should be applied strictly without broad interpretation. Therefore, from our perspective, the aforementioned transactions do not fall within the scope of Article 03 of the Commercial Code. However, heirs who may acquire the commercial premise through inheritance, if they subsequently perform any legal transaction involving that commercial premise—such as its sale, pledge, or lease—their act is deemed commercial by its form even if they are not merchants, because the commercial nature follows the transaction on the commercial premise itself, not the person conducting it.³

¹ Nour Eddine Chazali, *Commercial Law, Commercial Transactions, Merchant, Commercial Premise*, Dar Al-Ilm for Publishing and Distribution, Annaba, 2003, p. 52.

² Ahmed Mohrez, previously cited source, p. 96.

³ here is no legal impediment to dedicating a commercial premise as a waqf asset, as ruled by the Supreme Court in its most recent jurisprudence dated January 6, 2009, stating: "The dispute between the parties concerns a commercial premise belonging to waqf property..." See: Commercial and Maritime Chamber Decision No. 501842, dated January 6, 2009, in the case of the Religious Affairs and Endowments Directorate against (B-A) and others, *Supreme Court Journal*, Issue No. 2, 2009, p. 188.

Section Three

Contracts Related to Maritime and Air Commerce

Article 03 (Paragraph 05) of the Commercial Code stipulates that “any commercial contract related to maritime and air commerce” is considered commercial by its form.¹

Before delving into the formal requirements imposed by the legislator to confer a commercial character on this type of transaction, it is necessary to point out a flaw in the wording of this paragraph in its Arabic version, where it begins with the phrase "any commercial contract." In reality, if the contract is already commercial, it does not require an additional criterion to classify it as commercial again. If we accept the accuracy of the paragraph as written, the remainder of the paragraph becomes meaningless, since the contract would have already acquired the commercial nature prior to its connection to maritime and air commerce, which certainly was not the Algerian legislator’s intention. Referring back to the French version of the same article, we find that the correct translation is more precise than the Arabic text, stating: "any contract related to maritime and air commerce."

Moreover, the wording of this paragraph almost literally matches Article 02 (Paragraph 18) of the Commercial Code, which addresses commercial acts by their subject matter, stating that “all insurance contracts and other contracts related to maritime commerce” are considered commercial by their subject.

In fact, applying these two provisions does not lead to contradictory results regarding the commercial nature of the activity in their overlapping domain, but rather to imposing two different thresholds to reach that result. Applying Article 03 (Paragraph 05) would set a high threshold for conferring commercial status on maritime and air commerce contracts compared to the lower threshold under Article 02 (Paragraph 18). The former is formulated as an exhaustive list and therefore cannot be extended by analogy, while the latter is illustrative and not exhaustive, allowing for the extension of its scope to other contracts not explicitly mentioned.

In this case, to apply Article 03 (Paragraph 05) of the Commercial Code, two essential conditions must be met:

1. The act must be a contract in both form and subject matter. Other obligations arising from different sources, such as unilateral will or tort (civil liability), do not fall within the scope of this article.

¹ The French text is as follows: "Tout contrat concernant le commerce par mer et par air." See: Ahmed Mohrez, previously cited source, p. 97.

2. The contract must relate to maritime and air commerce, meaning that the purpose of the contract is commercial exploitation with the intent of speculation and profit-making.¹

However, a closer look at these conditions reveals that the profit and speculation criterion is an objective rather than a formal one. Thus, applying Article 02 (Paragraph 18) to confer commercial status on these types of acts appears, in our opinion, to be more accurate than relying on Article 03 (Paragraph 05).

It is noteworthy that the Algerian legislator recognized this issue through Order No. 96-27 amending and supplementing Order No. 75-59, which includes the Commercial Code, by appending six additional paragraphs to Article 02, among which five relate exclusively to maritime commerce, including the aforementioned Paragraph 18. However, this should have been followed by the repeal of Paragraph 05 of Article 03 due to its redundancy and incompatibility with the formal criteria required for commercial acts by their form. As for air commerce activities, they can be analogized to maritime commerce activities covered by Article 02, since the latter's list is illustrative and not exhaustive, as previously mentioned.

Section Two

Regular Commercial Activities

Regular commercial activities refer to the category of acts that the Algerian legislator considers commercial by their form and which require a certain degree of regularity and continuity in their practice. This category differs from commercial activities related to entrepreneurship, as the latter do not require a specific form to be practiced; rather, they are linked to the nature of the activity itself, whether carried out by a natural or legal person. In contrast, the former requires a specific form for the activity to be considered commercial by its form, regardless of whether the activity itself is civil or commercial in nature.

This category includes two subtypes: commercial companies and business agencies and offices, regardless of their purpose. These will be discussed in the following two subsections:

Subsection One

Commercial Companies

The Algerian Commercial Code does not provide a definition of commercial companies but limits itself to regulating them within Book Five (Articles 544 to 840). Referring to the provisions of the Civil Code, as the general legal framework, it provides a definition of a company in Article 416, defining it as:

"A contract whereby two or more natural or legal persons commit to contribute to a common

¹ Ahmed Mohrez, previously cited source, pp. 99–100.

activity by providing a share of work, capital, or money, with the aim of sharing the profit that may result or achieving an economy or reaching an economic goal of common benefit, while bearing the losses that may arise therefrom."

In fact, companies are divided according to the nature of their activity into two types: commercial companies and civil companies. This is the traditional criterion for classifying companies. If the subject of their activity is civil, such as education, medicine, or law, the company is civil. However, if the subject of their activity is commercial, such as money exchange or brokerage, the company is commercial.¹

However, the Algerian legislator introduced an exception to this principle in the first paragraph of Article 544 of the Commercial Code, which states: "The commercial nature of a company is determined either by its form or its subject matter." The second paragraph of the same article stipulates that "partnership companies (*sociétés en nom collectif*), limited partnerships (*sociétés en commandite*), limited liability companies, and joint-stock companies are considered commercial by their form regardless of their subject matter."

Article 03 (Paragraph 02) of the Commercial Code provides that "commercial companies are considered commercial acts by their form." In this sense, this text suggests that a company can be considered commercial if its business activity is commercial on one hand, or if it takes one of the forms mentioned in paragraph 02 of Article 544 on the other hand.

In reality, this interpretation does not align with the Algerian legislator's intent regarding the criteria for classifying commercial acts by their form, as the latter relies purely on formal conditions to classify an act as commercial, without regard to other substantive criteria. Accordingly, the meaning of Article 03 (Paragraph 02) is limited to the companies mentioned in paragraph 02 of Article 544 and no others. These include partnership companies (*sociétés en nom collectif*), limited partnerships (whether simple or by shares), limited liability companies including single-member limited liability enterprises, and joint-stock companies.

The Algerian legislator did not define partnership companies explicitly, but it can be inferred from their legal framework that these are companies composed of two or more partners, all of whom acquire the status of merchants, with joint and unlimited liability for the company's debts. Their private assets guarantee those debts, and a partner cannot claim that their share represents only part of the company's capital. Such companies dissolve upon the withdrawal, death, prohibition from practicing commercial activities, loss of capacity, or bankruptcy of any

¹ See: Aziz Al-Akili, *The Intermediary in Commercial Companies: A Comparative Jurisprudential and Judicial Study on General and Specific Provisions*, Dar Al-Thaqafa for Publishing and Distribution, Amman, 2019, pp. 10–11.

partner, unless otherwise stipulated in the company's articles of association or unanimously decided by the remaining partners.

These companies are among the earliest types to emerge due to their suitability for commercial exploitation based on a small number of partners. They often consist of individuals bound by close kinship or friendship relations based on mutual trust, given the personal and joint liability burden they carry.¹

A limited liability company is one that consists of two or more partners and is called a "limited liability company." It is the only type of company that may consist of a single person, known as a "single-member limited liability company."² It is also unique among other companies in that the number of partners is subject to a legal cap, not exceeding 50 partners under Algerian commercial law, under penalty of dissolution. In both cases, the liability of the partner is not unlimited but is limited to the amount of their contribution to the company's capital. The partner is only liable for the company's debts up to their share, and this structure allows engaging in commercial activities without the partner acquiring the status of a merchant. This type of company is the most common in practice, considered the ideal model for establishing small and medium-sized enterprises.

Article 592 of the Commercial Code defines a joint-stock company as "a company whose capital is divided into shares and consists of partners who are only liable for losses up to the extent of their shares. The number of partners cannot be less than seven." This type of company also permits engaging in commerce without the partner acquiring merchant status. It is the most utilized form of company for mobilizing large capital in major economic projects. Therefore, the Algerian legislator requires its capital, represented by a number of equal and tradable shares, to be formed through subscription, whereby the partner provides a monetary contribution equal to the nominal value of the shares offered for subscription.³

As for simple limited partnerships, the Algerian legislator did not explicitly define them, but from their legal framework, they can be understood as companies consisting of one or more general partners who are merchants and bear unlimited and joint liability for the company's debts, and limited partners whose liability is restricted to their shares and who only bear losses

¹ Iony Randrianirina, op. cit., p. 79.

² See: Durbal Siham, *The Legal Framework of the Limited Liability Company in Algeria According to the 2015 Amendments*, Journal of Advanced Legal Research, Year 3, Issue 23, March 2018, p. 29.

³ See: Abdel Salam Zaïrou, *Subscription to the Capital of a Joint-Stock Company Between Contract and Unilateral Will*, Journal of Law and Political Sciences, Vol. 4, No. 2, June 2017, pp. 893–894.

up to their contributions. This form is a hybrid between a partnership company and a limited liability company.¹

The legislator defined the limited partnership by shares in Article 715(3) of the Commercial Code as companies whose capital is divided into shares, comprising one or more general partners who are merchants and bear unlimited and joint liability for the company's debts, and limited partners who hold shares as shareholders and are only liable for losses up to the extent of their shares. This form is a hybrid between a partnership company and a joint-stock company.²

All these companies are considered commercial by their form regardless of the nature of their activity, whether civil, such as sports companies, or commercial, such as exchange companies. It makes no difference whether the company is private or in the form of a public economic institution wholly or partially owned directly or indirectly by the state, according to Article 05 of Law No. 88-01 dated January 12, 1988, which contains the guiding law for public economic institutions.³

Since the text of Article 03 mentioned above is exhaustive rather than illustrative, it may not be extended by analogy or broad interpretation. Consequently, companies that take forms other than those stipulated in paragraph 02 of Article 544 of the Commercial Code are not considered commercial companies unless their business activity is commercial, such as the joint venture company (*société en participation*). Although the latter resembles, in terms of its personal nature, a partnership company (*société en nom collectif*), except that it is hidden and does not possess legal personality⁴, the Algerian legislator did not recognize it as commercial by form. Instead, it is classified as commercial by subject matter if its activity is commercial; otherwise, if its activity is civil, it is considered civil rather than commercial.

Section Two

Agencies and Business Offices Regardless of Their Purpose

“Agencies and business offices” derive their name from the nature of the services they provide, which are often linked to intermediary operations they perform in return for a certain commission or a percentage of the transaction value they mediate. These offices and agencies offer many and varied services, such as travel and tourism agencies, marketing and

¹ See: Sahraoui Nour Eddine, *Joint Liability of the Limited Partner in a Simple Limited Partnership*, African Journal of Legal and Political Studies, Vol. 1, No. 2, December 2017, pp. 104–105.

² For more on this type of companies, see: Fawzi Mohamed Sami, *Commercial Companies (General and Specific Provisions) – A Comparative Study*, Dar Al-Thaqafa Publishing and Distribution, Amman, 2019, p. 241.

³ Abdel Rahim Sabah, *The Specificity of the Joint Venture Company in Algerian Legislation*, Al-Ustadh Al-Bahith Journal for Legal and Political Studies, Vol. 3, No. 2, June 2018, p. 238.

⁴ Stéphane Piedelièvre, *op. cit.*, pp. 66-67.

advertising agencies, news agencies, employment agencies, debt collection agencies, marriage agencies, export/import license and customs clearance agencies, among others¹.

The Algerian legislator considered, under Article 03 (clause 03) of the Commercial Code, that agencies and business offices are commercial acts by their form regardless of their purpose. Accordingly, their activity is deemed commercial by form even if the service itself is civil in nature, such as mediation in marriage, employment, tourism, etc. The only exceptions are offices for liberal professions such as law, accounting, and engineering, where it is established that these are civil acts each governed by its own specific law. However, a close reading of the above-mentioned Article 03 reveals that the Algerian legislator conditioned the classification of these activities as commercial on their being conducted as a profession with the intention of speculation and profit-making.

It is notable that this latter criterion is an objective rather than a formal standard for classifying the act as commercial, which raises the question about the most appropriate normative basis for classifying these activities as commercial—whether by form or by subject matter. The French legislator correctly classified this category of activities as commercial acts by nature if conducted as a business, contrary to the Algerian legislator². This classification appears logical given its alignment with the objective criteria required for practicing such activities. This does not detract from the civil nature of the subject of some of the services these offices or agencies provide, since the commercial character applies to the activity of these offices or agencies, which essentially consists of selling services, expertise, or efforts exerted by the office or agency owner³. For example, the commercial character applies to the service provided by marriage agencies, not to marriage itself.

What confirms the validity of this interpretation is the contradiction the Algerian legislator fell into by stipulating in Article 04 of Legislative Decree No. 93-03 dated March 1, 1993, concerning real estate activity, that “In addition to the provisions stipulated in Article 02 of Order No. 75-59 including the Commercial Code, the following activities are considered commercial by their nature:

- All activities of acquisition and preparation of real estate units for sale or rent,
- All intermediary activities in the real estate sector, especially the sale or rental of real estate property,
- All activities of management and administration of real estate on behalf of others”⁴.

¹ See: Ahmed Mahrez, *supra* note, p. 95.

² Ammar Amoura, *supra* note, p. 73.

³ See: Ahmed Mahrez, *supra* note, p. 95.

⁴ Farha Zarawi Saleh, *supra* note, pp. 98-100.

Because the activities listed above are inherently part of the exclusive tasks performed by real estate agencies according to the applicable legal frameworks, their classification under Article 04 of Legislative Decree No. 93-03 makes them explicitly commercial by their subject matter. At the same time, applying Article 03 (paragraph 03) of the Commercial Code would make them commercial by their form.

Moreover, the services provided by agencies and business offices often overlap with brokerage and commission agency activities, which the Algerian legislator classifies as commercial by their subject matter, not by their form. Although this difference does not create a contradiction in cases where these activities overlap legally, as they remain commercial in all scenarios, it does raise questions about the appropriate criterion for classifying them: by form or by subject matter. Therefore, it would have been more accurate for the Algerian legislator to include these activities within Article 02 of the Commercial Code, provided they are carried out as part of a commercial enterprise for speculation and profit-making purposes.

When considering the Algerian legislator's approach, it is evident that he has significantly expanded the list of activities classified as commercial by their form, compared to the French legislation, which limits this classification to bills of exchange and commercial companies, while categorizing all other activities either by their subject matter or by accessory criteria. Since these activities are listed exhaustively rather than illustratively, the Algerian legislator should have refrained from expanding this list and limited it to activities that are not otherwise captured by the objective criterion. Their application requires strict formal conditions that do not allow for analogy in all cases.

Section Three

Accessory Commercial Activities

Although the Algerian legislator relied on the criteria of commercial activities by their subject matter and by their form to classify commercial activities, these criteria do not encompass all other activities that commercial law doctrine considers to be commercial due to their close connection to trade, despite the previous criteria's failure to capture them. Thus, French doctrine and jurisprudence, followed by most comparative legislations including that of Algeria, developed a new theory called "accessory commercial activities," also known as "occasional commercial activities" or "relative commercial activities." This theory combines the objective nature of commercial activities with the personal or categorical element (the trader category) of the person performing these activities.¹

¹ Nadia Foudil, previously cited work, p. 97.

In this regard, Article 04 of the Algerian Commercial Code provides:

"It is considered an accessory commercial activity:

Activities performed by a trader related to the conduct of his trade or the needs of his store.
Obligations between traders."

We will now examine the legal framework for accessory commercial activities and the different types and areas of application that commercial law doctrine has conceptualized,¹ in the following two subsections:

Subsection One

Legal Framework for Accessory Commercial Activities

By examining the wording of Article 04 of the Commercial Code, it is clear that accessory commercial activities are originally civil in nature because they fall outside the legal enumeration of commercial activities listed in Article 02 of the Commercial Code. However, they acquire a commercial character when certain conditions are met, based on the status of the person performing them (the trader) on one hand,² and the context in which the activity is performed (conducting trade or meeting store needs) on the other. Doctrine and jurisprudence have also established a presumption that all activities performed by a trader are considered commercial by accessory nature unless proven otherwise. This is what we will address in the following two subsections:

Section One

Conditions for the Application of the Theory of Commercial Acts by Accessory Nature

The acts carried out by a merchant can be divided into three different categories:

1. **Purely commercial acts** performed by the merchant as part of their usual commercial activity for the purpose of making a profit. There is no dispute that these acts are subject to the provisions of commercial law.
2. **Purely civil acts** that are completely unrelated to the spirit of commerce and pertain to the merchant's private life, such as marriage, inheritance, family expenses, and other personal matters. There is no dispute that these acts fall outside the scope of commercial acts and apply only to individual merchants, not to commercial companies, as they are closely linked to the human condition.
3. **Acts that are civil in origin**, but whose legal nature changes depending on the person performing them and the occasion for doing so. If a merchant carries out such acts in connection with the practice of their trade or to meet the needs of their business, the act is considered a

¹. Stéphane Piedelièvre, *op.cit*, p. 68.

² Ahmad Mahraz, previously cited work, p. 103.

commercial act by accessory nature. However, if performed by a non-merchant, the act retains its civil nature¹. This will be explained in the following two points:

First: The presence of the merchant status in the person performing the act

Article 4 of the Commercial Code requires that, for an act to be considered commercial by accessory nature, it must be performed by a merchant. Article 1 of the Commercial Code defines a merchant as:

“Any natural or legal person who habitually carries out commercial acts as their usual profession, unless otherwise provided by law.”²

From these legal texts, it is evident that the acquisition of merchant status—and therefore the classification of an act as commercial by accessory nature—does not depend on how the person describes themselves or how others describe them, nor on whether they are registered in the commercial register (as will be explained later). Instead, it depends on the habitual performance of commercial acts and the adoption of such acts as a usual profession, whether the person is a natural or legal person (e.g., a commercial company).

Accordingly, civil acts carried out by a person incidentally to an isolated commercial act, without acquiring merchant status, are not considered commercial by accessory nature. For instance, if someone purchases goods for resale and profit and transports them to their warehouse, the purchase for resale is a commercial act by its nature, but the transport of those goods does not become commercial by accessory nature because the person does not qualify as a merchant.

Contrary to what might initially be inferred from Article 4 (Paragraph 2), it is not required that both parties to the relationship be merchants for the act to be considered commercial by accessory nature. It is sufficient that only one party is a merchant; the act is considered commercial by accessory nature for the merchant and civil for the non-merchant. The inclusion of "obligations between merchants" in Article 4 (Paragraph 2) does not contradict Paragraph 1, which requires that only one party be a merchant. Rather, Paragraph 2 reinforces what is stated in Paragraph 1. In other words, the legislator's intention was to clarify that if the presence of a merchant in the relationship is sufficient to classify an act as commercial by accessory nature, then it follows all the more clearly that if both parties are merchants, the act is indeed commercial by accessory nature.

It would have been preferable for the Algerian legislator to remove Paragraph 2, similar to what the Egyptian legislator did, to avoid any confusion in its interpretation, especially since

¹ Ahmed Mahrez, previously cited, p. 103.

² Adel Ali Al-Maqdadi, previously cited, p. 86.

Paragraph 1 is sufficient to comprehensively apply the theory of commercial acts by accessory nature, encompassing all possible cases, including obligations between merchants.¹

Second: The link between the act and the practice of the merchant's trade or the needs of their business

For an act to be considered commercial by accessory nature, it is not enough for the person performing it to have merchant status. Another condition must be met: the act must be related to the practice of the merchant's trade or to the needs of their business, or it must occur within or on the occasion of their commercial activity. This condition must exist alongside the requirement of merchant status for the act to acquire the commercial nature by accessory. Otherwise, the act retains its civil character.²

Importantly, the act does not need to be directly related to the merchant's main commercial activity. It is sufficient if the act occurred because of the merchant's commercial activity—if not for that activity, the act would not have occurred. For example, if a merchant rents a warehouse to park a car used to transport goods for their store, the rental of the warehouse is not directly related to the merchant's main commercial activity (operating the store) but is instead linked to another activity (using the car to transport goods), which in turn supports the main commercial activity.

Likewise, the use of the phrase "related to the exercise of his trade," as stated in Article 04 (paragraph 1) mentioned earlier, does not mean that if a trader engages in another commercial activity outside the scope of his declared trade, it would not be considered a commercial act by accessory nature. For instance, if a trader in office supplies allocates part of his shop to sell ice cream without a license, this practice, although a violation under Article 41 of Law 04-08 concerning the conditions for exercising commercial activities (as amended and supplemented), does not exempt the trader's act from being considered a commercial act. This is because such provisions are intended to protect third parties dealing with the trader, not to limit the trader himself. What matters is the habitual practice of that commercial act, not its registration in the commercial register or the definition of the trader's activity in the economic activities classification list subject to commercial register registration.³

Furthermore, the use of the same phrase does not imply that the "activity" performed by the trader must necessarily be commercial. This interpretation does not apply to all activities of commercial companies, as their activities may be commercial or civil, depending on whether

¹ Stéphane Piedelièvre, *op.cit.*, p. 69.

² Ahmed Mahrez, previously cited, p. 103.

³ See: Law No. 04-08 of August 14, 2004, as amended and supplemented, concerning the conditions for carrying out commercial activities.

they adopt a commercial form by virtue of their structure. In our view, it would have been more accurate and comprehensive for the Algerian legislator to have used the phrase "related to the exercise of his activity," making it applicable to both individual traders and commercial companies alike. As for partners in partnerships who acquire the status of traders, their acts are deemed commercial by accessory nature when performed in relation to the company's activities. However, if a partner engages in the same act for his own personal benefit, the act remains civil rather than commercial.

The rationale behind this theory, as developed by commercial jurisprudence and courts—adopted in comparative legislation including Algerian law—is to ensure that acts performed by a trader in the course of practicing his trade or for the needs of his shop acquire a unified legal status. This aims to create harmony across all the trader's activities and to subject them to a single legal framework, ensuring that commercial life forms an integrated whole. As such, both principal and accessory acts are governed by the same legal system, in line with the principle that "the branch follows the principal in law." Commercial activity is large and complex, intertwining acts with clear commercial character and civil acts closely linked to the trader's commercial activity. ¹There is no logic in requiring courts to apply commercial law to one part and civil law to another, especially given that the ultimate purpose of the civil act is to serve the commercial activity aimed at making profit and speculation. It is only rational, therefore, to subject both types of acts to the same legal system because they share the same ultimate purpose of generating profit, even if indirectly in the case of the accessory act.

Accordingly, delving into whether the "intention to achieve profit" applies to the accessory act is, in our view, unnecessary. The intention to achieve profit should be assessed for the overall set of acts as a whole, not separately for each act. Therefore, the fact that the accessory act also aims, even indirectly, to achieve profit is simply a natural consequence, since without this act, the principal act would not exist and profit would not be achieved as an accessory result.

In conclusion, acts deemed commercial by accessory nature are, by their origin, civil acts. However, if they are performed by a trader in the course of practicing his trade or for the needs of his shop, they shift from the category of civil acts to that of commercial acts by accessory nature. They are thus based on a personal professional criterion (the status of the person performing them as a trader) and an objective criterion (their connection to a principal commercial activity). Therefore, we do not agree with the term "personal or self-commercial

¹ Nadia Foudil, *op. cit.*, p. 101.

acts" as attributed to the trader himself, but rather, these are commercial acts by accessory nature that relate to both the person of the trader and the subject matter of his activity.

Section Two: Proof of Ancillary Commercial Acts

Departing from the general rule of evidence, which states that "the burden of proof lies on the claimant"—meaning that the claimant must prove what they allege—the commercial judiciary has established a presumption in favor of those dealing with the merchant. It assumes that all activities carried out by the merchant, even those outside the scope of their primary commercial activity, are considered ancillary commercial acts. As a result, these acts are subject to the provisions of commercial law regarding evidence and jurisdiction. This is based on the assumption that the merchant has undertaken them in connection with their commercial activity or for the needs of their business. This is called the "commercial presumption," but it is a simple presumption that can be rebutted. The merchant can prove that the civil act in question was not related to their trade, in which case it is subject to the provisions of civil law and not commercial law.

The Algerian legislator did not explicitly confirm this presumption in the text of the law. It would have been preferable for the legislator to include it explicitly in the law, just as the Egyptian legislator did in paragraph 2 of Article 8 of the Commercial Code, which states: "Every act performed by the merchant is presumed to be related to their trade unless proven otherwise."¹

Undoubtedly, the aim of establishing this "commercial presumption" in favor of third parties dealing with the merchant falls within the framework of implementing the well-established principle of "protecting the weaker party" in commercial transactions. It seeks to provide better protection to those dealing with the merchant and to grant them additional advantages by allowing them to benefit from the stringent provisions of commercial law, including the presumption that the merchant's acts are commercial until proven otherwise.

Purely commercial acts and purely civil acts, as mentioned at the beginning of the previous section, do not pose problems in terms of evidence. It is usually easy for the courts to identify acts carried out by the merchant that fall within the scope of their primary commercial activity, or those that are purely civil in nature—such as when a merchant contracts with a travel agency to perform pilgrimage and Umrah services.²

¹ Abdelhamid El-Chouarbi, previously cited, p. 45.

² Ahmed Mahrez, previously cited, p. 109.

However, there are certain acts that do not clearly fall into either category, making their proof and determination of nature more difficult. These are acts that could be undertaken by the merchant in connection with their commercial activity or the needs of their business, but could also be performed in their private, civil life. For instance, a merchant might open a current account at a bank for both personal and professional use.

A review of judicial practice shows that courts are not lenient in accepting evidence that seeks to rebut the "commercial presumption." It is presumed that all acts performed by the merchant are related to their commercial activity or the needs of their business unless proven otherwise. The trial court has the discretion to evaluate the evidence provided to rebut this presumption. The court derives its conviction from the facts presented and the extent to which the act is connected to the merchant's business or the needs of their shop in each case individually.

In reality, this judicial strictness in accepting evidence to rebut the "commercial presumption" leads us to an important conclusion: the merchant cannot rely on all possible means of proof for their claim, because such a claim aims to shift the act from the realm of commercial law to that of civil law. This does not contradict the fact that the presumption is simple and can be rebutted. Rather, it merely means that this presumption is not absolute, and the merchant can establish contrary evidence. If the claim were in the opposite direction—for example, if a civilian party invoked the "commercial presumption" against the merchant—then all means of proof would be permissible. In that scenario, the judiciary would be lenient in accepting the presumption, applying the principle that "proof is free" in commercial matters and is not subject to the formal rules known in civil law, including proving the merchant status of the person performing the act to classify it as a commercial act by virtue of its ancillary nature.

Second Requirement

The Scope of Application of Commercial Acts by Accessory

Unlike commercial acts by their nature or form, the Algerian legislator did not provide an enumerative list of accessory commercial acts. Instead, it was sufficient to stipulate the theory or principle and the conditions necessary for its application. Article 4 of the Commercial Code was drafted in a comprehensive and absolute manner. Therefore, there is no need to debate

whether accessory commercial acts are mentioned by way of example or exhaustively, because they simply were not mentioned in the text of the aforementioned article. Rather, this article laid down the principle that must be applied by analogy to acts that meet the conditions set out by that principle to determine whether they fall within the category of accessory commercial acts.¹

In this context, it is conceivable that the scope of application of these acts extends to cover all forms of obligations, whether contractual or non-contractual. This will be clarified through the following two sections:

Section One

Forms of Accessory Commercial Acts Arising from Traders' Contractual Obligations

Contractual obligations are among the most important legal transactions to which traders resort in order to conduct their commercial activities and meet the needs of their stores. Although these obligations are, by their legal nature, considered civil acts in principle, they may acquire a commercial character whenever the legal conditions for accessory commercial acts—stipulated in Article 4 of the aforementioned Commercial Code—are met. Examples include obligations arising from a trader contracting with electricity, gas, water, internet, and telephone supply companies for the benefit of his commercial premises.

Generally, all contracts concluded by the trader concerning the exercise of his trade or the needs of his shop are considered accessory commercial acts, such as advertising and publicity contracts in all their forms to promote his goods, and insurance contracts that the trader concludes to insure his commercial premises against theft, fire, and other risks. This also includes training and apprenticeship contracts that the trader enters into for the benefit of his shop workers to improve their professional performance, as well as lease contracts concluded by the trader for the needs of his trade or his commercial premises, including renting warehouses or real estate where he carries out his commercial activity or stores his goods. Transport contracts concluded by the trader to transport his goods or his shop workers to their workplace, and other contractual obligations, are also included.

Conversely, excluded from the category of accessory commercial acts are contracts entered into by the trader that are not related to the exercise of his trade or the needs of his shop, such as contracts in which the trader undertakes to finance the activities of some charitable associations and sports clubs. It should also be noted that the provision of Article 4 (paragraph 2) mentioned

¹ Ali Al-Baroudi, Mohamed El-Sayed El-Feki, *Commercial Law, Commercial Transactions, "Traders, Commercial Funds, Commercial Companies, Banking Operations and Commercial Papers,"* University Publishing House, Alexandria, 1999, p. 94.

above does not mean that "all obligations between traders" are necessarily considered accessory commercial acts; rather, they must also relate to the exercise of their commercial activity or the needs of their commercial premises. Otherwise, their acts are considered civil, not commercial. For example, excluded from the category of accessory commercial acts are certain contractual obligations that traders enter into with one another that do not relate to the exercise of their trade or the affairs of their commercial premises, such as contracts for the sale of a house by one trader to another who intends to live there with his family, as well as marriage contracts between traders.¹

In this sense, the criterion adopted for classifying accessory commercial acts is not a purely personal criterion based only on the trader's status. Rather, it is a mixed criterion that combines the personal or sectoral aspect (the category of traders) on the one hand, and the objective aspect of these acts, meaning they must relate to the trader's commercial activity or the needs of his shop on the other hand. Consequently, the application of the theory of accessory commercial acts stipulated in the aforementioned Article 4 requires reading paragraphs 1 and 2 together and ensuring that all their conditions are met, as the existence of only one of the conditions is not sufficient.

Based on the text of Article 651 of the Civil Code, which states: "The guarantee of a commercial debt is considered a civil act, even if the guarantor is a trader," a debate has arisen regarding the legal nature of the guarantee contract concluded by a trader — whether it is a commercial act by way of accessory or a civil act. One school of thought in jurisprudence relies on the fact that the guarantee contract "is a donation contract by which the guarantor ensures a debt for another person without aiming to achieve profit or speculation," and thus it is considered a civil act rather than a commercial one.

In our opinion, the text of Article 651 mentioned above does not contradict the text of Article 04 of the Commercial Code, nor does it constitute an exception to it. The guarantee of a commercial debt provided by a trader is considered a civil act according to Article 651 because it does not relate to the exercise of his trade or the needs of his store. However, if this latter condition is met, then it is considered a commercial act by way of accessory according to Article 04 of the Commercial Code — for example, if a wholesale trader guarantees a commercial debt for one of his retail clients to spare him the risk of bankruptcy in order to preserve him as a customer of his store. In this case, the guarantee does not imply an intention

¹ Ahmed Mahrez, previously cited, pp. 104–105.

of donation but rather aims to protect the interests of the guarantor himself, not the guaranteed debtor.¹

This interpretation is not contradicted by the legal nature of the debt itself as commercial, as indicated by Article 651. This is because the debt does not constitute an obligation towards the guarantor trader but rather an obligation towards the guaranteed debtor. Therefore, the commercial character attaches to the debt in relation to the guaranteed debtor but does not attach to the guarantee contract itself in relation to the guarantor trader, whose act is originally civil but becomes commercial by way of accessory if it is connected to the trader's commercial activity or the needs of his store.²

What supports the above interpretation is the content of paragraph 2 of Article 651 of the Civil Code, which states: "However, the guarantee arising from the securing of commercial papers as a collateral or through their endorsement is always considered a commercial act." This means that the guarantee contract is not always a civil act; rather, it can be commercial whenever its conditions are met. It may be commercial by its subject matter if issued by a bank, commercial by its form if it arises from securing a bill of exchange or endorsing it, or commercial by way of accessory if the guarantor is a trader and the guarantee is related to the exercise of his commercial activity or the needs of his commercial establishment.³

It is noticeable that the Algerian legislator was not precise in the exact use of terminology in paragraph 2 of Article 651 of the aforementioned Civil Code, where it considered that a guarantee arising from the endorsement of "commercial papers" is always deemed a commercial act. It would have been more appropriate for the legislator to specify "a guarantee arising from the endorsement of a bill of exchange as a provisional guarantee, excluding other commercial papers," since dealing with bills of exchange is considered a commercial act by its form, including guarantees arising from the provisional endorsement or transfer of the bill. Meanwhile, dealing with other commercial papers is regarded as a civil act rather than a commercial one. It is illogical for the subsidiary act (the guarantee) to be commercial while the original act (dealing with other commercial papers) is civil. ⁴To say otherwise contradicts the idea of unifying the legal regime applicable to both the subsidiary and original acts, applying the principle that "the subsidiary follows the ruling of the original."

A dispute also arose regarding the legal nature of contracts concluded by the merchant with their employees, based on the assumption that the employment contract is subject to special

¹ See: Nadia Fodil, *op. cit.*, pp. 102–103.

² *Ibid.*, p. 103.

³ *Ibid.*, p. 103.

⁴ See: Farha Zarawi Saleh, *op. cit.*, p. 124.

provisions outside the scope of commercial law. However, the prevailing opinion considers such contracts as commercial subsidiary acts for the merchant if they meet the conditions stipulated in Article 04 mentioned above. At the same time, attributing the commercial character to the employment contract does not conflict with the independent nature of labor law, which guarantees the protection and rights of the worker against the employer. Rather, it affirms and supports it by providing additional benefits in favor of the worker, applying the rule of “applying the interpretation most favorable to the weaker party,” who is the worker¹.

In summary, all contractual obligations entered into by the merchant relating to the exercise of their trade or the needs of their store are, in principle, considered commercial subsidiary acts unless the merchant proves otherwise. To apply the theory of commercial subsidiary acts, the conditions set out in Article 04 above must be fulfilled collectively; otherwise, the act retains its civil nature.

Section Two

Types of Ancillary Commercial Activities Arising from Non-Contractual Obligations of Traders

The courts in both France and Egypt have been hesitant to apply the doctrine of ancillary commercial activities outside the realm of contractual obligations, arguing that the link between non-contractual obligations and the exercise of commerce is less evident than their link to contractual obligations. However, they eventually settled on extending the application of this doctrine to include non-contractual obligations as well, based on the generality of the legal provisions governing them. This principle applies equally to Article 4 of the Algerian Commercial Code.²

Accordingly, it is conceivable that ancillary commercial activities could include all forms of non-contractual obligations, such as those arising from the trader's tort liability when this results from the practice of his commercial activity or the needs of his store. Thus, a trader's liability for compensation due to acts of unfair competition he commits—which may cause damage to competing traders—would be considered an ancillary commercial activity. This may include acts such as defaming the reputation of another trader to lure customers away to his own store, counterfeiting a trademark, or misappropriating another trader's trade name.³

The theory of commercial acts by accessory may also extend to obligations arising from unjust enrichment, in cases where there is a connection between the enrichment from which the

¹ Ahmed Mahrez, *op. cit.*, pp. 105–106.

² Nadia Foudhil, *Op.cit.*, p. 105.

³ Salman Bouzayeb, *Principles of Commercial Law*, First Edition, Majd University Foundation for Studies, Publishing and Distribution, Lebanon, 2003, p. 100.

merchant benefits and their commercial activity or the needs of their business. Accordingly, an example of a commercial act by accessory is the obligation of an insurance company to return extra premiums it received without cause when the insured risk ceases to exist. Another example is the obligation of a merchant to a third party who acted out of benevolence, such as paying off the merchant's debt to save them from bankruptcy, or a carrier selling perishable goods on behalf of the merchant without their authorization to spare them losses.¹

It is also conceivable that the theory of commercial acts by accessory extends to obligations arising from the unilateral will of the merchant, in cases where there is a connection between the merchant's obligation and their commercial activity or the needs of their business. For instance, it would be considered a commercial act by accessory when a commercial company promises to award a prize to a customer who collects a certain number of vouchers proving their purchase of its goods. Similarly, it applies when a merchant promises a bonus or reward to an employee with outstanding performance at the end of the year.

In light of the above, it can be concluded that, by adopting the theory of commercial acts by accessory, the Algerian legislator has expanded the scope of commercial acts, making it possible to extend commercial status to civil acts whenever certain conditions—combining both personal and objective elements—are met. In the absence of these conditions, however, the act retains its civil nature.

Section Four

Mixed Transactions

Mixed transactions do not constitute a fourth, independent category of commercial acts, unlike the purely commercial acts typically studied in commercial law. Consequently, they are not explicitly addressed in the Commercial Code. As the term itself suggests, mixed transactions are characterized by their nature or classification differing based on the parties involved. A transaction may be commercial for one party and civil for another. Likewise,² it may be commercial for both parties, though the nature of its commercial character may differ: it might be considered commercial by its subject matter for one party and commercial by its form for the other. Since this latter type does not raise any legal difficulties regarding the applicable legal regime—because commercial law applies to both parties—it suffices to focus on the first type of mixed transaction: where the transaction is commercial for one party and civil for the other, which presents certain complexities in determining the legal regime applicable to each party.

¹ Nour Eddine Chadli, *op.cit.*, p. 60.

² Ahmad Mahrez, *op. cit.*, p. 109.

Before delving into the legal framework governing the parties to a mixed transaction, it is important to note that the classification of a mixed transaction depends on the nature of the act itself, not on the status of the parties involved. It is not a requirement for either party to be a merchant; it suffices for the transaction to be commercial for one party, even if only conducted once, and civil for the other. For example, a transaction is considered mixed if a person buys a car to resell it at a profit from someone who inherited it—here, it is commercial for the first party and civil for the second.¹

There has been considerable debate about the legal regime applicable to the parties in mixed transactions. Should a dual legal regime be applied, meaning that civil law applies to the party for whom the transaction is civil, and commercial law applies to the party for whom it is commercial? Or should a unified legal regime apply to both parties equally? The following will examine the prevailing opinion in Algeria within the following two sections:

Section One

Manifestations of the Dual Legal Regime in Mixed Transactions

Comparative legal systems differ regarding the legal regime applicable to mixed transactions. Some systems, such as Kuwaiti, Yemeni, and Emirati law, submit such transactions to commercial jurisdiction for both parties, whether the party is civil or commercial. However, this approach has been criticized on the grounds that applying the rigorous and strict rules of commercial law to the civil party is unjustified, as it is unreasonable to compel a non-merchant to appear before a specialized court with which they are unfamiliar.²

Other systems have subjected such disputes to civil courts for both parties, arguing that a civil party cannot invoke commercial law against a commercial party, let alone have it applied against themselves. This is the approach adopted by Saudi Arabian courts.³

In contrast, the prevailing view in France, Egypt, and Algeria favors a dual legal regime. In this approach, the rules of commercial law apply to the party for whom the transaction is commercial, while civil law applies to the party for whom the transaction is civil. This results in differences in the applicable rules to each party depending on their respective classification, which manifests in several respects, as outlined below:

Subsection One

In Terms of Judicial Jurisdiction

¹ Stéphane Piedelièvre, *op. cit.*, p. 105.

² Ahmad Mahrez, *op. cit.*, p. 110; Muhammad Labib Shanab, “Mixed Commercial Transactions: Their Scope and Legal Regime,” *Journal of Legal and Economic Sciences*, No. 1, Sixth Year, Ain Shams University, Egypt, 1964, p. 294.

³ see: Yusuf bin Abdullah Muhammad Al-Khudair, *Freedom of Evidence in Commercial Law, Judicial Journal*, Issue 7, Ramadan 1434, pp. 44–45.

Judicial jurisdiction in mixed transactions—where one party is a civil party and the other a commercial party—is determined based on whether the subject of the dispute is civil or commercial with respect to the defendant. If the transaction is commercial for the defendant, the plaintiff, for whom the transaction is civil, may bring their case before the commercial court. However, because the commercial court is considered exceptional and unfamiliar to the party for whom the transaction is civil, the plaintiff is also permitted to bring their case before the civil court.¹

On the other hand, if the defendant is the party for whom the transaction is civil, the party for whom the transaction is commercial must bring their case exclusively before the civil court.

This divergence in applying two different legal systems to mixed transactions is based on the premise that the party for whom the transaction is civil is unfamiliar with commercial law and does not benefit from its advantages and safeguards. Therefore, it is unreasonable for the commercial party to harm the civil party by insisting on the application of commercial law and compelling them to appear before a court that is entirely unfamiliar to them. Conversely, allowing the civil party to bring their case before the civil courts is deemed acceptable.²

Unlike the situation in France, this issue does not arise in Algeria because there is no separate commercial judiciary. In all cases, jurisdiction lies with the *tribunal de première instance* (first instance court). However, within this court,³ the civil division or the civil chamber at the appellate level (the *conseil judiciaire*) hears cases where the transaction is civil for the defendant. In contrast, the commercial division or commercial chamber decides cases where the transaction is commercial for the defendant.

