The text offers a comprehensive introduction to business law and the Jordanian legal system.The textbook provides for key concepts and terms, contract basics, corporate structures, legal aspects of buying and selling, common pitfalls, international business issues and more.

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Business Law in Nutshell (with Specific

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Business Law in Nutshell (with Specific Emphasis on Jordan

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Business Law in Nutshell (with Specific Emphasis on Jordan Legal system)

Bashar H. Malkawi*

General Theory of Law and Right

The Legal System

Definition of Law

There is no generally accepted definition of law. Its meaning vary in the context. Attempted definitions are part of a science known as "Jurisprudence". It studies the nature, sources, efficiency, form and substance of law and legal institutions.

The term law was defined by a Jurist called "Salmond" as follows: "Body of principles recognized and applied by the state on its objects on the administration of justice".

Another Jurist called "Austin" defined law as follows: "Rules of conduct imposed and enforced by a sovereign on its objects".

A Jurist called Blackstone defined law as: "Rules of civil conduct prescribed by the supreme power of the state, commanding what is right and prohibiting what is wrong".

From the above-mentioned definitions, one can define law as a body of general rules that regulate the conduct of individuals in a society, and which individuals must obey and follow subject to sanctions decided and enforced by the state through the administration of its justice system.

Law and Justice:

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Law protects rights of individuals and essential for the administration of justice and maintenance of order in societies. Absence of law and order leads to the break-up of societies. No one care for others. Relationships become with no shape. As a result, rights of individuals will not be secured and protected.

Broadly speaking, law preserves, guides, and advances the social values in any society. These values include equality, liberty, freedom and justice. The deployment of law in order to preserve these values can be termed as "the role of law".

For example, it has been stated clearly that no one shall be deprived of his or her freedom or property except by some provisions of law. Also, it has been indicated that government, parliament, civil servants and police are not above the law.

In the field of business, individuals come into contact with each other in different capacities, such as, sellers and buyers, sellers and customers, banks and customers, employers and employees, insurers and insureds, shareholders and managers in the companies.

Law regulates the conduct of people doing business, protects their properties and contractual rights, and resolves any potential dispute between business-persons and/or non-business-persons

Law and Morality:

Morality can be defined as a body of principles and values concerning people's behavior which is generally accepted by a given society.

Rules of morality may be embodied as legal rules, e.g., rules prohibited murder and theft. Rules of morality may be separated from law, e.g., traffic rules. And, finally, rules of morality may contradict legal rules, e.g., interests.

The main differences between law and morality are:

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1. Objective: Law aims at order while morality aims at achieving nobility of character.

2. Scope: Law regulates the relationship between individuals in societies while morality regulates both the relationship between individuals on the one hand and the relationship between an individual and him/herself on the other hand.

3. Content: law comprises rights and duties on individuals while morality has duties only.

4. Penalty: Breaking the law means material penalty such as prison or fine while violating morality means immaterial penalty such as disapproval of public opinion.

5. Enforcement: Law enforced through the judicial system while the enforcement of morality depends on the conscience of individuals.

6. Duration: Any change in morality at any given society is relatively slow while law changes from time to time in order to keep up with changes and developments in societies.

7. Characteristics: Moral rules are determined by the societies according to their believes and needs while legal rules should be characterized as:

- Social: since the purpose of law is to regulate relationships of individuals in societies, absence of societies leads to the fact that law is not needed.

- Abstract: legal rules must not be targeting certain set of people or their acts. Such practice will result in arbitrary choices between peoples' needs. It will result also in deciding what interests are more important than others. It will result also in deciding which people receive privilege more than others. And finally, such practice contradict equality.

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- Transparent: In order to make law effective in guiding peoples' expectations and choices, they must be able to know what the law is and to make their choices accordingly.

Classification of Law

The idea of law classification is useful in two respects: First, making law more easy to understand and comprehend. Second, determine the applicability of different legal rules within different context and different areas of application. Law can be classified in two main categories: natural law vs. positive law, and public law vs. private law. Those two main categories will be studied carefully in the following pages.

natural law vs. positive law

Natural Law: It can be defined as a set of principles and rules which provide collectively an adequate guidance for humans behavior. Such set of principles and rules can be derived from the nature of humans and the nature of society.

Professor Hart, a leading scholar on Jurisprudence, view natural law as a restriction on the use of violence, mutual forbearance, mutual compromise, respect for others' property, respect for creation and modification of obligations and sanctions if law is broken.

Positive Law: It can be defined as a system of legal rules adopted, endorsed, enacted and imposed by the state. Positive law can be classified in three main categories:

1. Written and unwritten law
2. Substantive and adjective law
3. Mandatory (Imperative) and Supplementary (complimentary) law

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Written and unwritten law: Written laws are documented precisely and published to the general public openly such as the Jordanian Constitution and the Jordanian Civil Code while unwritten laws are not documented and not published to the general public such as custom.

Substantive and adjective law: Substantive law determine rights, duties, obligations and liabilities of individuals. Adjective law concerns the rules that govern the formalities of conducting judicial proceedings. It concerns also with the constitution and jurisdiction and competence of different courts. It concerns also the enforcement of the outcome(s) of substantive laws.

For example, the law which prohibits monopolization of goods and services and unfair competition in business is called "competition law" which is a substantive law. The set of procedural rules of bringing suits, conducting trials and appealing judgments when the substantive law is breached is called adjective law.

Mandatory (Imperative) and Supplementary (complimentary) law: Mandatory law is the set of rules which cannot be modified or excluded through parties' agreement either explicitly or implicitly. In other words, parties are bound to comply with mandatory laws. The legislature states clearly the intention of having a mandatory law by stipulating the issue in an unequivocal terms. Normally, the legislature uses the terms "parties shall…" or "parties shall not…" in order to achieve this end. Sometimes, the legislature uses certain terms in order to achieve this end, such as "Notwithstanding anything to the contrary".

For example, Article 80 of the Jordanian Companies Act of 1997 No. 22 provides the following:

> " the registration of the limited partnership in shares shall be subject to the approval of the companies controller."

Similarly, Article 15 of the Jordanian Income Tax law of 1985 No. 57 provides that:

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> "Notwithstanding anything to the contrary contained in this law, the taxable income of insurance companies dealing in life insurance which is subject to tax is estimated at the equivalent of 10% of the total amount of insurance premiums due to the company for life insurance. No deductions are allowed on this amount or part of this amount for any reason whatsoever."

On the other hand, supplementary law is the set of rules which can be modified or excluded through parties' agreement either explicitly or implicitly. Normally, the legislature uses the terms "unless it is otherwise agreed" or "subject to any agreement or expression to the contrary" in order to achieve this end. For example, Section 426 of the Jordanian Civil Code of 1976 provides that:

> "Joint liability among debtors shall not arise except by agreement or a provision in the law."

Similarly, Section 522 of the Jordanian Civil Code of 1976 provides that:

> "The purchaser shall deliver the price at the time of contracting and before taking delivery of the sold property unless it is otherwise agreed"

public law vs. private law: This method of classification depends on the role of the state in a given interaction, transaction or relationship. It should be noted that the state might act as a sovereign or it might act as a natural person without any sovereignty and without being a representative of the society. In the first scenario, the relationship should be governed by public law. In the second scenario, the relationship should be governed by private law.

Consequently, public law consists of the rules and principles of law which involves the state as a sovereign representing society. In contrast, private law consists of the rules and principles of law which involve individuals.

This classification was used by the Romans as they drew a clear distinction between public law which governs relationships between the state and its citizens and private

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law which governs the relationships between individuals. This method of classification was adopted by the Arabic countries including Jordan

For example, criminal law is part of the public law. Criminal law defines variety of actions forbidden by the state. More precisely, criminal law defines classes of conduct deemed particularly injurious by the state to the general public, such as murder, robbery and assault. The state, as a representative of the society, strongly disapproves of such actions and punish those who fail to observe the standards. Criminal law imposes a penalty on any forbidden action such as fine, imprisonment, or even the capital punishment. Such punishment is carried out by the state through its coercive power. Effectively, the purpose of criminal law is to punish the offender rather than compensating the victim.

On the contrary, one of the main purposes of private law is the orderly resolution of disputes between individuals by providing a remedy, usually financial remedy, to the aggrieved party against the wrongdoer. More precisely, compensation of the aggrieved party is one of the main aims of private law.

Branches of Public Law

There is a large debate in modern times on the role of the state in regulating individuals activities. Some believe that the state should exert more power and control over its objects' commercial and private life activities, while others believe that such role should be diminished.

Public law is usually divided into external public law which deals with public international law and internal public law which consists of constitutional law, administrative law, criminal law and finance law. The following pages will deal with the branches of public law.

1. **Public International Law**

This branch of law deals with rules and customs which regulate the relationships of the states among themselves, such as international conventions in order to determine the rights and duties of each one of them. Besides, it deals with the relationships

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between the states and the international organizations such as the WTO and WIPO, and regional organizations such as the Arab league and the EU.

Topics of public international law include among other things the statuses of war, peace and neutrality among states, political status of states, i.e., independent or dependent, diplomatic relationships between states, issues related to the territorial boundaries and maritime frontiers of the state.

2. Constitutional Law

Constitutional law of any country must be examined carefully in close conjunction with the history and nature of that country. For example, the Jordanian constitution stipulates that Jordan is a Muslim country. This is due to the fact that the majority of Jordanians are Muslims.

Also, the UK constitution must be studied in conjunction with the British history in the seventeenth century when there was a struggle between the King and the Parliament. Similarly, the UK constitution must be studied in conjunction with the fact that the UK consists of four parts: England, Wales, Scotland, and Northern Ireland. This might explain the existence of monarchy in the UK at present. This might explain also the fact that the UK constitution is unwritten, i.e., the UK constitution had never been embodied in a formal legal document. Also, it must be borne in mind that there is a large debate in Europe over an EU constitution. Some think that the renaissance and its thinkers and philosophers should be documented in the constitution. Others think that Christianity should be equally documented. The matter is still debated in Europe.

This branch of law deals with the constitution of the state as a legal framework. It also defines the form of the state, e.g., monarchy, republic. It also deals with the division of power within the state, the competence of each division and the limits of its power. A very important issue that stands in the core of constitutional law is the principal of the separation of power. There are three division in the state: First, the legislative authority which issue the laws. Second, the judicial authority which settles the

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disputes arising under the law. Third, the executive authority which executes and applies the laws. And finally, it deals with certain rules that guarantee citizens' liberties, freedom, justice and equality such as the right of gathering and the right of expressing one's opinion and the right to be heard by an independent third party neutral in a transparent manner.

3. Administrative law:

Until recently, Administrative law was sought as branch of constitutional law. Then it has been separated due to the increasing role of the government in everyday life of the citizens. Such role might interfere with citizens' rights and duties towards the state. The central point in administrative law is the potential conflict between the individuals on the one hand and the government as an executive power on the other hand. This is due to the fact that the greater the role played by the executive power in the regulation of the life of the community, the greater the risk that the individual will lose his/her fundamental rights, such as their right in their properties. In actual fact, the administrative law relates mainly to safeguarding such fundamental rights. As a result, the need arises to differentiate between the relationship between the state and its citizens on the one hand, and the relationship between the government and the citizens of the state on the other hand.

The subject-matter of Administrative law is concerned mainly with the broad issues raised by the governmental power of regulation, such as housing, public health, cities and towns planning. This is regulated by various statutory provisions.

In the case of any dispute between the government and the citizens of the state and where there is a challenge of an administrative action by an individual, suits against the government by individuals would be subject to the control of the judicial authorities where the administrative tribunals must deal with such disputes. In actual fact, administrative tribunals were established to determine rights, duties, responsibilities, and liabilities of the citizens in their dealing with the state. To this

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effect, the High Court of Justice was established in Jordan in 1989 as an administrative court.

It must be noted clearly that the government as an executive power is not and should not be immuned from the scrutiny of the judicial authority through the administrative tribunals.

For example, the remedies in administrative law is open to the individuals in the case of a seizure of an individual's property by the state in return for a compensation for the purpose of planning cities and towns, Similarly, the remedies in administrative law is open to the individuals in the case where a civil servant, who is in effect is a representative of the state, is in breach of his obligations either to the state or to the citizens of the state.

4. Criminal Law: This branch of public law consists of rules relating to acts and/or omissions which are viewed by the state as wrong and punishable, and therefore, the state wishes to suppress them as crimes, such as murder, theft, assault.

It must be noted however, that the act or the omission which is viewed by the state as a crime may or may not be immoral. It would be a criminal act if and only if the state declared such act or omission to be a criminal act or a criminal omission by a statutory provision.

It must be noted that in deciding any criminal liability, attention must be paid to the proof of the existence or lack of good faith and bad faith. Attention must be paid also to the mental state of the offender, i.e., there might be some mental disorder or abnormality. In both case, criminal liability might be diminished.

And finally, criminal procedures are associated with criminal law. Criminal procedures are concerned with the structure of the proceedings in courts, rules of evidence, the sentence, and the right of appeal.

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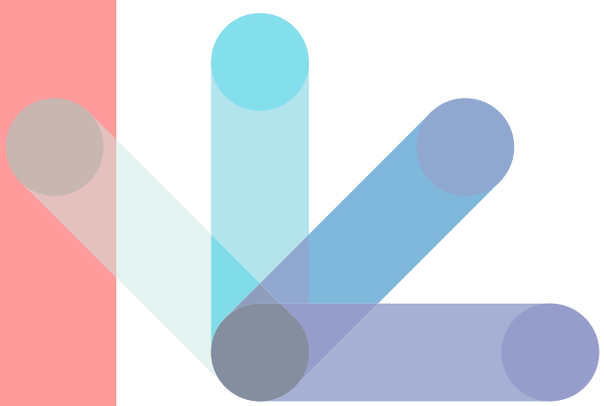
5. Finance Law: This branch of law includes the rules that govern financial aspects of the activities of the state, particularly, the budget of the state and the revenues and expenditures of the state.



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Private Law

Individuals in any society come across private law more often than public law while comparatively speaking, their encounter with public law is quite rare. Private law consists of civil law, commercial law, labor law and private international law. Those branches of private law will be studied carefully in the following pages.

Civil Law

Civil law is considered to be the main source of private law. It regulates private activities and transactions and interactions and relationships of individuals which are apparently not regulated by commercial law. Moreover, if any matter within the realm of private law is not regulated, then reference must be made to civil law.

Civil law deals mainly with contracts and their different kinds such as mortgage contracts, carriage contracts and brokerage contracts. It also deals with the right of property, its sources and its effect. There are basically two types of properties, first, personal property, second real property.

Personal property refers to movable things whether tangible such as cars and books, or intangible things such as shares in companies and intellectual property rights which includes patents, copyrights and trademarks. Real property refers to immovable things such as lands and buildings.

The law of civil procedures deals with the organization of civil proceedings, civil courts, witnesses and experts. It deals also with the performance of the outcome(s) of a civil suit. It deals also with rules of evidence which determine the rules of proving facts in a civil suit.

Commercial Law

As contrasted with civil law, commercial law relates to special classes of persons and activities which are termed as commercial persons and commercial activities. Commercial law includes the definition, conditions and consequences of being a merchant. It deals also with commercial transactions and commercial papers such as

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cheques, promissory notes and bills of exchange. It deals also with commercial contracts such as brokerage, agency and mortgage. Finally, commercial law regulates the rules of bankruptcy.

One of the main branches of commercial law is company law which regulates various kinds of companies, their foundation, administration, activities and dissolution.

Also, maritime law is considered one of the main branches of commercial law. It involves the rules that govern maritime navigation and define rights and duties of the shipowner, the captin, the crew, the carrier. It regulates also carriage of goods by sea and maritime insurance.

Labor law (Employment Law)

This law regulates the rights and duties of the employers and the employees. It includes topics such as health and safety at work and unfair dismissal.

Private International Law

This law deals with conflict of laws where there is a foreign element in a contractual relationship. The application of this law is compulsory upon the existence of foreign element in the contractual relationship.

Private international law regulates the applicable law in any potential dispute, the competent court to have jurisdiction to hear and decide on the dispute and the effects of a foreign judgment in various states.