Subsection Two

In Terms of Evidence

In contrast to the general rules applicable in civil law, which limit the means of evidence in civil matters, evidence in commercial matters is unrestricted and may be established by any means, including witness testimony and presumptions, in accordance with Article 30 of the Commercial Code, regardless of the value of the dispute. However, this principle applies only

¹ Nadia Fodil, *op. cit.*, pp. 122–123.

² Muhammad Farid Al-Uraini and Hani Dweidar, *op. cit.*, p. 68.

³ See also: Articles 6 and 10 of Organic Law No. 05-11 of 17 July 2005, as amended and supplemented, relating to the judicial organization, published in Official Gazette of Algeria No. 51 on 30 July 2005.

against the party for whom the transaction is considered commercial when they are the defendant in mixed disputes. In the opposite scenario, the civil party is subject to the general civil law rules.

Importantly, the application of either of these principles does not imply a necessary link between the judicial jurisdiction and the applicable law. The decisive factor here is the nature of the dispute as a mixed transaction, not the type of court hearing the case. Consequently, even if the commercial division or chamber has jurisdiction, the judge may apply the civil rules of evidence to the party for whom the transaction is civil and the commercial rules to the party for whom it is commercial, depending on the circumstances—and vice versa.¹

Moreover, applying the principle of “freedom of evidence” against the party for whom the transaction is commercial does not mean that the evidence provided by the plaintiff will be conclusive against the defendant. The judge may reject such evidence if the defendant presents stronger proof, such as written documentation. This demonstrates that the judge has broad discretionary power in dealing with the principle of freedom of evidence in commercial matters. The judge may reject witness testimony and presumptions if they find them unsatisfactory, as they sometimes constitute only prima facie evidence that may need to be corroborated by written documentation (particularly as recorded in commercial ledgers) or any other means that would convince the court of the claimant’s assertions—especially if the transactions in question involve significant financial sums that are difficult to establish without written evidence.

It is clear that subjecting evidence in disputes of a mixed nature to a dual legal regime for both parties serves the interests of the party for whom the transaction is civil more than those of the party for whom it is commercial. The legislator’s decision to apply a dual legal regime to evidence in mixed disputes can be justified as providing greater protection to the weaker party in the mixed relationship—the party for whom the transaction is civil—by allowing them to resort to all means of evidence against their opponent, who considers the transaction commercial. Meanwhile, the latter party is required to provide written evidence whenever the value of the obligation exceeds 100,000 Algerian dinars or is of an unspecified amount, in accordance with Article 333 of the Algerian Civil Code.²

¹ See: Ahmad Mahrez, *op. cit.*, p. 111.

² Nadia Fodil, *op. cit.*, p. 123.

Subsection Three

In Terms of Enforcement Procedures

The legal regime applicable to mixed transactions varies according to the nature of the transaction with respect to each party, especially regarding enforcement procedures. The party for whom the transaction is civil may request the bankruptcy declaration of the party for whom the transaction is commercial in case of non-payment or insolvency upon maturity of the debt. However, enforcement against the party for whom the transaction is civil must follow the procedures established for enforcing civil debts. If the civil party fails to pay the debt by the due date, the judge may grant a reasonable extension or additional time to fulfill the obligation (known as *nathrat al-maysira* or leniency) if the circumstances warrant it and if the creditor is not prejudiced by the delay. This is provided for in Article 210 of the Algerian Civil Code, which states:

*"If it appears from the obligation that the debtor can only fulfill it with ability or leniency, the judge shall set a suitable date for the due date, taking into account the debtor's current and future resources, with the condition that the debtor acts with the diligence of a prudent person seeking to fulfill their obligation."*¹

Additionally, joint liability is presumed among multiple debtors in mixed transactions where the transaction is commercial towards them. This is a well-established rule in commercial matters that the judiciary respects and applies. By contrast, joint liability among multiple debtors in mixed transactions where the transaction is civil towards them can only be established by a legal provision or agreement between the parties.²

Enforcement procedures also require that the debtor for whom the transaction is civil be formally notified by an official document served through judicial officers. In commercial matters, however, it is customary that a simple ordinary letter suffices as notice against the party for whom the transaction is commercial, without the need for a formal judicial document.³

In summary, the legal regime applied to enforcement procedures in mixed transactions differs according to the nature of the transaction vis-à-vis each party. The strict and rigorous provisions of commercial law apply to the party for whom the transaction is commercial, while the party for whom the transaction is civil benefits from the flexible and lenient provisions of civil law.

Section Two

¹ See also: Ahmad Mahrez, *op. cit.*, pp. 52–53.

² Same reference, p. 52.

³ Same reference, same page.

Manifestations of Applying a Unified Legal Regime to Both Parties in Mixed Transactions

Although it is generally agreed that a mixed transaction requires, in principle, the application of a dual legal regime to the two parties involved—where commercial law applies to one party and civil law to the other, according to their respective roles in the relationship—this rule is not absolute. Some legal disputes of a mixed nature may require the application of a unified set of rules to both parties.

In French legal doctrine, the arbitration clause is the closest example necessitating a unified legal regime for both parties, specifically in cases where both contracting parties agree to submit their potential disputes to arbitration rather than to state courts. In Algeria, there are many exceptions explicitly stipulated by law, some of which include the following (non-exhaustive list):

Subsection One

Proof of Maritime Contracts

Contrary to Article 30 of the Algerian Commercial Code, which states that evidence in commercial matters is “free” from all restrictions and may be established by any means, the Algerian Maritime Code includes certain exceptions to this principle of freedom of evidence by requiring official written documentation for all maritime contracts, regardless of the nature of the parties involved. It makes no difference whether the transaction is civil or commercial with respect to the defendant.

Specifically, Article 57 of Order No. 76-80 dated October 23, 1976, which contains the amended and supplemented Maritime Code, requires that a maritime mortgage contract be evidenced by an official document under penalty of nullity. It states: *"A maritime mortgage must be established by an official document issued solely by the shipowner who must have the capacity to mortgage; otherwise, it is null and void."* Notably, this official writing is not merely a condition of proof but a condition for the validity of the contract itself.¹

Article 642 of the same Order similarly requires that ship charter contracts be in writing, stating: *"The charter contract must be evidenced by writing. A ship charter contract is the contract that entails the parties' obligations. This proof rule does not apply to ships with a total tonnage of less than 10 tons."*²

¹ Mohamed Labib Shanab, *op. cit.*, p. 307.

² Stéphane Piedelièvre, *op. cit.*, p. 105.

Article 749 of the same Order imposes the same requirement for maritime shipping contracts, stating:

"The bill of lading constitutes proof of the carrier's receipt of the goods mentioned therein for transport by sea, and is also considered as evidence of possession and receipt of the goods."

Furthermore, Article 826 of the same Order stipulates that passenger sea transport contracts must be evidenced by a travel ticket, stating:

"The carrier must issue the passenger a travel ticket evidencing the obligations of the parties. The issued travel ticket serves as proof of the contract and payment of the fare."

It is evident that the Algerian legislator has required maritime contracts to be proven by official documents due to their special importance compared to other commercial contracts.¹ This importance stems from the high financial value of ships and the volume of goods transported, as well as the severe risks that may arise from such contracts. Consequently, Algerian law subjects these contracts to a unified legal regime applicable to both parties in mixed disputes.

Subsection Two

Proof of Insurance Contracts

The rules regarding the proof of insurance contracts in Algerian legislation do not differ significantly, in terms of their specificity, from those governing the proof of maritime contracts. Order No. 95-07, dated January 25, 1995, relating to insurance (as amended and supplemented), also contains exceptions to the principle of freedom of evidence by requiring official written documentation for insurance contracts in disputes of a mixed nature, regardless of whether the transaction is civil or commercial with respect to the defendant.

Specifically, Article 8 of the aforementioned Order provides that:

"... The obligation of the parties may be proven either by the insurance policy, the insurance coverage memorandum, or any written document signed by the insurer."

Article 7 of the same Order confirms that the insurance contract must be drawn up in writing, clearly and legibly, and must mandatorily include, in addition to the signatures of the subscribing parties, other information such as the names of the parties, the amount of the premium or subscription, etc. This means that proof by any other means than those stipulated in the previous articles is not permissible.

Furthermore, Article 97 of the same Order states:

"A maritime insurance contract is proven by the insurance policy, and the obligations of the

¹ Zahi Amor, *Droit des transports*, Office des publications universitaires, Algiers, 1991, p. 77.

parties before the issuance of the policy may be proven by any other written document, notably the coverage notice."

Thus, the proof of insurance contracts likewise requires the application of a unified legal regime to both parties in mixed disputes, as proof must be by writing exclusively, regardless of whether the transaction is civil or commercial with respect to the defendant. The party who considers the transaction civil (the insured) cannot invoke the principle of freedom of evidence against the party who considers the transaction commercial (the insurer).

It might have been preferable for the Algerian legislator to have used the word "must" instead of "may" in the above articles, since the latter does not clearly indicate that these provisions are mandatory rules not subject to exception, whereas the former clearly aligns with this intent, which was indeed the legislator's aim.

Subsection Three

Proof of Commercial Pledge

Article 31 of the Algerian Commercial Code states:

"A pledge constituted by a merchant or a non-merchant for the purpose of a commercial act, against third parties and between the contracting parties, is proven according to the provisions of Article 30."

According to the provisions of Article 30, as noted earlier, evidence is free and unrestricted.

By reading the two articles together, it is clear that the Algerian legislator has subjected the proof of commercial pledges to a unified rule that applies equally to both parties in a mixed transaction. Thus, the party who considers the transaction commercial may benefit from the application of the "principle of freedom of evidence," just as it applies to the party who considers the transaction civil.

However, this rule does not apply to the "possessory pledge" of the commercial premises or to the possessory pledge of patents. Article 120 of the Commercial Code stipulates: *"The possessory pledge (of the commercial premises) must be proven by an official contract."* Similarly, Article 36 of Order No. 03-07 dated July 19, 2003, relating to patents, provides that the possessory pledge of a patent may only be proven in writing.¹

¹ Nabila Boufoula, "Protection of Insurance Service Consumers' Rights in Algeria," *Journal of Economic and Financial Research*, Vol. 6, No. 1, June 2019, p. 186.

Therefore, proof of possessory pledges on commercial premises or patents is not subject to the "principle of freedom of evidence." Writing in these contracts is not merely a means of proof but is a condition for the validity of the contract under penalty of nullity.¹

In our opinion, the provisions of Articles 120 and 36 mentioned above do not constitute an exception to the provisions of Article 31 mentioned earlier. This is because Article 31 unified the rule applicable to the proof of commercial pledges in mixed legal relationships, whereas the possessory pledge of commercial premises or patents, which are elements of such pledges, are not considered mixed transactions in the first place but rather constitute commercial acts **in form** between the parties, according to Article 3 of the Commercial Code. Although the Algerian legislator has required these pledges to be proven by official written documents, as an exception to the "principle of freedom of evidence" in commercial transactions, the relationship between the parties to these pledges requires that they be subject to a unified legal system for both parties in all cases.

The argument that these pledges are commercial acts **in form** only with respect to the merchant empties Article 3 of its meaning entirely. The commercial nature of the possessory pledge of the commercial premises or patents, which are elements thereof, vis-à-vis the merchant is merely a given fact; if it were not commercial **in form**, it would be commercial by consequence due to the fulfillment of the legal conditions for those pledges. Therefore, such contracts are commercial acts **in form** in relation to all parties involved.

Regardless of the nature of the parties involved in all commercial pledges, including the possessory pledge of commercial premises or patents that are part of it, it can be said that they are all subject to a unified legal system in their proof. However, these two pledges require proof by official contract for both parties, whereas the parties to other mixed legal relationships involving commercial pledges may prove them by any means of evidence.²

Subsection Four

Agreement of the Parties to a Mixed Transaction to Apply a Unified Legal System

Although the principle of "freedom of evidence" in commercial matters is explicitly stated in Article 30 of the Commercial Code, it is not considered mandatory (public order). It is a principle derived from commercial customs and is not a peremptory rule. Therefore, the parties to a mixed legal relationship may agree to deviate from it by stipulating the necessity of drafting

¹ Samiha Béchina, "Possessory Pledge of Patents," *Journal of Judicial Ijtihad*, Vol. 12, No. 2, October 2019, p. 336.

² See: Yousef bin Abdullah Muhammad Al-Khudair, previously cited, pp. 29–30.

their contract in written form, to avoid any problems that may arise from the absence of written evidence, and as a means to facilitate the judge's work in resolving the dispute quickly and accurately. There is no blame on the parties if they violate the previous principle and agree on rules they deem closer to achieving justice and uncovering the truth.¹

This does not, in any way, mean that the parties to a mixed transaction may agree to describe the transaction in a way that contradicts the legal criteria. The characterization of the transaction as commercial or civil is a matter of public order. If the parties agree to consider a transaction commercial when it is not, or civil when it is not, according to the law, the court must disregard their agreement and apply the legal standard. Agreeing to deviate from the principle of freedom of evidence is not the same as agreeing to mischaracterize the nature of the transaction as civil or commercial, as the latter is legally inadmissible.

The civil party can no longer invoke the right to prove by means other than the official written form, since they have waived this right of their own free will.²

Here, it is important to note that the "principle of freedom of proof" in commercial matters is a right established in favor of the party for whom the act is considered civil in relation to the party for whom the act is considered commercial. This means that the civil party may choose to exercise or to waive this right, but the converse is not true. Therefore, an agreement to the contrary is also invalid. In other words, the parties to a mixed transaction cannot agree to exempt the party for whom the act is considered commercial from the requirement of written evidence in relation to the party for whom the act is considered civil, whenever the value of the obligation exceeds 100,000 DZD or is not determined, in accordance with Article 333 of the Algerian Civil Code. This article is a matter of public policy and may not be derogated from except by law. Consequently, the party for whom the act is considered commercial cannot benefit from the application of the "principle of freedom of proof" because it is not established in their favor in any case.

However, the Algerian legislature has provided for specific cases in which the party for whom the act is considered commercial may benefit from the "principle of free proof" in relation to the party for whom the act is considered civil. These exceptions are exhaustive, not illustrative. This is stipulated in Article 336 of the Civil Code, which provides that the party for whom the act is considered commercial may prove by witness testimony (in cases where written proof would normally be required) if there is a material or moral obstacle preventing

¹ See: Ahmed Mohrez, previously cited, p. 112.

² See: Yousef bin Abdullah Muhammad Al-Khudair, previously cited, pp. 51–52.

the acquisition of written evidence, or if the creditor (the commercial party) has lost their written instrument for a reason beyond their control.¹

"The application of a unified legal system to certain mixed transactions—apart from cases of arbitration agreements between the parties to the mixed relationship, as noted by French jurisprudence—is, in fact, only a partial application. It covers solely those aspects explicitly stipulated by law and does not extend to all other aspects of the mixed relationship. Even though we have mentioned only some examples, these are cited exhaustively by law, not by way of example. Consequently, it is not permissible to agree on deviating from them or to expand their interpretation.

For instance, if we consider the aspect of evidence in insurance contracts, we find that Algerian legislation subjects it to a unified rule. However, this does not mean that all other aspects of the mixed transaction in that relationship will also be subject to a unified legal system. If the insured fails to pay, he is not subject to the strict rules of commercial law, nor is he declared bankrupt if the transaction is civil in nature for him. Thus, the mixed transaction relationship in this instance is subject to a unified legal system only in the part concerning evidence.² The same principle applies to other exceptions mentioned in the law, such as the proof of maritime contracts, proof of commercial mortgages, or even cases where the parties to the mixed transaction agree to apply a unified rule to a specific aspect of their relationship. Any argument to the contrary would contradict the principle that applying a unified legal system to a mixed transaction is an exception, not a rule, and exceptions should not be expansively interpreted."

In this context, we do not agree with certain opinions that have expanded the interpretation of this exception, arguing that some mixed work relationships are entirely governed by a unified legal system in all aspects of the relationship, regardless of whether the transaction is commercial for one party or civil for the other. For example, some have argued that commercial mortgages in mixed transactions are entirely subject to a unified legal system applicable to both parties in all respects. From our perspective, this interpretation lacks any legal foundation because Article 31 of the Commercial Code refers solely to the aspect of evidence in commercial mortgages, subjecting it to the "principle of freedom of evidence" between the parties. As for the other aspects of the mixed relationship, there is no legal basis for expanding this interpretation and subjecting them in turn to the provisions of commercial law for both parties. To argue otherwise would subject the party for whom the transaction is civil in nature to the strict rules of commercial law without justification. Therefore, the application of the

¹ Nadia Foudhil, *op.cit.*, p. 123.

² Stéphane Piedelièvre, *op. cit.*, p. 105.

exception must remain within the narrow and exclusive limits specified by law. Beyond that, the general principle should apply: the provisions of commercial law govern the party for whom the transaction is commercial, while the provisions of civil law govern the party for whom the transaction is civil.

Although the Algerian judiciary has settled on the principle of applying a dual legal system to mixed transactions as a general rule—while recognizing certain exceptions specified by law—we have noticed that the Algerian legislator has not explicitly addressed mixed transactions in the texts of the Commercial Code. It would have been better to do so, not because mixed transactions constitute a fourth category of commercial transactions, but to clarify the applicable legal system and the exceptions to it, just as the Egyptian legislator did in Article 3 of the Commercial Code, which states: “If the contract is commercial for one of the parties, the provisions of commercial law apply only to the obligations of that party, and the obligations of the other party are governed by civil law unless the law provides otherwise.”

Chapter Four

The Merchants

The Algerian legislator has given the category of “merchants” a special legal status. The first chapter of the first book of the Commercial Code is titled “Merchants” and includes the provisions for acquiring this status under Articles 01 to 08. Once the legal conditions for acquiring this status are met, these merchants become subject to certain legal obligations that the legislator set out in Chapters Two and Three of the same book, namely: maintaining accounting books (Articles 09 to 18) and registration in the commercial register (Articles 19

to 28).

In the following, we will discuss, according to the order adopted by the Algerian legislator, the conditions for acquiring this status as well as the obligations imposed on these individuals in the following two sections:

Section One

Conditions for Acquiring the Status of Merchant

Article 01 of the Commercial Code defines a “merchant” as:

> “Any natural or legal person who habitually engages in a commercial activity as a profession, unless the law provides otherwise.”

After recognizing electronic commerce under Law 18-05 of May 10, 2018, on electronic commerce, paragraph 4 of Article 06 of the same law defined the electronic merchant, or so-called “electronic provider,” as:

> “Any natural or legal person who markets or offers goods or services through electronic communications.”

Articles 05 to 08 of the Commercial Code set out the specific legal capacity required to engage in commerce.

According to these articles, the Algerian legislator requires two essential conditions for acquiring the status of merchant: first, the person must engage in one of the commercial activities specified in the Commercial Code as a profession, and second, the person must have the legal capacity to engage in commerce. We will discuss these two conditions in the following subsections:

Subsection One

Engaging in Commercial Activities as a Profession

By examining Article 01 of the Commercial Code, it is clear that engaging in commercial activities as a profession is the essential condition for acquiring the status of merchant. Although the legislator did not define the term “profession,” legal scholars and the judiciary have established the legal parameters for determining its meaning. As for commercial activities themselves, the legislator did not need to redefine them because they were already set out in Articles 02 and 03 of the Commercial Code, as we saw previously. However, certain related activities are excluded from the scope of commercial activities defined in Article 01, which we will discuss later.

Although the acquisition of this status is not presumed for everyone who engages in commercial activities, the Algerian legislator did not depart from the general rules of commercial evidence, allowing anyone claiming this status to prove it by any means of evidence. Therefore, the

following three subsections will study the concept of profession, its scope, and finally the means of proving it or proving the status of merchant, as follows:

Section One The Concept of Commercial Practice Before delving into any concept of "commercial practice," it should be noted that the Algerian legislator, after abandoning the term "commercial practice" in Decree No. 75-59, which includes the Commercial Code as amended and supplemented by Decree No. 96-27, has resorted to using the term "professional practice" instead of "professionalism." Some scholars believe that the Algerian legislator did well when he resorted to using the term "profession," as it is the most accurate translation of the French term "profession," which was also adopted by the French legislator¹, and the most comprehensive in terms of its technical concept compared to the old term "artisan," as the latter suggests that it is more related to traditional handicrafts than to commercial activities, while "professional business" includes all vital activities in the commercial and economic field².

"Profession" may be a "craft," but not every "craft" is a "profession," which is what Article 7 of Law No. 04-08 of August 14, 2004, regarding the conditions for practicing commercial activities, as amended and supplemented, emphasized, as it stipulates that: "Agricultural activities and craftsmen are excluded from the scope of application of this law." Although the Algerian legislator did not specify what is meant by "engaging in commercial activities," jurisprudence and the judiciary have undertaken to establish legal controls to define its concept. In this regard, Professor Ahmed Mahrez has developed a definition of "engaging in commercial activities," which we will apply to "engaging in commercial activities," by combining the legal controls upon which it is based within a single definition. He believes that it means "directing human activity toward conducting commercial activities, on a regular, continuous, and independent basis, which a person adopts as a means of earning a living and making a profit." This definition is close to the definition developed by Professor Mustafa Kamal Taha, who defined it as: "directing activity in a habitual and regular manner to carry out a specific work and earning a living from it." The concept of French jurisprudence did not differ from the two previous concepts, as Professor Michel Menjucq defined it as: "The activity that a person undertakes habitually and repeatedly in order to obtain the resources necessary for his existence." From the above, it becomes clear that "engaging in commercial activities" has three legal controls or conditions that must be met in order for the person performing it to acquire the status of a merchant. We summarize these through the following elements:

¹ See, for example, Article 02 of the decree dated 25 February 2018, which determines the closure period for the fishing of the long-billed swordfish in waters under national jurisdiction

² See: Hani Mohamed Dweidar, *op.cit.*, p. 237.

First: Conducting commercial activities regularly and continuously. “Practicing commercial activities,” which is a condition for acquiring the description of a merchant, requires the availability of certain legal controls inspired by jurisprudence from relevant legal texts, including the text of Article 1 of the aforementioned Algerian Commercial Code. In this regard, the practice of commercial activity must be regular and continuous in order for a person to acquire the status of a merchant. Whoever conducts commercial activity on an occasional basis does not acquire the description of a merchant¹. Rather, commercial activity must be conducted repeatedly and with a degree of regularity and continuity without any interruption that might fundamentally violate these controls and undermine their content. Thus, weekly, annual, or occasional holidays in which a person stops practicing his commercial profession are not considered a violation of the aforementioned controls, because they do not affect their essence, which is confirmed by Article 22 of Law No. 04-08, issued on August 14, 2004, relating to the conditions for practicing commercial activities, as amended and supplemented, when it states that: “Any natural or legal person who practices an activity may Commercially, stopping the practice of his trade during the weekly and/or annual holiday. Merely "habitually" engaging in some commercial activities from time to time does not amount to "professionalism," due to the lack of regularity and continuity. A farmer who habitually draws bills of exchange from those who buy his crops does not necessarily have to be a merchant, even though his business is considered commercial in form, according to Article 3 of the Commercial Code.

Not everyone who engages in commercial activity is considered a merchant. In this regard, we believe that the Algerian legislator was not successful in employing the term “habitual to him,” which immediately followed the word “profession,” as the latter contradicts the former in terms of the presence of the elements of regularity and continuity, as we indicated previously. The Algerian legislator would have been more appropriate if he had used the phrase “and takes it as his profession” instead of the phrase “and takes it as his usual profession,” taken from the French legislator “en font leur profession habituelle,” because the first phrase fulfills, from our point of view, the purpose that the legislator was aiming for, on the one hand, and removes any ambiguity or contradiction in terms of the compatibility of its terms with the aforementioned legal controls, on the other hand. Although the text of Paragraph 04 of Article 06 of the aforementioned Law 18-05 on e-commerce was deficient in its use of terms that correspond to the previous elements of the concept of professionalism, as it used the phrase "marketing or

¹ Ahmed Mahrez, op.cit, p. 140.

offering the provision of goods and services," the latter, when read in conjunction with the text of Article 01 of the Commercial Code, would achieve the same purpose and meaning.

The availability of the elements of regularity and continuity does not require that a person dedicate all his efforts and time to practicing his trade, but it is sufficient that he allocates a regular and continuous part of his effort and time to it¹. It is also not required that a person practice his commercial work on a daily basis in order for the elements of regularity and continuity to be available. There are some jobs that may, by their nature, require that a person practice them on a weekly basis, such as a ship owner who may allocate a trip for his customers every week, or he may practice them on a regular and continuous monthly or semi-monthly basis, as is the case for people who practice "import and export" activities, as their trade requires that they be practiced at separate time periods distributed throughout the year. Indeed, the Egyptian judiciary went further, holding that whenever a person actually purchases cotton each season for trading, he is considered a trader under the law. However, when the business is not continuous year after year, but rather interrupted in the middle of the period, the lack of continuity, especially if it is prolonged, negates the element of professionalism (professionalism).

The requirement of regularity and continuity raises another, no less important issue related to the time frame for the beginning and end of commercial activities. In this regard, the French jurist Stéphane Piedelièvre questioned the minimum frequency of commercial activities for which the elements of regularity and continuity could be considered present, and thus adopted as a criterion for the beginning of commercial activities?²

Commercial jurisprudence in Algeria has agreed that it begins with the first work a person performs related to his profession. This is a matter that can be simply deduced from the text of the aforementioned Article 1, when it includes the phrase "he performs a commercial activity and adopts it as his usual profession." That is, performing a commercial activity for the first time in a person's commercial life does not negate the condition of regularity and continuity in his work, simply because he performed it once. Rather, it is sufficient for the person's work to be coupled with the intention of regularity and continuity. All work must have a beginning, and it is illogical to require that it be repeated several times in order for this condition to be met. The material element of repeatedly performing a commercial activity, if combined with the moral element with the intention of adopting a certain position in appearing as a professional,

¹ See: Mostafa Kamal Taha and Wael Anwar Bandak, *Principles of Commercial Law*, op.cit, p. 161.

² See the text of Article 02 of the decree dated 16 April 2006, which establishes the maritime fishing logbook.

is sufficient to strip the person of the status of a merchant, even if he performed it for the first time.

While Islamic jurisprudence unanimously agrees that "preparatory work" falls outside the scope of a person's acquisition of merchant status, as it does not meet the conditions of regularity and continuity. These activities, such as leasing a warehouse where the person will conduct their business, furnishing a commercial premises, contracting with workers, and other activities, are not intended for themselves, but rather serve as a means for the person to conduct their primary commercial activity.

If a person's commercial project fails before actually undertaking their commercial activity, their owner does not acquire the status of a merchant. In our opinion, these activities are not considered commercial by association, as the latter, in turn, requires the status of a merchant to be classified as such. Since this status is not present in the person who owns the project during the "preparatory work" period, it is inconceivable that they would be commercial by association unless the commercial project succeeds and its owner actually conducts his commercial activity. In that case, the person acquires the status of a merchant, and their preparatory work is considered commercial by association, given the fulfillment of its conditions. However, if these activities are related to the commercial establishment, they can be classified as commercial in form, in accordance with the text of Article 3 of the Commercial Code. The provisions of the Commercial Code apply to them, but they do not give their owner the status of a merchant during that period due to the failure to meet the conditions of regularity and continuity, as we saw previously.

The conditions of regularity and continuity remain in place throughout the merchant's commercial life, and are only lost due to material facts that undermine their actual existence, such as the merchant actually ceasing to practice his trade, upon completion of the liquidation of his business premises¹, or his death, or if it becomes impossible for him to practice it, such as if he is imprisoned, for example. However, this does not exempt him from his obligations towards third parties dealing with him in that capacity. As for temporary administrative decisions to close a merchant's business premises resulting from the latter's violation of the provisions of the laws and regulations in force, their owner does not lose his status as a merchant, because they do not fundamentally affect the conditions of regularity and continuity. They are merely exceptional penalties related to the temporary suspension of his commercial

¹ See: Mostafa Kamal Taha and Wael Anwar Bandak, Principles of Commercial Law, op.cit, p. 160.

activity, with the aim of subjecting the merchant to the applicable laws, but they do not require the removal of his commercial status.

As for commercial companies, the timeframe for the beginning or end of the acquisition of merchant status for them or for their partners, in cases where the law so stipulates, has other special provisions. These vary depending on the type of company. We will defer their study to the book on commercial companies. Second: The requirement to conduct commercial activity independently. The element of "independence" requires that a person conduct his commercial activity in his own name and on his own account, and under his own personal responsibility. Therefore, applying this rule excludes from the "merchant category" persons who conduct commercial activities in their own name and on behalf of others, such as a worker or a company manager, as they do not acquire the description of merchants due to the lack of the element of independence in them¹. By implementing this condition, a person is personally and unlimitedly liable for all of his debts and obligations.

A merchant's financial assets are not multiple, and he may not specify a specific amount to determine his liability for his debts or commercial obligations, under penalty of his payment being invalidated for violating the public order prevailing in the commercial community. This is stipulated in Article 188 of the Civil Code, which states: "All of the debtor's assets guarantee his debts." Commercial companies, however, have specific provisions that vary depending on the type of company, in terms of determining their liability for the company's debts, as we will discuss later. In fact, this condition can be easily deduced from the text of Paragraph 1 of Article 2 of Law 90-22, issued on August 18, 1990, relating to the Commercial Register, as amended and supplemented, which states: "Any natural person enjoying civil rights may express a desire to engage in commercial activities in his own name and for his own account." According to paragraph 2 of the same article, any founding member of a company may draft, "in its name and on its own account," the official contract that includes the company's contract and the ratification of its articles of association. This same requirement was confirmed by Article 5 of Executive Decree No. 15-111, issued on May 3, 2015, which sets out the procedures for registration, amendment, and deletion in the commercial register, when it states: "Registration in the commercial register has a personal character."

This rule is also clearly inferred from Article 7 of the Algerian Commercial Code, which states: "A merchant's husband shall not be considered a merchant if he engages in a commercial activity that is subordinate to his wife's. He shall not be considered a merchant unless they

¹ See: Farha Zarawi Saleh, *op.cit.*, pp. 496-497.

engage in a separate commercial activity." Paragraph 1 of Article 8 of the same law emphasizes the necessity of the same rule when it states: "A female merchant shall be personally bound by the actions she undertakes for the needs of her trade." It should be noted that the wording of Article 7 was more precise than Article 8, in that it chose the more appropriate and comprehensive term. The legislator used the phrase "merchant's husband" in Article 7, but should have adhered to the same phrase instead of the phrase "female merchant" in Article 8, as the former phrase is more comprehensive, encompassing both men and women. We add this observation to the list of observations that we urge the legislator to address later. Perhaps what is stated in the aforementioned Article 7 explains the last phrase in Article 1 of the Commercial Code, "unless the law provides otherwise," which was attached to the text of the same article in Order No. 96-27, amending and supplementing Order No. 75-59, which includes the Commercial Code. The addition of this phrase was not arbitrary, but rather came to clarify that the availability of the aforementioned conditions does not directly grant commercial status, as some laws may stipulate special conditions or exceptions¹. Although the merchant's husband may engage in a commercial activity that meets the conditions of continuity and regularity, the Algerian legislator has exempted him from being granted the status of merchant by law, due to the lack of the condition of independence. However, if the merchant's husband engages in a commercial activity separate and independent from his husband's activity, he acquires the status of merchant, provided that he bears personal responsibility for that status, separate from his husband's commercial status. However, this condition is waived as an exception for commission agents who conduct their business on a regular and continuous basis.

These persons acquire the description of a merchant, even though they contract in their own names and for the benefit of others and not for their own personal account², which in turn applies to the broker³. This condition is also waived for the general partner in both types of joint-liability and limited partnership companies, as the person acquires the status of a merchant in this case, simply because he is a partner in the company, without any condition to practice his activity independently of the company's activity⁴, a matter which we will leave the details of later in a special book. In this case, jurisprudence has differed regarding the status of a person who practices a commercial activity behind the back of another person, such as persons prohibited from practicing the commercial profession whose jobs are incompatible with practicing that profession, such as judges, military personnel, employees, and others who

¹ See: Farha Zarawi Saleh, *op.cit.*, pp. 496-497.

² See: Ahmed Mahrez, *op.cit.*, p. 141.

³ Ahmed Mahrez, *op.cit.*, p. 141.

⁴ See: Mostafa Kamal Taha and Wael Anwar Bandak, *Principles of Commercial Law*, *op.cit.*, p. 164.

practice the commercial profession under the names of their spouses or children¹, or persons convicted and disqualified for committing the felonies and misdemeanors stipulated in Article 8 of Law No. 04-08, issued on August 14, 2004, concerning the conditions for practicing commercial activities, as amended and supplemented, such as theft, drug trafficking, tax evasion, etc. Does the "hidden" (concealed) person acquire the status of a merchant, or is the "covering" (apparent) person, who practices the business in his own name and on behalf of others, the one who acquires this status? This dispute is based on the principle of "publicity" in commercial transactions, which in turn is based on a fundamental principle upon which commercial life is based:

the "principle of trust and credit" among the public dealing with the merchant. The essence of trade is to be conducted in publicity. Indeed, many commercial enterprises allocate a portion of their expenses to advertising and publicity². In this regard, one branch of Islamic jurisprudence holds that a "concealed" person is one who acquires the status of a merchant because he speculates with his own money and commercial exploitation is carried out on his behalf, even if he is subject to the penalties and disciplinary sanctions stipulated in applicable laws and regulations. Another branch of Islamic jurisprudence holds that a "concealed" person is one who acquires the status of a merchant to protect others dealing with him. He deals with them in his own name, appearing as if he is working for his own account, and they have no connection to the "concealed" person. The latter's role, however, is limited to merely investing his money, which is insufficient to confer the status of a merchant on them due to the failure to meet the "publicity" requirement³.

Regarding this issue, the first part of the previous question is answered in Paragraph 3 of Article 9 of Law No. 04-08, issued on August 14, 2004, concerning the conditions for conducting commercial activities, as amended and supplemented. This paragraph states: "Acts committed by a person in a situation of incompatibility shall have all their legal effects towards bona fide third parties who may invoke them, without the person concerned having the right to benefit from them." Article 382 (paragraph 3) of the Commercial Code also states: "Penalties for fraudulent bankruptcy shall be applied to persons who secretly practice trade in the name of others or under fictitious names and commit one of the acts stipulated in Article 374 of this law." We see that both acquire the status of merchant with respect to their obligations, not with respect to their rights, to protect third parties who deal with them in good faith. That is, third

¹ Fawzi Mohamed Sami, *op.cit.*, p. 133.

² Iony Randrianirina, *op. cit.*, p. 135.

³ Ahmed Mohamed Abu Al-Rous, *op.cit.*, p. 72.

parties can assert the status of merchant against the concealer and the concealed party on the basis of solidarity, in accordance with the principle of solidarity between debtors in the event of multiple debtors in commercial transactions. The harsh provisions of commercial law apply to them, including the permissibility of declaring them bankrupt. The funds with which the concealed party speculates are the guarantor from this perspective. The concealer's appearance as a merchant and his dealings with others on this basis is what gives him the status of merchant, applying the theory of "apparent appearance." This is also in accordance with what is required by the principle of stability of transactions between people, from another perspective, in addition to protecting the confidence of the public, who are reassured about dealing with him on this basis. It is as if he has agreed to be bound by the status of merchant against the public¹, while neither the concealer nor the concealed party can assert their status as merchants against third parties, in accordance with the rule that "the wrongdoer cannot benefit from his mistake." The Egyptian legislator did well, and the Algerian legislator should do the same, when the former settled every dispute on this issue by stating in Article 18 of the Egyptian Commercial Code that: "The status of a merchant is established for anyone who practices trade under a false name or concealed behind another person, in addition to its establishment for the apparent person"².

Section Two The Subject of Professional Practice

The Algerian legislator stipulated that "profession" must be applied to "commercial activities" in order for a person to acquire the status of a merchant. Article 1 stipulates that "Any natural or legal person who engages in commercial activity is considered a merchant..." However, agricultural and craft activities, liberal professions, civil companies, and cooperatives whose purpose is not profit are excluded from the scope of commercial activities. This is what Article 4 of Law 90-22 of August 18, 1990, relating to the commercial register, as amended and supplemented, stipulates: "Artisans do not have the status of merchants within the meaning of Law No. 82-12 of August 28, 1982, containing the basic law for craftsmen, civil companies, and public institutions responsible for managing public facilities..." This was later confirmed by Article 7 of Law No. 04-08 of August 14, 2004, relating to the conditions for practicing commercial activities, as amended and supplemented, which states: Its text states: "Agricultural activities, craftsmen, civil companies,

¹ Here, a distinction must be made between the procedures for closing the accounting books of traders and the procedures for closing the registers for depositing contracts of sale or pledge of a commercial establishment. These registers are kept by the national commercial register centers and include information on previous contracts. Article 146 of the Commercial Code stipulates that: "In December of each year, the registers mentioned in the articles above shall be presented to the president of the court, who shall review their content and verify that the registration has been done accurately. He shall then approve them at the end of the last entry." However, this procedure refers specifically to the approval of the entries in the registers for the deposit of contracts of sale or pledge of a commercial establishment by the competent court president, not the accounting books kept by traders. This is evidenced by the fact that the commercial custom in Algeria has not tended towards applying this practice to the traders' accounting books.

² Ahmed Mahrez, *op.cit.*, p. 142.

cooperatives whose purpose is not profit, liberal civil professions practiced by natural persons, and public institutions charged with managing public services are excluded from the scope of this law, with the exception of public institutions of an industrial and commercial nature." The owners of these activities, even if they meet the conditions of regularity and continuity, do not acquire the status of merchants under the law.

Although the Algerian legislator stipulated "commercial activities" in Articles 2, 3, and 4, as we saw previously, which may seem, at first glance, to require further clarification, commercial jurisprudence has held that engaging in some of the commercial activities stipulated in those articles does not confer the status of merchants on their owners, even if the conditions of repetition, continuity, and independence are met. There is no disagreement in commercial jurisprudence that all commercial activities, according to their subject matter, as mentioned in Article 2 of the Commercial Code, if carried out by a person regularly, continuously, and independently, qualify their owner as a merchant, as they are original commercial activities¹, such as those engaged in the profession of purchasing fruits and vegetables for the purpose of reselling them and making a profit, or those engaged in mediation and brokerage operations, and other activities mentioned in the aforementioned Article 2. This applies equally to whether they are physical commercial activities or electronic commercial activities, as stipulated in Paragraph 1 of Article 6 of Law 18-05 on electronic commerce, which states: "Electronic commerce: the activity by which an electronic supplier proposes or guarantees the provision of goods and services remotely to an electronic consumer, via electronic communications."

There is no disagreement in commercial jurisprudence regarding the exclusion of "commercial activities by association," stipulated in the aforementioned Article 4, from the scope of commercial activities stipulated in the aforementioned Article 1, because they are civil activities in principle, and it is also inconceivable that they be a condition for acquiring the status of a merchant, because the latter is what is considered a condition for classifying commercial activities by association as such, and thus the opposite is not true because acquiring the status of a merchant precedes the classification of the work as commercial by association².

While there is controversy surrounding commercial activities according to form, stipulated in Article 3 of the Commercial Code, and the extent to which they can serve as a criterion for acquiring the status of merchant when a person engages in them repeatedly, continuously, and independently, as we have seen previously, the French professor Iony Randrianirina believes

¹ adia Foudil, *op.cit.*, p. 172.

² Decision of the Commercial and Maritime Chamber No. 605566, dated 04 March 2010, in the case of (A.M) v. (B.B), Supreme Court Journal, Issue 2, 2011, p. 232.

that engaging in any commercial activity cannot alone be a criterion for acquiring the status of merchant unless it is coupled with the intent to make a profit. Otherwise, such activities are considered commercial, and the provisions of commercial law apply to their owners, without them being entitled to the status of merchant. A person's habit of drawing bills of exchange does not qualify him as a merchant, even if he reaches a degree of regularity and continuity, for the simple reason that these activities, although subject to the provisions of commercial law, do not aim to make a profit, which is one of the most important objective criteria by which the acquisition of that status should be measured¹. In this case, cooperatives or institutions that deviate from their moral and ethical objectives and instead aim to make a profit are considered merchants under the law. In this regard, the French Court of Cassation, in its ruling issued on March 17, 1981, held that the Islamic Institute affiliated with the Paris Mosque, established under French association law, was deemed a merchant under French law if it was proven to operate a profit-making establishment, such as a store selling "halal meat" in accordance with the principles of Islamic law². It is worth noting that this conclusion intersects with the previous definitions of Professors Ahmed Mahrez and Mustafa Kamal Taha, who indicated that "engaging in commercial activities" must be "a means of earning a living and making a profit," meaning that the activity must be a source of income that allows the person performing it to live on, even if it is not their sole source of livelihood³. Thus, the repeated performance of a business on a regular basis, without the intention of making a profit or making it a source of livelihood, does not qualify the person performing it as a merchant⁴. Therefore, all commercial activities, by their nature, are not suitable as a source of income and livelihood. For example, the habit of drawing bills of exchange, even if it reaches a degree of regularity and continuity, is not an end in itself; rather, it is a means of collection and payment, nothing more, nothing less. Similarly, it is inconceivable that mortgaging a business premises would be a commercial activity that would earn its owner the status of a merchant, as it is merely a means of securing a specific debt and is not, by its nature, suitable as a source of income and livelihood. Commercial companies may acquire the status of merchants if the subject of their activity is commercial. They may also acquire this status simply by adopting a particular form, as stipulated in Article 3 of the Commercial Code, even if the subject of their activity is civil, not commercial. Business agencies and offices also acquire the status of merchants because they, in turn, aim to achieve profit. Whatever the case, we were drawn to the appropriate wording of

¹ Ahmed Mahrez, *op.cit.*, pp. 146-147.