The main differences between public international law and private international law are as follows:

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1. public international law regulates the relationship between states as sovereignties while private international law relates to the rights and duties of nationals of different states when they interact, transact or constitute a relationship
2. The institutions which make and enforce the rules of public international law are states and international organizations while the institutions which make and enforce the rules of private international law are the national legislatures and the courts of individuals' states.
3. Rules of public international law are agreed upon rules between states as sovereignties in order to regulate the relationships between states in the international community, while private international law is a part of each country's municipal law which means that private international law varies from one country to the other.
4. The relevance and importance of public international law is an issue to be determined by various states while the relevance of private international law is increasing rapidly in view of emerging social changes across borders and conditions of modern life which have brought frequent and closer contact between the nationals of different states such as emigration, foreign travel and the cross-border nature of commerce and recently electronic commerce.

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Sources of Law

There are five main sources of the Jordanian Law: Legislation, custom, equity, judicial precedents and jurisprudence. They will be studied carefully in the following pages.

Legislation

Legislation is the principal source of the Jordanian Law which must not contradict the Jordanian Constitution. Legislation means the formation of legal rules by the competent authority then such rules must be embodied in statutes as Acts.

It must be noted that the competent authority that issue these legal rules in Jordan is the legislative authority which is entrusted to the Parliament which consists of the House of Representatives and the House of Senates.

It must be noted also that any legal rule issued by the Parliament must be endorsed by his Majesty, then it must be published in the official Gazette before it becomes a law. Legislation becomes executable and applicable to individuals if and only if it has been published and the individuals are informed of its existence. This represents a main principle of the administration of justice which is transparency. Since it is impractical to inform each citizen of new laws, the state assumes that every object on its territory, whether citizens, residents or foreigners are informed of its laws upon their publication in the "Official Gazette".

In certain circumstances, such as the dissolution of the Parliament or when the Parliament is not in session, the Jordanian Constitution delegates the power of issuing "temporary laws" to the executive power, i.e. the government which must be endorsed by his Majesty.

In order to facilitate the administration of laws in governmental departments and since laws are drafted with general terms, the governmental departments are usually empowered by various laws to issue regulations and directives to facilitate

the implementation of various laws. However, such regulations and directives must not contradict the laws.

Custom

In underdeveloped societies and before the emergence of the state in its modern shape, individuals were not represented in order to express their interests in the form of laws, instead the chiefs of tribunals were acting in a manner which conforms to the rules imposed by customs in that particular society. There are general customs which are the ones that prevail all over the country, and there are local customs which prevails in certain areas.

Custom can be defined as the adaptation of certain practices and habits by certain people for a long time and without substantive changes which results in making such practices and habits compulsory.

Distinction must be made between customs and usage. Customs consist of a material element which is following a certain practice by certain individuals, and psychological element which is the individuals' conviction that such practices are binding. However, usage consists of a material element only. Having said that, it must be noted that usages can become binding once they are incorporated, either explicitly or impliedly, into parties' agreement. This is a main aspect of the idea of freedom of contracting.

The main advantage of customs that it is flexible and adaptable to new needs and interests of individuals. The main disadvantages of customs that it is usually spontaneous which means that it does not go through critical examination and it is usually obscure and not precise which means that in effect it cannot lead peoples' expectations and cannot create stability therefore.

The Jordanian Civil Code stipulates clearly the conditions of accepting certain customs by courts in order to have the force of law. These conditions are set out in Article 2 Subdivision 3 which states that:

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> "Customs shall be general, ancient, stable and continuous, and they shall not contradict the provisions of law, public order or morals."

Equity

Equity is a generic term that encompasses fairness, reasonableness, morality and justice. Its roots can be traced back to natural justice. As a result, in many cases, the determination of equity as a source of law is challenging. Besides, principles of equity should be consistent with the provisions of law. Accordingly, it has been considered as a supplementary source of law.

However, rules of equity can be utilized to encounter any deficiency or injustice in the provisions of law. Moreover, equity can be utilized to deal with entirely new rights and remedies totally unknown to the provisions of law. Furthermore, equity implies certain remedies as a relief that can be offered in particular circumstances that are beyond the reach of law. It is to be hoped that such notion of equity will be utilized in Jordanian Law.

Aristotle, an ancient Greek philosopher, has pointed out that laws might fail to achieve adequate justice through its provisions because such provisions are designated in such a way that deals with subjective circumstances. Instead, equity implies body of rules and principles which are concerned by classes and sets of persons and events rather than individuals and individual instances. As a result, equity can converge rather than diverge the applicability of various laws because it is based to a large extent on morality.

Judicial Precedents

This source of law consists of the decisions of courts which have been made in the course of litigation. The decisions of courts are more than just authoritative statements of the law since they can be binding in subsequent cases where the material facts are the same, non-withstanding whether or not the other courts believe that such decisions are appropriate. Having said that, it must be noted that judicial precedents are supplementary source of law.

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It must be borne in mind that high-ranking courts, such as the cassation court, are competent to issue such judicial precedents in order to be followed by low-ranking courts, such as courts of conciliation or courts of first instances.

When the judge encounters a case without precedents, in other words, the material facts of the case are unlike any previous case, the judge is obliged to decide according to other sources of law. By doing so, the judge decree a new judicial precedent which other judges will follow if they encounter similar material facts.

The idea of Judicial Precedents is more evident in common law countries such as the UK and the US rather than civil law countries such as France and Jordan. In Anglo-Saxon countries, judicial precedents are termed as judge-made law.

Jurisprudence

It studies the nature, sources, efficiency, form and substance of law and legal institutions. In France, it has been said that French law has been influenced to a large extent by Jurists' comments and proposals. In Jordan Jurists' opinions are supplementary source of law and Judges refer to such opinions for guidance only.

It must be noted here that "Islamic Jurists' opinions" are more than guiding principles in issues related to Family Law such as marriage, divorce and inheritance. In other words, Article 2 of the Jordanian Civil Code states that in the absence of any provision in the Jordanian Civil Code that regulates issues related to Family Law, reference must be made to "Muslim Jurists". There are four schools of jurisprudence in Islam: The Hanafi, The Maliki, The Shafi and The Hanbali. If Islamic Jurisprudence cannot provide an appropriate answer to the issue under consideration, then reference must be made to the Law of Sari'a which is based on The Holy Qura'n and the Prophet Sunn'a.

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Persons and their legal status

Legal personality can be defined as an entity to which rights and duties can be attached by law. Accordingly, law concerns only with persons as holders of rights and subject to duties. There are two kinds of legal personalities: Natural legal persons and Artificial legal persons (juristic persons)

Natural legal persons

Natural legal persons which consists of individual human beings. Humans are the main subject of any rule of law. Personality in law commences at birth and ends at death because prior to birth and after death people are not capable of acquiring rights and duties.

But it must be noted that there are certain categories of natural legal persons who are subject to special provisions of law such as minors who have limited contractual capacity until they are eighteen. In Jordan, a person acquire full capacity if he/she reaches the age of eighteen while enjoying his/her full mental ability and has not been interdicted.

Moreover, it must be noted that not every natural person is subject to the law of a certain country unless that country has the jurisdiction to apply its laws on that particular person and consequently to hear the dispute in its courts. No national court will hear a dispute which it has not jurisdiction to hear. Such jurisdiction is conferred by the statutes of that country.

Natural legal persons are normally belonging to certain states as citizens. Such relationship is termed as “nationality” which entitles citizens to acquire rights such as right of property and right of employment and right of voting. Non-citizens are not allowed to vote under any circumstances.

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Artificial legal persons (juristic persons)

Artificial legal personality has been attributed to a group of persons gathered in pursuance of a certain end such as companies. Companies can be defined as a group of persons who agree to co-operate with a view of creating pecuniary gains dividable among the members of the group.

Artificial legal persons might have public characteristics such as the state and the municipalities, and it might have private characteristics such as companies and societies and establishments who are established by virtue of the provisions of law

It must be noted that private juristic personalities might have public interest, however, they are not organs of the government because they owe their origin and existence to private enterprises.

It must be emphasized that the commencement of the personality of a public juristic person depends on issuing a decision to that effect by the competent authority while the personality of a private juristic is a private initiative that must be recognized by the competent authority. For example, the formation of companies in Jordan implies that such companies enjoy juristic personalities however, such personality must be recognized by specific provisions of the Jordanian Companies Act.

The extinction of public juristic persons may be the consequence of the withdrawal of the recognition of its personality by the competent authority. But in private juristic persons, the dissolution is either voluntary by members or compulsory by a court decision in the case of insolvency.

Upon the dissolution of private juristic persons, the assets are liquidated in accordance with the constitution of the private juristic person, then the debts are paid and the rest of the assets are to be distributed among shareholders or participants, unless the law mentions certain rules in this respect.

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The legal status of juristic persons is challenging because they cannot be credited with the possession of will or mind as it is the case with natural persons. Having said that, it must be noted that in practical terms, the will of a juristic person is the will of the human beings who are members or participants or shareholders in this juristic person.

As a result, it must be borne in mind that the main criterion in assessing the legal status of a juristic person is the intention of accomplishing some definite object(s). For example, every company is established in order to accomplish certain purpose(s). Thus its activities must be confined to such purpose(s). If it goes beyond the limits of its power, this would be void or *Ultra Vires* action, i.e., it cannot produce legal effects. For example, the Jordanian Civil Code provides that any insurance company must conduct its business with reference to certain type of insurance such as life insurance or Motor insurance. If a company that has been authorized by law to be a life insurance company conducts motor insurance, then its activities are void. Apparently, this is not the case with natural persons. Therefore, law imposes certain limitations on juristic persons.

Obviously, in cases of fraud, malice and deceit no criminal punishment can be taken against a juristic person, nevertheless, it can be liable for damages which can be awarded against them in the same manner as natural person, i.e., fine.

Article 51 of the Jordanian Civil Code provides that a juristic person shall enjoy, within the limits prescribed by law, all the rights except those attached to humans. This implies that juristic persons shall enjoy the following:

1. Independent financial patrimony
2. The ability to be represented.
3. The right of adjudication
4. Legal capacity
5. Domicile: Every natural person is supposed to have allegiance to a particular state. Such allegiance is called nationality. It is important to decide on the nationality in order to ascertain the applicable law and the competent court.

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On the other hand, domicile means the place where a natural person permanently resides. Note that length of residence is irrelevant, instead, the intention of that natural person is the indicative factor of the domicile.

There are two main kinds of residence: Domicile of origin which is acquired by birth and conferred upon the father's domicile. And domicile of choice which is acquired upon relinquishing domicile of origin voluntarily in order to reside in another country.

If a juristic person such as a company that has branches, the domicile of the company should be the place of its headquarter.

The scope of legal personality has been enlarged beyond natural persons to reach lifeless objects which are certainly not persons in the ordinary sense such as companies, clubs, trade unions. Apparently such artificial personality must be distinguished and separated from the natural personalities of the individuals who are constituting the artificial personality. This is due to the fact that the creation of a group of persons must be distinguished from the members of such group because both categories will have different rights and duties. There are certain consequences of such separation:

1. In actual fact, a particular legal rule may be inapplicable to natural legal persons. For instance, companies' taxes are only payable by companies.
2. A company can sue and be sued in its own name and even it can be sued by its own members.
3. A company can make contracts on its own behalf and its members cannot claim the benefit nor be subjected to any legal consequences of such contracts.
4. A company can own property in its own name and its members have no direct interest in such property. In actual fact, given that members of a company can it own its property, but they merely have shares in such property, they cannot pledge or endow such property.
5. Given that a company have a legal personality and operational, its debts are not the responsibility of its members. Having said that, it must be noted that in unlimited liability companies, the declaration of the insolvency of the

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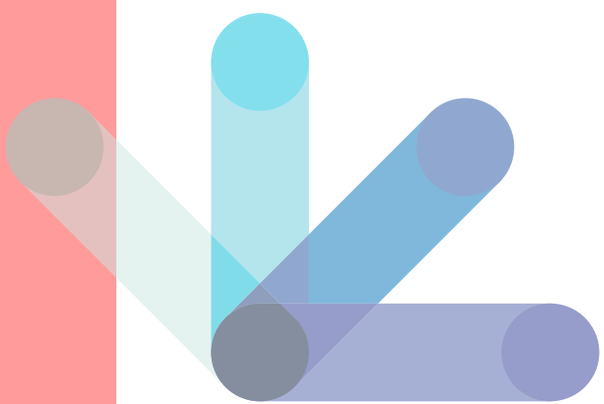
company implies that its members are personally liable to pay the company's debts. Apparently, the majority of companies are limited liability companies.



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Theory of Right

Definition of Right

Legal relationships are frequently expressed in terms of rights and duties and powers. For example, if A and B are the parties of a purchase contract, they owe each other a duty to perform what they have agreed upon. In other words, A owes B a duty to give him the subject-matter that has been agreed upon while B has a right to claim that subject-matter. At the same time, both A and B have the power to remedy any breach of the contract caused by either A or B.

Article 72 of the Jordanian Civil Code states that there are six means to prove rights. They are as follows: 1. writing 2. testimony 3. presumptions 4. Inspection and Expertise 5. Admission 6. Oath.

Classifications of Rights

Legal rights may be classified in different ways. The most common classifications are the following.

1. Perfect and Imperfect rights: Perfect right is recognized by law and enforceable by the state whenever the need for enforcement arises. While imperfect right is recognized by law but it is not enforceable. For example, the right of recovering a debt after lapsing certain time prescribed by law is unenforceable. The Jordanian law states that such lapse of time is 15 years after the payment of the debt is due.

It must be noted that imperfect rights might become perfect rights upon certain circumstances. For instance, if the law requires for evidence purposes that a certain contract, such as insurance, is in writing and the parties conclude the contract verbally then it creates imperfect right. However, once it is documented it becomes perfect right.

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2. Positive and negative rights: Positive rights correspond to positive duties and acts. For example, if A is a creditor and B is a debtor, then A has a positive right. While negative rights corresponds to situations where a person is ordained by law to refrain from doing certain acts. For example, if A owns a land, other persons are not allowed to trespass on his land.

3. Public and Private Rights: If the state or any of its subdivision is involved in a relationship, interaction or transaction with individuals then the rights of each side would be public rights. For example, the relationship between the state and its civil servants. While the relationships between individuals create private rights.

4. Real and Personal Rights: Real right is the entitlement of a certain power given by law to a certain individual over a certain thing, whereby if any person interferes with such entitlement, the owner of the real right is entitled by the law to prevent such interference. On the other hand, personal rights consist of entitling someone to bring a claim against particular detrimental individual compelling him to deliver a material thing or to do or abstain from doing some definite acts.

Execution of Rights

There are two means of executing rights, voluntarily execution and compulsory execution.

As regards voluntarily execution, Article 316 of the Jordanian Civil Code provides that "execution of rights shall be voluntarily if settlement is effected". For example, a debtor might attempt to settle the dispute with the creditor. Such settlement is a method of executing the debtor's duty of fulfilling his obligations towards the creditor. If the creditor rejects a valid settlement of his debt without legal justification, the debtor can serve upon him a writ to accept the settlement which results in the debtor acquiring the right to deposit the amount of settlement with the competent court (settlement shall be effected at the place of the debtor's domicile or at the place of his business, unless it is otherwise agreed).

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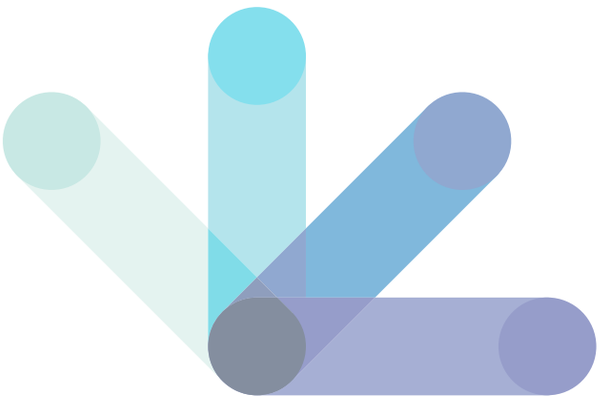
As regards compulsory execution, Article 360 of the Jordanian Civil Code, the debtor shall be obliged to perform his obligations to the creditor upon receiving a judicial writ to that effect. If the object of the right is a physical performance of work where the debtor should do it personally, then the debtor should do such work reasonably and the creditor can reject its performance by others. If the debtor refuses to do the work, the creditor can secure permission from the court to do it at the expense of the debtor. If such expenses are not stipulated in the contract or under the law, the court shall estimate it as that equal the actual damage that occurs to the creditor.