² Same reference, p. 147

³ Ahmed Mahrez, *op.cit.*, pp. 147-148.

⁴ Same reference, pp. 149-150.

Articles 6 and 7 of the Egyptian Commercial Code, which settled all disputes regarding the commercial activities that give the owner the status of a merchant. They stated at the beginning that:

“The status of a merchant is acquired through the regular or professional practice of the following activities...” On this basis, we also call on the Algerian legislator to follow the example of the Egyptian legislator by clarifying the commercial activities that, when practiced professionally, give the owner the status of a merchant. There has been a dispute over the validity of illegal activities for their owner to acquire the status of a merchant. Here, it is necessary to distinguish between the practice of illegal activities and regulated activities that may only be practiced with an administrative license or prior approval, such as activities related to gambling, lotteries, and alcoholic beverages. There is no dispute about the owner acquiring the status of a merchant if he obtains an approval or license that allows him to carry out those activities, as we will see later¹. However, if he practices them without obtaining prior approval or a license, or if it has been withdrawn, he does not acquire the status of a merchant, without this exempting him from the criminal prosecutions stipulated by law. This is explicitly stated in paragraph 3 of Article 5 of Law No. 90-22, dated August 18, 1990, relating to the commercial register, as amended and supplemented, which states:

“The lack of the legal conditions required to practice the aforementioned regulated professions prevents recognition of the status of merchant.” As for trading in some illegal activities that are absolutely prohibited by law, such as trading in drugs, human organs, and others², there is no dispute that practicing these activities does not give the person the status of a trader, because the rules of the Penal Code, which are more stringent than the rules of commercial law, are sufficient to prosecute him and prosecute those who deal with him equally³.

Section Three Proof of Commercial Practice (Proof of Merchant Status) It is noted from the text of Article 1 of the Commercial Code that the criterion for a person to acquire the status of a merchant is not based on how they describe themselves, how others describe them, their reputation or fame, or even registration in the commercial register, as we will see later. Furthermore, acquiring this status does not require a person to have a business premises. Although the latter is one of the most important aspects of practicing commerce, it is not a requirement, as is the case for a traveling merchant. Rather, the criterion is the practice of the commercial activities stipulated in Algerian Commercial Code as a profession, whether the

¹ See: Mostafa Kamal Taha and Wael Anwar Bandak, Principles of Commercial Law, op.cit, p. 173.

² Mostafa Kamal Taha and Wael Anwar Bandak, Principles of Commercial Law, op.cit, p. 173.

³ See: Nadia Foudil, op.cit, p. 175.

person performing it is a natural person or a legal entity, such as a commercial company¹. On this issue, French professor Iony Randrianirina distinguishes between the actual merchant who actually engages in commercial activity, even if he is not registered in the commercial register or is hidden behind another person, and the merchant in the eyes of the law, who may be registered in the commercial register but does not actually engage in trade. Between the two scenarios, the former is considered a merchant and is subject to the harsh provisions of commercial law, while the latter's registration is considered a simple presumption that can be proven to the contrary by anyone with an interest in it².

In this case, the "character of merchant" is not presumed; rather, the person claiming this status must prove it by all means of proof³. It may be in the interest of a third party to claim that the person with whom he contracted is a merchant, just as it may be in the interest of the merchant himself to assert this status, and he may prove this aforementioned status by all means of proof if he is not registered in the commercial register⁴. While this status is presumed in a person registered in the commercial register without actually engaging in business, bona fide third parties dealing with such a person may also deny this status by all means of proof if doing so serves their interests. For example, a specific person claims that the apparent person (registered in the commercial register) is conducting a business in his own name and on behalf of another, anonymous person, and that the latter is the actual merchant, as we have seen previously.

This is stipulated in paragraph 2 of Article 9 of Law No. 04-08, issued on August 14, 2004, concerning the conditions for practicing commercial activities, as amended and supplemented.

This paragraph states: "The person claiming a case of incompatibility must prove it." Proving "merchant status" is a substantive matter subject to the discretion of the trial judge.

The latter, in deciding these facts, is not subject to the oversight of the Court of Cassation. When the court decides whether or not the elements of a commercial profession are present, it must base its legal conclusion on that, namely the existence or non-existence of a commercial profession. The French professor, Stéphane Piedelièvre, believes that proof of the merchant's status can be extracted by the judge through some positive material facts that establish evidence of practicing trade according to each individual case. The presence of the element of "contact with customers" is evidence of the person's acquisition of this status, even if he is not registered

¹ See: Farha Zarawi Saleh, *op.cit.*, p. 505.

² Ahmed Mahrez, *op.cit.*, pp. 151-152.

³ Farha Zarawi Saleh, *op.cit.*, pp. 489-490.

⁴ Ahmed Mahrez, *op.cit.*, p. 152. See also: Nour El-Din Al-Chazli, *op.cit.*, p. 99.

in the commercial register. The presence of this element is what can be used to distinguish between merely “habitual business” or “practicing business”¹.

The Second Requirement Legal Capacity to Practice a Commercial Profession Capacity refers to a person's ability to perform a legal act in a manner recognized by Islamic law, resulting in specific legal effects². Because commercial activities are acts of disposal, the person engaged in commercial activity must possess the legal capacity necessary to perform legal acts³. Returning to the provisions of the Algerian Commercial Code, we find that it only addresses the capacity of merchants in relation to the provisions relating to the legal capacity of minors stipulated in Articles 5 and 6 thereof. Beyond that, we must refer to the general rules of capacity contained in the Civil Code. Therefore, we will address the capacity of adult persons, then the capacity of minors in the following two sections: Section One Full Commercial Capacity (Adult Persons) The Algerian legislator did not exempt merchants from a special capacity that differs from the legal capacity generally stipulated in Article 40 of the Civil Code. Referring to the provisions of the latter, we find that it states: "Every person who has reached the age of majority, is in possession of his mental faculties, and has not been placed under guardianship, has full capacity to exercise his civil rights. The age of majority is nineteen (19) complete years." Accordingly, in principle, no one who has not reached the legal age of majority may practice the profession of commerce. The legislator has made no distinction in this regard between men and women, or between Algerians and foreigners, even if the latter is a minor according to their country's law. This is confirmed by Paragraph 2 of Article 10 of the Civil Code. The reason for this is the Algerian legislator's desire to achieve equality among all adults and not to grant special protection to foreigners at the expense of Algerians, or men at the expense of women, or vice versa.

However, if a person is a minor or suffers from a disability, the ruling varies depending on whether they are incapable or partially incapable. In the former case, they are incapable of exercising their civil rights, including practicing the profession of commerce, while in the latter case, their actions are subject to annulment. In this regard, Article 42 of the Civil Code states: "Anyone who lacks discretion due to young age, dementia, or insanity is incapable of exercising their civil rights. Anyone who has not reached the age of thirteen is considered incapable of discernment." Article 43 states: "Anyone who has reached the age of discretion but has not reached the age of majority, and anyone who has reached the age of majority but is a fool or a

¹ See: Nadia Foudil, *op.cit.*, p. 177.

² See: Ammar Amoura, *op.cit.*, p. 108.

³ Fawzi Mohamed Sami, *op.cit.*, p. 137.

person of incompetence, shall be deemed to have limited legal capacity, in accordance with the provisions of the law." Article 80 of the Civil Code also provides for another special case, stating: "If a person is deaf and mute, blind and deaf, or blind and mute, and is unable, due to that disability, to express his will, the court may appoint a judicial assistant to assist him in the actions required by his interest. Any action for which a judicial assistant has been appointed shall be voidable if it is carried out by the person to whom assistance has been decided without the assistant's presence after the assistance decision has been registered."

If a person is completely incapacitated, all of his actions are absolutely invalid, and it is not permissible to agree to correct them, and he is not permitted to practice any specific legal action, including practicing the profession of commerce. However, if the person is partially incapacitated or has a disability as stipulated in the aforementioned Article 80, his actions are subject to invalidation, because they do not completely nullify his will, but rather diminish it¹. Here, a distinction must be made between lack of legal capacity and prohibition from practicing a commercial profession. In the latter case, these individuals have reached the legal age of majority and are free of any impediments to legal capacity. However, the law prohibits them from engaging in commercial activities for reasons of public interest or regulation of the profession they practice, such as judges, military personnel, doctors, civil servants, and others², or for judicial reasons, such as those convicted and those whose reputations have been restored for committing the felonies and misdemeanors stipulated in Article 8 of Law No. 04-08, issued on August 14, 2004, concerning the conditions for practicing commercial activities, as amended and supplemented, such as theft, drug trafficking, tax evasion, etc. When these individuals engage in commercial activities, they acquire the status of merchants, and their commercial activities remain valid. However, they are subject to disciplinary penalties for violating this prohibition³. These individuals' acquisition of the status of merchant is not an advantage for them, but rather a privilege established to protect the rights of those who deal with them in good faith. All the strict provisions of commercial law apply to them, including the permissibility of declaring them bankrupt. However, they cannot assert this status against third parties, as the prohibition is established for the public interest, not for the benefit of the employee himself. As for the status of minors or persons under guardianship, it is established to protect their personal assets, not for the benefit of third parties. If a minor or person under guardianship engages in

¹ Ahmed Mahrez, *op.cit.*, p. 155.

² Fawzi Mohamed Sami, *op.cit.*, p. 139.

³ Sabaihi Rabia, *The Judge's Authority in Overseeing Credit in Commercial Books*, study day entitled "The Electronic Aspect of Commercial Law", organized by the Faculty of Law and Political Science at Mouloud Mammeri University in cooperation with the Laboratory of Law and New Technologies, no publisher, 23 November 2016, p. 178.

commercial activity, they do not acquire the status of merchant, and the provisions of commercial law do not apply to them. Article 50 of the Civil Code stipulates that a legal person shall have legal capacity within the limits specified in its incorporation contract or as determined by law, a matter we will leave to be detailed later in the section relating to commercial companies. Section Two Minimum Authority for the Practice of Trade In commercial law, the legal authority for minors means granting them legal authorization to practice the trade profession within the limits of the authorization granted to them, prior to reaching the legal age of majority for a period of time specified by law. Legal authorization to practice the trade profession is granted by the person authorized by law to grant it to a minor if the minor is deemed to possess a degree of diligence and good management that qualifies them to practice the trade profession before reaching the legal age of majority, provided that it is approved by the competent judicial authority. The following discusses the procedures for granting authorization to practice the trade profession and the limits of that authorization under the following two elements:

First: Procedures for certifying minors to practice the profession of commerce. The Algerian legislator has recognized the legality of certifying minors under Article 5 of the Commercial Code, which states: "A minor of full legal age, male or female, who has reached the age of eighteen and wishes to engage in commerce, may not commence commercial transactions. He may not be considered of legal age with respect to the commitments he enters into for commercial purposes: - If he has not previously obtained the permission of his father or mother or a decision from the family council certified by a court, if the father is deceased, absent, has lost his parental authority, is unable to exercise it, or if both parents are absent. - This written permission must be submitted in support of the application for registration in the commercial register." The Algerian legislator did well to set the age of 18 years for the minor to become legally competent, in contrast to the French legislator, who set it at only 16 years of age. This has made the minor subject to severe criticism from French commercial jurisprudence¹. Perhaps the wisdom behind this stems from the punitive age set by the Algerian legislator at 18 years, in accordance with Articles 50 and 51 of the Penal Code. Undoubtedly, unifying the commercial capacity of the legally competent minor and the legal capacity for criminal liability will remove any potential contradiction in terms of the provisions applicable to these legally competent minors as a penalty for their failure to fulfill some of their obligations as merchants, including the permissibility of declaring them bankrupt and imposing certain criminal penalties on them.

¹ Sabaihi Rabia, op.cit, p. 180.

It is illogical to impose penalties or impose them on a legally competent minor who has not yet reached the legal age for criminal liability. This is a matter that the Algerian legislator has recognized, placing them on an equal footing with other merchants in terms of rights, obligations, and the consequences resulting from them. However, our attention was drawn to the Algerian legislator's use of some inappropriate and contradictory terms in the text of this article. The phrase "a minor who is a legal guardian may not be considered a guardian" is inaccurate. A minor may not be described as a "guardian" unless they have actually obtained legal permission to practice a trade profession, which has not yet occurred, and which the Algerian legislator did not intend, as evidenced by its contradiction with the phrase "he may not be considered an adult" at the beginning of the same article. It would have been more appropriate for the Algerian legislator to remove the word "guardian" to correct the meaning and eliminate the contradiction, so that the phrase would read: "A minor, male or female, may not..." The Algerian legislator is also criticized for using meaningless phrases, such as the phrase "or by decision of the family council," borrowed from the French legislature. In addition to the unfamiliar term "decision" in this area, we have not found in Algerian legislation provisions relating to the disposal of minors' assets, except for those relating to the guardian and the representative stipulated in Articles 92 to 100 of the Family Code. As for the "family council," we have not found any significant trace of it, except in the 1959 law regulating the personal status of Algerian Muslims. This law is a legacy of the French colonial era, and was in effect until July 5, 1975, when it was repealed on the 13th anniversary of National Independence Day, along with other laws whose application was extended immediately after independence. Given the futility of the previous phrase, the question remains as to who is legally qualified to grant a minor permission to practice the trade profession if this is not possible for both of his parents? Given the futility of the previous phrase, we believe it should be replaced by the aforementioned provisions on guardianship and guardianship, as they serve the same purpose as the Algerian legislator intended. The text of the previous article should be amended to align with this logic later, or a so-called "family council" should be created and its duties and composition clarified, as the Moroccan legislator did under Article 251 of the Moroccan Family Code, which stipulates "the establishment of a family council entrusted with the task of assisting the judiciary in its jurisdictions related to family matters." The decree regulating it then specified the composition and powers of this council¹. Our attention was also drawn to the Algerian legislator's use of inaccurate phrases in family law jurisprudence, such

¹ Ahmed Mahrez, *op.cit.*, p. 156.

as the last phrase in the previous article, which is "the absence of a father and mother." Returning to the provisions of the Algerian Family Code, we find that it uses the phrase "unknown parentage" in Articles 44, 119, and 120. As for the first phrase, which we found no trace of within its provisions, it would be more appropriate to amend it because it is illogical to attribute a person to nonexistence.

The final issue concerns the person who has the authority to grant the required permission for a married woman to practice commerce if she is still a minor. Assuming that the wife married upon reaching the age of 18 and wanted to practice commerce, it is known that she requires legal permission to qualify for this. The question that arises is: from whom does the married woman request this permission, or rather, who has the right to grant their permission before the presiding judge? Are they the persons mentioned in Article 5 of the Commercial Code, or is it the husband, as he is the one to whom guardianship is transferred if she is a minor, and he is the one whose obedience is required? Or does her marriage enable the woman to practice commerce? In the absence of a precise text or judicial precedent that resolves these issues, we must adhere to the literal meaning of Article 5 above. Accordingly, the required permission to authorize a married minor to practice commerce must be granted by the persons granted that authority in accordance with the same article. Perhaps what supports this interpretation is what is stated in Article 37 of the Family Code, which states that "each of the spouses has a financial asset separate from that of the other. Therefore, permission is granted to the father, mother, guardian, or custodian until this loophole is addressed by the Algerian legislator, who explicitly grants the required permission to authorize a married minor to her husband, just as the Egyptian legislator did when he established this permission in the husband's interest pursuant to Article 14 of the Egyptian Commercial Code. Whatever the case, the legal permission granted to a minor to practice commerce is provided for by arrangement and not by choice, as Article 5 of the Commercial Code is a mandatory rule, and it is not permissible to agree to violate it, as evidenced by its opening with the phrase "it is not permissible." Therefore, granting permission to practice commerce is a violation of Article 5 of the Commercial Code. For minors, the mother's permission is not valid in the presence of the father, unless this is possible. The guardian or custodian's permission is not valid in the presence of the mother, unless this is also possible. All of this is subject to nullity for violating public order. The permission must be explicit to engage in the commercial profession, not to manage funds¹. After this permission is issued to the minor by the father, mother, guardian, or custodian, it must be authenticated by

¹ Abdelhamid El-Shawarbi, *op.cit*, p. 113.

the competent court. The law stipulates that this written permission must be submitted along with the application for registration in the commercial registry. This requirement constitutes a publicity stunt intended to inform others that the merchant is a minor. Therefore, failure to fulfill this obligation results in the minor not acquiring the status of a merchant and cannot assert this status against third parties¹.

Second: The limits of legal permission for a minor with legal capacity to practice commerce. The text of the aforementioned Article 5 is absolute and without any restrictions. This raises the question of the limits of legal permission for a minor to practice commerce. Is it absolute or restricted? A review of Article 6 of the Commercial Code reveals that it places restrictions on the disposal of minors' real estate due to its significant financial value. It subjects it to the general rules governing the sale of minors' assets, as a guarantee from the legislature to protect their assets. This restriction applies even if the minor has absolute permission to practice commerce. Otherwise, their disposal will be invalidated for violating public order. Article 5 states: "Minor merchants licensed in accordance with the provisions of Article 5 may establish a lien or mortgage on their real estate. However, disposing of these assets, whether voluntary or compulsory, can only be accomplished by following the procedures governing the sale of the assets of minors or persons lacking legal capacity." With regard to the disposal of movable property, the permission granted to a minor to engage in commerce may be absolute and without any restriction. It may also be restricted, whether in terms of the subject matter or the amount of money allocated for that purpose, as evidenced by the phrase "may" in the aforementioned Article 5. In the latter case, the minor of sound mind may not exceed the limits of the permission granted to him to engage in commerce. If the person with the authority to grant the permission specifies a specific area for the minor to engage in commerce, he must adhere to the limits of that permission, such as specifying the permission to engage in the textile trade. If the minor of sound mind exceeds the limits of trading in stocks and financial bonds, his action is voidable, and this does not confer upon him the status of a merchant except within the limits of the permission granted to him. In this case, the minor of sound mind may only be declared bankrupt within the limits of his assets invested in his business, and this does not extend to his other assets not included in the permission². Since the authority to grant permission is established for the benefit of the minor through the person who legally holds it, the latter also has the authority to amend the limits of that permission by reducing, expanding or even revoking it if there are

¹ Ahmed Mahrez, same reference, pp. 156–157.

² Abdelhamid El-Shawarbi, *op.cit.*, p. 113.

serious reasons for the person granting the permission to believe that the interest of the minor requires it. Although the text of the aforementioned Articles 5 and 6 did not explicitly stipulate this issue, some have inferred it from the text of Article 25 (paragraph 1) of the Commercial Code when it stipulated that the provisions of the preceding article apply “in the event of revocation of the legalization of the minor merchant in application of the provisions of the legislation relating to the family and upon cancellation of the permission granted to a minor to practice trade.” Returning to the provisions of the Family Code referred to in the previous article, we find that Article 84 thereof allows the judge to revoke the permission granted to the discerning person to dispose of his funds¹. This authority is also based on the established procedural rule known as the “parallelism rule,” which stipulates that the legal authorization granted to the person with the authority to grant it may be withdrawn, provided that the withdrawal or modification of the authorization is approved by the competent court.

Section Two Professional Obligations of the Merchant If the legal conditions for acquiring the status of a merchant are met, as described above, these merchants are subject to certain legal obligations, the provisions of which are set forth by the legislator in Chapters Two and Three of Book One of the Commercial Code. These obligations are, respectively: keeping accounting books for merchants (Articles 9 to 18) and registration in the commercial register (Articles 19 to 28). Below, we discuss, in accordance with the order adopted by the Algerian legislator, the obligations imposed on these persons within the following two requirements: Requirement One

Maintaining Merchant Accounting Books The status of a merchant imposes special obligations on those who acquire it, foremost among which is the obligation to maintain merchant accounting books to record the transactions conducted by the merchant. The primary purpose of imposing this obligation is to serve the merchant's interests. If properly maintained and organized, these books serve as a true mirror of the merchant's activity, enabling the merchant to see the progress of his business and its successes or failures. They accurately reflect his financial position and serve as a true and reliable record of the state of his business. Given the rapidity with which commercial transactions are concluded and executed, the legislator has permitted proof of them by all means of proof, including circumstantial evidence. However, in return for this facilitation, the legislator intended to record these transactions in special books that the merchant, his creditors, and other interested parties can refer to for evidence. The Algerian legislator has regulated the provisions relating to this obligation in Articles 9 to 18 of the Commercial Code, as well as Law No. 07-11 issued on November 25, 2007, concerning the

¹ Nadia Foudil, *op.cit.*, p. 180.

financial and accounting system, as amended and supplemented¹, as well as the provisions of Executive Decree No. 08-156 issued on May 26, 2008, implementing the provisions of the aforementioned Law No. 07-11. Meanwhile, the provisions relating to electronic accounting books are contained in Executive Decree No. 09-110 issued on April 7, 2009, which specifies the conditions and procedures for maintaining accounting using information systems. Before delving into the provisions relating to this obligation, it is important to note that the Algerian legislator used the term "commercial books" in the provisions of Articles 9 to 18 of the Commercial Code, while calling them "accounting books" in Article 82 of the same law in the provisions relating to the sale of a commercial establishment. The legislator did well to return to using the term "accounting books" within the provisions of the aforementioned Law No. 07-11, which is the same name adopted by the French legislator "Les documents comptables". In our opinion, this latter term is more accurate and more appropriate in terms of its suitability to the main function performed by these books and the legislative objective for which they were established. Commercial life is closely linked to the concept of accounting².

After the entry into force of the aforementioned Law No. 07-11 on January 1, 2009, pursuant to Article 41 thereof, the Supreme Court confirmed, in its decision issued on March 4, 2010, its tendency to use the term "accounting books" despite citing the text of Articles 9 and 10 of the Commercial Code³. Therefore, we tend to use the term "merchant's accounting books" instead of the former. Below, we will detail the scope of the obligation to keep these books and their role in proof within the following two branches:

Section One The Scope of the Obligation to Keep Accounting Books for the Merchant The Algerian legislator has devoted Articles 9 to 12 of the Commercial Code to the provisions regulating the maintenance of these books. These articles specify the persons obligated to keep them, their types, and the manner of organizing and maintaining them. We will explain this in the following sections: First: The Scope of the Obligation to Keep Accounting Books for the Merchant in terms of persons. Article 9 of the Commercial Code states:

"Every natural or legal person with the status of a merchant is obligated to keep a journal in which he records the business's operations on a daily basis, or to review the results of these operations at least monthly, provided that he retains all documents necessary to review these operations on a daily basis." In the same vein, Article 4 of Law No. 07-11 on the aforementioned

¹ Abdelhamid El-Shawarbi, same reference, p. 109

² Ahmed Mohamed Abu Al-Rous, *op.cit*, p. 75.

³ See: Mostafa Kamal Taha and Wael Anwar Bandak, *Principles of Commercial Law*, *op.cit*, p. 173.

financial accounting system stipulates that: "The following entities are required to maintain financial accounting:

- Companies subject to the provisions of the Commercial Code, - Cooperatives, - Natural or legal persons producing commercial or non-commercial goods or services, if they engage in economic activities based on recurring transactions,
- All natural or legal persons subject to this requirement under a legal or regulatory provision."

The Algerian legislator has not followed some comparative legislation that exempts small traders whose turnover does not exceed a certain threshold from maintaining commercial accounting books. This is similar to the Egyptian legislator, who set it at twenty thousand Egyptian pounds¹, and the French legislator, who set it at seven hundred thousand euros for a sole trader and eight million euros for commercial companies². However, the Algerian legislator has not set a specific threshold that exempts any trader from maintaining accounting books, regardless of their turnover. In this regard, it is necessary to distinguish between bookkeeping as a commercial accounting obligation and bookkeeping as a tax accounting obligation. If the provisions of the Algerian Commercial Code do not exempt any merchant from keeping accounting books, regardless of his turnover, the provisions of some tax accounting laws, which are originally volatile and unstable, may exempt small merchants whose turnover does not exceed a certain limit from keeping compulsory accounting books and subject them instead to keeping simplified accounting books, or they may exempt them from this obligation and subject them to arbitrary financial accounting. For example, we can mention the text of Article 5 of Law No. 07-11 mentioned above, which states that: "Small entities whose turnover, number of employees and activity do not exceed a certain limit may keep simplified financial accounting." Article 43 of Executive Decree No. 08-156, which includes the implementation of the provisions of the aforementioned Law No. 07-11, clarified how the previous article is to be applied when it stipulated that: "Small entities that meet the conditions of activity, turnover, and number of employees are subject to simplified accounting called treasury accounting, if they choose another method, and are subject to the preparation of special financial statements consisting of:

- End-of-year financial position.
- Calculating the financial results for the financial year. - Treasury change schedule during the fiscal year. Article 2 of the decision dated July 26, 2008, issued by the Minister of Finance,

¹ Ahmed Mahrez, *op.cit*, p. 154.

² Abdelhamid El-Shawarbi, *same reference*, p. 114.

which sets the ceilings for turnover, number of employees, and activity applicable to small entities for the purpose of maintaining simplified financial accounting, stipulates the following:

"Small entities whose turnover, number of employees, and activity do not exceed one of the following ceilings (10 million dinars for commercial activities) over two consecutive fiscal years may maintain simplified financial accounting"¹.

Although the simplified financial accounting system was later abandoned under some highly volatile tax laws, and only the real or arbitrary financial accounting systems were retained, in addition to the fact that these laws do not establish a fixed turnover that sets the specific minimum threshold referred to above², the evidence from these laws is that, although they exempt traders from the mandatory accounting records, they do not exempt them from this obligation commercially. In other words, they partially exempt them from this obligation in The Algerian legislator, while requiring every natural or legal person with the status of a merchant to maintain accounting books, did not require the merchant to record the data contained in his books himself. Rather, he has authorized him to assign this task to one of his employees, with his knowledge, under his supervision, and under his responsibility. Indeed, some large commercial projects that employ huge capital have begun to entrust this task to specialized accounting firms with the scientific and technical expertise that qualifies them to perform this function in an accurate and organized manner. Some commercial projects even establish financial and commercial departments, depending on the size and capabilities of the project³. Dispute has arisen over the extent to which the maintenance of separate accounting books is mandatory for the general partner in general partnerships and limited partnerships of both types, based on the fact that he acquires the status of a merchant. Some legal scholars believe that the general partner is not required to maintain separate accounting books, as they would be ineffective, as they would merely duplicate what has already been done. It is recorded in the company's accounting books, while another opinion in Islamic jurisprudence holds that maintaining these books is mandatory even for the general partner, since he acquires the status of a merchant and the law does not explicitly exempt him from this obligation⁴. We see the validity of the argument of the first opinion, which states that the general partner is not required

¹ Ahmed Mahrez, same reference, p. 154.

² Abdelhamid El-Shawarbi, *op.cit*, p. 114.

³ Nadia Foudil, *op.cit*, pp. 172–173.

⁴ Ahmed Mahrez, *op.cit*, p. 143.

to maintain accounting books separate from the company's books. In addition to its futility, as it would merely duplicate what was recorded in the company's accounting books, including the general partner's profits, we believe that the maintenance of separate accounting books by the general partner does not exempt him from the legal consequences resulting from the company's bankruptcy declaration in the event that it ceases to pay its debts. The joint and several liability of the general partners in general partnerships and limited partnerships of both types assumes that this liability extends to the consequences resulting from the company's bankruptcy declaration. If the latter constitutes negligent bankruptcy against the company due to its failure to maintain accounting books or its irregularity, then the same effect will apply to the partner. The bankruptcy of the jointly liable party is also a negligence, and vice versa. Therefore, we see that there is no need to keep accounting books separate from those kept by the company, as they are not useful in terms of the legal purpose for which they were established.

Second: Types of accounting books for merchants. The Algerian legislator has obligated every natural or legal person who acquires the status of a merchant to maintain the accounting books stipulated by law, leaving them free to choose other appropriate books if the nature and importance of the business so requires. Commercial books are divided into two types: 1- Mandatory books: The mandatory books, as stipulated in Articles 9 and 10 of the Commercial Code, consist of the journal and inventory books. In addition to the latter two, Article 20 of Law No. 07-11 mentioned above, added a third book called the "large book." Some laws have added other mandatory books specific to specific commercial activities, in addition to the aforementioned books. We will discuss this in the following points: A- Journal Book: The journal book is the most important accounting book in a merchant's professional life, as it constitutes the accounting foundation upon which the merchant's business is based. As its name indicates, it is the detailed daily record that includes all the activities performed by the merchant. His commercial day¹In this regard, Article 9 of the Commercial Code stipulates that: "Every natural or legal person with the status of a merchant is obligated to keep a journal in which he records the business operations day by day, or at least reviews the results of these operations on a monthly basis, provided that he retains all documents that enable the daily review of these operations." The phrase "records the business operations day by day..." means that the merchant records in the journal all transactions he carries out daily related to his business, including buying and selling, borrowing, paying and receiving commercial papers or cash, receiving goods in kind, and other transactions related to his business. This is confirmed

¹ Ahmed Mohamed Abu Al-Rous, op.cit, p. 77.

by Paragraph 3 of Article 20 of Law No. 07-11 mentioned above, which states: "The movements of assets, liabilities, private funds, charges, and products of the entity shall be recorded in the journal. If auxiliary books are used, the journal includes only the monthly balance of entries in the auxiliary books (the monthly totals for each auxiliary book)." The Algerian legislator did not clearly state its position on the issue of recording a merchant's personal withdrawals in the daily ledger, as some comparative Arab legislations have done, such as the Egyptian and Jordanian legislators. Professor Ahmed Mahrez believes that the Algerian legislator has done well by not obligating the merchant to record his personal expenses in the daily book, as this would affect the merchant's personal life, which might harm him if others see it ¹ However, this opinion, despite its validity, may not be in line with the purpose for which these accounting books were created, which is to accurately show the financial position, the merchant's assets, his efficiency, and the status of his treasury at the end of the fiscal year, which is what Article 3 of Law No. 07-11 mentioned above stipulates. In addition, the legislator himself has taken this particular issue into consideration and has not permitted viewing these books except in very exceptional cases and limited by the text of the law, as we will explain later. Accordingly, we believe that recording the merchant's personal withdrawals in the daily book, even month by month, would preserve the merchant's interest in the first place, as it shows his financial position with complete accuracy and is a true and reliable record of the state of his business, so that he can see the movement of his business and the profit or Loss. Article 20 of the aforementioned Law No. 07-11 clearly permits a merchant to keep more than one auxiliary journal to the extent that it meets the needs of his business, such as allocating one journal for purchases, another for sales, and a third for expenses. In this case, there is no need to re-enter the details of the transactions contained therein in the main journal. Rather, it is sufficient to transfer the totals of the auxiliary journals to the latter at regular intervals. If this procedure is not followed, the total of the auxiliary journals is considered a main journal with multiple parts², provided that the merchant retains these auxiliary journals so that they can be consulted whenever necessary. This is the intent of the last part of Article 9 of the Commercial Code, "provided that in this case, he retains all the documents with which these transactions can be reviewed daily"³.

¹ See: Mostafa Kamal Taha and Wael Anwar Bandak, *Principles of Commercial Law*, op.cit, p. 166.

² See: Abdelhamid El-Shawarbi, op.cit, p. 146.

³ See: Ahmed Mohamed Abu Al-Rous, op.cit, p. 28.

This last phrase also raises another issue related to the classification of the "book of documents and correspondence." It is not a book in the true sense of the word, but rather a collection in the form of a folder containing documents related to the merchant's activity, such as correspondence, telegrams, and invoices, so that they can be easily referred to and relied upon for proof. However, some jurisprudence classifies it as an optional book, not a mandatory one. The previous phrase clearly indicates that it is an auxiliary book to the daily book, should the merchant choose to review the results of his monthly operations. In this case, he must keep all the documents with which those operations can be reviewed, which are at the core of the operations carried out by the "book of documents and correspondence." While the Algerian legislator has authorized the merchant to keep manual or electronic journals, this is stipulated in Article 24 of the aforementioned Law No. 07-11, which states that: "Accounting shall be kept manually or via computer systems." Article 18 of Executive Decree No. 09-110, issued on April 7, 2009, which sets out the conditions and procedures for keeping accounting via computer systems, details how these electronic journals are to be kept, stating the following: "The accounting software program shall record daily every transaction completed by this program in a card called an electronic journal of events, which must include a description of the transaction performed and the work device used, the date and time of the transaction, the type of transaction performed, and the data or constants entered." Given the significant technological development, the widespread use of these electronic ledgers has become widespread in recent years, as they meet the principle of "speed" upon which trade is based, in addition to their ease of use and low cost. However, their organization must be subject to special conditions that meet the requirements of preservation, custom, security, credibility, and data retrieval, in accordance with the provisions of paragraph 2 of Article 24 mentioned above.

A- Inventory Book: Article 10 of the Commercial Code stipulates that: "He (the merchant) must also conduct an annual inventory of the assets and liabilities of his enterprise and close all his accounts for the purpose of preparing the budget and calculation of results. These budgets and calculations of results shall then be copied into the inventory book." Article 15 of Law No. 07-11 mentioned above stipulates: "The assets and liabilities of entities subject to this law shall be inventoried in terms of quantity and value at least once a year, based on a physical examination and inventory of supporting documents. This inventory must reflect the actual status of these assets and liabilities." Paragraph 3, Part 3 of Article 20 of the same law stipulates that: "The entity's budget and profit and loss account shall be entered in the inventory book." The preceding texts indicate that the merchant is required to maintain an inventory book, in which he records the assets of his commercial enterprise, namely the merchant's fixed and movable

assets and rights owed by third parties, and liabilities, which are debts owed by the merchant to third parties. In addition to listing the merchandise held by the merchant in his store and warehouses, which are included in the annual inventory conducted by the merchant, he must record the annual balance sheet, which reflects the merchant's true financial position at the close of each fiscal year. This balance sheet must be recorded in a two-sided table in accordance with accounting rules. The first is the positive side, which represents the merchant's rights, i.e., all of his assets and rights owed by third parties. The second is the negative side, which covers the merchant's obligations and debts to third parties. Article 30 of the aforementioned Law No. 07-11 has set the duration of the accounting fiscal year at twelve months covering the calendar year. However, it allows the closing of the fiscal year on a date other than December 31 in the event that its activity is linked to an exploitation cycle that is not in line with the calendar year, as is the case for companies whose investments are in the form of long-term contracts, where the start and end dates fall in different fiscal years, so the inventory process is according to the pace of progress for each stage in the process, or as is also the case for the activities of selling some marine products, the period of which may reach 3 months of each year in some cases for biological rest and reshaping the area¹. The same article also permits some exceptional cases where the fiscal year is less or more than 12 months, especially in the case of establishing or discontinuing an entity or in the case of changing the closing date, such as if the merchant starts his activity for the first time in the middle of the fiscal year, or if he stops practicing his commercial activity in the middle of the fiscal year, he is forced to close it in less than 12 months, and in this case he must justify it in the inventory book.

Similar to electronic journals, Executive Decree No. 09-110, issued on April 7, 2009, which sets the conditions and procedures for accounting using computer systems, authorized the keeping of electronic inventory books. Article 19 of the decree states the following:

"The accounting software must include an archiving procedure that allows the transfer of all accounting records and data for closed and open accounting periods to transferable storage media without the possibility of modification." Therefore, keeping electronic inventory books is nothing more than the automated archiving of data recorded in the "electronic journal of events," allowing, through programming, the recording of the annual budget inventory and the calculation of results for the business entity at the end of each fiscal year.

C- The Large Book: The truth is that maintaining this book was not mandatory under the provisions of the Algerian Commercial Code. It was not stipulated as such until 2007, pursuant

¹ See: Nadia Foudil, *op.cit.*, p. 190.

to Article 20 of the aforementioned Law No. 07-11, which stipulates: "Entities subject to this law shall maintain accounting books, including a daily book, a large book, and an inventory book, taking into account the provisions specific to small entities. The daily book and the large book are divided into a number of auxiliary books and auxiliary records, to the extent that corresponds to the entity's needs.

The second part of Paragraph 3 of the same article states: "The large book includes the total account transactions during the relevant period." This book is known professionally as the general ledger and is considered one of the most important accounting books in commercial circles. Without it, commercial accounting is incomplete and fails to fulfill its intended purpose. This book serves as the final entry record into which all entries in other books are fed, thus expressing the final results of the merchant's activity.

Therefore, it does not replace other books, especially Journal¹. This journal is maintained using a special technical method of interest to financial accounting. This means that entries in this journal are made on the basis of the client unit or the transaction unit. This means that all entries in the journal are transferred to tables specific to each transaction or each client separately, according to their chronological order². This is known in accounting as "auditor's check" or "organizer's organization." Therefore, its use is widespread in commercial activities that require large capital, such as banks and insurance companies. Similar to the journal, Article 20 of the aforementioned Law No. 07-11 clearly permits a merchant to maintain more than one large auxiliary journal, to the extent that it meets the needs of his business. For example, a large journal may be designated for purchases, another for sales, and a third for expenses. The totals of the auxiliary journals must be transferred to the main large journal at regular intervals.

If this procedure is not followed, the total of the auxiliary journals shall be considered a large main journal with multiple parts³. Meanwhile, large electronic journals find their legal basis within the provisions of Article 19 of Executive Decree No. 09-110, issued On April 7, 2009, which sets the conditions and procedures for accounting using computer systems, it also stipulated the maintenance of electronic inventory books. It stated the following: "The accounting software must include an archiving procedure that allows the transfer of all

¹ See: Farha Zarawi Saleh, *op.cit*, p. 433.

² Same reference and page.

³ The wisdom behind prohibiting certain categories of people from practicing commerce is to prevent their official duties from being affected by such practices and to avoid harming the interests of others. Additionally, the special nature of certain professions requires depriving their holders from engaging in commerce to avoid misuse of their official influence. See: Helou Abu Al-Helou, Zuhair Abbas Karim, *op.cit*, pp. 160–161.

accounting records and data for closed and open accounting periods to removable storage media without the possibility of modification." The word "locked" refers to inventory books, and the word "unlocked" refers to the large ledger in which all accounting records and data recorded in the electronic journal of events are transferred to removable storage media without the possibility of modification in the large electronic ledger.

D- Mandatory books for specific activities: Although the Algerian legislator has obligated all merchants to keep the aforementioned commercial books, these books alone may be incapable, in some specific activities, of achieving the purpose for which they were established, namely, accurately determining the merchant's financial position and the results of his operations.

Therefore, some laws regulating certain commercial activities require merchants subject to their provisions to keep other, specific, mandatory books that are practically more accurate in indicating the merchants' financial position. Since identifying all of these books requires familiarity with other laws that address them in specific texts, we will suffice with mentioning some of them, but not limited to them. Among these laws, we can mention the list of accounting books kept by insurance companies, as stipulated in Article 2 of the decision issued on July 23, 1996, which specifies the list of books and records kept by insurance and/or reinsurance companies and insurance brokers and their forms, which came in implementation of the provisions of Article 225 of the decree. 95-07, issued on January 25, 1995, relating to insurance, as amended and supplemented, states the following: "Insurance and/or reinsurance companies must maintain the following books: - A daily book containing periodic summaries of all operations. - A general ledger containing all accounts. - A balance sheet book for each quarter, containing, on the last day of each quarter, a summary of the balances of all accounts opened in the general ledger. - Books for the cashier, the bank, and the postal current account, showing the following: • Daily balance. • Classification of revenues and expenses.

Totals for each month. • Summaries from the beginning of the fiscal year.
- A permanent inventory book for movable securities, real estate, and loans.
- An annual inventory book." Returning to the provisions of Article 3 of Executive Decree No. 03-481 of December 13, 2003, which defines the conditions and procedures for practicing marine fishing, we find that it obliges persons practicing commercial marine fishing to maintain a professional fisherman's logbook, as stated in the following text: "A professional fisherman's logbook shall be established for all persons practicing marine fishing professionally." Subject to this status, and thus to this obligation to maintain a professional fisherman's logbook, all

persons practicing commercial marine fishing are subject to this status, in accordance with Article 4 of the same decree.

This logbook is a numbered and indexed logbook provided by the regionally competent marine fishing administration, containing information on each fishing operation from beginning to end¹. The Algerian legislator also provided the "electronic supplier" with a special electronic register that is appropriate to the nature of his electronic commerce. This is stipulated in Article 25 of the aforementioned Law 18-05 on electronic commerce, which states: "Every electronic supplier must keep records of completed commercial transactions and their dates and send them electronically to the National Centre for the Commercial Register." Article 2 of Executive Decree No. 19-89 of March 5, 2019, which specifies the procedures for keeping records of electronic commercial transactions and sending them to the National Center for the Commercial Register, defines the function of this register by stating: "The commercial transaction register is an electronic file in which the electronic supplier deposits the following elements of the completed commercial transaction: - The contract, - The invoice or its substitute document, - Each receipt, during delivery, return, or refund, as the case may be. The elements mentioned in the above paragraph must be stored by the electronic supplier in a manner that allows access, reading, and understanding to enable qualified personnel to examine them." Not only that, but the Algerian legislator went further when he stipulated in Article 370 (paragraph 6) of the Commercial Code that: "Any merchant who ceases to pay shall be deemed to have committed bankruptcy through negligence if he finds himself in one of the following situations: ... If he has not kept any accounts consistent with professional practice, given the importance of his business." The final phrase, "accounts consistent with professional practice, given the importance of his business," suggests that the Algerian legislator has deemed the books that commercial practice requires to be kept in certain commercial activities, based on their importance, to be compulsory books. This text is close in its content to the Egyptian legislator, who left the matter to be discretionary according to whether the nature of the commercial activity requires keeping other mandatory books or not. Therefore, Egyptian jurisprudence calls them "relative mandatory books," meaning that they are mandatory for some commercial activities that by their nature require keeping certain books, and non-mandatory for some other activities that do not by their nature require them². This is a standard that lacks sufficient

¹ Ahmed Mohamed Abu Al-Rous, *op.cit.*, pp. 22–23.

² See: Mohamed Saad Eddine, How to Register in the Commercial Register in Light of Decree 15-111, *Algerian Journal of Legal, Economic and Political Sciences*, Issue 3, Vol. 53, September 2016, p. 285.

precision and clarity, and often requires the assistance of technical experts, whose view may differ according to the nature of the trade and the extent and size of the commercial project.

2- Optional Books: These are books that the law does not require the merchant to keep or use. However, these books are considered important for the merchant, as they enable him to easily and conveniently monitor the results of his business. These books depend on the type and size of the project. The most important of these books are: A- The Scratch Book: This is a book in which the merchant records all transactions he carries out as they occur. These transactions are not subject to any specific rules, but may be recorded in an unorganized manner. The entries are then transferred to the journal in an organized manner. B- The Cash Book: This book records the movement of incoming and outgoing cash, and allows the merchant to verify the amount of cash on hand. This book is used particularly in banks and financial institutions where collection and payment transactions occur continuously, as these transactions are considered an essential part of banking activity. C- The Warehouse Book: This is a book that records the movement of goods entering and leaving the merchant's warehouse. D- The Remittance and Commercial Papers Book: This is a book in which all commercial papers owed by the merchant are recorded, along with their due dates (bill of exchange, promissory note, check). Regardless of the circumstances, optional books, although not mandatory for merchants, do not mean they lack legal value in determining the merchant's financial position or in evidence before the courts. The lack of mandatory maintenance of these books constitutes a presumption that the merchant does not have them. However, if it is proven that the merchant maintains them, the opponent may invoke them before the competent judicial authorities as evidence, especially if they are regularly maintained.

Third: Rules for Keeping Accounting Books for the Merchant. The Algerian legislator has subjected the keeping of accounting books for merchants to specific regulatory rules that ensure the accurate determination of the merchant's financial position. The Algerian legislator has required the merchant to retain these books and their documents for a specified period of time so that they can be referred to as evidence. This is what we will discuss in the following points: 1- Regulating the Keeping of Accounting Books for the Merchant. If a merchant's accounting books are regular and accurate, they inspire confidence and provide reassurance, accurately reflecting the merchant's financial position and providing a true reflection of his business activity. Regarding this issue, Paragraph 1 of Article 10 bis of the Commercial Code states: "The accounts and balance sheets of merchants aim to objectively monitor the development of the entity's financial assets and in accordance with regulatory

techniques." Article 3 of Law No. 07-11, which includes the aforementioned financial accounting system, affirms that the financial accounting system aims to present "a true picture of the entity's financial position and assets, its efficiency, and the status of its treasury at the end of the fiscal year." Article 10 of the same law also states: "Accounting must meet the requirements of regularity, credibility, and transparency related to the processes of maintaining, monitoring, presenting, and reporting the information it processes." To achieve this purpose, the Algerian legislator has stipulated a set of provisions aimed at embodying this goal in a manner that ensures its regularity and guarantees the accuracy of the data contained therein. In doing so, the legislator has taken care to distribute these safeguards across all stages of the use of these books, beginning with their creation, through their period of use, and finally their closure at the end of each fiscal year. During the creation phase, the legislator requires that the pages be numbered and marked by the judge of the competent court within whose jurisdiction the merchant's activity is located prior to any use of these books. This is stipulated in Paragraph 2 of Article 11 of the Commercial Code, which states: "The pages of each of the two books shall be numbered and signed by the judge of the court in accordance with the usual procedure." In the same context, Article 21 of the aforementioned Law No. 07-11 stipulates: "The president of the court where the entity is headquartered shall number and mark the daily book and inventory book." There is no doubt that the legislator's intention behind this procedure is to protect these notebooks from any removal of pages, concealment, or replacement of some with others, or the destruction of the notebook entirely and the replacement of an artificial notebook in its place¹

Given the importance of the next stage, the use of accounting books, which extends until the end of the fiscal year, the legislator has provided detailed provisions for this stage. These provisions relate to entry requirements, the type of data recorded in these books, and the unit of measurement for transactions (type of currency). In this regard, Paragraph 1 of Article 11 of the Commercial Code stipulates that: "The journal and inventory books shall be kept by date, without leaving any blanks or alterations of any kind, or transferring them to the margin." In the same context, Article 23 of the aforementioned Law No. 07-11 stipulates that: "The numbered and indexed accounting books shall be kept without leaving any blanks or alterations of any kind, or transferring them to the margin." By imposing these detailed provisions, the

¹ See: Articles 03 and 04 of Executive Decree 20-355 dated 30 November 2020, amending and supplementing Executive Decree No. 15-234 dated 29 August 2015, which determines the conditions and procedures for practicing activities and professions subject to registration in the commercial register.

Algerian legislator aims to ensure the integrity of the data contained in the books by preventing them from being altered by interpolation between lines and by preventing additions to them in spaces left between those lines¹. If a erroneous entry is to be corrected, this should be done by writing another entry on the date the error is discovered². Regarding the organization of electronic accounting books, special provisions are included in Paragraph 2 of Article 5 of Executive Decree No. 09-110, issued on April 7, 2009, which defines the conditions and procedures for keeping accounting records using computer systems. This provision states the following: "Computer system versions must be identified, numbered, and dated upon creation using means that provide full guarantees of proof." Article 6 of the same law states: "The non-deletion or correction of records imposed in manual accounting shall apply to accounts maintained using computer systems in the form of a certification procedure for the entire accounting period, which prohibits any modification or deletion of a certified record." Furthermore, the Algerian legislator requires that commercial transactions in these books be recorded in accordance with the established accounting principle known as "double entry." This is to ensure both formal and substantive consistency in these books, so that the debit amount equals the credit amount at the end of each fiscal year. In this regard, Article 16 of Law No. 07-11, which includes the aforementioned financial accounting system, states: "Accounting records shall be prepared according to the principle known as 'double entry': each entry shall cover at least two accounts, one debit and one credit, while respecting the chronological order in recording transactions. The debit amount must be equal to the credit amount." As for the unit of measurement for transactions, the Algerian legislator has defined it exclusively as the national currency. Article 12 of the aforementioned Law No. 07-11 clearly states: "Financial accounting shall be maintained in the national currency." Article 13 of the same law also states: "Transactions recorded in foreign currency shall be converted into the national currency according to the terms and conditions specified in the accounting standards." This is confirmed by Paragraph 2 of Article 10 of Executive Decree No. 08-156, implementing the provisions of the aforementioned Law No. 07-11, which states: "The Algerian dinar shall be the sole unit of measurement for recording entity transactions." The Algerian legislator aims, through this condition, to achieve a dual goal. The first part relates to the idea of national sovereignty, of which the Algerian dinar is one of the most important manifestations. The second part relates

¹ Ahmed Mahrez, *op.cit*, p. 160.

² Farha Zarawi Saleh, *op.cit*, p. 451.

to the accounting aspect, which is based on the principle of "homogeneity of the monetary unit or monetary measure." Unlike the Egyptian legislator, who required that accounting data in these books be written in Arabic¹, and the French legislator, who required that they be written in French², the Algerian legislator neglected to specify the language in which the accounting data in these books should be written. Conventionally, it is permissible to write them in Arabic, and often in French, provided that they are translated into Arabic before the competent judicial authorities. This issue presents difficulties related to inaccurate translation and the resulting legal consequences for the disputing parties and for determining their legal status. This requires the Algerian legislator to stipulate that they be written directly in Arabic and exclusively. As for the final stage, the closing of the fiscal year, the Algerian legislator was not strict in regulating it, and was content to stipulate the necessity of closing it without specifying the procedures to be followed in doing so. This is clearly indicated by the phrase "and to close all his accounts" in Article 10 of the Commercial Code. Article 19 of Law No. 07-11, which includes the aforementioned financial accounting system, also stipulates: "A closure procedure must be implemented aimed at freezing the chronological sequence and ensuring that records are not tampered with." It is customary for the merchant to record the closing of the fiscal year himself or through the accountants assigned to do so, and to open the new fiscal year on the next page directly, while we find that some comparative legislations have obliged merchants to follow strict procedures when closing the fiscal year, similar to the Egyptian legislator who required the merchant to submit his commercial books to the Commercial Registry Office to certify the number of pages used during the year or when the pages of the book have expired, and the merchant or his heirs must also do the same procedure in the event that his activity has ceased to be recorded to that effect³. It is more appropriate for the Algerian legislator to take this procedure into consideration at the first opportunity available to him, to provide more guarantees for the regularity of the merchant's accounting books and to prevent additions to them⁴.

¹ Karim Karima, The Use of Information Technology and the Process of Registration in the Commercial Register, *Maaref Journal*, Issue 1, Vol. 13, June 2018, pp. 79–80.

² Same reference and page.

³ Ben Hamidouch Nour El-Din, Crimes Related to the Conditions of Practicing Commercial Activities or the Commercial Register, *Al-Moufakker Journal*, Mohamed Khider University of Biskra, Issue 13, Vol. 11, February 2016, p. 277.

⁴ See: Ahmed Mahrez, *op.cit.*, p. 170.

Article 12 of the Commercial Code stipulates that: "The books and documents referred to in Articles 9 and 10 must be kept for a period of 10 years. Incoming correspondence and copies of letters addressed must also be organized and kept for the same period." Paragraph 4 of Article 20 of Law No. 07-11, which includes the aforementioned financial accounting system, also stipulates that: "Accounting books or their substitutes, as well as supporting documents, shall be kept for a period of 10 years starting from the closing date of each financial accounting year." From the two previous texts, it is clear that the legislator requires the merchant to keep his accounting books for a period of ten years starting from the closing date of each financial accounting year. As for correspondence, copies of letters addressed to him, and other supporting documents, the legislator did not specify the starting date of this period, but it is self-evident that it begins from the date of their receipt. The legislator also did not specify the period for keeping other books, such as the draft book, the treasury, etc. However, some jurisprudence considers them to be kept for the entire period necessary for the prescription of established rights, which is 15 years (). We believe that the most likely opinion is a period of 10 years, applying the rule that the branch follows the root in the ruling. Perhaps what supports this interpretation is the phrase "the accounting books or the supports that replace them" contained in the text of paragraph 04 of Article 20 of Law No. 07-11 containing the aforementioned financial accounting system, as it was general and did not specify a specific book, which means that what it contained was provided by way of example and not exhaustive, and therefore it includes all books, both mandatory and non-mandatory. The phrase "books and documents must be preserved" indicates that the legislator did not address the merchant himself in the previous texts, but rather subjected the accounting books to this obligation. This obviously means that this obligation can extend to his heirs upon his death, requiring them to retain those books for the aforementioned period, provided that the ten-year period specified by the legislator for their preservation has not yet expired. After this period has expired, the merchant may destroy his commercial books and documents. The merchant cannot be compelled to present them before the court, as there is a legal presumption of their destruction after the expiration of that period. This presumption is established in favor of the merchant, not the opponent. However, the latter may prove the opposite of this presumption by establishing evidence that the books still exist, in which case the merchant is obligated to present them. The period of ten years is not considered a limitation period, as its expiry does not result in the expiry of the rights or debts recorded in the book. Rather, its expiry leads to a simple presumption that the merchant has destroyed his books, no more and no less, which was confirmed by the Supreme Court in its decision issued on March 4, 2010, when it said, "The obligation to keep the accounting books,

listed in Articles 9 and 10 of the Commercial Code, for a period of 10 years does not mean the loss of the right to profits”¹. If the opponent has evidence other than the destroyed books or if it is proven that their owner still keeps them, they may be presented to the court as evidence proving that right or debt.

Section Two Consequences of Maintaining or Not Maintaining Accounting Books for a Merchant The Algerian legislator has obligated every natural or legal person holding the status of a merchant to maintain accounting books, subjecting them to special regulations to ensure their regularity and the accuracy of the data contained therein. However, this was not done unintentionally. Rather, it obligated every merchant to maintain accounting books because of their extreme importance to the merchant himself and those dealing with him, particularly in matters of commercial evidence. The merchant's accounting books are among the means of evidence relied upon by the Algerian legislator in commercial matters (Articles 30 and 31 of the Commercial Code). However, failure to maintain them or violating the rules for their regularity entails civil and criminal responsibilities, which we will detail in the following two sections: First: The evidential validity of the merchant's accounting books. The Algerian legislator has devoted Articles 13 to 18 of the Commercial Code to provisions relating to the evidential validity of merchants' accounting books. These provisions outline how to refer to these books and invoke their contents, as well as the evidential strength of these books. This will be explained in the following points: 1- How to refer to a merchant's accounting books and invoke their contents: A merchant's accounting books may be referred to in any of the ways stipulated by law, including, but not limited to, Article 16 of the Commercial Code. However, before that, for a judge to be able to accept these books as evidence, a set of conditions must be met. Below, we discuss the conditions for accepting these books and the methods for referring to them, as follows: A- Conditions for the Admissibility of a Merchant's Accounting Books as Evidence: For a judge to be able to accept a merchant's accounting books as evidence, the following conditions must be met: First Condition: The accounting books must be regular, as explicitly stipulated in Article 13 From the Commercial Code, it states: “The judge may accept regular commercial books as evidence between merchants with regard to commercial transactions.” Regularity is considered a presumption of the merchant’s honesty and a source of reassurance about the accuracy of the data he recorded in his books. Irregular books, however, cannot be presented to the court and do not have the force of proof before it in favor

¹ See: Nadia Foudil, op.cit, pp. 196–197.

of those who keep them, according to the text of Article 14 of the Commercial Code as well. However, they may have utility before the judge, in favor of others and not in favor of those who keep them, so they have a degree of conclusive evidence, and thus they are suitable to be a presumption that, along with other evidence, can help form the judge's conviction¹.

The Algerian legislator has stipulated the validity of the merchant's accounting books without specification. This indicates that accounting books in general, whether mandatory or optional, are valid if they are regular. Second Condition: Article 13 of the Commercial Code requires that the parties to the dispute be merchants to prove commercial transactions. This is clearly confirmed by the phrase "as proof between merchants with respect to commercial transactions." This is because merchants alone are obligated to keep regular accounting books, and it is self-evident that these books are valid only between them, even if both or one of the merchants has retired from business or died at the time of the dispute. This is because the time of keeping the books is what matters, not the time of the dispute's origin². Because the legislature did not require merchants to record their personal expenses, unlike some comparative legislation, the legislature stipulated that, in order for commercial books to be considered as evidence, the dispute must be commercial and between two merchants. However, if the dispute is civil, such as a merchant purchasing supplies for his own and his family's personal use, these books are not binding as evidence in relations between merchants. This is because recording such data in accounting books is not mandatory, which may make it difficult to compare the data between the two books. However, this condition is not absolute. The legislature has permitted non-merchants to rely on their books, provided that the evidence contained therein is not divided if it is consistent. It has also permitted merchants themselves, in some exceptional cases, to rely on their accounting books as evidence against non-merchants, so as not to deprive them of their sole means of proof. This will be explained later in this study. Third Condition: The dispute should not relate to a transaction for which the law requires formal writing, such as a commercial company contract. It is not permissible to rely on the company's accounting books, no matter how regular they are, out of respect for mandatory legal provisions. Furthermore, the merchant's accounting books are not considered private documents in the legal sense of the word, as they lack the debtor's signature. Therefore, they are not considered a principle of written proof³. B - Methods of accessing the merchant's accounting books: The Algerian

¹ Karim Karima, *op.cit.*, pp. 81–82.

² Same reference, p. 80.

³ Michel Menjucq, *op. cit.*, p. 31.

legislator has permitted access to the merchant's accounting books in one of only two ways: full access or delivery (Article 15 of the Commercial Code), and partial access or presentation (Article 16 of the Commercial Code), as follows: First Method: Partial access (presentation) Partial review or submission means that the merchant submits his accounting books to the judge so that he can extract from them what is relevant to the dispute. This is stipulated in Article 16 of the Commercial Code, which states: "The judge may order, even of his own accord, the submission of commercial books during a dispute for the purpose of extracting what is relevant to the dispute." The judge may review them himself or appoint an expert for this purpose. In practice, the judge or expert's review of the merchant's books occurs in the presence of the latter. The opposing party may not personally review the merchant's books to protect the merchant's data and secrets and to prevent anything that might lead to unfair competition. In cases where the books are located far from the competent court, Article 17 of the Commercial Code authorizes judges to issue a judicial delegation to the court where the books are located or to appoint a judge to review them, prepare a report on their contents, and send it to the competent court in the event of a proposal to submit them, a request for their submission, or an order to do so.

It should be noted, however, that the order to submit books is not limited to the commercial court. Rather, the competent civil court may also order their submission, as if one of the parties were a civil party and chose to file their lawsuit before the civil court, for example. The judge may order their submission on his own initiative or at the request of the opponent. In the latter case, the judge has absolute freedom to accept or reject the opponent's request based on his assessment of the circumstances of the case. The inference of a merchant from his books is not a right granted to the merchant's opponent, which the judge must grant whenever he requests it. Rather, it is a discretionary matter for the judge; he may grant it if he wishes, or reject it. In any matter in which the law gives the judge the option of taking or leaving it, there is no blame on him if he favors one option over the other, and he cannot be accused of violating the law in this case¹. This provision constitutes a departure from the principle that "a person may not be compelled to provide evidence against himself." The reason for this exception is based on the trust placed in the merchant by third parties, who are not interested in proving their dealings with him in writing. This leaves them with no evidence other than what the merchant proves

¹ It should be noted that Article 43 of Law 04-08, mentioned above, states that its provisions repeal all provisions contrary to it in Law 90-22 related to the commercial register, also mentioned above. Therefore, the commercial register should be treated as an official document, not as an official contract as previously indicated.

against himself in his books. It is unreasonable for the law to deprive them of their only source of proof: the merchant's own books. Since this constitutes a departure from general rules, it may only be ordered if the court is satisfied of its necessity and usefulness, and the circumstances of the case indicate the seriousness of the claimed right. There is no reason to compel the merchant to submit his books if the payment claimed by the debtor contradicts the elements of the case¹. If the judge orders the party to whom the evidence is presented to produce the books and they then refuse to do so, the judge may compel them to comply under penalty of a fine for each day of delay, in accordance with the general rules stipulated in Article 71 of the Code of Civil and Administrative Procedure ². The judge may also direct the other party to take an oath (Article 18 of the Commercial Code). With this provision, the legislator has established a legal presumption that reduces the burden of proof for those who bear this burden. Furthermore, the judge may draw whatever presumptions he wishes from this refusal, and he may accept or reject them. The merchant's opponent may dispute them, and he may argue that they are irregular or inaccurate by presenting evidence to support this. The second method: the method of total inspection (delivery). Total inspection or delivery, as its name indicates, means forcing the merchant to hand over his books and surrender them completely to the court, who in turn may hand them over to the opponent to review and search for evidence that supports his claims, or to any person legally qualified to review them, such as tax officers. Given the seriousness of this procedure, as it inevitably results in the disclosure of the merchant's secrets³, the legislator has permitted it in exceptional cases limited by law. Article 15 of the Commercial Code states: "It is not permissible to order the submission of books and inventory lists to the court except in cases of inheritance, company division, and in the event of bankruptcy." In inheritance cases, the legislature has authorized anyone with a claim to the estate to request the court to review the books of the deceased merchant, so they can determine their rights in the estate. However, the deceased merchant's creditors are not permitted to review his books, as the legal definition of who has the right to review them does not apply to them. This right is exclusively linked to the heir or legatee, and no one else. In the event of a company being divided upon its dissolution and entering the liquidation phase, the legislature has authorized each partner to request access to the company's accounting books so they can review them and verify their share in the division. In the case of bankruptcy, the legislator has authorized the bankruptcy trustee

¹ See, for example, Professor Nadia Foudil, *op.cit.*, p. 191.

² Michel Menjucq, *op. cit.*, p. 32.

³ See: Farha Zarawi Saleh, *op.cit.*, pp. 458–459.

appointed by the court to have full access to the bankrupt merchant's accounting books so that he can carry out his duties as fully as possible. Creditors may not have access to those books in their personal capacity. However, if they are appointed as bankruptcy auditors, they have the right to have access to those books by virtue of their position. They are charged with examining the accounts, stating the situation submitted by the debtor, and assisting the appointed judge in his task of monitoring the work of the bankruptcy trustee, in accordance with the text of Articles 240 and 241 of the Commercial Code. In addition to the three previous cases, Article 6 of Order No. 76-101 of December 9, 1976, containing the Code of Direct Taxes and Similar Duties, as amended and supplemented, stipulates a fourth case, namely, full access for tax officers legally qualified to perform their oversight duties in this regard. It states that: "The bodies referred to in paragraphs 2, 3 and 4 of Article 4 above must, upon every request made by direct tax officers who hold at least the rank of auditor, provide the accounting books and the accompanying documents, as well as all useful evidence aimed at proving that they are being conducted in accordance with the legal and regulatory provisions governing them." Article 190-2 bis (paragraph 3) also stipulates full access for tax officers in the event of electronic accounting books being kept, stating: "...the taxpayer must place at the disposal of the administration all copies and documents used in establishing the accounting prepared using computer technology..."

The Algerian legislature has also subjected commercial companies to other oversight procedures aimed at investigating their accounts and financial statements. This procedure allows for access to all supporting documents and records, including access to the company's accounting books by auditors. The latter certifies the validity and accuracy of these accounts, in accordance with the provisions of Paragraph 2 of Article 10 bis of the Commercial Code. These companies must publish their financial statements (depositing the social accounts) in accordance with the legally stipulated procedures, subject to their civil and criminal liability ¹. With the exception of these cases, which are exclusively mentioned in the text of the law, full access to the merchant's accounting books is prohibited. The rule is mandatory, and it is not permissible to agree to derogate from it or to expand its interpretation, as evidenced by the phrase "may not" at the beginning of the aforementioned Article 15, the word "must" at the beginning of the aforementioned Article 6, and the phrase "legal persons are obligated" at the beginning of Paragraph 2 of Article 10 bis. The legislator has noted the importance of access to these persons, in addition to the absence of harm from revealing the secrets contained therein,

¹ Iony Randrianirina, op. cit., p. 107.

especially the fear of unfair competition, because the merchant has retired from trade in the first three cases, which means that there is no longer any benefit in keeping his trade secrets, to the extent that those concerned with inheritance cases, company division, and bankruptcy cases benefit from them¹. As for the last two cases, this access does not pose a danger to the merchant from the perspective of his fear of unfair competition, because tax officers and accountants are obligated to maintain professional secrets, in addition to the fact that this control procedure is required by the need to prove that these books are being conducted in accordance with the legal and regulatory provisions that govern them. Although there are some cases that can be compared to the previous cases, such as the division of jointly owned property and the settlement of bankruptcy, as stipulated in some comparative legislation, the Algerian legislator did not permit full access to a merchant's books except in the exclusive cases stipulated above. This may be due to the fact that the harm of revealing a merchant's trade secrets is not negated in the latter two cases, as the merchant continues to operate his business in these cases. Therefore, his fear of unfair competition in the event of full access to his books remains legitimate. It is noteworthy that this prohibition on full access to a merchant's books is originally intended to serve the merchant's interests and protect his trade secrets. This indicates that full access is permissible with the merchant's consent in cases other than the previous ones². This is often found in banks' requirement to review a merchant's books when granting loans or opening credits³.

1- Limits of the evidential authority of a merchant's accounting books. The Algerian legislator has organized the provisions related to the limits of the validity of the merchant's accounting books and their evidential strength in both the commercial and civil laws. The former has determined their validity between merchants in Articles 13 to 18 thereof, while the civil law has been concerned with organizing its provisions in the relationship between the merchant and the non-merchant in the text of Article 330 thereof. Below we review the limits of that validity in both cases:

A- The validity of accounting books in favor of the merchant vis-à-vis third parties. As an exception to the general rule of proof, which stipulates that "a person may not fabricate evidence

¹ See: Farha Zarawi Saleh, same reference, p. 466 et seq.

² See: Fatiha Youssef Mouloudah Amari, The Legal Effects of Failing to Register in the Commercial Register, Algerian Journal of Legal and Political Sciences, Issue 2, Vol. 41, June 2004, p. 106.

³ See: Mostafa Kamal Taha and Wael Anwar Bandak, Principles of Commercial Law, op.cit, p. 150.

for himself," and because the merchant's accounting books are created by their owner, the Algerian legislator has permitted the merchant to derive evidence for himself from his books in specific cases and as an exception, whether this is in his relationship with a fellow merchant or in his relationship with a non-merchant. We will address both hypotheses as follows: First hypothesis: The validity of books in favor of the merchant vis-à-vis another merchant. The principle is that commercial books are only valid in relations between merchants. It is unreasonable for a merchant to rely on his accounting books as evidence against another person who does not have the same means to prove the validity of his claim ¹. This is what Article 13 of the Commercial Code explicitly stipulates, stating: "The judge may accept regular commercial books as evidence between merchants with regard to commercial transactions." In this case, each of the merchants keeps a commercial accounting book, in which each of them records his commercial activity, which allows for comparing those books and determining the truth. If the data recorded in both books matches, such that the subject of the dispute is recorded on the debtor's side in the book of one of them, and recorded on the creditor's side in the book of the other party, the judge may accept what is stated in those books and consider them complete evidence, if they are regular². If one of the two registers is regular and the other is irregular, the judge may give preference to the data contained in the regular register over the irregular register. However, if both are irregular, neither has priority over the other. However, the judge may still rely on what is contained in both, such as if both registers are irregular but they are identical in the data in dispute. It is also conceivable that we are dealing with an anomalous situation, where both books are regular, but they are not identical in terms of the data in dispute, which is what the Jordanian legislator called "the inconsistency of conflicting data in regular books"³, such as when one of them records the fact of sale on the creditor's side and the other neglects to record the fact of purchase on the debtor's side. If doubt is interpreted in civil matters in favor of the debtor, as he is the weaker party that bears the most obligations, then doubt in commercial matters is not interpreted in favor of the owner of the accounting books⁴. Because both have an accounting book, the judge may resort to all means to ensure the formal and substantive regularity of the two books, such as requesting, for example, the reports including the financial accounting audit prepared by the auditor for commercial companies every year. Here, the importance of legal publication of these reports becomes clear, as

¹ See: Mohamed Fattahi, *The De Facto Commercial Company in Algerian Legislation*, Journal of Legal and Political Sciences, Issue 02, Vol. 07, June 2016, p. 105.

² See: Fatiha Youssef Mouloudah Amari, *op.cit*, p. 108.

³ Nadia Foudil, *op.cit*, p. 197.

⁴ See: Farha Zarawi Saleh, *op.cit*, p. 466 et seq.

paragraph 2 of Article 10 bis of the Commercial Code states that: "Only regularly published announcements have authority before courts and public administrations." If it becomes apparent that one party has neglected its legal obligations to publish the company's financial statements, the judge may consider its accounting records to be objectively irregular. Consequently, he may give preference to the data from the company's books, which consistently complied with its aforementioned legal obligations. However, if it becomes apparent that both parties have failed to comply with the aforementioned legal obligations, the judge may consider both to be irregular. The judge may form his conviction based on other evidence and whatever he is confident in, without this exempting either party from civil and criminal liability arising from the breach of these obligations. If the accounting records are electronic, the judge may appoint a specialized expert to assist the judge in verifying the regularity and reliability of the commercial books¹. Here, it is worth noting that the Algerian legislator's recognition of merchant electronic accounting books primarily aims to ensure the regularity and reliability of electronic accounting books. The legislator stipulated that they be prepared using advanced, impenetrable protection and technological techniques. This is stipulated in Paragraph 2 of Article 5 of Executive Decree No. 09-110, issued on April 7, 2009, which defines the conditions and procedures for accounting using information systems, stating: "Issues of information systems must be identified, numbered, and dated upon their creation using methods that provide full guarantees of proof." This is confirmed by Article 323 bis 1 of the Civil Code, which states: "Electronic written proof is considered the same as paper proof, provided that the identity of the person issuing it can be verified and that it is prepared and stored in conditions that guarantee its integrity." Therefore, this type of ledger will have, in addition to its evidentiary function, a self-regulatory function, which will have a positive impact in providing an accurate picture of the merchant's true status and determining his financial position with complete accuracy.

The second hypothesis: The validity of books in favor of the merchant against a non-merchant. After the Algerian legislator stipulated at the beginning of Paragraph 1 of Article 330 of the Civil Code that "merchant books are not valid against non-merchant," he subsequently exempted from this rule the data recorded in these books regarding the supplies made by

¹The legislator should have avoided using the term "socialist enterprise" in the text of Article 25 after amending the Commercial Code by Ordinance 96-27 dated 9 December 1996, as this type of enterprise was abolished by a series of laws and regulatory decrees, such as Executive Decree 90-42 dated 30 January 1990, which explicitly repealed the old basic laws of socialist economic enterprises transformed into public economic enterprises, as well as Law 90-11 dated 21 April 1990 on labor relations, which repealed Ordinance 71-74 dated 16 November 1971 concerning socialist management of enterprises and the Socialist Enterprise Organization Charter.

merchants. He stated in the same paragraph: "However, when these books contain data related to supplies made by merchants, the judge may direct a supplementary oath to either party regarding matters that must be proven by testimony." If a building materials merchant routinely supplies raw materials to a plaster carver, he may rely on the data recorded in his accounting books. In this case, the judge may direct a supplementary oath to either party, according to his convictions and the circumstances of the case, provided that the value of the supplies sought to be proven in these books does not exceed the legal threshold for testimony, which is 100,000 Algerian dinars (Article 333 of the Civil Code). Because supplies are made without written evidence, the Algerian legislator deemed it appropriate for the merchant's books to have evidentiary force in this regard, so that the merchant is not deprived of his sole means of proving what he has supplied to customers¹. Since this exception constitutes a departure from the rule that merchants' books are not evidence against others, the merchant's books must be in order; otherwise, the judge may refuse to recognize the data contained therein². In accordance with the provisions of paragraph 2 of Article 348 of the Civil Code, the Algerian legislator did not make the data contained in the merchant's accounting books, related to his supplies to his customers, complete evidence, nor did it strip them of any evidentiary force. Rather, it considered them a starting point for proof, which the judge may supplement by directing a supplementary oath to either party. It goes without saying that directing a supplementary oath to one of the parties is optional and not mandatory, as evidenced by the phrase "and the judge may." He has the option to direct it to either the plaintiff or the defendant, without any objection to his violation of the law. However, the judge may not supplement the evidence recorded in the merchant's books with evidence other than the supplementary oath, such as circumstantial evidence and witness testimony³. He may also not direct a supplementary oath if the subject of the dispute relates to a matter other than supplies, such as a loan the merchant extended to his client or the fulfillment of an obligation to perform a task. In this case, the merchant's book is not evidence against non-merchants, even if it is regularly maintained.

B- The authority of accounting books against the merchant himself: Departing from the general principle of proof, which is that "a person may not be compelled to provide evidence against himself," or what is also called "the inadmissibility of forcibly seizing legal evidence from the opponent to use it as a tool of evidence against him", the Algerian legislator has permitted merchant books to be evidence against them, whether the plaintiff is a merchant or not. From

¹ See: Farha Zarawi Saleh, *op.cit*, p. 470.

² Same reference, p. 466.

³ See: Hassain Samia, Digitalization of the Commercial Register and its Impact on Commercial Activity, study day entitled "The Electronic Aspect of Commercial Law", organized by the Faculty of Law and

this perspective, they constitute a written acknowledgment by the merchant of the right of his opponent, as stipulated in paragraph 2 of Article 330 of the Commercial Code, which states: "The merchant books shall be evidence against these merchants. However, if they are regular, it is not permissible for anyone who wishes to extract evidence for himself to fragment what is contained therein and exclude from it what contradicts his claim." The text was absolute, so it did not distinguish between compulsory or optional books, nor between regular or irregular books, and it did not stipulate that the books be regular in order for them to be evidence against their owners, except for the lack of fragmentation of the content contained in them. If the books are regular, then it is not permissible for the opponent to fragment the evidence recorded in those books, selecting from it what is in the interest of his claim and excluding from it what contradicts his claim. He must either rely on it completely in extracting the evidence or exclude it completely, as if a person bought goods from a merchant, and the latter recorded the facts of the purchase and the payment of the price. It is not permissible for the plaintiff, if the books are regular, to fragment this statement, by taking from it the fact of the purchase and excluding from it the fact of the payment of the price. In the concept of contradiction, irregular books are not covered by the rule of "the inadmissibility of dividing evidence." Accordingly, the merchant's books are evidence against him even if they are irregular. Saying otherwise leads to the wrongdoer benefiting from his mistake, and this is not permissible because it conflicts with the principle of good faith and trust in dealing that prevails in commercial transactions.¹

Since this constitutes a departure from the general rules of proof, and since the probative force of the merchant's accounting books in his relationship with third parties is less than in the relationship between merchants and merchants, the judge has absolute freedom to accept or reject them, depending on the circumstances of the case. Indeed, accepting them is discretionary, not mandatory, for the judge. He may accept them if he chooses, or reject them if he chooses. In any matter in which the law grants the judge the option of taking or leaving them, there is no blame on him if he favors one option over the other. He cannot be accused of violating the law, no matter how permissible his assessment may be. However, if the judge opts for the first option, the merchant may prove the opposite of what is stated in his books by all means of proof. He may prove their error, such as the entry being an oversight, or their corruption, such as the entry being made before the transaction was even completed.

Second: Liabilities arising from the failure to maintain or irregularity of the merchant's accounting books. Article 14 of the Commercial Code stipulates that: "Records that individuals

¹ See: Abdelhamid El-Shawarbi, op.cit, p. 151.

are obligated to keep and that do not comply with the conditions stipulated above may not be presented to the judiciary and shall not have probative force in favor of those who keep them, without prejudice to the provisions of the Bankruptcy and Insolvency Act." This provision indicates that the Algerian legislator, keen to ensure respect for its rules regarding merchant accounting records, has established civil and criminal responsibilities for failure to keep them or for breaching the rules governing their regularity. Before delving into these civil and criminal responsibilities, it is necessary to draw attention to the word "individuals" mentioned in the first part of the text of the previous article. In our opinion, the Algerian legislator was unsuccessful in employing this term, which may be due to an inaccurate translation of the term "personnes les" in the French text, which means "persons" and not "individuals," as the latter includes the merchant as a natural person and does not include the merchant as a legal person. We are certain that the Algerian legislator did not intend this, and the correct approach requires employing the term "persons" instead of "individuals," because the former includes both the natural and legal merchant, while the latter is incapable of combining them. Below, we will outline the civil and criminal liabilities arising from the failure to maintain or irregularity in the accounting books of merchants, as follows:

- 1- Civil liabilities arising from the failure to maintain or irregularity in the accounting books of merchants: The books that merchants are obligated to maintain, but which do not comply with the legal requirements for their regularity, may result in a set of civil liabilities for the merchant, encompassing several aspects. Irregular books have no evidential force before the courts in favor of those who maintain them. However, the opposite is not true. Irregular books are not evidence in favor of their owner; rather, they may harm him, and thus constitute evidence against him. To say otherwise would lead to the wrongdoer benefiting from his mistake, which is impermissible, as it conflicts with the principle of good faith and trust in dealings that prevail in commercial transactions. Therefore, a merchant who neglects his books deprives himself of the legal benefits granted to him if he adheres to maintaining his books in an organized and accurate manner, especially if his opponent is a merchant, as the truth is easily determined by comparing their books. Meanwhile, the irregularity of his books constitutes a presumption against him and favors the claimant against the owner of those books¹. Furthermore, they are not covered by the aforementioned principle of "indivisibility of evidence." From a tax perspective, a merchant who does not keep accounting books, or does not follow the rules stipulated by law regarding the

¹ Same reference, p. 468.

regularity of his accounting books, will find it difficult to estimate the actual taxes due, given the impossibility of accurately determining his financial position. Consequently, he is subject to arbitrary assessments, which often do not serve the merchant's interests¹. From a protective bankruptcy perspective, it is also difficult to reach a judicial settlement with a merchant if his financial affairs are in a state of flux that could lead to his cessation of payments, due to the difficulty of determining his financial position. This deprives the merchant of the ability to resume his business due to his failure to prove his bad luck and good faith through his books, which he neglected to keep or violated the legal rules governing them².

2- Criminal Liabilities Resulting from the Failure to Maintain or Regularly Maintain Accounting Books: In addition to the civil liabilities imposed by Article 14 of the Commercial Code on merchants who fail to observe the legal requirements for the regularity or lack thereof of their accounting books, the same article stipulates in its final section that there are criminal liabilities resulting from violating these requirements. In this regard, it refers to the Bankruptcy and Insolvency Act, as stipulated in Chapter Three of Book Three of the Commercial Code (Articles 369 to 388). According to the provisions of Paragraph 6 of Article 370 of the Commercial Code, "Any merchant who ceases to pay and is in one of the following situations shall be deemed to have committed bankruptcy by negligence: ... 6- If he has not kept any accounts in accordance with professional practice due to the importance of his business." Paragraph 5 of Article 371 of the Commercial Code also stipulates that: "Any merchant who ceases to pay and is in one of the following situations may be deemed to have committed bankruptcy by negligence: ... 5- If his accounts are incomplete or not properly maintained." It is noteworthy that the Algerian legislature has stipulated provisions of varying severity. It has obligatorily subjected merchants who did not maintain their accounting books to bankruptcy by negligence, while making it optional if their accounting books are incomplete, such as if they keep a journal but neglect the inventory book, or if they are not properly maintained. In this last case, the judge has absolute freedom to declare them bankrupt due to negligence or not, according to the circumstances of the case and the extent of the negligence and inability (the value of the debt).

Article 374 of the Commercial Code also stipulates another, more stringent type of bankruptcy, stating: "Any merchant who, in a state of default, conceals his accounts, squanders

¹ Ahmed Mahraz, previously cited, p. 148

² Ahmed Mahraz, previously cited, p. 148

or embezzles all or part of his assets, or fraudulently acknowledges his debts for amounts not owed, whether in his official documents, customary pledges, or in his balance sheet, shall be deemed to have committed fraudulent bankruptcy." According to the provisions of this article, the crime of fraudulent bankruptcy appears to be more serious than the crime of bankruptcy by negligence. The legislature has established more severe penalties for it than for the latter. This is because it goes beyond merely violating legal procedures, such as failing to maintain accounting records or their irregularity, to a more serious degree, which may include concealing or destroying them altogether, or falsifying their data, such as acknowledging amounts owed by others that are not owed, or vice versa. Therefore, a judge's ruling on this matter is mandatory, not optional. Returning to the provisions of Article 383 of the Penal Code, we find that it states: "Anyone proven responsible for committing the crime of bankruptcy in the cases stipulated in the Commercial Code shall be punished: - For bankruptcy by negligence, imprisonment from two months to two years and a fine of 25,000 DZD to 200,000 DZD. - For bankruptcy by fraud, imprisonment from one to five years and a fine of 100,000 DZD to 500,000 DZD. In addition, the fraudulent bankrupt may be sentenced to deprivation of one or more of the rights stipulated in Article 9 bis 01 of this law for a period of at least one year and at most five years." In addition to the aforementioned penalties, Order No. 76-101 of December 9, 1976, containing the Direct Taxes and Similar Taxes Code, as amended and supplemented, stipulates a set of tax fines and misdemeanor penalties resulting from the use of fraudulent methods to reduce the tax base or the fees subject to it. Among these fraudulent methods is the text of Paragraph 1 of Article 362 (Article 1) of the same law, which states the following: "Intentionally omitting to transfer or attempt to transfer writings, or transferring or attempting to transfer incorrect or fictitious writings in the journal and inventory books stipulated in Articles 9 and 10 of the Commercial Code, or in documents replacing them, when the inaccuracy concerns fiscal years for which the writings have been closed." Article 24 (paragraph 03) of Law 04-02 of June 23, 2004, as amended and supplemented, which defines the rules applicable to commercial practices, stipulates that: "Commercial practices aimed at:

...