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Sources of Obligations

Obligations are created either by the will of the persons such as contracts and unilateral disposition. Alternatively, obligations might be resulted from a beneficial act (unjust enrichment) or an act that causes damages (torts). And finally, obligations might be imposed by the authority of the law. We will study contracts in the following pages.

Contracts

Definition

A contract can be defined in broad terms as a mutually expressed intention between two or more persons to create a legal relationship between them in the form of binding agreement to do or not to do something, to which the law will give legal effect non-withstanding if it is documented in a written form or not.

Forms of contract

Contracts include, but not confined to, everyday transactions such as hiring a taxi, buying goods and taking out life insurance polices and taking over small companies by other big companies.

At first sight it might appear that legal enforceability is irrelevant in such transactions because parties' agreement is immediately followed by performance. However, if things go wrong, for example, if the taxi crashed owing to the negligence of the driver, or if the sold goods are defective, then the law of contract will come into play.

Battle of forms

In some cases such as insurance contracts, the parties' bargaining power in the formulation of a contract is not equal. This would result in an unfair contractual terms that causes disputes between contractors. Practically speaking, insurance companies usually insist on certain terms in the contract with the insureds which apparently results in favorable treatment of the insurance company. However, well-informed insureds, or more precisely, well-assisted insureds by a professional broker, can alert

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contractual terms to their favor and refuse to accept the insurance companies' terms. This is resulted on "the battle of forms".

Freedom of contracting

This idea might be described as the notion that parties should enjoy a wide freedom to make contracts with minimal interference by the state. This idea might be explained by arguing that the best interests of all will be best served by each person pursuing his own self-interest. Apparently, there is a conflict between the paternalism of the state in order to protect weak contractors and the idea of freedom of contracts.

Agreement in contracts

Agreement can be defined simply as consensus between two or more parties on the same thing. Although agreement is necessary for the conclusion of contracts, however, there are some situations where the agreement has not materialized while the contract is considered to be valid.

For example, if A offers to sell his car to B by posting a letter to that effect then he withdraws his offer after one week. However, B did not receive the withdrawal letter and accept the first offer. As a result, the contract of selling the car is valid although there is no agreement between the contractors.

An agreement in any contract is formed by an offer being made by one party which is accepted by the other. Apparently, there is no need for any particular words, conduct or forms to be used, i.e., the offer and acceptance might be verbal. All that is needed is a sufficient showing of intention to offer or to accept respectively.

It is important to emphasis however that the existence of offer and acceptance does not mean that there is a contract, it is the existence of agreement which counts. Thus, one must analyze what constitutes an offer and counter offer? what constitutes an acceptance? how the offer and acceptance are conveyed? And how an offer is terminated?

Offer

An offer is made where a person(s)-offreror(s)- unequivocally expresses to another person(s)-offeree(s)- his willingness to make a binding agreement on the terms specified by him if they are accepted by the offeree(s). For example, a shopkeeper who puts a ticket on goods stating the price is bound to sell them at that price. Article

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94/1 of the Jordanian Civil Code provides that the display of goods with their prices is an offer.

The offer must be definite without any vagueness or illusion because the court might held that there is no contract if the offer is insufficiently certain. This case might arise in enquiries and replies with regard to the lowest possible price. It might arise also in "invitations to treat" which can be defined as an invitation to enter into negotiations which may lead to the making of an offer.

For example, if someone announces in a newspaper that he has a house to let, he is not obliged to let it to the first coming who agrees to pay the rent because this is not an offer but it is an invitation to treat. As a result, it is for the customer to make the offer.

Also, if a shopkeeper displays goods in his shop-window, this does not constitutes an offer, instead it constitutes an invitation to treat. As a result, it is for the customer to make the offer.

Acceptance

The basic rule is that for an acceptance to be effective, it must be in accordance with the precise terms of the offer. The reason for this is practical since if the offeror is not told that his offer has been accepted, he does not know whether he has made a contract or can make offers to others.

If someone receives an offer and responds by saying "I accept the offer with certain modifications", this is not an acceptance at all but rather a "counter-offer" which will only give rise to a contract once it is accepted by the other party. Apparently, when the offer is met by a counter-offer, the original offer becomes dead and no longer available for acceptance.

Writing

The Jordanian Law states that there is no requirement that a contract should be in writing except where so provided by the statute such as insurance contracts for proof purposes. In other words, verbal contracts are producing legal effects. However, it

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must be noted that the requirement of writing is considered to be the strongest form of proving the existence of a contractual agreement once a dispute arises.

In actual fact, under the Jordanian law, there are certain essential elements that must be fulfilled in order to create a valid contract. They are respectively:

1. Legal capacity: Persons over18 who are not mentally disabled and who are not interdicted are capable of concluding contracts.
2. consent: It must not be affected by duress (forcing a person to enter a contract without his consent) or deceit (a party to a contract must not use deceptive means to induce the other to enter into the contract. Using deceptive means to induce the consent is a reason for rescinding the contract by the misled party. In actual fact, the deliberate failure to disclose a material fact is considered to be a deceptive mean provided that the misled party proves that he would not have entered the contract, had he known such facts.)
3. Subject-matter: It is the agreed-upon object in the contract. It could be an undertaking to do or not to do a certain act.
4. Cause: It is the direct purpose for which a contract has become into being.

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Business Law

The Concept and sources of Commercial Law

The Concept:

In certain countries such as England, the USA, and countries which follow the common legal system, the commerce law which is know under these systems as (Business law), is not a separate branch of law. Instead, it is one of the important branches of Civil Law. In actual fact, trading and non-trading communities are governed together within the realm of civil law.

Moreover, in common law countries, Business law embraces subjects relating to public law and private law as well, (e.g., Contract Law, governmental regulation of business activities, taxation, employer and employee relations, negotiable instruments, insurance, social security, etc.).

On the contrary, in countries which follow the Civil Law System such as France and Jordan, trading and non-trading communities on the one hand, and commercial activities and civil activities on the other hand, are governed separately. Consequently, traders and commercial activities are governed by commercial law, while non-traders and civil activities are governed by civil law. Consequently, Business Law -which is also called Commercial Law- enjoy a separate status.

However, both commercial Law (Business Law) and civil law in those countries are branches of private law. In other words, despite the existence of common grounds (being branches of private law), commercial law can be contrasted with civil law as the first relating to special category of individuals called merchants and special category of activities called commercial activities, while civil law embraces rules that regulate and govern all private affairs among individuals.

According to the Jordanian Commerce Law No. (12) 1966 section 1(2), 'Commercial law' which is also called 'Business Law' was defined as:

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> a group of specialized legal rules governing the commercial activities which are conducted by any legal entity, and a group of specialized legal rules governing the commercial activities which are conducted by those whose profession is commerce.

It is obvious from the definition above that commercial law in its strict meaning according to the Jordanian Commerce Law No.(12) 1966 implies that:

First, all commercial activities which are carried out by any person are included in the definition, non-withstanding if those commercial activities carried out by a trader, non-trader, unless he/she is prohibited by law such as judges.

Second, all classes of persons called merchants, whose profession is to perform commercial activities, are included in the definition. Merchants can be natural person or artificial person The artificial persons should be corporations which its objective is commerce.

It should be noted that the definition of commercial law in the widest since is wider than the definition under section 1 (2) of the Jordanian Commerce Law No.(12) 1966. The definition under section 1 (2) above is not more than listing of one or two of the subject-matters embraced under the Law in question.

Thus, the commerce law in Jordan may be defined as a group of legal rules that governs and regulates the merchants, commercial activities, commercial contracts such as commercial mortgage, carriage of goods and passengers, commercial agency, brokerage, Negotiable instruments (commercial papers) such as cheques, promissory notes and bill of exchange and finally the rules of bankruptcy.

The Sources of the Jordanian Commerce Law

The Jordanian Commerce Law No. (12) of 1966 section 3 mentions the sources of the Commerce Law by stating that:

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> "If there is no legal reference to be applied, the judge may utilize any legal precedent, legal opinion (Jurisprudence), equity and commercial custom".

The provisions above indicate to the sources of the Commerce Law which are as follows:

1- The Jordanian Civil Code (1976);
2- Judicial precedent
3- Legal opinions
4- Equity
5- Commercial custom

1- The Jordanian Civil Code:

The Jordanian Commerce Law No. (12) of 1966 section (2) (1) mentions the sources of the Commerce Law by stating that:

> "If this law doesn't cover the matter on hand, the civil law will be applied instead"

The analysis of section 2 (1) of the Law above indicates to the Civil Code as the principal source for the Commerce Law. That means the other sources provided by the Commerce Law are referred to them for guidance only. Thus, in case where the Commerce Law does not cover a commercial issue under its provisions, a priority is given to the Civil Code to be used, on the condition that the application of such provisions should be adequate to the principles of commerce law (speed and trust and easiness of procedures). If the Judge finds the provisions of the Civil Code are not in accordance with the requirements of the commercial activities such as speed, trust and easiness of procedures, he should not make an application for them and then utilize one of the other provided sources.

2- Judicial Precedent:

Judicial precedent may be defined as a judgment or decision of a court of law cited as an authority for deciding a similar set of facts. In other words, judicial precedents are

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judicial decisions and are binding on all courts having jurisdiction lower to that of the court which gave the judgment. They are also generally followed even by those of equal jurisdiction in deciding similar points of law. Whenever the Commerce Law and Civil Code are silent on a point or there is an ambiguity; the judge has to utilize the judicial precedents in the event of a conflict.

3- Opinions of Jurists

A 'jurist' is the person who is an expert on law. Opinions of jurists mean the principles, ideas and point of views which may be lied down by the jurists explaining the scope, meaning and ways of implementation of the law.

No doubt that opinions of jurists play great role in enriching the jurisprudence. Opinion of jurists may be found in legal journals and periodicals, legal text-books, reference books and legal conferences.

The courts are influenced by opinions of jurists and often give their approval of views expressed by jurists who are held in high regard and the degree of influence varies according to the reputation of the jurist and the nature of his or her work.

It should be noted that according to section (3) of the Jordanian Commerce Law, opinions of jurists are referred to as a source utilized by the judge in the event of a commercial conflict only for guidance.

4-Equity

The term 'Equity' means fairness and natural justice. The doctrine of 'equity' was developed by the Common Law System. The judge may utilize equity as a complementary source of law where the law expressly leaves a point to his discretion, or directs him to take circumstances into consideration.

5- Commercial Custom:

Custom may be defined as a long established practice of the people. In order that a practice of people might be considered as a valid custom it should have been exercised from time immemorial, have been exercised continuously, be contrary neither to law nor public order or morals and be consistent.

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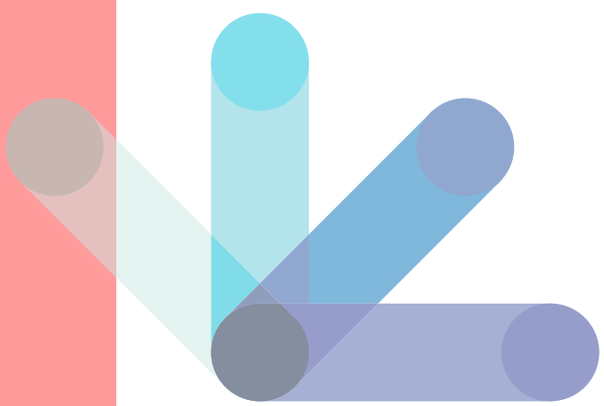
It is well-know that ‘Commercial Custom’ is an important source of commercial law and plays an important role in regulating the business dealings between merchants. It should bear in mind that most of codified commercial rules used to be customs.

It should noted that under section (3) of the Commerce Law the legislature places ‘commercial custom’ the last source where the judge may utilizes it as a source for guidance only.



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Types of Commercial Activities

It is necessary to know the criterion of distinguishing between commercial activities and civil activities to be able to determine the applicable law and the methods of proving the existence of right.

There are many theories produce presented by the jurists of commercial law as an attempt to distinguish a commercial activity from a civil activity, the most well-know of these theories are the theory of speculation, the theory of circulation and the theory of enterprise.

1- The Theory of Speculation

The substance of this theory is that the criterion of distinguishing between a commercial activity and civil activity is speculation. This means that when someone conducts an activity, which may involve buying goods or shares, or buildings and properties in the hope of being able to sell them again at a higher price and make profit, then such activity is considered to be a commercial activity.

This theory was criticized by saying that the theory can not be taken as an absolute criterion where there are some activities considered to be civil and the purpose of conducting them is the purpose of making profit such as lawyers who practice law at courts and give consultations to their clients. Apparently, lawyers aim to gain profit from doing such practice, same for doctors and architectures who practice their professions for the purpose of making profit for living.

In addition, there are some activities considered to be commercial and the purpose of conducting such activities is not making profit, such as issuing one of the commercial papers (cheques, promissory notes and bill of exchange).

2- The Theory of Circulation

The substance of this theory is that an activity is a commercial one if it has the effect of circulation of assets, products, monies starting form the manufacturers or producer to consumers. The theory in question faced a criticism that there are some activities conducted and have the effect of circulation but deemed civil activities, such as the activities of cooperative societies where goods are circulated from the manufacturers

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to the societies and then sold to consumers. Moreover, there are some activities deemed to be commercial activities and have no effect of circulation such as carriage of persons.

3. The Theory of Enterprise

The principle of this theory is that the criterion of distinguishing between a commercial activity and a civil activity is the idea of enterprise not the nature of the commercial activity itself. In other words, if someone conducts a commercial activity through an enterprise repeatedly and regularly; such an activity is considered to be a commercial activity (e.g., banking, insurance). Consequently, although the purpose of conducting a casual activity is to make a profit, it shall not be deemed to be commercial since that activity is not conducted repeatedly and regularly through an enterprise.

However, this theory is in contrast with the Jordanian Commerce Law which provides that conducting a casual activity of purchasing commodities with the intention of selling them at profit shall be deemed to be commercial activity (see the Jordanian Commerce Law No.(12) 1966. Section (6) (1) (a)).

It is obvious that none of the theories above were able to provide a clear definition for a “commercial activity” and then provide a definite criterion applicable for all provided commercial activities by commerce law. Thus, all commerce laws adopt more than one theory as criterions to determine some activity to be deemed to be commercial or turn to listing all activities that shall be considered as commercial activities.

The Commercial Activities under the Jordanian Commerce Law

The Jordanian Commerce Law No.(12) 1966, is corresponding to the other Arab laws where it does not give a definition to the commercial activity because it is difficult to give a general definition to all activities that are considered commercial according to Commercial Law. As a result, the Commerce Law lists the commercial activities as a

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non-exhaustive examples. The Jordanian Commerce Law sets down the commercial activities under three groups:

1- Inland Commercial activities (section 6).
2- Marine Commercial Activities (section 7).
3- Activities conducted for commercial purpose (section 8).

1- Inland Commercial Activities

The Jordanian Commerce Law sets down activities that shall be deemed to be inland commercial activities. These activities are as follows:

1. Purchase of movable materials with the intention of re-selling them at profit, either in the same condition or after manufacturing or processing them.
2. Purchase of movable materials with the intention of hiring them out or hiring movable materials with the intention of re-hiring them out.
3. Foreign and stock exchange, and banking operations.
4. Supply of materials.
5. Industrial activities whether or not they are linked to an agricultural investment, unless the conversion of the materials in the agricultural field is made by simple manual conversion.
6. Carriage of goods or persons by land, air and sea.
7. Agency and Brokerage.
8. Insurance in all kinds.
9. Public exhibitions.
10. Printing Press (printing, publishing, photography, recording, advertising, and transmitting activities).
11. Public warehousing.
12. Mining and petrol.
13. Real estates activities.
14. Purchase real estates with the intention of selling them at a profit.
15. Business agencies.

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As regards the first and the second activities, there are some conditions that should be satisfied in order to consider those activities as commercial activities which are: 1. the purchase with the intention of selling or hiring, 2. the subject-matter of purchase should be for material movables 3. the selling and hiring should be carried out with intention for a profit.

- The purchase with the intention of selling or hiring:

'Purchase' in the widest sense means acquiring some property or benefit from such property for consideration (which is usually financial consideration). The operation of purchase is an essential element to consider an activity being a commercial activity. Consequently, if someone sold something without being purchased such as receiving it as a gift, will, or inheritance; that activity will be a civil activity since there was no purchase for consideration. This principle also applies to agricultural and maritime exploitation where the farmer and the fisher are the first producers of the products and then there is no operation of purchase.