- Destroying, concealing, or falsifying commercial and accounting documents with the intent to conceal the true terms of commercial transactions are prohibited." Article 37 of the same law stipulates that: "Without prejudice to the penalties provided for in tax legislation, any violation of the provisions of Articles 24 and 25 of this law shall be considered fraudulent commercial practices and shall be punishable by a fine of 300,000 DZD to 10,000,000 DZD." As for the electronic ledgers of the electronic supplier, the Algerian legislator has imposed

penalties on anyone who violates the provisions of this obligation. Article 41 of the aforementioned Law 18-05 on e-commerce stipulates that: "Any electronic supplier who violates the provisions of Article 25 of this law shall be punished by a fine of 20,000 to 200,000 DZD." The Algerian legislator has allocated penal provisions for some of those in charge of commercial companies in the event of their suspension of payments, ranging from bankruptcy by negligence, if they hold or order the company's books to be kept irregularly (Article 378, Paragraph 05 of the Commercial Code), or if they distort the data recorded in the company's books to conceal all or part of their financial liability in the face of the company that has suspended payments (Article 380 of the Commercial Code), and conviction for bankruptcy by fraud if they conceal, destroy or distort the company's books (Article 379 of the Commercial Code).

Second Requirement Commitment to Registration in the Commercial Register The commercial register is an official document containing the basic data of the merchant, with the aim of organizing the commercial community and enabling it to gather and consolidate the facts that must be known about each merchant, making them a unified collection accessible to the public¹. While the objective of enforcing the obligation to maintain accounting records for merchants is primarily to serve the interests of the merchant, the obligation to register in the commercial register has a publicity function, primarily aimed at achieving publicity for the benefit of those dealing with merchants, facilitating commercial transactions with them by instilling confidence and reassurance in them. It also has an important statistical function, as it serves as a guide for the state and its public agencies in determining the true state of trade and, through it, assisting in formulating the state's general economic policy by developing development and planning programs in this important sector and monitoring their implementation². The Algerian legislator has addressed the provisions specific to this obligation in Articles 19 to 28 of the Commercial Code. Given the potential for further legislative interventions to address the potential impact of technological developments in this field, the Commercial Code's provisions are limited to substantive and fundamental issues, referring elsewhere to existing laws and regulations and future provisions. Article 20 bis of the Commercial Code states: "The procedures for registration in the Commercial Register shall be determined in accordance with the applicable regulations." While other laws and regulations dealing with registration in the Commercial Register are numerous and varied, the most important can be highlighted, such as Law No. 90-22 of August 18, 1990, relating to the Commercial Register, as amended and supplemented;

¹ Nadia Foudhil, previously cited, p. 172.

² See: Mostafa Kamal Taha, Wael Anwar Bendak, *Principles of Commercial Law*, previously cited, p. 1

Law No. 04-08 of August 14, 2004, relating to the conditions for conducting commercial activities, as amended and supplemented; and Executive Decree No. 15-111 issued on May 3, 2015, which determines the procedures for registration, amendment, and deletion in the Commercial Register, as amended and supplemented. Executive Decree No. 06-222 of June 21, 2006, which specifies the form and content of the commercial register extract, and finally Executive Decree No. 18-112 of April 5, 2018, which specifies the form of the commercial register extract issued electronically, as amended and supplemented. Section One Rules for Registration in the Commercial Register The Algerian legislator has subjected the obligation related to registration in the commercial register to specific rules and provisions that ensure the precise achievement of the objectives for which this obligation was imposed. It requires every natural or legal person engaged in trade to register in the commercial register, and then clearly outlines the mechanisms for this registration, including the new mechanisms for registration in the commercial register via electronic procedures, which we will explain in the following two sections: First: Persons obligated to register in the commercial register. The Algerian legislator has subjected every natural or legal person engaged in trade to registration in the commercial register, in accordance with certain conditions stipulated in Articles 19 and 20 of the Commercial Code, whether the trade is physical or electronic. The Algerian legislator has subjected the "electronic supplier" to registration in the commercial register in accordance with Article 8 of Law 18-05 on electronic commerce mentioned above. The legislator has also stipulated some restrictions that exempt certain categories excluded by law from the status of merchant from registration in the commercial register, or restrictions that prevent certain persons who are in a conflict of interest or who have been convicted of committing certain misdemeanors and felonies from the same obligation, pursuant to Articles 7 and 8 of Law No. 04-08 of August 14, 2004, relating to the conditions for practicing commercial activities, as amended and supplemented. This will be discussed in the following two elements:

Requirements for registration in the Commercial Register: Article 19 of the Commercial Code states: "Registration in the Commercial Register is required. 1- Every natural person who has the status of a merchant under Algerian law and conducts commercial activities within Algeria. 2- Every legal entity that is a merchant in form, or whose purpose is commercial, and whose headquarters is in Algeria, or has an office, branch, or any other establishment." Article 20 of the Commercial Code also states: "This requirement applies specifically to:

- 1- Every merchant, whether natural or legal person.

2- 2- Every commercial enterprise headquartered abroad that opens an agency, branch, or any other establishment in Algeria. 3- Every foreign commercial representative office that conducts commercial activities within the country." Regardless of the repetition between the texts of the first two paragraphs of both of the aforementioned articles, it is clear from them that the person obligated to register in the commercial register is any person with the status of a merchant, whether natural or legal, as stipulated in Article 1 of the Commercial Code, detailed above. This applies regardless of whether the person is Algerian or foreign, male or female, provided that they conduct their commercial activity within Algerian territory. After the Algerian legislature recognized e-commerce under the aforementioned Law 18-05 on e-commerce, it subjected "electronic suppliers" to registration in the commercial register, as stipulated in Article 8 of the same law, which states: "E-commerce activity is subject to registration in the commercial register or in the register of traditional industries and crafts, as the case may be, and to the publication of a website or web page on the internet, hosted in Algeria with the ".com.dz" extension. The website of the electronic supplier must have the means to verify its authenticity." As for commercial companies and establishments, the legislator stipulates that they must be headquartered in Algeria, or have an office, agency, branch, or other establishment in Algeria, or have a commercial representative office if they are affiliated with foreign states or public institutions and conduct commercial activities in Algeria. Article 6 of Law No. 04-08, relating to the conditions for conducting commercial activities, mentioned above, emphasized this matter by stating: "Notwithstanding the provisions of Article 20 of Order No. 59-75 of September 26, 1975, containing the Commercial Code, as amended and supplemented, every establishment operating in Algeria under the name of a commercial company and headquartered abroad must be registered in the commercial register." In imposing this obligation, the Algerian legislator relied on the criterion of "place of business," not the criterion of "headquarters," where the center of commercial transactions is located. Under the former criterion, a merchant is not required to have a headquarter in Algeria to be subject to the obligation to register in the commercial register. Rather, it is sufficient for him to conduct his commercial activity simply by opening an office, agency, or branch in Algeria.¹ This is confirmed by Article 50 (paragraph 5) of the Civil Code, which states:

¹ Mostafa Kamal Taha, Wael Anwar Bendak, *Principles of Commercial Law*, previously cited, p. 175.

3- "Companies whose headquarter is located abroad and whose activities are in Algeria are considered to be headquartered, under the domestic law of Algeria." As for a merchant who conducts his business outside the national territory, he is not required to register in the commercial register, even if he is Algerian. Similarly, a commercial company that conducts its business outside Algerian territory is not required to register in the commercial register, even if all of its partners are Algerian. As for the "electronic supplier," the Algerian legislator did not stipulate that the activity must necessarily be conducted in Algeria or that the supplier must acquire Algerian nationality in order for the provisions of Algerian law to apply to them. Rather, the legislator simply required that these conditions be met by one of the parties to the contract, whether the "electronic supplier" or the "electronic consumer," or by the place where the contract was concluded. This is stipulated in Article 2 of Law 18-05 on electronic commerce mentioned above, which states: "Algerian law shall apply in the field of electronic commercial transactions if one of the parties to the electronic contract: - Has Algerian nationality, - Is legally resident in Algeria, - Is a legal person subject to Algerian law, - Or the contract was concluded or executed in Algeria." Not only that, but the Algerian legislator has imposed on the managing tenant (the lessee of the commercial premises, as we will discuss later), whether a natural or legal person, to register in the commercial register. This is stipulated in paragraph 2 of Article 203 of the Commercial Code, which states: "The managing tenant shall have the status of a merchant...and shall be subject to all obligations arising therefrom. He must also comply, as appropriate, with the provisions of this law relating to the commercial register." It is well established that the managing tenant of the commercial premises manages the premises in his own name and for his own account, and is therefore obligated to register in the commercial register, just like any other merchant¹. The lessor of the commercial premises must also register himself in the commercial register, as confirmed by paragraph 4 of the same previous article, which states: "The lessor must either register himself in the commercial register or amend his own registration, explicitly stating the management lease." The legislator's objective in doing so is to protect third parties, who must be aware of the status of the owner of the commercial premises².

It is the same whether a merchant practices his business permanently, regularly, in any commercial establishment, or in a non-permanent manner, through display or traveling in markets, exhibitions, or any other space designated for this purpose (Articles 18 and 19 of Law No. 04-08 on the Conditions for Conducting Commercial Activities, as amended and

¹ See: Nadia Foudhil, previously cited, p. 175.

² See: Farha Zarawi Saleh, previously cited, p. 505.

supplemented). In summary, the provisions for registration in the Commercial Register are imposed on every individual merchant, commercial companies, regardless of their form or purpose, and public institutions of an industrial and commercial nature. These institutions must conduct their commercial activities in Algeria, have an office, agency, branch, or other establishment in Algeria, or have a commercial representative office, if affiliated with a foreign state or public institution, and conduct commercial activities in Algeria. 2- Restrictions on Registration in the Commercial Register. The Algerian legislature includes a number of restrictions on registration in the Commercial Register with regard to the persons subject to this obligation. The legislature stipulates that the person must not be subject to any measure that exempts or prevents them from engaging in trade. The Algerian legislator has excluded some activities from the scope of commercial professions, not subjecting them to the provisions of the Commercial Code and, consequently, not subjecting them to the obligation to register in the commercial register. In this regard, Article 7 of Law No. 04-08, relating to the conditions for practicing commercial activities, mentioned above, states: "Agricultural activities, craftsmen, civil companies, cooperatives whose purpose is not profit, liberal civil professions practiced by natural persons, and public institutions responsible for managing public services are excluded from the scope of application of this law, with the exception of public institutions of an industrial and commercial nature." Article 33 of Order 96-01 of January 10, 1996, which sets out the rules governing traditional industries and crafts, also states: "Craftsmen and traditional industries and crafts cooperatives are not subject to registration in the commercial register as stipulated in applicable legislation." While the Algerian legislature prohibits certain persons whose professional status is legally incompatible with the practice of trade, or those who are subject to a measure preventing them from practicing that activity or profession, from engaging in any commercial activity. This is stipulated in Paragraph 1 of Article 9 of Law No. 04-08, the aforementioned Conditions for the Practice of Commercial Activities, which states:

"No one may practice a commercial activity if it is subject to a special system that provides for a situation of incompatibility." Article 13 of Law 90-22 of August 18, 1990, relating to the Commercial Register, as amended and supplemented, also stipulates that every natural person who meets the legal conditions for practicing a particular commercial activity must "clearly and explicitly state that they wish to practice this activity in accordance with the law and commercial customs and that they are not the subject of any measure preventing them from practicing that activity or profession.

" These persons are prohibited by law from engaging in trade for reasons of public interest or regulation of the profession they practice, such as judges, military personnel, doctors, civil

servants, and others¹. The legislature also prohibits certain individuals from practicing the trade profession for judicial reasons, such as persons convicted or disqualified for committing the felonies and misdemeanors stipulated in Article 8 of Law No. 04-08, mentioned above, such as theft, drug trafficking, tax evasion, etc. When these individuals engage in trade, they acquire the status of merchants, and their commercial activities remain valid. However, they are subject to disciplinary penalties for violating this prohibition². Furthermore, the legislature has made the practice of certain professions and activities regulated or governed by legislative provisions subject, in addition to registration in the commercial register, to obtaining a license or accreditation granted by the appropriate departments or bodies³, such as pharmacy, stamp and seal manufacturing, and operating liquor stores, among others. A person may obtain a temporary license or accreditation to initiate registration procedures in the commercial register. However, the actual commencement of such activities remains conditional upon the person obtaining the final license or accreditation granted by the legally authorized administrations or bodies (Articles 4 and 25 of Law No. 04-08, aforementioned). Regulated professions, as defined in Article 2 of Executive Decree No. 15-234 of August 29, 2015, which sets the conditions and procedures for practicing regulated activities and professions subject to registration in the commercial register, are defined as: "Activities and professions of a private nature, the practice of which is permitted only if the conditions required by regulation are met." Article 5 of Law 90-22, relating to the commercial register, defines them as "all professions whose practice is contingent upon the possession of certificates or qualifications issued by institutions authorized by law." As for general partners in partnerships and limited partnerships, it has been established that they are not registered separately in the commercial register, despite their status as merchants. It is sufficient to list their names in the company's commercial register, unless they conduct independent business. In short, meeting the conditions for registration in the commercial register may not be sufficient to subject a person, whether a natural or legal person, to this obligation. Rather, the person must not be subject to any measure that prevents them from engaging in or practicing commercial activities.

Second: New mechanisms for registration in the commercial register (registration in the electronic commercial register). The mechanism for registration in the commercial register is subject to specific procedures, starting from the initial registration, through its amendment, and ending with its deletion. Every natural person, or every legal entity, through their legal

¹ Ahmed Mahraz, previously cited, pp. 154

² Farha Zarawi Saleh, previously cited, pp. 489-490.

³ Ahmed Mahraz, previously cited, p. 152. See also: Nour Eddine Chaalali, previously cited, p. 99.

representative, must clearly declare their desire to engage in a specific commercial activity, through a request submitted by the person concerned or their legal representative to the local branch of the National Center for Commercial Registers with regional jurisdiction. Based on the supporting documents that support the validity of the registration applicant's data, which vary depending on the type of activity and the person, whether natural or legal, the person subject to registration in the commercial register receives an extract from the commercial register containing a single registration number for the main registration that cannot be changed until it is deleted. It also includes all the data and information that indicate the type of person required to be registered in the commercial register (natural or legal), the type of his activity, the address of his commercial base, and other data required by those dealing with him (Article 02 and following of Executive Decree No. 06-222 of June 21, 2006, which determines the form and content of the commercial register extract)¹. After obtaining the extract of the commercial register, the person subject to registration, whether a natural or legal person, with the exception of public institutions of an industrial and commercial nature, must comply with the procedures for compulsory legal advertising, which includes publishing a summary of what has been registered in the official bulletin of legal advertisements, which the National Centre for the Commercial Register is responsible for preparing and publishing (Article 19 of the aforementioned Law 90-22), provided that this legal advertising is published in the national written newspapers, periodicals or daily newspapers qualified for that purpose or any appropriate means (Article 14 of the aforementioned Law 04-08)². For natural persons, compulsory legal advertising aims to inform third parties of the merchant's status, legal capacity, residence, and ownership of the business premises (Article 15 of the same law). For commercial companies and sole proprietorships, it aims to inform third parties of the contents of the company's articles of association, transfers, amendments, and transactions involving capital, mortgages, management leases, the sale of the business premises, accounts, and financial promissory notes (Article 12 of the same law). With this procedure, the commercial register provides an extremely important service to the public dealing with merchants by providing the publicity upon which registration is based. The data contained in the commercial register is not confidential; rather, it must be made public, allowing the public to review it and be informed of any information they may need about the merchant.

In order for registration to reflect a true image of the legal status of the merchant, which should be concomitant with his commercial life, the legislator has obliged every merchant who makes

¹ Ahmed Mahraz, previously cited, p. 156

² See: Nour Eddine Chaalali, previously cited, p. 102

an amendment or change in his commercial activity, such as opening new branches for his activity, or reducing or increasing his capital, or changing the type of his activity, to indicate these amendments in his commercial register. In the event that the merchant's activity ceases, such as if he is imprisoned, for example, or in the event of his death, anyone who has an interest may request an indication of the cancellation of his registration in the commercial register¹. The legislator has granted a period of three months to amend the data in the commercial register extract based on changes to the merchant's legal status or situation (Article 37 of the aforementioned Law 04-08), and a period of two months for the heirs of the deceased to complete the deletion procedures, as stipulated in Article 33 of Law 90-22 on the aforementioned commercial register. However, if they wish to continue the project, as a joint venture, they must request that this be noted in the commercial register from year to year, so that their commercial transactions with third parties are publicly recorded on this basis². In implementation of the provisions of Article 5 bis of Law 04-08 on the conditions for practicing commercial activities, a new mechanism for registration in the commercial register has been introduced using an electronic procedure, as stipulated in Article 3 of Executive Decree No. 15-111 issued on May 3, 2015, which sets out the procedures for registration, amendment, and deletion in the commercial register. Indeed, Executive Decree No. 18-112 of April 5, 2018, was issued, specifying the form for an extract of the commercial register issued electronically, as amended and supplemented. Article 7 requires "all merchants who do not possess a commercial register bearing the electronic code "S.T.E" to request amendments to their commercial register extracts at the branches of the National Center for Commercial Registers with the regional competence, in order to obtain the electronic code "S.T.E" (called the electronic commercial register)." According to Article 3 of the aforementioned decree, the electronic code "S.T.E" represents a graphic code containing encrypted data and information about the merchant. Article 5 of the same decree stipulates that this electronic code "S.T.E" can be read using any device equipped with an image capture system, using an application downloaded free of charge from the electronic portal of the commercial register. This application has two versions: one intended for the public, allowing access to the identity of the register owner. The second is intended for the benefit of relevant public administrations and institutions and partners of the National Centre for Commercial Registry, such as commercial control officers, tax and customs inspectors, and others. This version enables them to obtain more detailed information³. To

¹ Ahmed Mahraz, previously cited, pp. 151-152.

² See: Nadia Foudhil, previously cited, p. 175.

³ See: Nadia Foudil, previously cited, p. 177.

embody the idea of e-governance using information technology between the merchant and the Commercial Registry, the legislature is gradually moving towards generalizing this procedure by requiring all merchants to verify commercial registry extracts issued electronically. This is stipulated in Article 2 of Executive Decree No. 20-154 of June 8, 2020, amending and supplementing the aforementioned Decree No. 18-112. Paragraph 3 of Executive Decree No. 20-154 stipulates that "Starting January 2, 2021, public administrations and institutions may only accept commercial registry extracts issued electronically in their commercial transactions." This means that the traditional commercial register extract will no longer have any legal value as of the date mentioned above, and will be replaced exclusively by the "electronic commercial register." In fact, the use of technology in relation to the electronic commercial register covers all stages of registration in the commercial register, starting with the submission of documents. This is stipulated in Article 3 of Executive Decree No. 15-111 issued on May 3, 2015, which defines the procedures for registration, amendment, and deletion in the commercial register. Article 3 states: "Registration in the commercial register and the submission of related documents may be carried out electronically, in accordance with the technical procedures for electronic signature and certification." Because the Media Law recognizes what is known as "electronic journalism," compulsory legal advertising may be published through newspapers also published electronically¹, after obtaining an electronic commercial register extract. This matter is referred to Chapter Five of the Media Law, entitled "Electronic Media."

Section Two Legal Consequences of Registration or Non-Registration in the Commercial Register The Algerian legislator has obligated every natural or legal person engaged in commerce to comply with registration in the commercial register. However, this was not done unintentionally. Rather, it obligated every merchant to do so because of its extreme importance to the merchant himself and those dealing with him, and the consequences that result from it, which determine its legal value, whether vis-à-vis the merchant or the latter's objection to the information contained therein against third parties. Failure to maintain such information or violating the rules governing its regularity entails civil and criminal responsibilities, which we will detail in the following two sections: First: The Legal Value of Registration in the Commercial Register. The legal value of commercial registration, in terms of the resulting legal effects, varies from one country to another. In this regard, Germany is a model for countries that recognize commercial registration as absolute, unprovable, and unassailable except by

¹ See: Ammar Amoura, previously cited, p. 108.

forgery. Germany considers commercial registration to have a publicity function entrusted to judicial authorities, as it is a condition for acquiring merchant status, not merely a legal obligation. France, on the other hand, is a model for countries that do not recognize commercial registration as absolute, but rather consider it a simple legal presumption that accepts proof to the contrary. Furthermore, it has an administrative, rather than publicity, function, as it is not considered a condition for acquiring merchant status, but rather a mere legal obligation incumbent upon all those engaged in trade. What is the position of the Algerian legislator on the legal value of commercial registration? Is it an absolute or simple legal presumption of merchant status? Is commercial registration a condition for acquiring merchant status, or is it merely a legal obligation incumbent upon all those engaged in trade, even if they are not registered in the commercial register? Returning to the relevant legal texts, we find that Article 21 of the Commercial Code states that: "Every natural or legal person registered in the commercial register is deemed to have acquired the status of a merchant under applicable laws and is subject to all consequences arising from this status." Paragraph 1 of Article 19 of Law 90-22 on the aforementioned commercial register also states: "Registration in the commercial register is an official contract proving full legal capacity to engage in commerce..." Paragraph 2 of Article 2 of Law 04-08 on the conditions for engaging in commercial activities, aforementioned, states: "The commercial register extract is an official document that qualifies any natural or legal person with full legal capacity to engage in commercial activity, and is valid before third parties until it is challenged on the grounds of forgery." Before delving into the legal value of registration in the commercial register, we note that the Algerian legislator did not settle on using a unified term in its legal description of registration in the commercial register. It considered it an "official contract" in the text of Article 19 of Law 90-22 relating to the aforementioned commercial register. However, it retracted from using this term and replaced it with another term in the text of Article 02 of Law 04-08 relating to the conditions for practicing commercial activities, aforementioned, and considered it an "official document." In our opinion, the Algerian legislator did well by using the latter term instead of the former, because "contract" produces its effects, in principle, between its parties and no one else, which is a matter that we are certain the legislator did not intend¹.

A preliminary reading of the preceding texts suggests, at first glance, that registration in the Algerian commercial register constitutes conclusive evidence of the acquisition of merchant status, such that the contrary can only be proven by forgery. This conclusion leads us to

¹ Fawzi Mohamed Sami, previously cited, p. 137.

conclude that registration in the commercial register is not merely a legal obligation incumbent upon those engaged in trade, but rather a condition for acquiring merchant status. In arriving at this conclusion, some Algerian jurisprudence relies on Article 21 of the Commercial Code before it was amended by the aforementioned Order 96-27, where the phrase "unless proven otherwise" was deleted. Some interpret this as conclusive evidence that the Algerian legislator intended to shift from the French model, which considers registration in the commercial register to be a simple legal presumption of merchant status, subject to proof to the contrary, to the German model, which considers it to be a conclusive legal presumption that can only be refuted by forgery¹. This interpretation, while valid, is not supported for several reasons, including those relating to the individual trader and those relating to commercial companies. Although the Algerian legislator deleted the phrase "unless proven otherwise" from Article 21 of the Commercial Code, the latter, when read in conjunction with some other relevant texts, leads us to a slightly different conclusion. If we examine the text of Article 1 of the Commercial Code closely, we find that acquiring the status of a trader does not necessarily require registration in the commercial register; rather, it is sufficient to engage in a specific commercial activity on a regular and continuous basis, as previously explained. Even assuming that registration in the commercial register is conclusive evidence of the acquisition of this status, the lack of registration in it is not considered evidence of the non-acquisition of it. By eliminating the phrase "unless proven otherwise," the Algerian legislator took a step back from the French model and moved closer to the German model. However, it did not give the commercial registry entry a full advertising function, nor, consequently, a full, absolute legal force. Rather, it made it so only against the person who holds the entry. Meanwhile, the Algerian legislator still allows anyone with an interest to prove that a particular person is engaged in trade, even if they are not registered in the commercial registry, as is the case with the hidden trader. Therefore, the Algerian legislator's retraction from considering the commercial registry entry as a simple presumption is only a relative retraction. In this regard, Professor Farha Zarawi Saleh believes that the Algerian legislator intended to follow the French approach, but it miscalculated in choosing the appropriate terminology to clarify its intent. The French legislator's provisions were clear and unambiguous, clearly stipulating that the opposite of this conclusive presumption may only be proven by third parties dealing with the person registered in the commercial registry. The latter, however, cannot refute it under any circumstances². Although the phrase "and it shall be valid before third parties until it is challenged for forgery," appearing

¹ Ahmed Mahraz, previously cited, p. 155.

² Ahmed Mahraz, previously cited, p. 156.

at the end of Paragraph 2 of Article 2 of Law 04-08 on the Conditions for Conducting Commercial Activities, mentioned above, may suggest a different interpretation, Paragraph 2 of Article 9 of the same law reaffirms the permissibility of proving the opposite of this presumption in cases of incompatibility, stating: "The person claiming a case of incompatibility must prove it." On this issue, French professor Iony Randrianirina distinguishes between the actual merchant who actually conducts a commercial activity, even if he is not registered in the commercial register or is hidden behind another person, and the merchant in the eyes of the law, who may be registered in the commercial register but does not actually conduct business. In both cases, the former is considered a merchant and is subject to the strict provisions of commercial law, while the latter's registration, with respect to third parties, constitutes a simple presumption that can be proven to the contrary by anyone with an interest in the matter.

Perhaps what supports the above interpretation is what is stated in Articles 24 and 25 of the Commercial Code, when the legislator imposes certain responsibilities on natural or legal persons subject to registration in the commercial register in the event of their failure to include certain information that would indicate the true legal status of each merchant. They may not claim against third parties with whom they have contracted due to their commercial activity or against public administrations for their omission of such information. However, the legislator reaffirms in the same article that they may claim such information if they prove, by means of evidence acceptable in commercial matters, that the persons concerned were aware of such information at the time of concluding the contract (Article 24 of the Commercial Code). In this context, they may use all means of evidence acceptable in commercial matters¹. This means that the failure to include such information in the commercial register constitutes a simple, but not conclusive, presumption against the merchant, such that the opposite can be proven. As for commercial companies, the legislator did not require their registration in the commercial register in order for them to acquire their commercial status, and their registration only resulted in the company acquiring a legal personality as of the date of registration². For this very reason, the legislator recognizes the joint-stock company without it having a legal personality, and without requiring it to be registered in the commercial register as well³. He also recognized the actual company, whose transactions are considered valid and have their effects unless a third party asserts their invalidity⁴. Article 549 of the Commercial Code stipulates that: "The company does not enjoy a legal personality except from the date of its registration in the

¹ Abdelhamid El-Shouarbi, previously cited, p. 113.

² Ahmed Mahraz, previously cited, pp. 156–157.

³ Abdelhamid El-Shouarbi, previously cited, p. 113.

⁴ Nadia Foudil, previously cited, p. 180.

commercial register. Before completing this procedure, the persons who pledged in the name of the company and on its behalf are jointly liable without specifying their assets, unless the company, after its legal establishment, accepts to assume the pledges taken.” Here, we suffice to say that the Algerian legislator did not deny the company its commercial status prior to its registration in the commercial register. Rather, it permitted the company to undertake the commitments made prior to its registration. Otherwise, the persons who undertook in the company's name and on its behalf would be jointly liable, without specifying their assets. With the exception of the company's acquisition of legal personality as of the date of its registration, we defer the details of the specific results for each company individually to the book on commercial companies later.

Second: Liabilities arising from a merchant's failure to comply with his obligation to register in the commercial register. There is no doubt that the Algerian legislator, by moving closer to the Aman model regarding the obligation to register in the commercial register and strengthening its legal and advertising function, was also obliged to impose, in parallel, a set of civil and criminal liabilities in the event that a merchant fails to comply with this obligation, whether by failing to register in the commercial register, omitting certain required information, so that all interested parties can see their true legal status, or by failing to fulfill other legal obligations in this area. This will be explained as follows: 1- Civil liabilities arising from a merchant's failure to comply with their obligation to register in the commercial register. Article 22 of the Commercial Code states: "Natural or legal persons subject to registration in the commercial register who have not registered within the two-month period may not assert their status as merchants before third parties or with public administrations until after their registration. However, they may not invoke their failure to register in the register to evade the responsibilities and duties inherent in this status." Article 29 of Law 90-22 on the aforementioned Commercial Register also stipulates that: "The contracts stipulated in Articles 19 to 22 of this law may not be invoked against third parties if they are not subject to mandatory legal registration. However, they nevertheless impose civil and criminal liability on the persons concerned." These two texts clearly indicate that failure to register in the Commercial Register, or failure to carry out mandatory legal registration procedures for persons legally bound by it, waives their rights as merchants without any reduction in their obligations. Therefore, they cannot assert this status. However, the opposite is not true¹, a matter previously explained. If the person concerned does not take the necessary steps to record in the commercial register any changes to his status, or to delete the business in

¹ Abdelhamid El-Shouarbi, previously cited, p. 109.

cases where this is legally required, such as death or the completion of liquidation resulting from bankruptcy, for example, the law allows anyone with an interest in this to request the recording of these changes or deletions. This is stipulated in Article 26, which states: "The recording of any changes to the status of the registered trader, as well as deletions occurring in the event of the cessation of his commercial activity or upon his death, may be requested by any person with an interest in this. If it is not issued by the person concerned, the petition shall lead to the immediate appearance of the applicant before the judge in charge of monitoring the commercial register, who shall decide on the problem." Although Article 33 of Law 90-22 relating to the aforementioned commercial register allowed heirs to continue to exploit their deceased's project, in common, year after year, if it was necessary for it to continue for a period on this basis, if they did not make a note indicating this or delete it within two months of the date of their deceased's death, the public officer of the commercial register must delete it on his own initiative within one year of the date of death after verifying this fact¹.

In any case, they cannot rely on the failure to record changes to their status in the register or their failure to be removed from the register in the event of the cessation of their activity, as a pretext for relieving themselves of the responsibilities and duties inherent in this status. Paragraph 3 of Article 5 of Law 90-22 on the aforementioned Commercial Register goes even further, stating that: "The lack of the legal conditions required to practice the aforementioned regulated professions prevents recognition of the status of a merchant." This means that a person who engages in a regulated commercial activity without obtaining a license or prior accreditation is not considered a merchant under the law and cannot assert this status against third parties. The legislator also imposed certain responsibilities on natural or legal persons subject to registration in the commercial register in the event of their failure to comply with the obligation to include certain data that would indicate the true legal status of each merchant. They cannot claim against third parties with whom they have contracted due to their commercial activity or before public administrations, for their omission of such data, unless they prove by means of evidence acceptable in commercial matters that the persons concerned were aware of such data at the time of concluding the contract (Article 24 of the Commercial Law). In this context, they may use all means of evidence acceptable in commercial matters². Article 25 of the Commercial Code stipulates five statements, the omission of which would render the previous provisions inapplicable. These are as follows: 1- In the event of a revocation of the legalization of a minor merchant in accordance with the provisions of family law and the

¹ Ahmed Mohamed Abu El-Rous, previously cited, p. 75.

² Ahmed Mahraz, previously cited, p. 154.

revocation of a minor's authorization to engage in commerce. 2- In the event of final judgments ordering the seizure of a merchant and the appointment of either a judicial guardian or a disposer of his assets. 3- In the event of final judgments ordering the nullification of a commercial company by dissolving it. 4- In the event of the termination or cancellation of the powers of any person with a binding capacity to hold a merchant, company, or joint-stock company liable. 5- In the event of a resolution issued by the general assembly of a joint-stock company or limited liability company ordering the general assembly to take a decision in the event of a loss of one-third of the company's finances. In addition to the above-mentioned information, Article 23 of the Commercial Code stipulates another case, subject to the same provisions as above. However, it is more stringent regarding the merchant's claim that a third party is aware of it. A merchant who transfers his business, by sale or mortgage, or who leases it, cannot claim the termination of his business activity to evade his liability for the obligations he assumed with his successor regarding the operation of the business, unless he deletes his registration in the commercial register, or the corresponding entry, or the entry that includes placing his business on a management lease. In this case, the merchant may not claim that a third party had personal knowledge of the unrecorded facts, even if he was aware of them. The rationale behind the necessity of publishing this extremely important information by registering it in the commercial register is clear, as it clarifies the legal status of the merchant by making it publicly available to all those dealing with him. Furthermore, omitting it would harm third parties and undermine the foundations of trust and credit required in commercial transactions. Therefore, the law allows those dealing with the merchant to invoke it against him, as it is valid even if it is not registered in the commercial register¹. 2- Criminal liabilities resulting from a merchant's failure to comply with his obligation to register in the commercial register. The Algerian legislator not only imposed the previous provisions relating to civil liabilities resulting from failure to comply with the obligation to register in the commercial register, but also went beyond that to impose criminal liabilities on violators of its provisions. In this context, Article 28 of the Commercial Code stipulates that: "Any natural or legal person, not registered in the commercial register, who normally carries out a commercial activity, shall have committed a violation that shall be observed and punished in accordance with the applicable legal provisions in this area. The court that imposes the fine shall order the registration of the required entries or deletions in the commercial register within a specified period and at the expense of the person concerned." It is clear from this text that the phrase "not registered in the commercial register" includes cases of

¹ Abdelhamid El-Shouarbi, previously cited, p. 114.

non-registration, modification, or deletion, as evidenced by Paragraph 2 of the same article, which requires the competent judge to grant the concerned party a specific period of time to settle their status, either by registration, modification, or deletion, without exempting them from the resulting criminal penalties. Article 42 of Law 18-05 of May 10, 2018, relating to e-commerce, also stipulates the penalties imposed on an electronic supplier in the event of non-registration in the commercial register, stating: "The authority authorized to grant domain names in Algeria, based on a decision from the Ministry of Commerce, shall immediately suspend the registration of domain names for any natural or legal person present in Algeria who proposes to provide goods and services via electronic communications without prior registration in the commercial register. The suspension of this website shall remain in effect until its status is settled." While Article 27 of the Commercial Code imposes certain penalties on any merchant who fails to mention in the title of his invoices, orders, tariffs, advertising brochures, or on all correspondence related to his establishment and signed by him or in his name, the seat of the court where the registration was originally made and the registration number he obtained. Because the commercial register is a media outlet in the commercial community, it would have been more appropriate for the Algerian legislator to follow its Egyptian counterpart and require everyone registered in the commercial register to write his trade name and registration number on the facade of his business, so that others can view the data that interests him¹, similar to commercial police officers who, with the registration number on the facade of the business, can easily perform their supervisory duties to the best of their ability.

In this regard, Article 31 of Law 04-08 on the Conditions for Conducting Commercial Activities, mentioned above, stipulates the following: "The qualified agents referred to in Article 30 above shall close the premises of any natural or legal person who engages in a permanent commercial activity without registering in the commercial register until the perpetrator of the crime has settled his/her situation. In addition to the closure procedure, the perpetrator shall be punished with a fine of 10,000 DZD to 100,000 DZD." Article 32 of the same law also stipulates: "Merchants who engage in non-permanent commercial activities without registering in the commercial register shall be punished with a fine of 5,000 DZD to 50,000 DZD. In addition to this fine, the qualified control agents referred to in Article 30 above may seize the perpetrator's goods and, if necessary, the means of transportation used." Article 37 of the same law stipulates the penalties for failure to amend the data in the commercial

¹ See: Mostafa Kamal Taha, Wael Anwar Bonda, *Fundamentals of Commercial Law*, previously cited, p. 173.

register extract, stating: "Failure to amend the data in the commercial register extract within three months due to changes in the merchant's legal status or situation shall be punishable by a fine of 10,000 to 100,000 DZD and the temporary withdrawal of the commercial register by a judge until the merchant resolves his or her situation. The following are considered urgent changes to the merchant's status or legal status: - Changing the address of a natural person (the merchant), - Changing the registered office of a legal entity, - Changing the address of the establishment or subsidiary establishments, - Amending the company's articles of association." In the event of practicing a regulated commercial activity without a prior license or accreditation, Article 40 of the same law stipulates: "Subject to the penalties stipulated in the legislation governing it, practicing a regulated activity or profession subject to registration in the commercial register without the required license or accreditation shall be punishable by a fine of 50,000 to 500,000 DZD. Furthermore, the judge shall close the business premises. If the offense is not settled within three months from the date of discovery of the offense, the judge shall automatically delete the commercial register." As for the failure to publish legal information, Articles 35 and 36 of the same law stipulate a fine of 30,000 to 300,000 DZD for a legal entity, while a fine of 10,000 to 30,000 DZD is imposed for a natural person. Finally, Articles 33 and 34 of the same law stipulate cases of false declaration and forgery or counterfeiting of a commercial register extract. Article 33 states: "Anyone who, in bad faith, makes false statements or provides incomplete information for the purpose of registering in the commercial register shall be punished by a fine of 50,000 to 500,000 DZD." Article 34 states: "Anyone who counterfeits or forges a commercial register extract or related documents shall be punished by imprisonment from six months to one year and a fine of 100,000 to 1,000,000 DZD. In addition to these penalties, the judge shall automatically order the closure of the business in question and may also decide to prohibit the forger from engaging in any commercial activity for a maximum period of five years." In order not to confuse the reader, we refer the remaining criminal responsibilities to Articles 38 to 41 of the same previous law. The penalties stipulated in Law 90-22 relating to the commercial register were repealed by virtue of Article 43 of Law 04-08 relating to the conditions for conducting commercial activities, mentioned above, for violating the latter's provisions. Finally, it is worth noting that Algeria's move towards enforcing the general conformity of electronic commercial registers aims primarily to limit the practice of forging extracts from traditional commercial registers and combat the phenomena of fraud and deception in the use of these registers¹. This is because

¹ See: Abdelhamid El-Shawarbi, op.cit, p. 151

the electronic commercial register incorporates advanced protection methods and technological techniques that are difficult to penetrate. Consequently, this type of register will have, in addition to its advertising, statistical, and economic functions, an additional self-regulatory function, which will have a positive impact in reducing the scope of the aforementioned crimes.

Chapter Five

The Commercial Establishment

The concept of a commercial establishment, as a legal concept, is quite modern when compared to the historical depth of trade and the commercial customs that governed it. The concept of a commercial establishment, in its contemporary sense, was not fully developed until the late nineteenth century. For a long period, the value of a commercial establishment remained tied to the person of its owner. This was due to the incompleteness of the elements of the establishment from the perspective of merchants. They viewed it solely from its material aspects, such as goods and merchandise, considering these elements to have a tangible role in commercial exploitation. The importance of intangible elements, such as trademarks, patents, and industrial models, was not recognized until much later. Given the novelty of the concept of a commercial establishment as an entity independent of its owner, various comparative international legislations did not address it with legislation and regulation until the beginning of the twentieth century. In the face of rapid technological progress, the modern concept of the commercial establishment has become entrenched, with the emergence of the concept of "e-commerce" as a new tool for attracting investors and achieving huge and rapid profits. Global legislation was forced to recognize it and regulate its provisions, which had a clear impact on the evolution of the concept of the traditional components of the commercial establishment. This is the case with the element of "contact with customers," which is now paralleled by the new concept of the "electronic customer or consumer," and other elements, which French jurisprudence has combined to form what is known as the "electronic commercial rule" (*fonds de commerce électronique*). As for the Algerian legislator¹, Book Two (Articles 78 to 214) of the Commercial Code is devoted to regulating the provisions specific to the commercial establishment, while it recognized electronic commerce under the provisions of Law No. 18-05, dated May 10, 2018, relating to electronic commerce. The Algerian legislator did not define the commercial establishment, merely mentioning its elements in Article 78 of the Commercial Code. The remaining articles were devoted to provisions relating to transactions involving the commercial establishment,² such as its sale, pledge, and lease (free management). The protection of the commercial establishment is subject to the general rules relating to tort liability in some cases and contractual liability in others. Below, we discuss the concept of the commercial establishment, its protection, and the transactions involving it in the three following

¹ Xavier Linant De Bellefonds, *The Law of Electronic Commerce*, 1st edition, Presses Universitaires de France, Paris, 2005, p. 13.

² *Ibid.*

sections: Section One The Concept of the Commercial Establishment The Algerian legislator did not define the commercial establishment, but listed its mandatory and non-mandatory elements in Article 78 of the Commercial Code. It was obvious that Law No. 18-05, dated May 10, 2018, relating to electronic commerce, did not, in turn, recognize the “electronic commercial rule.” In fact, it did not even mention it directly. Rather, it is a legal term that French jurisprudence derived from the traditional name of the commercial establishment, based on the French legislator’s recognition of the most important element, which is the “electronic customer.” As for the Algerian legislator, he was content to mention the most important elements that distinguish the “electronic commercial rule” from the elements that make up the commercial establishment in its traditional concept. In the absence of any legislative definition, commercial jurisprudence had to undertake this task, clarifying its nature and distinguishing characteristics. This is what we will review in the following two sections:

Section One Elements of a Commercial Establishment Article 78 of the Commercial Code states: "The movable assets designated for the practice of a commercial activity are considered part of a commercial establishment. The commercial establishment necessarily includes its customers and its reputation. It also includes all other assets necessary for the operation of the commercial establishment, such as the address of the commercial establishment, the trade name, the right to rent, equipment, machinery, goods, and industrial and commercial property rights, all unless the law provides otherwise." ¹

Although Law No. 18-05, relating to e-commerce, did not directly mention the "electronic commercial base," it did list its essential components, which distinguish it from traditional stores. Paragraph 3 of Article 6 stipulates the "electronic consumer," which corresponds to the "customers" or "clients" in traditional stores. Paragraph 8 of the same article stipulates the "domain name," which allows access to the website of the electronic commercial base. By reading the previous texts together, it becomes clear that a commercial establishment, in its traditional sense or "electronic establishment," consists, in both cases, of tangible and intangible elements. The importance of these elements varies from one establishment to another, but the establishment must necessarily include its customers and reputation, which we will detail as follows: Section One The Material Elements of a Commercial Establishment The material elements of a commercial establishment are those elements that play a tangible role in commercial exploitation, such as goods, merchandise, equipment, and machinery. Real estate is excluded from the elements of a commercial establishment, which we will explain as follows:

¹ See: Helou Abou Helou and Zuhair Abbas Karim, *op. cit.*, p. 247.

First: Goods and Merchandise Goods are those items prepared for sale, whether manufactured or raw materials. Merchandise may be an essential element of a commercial establishment depending on the type of activity, as is the case with textile and food trade, or it may not be an element of the commercial establishment at all, as is the case with service establishments such as video game stores, brokerage, and commission agencies¹.

The Algerian legislator's recognition of e-commerce does not mean that the electronic commercial base does not include goods and merchandise. Rather, it varies according to the type of activity, except that its presentation is via electronic communications. This is stipulated in Paragraph 1 of Article 6 of Law 18-05 on e-commerce, which states: "Electronic commerce: the activity by which an electronic supplier offers or guarantees the provision of goods and services remotely to an electronic consumer, via electronic communications." The activity of an electronic supplier often consists of electronic services, such as the electronic advertising and promotion services stipulated in Paragraph 6 of the same article. Second: Equipment and machinery. This refers to all movable means, not offered for sale, used by the store owner in the conduct of his commercial activity, such as machines used in manufacturing or repair workshops, vehicles used for transportation, air conditioning units, display equipment, and office furniture². Equipment and machinery may or may not be an important component of a business, depending on the type of activity, as is the case with sewing and embroidery shops, which require machines specifically designed for this purpose. The type of equipment may also vary, both quantitatively and qualitatively, depending on the type of business activity, including "electronic business", which may require computers, printers, scanners, and other devices.

Third: Excluding real estate from the components of a business. There is no dispute that the Algerian legislator, in enumerating the components of a business, does so by way of example and not exhaustively. This means that additional components may be added depending on the type and size of the business, whether traditional or electronic. Because the Algerian legislator did not mention real estate among the components of a business, commercial jurisprudence has differed as to whether real estate is included among the components of a business. We agree

¹ See: Fawzi Mohamed Sami, *op. cit.*, p. 186.

² Article 13 of Executive Decree No. 15-111, dated May 3, 2015, which defines the procedures for registration, amendment, and deletion in the commercial register, as amended and supplemented, provides: "In addition to the documents required for registration in the commercial register for natural persons who are traders and leasing managers referred to in Articles 7 and 11 mentioned above, foreign nationals must also provide a copy of the residence card." Moreover, in order to obtain the professional card for a foreigner, the Algerian legislator requires proof of registration in the commercial register, as stipulated in Article 07 of Executive Decree No. 06-454 of December 11, 2006, concerning the professional card issued to foreigners engaged in commercial, industrial, craft, or freelance activities in the national territory, which states: "A foreigner wishing to carry out commercial activities as a natural person cannot obtain the professional card until proof of registration in the commercial register has been provided." This means that obtaining this card is not a restrictive condition for a foreigner to engage in commercial activity, nor does it constitute an authorization for such activity.

with the view that real estate is excluded from the components of a commercial establishment, as evidenced by the fact that the Algerian legislator did not mention it in Article 78 of the Commercial Code. Had it been otherwise, the legislator would not have omitted it, given the financial value of real estate, as it is one of the most important components of wealth, compared to the other components enumerated in the same article. The legislator was also clear in the first paragraph of the previous article, which stipulated movable assets, excluding real estate, stating: "Movable assets designated for the practice of a commercial activity are considered part of the commercial establishment." Perhaps what supports this interpretation is that the Algerian legislator did not prohibit foreigners from practicing the profession of trade and did not, consequently, deprive them of owning commercial establishments in Algeria under certain conditions¹. Regarding real estate, the general rule prohibits foreigners from owning real estate in Algeria, except as an exception, pursuant to the provisions of Articles 1 and 2 of Decree No. 64-15 of January 20, 1964, relating to freedom of transactions, as amended and supplemented (). If real estate were a component of a business premises, a foreign merchant would not be permitted to own the business premises by extension, in accordance with the rule that whoever owns the whole owns the part. Furthermore, Algerian law has subjected transactions involving commercial premises and real estate to different provisions, such that the sale or mortgage of the business premises does not replace the sale or mortgage procedures for the real estate. If a merchant owns the real estate in which he conducts his commercial activity and then decides to sell his business premises, which is included within the real estate, he will find himself faced with two different transactions: the first relates to the sale of the real estate on the one hand, and the second relates to the sale of the commercial premises on the other. Each transaction is subject to a legal system different from the system governing the other transaction², namely the provisions of the Civil and Commercial Codes. As for the electronic commercial law, there is no room to discuss real estate as a component of it, except in one case, as is the case with traditional commercial establishments. This is when the subject of the commercial activity is the purchase of real estate for resale, in accordance with Article 2 of the Commercial Code. In this case, real estate is treated as merchandise. However, the sale of the commercial establishment in this case does not replace the sale procedures for the real estate³. It is worth noting that real estate by allocation, which is fixed movable assets (materials) allocated for the use of the real estate (Article 683 of the Civil Code), if its owner conducts business in a property

¹ See: Zaidani Toufik, *The Right of Foreigners to Own Real Estate in Algerian Legislation*, *Al-Bahith Journal for Academic Studies*, Issue 2, Volume 05, July 2018, p. 430.

² Jean Bernard Blaise and Recharad DESGORCES, *Droit des affaires*, 9th edition, L.G.D.J, Paris, 2017, p. 264.

³ See: Ahmed Mahraz, *op. cit.*, p. 189.

he owns, is essentially subject to the provisions of the real estate designated for its service. However, this provision does not prevent this movable asset from being considered a component of the commercial establishment. The Egyptian legislator did well, and the Algerian legislator should do the same, by resolving this issue. Article 38 of the Egyptian Commercial Code stipulates that if the merchant owns the real estate in which he conducts business, this real estate is not a component of his business¹.

The Moral Elements of a Business

The moral elements constitute the essence of a business and the foundation of its legal concept. Without them, the concept of a business in its contemporary sense would not be complete. With the emergence of the concept of "e-commerce," the modern concept of a business was consolidated, and the value of the moral elements that comprise a business became more clearly embodied. This had a clear impact on the development of the traditional concept of a business and the emergence of a more modern concept called "electronic commercial law." Faced with rapid technological progress,² Algerian lawmakers had to keep pace with international legislation that recognized this new concept. Law No. 18-05, dated May 10, 2018, relating to e-commerce, was issued. Law No. 18-05, dated May 10, 2018, mentions the most important element of the electronic commercial law: the "electronic consumer" or "electronic customer," which parallels the element of "contact with customers" in the traditional concept of a business. It also includes another new element called the "electronic domain name," which commercial jurisprudence differs in its adaptation to the traditional elements that parallel it in a traditional business. With the exception of customer contact and reputation, not all intangible elements are required to be present in a business premises. They may be present in some premises, or they may not be present, depending on the type of commercial operation. Similar to the tangible elements that comprise a business premises, it is worth noting that the intangible elements are mentioned as examples, not exhaustively. This allows for the addition of other intangible elements not mentioned by the legislator. Nothing is more indicative of this than the opening of the aforementioned Article 78 with the phrase "are considered part" and its conclusion with the phrase "all of this unless the law provides otherwise"³. Therefore, we will suffice with presenting the most important intangible elements that comprise a business premises mentioned by the Algerian legislator in the previous article, as well as the most important newly developed

¹ Same reference, p. 187.

² See: Ahmed Mohamed Abu Al-Rous, *op. cit.*, p. 677.

³ See: Karkadan Farid, "Customer Contact as an Element of the Commercial Establishment: A Comparative Study," *The Academic Journal for Legal Research*, vol. 17, no. 01, 2018, p. 166.

elements that comprise the electronic commercial base, such as the "electronic customer," the "electronic domain name," and the "electronic hosting contract," as follows:

First: The element of contact with customers or the electronic consumer (customer).

Algerian legislators had no need to define the element of customer contact. Commercial jurisprudence has addressed it with a set of definitions that are similar in content. Almost everyone agrees that what is meant by customers or clients is the group of people who are accustomed to dealing with the business. This is the most important element of the business, and the latter cannot exist without "customers". This is confirmed by Paragraph 2 of Article 78 of the Commercial Code, which states: "The business necessarily includes its customers and its reputation." Regarding this idea, French professor Charles Vilar says, "The element of customer contact is the essence of the business, its driving force, and its living cell"¹. Meanwhile, French professors Georges Ripert and René Roblot argue that "the element of customer contact is not merely one of the components of the business, but rather the business itself, and this element affects the existence or nonexistence of the business"². As for Professor Farha Zarawi Saleh, she believes that the element of communication with customers is the backbone of the business, and the latter cannot exist without customers³.

After the Algerian legislator recognized the concept of e-commerce, Paragraph 3 of Article 6 of Law 18-05 on e-commerce defined the electronic consumer (customer) as: "Any natural or legal person who acquires, for a fee or free of charge, a good or service through electronic communications from an electronic supplier for the purpose of final use." By reading the texts of Articles 78 of the Commercial Code and Article 6 of Law 18-05 on e-commerce together, we find that the idea of establishing an e-commerce platform does not conflict with the traditional concept of a commercial establishment, even though it is not stipulated in the new law. The e-customer is, ultimately, the same as the traditional customer; all that matters is that they resort to electronic means in their dealings with the establishment owner, such as electronic payment cards and others. However, by recognizing the e-consumer or e-customer, the Algerian legislator implicitly recognized the e-commerce platform, as the e-customer is the core of the e-commerce platform, and without it, the latter cannot exist. It is noteworthy that the Algerian legislator was not precise in employing the appropriate term, using the phrase "electronic consumer" rather than "electronic customer." This is because the latter phrase is closer and more

¹ Abdel Hamid Al-Shawarbi, *op. cit.*, p. 200.

² See: Karkadan Farid, "Customer Contact as an Element of the Commercial Establishment," *op. cit.*, p. 164.

³ Charles Vilar, *Fonds commerce et marché d'intérêt national, Revue trimestrielle de droit commercial*, Paris, Librairie Sirey, no. 1, Paris, 1973, p. 39.

⁴ Georges Ripert and René Roblot, *TRAITE DE DROIT COMMERCIAL*, vol. 01, volume 01, 18th edition, L.G.D.J, Paris, 2001, p. 329.

accurate than the former, in terms of its conformity with the traditional concept of customer contact stipulated in Article 78 of the Commercial Code. "Electronic customer" is broader in meaning than simply "electronic consumer," as the latter purchases services or goods from the owner of the business for the purpose of final use, as confirmed by the last phrase of paragraph 3 of Article 6 mentioned above. This is not required for the "electronic customer," as is the case for wholesale store owners, who may have regular customers from retail store owners. The latter do not purchase their services or goods for final consumption, but rather for the purpose of remarketing and profit. Therefore, every "electronic consumer" is considered an "electronic customer," and vice versa. The significant financial value of customer contact is evident in assessing the profits of a business, whether in a traditional or online store. The number of customers increases the business's profits, and vice versa. As a result, a business that has lost customers, or whose contact with it has ceased, means the entire business has disappeared¹. In this sense, actions taken against a business whose customers have abandoned it for any reason are considered invalid due to the business's disappearance². However, the element of customer contact is not negated if the merchant temporarily ceases to operate his business for a compelling reason beyond his control, such as the case of force majeure resulting from the 2020 COVID-19 pandemic. It is up to the trial judges to assess whether the cessation has led to the disappearance of customer contact or not, depending on the circumstances of each individual case³. In this regard, the Supreme Court ruled in a jurisprudence dated June 3, 2009, that "the disappearance of the commercial base (FC) due to an earthquake that destroyed the building where the base is used leads to the termination of the lease by operation of law"⁴. Therefore, the legislator has given this element special protection, granting the business owner the right to protect the relationship that binds him to his customers and preventing third parties from misleading them. To avoid the business through illegal means through a lawsuit for unfair competition. Recognizing this right of the business owner to protect the relationship that binds him to his customers does not mean forcing the latter to frequent his business. Rather, it is an automatic relationship subject to the customers' own convictions, and they have absolute freedom in dealing with him, whether they accept or reject him. To consider the element of customer contact, whether it exists or not, merely hypothetical or potential customers are not

¹ See: Karkadan Farid, "Customer Contact as an Element of the Commercial Establishment," *op. cit.*, p. 170.

² Louzi Khaled, "Criteria for Distinguishing Between the Lease of a Commercial Establishment and the Lease of Real Property for Commercial Activity," *Journal of Real Estate and Environmental Law*, vol. 06, no. 10, January 2018, p. 112.

³ *Ibid.*, p. 113.

⁴ Decision of the Commercial and Maritime Chamber No. 539508, dated June 3, 2009, in the case of Société Club Hôtel Club Hotel against the National Office for Promotion and Real Estate Management and others, *Journal of the Supreme Court*, no. 1, 2011, p. 200.

sufficient. Rather, customers must be real and certain. This was confirmed by the Supreme Court in its most recent ruling dated April 1, 2009, when it ruled that "the commercial base does not prove its ownership by the commercial register, which is not even considered one of its elements, as stipulated in Article 78 of the Commercial Code"¹. Registration in the commercial register is not evidence of the formation of real and certain customers. Therefore, considering the element of customer contact is linked to the beginning of the actual operation of the business and its opening to the public, not merely by registration in the commercial register, as confirmed by the French Court of Cassation in its most recent ruling. On December 4, 2013, she stated: "The element of customer contact, as the essential element in the commercial establishment, only exists potentially when obtaining a license to establish a pharmacy, and opening it to the public is the only way to consider the existence of actual and confirmed customers"².

There is no disagreement in Islamic jurisprudence and the judiciary regarding the importance of permanent or fixed customers, who are individuals who have consistently conducted business with honesty, integrity, and integrity. A business with a large number of regular customers who are accustomed to dealing with it is of greater value than a business that only serves occasional customers. As for occasional or transient customers, their importance varies depending on the business's geographical location and the type of service it provides. A business located near a train station or fuel distribution stations on national highways is frequented by more transient or temporary customers than permanent customers. Nevertheless, the business can form a continuous and uninterrupted connection with its customers. Both approaches often combine in a single business. A business located in a populated area has its regular customers among the residents of that area, but it is not limited to them; it also has extensive connections with transient customers³. Until recently, the judiciary linked the element of customer contact to the merchant himself. If a merchant does not have his own customers who visit him personally, he is not considered to have a business, such as if a merchant had a business at an airport. In this case, the customers are not attracted by the business as much as they are by their connection to the airport. Therefore, the owner of the business only benefits from third-party customers, and therefore does not have his own customers. Given that it is a traditional standard that approximates the traditional concept of a commercial establishment, whose value has, for a long time, been linked to the person of its owner⁴, the judiciary has abandoned it and no longer

¹ See: Ahmed Mahrez, *op. cit.*, pp. 189–190.

² PEDAMON Michel and KENFACH Hugues, *Droit commercial*, 4th edition, Dalloz, Paris, 2015, p. 230.

³ See: Abdelhamid El-Chouarbi, *op. cit.*, pp. 201–202.

⁴ PEDAMON Michel and KENFACH Hugues, *op. cit.*, p. 234.

strictly applies it. Instead, it has adopted a modern standard based on “management independence” in the commercial rule¹, which was ruled by the French Court of Cassation in a ruling dated February 5, 2003, stating: “If the lessee company alone managed its shares and sales and paid its subscription directly to the French Electricity Company and its consumption, but was subject to the shopping center’s operating hours and the latter was the one who guaranteed the payment of fees, as well as regulating advertising and setting pricing policy, then the Court of Appeal could have concluded from this that the company “Minit France” did not benefit from “management independence” and could not claim the application of the Commercial Rental Law, because it did not own an independent commercial establishment”². There is no doubt that this modern trend is supported by the development in the concept of the commercial establishment itself, especially after most comparative international legislation recognized the "electronic customer" and, through it, the "electronic commercial base." In the latter, the personal nature of customers no longer holds the same importance that linked them to the owner of the traditional commercial establishment. This is due to the absence of a direct relationship between the electronic supplier and the electronic customer due to the special nature of the digital space in which it operates. In this space, the electronic supplier necessarily resorts to a "hosting service" provider to host it on its server, thus playing the role of an intermediary between the electronic supplier and its electronic customers, as we will discuss later. Although e-commerce websites provide automated and self-services whose mission is to count the number of customers visiting the e-commerce platform, and allow for the precise determination of the number of real and confirmed customers who have actual commercial transactions with the e-commerce store³, the modern standard based on “management independence” in the commercial base seems more appropriate in turn to consider the element of contact with electronic customers. The e-commerce base, like traditional stores, may in turn be within unified digital platforms, which are e-commerce sites, gathered in the same virtual location and subject to unified rules. There is no doubt that applying the standard of “customers’ personal nature” will deny the e-commerce bases that are gathered in a single digital platform the status of a commercial store, while the modern standard based on “management independence” in the commercial base is consistent with recognizing this status. These are

¹ See: Abdelhamid El-Chouarbi, *op. cit.*, pp. 201–202.

² See also: Karkadan Farid, “Customer Contact as an Element of the Commercial Establishment,” *op. cit.*, p. 161.

³ See: Hamadouch Anissa, *The Electronic Commercial Rule*, study day entitled "The Electronic Aspect of Commercial Law," organized by the Faculty of Law and Political Science at Mouloud Mammeri University in collaboration with the Laboratory of Law and New Technologies, no publisher, 23 November 2016, p. 82.

issues imposed by the nature of e-commerce and the privacy that distinguishes it from traditional commerce.

Second: The element of fame (commercial reputation). Fame or commercial reputation refers to the ability of a business to attract customers¹, due to the quality of the goods or services provided by the business owner, the competitiveness of the prices it offers, the popularity of its trade name or trademark, or other elements that make up the business. Fame, in short, is based on trust in the elements that collectively comprise the business, which is the principle upon which commerce in general is based. With the emergence of the concept of e-commerce, the importance of the element of fame has increased, as evidenced by the Algerian legislator's provision for electronic advertising operations, within the provisions of Law 18-05, dated May 10, 2018, relating to e-commerce, in Articles 30 to 34. This is due to the large amount of funds and the number of investors attracted by this method to attract customers and generate profits, which has proven to be a global success with the large and rapid returns it now generates. Some Islamic jurisprudence believes that e-commerce has the potential to attract customers, especially if it provides secure payment methods, adheres to delivery deadlines, provides after-sales services, and honors its legal obligations in contracts. Other Islamic jurisprudence distinguishes between customer contact and reputation, viewing them as two distinct elements of a business. While the former represents the group of regular customers who have become accustomed to dealing with the business, commercial reputation represents the business's ability to attract transient or occasional customers due to its location or the good presentation of its products. As of this writing, we have not found any legal basis or judicial precedent to support this distinction. We believe that the latter stems from an inappropriate translation of the terms "Clientèle," which refers to loyal or regular customers. These customers typically maintain a strong relationship of trust with the business owner. This may take the form of a regular or formal relationship, such as supply contracts (), and "Achalandage," which refers to occasional or transient customers (). This term does not imply fame or commercial reputation; otherwise, what's the point of using a term with a different meaning? The Algerian legislator could have expressed this meaning directly using the phrase "the business necessarily includes its regular and transient customers," as the French legislator did. We believe that the term "customers" includes both, whether permanent or occasional. "Commercial reputation," on the other hand, refers to the business's ability to attract both regular and occasional customers. In any case, we believe that the element of customer contact is inseparable. "Commercial reputation", and we

¹ Ahmed Mahrez, *op. cit.*, p. 190.

see that the legislator mentioned them in conjunction and not as a distinction in the text of paragraph 02 of Article 78 of the Commercial Law, stating: “The commercial establishment necessarily includes “its customers and its reputation”, as the ability of the commercial establishment to attract customers is the essential determinant of the element of contact with customers, and represents a vital element in determining the value of the establishment, as they are two sides of the same coin¹, as the more the reputation of the commercial establishment increases, the more customers there will be, and vice versa. In other words, it can be said that "customer contact" and commercial reputation are two distinct yet interconnected elements, neither of which can replace the other nor be separated from it.

Others believe that the right to contact customers is a personal element closely related to the merchant, while commercial reputation represents a tangible element linked to the business itself and its distinctive qualities and characteristics that enable it to attract customers, such as a good location, luxurious appearance, and meticulous organization.

If we have an opinion on this distinction, it seems extremely reductive. We have not found any legal basis or judicial precedent to support it, and we have hardly seen any presence of it in practical reality. Rather, this interpretation takes us back to the traditional and old concept of the business, which links the latter to the person of its owner. This means that the latter's death means the demise of the entire business, which is incorrect². Perhaps what supports this interpretation is the recognition by comparative international legislation of the "electronic customer." Undoubtedly, the specific nature of the latter's dealings with the "electronic supplier" differs from the nature of the relationship between customers. In the case of a traditional retailer, while the right to contact customers, in this latter case, is a personal element closely related to the merchant, the relationship between the "e-customer" and the "e-supplier" is not direct. Rather, the latter resorts to "e-hosting" service providers as intermediaries on websites. Consequently, a direct personal relationship between the e-customer and the e-shop owner is inconceivable, and in many cases, the customer may not even be aware of its existence. If we accept the aforementioned distinction, then "e-shops" would cease to exist, lacking the pillar upon which the concept of a retail store is based in its contemporary sense: the element of customer contact.

Third: The Trade Name, Trade Emblem, or Domain Name (Le nom de domaine)

The trade name is the name used by a merchant on the storefront of their shop, on invoices, or in advertisements to distinguish themselves from other shops. This name could be the personal

¹ See: Abbas Helmi, *Commercial Law*, University Press Office, Algeria, 1983, p. 67.

² Thibault Verbiest, Maxime Le Borne, *op. cit.*, p. 146.

name of the merchant who owns the shop, and it may be modified, such as “Al-Hajj Ibrahim and Sons,”¹ or it may be an innovative designation that replaces the merchant’s actual name, provided it corresponds to reality. In this case, it is referred to as the trade emblem, such as “Ibn Badis Library” or “Ali Baba Store” or “Golden Salon.”² The trade emblem enjoys the same legal protection as the trade name and holds financial value as part of the commercial establishment, because of the impact it creates on customers. In fact, it may even be the most important element if the commercial establishment is a newspaper or a television channel. In this context, the sale of the trade name or emblem is, in essence,³ the sale of the commercial establishment itself, even if the sale pertains solely to the name or emblem.

It is important to distinguish between the “trade name” (le nom commercial) and the “trade emblem” (l’enseigne). The Algerian legislator was not precise in translating the latter term, using instead the phrase “” (which literally means “commercial address”), whereas this phrase is actually a translation of “l’adresse commerciale,” which is one of the mandatory data elements in the commercial register used to specify the location of the business premises for addressing the merchant (paragraph 02 of article 03 of Executive Decree No. 06-222, which defines the template and content of the commercial register extract).

As for the domain name (Le nom de domaine), it was defined in paragraph 08 of article 06 of Law No. 18-05 on electronic commerce as:

“A string of letters and/or numbers that is standardized and registered with the national registry of domain names, and that allows for identification and access to the electronic website.”

It serves as a password, without which an online customer cannot access the electronic supplier’s website. In other words, it is a tool for searching, accessing, and publishing information,⁴ such as “https://www.amazon.com.”

Legal scholars differ on the legal nature of the domain name and whether it constitutes part of the components of an electronic commercial establishment. Some scholars argue that the domain name is merely a technical system that does not give rise to any rights. They believe that the purpose of using the domain name in websites is solely to address technical issues and that it therefore does not possess any financial value.

¹ See: Ahmed Mahrez, previously cited, p. 191.

² See: Mostafa Kamal Taha, Wael Anwar Banduq, *Principles of Commercial Law*, previously cited, p. 657.

³ See: Hammadouch Anissa, previously cited, p. 84.

⁴ See: Rasha Mohamed Taysir Khattab, Maha Youssef Khassawneh, "The Application of the Legal System of the Commercial Premises to the E-Commerce Website," *Journal of Sharia and Law*, College of Law, UAE University, Issue 46, 2011, p. 464.

While the jurisprudence and case law in both France and Belgium tend to liken the “**domain name**” in the context of electronic commercial establishments to the “**trade name**” or “**commercial sign**” in the context of traditional commercial establishments¹, this approach was confirmed by the Paris High Court in its order dated July 27, 2000, which ruled that: “The legal protection of a domain name on the Internet is subject to the same rules as the protection of a trade name, which can only be acquired through actual use.”²

As for the Algerian legislator, it has clarified its position regarding the legal nature of the “**domain name**” in paragraph 2 of Article 9 of Law No. 18-05 on electronic commerce, which stipulates the mandatory registration of the domain name in order to engage in electronic commercial activity, stating:

“No electronic commerce activity may be carried out except after the domain name is registered with the National Center for the Commercial Register.”

This provision makes it clear that the “**domain name**” is considered an essential component of the electronic commercial establishment. In fact, the Algerian legislator has considered it a mandatory element—without it, the electronic commercial establishment does not exist. We tend to support the view that equates the “**domain name**” in the electronic commercial establishment with the “**trade name**” or “**commercial sign**” in the traditional commercial establishment. This is evidenced by the fact that the combination of letters and numbers that make up the “**domain name**” is typically derived from the trade name or commercial sign itself, as in the case of Amazon, whose domain name is “https://www.amazon.com.”

In Algeria, Article 8 of Law No. 18-05 on electronic commerce requires that the domain name hosted in Algeria must end with either the international extension “.com” or the national extension “.dz.”

Fourth: The Right to Lease or the Electronic Hosting Contract

The **right to lease** refers to the right arising from the rental relationship between the property owner (lessor) and the merchant (lessee), which grants the latter the right to occupy and use the premises for commercial activity. The Algerian legislator has regulated the specific provisions related to this right in Title II of Book II of the Commercial Code under the heading “Commercial Leases” (Articles 169 to 202).

Whether the rented property is a building (structure) or bare land on which commercial structures are built either before or after the lease (Article 169 of the Commercial Code)—as is the case with activities like sand and gravel sales—the **right to lease** remains significant.

¹ Thibault Verbiest, Maxime Le Borne, previously cited, p. 147.

² Tribunal de grande instance, Paris, interim relief, July 27, 2000, No. RG: 00/07681, No. 11, p. 04.

The **right to lease** is considered one of the important elements of the commercial establishment in cases where the merchant rents the property or a part of it to conduct commercial activity. This is the most common scenario, such as a hotel adjacent to an airport or a passenger transport station. It may be of lesser importance in the case of wholesale traders. However, it may not even constitute an element of the commercial establishment at all, such as in the case of itinerant merchants or when the merchant owns the property in which they conduct their commercial activity. This typically applies to large commercial projects like shopping centers, banks, and similar enterprises, where the property owned by the merchant is not part of the elements comprising the commercial establishment¹.

Although the Algerian legislator recognized, in Article 78 of the Commercial Code, the right to lease as one of the elements constituting the commercial establishment, it effectively stripped this element of its substance and rendered it meaningless through the introduction of Article 187 bis by Law No. 05-02 of 6 February 2005, which amended the Commercial Code. Paragraph 02 of this article stipulates:

"The tenant is required to vacate the leased premises at the end of the term specified in the contract without the need for a notice of eviction and without the right to the compensation for loss of goodwill provided for in this law, unless otherwise agreed by the parties."

Although the provisions of the previous article apply only with immediate effect, according to Article 187 bis 01, it is clear that the Algerian legislator has favored the interests of the lessor over those of the tenant — even at the expense of one of the most important elements of the commercial establishment: the right to lease. The existence or absence of the commercial establishment can hinge on this right, which the new provision has made entirely subject to the will of the lessor. The lessor can,² at their discretion, choose to renew the lease — in which case the commercial establishment survives — or to refuse renewal — in which case the commercial establishment effectively ceases to exist with the expiration of the contract. In other words, the Algerian legislator has, through this imbalanced provision, turned the entire commercial establishment — not just the right to lease — into a contractual relationship entirely at the mercy of the lessor's will, beginning and ending with their decision.

In addition to this unjustified imbalance created by the Algerian legislator between the lessor and the tenant, the tenant is left vulnerable to the lessor's arbitrariness or deceit, without any safeguards or rights. It goes without saying that the good exploitation of the commercial

¹ See: Abdelhamid Al-Shawarbi, previously cited, p. 203. Also see: Ahmed Mahrez, previously cited, pp. 191–192.

² See: Salmani Al-Fadhil, "The Commercial Rule in Algeria after 2005," *Academic Journal of Legal Research*, Volume 11, Issue 1, July 2020, p. 230.

establishment by the tenant is a principal and direct cause of the increase in the financial value of the leased property. Yet, the lessor can compel the tenant to vacate the premises at the end of the contract and then re-lease them at a higher rent or exploit them themselves, as there is no legal barrier to this. In practice,¹ the lessor exercises their right to refuse the renewal of the commercial lease and, in effect, seizes the two most important elements of the commercial establishment: customer relationships and reputation. This constitutes a form of “legalized unfair competition.”

As for electronic commercial establishments, this issue does not arise due to the unique nature of the digital space in which e-commerce takes place. Instead, e-commerce requires recourse to what is known as the “hosting contract” (*Le contrat d’hébergement*). This is a contract concluded between the “hosting service provider” and the “electronic vendor,” by which the provider hosts the electronic vendor’s website on their information server, thereby allowing electronic customers to access the commercial website via the internet.

Although the Algerian legislator did not mention this element in Law No. 18-05 on electronic commerce, the practical exercise of e-commerce necessarily requires this service.

Furthermore, recognizing the element of “electronic hosting” does not conflict with the non-exhaustive list of elements constituting the commercial establishment set forth in Article 78 of the Commercial Code. Indeed, some argue that its importance is equivalent to that of the “lease contract” in a traditional commercial establishment. Some have even called it the “informational lease contract,” where the “hosting service provider” acts as the lessor and the “electronic vendor” as the lessee, with the electronic space on the hosting provider’s server serving as the leased premises.²

The refusal to renew the electronic hosting contract does not raise any significant issues compared to the refusal to renew a traditional lease contract. This is not because of its lack of importance in forming the electronic commercial establishment, but rather because there are thousands of hosting service providers available across the internet. There is therefore no need to establish special legal protection for the electronic vendor who conducts their e-commerce activities within the space allocated to them by the hosting provider. Moreover, changing hosting providers does not affect the continuous visibility of the e-commerce website at all.³

Fifth: Industrial and Commercial Property Rights

¹ See: Salmani Al-Fadhil, *op. cit.*, pp. 229, 230.

² See: Hamadoush Anissa, *op. cit.*, p. 85.

³ See: Rasha Muhammad Tayseer Khattab, Maha Yousef Khasawneh, *op. cit.*, p. 377.

These are innovative rights recognized for every individual who owns them, granting them the exclusive right to exploit them in accordance with legally established conditions, and protected by law against any infringement. The importance of these rights varies from one commercial establishment to another depending on the nature of the activity. If present, they play a significant role in attracting customers to the commercial establishment and activating its operations. In other cases, such rights may not exist if the nature and scale of the activity do not require them.¹

These rights encompass a variety of elements that may be exploited in the commercial establishment, such as patents, industrial designs and models, trademarks, trade data, and the name and trade emblem we previously discussed, as well as the protection of layout designs of integrated circuits and appellations of origin.

In fact, studying all these elements is part of the curriculum for the subject of “Intellectual Property” in both the public and private law departments. Until then, we will suffice here with a brief definition of the three most important elements: patents, industrial designs and models, and trademarks, as follows:

Patents

Article 02 of Ordinance No. 03-07 of 19 July 2003 on patents defines a patent as a document granted by the National Institute of Industrial Property to protect an inventor’s idea that provides a practical solution to a specific technical problem. The inventor may assign the patent, with or without compensation, to a commercial establishment, granting it the right to exploit it and be legally protected against any infringement of this right.²

Industrial Designs and Models

Article 01 of Ordinance No. 66-86 of 28 April 1966, concerning industrial designs and models, provides that:

“A design is any arrangement of lines or colors intended to give a specific appearance to an industrial or handicraft product. A model is any shape that can be formed and is either colored or not, or any industrial or handicraft product that can be used as an original image for the production of other units, and which is distinguished from similar models by its external appearance.”

¹ See: Karkadan Farid, Transactions on Commercial Establishments That Do Not Transfer Ownership, op. cit., p. 63.

² See: Ahmed Mahrez, op. cit., pp. 192, 193.

According to Article 02 of the same Ordinance, ownership of the design or model belongs to the person who first created it, and they have the right to exploit it in accordance with the legal provisions.

Common examples of designs include patterns on textiles or the graphic designs used in certain women's fashion lines, which create a distinctive impression in the customer's mind, helping them to accept or reject the product based on its appearance. As for industrial models, examples include the shapes and structures of cars, and the distinctive shapes of bottles for soft drinks or perfumes, which differentiate them from other similar goods.

3- Trademark:

Article 01 (paragraph 01) of Ordinance 03-06 dated July 19, 2003, relating to trademarks, defines the latter as:

"All signs capable of graphic representation, including words such as personal names, letters and numbers, drawings or pictures and shapes distinctive of goods or their packaging, and colors alone or in combination, all of which are used to distinguish the goods or services of a natural or legal person from those of others."

According to the same Article (paragraph 02), a trademark may be collective when it is used by different entities under the control of its owner.

The same Article (paragraph 05) distinguishes the trademark from the trade name, the latter being the designation or commercial sign identifying the business establishment, as we have seen previously.

The trademark is among the most important elements constituting the commercial establishment, if it exists, because of its impact on the public's perception. Notable examples of famous trademarks include the image of the green crocodile used by the French clothing company "Lacoste," and the bitten apple image used by the American electronics company "Apple" on its products.

Once registered, the trademark grants its owner the exclusive right of exploitation, which entitles them to prevent others from using similar marks for goods or services of the same type for commercial purposes when such use is likely to cause confusion in the public's mind.¹

Conclusion:

From the above presentation of the components of the commercial establishment, we conclude that the latter is not merely the physical location where the merchant conducts their

¹ See: Karkadan Farid, Transactions on Commercial Establishments That Do Not Transfer Ownership, op. cit., p. 62.

business. Rather, it consists of the set of movable, tangible and intangible assets that the merchant uses in conducting their business, with these components collectively forming the commercial establishment. Crucially, this set must include the elements of customer contact and goodwill.

This definition, and the elements that make up the traditional commercial establishment, do not conflict with the concept of an "electronic commercial platform," which has some distinctive features compared to the traditional commercial establishment. These include its operation in the virtual space and the presence of specific elements unique to electronic commerce, namely the "domain name" and the "electronic hosting agreement."

Because the elements listed in Article 78 of the Commercial Code are illustrative rather than exhaustive, it is rare for all of them to be present in a particular commercial¹ establishment. Moreover, the set of elements may vary depending on the nature and scale of the business. Among the elements not mentioned in the previous Article of Algerian law are "literary and artistic property rights," which are the rights of authors and artists to their literary, artistic, and scientific creations. These rights may, when present, be considered elements of the commercial establishment—indeed, they may be among its most important elements if the establishment is a publishing house or an authorship business.

We also find the element of "licenses and accreditations," which are required for certain regulated commercial activities, as we have previously seen. However², these licenses and accreditations are only considered part of the commercial establishment when they are not personal or non-transferable. In this respect, the Supreme Court, in its most recent ruling dated April 18, 2019, affirmed that licenses related to firearms are personal and subject to specific administrative procedures stipulated by law. These licenses expire upon the death of their holder and are not automatically transferred to any other person, even if they are a legal heir.

Moreover, "registration in the commercial register" is also not considered one of the licenses or authorizations that might constitute an element of the commercial establishment. Rather, it is merely an obligation that falls upon the trader as soon as they engage in a particular commercial activity. This was confirmed by the Supreme Court in a ruling dated April 1, 2009, which held that "the ownership of a commercial goodwill (fonds de commerce) is not established by the

¹ See: Mustafa Kamal Taha and Wael Anwar Bundak, *Principles of Commercial Law*, op. cit., p. 647.

² Misdemeanor and Contravention Chamber Decision No. 0820128, dated April 18, 2019, in the case of (B.M.) and (Sh.H.) v. the Public Prosecution, *Supreme Court Journal*, Issue 1, 2019, p. 152.

commercial register, which is not, in fact, one of its constituent elements as stated in Article 78 of the Commercial Code."¹

In our view, the "ability of the element to attract customers" is the determining criterion for whether it constitutes one of the components of a commercial establishment. In this context, "rights and debts" are not considered among these components, as they do not form part of the commercial exploitation itself but are merely a positive or negative outcome of such exploitation. It is also inconceivable for these "rights and debts" to directly or indirectly attract customers in the same way that other elements do. This interpretation is supported by the fact that "accounting books and correspondence" of the trader, which contain the "rights and debts," are not considered part of the commercial establishment's components. The legislator has obligated the trader to keep them for ten years from the date they are closed, which means they do not transfer with the other elements of the commercial establishment when it is disposed of.²

Section Two:

The Distinctiveness of the Commercial Establishment from Other Assets

The commercial establishment has a special nature that sets it apart from other assets. This distinctiveness manifests in several aspects, some of which have been directly recognized by the legislator in the first paragraph of Article 78 of the Commercial Code, which stipulates the movable and commercial nature of the commercial establishment by stating: "Movable assets allocated to the exercise of a commercial activity shall be considered part of the commercial establishment." Other aspects have been settled by commercial jurisprudence, recognizing the commercial establishment as an intangible asset, distinct and independent from its constituent elements. We will address these characteristics as follows:

Section One:

The Commercial Establishment as a Movable Asset

Although the Algerian legislator did not include real estate among the constituent elements of the commercial establishment, it was unequivocal in the first paragraph of Article 78 of the Commercial Code, which refers solely to movable assets and excludes real estate by stating: "Movable assets allocated to the exercise of a commercial activity shall be considered part of the commercial establishment." Consequently, the rules applicable to movable assets—unless specifically excluded—apply to both the tangible and intangible elements comprising the

¹ Commercial and Maritime Chamber Decision No. 532985, dated April 1, 2009, in the case of (M.A.) v. the heirs of (A.S.) and his associates, Supreme Court Journal, Issue 2, 2010, p. 187.

² See: Ahmed Mahrez, *op.cit.*, p. 183.

commercial establishment. Thus, if a trader bequeaths all of their movable assets to another, the commercial establishment is included in that bequest.

This characteristic is significant in terms of the law that governs each type of asset. The commercial establishment is subject to the provisions of commercial law, while real estate is governed by civil law—except in cases where the commercial activity involves purchasing real estate for the purpose of resale, as provided for in Article 2 of the Commercial Code. In such cases, real estate takes on the status of goods. However, the sale of the commercial establishment in these circumstances does not obviate the need to follow the special procedures applicable to the sale of real estate.¹

Section Two:

The Commercial Establishment as an Intangible Asset

We have seen that the commercial establishment comprises both tangible and intangible elements, with the latter constituting the essence of the commercial establishment. Although commercial jurisprudence unanimously recognizes the intangible nature of the commercial establishment, the presence of tangible elements has given rise to differing opinions on how to establish this intangible nature. Some have considered it a legal grouping of assets, while others view it as a factual grouping. A third opinion regards it as an intangible property right. We will briefly present these views in the following subsections:

First: The Theory of the Legal Grouping

This theory considers the commercial establishment as a legal grouping of assets, possessing its own distinct patrimony separate from the general patrimony of the trader. Proponents of this theory consider the commercial establishment to be a legal person, enjoying its own legal personality independent of the trader who owns it. Accordingly, the commercial establishment would have its own rights and obligations arising from its commercial exploitation, separate from the rights and obligations of the trader personally.

This theory is supported by German jurisprudence, which recognizes the possibility of multiple patrimonies for a single person. One consequence is that the debts of the commercial establishment are secured solely by its own assets, and not by the trader's other assets, and vice versa.²

However, adopting this theory does not align with the position of the Algerian legislator, which upholds the principle of the unity of patrimony. This is confirmed by paragraph 1 of Article 188 of the Civil Code, which states: "All the debtor's assets guarantee the payment of

¹ The same reference, p. 189.

² See: Karkaden Farid, "The Special Nature of Commercial

their debts." Moreover, it contradicts Article 49 of the Civil Code, which enumerates legal persons without mentioning the commercial establishment. Additionally, adopting this theory conflicts with the fact that the transfer of a commercial establishment does not, by operation of law, include the automatic transfer of rights and debts arising from its exploitation to the transferee.

Second: The Theory of the Factual Grouping

In response to the criticisms of the first theory, another opinion suggests that even if the commercial establishment is not a legal grouping of assets, it can be viewed as a factual or practical grouping of assets that have come together to achieve a common goal: the exploitation and investment of the commercial establishment. However, this grouping does not create its own patrimony separate from the general patrimony of the trader.¹

One consequence of this theory is that each element of the commercial establishment retains its own independent identity, its unique nature, and the specific legal regime to which it is subject, even though all these elements are united and collectively form the commercial establishment.