On the other hand, the purchase of movable materials should be carried out with the intention of selling them. Thus, if someone purchases a fridge for his private use and then sold it, such operation will not be deemed to be commercial since the purchase of the fridge was carried out without the intention of selling it.

It should be borne in mind that the activity is still commercial if the purchase of movables with the intention of selling or hiring them has been carried out and due to some circumstances the purchaser could not sell it.

- The operation of purchase should be for movable materials

Movable things mean things that can be moved from one place to another without damage or deformation such as cars, books, suitcase, etc. When it is said that something is material that means it is clear enough to be easily seen, felt or noted and always related to possessions or money rather than to more abstract things such as ideas. Section 6 of the Commerce Law stipulates that the purchase or hiring should be

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for movable materials and that means that the Law excludes all the operations of purchase or hiring for the purposes of selling or hiring of movable immaterials such as trade marks or patents or copyrights.

- The selling and hiring should be carried out with intention for a profit.

Any operation of purchase or hiring for the purpose selling or hiring should be carried out with the intention for a profit. However, the intention of making profit should exist at the time of the purchase, otherwise such an activity of purchase will not be deemed to commercial. This condition excludes some activities to be deemed to be commercial such as the activities of cooperative societies which purchase goods to be sold to its members without profit.

Foreign exchange, stock exchange, and private and public banking operations.

The operations of foreign and stock exchange, and banking operations are considered to be commercial activities by the virtue of section (6)(1)(d) of the Commerce Law. It is obvious that the Jordanian legislature adopts the theory of enterprise regarding the operations of banks, foreign exchanges to be deemed to be commercial activities.

The Law of Exchange transactions No.(26) of 1992 states that foreign exchange means the dealing with foreign currencies and valuable metals. Foreign currency is the currency other than the Jordanian Dinar such as the U.S. Dollar, Pound Sterling, Japanese Yen, etc. Valuable metals are the gold or silver ingots or golden or silver currency and any gold or silver. Also, stock exchanges mean trading (purchase and sale) with stocks and shares. Thus, the purchase and sale of stocks and shares are deemed to be commercial activities.

Regarding the banking operations, they are unlimited and may include one or more of the following forms of operations: raising of money; the lending of money either upon or without money security; the drawing making and accepting and discounting and buying and selling and dealing in bills of exchange, promissory notes, cheque, bills of lading, debentures.

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Apparently, all forms of banking operations are considered to be commercial activities in respect to banks and deemed to be civil activities to banks' customers unless such operations are carried out by a merchant in order to facilitate his commercial activity.

Supply of materials

Supply of materials means an undertaking of supplying specific movable materials to an entity on a continuous basis, such as supply of foods or medicine to hospitals, or supply of uniform to armies, or supply of stationary to universities and schools. Apparently, supply of material may take the manner of sale or hiring out the movable materials but the essential element is that activity should be carried out continuously.

It should be noted that the Jordanian Commerce Law does not stipulate that the activity of supply of materials should be carried out through an enterprise to be deemed to be commercial activity as it is stipulated in other legal systems. Egyptian, Syrian and Lebanon Legal System stipulates that supply of material should be carried out through an enterprise to be considered to be commercial activity.

It should be noted also that the Jordanian Commerce Law does not stipulate that the supplied materials should be purchased in order to be considered a commercial activity. Consequently, the activity of supplying materials by farmers who are the first producers is considered a commercial activity as long as the activity carried out continuously.

Industrial activities even if linked to an agricultural investment unless the conversion of materials is made through simple manual conversion.

Industrial activities means the works and processes involved in collecting raw materials and making them into products in factories. Apparently, industrial activities usually carried out through an enterprise. However, the Jordanian Commerce Law does not stipulate that industrial activities should be carried out through an enterprise to be deemed to be commercial activity.

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Moreover, the Commerce Law deems the industrial activity to be a commercial even if the industrial activity is associated with agricultural exploitation unless the transformation of material is done through manual work.

Carriage of goods or persons by land, air and sea

The types of carriage are varied, it may be by air, land (including rail) and sea. All kinds of carriage are considered to be commercial activities. The Commerce Law does not stipulate that such activities should be carried through an enterprise although usually carriage by sea or air is carried out through enterprises. Thus, the activity of a taxi driver is deemed to be a commercial activity although he depends on the manual work and even if it is carried out on a casual manner.

According to section (68) of the Jordanian Commerce Law (12) (1966), a carriage contract is the one by which the carrier undertakes to carry by his own means a person or a thing from one place to another in consideration of remuneration.

Agency and Brokerage

As regards agency, there are two types of agency contracts, general agency and commission agency contracts. General agency contracts may be defined as appointing an agent who handles all the principal's affairs by taking legal acts in the principal's name and for his account, while the commission agency may be defined as a contract pursuant to which the agent undertakes to carry out in his own name a legal act for the account of the principal for a commission to be received from the principal.

Ordinary Agency is governed by Section (833) of the Jordanian civil Code 1976 that defines it as " The agency is a contract by virtue of which the principal appoints another person on his behalf for certain permissible disposition". As far as the commission agency is concerned, the Jordanian Commerce Law (12) of 1966, section (80) (1) provides that "An agency shall be commercial when it relates to commercial activities". This means that an agency whether general or commission agency, shall be commercial when it only relates to commercial activities.

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On the other hand, brokerage is a contract by virtue of which a broker undertakes to look for and mediate in the negotiations for another person, with a second party, in order to execute a specific contract in consideration for a monetary payment.

The difference between the agency and the brokerage is that the task of the broker is confined to mediate between two parties or more in order to execute a contract, thus, the broker is not a party to the contract while the agent is a party to the contract. However, brokerage is deemed to be a commercial activity even though it might relate to civil activities.

All kinds of Insurance.

Insurance may be defined as a device to shift the loss caused by a particular risk from the insured to the insurer in a legally binding form.

The contract of insurance is basically governed by the statutory provisions which form part of the Jordanian Civil Code of (1976). The 'Insurance Contract' is governed under sections (920- 249) of the Jordanian Civil Code (1976). It is also governed by the Insurance Regulatory Act No. 30 of 1984.

Section (920) of the Code defines the '*insurance'* as follows:

"The insurance is a contract by virtue of which the insurer undertakes to pay to the insured or to the beneficiary a sum of money or a regular income or any other financial remuneration in the case of occurrence of the accident insured against or of the risk stated in the contract, in consideration of a specified sum or premiums payable by the insured to the insurer".

It is obvious that the insurance relationship is a contractual arrangement embraces the following elements:

The insurer: He is the party which promises to pay a sum of money to indemnify the other party. The Jordanian Companies Act No.22 of 1997. Section (93) (1) states that

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the insurer must be a public limited company registered under the Jordanian Companies Act 1997.

The Insured: He is the party who is insured by a particular policy in exchange of a premium payable to the insurer (Insurance Company). It is also called a policyholder.

The beneficiary: He is the person to whom the insurance compensation is payable.

Premium: It is the consideration given by the insured in return for the insurer's undertaking to cover the risks insured against in the policy of insurance.

The policy of insurance: It is a document that contains a contract of insurance (terms and conditions) made by the insurer with the insurer.

The subject- matter of the insurance: It is the thing or property insured.

Insurable interest: It is the interest of the insured in the subject -matter.

Types of Insurance:

Insurance might varies according to its subject such as an inland, maritime and air insurance. It might varies according to the covered risks such as life insurance, insurance against fire, earthquake, tornadoes, explosions, theft, and insurance concerning health. And it might varies according to its form which can be divided into two categories:

a- Insurance for profit: It is an insurance by virtue of which the insurer undertakes, in return of a premium, to pay to the insured a certain sum of money on the occurrence of a certain event. Apparently, the insurer is conducting the insurance activity in order to achieve profit.

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b- Cooperative Insurance: It is a type of insurance by virtue of which a group of people agree that each member of the group is protected against a certain risk and shall be indemnified in exchange of a premium. Apparently, in a cooperative insurance the insurer and the insured are the same person whereby there is no intention to achieve profit..