Nevertheless, this theory has also been criticized. The factual grouping of assets does not have any legal meaning, since any recognized grouping of assets is legal in nature. This brings us back to the first theory and subjects it to the same criticisms. As the law does not recognize factual groupings, any such grouping would be contrary to legal principles and therefore without legal effect—this being the situation of the commercial establishment according to this theory.²

Third: The Theory of Intangible Ownership

In response to the criticisms and limitations of the two preceding theories, a third opinion has emerged, asserting that the commercial establishment is an intangible form of ownership.

According to this view, it is neither a legal grouping of assets nor a factual grouping.

Proponents of this theory rely primarily on the mandatory elements that are essential for the existence of the commercial establishment, namely customer relations and goodwill.

Goodwill, in particular,³ is the cornerstone of the modern concept of the commercial establishment. The presence of tangible elements in the commercial establishment is a relative matter that does not determine the existence or nonexistence of the establishment itself. In

¹ Establishments between Algerian Legislative Texts and French Judicial Rulings," *Academic Journal of Legal Research*, Volume 10, Issue 3, December 2019, p. 432.

² See: Karkaden Farid, *The Special Nature of the Commercial Establishment between Algerian Legislative Texts and French Judicial Rulings*, op.cit, p. 434.

³ See: Karkaden Farid, *The Special Nature of Commercial Establishments between Algerian Legislative Texts and French Judicial Rulings*, op. cit., p. 434.

other words, a commercial establishment may consist solely of intangible elements, but it cannot be comprised solely of tangible elements, regardless of their value.

Moreover, transactions concerning only the tangible elements—such as goods and equipment—do not result in the dissolution of the commercial establishment as a unified entity, provided that sufficient elements remain to ensure the continuity of the business. For example, a trader operating a commercial establishment for selling mobile phones may choose to stop selling them and instead offer only recharging services. This would not affect the existence of the commercial establishment, as long as the core elements of customer relations and goodwill remain intact.

The validity of this theory is further supported by the emergence of the concept of the electronic commercial establishment. In this context, the importance of intangible elements becomes even more pronounced, particularly with the advent of new intangible elements specific to online businesses, such as domain names and electronic hosting contracts.

Meanwhile, the significance of tangible elements has diminished in many online commercial activities,¹ especially with the development of electronic payment services that eliminate the need for the “electronic customer” to directly interact with the “electronic provider,” who instead relies on electronic hosting service providers as intermediaries on these platforms. This theory has gained widespread acceptance in the majority of legal scholarship, as it aligns with the true nature and essence of the commercial establishment, which is fundamentally intangible, despite being composed of both tangible and intangible elements.²

Section

Three:

The Commercial Nature of the Commercial Establishment

It is essential that the commercial establishment, in all its elements—both tangible and intangible—be dedicated to the exercise of a commercial activity. Without this commercial purpose, it does not qualify as a commercial establishment. Many activities involve customer interaction and have a client base, such as doctors’ clinics,³ lawyers’ and engineers’ offices, but these activities do not constitute a commercial establishment due to their inherently civil nature. The activity must be commercial according to Articles 2 and 3 of the Commercial Code. The Algerian legislator was unequivocal in paragraph one of Article 78 of the Commercial Code, stating: “Movable assets allocated to the exercise of a commercial activity shall be considered part of the commercial establishment.”⁴

¹ Ibid., p. 432.

² See: Ahmed Mahrez, *op. cit.*, p. 180.

³ Abdel Hamid Al-Shawarbi, *op. cit.*, p. 196.

⁴ See: Helou Abu Al-Helou, Zuhair Abbas Karim, *op. cit.*, pp. 243, 244.

As a result, the transfer of a commercial establishment necessarily entails the transfer of the elements of customer relationships and goodwill, as they constitute the core of the commercial establishment and it cannot exist without them. Conversely,¹ the transfer of the customer relationship element is not permitted in activities of a civil nature, since customers in such cases are linked to the person conducting the activity rather than the nature of the activity itself.

Moreover, it is not sufficient for a commercial establishment to exist merely by engaging in a commercial activity; this activity must also be lawful, meaning that it does not contravene public order or morality. Whether the activity is expressly prohibited by law—such as drug trafficking or trading in human organs—or is an activity requiring authorization or licensing that is carried out without such prior authorization, it does not grant its practitioner the status of a trader nor can it be considered as establishing a commercial establishment. This does not exempt the practitioner from criminal liability as provided by law.

Section

Four:

The Independence of the Commercial Establishment from its Constituent Elements

Analyzing the legal effects of the commercial establishment and its specific rules in parallel with the legal effects of its constituent elements and the rules governing each of them separately leads to the conclusion that the commercial establishment, as a unified entity, has an identity independent of its constituent elements. Likewise, these constituent elements do not lose their characteristics or merge entirely into the commercial establishment merely because they contribute to its formation. Rather, each element retains its own independent identity, nature, and the specific legal regime to which it is subject, despite their integration and common role in forming the commercial establishment.

For example, the commercial establishment is governed by commercial law, while its constituent elements are subject to different legal frameworks. Patents are governed by Ordinance No. 03-07 of July 19, 2003, trademarks by Ordinance No. 03-06 of July 19, 2003, and industrial designs by Ordinance No. 66-86 of April 28, 1966, among others.²

Consequently, the disposal of one of the constituent elements of the commercial establishment does not lead to the dissolution of the commercial establishment or to the elimination of the unity arising from the combination of these elements. Instead, the commercial establishment continues to exist as long as the core elements of customer relationships and goodwill remain.

¹ See: Farha Zarawi Saleh, *op. cit.*, pp. 203 ff.

² See: Karkaden Farid, *The Special Nature of the Commercial Establishment between Algerian Legislative Texts and French Judicial Rulings*, *op. cit.*, p. 438.

Section Two:

Protection of the Commercial Establishment

The element of customer relationships constitutes the essence and core of the commercial establishment. Its significant financial value is reflected in the profits of the commercial establishment, whether it is a traditional or electronic commercial establishment. The more customers there are,¹ the higher the profits of the commercial establishment, and vice versa. For this reason, the law has provided special protection to this element by granting the owner of the establishment the right to protect the relationship with their customers and to prevent others from misleading them or diverting them away from the establishment by unlawful means, through the action of unfair competition.

Translation:

In addition to legal protection, merchants have found another suitable means in the contracts they conclude to protect their commercial establishments from unfair competition. This is referred to by jurists as “contractual protection,” which, in some cases, is the only way to protect the relationship between the commercial establishment owner and their customers.

An unfair competition lawsuit is established based on the general rules of tort liability, while contractual protection for the commercial establishment is established based on the general rules of contractual liability. Below, we will address both methods in the following sections:

Section

One

Legal Protection of the Commercial Establishment (Unfair Competition Lawsuit)

Commerce is essentially based on the principle of "freedom of commerce," which is expressed in Article 61 of the 2020 Constitutional Amendment, stating: “Freedom of commerce, investment, and enterprise is guaranteed, and exercised within the framework of the law.” This principle inherently includes the obligation of free competition, but this competition must be lawful. If it is unlawful, the law allows the aggrieved party to claim compensation from those who engaged in such acts through an unfair competition lawsuit.

In reality, this lawsuit is a legal remedy recognized by the judiciary by applying the general rules of tort liability, which stipulate that any act—regardless of its nature—committed by a person that causes harm to others obliges the one who caused the harm to compensate for it. The Algerian legislator has recognized this lawsuit in Article 48 of Ordinance 03-03 of 19 July 2003, relating to competition, as amended and supplemented, which states: “Any natural or legal person who considers themselves harmed by a restrictive practice of competition,

¹ Ibid., p. 436.

according to the provisions of this ordinance, may bring an action before the competent judicial authority in accordance with the applicable legislation.” It has also been stipulated in some special laws, such as Ordinance 03-06 of 19 July 2003, related to trademarks. Article 28 of this ordinance states: “The holder of the trademark registration has the right to file a lawsuit against any person who has committed or is committing an infringement of the registered trademark. The same right applies against anyone who has committed or is committing acts suggesting that an infringement will be committed.”¹

It is noted that the Algerian legislator has also relied on the general rules of tort liability by applying Article 124 of the Civil Code, as the illegality of the competition constitutes a fault that causes harm and obliges the liable party to compensate the owner of the injured establishment. However, there are some specific features that distinguish an unfair competition lawsuit from other civil lawsuits. We will discuss this lawsuit through the elements on which it is based in the following three subsections:

Subsection One: Manifestations of the Fault Element in Unfair Competition Lawsuits

For the fault element in an unfair competition lawsuit to be present, there must be competition characterized by unlawfulness. This does not refer to prohibited competition, whether absolutely prohibited—such as drug trafficking, trafficking in human organs, and so on—or conditionally prohibited without prior authorization or licensing, such as pharmacy activities or the sale of alcoholic beverages.²

Furthermore, the competition must be real, between two or more parties engaged in similar or comparable commercial activities. In this context, complete identity between the two activities is not required; it is sufficient that they are similar enough for one to have an effect on the other’s customers. As a result, there is no unfair competition between the owner of a commercial establishment selling school supplies and a charitable association that sets up for the same purpose without seeking profit.

An unfair competition lawsuit does not require the element of bad faith or intent to harm the competitor. It is sufficient that the fault be either intentional or the result of mere negligence or ignorance of the actual harm that may be caused to the competing business owner. This is why French jurisprudence shifted from the narrow concept of unfair competition, which

¹ See: Ahmed Mohamed Abu Al-Rus, *op. cit.*, p. 689.

² See: Hani Mohamed Dawidar, *op. cit.*, p. 291.

required intentional fault, to the broader concept of unfair competition, in which the fault can be either intentional or unintentional.

Contrary to the general rules of civil liability, it is not necessary for the fault to have actually occurred; it is enough for a person to commit acts suggesting that a fault is likely to be committed. This is stipulated in Article 28 of Ordinance 03-06 of 19 July 2003, concerning trademarks, which states:

“The holder of a trademark registration has the right to file a lawsuit against any person who has committed or is committing an infringement of the registered trademark. The same right applies to any person who has committed or is committing acts suggesting that an infringement will be committed.”¹

Judicial applications, especially in France, have revealed countless examples of unfair competition practices. The Algerian legislator recognized some of these examples within Articles 26 to 28 of Law 04-02 of 23 June 2004, which defines the rules applicable to commercial practices, as amended and supplemented, under the heading “unfair commercial practices.” These examples are provided by way of illustration and not limitation, as practical commercial life and judicial disputes may reveal new forms of unfair competition,² such as electronic piracy of commercial websites. Therefore, we will focus on the three most important forms identified by commercial law scholars:

First: Practices Aimed at Damaging the Reputation of a Competing Business

These are practices that aim to spread false claims undermining the reputation of the merchant, or to denigrate the value of the goods or services they provide, or to spread propaganda with the aim of reducing their actual quality or value. The first paragraph of Article 27 of the aforementioned Law 04-02 addresses this type of practice, stating:

“Unfair commercial practices, as defined in this law, include in particular practices by which an economic operator does the following:

Damaging the reputation of a competing economic operator by disseminating harmful information affecting their person, products, or services.”

Examples of reputation damage against the merchant personally include spreading rumors that they are on the verge of bankruptcy, questioning their patriotism, alleging adherence to an unpopular political ideology, or claiming conversion to a religion contrary to the prevailing religion of the state—all with the aim of driving customers away. As for defamation of goods or services, this involves falsely claiming that they are defective or do not meet legal

¹ Ahmed Mahrez, *op. cit.*, p. 204.

² Cass. Com, January 9, 2019, No. 17-18, 350, Bulletin 2019, No. 64.

specifications, that they are harmful to health and pose dangers, or that the product is “not halal.”

In judicial applications of this type of conduct, the French Court of Cassation, in a recent decision dated 9 January 2019, stated:

“Even in the absence of a direct and active competitive relationship between the concerned parties, the dissemination of harmful information by one of them, which is likely to damage the reputation of a product marketed by the other, constitutes an act of defamation—unless the information in question relates to a matter of public interest and is based on a sufficiently factual foundation.”

Secondly: Practices That Create Confusion and Deception

These refer to acts that create confusion for customers, whether related to the commercial establishment as a whole—as stated in paragraph 08 of Article 27 of Law 04-02, which reads:

“Establishing a commercial establishment in close proximity to that of a competitor in order to exploit its reputation outside the established customs and competitive practices”—or related to an element of the commercial establishment, such that it creates in the customers’ minds a resemblance leading to confusion and an inability to distinguish between them. For example, a merchant adopting a trade name similar to that of another, or imitating the trademark of another merchant.

The Algerian legislator addressed this type of unfair competition in Law 04-02, where Article 27 in its paragraphs 02 and 03 states:

“Unfair commercial practices, as defined in this law, include in particular practices by which an economic operator:

1. Imitates the distinctive signs of a competing economic operator or copies their products, services, or advertising to attract customers of that operator by planting doubts and illusions in the consumer’s mind.
2. Exploits a distinctive technical or commercial skill without authorization from its owner.”

However, the judiciary requires for the confusion that creates liability to be based on actions that are genuinely similar and identical to the elements involved in the confusion, such that they have an impact on the other competitor’s customers. This was confirmed by the French Court of Cassation in a ruling dated 8 July 1955, stating:

“The rejection of the request by the beauty institution ‘Science et Beauté’ to prohibit the use of its trade name by a periodical magazine is legally justified, since the parties operate in

different and unrelated fields of activity, targeting different categories of customers, and there was no possibility of transferring the claimant's customers to the defendant.”

Thirdly: Practices That Cause Disruption in a Competing Business or in the Market

This type of practice has two forms. The first concerns causing disruption in a competing business and affecting the proper functioning and regular operation of its activities. This is addressed in paragraph 06 of Article 27 of the aforementioned Law 04-02, which states:

“Causing disruption in the organization of a competing economic operator and redirecting their customers using unfair methods, such as destroying or sabotaging their advertising tools, stealing their files or orders, illegal brokerage, and disrupting their sales network.”¹

Such practices can also involve enticing the employees of the establishment and encouraging them to strike or leave their work, with the aim of driving customers away and attracting them to the competing establishment. This is addressed in paragraph 04 of the same article, which reads:

“Enticing employees under contract with a competing economic operator in violation of labor legislation.”

Additionally, these practices may involve using one or more employees working for the owner of a competing business to lure that competitor's customers, or an employee or former partner exploiting trade secrets of the competitor's business. This is stated in paragraph 05 of the same article:

“Benefiting from trade secrets as an employee or former partner and using them to harm the employer or the former partner.”

The second form of this type of unfair competition does not target causing disruption to a specific competitor's business, but rather involves creating disturbances in the market in general. This is stated in paragraph 07 of the same article, which reads:

“Disrupting the organization of the market and causing disturbances therein, in violation of the laws and/or religious prohibitions, particularly by evading the necessary obligations and conditions for establishing, practicing, or conducting a commercial activity.”

An example of this form of unfair competition is “dumping,” which is a negative practice that targets creating general market disruption. It involves a merchant flooding the market with a large quantity of goods sold at below-cost prices. Later, after competitors withdraw from the market to avoid losses, the merchant raises the price again, thereby achieving a monopolistic position that allows them to recoup losses and make even greater profits unfairly.

¹ Cass. Civ. 08 juillet 1955, Gas. Pal., 1955, 2, J, p78.

Other examples of such practices include those that aim to provide an undeserved competitive advantage to the person engaged in the unfair competition, at the expense of their competitors, or misleading commercial practices directed at consumers or clients. For example,¹ a seller might claim in their advertising that their product has unique features that it does not actually possess, such as an herbalist claiming to have effective herbal mixtures to treat serious diseases contrary to reality. This type of practice is addressed in Article 28 of the aforementioned Law 04-02, which states:²

“... any misleading advertising is illegal and prohibited, especially if it:

1. Contains statements or information or visual representations that could mislead the definition of a product or service, or its quantity, availability, or features.
2. Includes elements that could cause confusion with another seller, their products, services, or activities.
3. Relates to a specific offer of goods or services while the economic operator does not have sufficient stock of those goods or cannot ensure the services that should normally be provided in comparison with the magnitude of the advertising.”

Among the judicial applications of this type of misleading commercial practice that violates legitimate competition is the recent decision of the French Court of Cassation dated February 12, 2020, which stated:

“While it is relatively easy to prove the harmful effects of practices that aim to divert customers, attract them to the perpetrator’s business, or disrupt the organization of the competitor’s work—such as the resulting economic consequences for the victim, including the loss of anticipated profit and the certain harm suffered—an order for compensation for the damage caused by these misleading commercial practices, which provide the perpetrator with an unfair competitive advantage at the expense of their competitors, is not contrary to the law.”

Section Two:

Manifestations of the Damage Element in an Unfair Competition Lawsuit

For an unfair competition lawsuit to be valid, the element of damage suffered by the plaintiff—the competing business owner—must be established. It does not matter whether the damage is material, such as disrupting the organization of an economic operator competitor and diverting their customers through unfair means, such as wasting or destroying their advertising materials or hacking the website of an electronic commercial platform, or whether

¹ See: Salman Othman, *op. cit.*, p. 3. See also: Jawad Kazim Darb al-Janabi, *op. cit.*, pp. 6

² Cass. Com, February 12, 2020, No. 17-31.614, Bulletin 2020, No. 174.

the damage is moral, which is actually the more likely scenario given the intangible nature of the commercial establishment and its essential elements, such as damaging the reputation of a competing economic operator by spreading false information that affects their person, products, or services.

Some jurists argue that the damage does not need to have actually occurred to be deemed established; it suffices that it is likely to occur in the future. This view is based on the idea that potential damage to a commercial establishment is, in fact, real damage, because the threat of damage itself is considered damage that can be remedied in kind by removing this threat and ordering the necessary measures to prevent the potential damage. Furthermore, this potential damage can be inferred from the occurrence of acts that usually cause harm to the commercial establishment, as in the case of imitating a trademark, contrary to the general rules of civil liability, which require the victim to prove actual damage.¹

Consequently, some commercial law scholars believe that an unfair competition lawsuit actually goes beyond the scope of civil liability. While the latter aims solely to compensate for damage, the former is also a preventive action aimed at preventing future harm. There are cases in which acts of unfair competition do not directly cause any damage, but the lawsuit is intended to remove the unlawful situation and prevent the occurrence of damage in the future. Therefore, an unfair competition lawsuit protects the property right of the commercial establishment, or more precisely, it protects the right to communicate with customers by relying on certain elements—similar to a claim for recovery, which protects the ownership of tangible property.²

In cases where there are multiple victims, such as in situations of practices that aim to create disturbances in the market generally, each of them may bring a separate action. However, the plaintiff is only entitled to compensation if they prove they have suffered personal damage. The lawsuit is brought against anyone who committed acts of unfair competition or participated in them, such as a printer who prints a counterfeit trademark without authorization from its owner, and their liability for compensation is joint and several in accordance with general rules.

It is worth noting that the reliance by some jurists on the criterion of “potential damage” as the basis for an unfair competition lawsuit is not entirely accurate. It is unacceptable to compensate for damage that may never occur at all.³ We believe that the Algerian legislator

¹ See: Ahmed Mahraz, previously cited, pp. 200–201.

² See: Miloud Salami, “Unfair Competition Lawsuit as a Form of Civil Protection for the Trademark in Algerian Law,” *Dafater al-Siyasa wal-Qanun* (Policy and Law Notebooks), Issue 06, January 2012, p. 183.

³ See: Miloud Salami, previously cited, p. 176.

was accurate in employing the more precise term “imminent damage,¹” as provided in paragraph 02 of Article 29 of Ordinance 03-06 of July 19, 2003, on trademarks, which states: “If the trademark owner proves that an infringement of their rights has become imminent, the competent judicial authority shall decide on the infringement of the rights and order the confiscation of the items and means used in the counterfeiting and their destruction if necessary.”²

The phrase “imminent damage” means that the damage has not yet occurred, but it is certain to occur in the future. In contrast, the phrase “potential damage” means that the damage may or may not occur at all. Because relying on this standard departs from the general rules of civil liability—which aim solely to redress damage that has actually occurred—this exception should not be interpreted expansively and must be applied strictly within its narrow limits.³

The damage may be either certain or imminent, including loss of profit or actual losses suffered. This was affirmed by the French Court of Cassation in its recent ruling dated February 12, 2020, stating:

“If it is somewhat possible to prove the harmful effects of practices that aim to divert customers or attract them to one’s business, or to disrupt the organization of a competitor’s operations — since they have negative economic consequences for the victim, including losses due to missed profits or actual losses suffered — then a ruling for damages arising from these misleading commercial practices that grant their perpetrator an undue competitive advantage over competitors is not contrary to the law.”⁴

Section Three

Establishing the Element of Causal Link Between Fault and Damage in Unfair Competition Claims

For an unfair competition claim to be successful, the causal link between the wrongful act (fault) and the damage suffered by the injured party (plaintiff) must be established. In other words, the damage must be a result of the wrongful act committed. In the absence of this causal link, there is no ground for awarding damages for unfair competition practices.

¹ See: Mostafa Kamal Taha, Wael Anwar Bandak, *Principles of Commercial Law*, previously cited, p. 665.

² See: Ahmed Mahraz, previously cited, p. 202.

³ See: Nadia Fodil, previously cited, p. 229.

⁴ Cass. Com, 12 February 2020, no. 17-31.614, Bulletin 2020, no. 174.

Thus, the defendant can avoid liability by proving that the damage suffered by the plaintiff was not a result of their wrongful act. For example, if the damage was caused by an external factor beyond the defendant's control,¹ by force majeure, an unforeseen event, or by the plaintiff's own fault. For instance, while it is permissible to seek damages for harm caused by the imitation of a competitor's trademark, it is not permissible for the plaintiff to claim damages for losses caused by the COVID-19 pandemic in 2020, because there is no causal link between the act of trademark imitation and the damage resulting from the business interruption due to the pandemic.

Unlike the general rules of civil liability, it is not always necessary for the injured party to prove the damage in every situation. While the injured party must generally establish the existence of this causal link when actual damage occurs, in the case of unfair competition claims where the damage is imminent,² it is our view that the causal link should be presumed by assuming the damage will occur. This imminent damage can often be inferred from facts that typically cause harm to the business, such as the imitation of a trademark. Therefore, presuming that imminent damage will certainly occur in the future, based on specific facts, implies presuming the existence of the causal link between the wrongful act and the imminent damage. Denying this would make proving the causal link impossible because the damage has not yet occurred.³

If the conditions for an unfair competition claim are met, the competent judicial authority will decide on the infringement of rights and will award civil damages, order the cessation of the unfair competition acts, and may confiscate and destroy the objects and means used to commit them when necessary. The court may also require the defendant to provide a guarantee to ensure the compensation of the injured party. Additionally, the court may order the publication of the judgment in a daily newspaper at the expense of the party held liable.

Besides the civil action based on tort liability, unfair competition practices may also constitute criminal offenses as provided by law. In this case, there would be two claims: one civil and one criminal.

Section Two

Contractual Protection of the Commercial Establishment (Non-Competition Agreements)

In addition to legal protection, merchants have found in the contracts they conclude a suitable means to protect their commercial establishments from competition, a concept known in legal

¹ See: Miloud Salami, *op.cit.*, p. 183.

² See: Mostafa Kamal Taha, Wael Anwar Bandak, *Principles of Commercial Law*, *op.cit.*, p. 668.

³ See: Fawzi Mohamed Sami, *op.cit.*, p. 202.

doctrine as *contractual protection*. Sometimes, this represents the only means to safeguard the relationship between the owner of the commercial establishment and their clients.

In this context, the protection of the commercial establishment from competition is achieved by applying the general rules of contractual liability, by including in the contract a clause stipulating non-competition between its parties. One of the most notable forms of such protection is contracts that include a non-competition clause between the employer and the employee, as well as contracts granting exclusive or sole exploitation rights. The third form of these contracts, concluded between the seller or lessor of the commercial establishment and the buyer or sub-lessee, will be addressed in the following section dedicated to the dispositions relating to the commercial establishment, as they constitute obligations arising from them. For now, we will limit our discussion to the first two forms of these contracts, as follows:

Subsection One

The Non-Competition Clause in the Contract Between Employee and Employer

The Algerian legislator has imposed on the employee an obligation not to compete with the employer in their activity during the employment relationship. This is provided for in Article 7 of Law No. 90-11 of 21 April 1990 on Employment Relations, which states:

“Workers are subject, within the framework of employment relations, to the following fundamental obligations:

7. They must not have direct or indirect interests in a competing establishment, company, or subcontractor, unless there is an agreement with the employer, and they must not compete with the employer in the field of their activity.”¹

It is clear that this provision imposes an obligation on the employee not to compete with the employer *only during the employment relationship*, and not after it ends, as evidenced by the phrase: “Workers are subject, within the framework of employment relations, to the following fundamental obligations...”. The basis of this obligation during the term of the employment contract lies in the importance of the secrets to which the employee is exposed, which are vital for the continued operation of the commercial establishment. This includes their knowledge of the identity of clients and direct contact with them, as well as trade secrets concerning customer attraction (the element of goodwill), which form the foundation of every commercial establishment.²

¹ See: Nasser Moussa, *The Employee's Obligation Not to Compete with the Employer in Algerian Legislation (Non-Competition Clause in the Employment Contract)*, *Journal of Labor and Employment Law*, Vol. 04, No. 02, December 2019, p. 535.

² See: Mourad El-Mouajda, Mohamed Al-Arman, *Contractual Protection of the Commercial Establishment*, *Journal of Studies and Research*, Vol. 07, No. 21, December 2015, p. 41.

Since the Algerian legislator did not regulate this issue after the employment relationship ends, merchants have found in the contracts they conclude with employees a suitable means to protect their commercial establishments from competition, especially if the employee's work involves access to trade secrets or knowledge of the establishment's clients. Employers often resort to including a non-competition clause in the contract to protect their interests, based on the general rules of contractual liability. Accordingly, the employee is prohibited from competing with the employer or participating in a competing activity after the contract ends, whether the competition is personal or under an alias, and whether it is for their own account or for the benefit of another person.

Since the inclusion of this clause in its absolute form in the contract conflicts with the worker's freedom to practice their trade, as stipulated in Article 61 of the 2020 Constitutional Amendment, and because the worker may find themselves compelled to accept it under the pressure of the need to work, we believe it is necessary to restrict this clause regarding its duration, geographic area, type of activity, and the reasonableness of the penalty clause in case of breach of the non-competition obligation, to the extent necessary to protect the legitimate interests of the employer. All this should be subject to nullity if it violates public order, which would achieve a balance between the worker's interest as the weaker party in the contract on the one hand, and the employer's legitimate interest in protecting their commercial establishment from competition on the other.

The Egyptian legislator acted rightly, and the Algerian legislator should do the same, by restricting this clause in Paragraph 01 of Article 686 of the Civil Code, which states: "If the work entrusted to the worker allows them to know the employer's clients or to have access to the employer's trade secrets, the parties may agree that the worker shall not compete with the employer after the contract ends, nor participate in any project competing with the employer."

Paragraph 02 (b) of the same article further provides: "However, for this agreement to be valid, it is required that it contain the following: ... (b) that the restriction be limited in terms of time, place, and type of work to what is necessary to protect the legitimate interests of the employer."

Article 687 states: "If a penalty clause is agreed upon in case of breach of the non-competition obligation, and this clause is excessive to the extent that it becomes a means to force the worker to remain in the employer's trade longer than the agreed period, then this clause shall be void, and its nullity shall extend to the entire non-competition clause."

Meanwhile, the French legislator goes further by restricting the non-competition clause with a financial compensation paid to the worker in exchange for accepting this clause, as the affected party throughout its duration. In this regard, the French Court of Cassation ruled in its precedent dated December 4, 2013, that: "If the employer does not pay the financial compensation related to the non-competition clause, the worker is released from their obligation not to compete.¹ Therefore, the employer cannot accuse an employee of working for a direct competitor after five months from the termination of their contract in violation of the non-competition clause stipulated in their contract if the employer failed to pay the related financial compensation."

In its latest precedent dated October 21, 2020, the French Court of Cassation confirmed "the rejection of the appeal filed by the employee against the employer company on the grounds that the latter informed the employee of its waiver of the non-competition clause before the termination of the employment relationship, thereby forfeiting its right to the financial compensation."²

Section Two

Exclusive or Sole Exploitation Licensing Contract

This contract is one under which one or both parties undertake to deal exclusively with the other party for all or part of the goods or services marketed by one of them, for a specified period and within a certain agreed geographic area. Accordingly, the exclusive or sole exploitation license contract is characterized by the exclusivity or limitation condition, which is not presumed but must be explicitly stipulated in the contract. For example, a company producing a certain type of car may require that it supply this product only to the exclusive agent in their region and not to others, and that the agent does not import another type of car that competes with its product. Thus, exclusivity is mutual between the parties, benefiting both: the exclusive agent is protected from competitors in their area, and the principal is reassured regarding the exclusive marketing and dealing of their product.³

The Algerian legislator permits resorting to this type of contract, as it is stipulated in certain special laws. For example, Article 16 of Order No. 03-06 dated July 19, 2003, concerning trademarks, provides that:

“Rights associated with a trademark may be the subject of a single or exclusive license for all or part of the goods or services for which the trademark was deposited or registered.”

¹ Cass. Soc., December 4, 2013, No. 12-27.239, Not published in the official bulletin.

² Cass. Soc., October 21, 2020, No. S 19-18.399, Judgment No. 931 F-D, Not published in the official bulletin.

³ See: Murad Al-Mawajda, Muhammad Al-'Arman, op.cit, p. 47.

Article 17 of the same order stipulates that: “Under penalty of nullity, the license contract as defined in Article 16 above, concluded in accordance with the law regulating the contract, must include the trademark, the license period, the goods and services for which the license was granted, and the territory within which the trademark may be used or the type of goods manufactured or services provided by the license holder.”

The Algerian legislator also requires, under penalty of nullity, that the exclusive license contract specify the license period, the goods and services for which the license was granted, and the territory within which the licensed premises may be used. This is to distinguish it from any unlawful monopolistic practices or the arbitrary imposition of a dominant position over the market or a part thereof. Article 10 of Order No. 03-03 dated July 19, 2003, relating to competition, amended and supplemented, states: “Any exclusive purchasing contract that enables its holder to monopolize distribution in the market is considered an obstruction or restriction of competition or a breach thereof.”

The exclusive or sole license contract differs from unlawful monopolistic practices or the arbitrary imposition of a dominant position over the market or part of it in that the subject of the exclusive license is usually non-essential goods or services, often goods that have substitutes and are available on the market, such as entertainment and sports programs.

The license holder attempts to organize the sale of their goods or services in the market and strives to compete with other goods or services using specific intermediaries. The exclusive marketing by certain persons of the license holder’s product is permissible as long as it is limited in terms of duration and territory and does not harm consumers.

Article 18 of Order No. 03-06 dated July 19, 2003, concerning trademarks, also provides that: “The trademark owner may enforce acquired rights against the license holder who breaches any of the conditions mentioned in Article 17 above.”¹

Among judicial applications related to the protection of exclusive exploitation contracts from practices contrary to fair competition is the ruling by the Paris Court of Appeal in its latest precedent dated June 13, 2019. The court rejected a lawsuit filed by the Qatari group “beIN SPORTS” and its branch operating in France against the regional satellite broadcasting company “Arabsat,” based in Saudi Arabia. The lawsuit claimed that Arabsat was responsible for damages resulting from the violation of intellectual property rights it owns under commercial contracts granting it exclusive distribution rights for sports programs and events.

¹ TGI Paris, reference, June 13, 2019, No. RG 18/59094 – No. 1/FF, p. 12.

The claim involved the unlawful use by the “beoutQ” channel of frequencies belonging to Arabsat. The court confirmed the absence of sufficient evidence proving that beoutQ’s content was transmitted via a frequency linked to the satellite broadcaster Arabsat.

Section Three
Transactions Affecting the Commercial Premises

The Algerian legislator addressed the special provisions related to transactions affecting the commercial premises in the second book (Articles 79 to 214) of the Commercial Code. The first chapter (Articles 79 to 168) is dedicated to provisions governing the sale and mortgage of commercial premises, while the provisions relating to free management, or what is known as lease management, are contained in the third chapter (Articles 203 to 214).

Article 03 (Article 04) of the Commercial Code considers that all operations related to the commercial premises are commercial acts by their nature, regardless of the status of the person performing them, even if they are not a trader. (This matter is referred to in Section Two of Chapter One of this study.)

We will successively discuss the three types of transactions affecting the commercial premises within the following topics:

Topic One

Sale of the Commercial Premises

The sale of commercial premises is governed by the provisions of Articles 79 and following of the Commercial Code. However, the latter is limited to regulating formal issues related to notarization and publicity of the sale, as well as matters related to the rights of the seller’s creditors, payment of the price, the seller’s privilege, and the rescission action arising from non-payment of the price. Other aspects of the sale have been left by the Algerian legislator to be regulated by the general provisions of contracts in general and the specific provisions of the sales contract in particular.

These provisions do not apply only to the sale of commercial premises but also extend to all transactions that transfer ownership of the commercial premises and are treated as sales of commercial premises, such as a promise to sell and offering the commercial premises as a share in a company. This is stipulated in Article 79 of the Commercial Code, which states: "Any voluntary sale or promise of sale, and more generally any transfer of a commercial premise, even if conditional, made under another type of contract, or resulting in the transfer of

the commercial premises by partition, auction, or by contribution to a company's capital, must be evidenced by an official contract, otherwise it shall be null and void."¹

We will study all these provisions within the following two subsections: the first dedicated to the formation of the sale of commercial premises and the second to the effects arising from this contract, as follows:

Subsection One

Formation of the Sale of Commercial Premises

For the formation of the contract of sale of commercial premises, the general elements of a contract must be present, namely consent, subject matter, and cause. General legal rules apply in this regard. However, there are special legal provisions that deviate from the general rules relating to sales under civil law. This exception is justified by the significant status of the commercial premises as a form of wealth approaching the importance of real estate, as well as its special nature as an intangible movable asset, which makes it difficult to subject transactions affecting it solely to general provisions. These exceptions manifest throughout the different stages of the sale of commercial premises, which we will address as follows:

First: The presence of the element of consent in the contract of sale of commercial premises.

On the element of consent in the contract of sale of commercial premises, there must be a mutual agreement between the will of the seller and that of the buyer, with both parties intending to produce the legal effect of transferring ownership of the commercial premises from the seller to the buyer in exchange for a monetary price. Additionally, both parties must possess the necessary commercial capacity, and Articles 05 and 06 of the Commercial Code must be observed. Consent must be free from defects such as error, fraud, duress, and exploitation (undue advantage). French courts tend to broadly annul contracts for the sale of commercial premises due to defects in consent because the commercial premises are intangible movable assets in which the buyer can easily be misled or mistaken, especially regarding the most important elements of the commercial premises.²

These provisions do not apply only to the sale of the commercial premises but also extend to all transactions transferring ownership of the commercial premises that are treated as sales, such as a promise to sell and offering the commercial premises as a share in a company. More broadly, any transfer of a commercial premise, even if conditional or arising from another type of contract such as a gift, promise of reward, or others, is included.

¹ Ahmed Mohrez, op.cit, p. 96.

² Nadia Foudil, op.cit, p. 239.

A promise to sell the commercial premises is an agreement between the promisor and the promisee, whereby the promisor commits to concluding the sale in the future if the promisee declares their desire to do so within a specified time. Thus, the promise to sell is not merely an offer, nor does it constitute a final sale; rather, it is an intermediate stage intended to pave the way for the eventual sale. The promise to sell is not considered a sale conditional upon a suspensive condition; therefore, the sale does not have retroactive effect back to the promise's date but only takes effect from the moment the promisee announces their intention to accept the offer. ¹

There is no doubt that the sale of commercial premises by auction, as mentioned in Article 79 cited above, refers to voluntary sales and not compulsory sales by public auction arising from enforcement procedures, since in the latter there is no scope for the parties' will as is the case in the former. ²The same applies to the transfer of commercial premises by partition, mentioned in the same article, where the parties have no say in the case of partition following the liquidation process resulting from the owner's bankruptcy. However, voluntary partition is subject to the same provisions applicable to the sale of commercial premises mentioned above.

Second: The presence of the elements of subject matter and cause in the contract of sale of commercial premises

For the element of subject matter to be present in the sale contract or in legal transactions treated as such, the sale must pertain to the commercial premises with its essential elements, which must necessarily include the two elements of customer connections and goodwill. If the sale is limited to one of the non-essential elements constituting the commercial premises, this does not lead to the disappearance of the commercial premises or destroy the unity arising from the combination of its components; rather, it continues to exist as long as the two elements of customer connections and goodwill remain, as these constitute the core of the commercial premises.

It is not required that the sale encompass all elements of the commercial premises; it is permissible to exclude some elements from the sale, provided that the remaining elements retain the description of commercial premises. For example, if the subject of sale is a newspaper or television channel, selling the trade name or commercial logo effectively constitutes a sale of commercial premises, even if the sale does not include anything other than this name or logo.

³Similarly, if the matter concerns a publishing house, the sale must include the literary and

¹ Ibid., p. 238.

² Iony Randrianirina, *op. cit.*, p. 72.

³ See: Mostafa Kamal Taha, Wael Anwar Bendaq, *Principles of Commercial Law*, *op.cit.*, p. 657.

artistic property rights element; without these, the contract would not be considered as relating to commercial premises.

According to general rules, the thing sold must be specific or capable of being specified, such as its location, area, address, and trade name—that is, all its characteristics that distinguish it from other premises—and it must be lawful and permissible to deal with.¹

If the subject matter of the contract is contrary to public order or public morals, the contract is null and void. This is stipulated in Article 93 of the Civil Code, which states: “If the object of the obligation is impossible in itself or contrary to public order or public morals, it is absolutely null and void.”

As for the element of cause, it refers to the purpose or objective of concluding the contract. It is required that the cause be lawful and not contrary to public order or public morals, for example, if the purpose of the sale is to unlawfully deprive one of the heirs of their right. This is confirmed by Article 97 of the Civil Code, which states: “If the contracting party undertakes an obligation for an unlawful cause or a cause contrary to public order or public morals, the contract is null and void.”

The cause mentioned in the contract is considered the true cause unless proven otherwise, and anyone alleging the fictitious nature of the cause must provide evidence that the contract has another unlawful cause different from the one stated.

Thirdly: The requirement of formalities in the contract of sale of a commercial establishment (authenticity and publicity).

Contrary to the general rules of commercial evidence stipulated in Article 30 of the Commercial Code, which are based on the principle of “freedom of proof” in commercial matters, the Algerian legislator has required the formal written contract for the validity of the sale of a commercial establishment. This is stated in Article 79 of the Commercial Code, which says: “Every voluntary sale or promise to sell, and more generally every transfer of a commercial establishment, even if conditional or concluded under another type of contract, or if it results in the transfer of the commercial establishment by partition, auction, or contribution to the capital of a company, must be proven by an authentic deed, otherwise it is null and void.”²

From this text, it is clear that the Algerian legislator considers the contract for the sale of a commercial establishment as a formal contract that cannot be concluded merely by consent, as in other legal transactions. The formal written contract is a condition for the validity of the contract and not merely a means of proof, as evidenced by the phrase “otherwise it is null and

¹ See: Karcaden Farid, *Transactions Affecting the Commercial Premises that Do Not Transfer Ownership*, op.cit, p. 132.

² Nadia Foudil, op. cit., p. 242.

void.” If the merchant cannot present written evidence before the court, the transaction is null and cannot be proven by any other means than the formal written contract.

Moreover, the Algerian legislator has required, according to paragraphs 2 and 3 of Article 79 mentioned above, that the contract must include certain data, which are as follows:

1. The name of the previous seller, the date, type, and purchase price concerning the intangible assets, goods, and equipment;
2. The list of privileges and mortgages affecting the commercial establishment;
3. The turnover achieved in each of the last three years of operation, or since the date of purchase if the establishment has not been exploited for more than three years;
4. The profits obtained during the same period;
5. When applicable, the lease, its date, duration, and the name and address of the lessor and the transferee.

Neglecting to mention the prescribed data may result in the nullity of the sale contract at the request of the buyer if the request is made within one year.

The Algerian legislator clearly aimed, by stipulating these data requirements, to emphasize its intent to protect the buyer by providing sufficient guarantees that clarify the true commercial status of the business, in accordance with the principle of trust and credit on which commerce generally relies.

Moreover, the legislator has made it mandatory to publish the sale of the commercial establishment and other transactions governed by the same rules, as provided in Article 83 of the Commercial Code, which states: "Any transfer of a commercial establishment under the conditions specified in Article 79 above must be declared within fifteen days from its date at the buyer's initiative, in the form of a summary or announcement in the Official Bulletin of Legal Announcements, as well as in a newspaper specialized in legal announcements within the district or province where the commercial establishment operates. For mobile commercial establishments, the place of operation is the place where the seller is registered in the commercial register."¹

This summary or announcement must be preceded by the registration of the ownership transfer contract or the declaration referred to in the registration law, if no contract exists; otherwise, it shall be null and void. The legislator also required, under penalty of nullity, that the summary include certain data to ensure the effectiveness of the publication and announcement as set out in paragraph 2 of the same article.²

¹ Ahmed Mohrez, *supra* note, p. 211.

² *Ibid.*, p. 213.

To safeguard the integrity of the announcement, the legislator further mandated, according to paragraphs 3 and 4 of the same article, that the announcement be renewed between the eighth and fifteenth day from the date of the first publication, and that it be published in the Official Bulletin of Legal Announcements within fifteen days of the first publication.

According to Article 95 of the Commercial Code, the buyer's obligation towards third parties is not discharged if the buyer fails to carry out the publication formalities required by law or if the price is paid to the seller before the expiry of the fifteen-day period.¹

If the establishment includes elements subject to special registration or publication systems, such special registration or publication shall not replace the publication or registration required for the commercial establishment unless otherwise provided by law.

Section

Two

Legal Effects Resulting from the Conclusion of the Commercial Establishment Sale Contract

The conclusion of the commercial establishment sale contract entails a set of legal effects, foremost among which is the transfer of ownership of the commercial establishment from the seller to the buyer. For this transfer to be effective as intended by the parties, the legislator, according to general rules, imposed an obligation on the seller not to interfere with the buyer, pursuant to Article 371 of the Civil Code.

Additionally, the Algerian legislator enumerated a series of other effects in four consecutive sections of the Commercial Code: the rights of the seller's creditors (Articles 84 to 89), payment of the price (Articles 90 to 95), the seller's privilege (Articles 96 to 108), and the action for annulment and rescission of the sale (Articles 109 to 116), as well as the seller's right to claim enforcement against the commercial establishment (Articles 126 to 139), which we will explain as follows:

First: Seller's Obligation Not to Compete with the Buyer
According to general rules, the seller is bound by a duty of warranty and non-interference with the buyer. The seller may not compete with the buyer by engaging in a similar trade, as such competition could divert customers from the buyer back to the seller, which is the core essence of the commercial establishment. To hold otherwise would render the contract meaningless and severely conflict with the principle of good faith in contract execution. It is clear that this is not about unlawful competition, but rather a legal obligation arising from the sales contract itself, prohibiting the seller from any acts of competition that harm the buyer's clientele.

¹ Ahmed Mohamed Abu Al-Rous, *supra* note, p. 682.

Article 371 of the Civil Code stipulates:

“The seller guarantees against interference with the buyer’s enjoyment of all or part of the sale, whether the interference arises from his own act or that of others who have rights conflicting with the buyer at the time of sale. The seller’s warranty applies even if the right of such third party is established after the sale and has been transferred from the seller himself.”

From this provision, it is clear that the seller must refrain from competing with the buyer in the use of the commercial establishment and guarantee against any interference, whether by the seller himself or third parties, even if such rights are established post-sale and stem from the seller.¹

It is not necessary for the contract to explicitly include a non-competition clause, although it is common practice to include such a clause to emphasize its importance and specify its temporal and territorial scope. However, this clause should not be general or absolute, as that would violate the constitutional principle of freedom of commerce. The clause is only valid if it is reasonably limited in terms of activity, place, and time, sufficient to protect the buyer’s interests.

Second: Rights of the Creditors of the Seller of the Commercial Establishment
Departing from the principle of the relative effect of contracts—which holds that a contract only affects the parties involved and not third parties—the Algerian legislator has established certain effects that may extend to third parties in the sale of a commercial establishment, specifically the creditors of the seller, as set out in Articles 84 to 89 of the Commercial Code.²

Article 84 of the Commercial Code provides:

“Any creditor of the previous owner, whether his debt is due or not within fifteen days from the date of the last day following the announcement, may oppose payment of the price by means of an extrajudicial act. The opposition must include the amount and reasons for the debt as well as the choice of domicile within the jurisdiction where the commercial establishment is located; otherwise, it shall be void.”³

The rationale behind this provision is to protect the rights of the seller’s creditors upon transfer of ownership, whether they hold privileged, pledged, or ordinary debts. The Algerian legislator established these safeguards to prevent collusion between the seller and buyer, since the transfer of ownership may decrease the value of the commercial establishment and consequently reduce

¹ See: Mourad Al-Mwajda, Mohamed Al-Arman, *op. cit.*, p. 58.

² Mourice Robinault, *La location-gérance de fonds de commerce*, Doctoral thesis, Faculty of Law, University of Rennes, 1951, pp. 195-196.

³ See: Mustafa Kamal Taha, Wael Anwar Bandak, *Principles of Commercial Law*, *op. cit.*, p. 683.

the security for creditors' rights. Moreover, it allows the seller's creditors to know the new location of the establishment to take appropriate legal action if necessary to recover their debts.¹ It is not permissible for the lessor to file an opposition to collect rent due or to become due, even if the parties have agreed otherwise (paragraph 2 of Article 84 of the Commercial Code). This opposition contradicts the provision of paragraph 3 of Article 172 of the Commercial Code, which allows the transferee of the commercial establishment to uphold the acquired rights of the transferor to complete the personal exploitation period if necessary. Moreover, the lessor's opposition or the termination of the lease may result in the impossibility of exploitation or a decrease in the value of the commercial establishment.

Any registered creditor or a creditor who has filed an opposition within the fifteen-day period, in the event that the price does not cover the debts of the registered creditors and those who opposed, may request the commercial establishment to be put up for public auction, in accordance with the provisions of Articles 133 to 139 of the Commercial Code, by requesting an increase of one-sixth of the value of the commercial establishment excluding equipment and goods (paragraph 2 of Article 85 of the Commercial Code). However, an auction by one-sixth increment is not allowed after a judicial sale of the commercial establishment, or a sale by public auction requested by the bankruptcy trustee, judicial liquidation, or co-owners in joint ownership of a commercial establishment (Article 89 of the Commercial Code).

The public official in charge of the sale may only accept bids from persons known to be financially reliable or who have deposited with him or with the Deposits and Trusts Department an amount not less than half of the full price of the initial sale or the part of the sale price stipulated to be paid in cash, plus the increment and allocation to pay the sale price (Article 86 of the Commercial Code).²

If the buyer who won the auction is dispossessed of the purchased item due to a higher bid, he must deliver under his responsibility any oppositions in his possession to the highest bidder upon receipt within eight days from the date the auction is awarded, if he has not previously recorded them in the conditions register. The effect of these oppositions then transfers to the auction price (Article 88 of the Commercial Code).

Third: The buyer's obligation to pay the price.

Upon the conclusion of the commercial establishment sale contract, the buyer incurs a fundamental obligation to pay the price agreed upon in the sale contract. According to general rules (Article 390 of the Civil Code), the agreement determines the method of payment and

¹ Ibid., p. 682.

² See: Nadia Foudhil, *op. cit.*, p. 262.

whether the price is payable immediately or deferred, wholly or in part. Due to the large value, the price is often divided in commercial establishment sales. The agreement also specifies the place and time for delivering the sold item. If the contract does not specify, the payment of the sale price is made at the place of delivery and becomes due at the time of delivery (Articles 387 and 388 of the Civil Code).

If the price of the commercial establishment is allocated among its elements, the seller or whoever holds the price must distribute it within three months from the date of the contract according to the first paragraph of Article 90 of the Commercial Code. After this period expires, any interested party may file an urgent lawsuit before the president of the court in whose jurisdiction the commercial establishment is located, who shall order either to deposit the price with the Deposits and Trusts Department or to appoint a judicial guardian to distribute the price (paragraph 2 of Article 90 of the Commercial Code)

To secure payment, the seller has a lien on the sold premises, the right to request rescission of the contract through a lawsuit, or the right to enforce the enforcement of the commercial premises. However, we will defer the study of the latter to the next section, as its provisions overlap with the provisions of enforceable enforcement relating to mortgages of commercial premises. We will suffice with examining the first and second rights as follows: 1- The seller's lien on the sold premises: Article 982 of the Civil Code defines a lien as: "A priority granted by law to a specific debt, taking into account its nature. A debt shall not have a lien except pursuant to a legal provision." This lien, enjoyed by the seller, entitles him to priority and the right of pursuit. By virtue of this priority right, he is entitled to collect his debt with priority over other ordinary creditors and privileged creditors who follow him in rank. It should be noted that creditors registered on the same day shall have the same rank. The seller also has the right, by virtue of the right of tracing, to demand that the sold premises be traced to whoever owns them. Third parties are not entitled to invoke the rule of possession of movable property as a title deed, because the scope of application of this rule is limited to tangible movables only, whereas a commercial premises are intangible, not tangible, movables¹. The Algerian legislature has regulated matters related to the seller's lien on the commercial premises in Articles 96 to 108 of the Commercial Code. However, this lien is not granted to the seller of the commercial premises unless the sale is established by an official contract and recorded in a public register maintained by the National Center for Commercial Registry within whose jurisdiction the commercial premises are located (Article 96 of the Commercial Code).

¹ See: Ahmed Mahrez, *op. cit.*, p. 217.

However, this lien must be recorded within 30 days from the date of the sale contract; otherwise, the lien is void. This period remains in effect even in the event of a bankruptcy judgment. Any interested party may assert this invalidity, even if the debtor is the debtor himself. We have been drawn to the inaccuracy of Article 97 of the Commercial Code, which addresses this issue. It states:

"The sale must be registered within 30 days from the date of the contract, otherwise it shall be void." In fact, the nullity applies to the seller's lien if it is not registered in the public registry, not to the sale contract itself. If the latter is established by a formal contract, it remains valid. All that matters is that the seller loses his right to the lien if it is not registered in the designated public registry. Paragraph 3 of the same article states: "If registration is completed in the aforementioned manner, the buyer shall have priority, and the lien may be invoked against the buyer's bankruptcy or judicial liquidation."

The seller's privilege only applies to the elements of the business premises specified in the sales contract and registration. If the privilege is not specified precisely, it is imposed by force of law on the moral elements only, not the material ones. The Algerian legislator has defined them in the text of paragraph 2 of the aforementioned Article 96, which are the address of the business premises, the right to rent, contact with customers, and goodwill¹. In derogation from the general rules of privilege, which stipulate that the seller's privilege, like other security rights, is indivisible—that is, each part of the sale guarantees the entire price, and each part of the price is guaranteed by the entire sale—the Algerian legislator, in Article 96 of the Commercial Code, has divided the privilege into three parts: intangible items, equipment, and merchandise. A separate price must be determined for each of these three parts (paragraph 3 of the same article). Each part only guarantees the corresponding price, not exceeding the price of another part (paragraph 4 of the same article). The price of the merchandise, then the equipment, and finally the intangible items must be deducted from the price paid, even if otherwise agreed upon (paragraph 5 of the same article). If the two parties agree to sell another item or several other items not included in the initial sale, the distribution of the price related to each item must be estimated separately from the resale price (paragraph 6 of the same article).

These rules are part of public order and cannot be violated by agreement. They aim to quickly release goods and equipment from the seller's lien. The interests of both the seller and the buyer have been taken into account. Goods and equipment are tangible items, and the seller's continued lien on them is useless if a bona fide third party possesses them, due to the application

¹ See: Nadia Fawdil, *op. cit.*, p. 263

of the possession rule to movable property as a title deed. The buyer's interest, however, emerges from the fact that goods and merchandise are visible items upon which the buyer's credit depends and upon which his ordinary creditors rely in dealing with him.

The lien is retained for a period of 10 years from the date of registration and is automatically deleted if it is not renewed before the expiration of this period (Article 103 of the Commercial Code). If the grounds for registration expire, deletion may be effected by the Commercial Registry officials pursuant to an order issued at the end of a petition, after summoning the parties (Article 104 of the Commercial Code).

1- Cancellation of a Commercial Premises Sale Contract:

The legislator has authorized the seller, as a guarantee of payment of the price or part thereof within the agreed period, to request cancellation of the contract through a lawsuit, and to consider the contract null and void. The contracting parties are returned to the status quo they were in prior to concluding the contract. The seller reclaims the commercial premises, and the buyer recovers the price he paid if he has already received any of it. Any condition contained in the commercial premises sale contract stipulating that the seller retains all or part of the sale price in the event of cancellation is considered null and void (Article 116 of the Commercial Code). The seller may also demand compensation from the buyer for any damages incurred as a result of the cancellation, in accordance with the general provisions set forth in Articles 119 and following of the Civil Code.

The Algerian legislator has stipulated the specific provisions for cancellation of a commercial premises sale contract in Articles 109 to 116 of the Commercial Code. These texts require that the seller has expressly reserved for himself in the sales contract his right to rescind in order for its effects to be produced against third parties. In the absence of this condition, the seller must expressly indicate this right in the lien registration. In this case, the rescission claim, like the lien right itself, is restricted to the elements included in the sale without other new elements added by the buyer to the premises (Article 109 of the Commercial Code). The seller's failure to expressly reserve this right in the sales contract or in the lien registration does not mean that his right to rescind is forfeited against the buyer. All that matters is that the ruling issued for rescission has no force against third parties, and the seller recovers the premises burdened with the rights established for the benefit of third parties.

The seller shall have the right to recover the items included in the sale, including those items for which his privilege or right to rescind has expired, regardless of any modifications made by the buyer. The goods and equipment shall be returned in the condition they are in at the time of rescission, not at the time of delivery upon sale, whether

their value has increased or decreased.

They shall be appraised either through an on-site expert evaluation, mutual agreement, or by judicial decision. In such case, the price shall be reduced by the amount the seller is entitled to under his privilege on the price of each of the goods and equipment. If any surplus remains beyond that amount, it shall serve as a guarantee for ordinary creditors (paragraph 2 of Article 110 of the Commercial Code).

Similarly, the seller of the commercial premises may invoke his right to rescind the sale against the group of bankruptcy creditors (Article 114 of the Commercial Code).

Article 111 of the Commercial Code requires the seller who files a rescission claim to notify the registered creditors at the place of residence they have chosen for the purpose of registration procedures, and a judgment on rescission may not be issued until one month has passed from the date of this notification.

Article 115 of the Commercial Code also requires the publication of every judicial or amicable rescission of the sale by the party who obtained it, in accordance with the conditions prescribed for the sale itself, within fifteen days following the date on which the rescission becomes final.

Section Two

The Pledge of the Commercial Premises

Since the commercial premises constitute movable property, pledging it according to general rules entails that the pledge is possessory, meaning the debtor must deliver the pledged item to the creditor. However, applying this rule contradicts the nature of the commercial premises as an intangible asset, which does not fall under the rule of possession in movables as a title document. Moreover, it contradicts the possibility of exploiting the commercial premises by depriving the merchant of possession, which would affect his position among his competitors. Departing from the general rules governing pledges of movables, the legislator has permitted the pledge of the commercial premises without requiring the transfer of possession to the pledgee creditor, thereby enabling the merchant to borrow to revive his trade by securing the commercial premises without losing possession and the right to exploit it. This is stipulated in paragraph 2 of Article 118 of the Commercial Code, which states: "*The pledge of the commercial premises does not entitle the pledgee creditor to assign it in settlement of his debts.*"¹

Our study briefly divides the pledge of the commercial premises into two branches: the first concerns its establishment, and the second concerns the effects resulting therefrom, as follows:

¹ See: Farid Karkadan, *Non-Title-Transferring Operations on the Commercial Premises*, supra, p. 84;

First Branch

Formation of the Pledge Contract

The pledge of the commercial premises, like other contracts, requires the presence of the general substantive elements, such as consent, subject matter, and cause. The law also mandates formal procedures in pledging the commercial premises to inform third parties of the true status of the pledged premises. This is done by following the procedures of official writing and registration, which we will explain as follows:

First: The Specificity of the Premises Element in the Pledge Contract (Exclusion of Goods from the Pledged Items).

The contract of pledge on the commercial premises is subject to the same substantive elements as the contract of sale of the commercial premises, with some particularities that distinguish the premises element in the possessory pledge contract of the commercial premises. Goods are excluded from the items included in the pledge, as stipulated by Article 119 of the Commercial Code, which states:

"The possessory pledge on the commercial premises may only include the parts attached to it such as the title of the premises, the trade name, the leasehold right, customers, commercial reputation, commercial furniture, equipment and machinery used in exploiting the premises, patents, licenses, trademarks or trade marks, industrial designs, and generally the related industrial, literary, or technical property rights."

It is clear from this text that the exclusive enumeration of the elements that may be included in the pledge does not include goods; therefore, goods cannot be included in the pledge. The rationale for excluding goods from the pledged elements is evident: including goods in the pledge would render them non-transferable, as they constitute an essential element relied upon by the customers of the premises when dealing with it.¹ This conflicts with the proper exploitation of the commercial premises during the pledge period and makes it impossible to provide financial liquidity secured as a guarantee to settle the debt. Furthermore, good-faith purchasers of goods cannot be confronted by the pledgee creditor's right of pursuit based on the possession rule in movables as a title document.

Thus, the exclusive enumeration of the elements that may be included in the pledge clearly aims to exclude the goods element without excluding any other pledged elements. However, from our perspective, this exclusive enumeration was not appropriate in terms of the legislator's intended purpose, which was to exclude only the goods element from the pledged elements.

¹ Ibid., p. 255.

The exclusivity of listing these elements necessarily excludes newly introduced elements of the electronic commercial establishment, which the Algerian legislator addressed in Law No. 18-05 related to electronic commerce, such as the “electronic domain name,” which is considered a fundamental component of the electronic commercial establishment. Indeed, the Algerian legislator regarded it as a mandatory element, without which the electronic commercial establishment does not exist. This makes it fundamentally impossible to pledge the electronic commercial premises, which was certainly not the legislator’s intention.

We believe that a provision fulfilling the legislator’s purpose should be framed in reverse, directly specifying the exception, such that it would read: *"The possessory pledge of the commercial premises shall not include goods among its elements, notwithstanding any contrary stipulations."*

Moreover, it is not required that the pledge encompass all elements of the commercial premises; it is permissible to exclude some elements from the pledge by agreement of the parties, provided that the remaining elements still qualify as a commercial premises, and that the elements of customer contact and commercial reputation are necessarily included.

For example, if the premises involve a publishing house, the pledge must cover the intellectual property rights, because without them the contract would not be considered related to commercial premises. If the pledge does not explicitly and precisely specify what it covers, it shall be limited to the title, trade name, leasehold right, customers, and commercial reputation (paragraph 3 of Article 119 of the Commercial Code).¹

Second: The Formality Element in the Commercial Premises Pledge Contract (Formality of the Pledge Contract).

Departing from the general rules governing pledges of movables, the Algerian legislator has permitted pledging the commercial premises without requiring the transfer of possession to the pledgee creditor. Instead, it requires the formal writing to validate the commercial premises pledge contract, as stipulated in Article 120 of the Commercial Code, which states: *"The possessory pledge shall be evidenced by a formal contract. The privilege resulting from the pledge shall take effect upon its registration in the public registry maintained by the National Commercial Register Center that operates within the commercial premises"*

¹ Sami Abdel-Baqi Abu Saleh, *Business Law*, 2nd edition, Dar Al Nahda Al Arabia, Cairo, 2003–2004, p. 399.

¹jurisdiction. The same procedure must be completed at the National Commercial Register Center in the jurisdiction of each branch of the commercial premises included in the pledge."

Also among the formal requirements is what Article 121 of the Commercial Code mandates regarding the necessity of registering the pledge within 30 days from the date of the pledge contract; otherwise, the privilege shall be null and void. Any interested party may invoke this nullity, including the debtor himself. The registration determines the rank of the privilege among the pledge creditors according to the chronological order of their registrations.

As an exception to the requirement of a formal written contract, the Algerian legislator has allowed the possessory pledge of the commercial premises to be evidenced by a notarized registered contract when the pledgee creditor is a bank or financial institution. This is stipulated in Article 123 of Ordinance No. 03-11 dated August 3, 2003, related to currency and credit, as amended and supplemented, which states:

"The possessory pledge of the commercial premises in favor of banks and financial institutions may be established by a notarized registered contract. This pledge shall be registered according to the applicable legal provisions in this field."

Second Branch

Legal Effects Resulting from the Commercial Premises Pledge Contract

The commercial premises pledge contract entails a number of important legal effects. As a bilateral binding contract, it imposes obligations on the pledging debtor and provides guarantees for the benefit of the pledgee creditor. It may also have effects on third parties. Below, we address these effects under the following points:

First: Obligations Arising from the Commercial Premises Pledge Towards the Pledging Debtor
According to paragraph 2 of Article 118 of the Commercial Code, the commercial premises remain in the possession of the pledging debtor so that he can continue to exploit it. In return, the legislator has obligated him to preserve the pledged assets and imposed civil liabilities entailing compensation in case he performs any positive or negative physical or legal acts (negligence) that may negatively affect the guarantee by diminishing its value or by failing to preserve the pledged elements. Examples include acts that could repel customers and drive them

¹ See: Farid Karkadan, *Non-Title-Transferring Operations on the Commercial Premises*, supra, p. 129.

away from dealing with the premises, delay in paying the rent for the premises used for trade, or any act that might nullify or cancel the trademark. The pledgee creditor has the right to prove the debtor's negligence and default by any means of evidence, while the debtor may prove the contrary by applying the standard of the care of a prudent person.

Furthermore, the legislator has imposed criminal liability on the debtor if he damages, embezzles, or spoils the pledged assets in any way that leads to reducing or impairing the rights of the pledgee creditor (Article 167 of the Commercial Code).

Second: Guarantees Granted for the Benefit of the Pledgee Creditor in the Commercial Premises Pledge Contract¹

The legislator allowed pledging the commercial premises without requiring the transfer of possession to the pledgee creditor. Thus, the commercial premises remain in the possession of the pledging debtor until the original obligation is executed through the payment of the debt value upon maturity. The pledgee creditor benefits from the privileges of priority and follow-up in recovering his debt. If this is not sufficient, the pledgee creditor may demand the enforcement of compulsory execution on the commercial premises to recover the debt or the remaining balance, which we will address as follows:

1. The Privileges of Priority and Follow-Up in Debt Recovery:

The pledge of the commercial premises in favor of the pledgee creditor creates a real right over it, granting him the privileges of priority in recovering his right, as provided by law, which grants him a privilege over the pledged asset with priority over other creditors of the pledging merchant, according to the order of registration (Article 120 of the Commercial Code). Creditors who register on the same day shall have the same rank (Article 122 of the Commercial Code).

Furthermore, the pledgee creditor is granted the right of follow-up over the commercial premises, wherever it may be held, and no third party may invoke their good-faith possession of the commercial premises to oppose this right. This is because the commercial premises constitute an intangible movable asset, not a physical one, and thus the possession rule applicable to physical movables as a title to ownership does not apply (Article 132 of the Commercial Code).

2. Compulsory Execution on the Commercial Premises:

¹ See: Karkadan Farid, Transactions on the Commercial Establishment that Do Not Transfer Ownership, op.cit, p. 197

The pledgee creditor, as well as the seller, to secure the payment of the price or the remaining balance, has the right to demand compulsory execution on the commercial premises by compelling the pledging debtor to fulfill his obligation and pay the debt or the remaining part thereof through seizure and sale.¹

The Algerian legislator permits both the pledgee creditor and the seller to obtain an order for the sale of the commercial premises by public auction pursuant to Articles 125 and 126 of the Commercial Code, after a 30-day notice of payment to the debtor and the possessor if different, without result. The application must be submitted to the court having jurisdiction over the commercial premises' location.

Article 127 of the Commercial Code also requires the pursuing pledgee creditor to notify the owner of the commercial premises (the pledging debtor) and the registered creditors at their chosen residences in the registration records at least 15 days before the auction sale. This aims to enable them to review the terms book, state their objections or remarks, and attend the auction if they wish.

The sale takes place 10 days after posting the mandatory legal announcement in the Official Gazette for legal announcements, as well as in a specialized legal announcements newspaper in the district or province where the commercial premises are located. The publication is evidenced by an annotation entry in the sale report (paragraphs 2, 3, and 4 of Article 127 of the Commercial Code).²

3. Effects of the Commercial Premises Pledge on Third Parties:

The effect of the possessory pledge contract on the commercial premises is not limited to the contracting parties—the pledgee creditor and pledging debtor—but extends to any person whose rights are harmed by the existence of the pledge contract. This includes subsequent registered pledge creditors and ordinary creditors as well.

The latter (ordinary creditors) are the most adversely affected by the conclusion of the possessory pledge contract on the commercial premises, since the secured debt may exhaust the general collateral pool of their debtor, on the basis of which they contracted, and they may be left with no security if the debtor has no other assets besides it.³

On this basis, paragraph 5 of Article 123 of the Commercial Code ruled that the registration of a possessory pledge, the subject of which is the exploitation of the commercial premises, may render prior debts immediately due. This ruling is an application of the general rule that the

¹ See: Ahmed Mahrez, *op. cit.*, p. 226.

² See: Nadia Fawdil, *op. cit.*, p. 254.

³ Arnaud REYGROBELLET and Christophe DENIZOT, *Funds of Commerce*, 2nd ed., Dalloz, Paris, 2011, p. 964.

term is waived to avoid weakening the securities; with the decrease in the value of the premises, the debt becomes payable immediately.¹

Therefore, ordinary creditors, whose debts are related to the operation of the business premises, may request a ruling to waive the terms and repay their debts before their due dates, based on the harm they may suffer as a result of such registration.

As for registered creditors, the legislature has established provisions to protect their rights in the event of a mortgage on the business premises in two cases. The first relates to the transfer of the business premises to another location. In this case, the registered debts become due by law if the owner of the business premises fails to notify the registered creditors of the chosen location within fifteen days of his intention to transfer the business premises and of the new location in which he intends to establish it (paragraph 1 of Article 123 of the Commercial Code). Notification is not sufficient in all cases, as the registered debts are not due by law. Moreover, transferring the business premises without the consent of the seller or the mortgage creditors may result in their debts becoming due if it results in a decrease in the value of the business premises (paragraph 4 of Article 123 of the Commercial Code). The second case concerns a request to terminate the lease of the premises where the business premises are operated, which is burdened by restrictions imposed by the owner. In this case, the owner must notify the previously registered creditors of the request for termination at the location chosen and specified in each creditor's registration. However, the ruling may not be issued before one month from this date (paragraph 1 of Article 124 of the Commercial Code). However, the termination of the lease by mutual consent is not final until one month after the date of notification to the registered creditors at each of their chosen locations. During this period, any registered creditor may request the sale of the business premises at public auction (paragraph 2 of Article 124 of the Commercial Code).

This is because termination of the lease may result in the impossibility of operation or a decrease in the value of the business premises²

Third Requirement

Free Management or Management Lease of the Business

The Algerian legislature has regulated the provisions relating to the free management contract, or what is known as the management lease contract of the business premises, in Articles 203 to

¹ See: Mustafa Kamal Taha and Wael Anwar Bundak, *Principles of Commercial Law*, op. cit., p. 682.

² See: Mustafa Kamal Taha, Wael Anwar Bandak, *Principles of Commercial Law*, op.cit, p. 682.

214 of the Commercial Code. Because there is some confusion regarding the concept of this contract compared to some similar contracts, we will first define the concept of this contract, then the conditions for its conclusion and the consequences arising from it, through the following sections:

First Section

Concept of the Free Management Contract or Management Leasing of the Commercial Premises

The free management of commercial premises is considered a modern contract necessitated by the requirements of commercial transactions, due to the benefit it provides to both parties to the contract on one hand, and for the revival of the national economy on the other. In some cases, it may be impossible for the owners of commercial premises to personally exploit their premises due to physical impediments preventing personal exploitation of those premises. For example, if there is a conflict of interest due to holding a certain position and the premises were inherited, or if a certain illness prevents personal exploitation, or if the owner has another business that does not allow him to exploit his commercial premises simultaneously. In all these cases, the owner of the commercial premises entrusts the exploitation of his premises to another person who benefits from it.¹

while the owner of the commercial premises retains ownership of the premises, to avoid shutting down his commercial premises which generate profits for him.

Thus, the free management contract is considered one of the usufructuary contracts related to the commercial premises, transferring possession but not ownership. It is a true lease contract, under which the owner of the commercial premises (the lessor) undertakes to lease the exploitation of his commercial premises (the leased property) for the benefit of a person called the “management lessee” (the lessee). The latter undertakes to exploit the commercial premises and benefit from it on his own behalf and is subject to all the obligations arising from this contract, for a specific period and in return for a known rent.

¹ See also: Hakima Damoush, Sabrina Slimani, *Protection of Creditors in the Free Management Contract*, Journal of Studies on the Effectiveness of Legal Norms, Vol. 01, No. 01, March 2017, pp. 147-148.

The Algerian legislator has provided for this type of contract in paragraph 1 of Article 203 of the Commercial Code, which states:

“Notwithstanding any contrary stipulation, the following provisions apply to any contract or agreement whereby the owner or operator of a commercial premises assigns all or part of the leasing for the purpose of exploitation to a manager on his own behalf.”

Regardless of the linguistic accuracy of this text, the legislator’s definition remains incomplete in that it does not mention the term of the contract or the rent. Therefore, it should be read together with the text of Article 467 of the Civil Code to complete the meaning.¹

The “management lessee” differs from the “salaried manager” in that the former is one of the parties to the free management contract, while the “salaried manager” is merely an employee entrusted by the owner of the commercial premises to manage his premises for a specified wage, on behalf of the owner and under his responsibility. The “management lessee” alone is subject to the provisions of commercial law,² whereas the “salaried manager” is subject to the provisions of labor law, does not acquire the status of merchant, and is not required to register in the commercial register.

It is also necessary to distinguish between the “salaried manager” (employee) and the “mandated manager” (agent).³ In the latter case, the contract takes on the character of a mandate contract rather than an employment contract. If the manager is fully subject to the orders and supervision of the owner, he is considered an “employee.” However, if he enjoys a significant degree of freedom and independence in carrying out his duties, he is considered an “agent.”

Second Section

Creation of the Free Management Contract

To be valid, like other contracts, the free management contract requires the availability of all the general substantive elements: consent, subject matter, and cause. This applies whether the parties are natural or legal persons (Article 205 of the Commercial Code).⁴ The law also requires the formal element in the free management contract of the commercial premises by following the procedures of official writing and publicity,⁵ which will be detailed as follows:

First: The Specific Nature of the Subject Matter in the Free Management Contract for Commercial Premises

¹ See: Khaled Zaidi, "The Responsibility of the Seller or Lessor of Free Management," Algerian Journal of Legal, Economic, and Political Sciences, Volume 47, Issue 1, March 2010, pp. 123-124.

² Jean-Pierre LE GALL and Caroline RUELLAN, Commercial Law, 13th edition, Dalloz, Paris, 2006, p. 36.

³ Paragraph 1 of Article 467 of the Civil Code states: "A lease is a contract by which the lessor enables the lessee to use a property for a specified period in exchange for a specified rental fee."

⁴ Xavier Delpech, Commerce Funds, 19th edition, Dalloz, Paris, 2020-2021, pp. 478-498.

⁵ Ibid., p. 492.

Although the free management contract of the commercial premises is considered a lease contract, it differs from the lease of the premises in which the commercial premises are operated in terms of the subject matter of the contract. The latter pertains to real estate—**the walls**—and is subject to the provisions of Articles 169 to 202 of the Commercial Code stipulate that a free management contract applies to an intangible property, namely a business premises, with all or part of its constituent elements. It is subject to the provisions of Articles 203 to 214 of the same law¹. The contract does not require that the business premises be fully construed. There is no objection to excluding certain elements from the contract by agreement of the parties, provided that the remaining elements meet the description of a business premises, including customer contact and reputation². By analogy to the exclusion of goods from the mortgage of a business premises, most French jurisprudence has held that the nature of this element is incompatible with its leasing capacity. This is because it is inconceivable to lease movables that perish upon initial use. They are, by their nature, intended for sale and consumption, not for the benefit of their use, as is the case with other elements. It often happens that a free management contract is coupled with a parallel contract for the sale of the goods present in the business premises, with the lessor also repurchasing them at the end of the contract³. Therefore, we believe it is more appropriate for the Algerian legislator to allocate this element with legal provisions commensurate with its specific nature in the free management contract. Second: The presence of the formal element in the free management contract for a commercial establishment (officialness and publicity). The Algerian legislator stipulated the presence of official writing and publicity for the validity of the free management contract. This is stipulated in Paragraph 3 of Article 203 of the Commercial Code, which states: "Every management contract shall be drawn up in official form and published within fifteen days of its date in the form of an extract or announcement in the Official Gazette of Legal Advertisements, and in addition, in a newspaper specializing in legal advertisements." This text makes it clear that the Algerian legislator has considered the free management contract for a commercial establishment to be a formal contract, for which mere consent is not sufficient, as is the case with other legal transactions. Official writing is one of the pillars of the contract's formation and not merely a means of proving it. If the merchant is unable to provide written evidence before the court, his transaction is invalid, and he cannot prove this transaction by providing evidence other than the official writing. If the premises include elements subject to a special registration or registration

¹ Louzi Khaled, *op. cit.*, p. 104.

² See: Karkadan Farid, *Transactions on Commercial Establishments That Do Not Transfer Ownership*, *op. cit.*, p. 129.

³ Xavier Delphech, *op. cit.*, p. 527.

system, the registration of the disposition of the commercial premises shall not replace the special registration or registration unless the law provides otherwise¹. At the end of the contract,² the legislator requires both parties to terminate it by following the same procedures used for publication (paragraph 5 of the same article). The Algerian legislator imposed these procedures for concluding the contract under penalty of nullity. Their purpose is to inform third parties of the premises' status, as stipulated in Article 212 of the Commercial Code, which states: "Any contract for lease-to-operate management or other agreement containing similar conditions agreed to by the owner or operator of the commercial premises that does not meet the conditions stipulated in the aforementioned articles shall be considered null and void. However, the contracting parties may not invoke this nullity against third parties."

Moreover, the legislator stipulated in Article 205 of the Commercial Code that the lessor must have engaged in commercial activity for at least five years, or have exercised, for the same period, the functions of a manager, commercial or technical director, and must have operated the business under management for at least two years. However, this duration may be reduced or waived by an order of the president of the court, at the mere request of the interested party and after hearing the public prosecutor's office, especially if the applicant proves that it is impossible for him to operate the business personally or through representatives (Article 206 of the Commercial Code).

However, these provisions do not apply, pursuant to Article 207 of the Commercial Code, to:

The state, the province (wilaya), the municipality, and financial institutions such as banks;

Persons under legal incapacity and the legally incapacitated (including the insane) or those who have a court-appointed guardian, with respect to the commercial establishment they owned before losing their legal capacity;³

The heirs, legatees of a deceased trader or artisan, and those benefiting from the division of inheritance, with respect to the commercial establishment transferred to them;

The lessor of the commercial establishment if the management lease aims primarily to ensure the distribution of products manufactured or distributed by the lessor under an exclusive contract.

It is noteworthy that the Algerian legislator, by setting these conditions, intended to emphasize the protection of the lessee (manager) by providing adequate guarantees to confirm the actual commercial status of the business base, particularly through the annual turnover achieved

¹ Nadia Fawdil, *op. cit.*, p. 242.

² Ahmed Mohamed Abu Al-Rus, *op. cit.*, p. 682.

³ See: Mustafa Kamal Taha, Wael Anwar Bundak, *Principles of Commercial Law*, *op.cit.*, p. 687.

during the five years of operation. This is in line with the principle of trust and credit that generally underpins commerce.

Section Three

Effects of the Free Management Contract for the Commercial Establishment

The free management contract for the commercial establishment entails a set of significant legal consequences. As it is a bilateral contract, it determines the rights and obligations of the contracting parties, producing effects both with respect to the lessor and the lessee-manager, and it may also have effects with respect to third parties. Below, we outline these effects through the following elements:

First: Effects of the Free Management Contract with Respect to the Lessor

As soon as the free management contract for the commercial establishment is concluded, the lessor loses the status of “merchant” if he had it previously. Nevertheless, he remains registered in the commercial register and must request a modification of the registration to reflect the lease of the establishment. If he was not previously registered, he must register himself without acquiring merchant status (as provided by Article 203, paragraph 04 of the Commercial Code, which states:

“The lessor must either register in the commercial register or modify his registration, clearly indicating the lease management arrangement.”).

Departing from the general rule of contractual relativity, the lessor of the commercial establishment is jointly liable with the lessee-manager for the debts contracted by the latter in connection with the operation of the establishment. This joint liability persists until the free management contract is published and for a period of six months from the date of publication (Article 209 of the Commercial Code).

According to general rules, the lessor is obliged to guarantee and not disturb the lessee (paragraph 1 of Article 483 of the Civil Code), by refraining from anything that would prevent the lessee from enjoying the commercial establishment. In particular, the lessor is bound not to compete with the lessee by engaging in a similar trade, as such competition would redirect customers from the lessee back to the lessor, undermining the foundation and essence of the commercial establishment itself. Any contrary interpretation would render the contract meaningless and would starkly contradict the principle of good faith in the performance of contracts.

Second: Effects of the Free Management Contract on the Lessee

Since the free management contract is an onerous contract, the payment of rent is a fundamental obligation on the part of the lessee-manager.¹ Although the Algerian legislator did not expressly mention the rent in paragraph 1 of Article 203 of the Commercial Code, this gap was addressed in Article 213 of the same law, which states:

“The price specified in the free management lease contract may be subject to revision every three years, similar to leases.”²

Additionally, Article 214 provides:

“The party wishing to request a revision must notify the other party by registered letter with acknowledgment of receipt or through a non-judicial procedure.”³

A combined reading of these provisions reveals that the Algerian legislator did not intend to omit the element of rent from the free management contract—it is, in fact, an essential obligation. This forms the decisive criterion distinguishing a lease contract from a loan-for-use contract. The parties have the freedom to determine its value and nature, whether monetary or in kind, unlike the sale of a commercial establishment, which the legislator requires to be for a cash price.

Since the lessee manages the commercial establishment in his own name and for his own account, he acquires merchant status if he did not already have it and becomes subject to all obligations imposed on merchants, including keeping commercial books and registration in the commercial register. He may be declared bankrupt if he stops paying his commercial debts. This is what paragraph 2 of Article 203 of the Commercial Code states:

“The lessee-manager acquires merchant status, or artisan status if the establishment has a craft nature, and he is subject to all obligations arising from this. He must also comply, as appropriate, with the provisions of this law relating to the commercial register.”

During the term of the contract, the lessee-manager is obliged to preserve the commercial establishment with all its constituent elements, in accordance with the standard of care of an ordinary person as stipulated in paragraph 1 of Article 495 of the Civil Code, which states:⁴

“The lessee must take care of the leased premises as an ordinary person would.”⁵

¹ Paragraph 1 of Article 483 of the Civil Code states: "The lessor must refrain from any interference that would prevent the lessee from enjoying the leased property. He may not make any changes to the property or its accessories that would diminish such enjoyment."

² See: Murad Al-Mawajda, Muhammad Al-Arman, *op. cit.*, p. 58.

³ See: Karkadan Farid, *Transactions on the Commercial Premises That Do Not Transfer Ownership*, *op. cit.*, p. 467.

⁴ See: Mustafa Kamal Taha, Wael Anwar Bundak, *Principles of Commercial Law*, *op. cit.*, p. 687.

⁵ See: Karkadan Farid, *Transactions on the Commercial Premises That Do Not Transfer Ownership*, *op. cit.*, p. 464.

If, for example, the lessee-manager fails to insure the commercial establishment during the term of the contract, he will be liable for any risks that may affect the constituent elements of the commercial establishment, whether through destruction or a decrease in their value. Since a commercial establishment is an intangible movable property, its destruction is not material but rather through the loss or disappearance of one of its essential elements, such as the revocation of the merchant's license and his prohibition from conducting his commercial activity.

It is also worth noting that the obligation not to compete is a mutual obligation between the parties to the contract, requiring the lessee to refrain from competing with the lessor by engaging in a similar business during the term of the contract and after its termination. Such competition would redirect customers from the lessor back to the lessee, which starkly contradicts the principle of good faith in the performance of contracts.

Third: Effects of the Free Management Contract on Third Parties

When the commercial establishment is operated by someone other than the owner through a free management arrangement, this creates concern for creditors about the security of their claims. This prompted Algerian legislation to establish a set of formalities and legal measures to protect their rights. These include imposing formal requirements for the conclusion of the contract under penalty of nullity, with the aim of notifying third parties of the status of the establishment. However, third parties cannot be held accountable for this nullity,¹ as stated in Article 212 of the Commercial Code:

“...However, the parties to the contract may not invoke this nullity against third parties.”

This nullity also leads to the loss of any rights that the contracting parties might acquire from the provisions relating to commercial leases, specifically regarding the renewal of leases for real estate or premises used for commercial or industrial purposes (paragraph 2 of the same article).

In addition to this, creditors have the right to request the competent court to shorten deadlines if they can prove that the free management arrangement will jeopardize the collection of their debts, provided this is done within three months of the publication of the free management contract (Article 208 of the Commercial Code).² They also have the right to seek recourse against the lessor in solidarity with the lessee-manager in the event that the latter fails to publish the contract, up to six months from that date (Article 209 of the Commercial Code). Furthermore, the debts of the lessee-manager become immediately due by operation of law upon the termination of the free management contract (Article 211 of the Commercial Code).

¹ See: Murad Al-Mawajda, Muhammad Al-Arman, op. cit., p. 58.

² See: Damoush Hakima, Sulaymani Sabrina, op. cit., p. 145.

Conclusion

At the conclusion of this work, we can only express our gratitude to Almighty God for enabling us to complete it. Throughout the study, we have endeavored to present the esteemed reader with a comprehensive explanation and a clear understanding of the general provisions of the Algerian Commercial Law in the five chapters covered in this book. We hope that we have succeeded in clarifying this part, and we ask God Almighty to guide us in completing what we have begun, so that we may explain all the provisions included in this law, whether related to commercial companies, commercial papers, or settlement and bankruptcy.

This was accomplished by the grace of God.

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