The Jordanian Commerce Law provides explicitly under section (6) (1) that all kinds of insurance are commercial activities. This means that all kinds of insurance whether they are aiming at achieving profit or not are considered to be commercial activity. As a result, there is an argument over the cooperative insurance whether it is deemed to be a commercial activity or not. Some of jurists argue that a cooperative insurance is not a commercial activity hence such type of insurance does not aim to make profit. Other group of jurists take the explicit provision of the commerce law 'All kinds of insurance' as an evidence that the legislature intended to consider both kinds of insurance to be commercial activities because the legislator would not have mentioned the word 'All'.

Public exhibitions

Public exhibitions means places which are designed for the public and provide the public with services including entertainment for a financial consideration. Examples of public exhibitions are restaurants, hotels, cafés, nightclubs, casinos, cinemas and playhouses, public swimming pools, health clubs, dry cleaning activities, horse racing.

Apparently, the activities of public exhibitions are deemed to be commercial activities as long as are carried out for the purpose of making profit. Thus, if a playhouse carries out its activities for the benefit of its members, then such activities are not deemed to be commercial activities since such activities are sought to be merely entertaining activities.

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Printing press:

Printing press includes publishing books, newspapers, magazines, leaflets, broadcasting (television and radio), and recording and photography studios. All these activities are deemed to be commercial activities if they are made with intent of making profit. However, it should be noted that an author who publish his work and sell it to the public is not deemed to be a commercial activity unless it is carried out by a publishing company.

Public Warehousing

Warehousing mean the process of storing large quantities of movable materials for consideration. The warehousing activity may be conducted by an individual, a company or a public entity.

The depositor of the goods in the public warehouse shall receive from the warehouseman a storage receipt showing the depositor's name, occupation and domicile, the type, nature, and quantity of the goods deposited, the name and location of the warehouse, name of the insurance company of the goods (if the goods are insured) and any other particulars as are required to identify the goods and indicate their value. The holder of the storage receipt is entitled to receive the goods deposited upon producing the receipt and have a right of mortgage on the deposited goods.

Warehousing activities are deemed to be commercial activities for the warehousemen and the depositors if the warehousing is related to his commercial activity.

Mining and Petrol

Mining means the activities concerned with getting valuable or useful minerals from the ground such as coal, diamonds, or gold. Petrol means the extraction activities concerned with raw oil that is found under the surface of the earth or under the seabed.

The general rule is that all the extraction activities are not deemed to be commercial activities since there is no operation of purchase of such materials. But due to the

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importance of the mining and petrol activities which need considerable capitals to be invested in such activities; the legislature decided to consider them to be commercial activities.

Real estate activities

Real estate activities mean all the operation concerned with the activities of construction of real estate such as buildings, hospitals, offices, bridges, oil pipes, phone and electricity lines. Apparently, real estate activities include maintenance and re-construction of estates.

All the real estates activities are deemed to be commercial activities whether they are carried out by companies or a sole individual and whether or not the contractor undertakes to supply the materials or the workers.

Purchase of real estates with the intention of selling them at a profit.

It is a commercial activity if someone purchases real estates for the purpose of selling it at profit whether the real estates sold in their original condition or after it has been transformed or divided. This is in contrast with the general rule that the purchase shall be related to movable materials.

It should be noted that the purchase of real estates should be for the purpose of selling them at profit and therefore purchase of real estates for the purpose of letting them whether furnished or unfurnished is not deemed to be a commercial activity.

It must be noted also that the Commerce Law does not stipulate that the real estates activities should be carried out through an enterprise, instead, real estate activities are deemed to be commercial activities if an individual carries out such a activity as long as the intent is to make a profit.

Business agencies.

Business agency means an agency which provides a service that people need in their daily life. Examples of business agencies are tourism, travel, import and customs clearing activities, and recruitment offices. The activities of business agencies are deemed to be commercial activities.

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As it has been mentioned earlier that the Jordanian Commerce Law sets down the commercial activities in the manner of example not exhaustive, and therefore the Commerce Law provides under section (6) (2) that 'it is considered within the inland commercial activities the activities which may deemed similar to the activities mentioned above, due to the similarity of their qualities and objectives.

Examples of analogous activities to the activities mentioned under section (6) (1) are water, electricity and gas distribution activities and post, telegraph telephone and internet activities.

As the discussion of the inland commercial activities has been completed, the following paragraphs will discuss the maritime commercial activities which sets down under section (7) of the Jordanian Commerce Law.

2. Maritime Activities

Section (7) of the Jordanian Commerce Law sets down activities related to sea navigation that shall be deemed to be commercial activities which are as follows:

1. Any project for construction or purchase of ships for the purpose of utilizing it commercially or reselling it, non-withstanding if the intention of construction, purchase, sale is for internal navigation (coastal navigation) or external navigation (navigation on the high sea).

2. Any related activity to maritime navigation such as purchase of supplies shall be deemed commercial activity. Thus, all the activities of purchase of supplies such as food, fuel, tools and all materials which the vessel may need for its navigation shall be deemed commercial activity.

3. Maritime chartering whereby an agreement between a shipowner and a charter takes place to let the ship to a charterer for the purpose of carrying a cargo. It should be noted that the charterer has no proprietary interest in the ship.

4. Undertaking by the owner of the ship that his vessel will carry a cargo.

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5. All contracts that are related to sea activities such as crew contracts of employment. It should be noted that the employment contracts for commercial ships in the manner of example not exhaustive. Thus, contracts related to sea activities may be contracts of maritime insurance and deemed to be a sea commercial activity for both the insurer company and the insured. Apparently, maritime insurance is one of the most important subjects of maritime law.

The Jordanian Legislature deals with 'Maritime Insurance' under sections 296-352 of the Jordanian Maritime Commercial Law No. 12 of 1972. Section 296 defines Maritime insurance as:

"a contract whereby the insurer agrees in consideration for the payment of a premium, to indemnify the insured against damage occurs in the course of a marine adventure as a result of a loss, provided that the amount of such indemnity shall not exceed the value of the subject matter which was lost".

Having said that, despite the importance of the maritime sales, neither the Jordanian Commerce Law nor the Maritime Commercial Law No. 12 of 1972 regulates other kinds of maritime contracts. In actual fact, many of the most important and commonly used sale contracts used in international trade are based on the assumption that goods will be carried by sea. Those contracts includes the following: f.o.b., f.a.s., c.i.f., c.& f, and arrival sale contracts.

- **F.O.B Sales (Free on Board)**

An F.O.B sale is one by which the sold item is delivered by the seller at the port of shipping, on board of the vessel designated by the buyer, for its transport. The buyer in the F.O.B sale shall arrange the transportation contract, and apparently notify the seller within reasonable time of the name of the vessel designated for the transport, as well as the venue and date set for shipping. Consequently, the seller is not responsible for the goods in this kind of sale from the moment of delivering the goods on board. However, the buyer may entrust the seller with the conclusion of both transport and insurance contracts for the goods, and the relationship between the seller and the buyer in this respect shall be governed by the provisions of the agency contract.

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- **F.A.S. Sale (Free Alongside Ship)**

F.A.S sale has much of common with F.O.B sale. This kind of sale is not used frequently. The seller shall deliver the goods alongside the ship nominated by the buyer ate the agreed port. The responsibility for loading goods and the expense of doing so are the buyer's responsibility.

- **C.I.F Sale (Coast, Insurance and Freight)**

C.I.F sale is the most important contract based on the carriage of the goods by sea. It is concluded when the seller undertakes to pay the price of the sold goods, the maritime insurance charges, and the freight costs. Apparently, the seller shall conclude a transportation contract for the goods with a reputable carrier, and shall choose a suitable vessel to carry goods. The seller shall buy an insurance policy for the sold item from a reputable insurer covering the risks of transport and shall assume all the coasts and expenses required thereof.

- **C. and F. Sale (Coast and Freight)**

It is a sale by which the seller undertakes to pay the price of the sold goods and the charges of freight only, so, the seller shall not buy the insurance policy for the sold goods.

- **Arrival Sale Contracts (ex-ship contracts)**

It is a contract by virtue of which the seller undertakes to deliver the goods to the buyer from the ship at the agreed port of arrival. Apparently, if the seller fails to deliver the goods, the buyer is not liable for the price, or if he had paid the price, then he can recover it.

3. Activities conducted for commercial purpose

This type of activities are related to or facilitating a commercial activity. Section (8) of the Jordanian Commerce Law considers all civil activities which are related or facilitating a commercial activity to be commercial activities, but subject to the following condition: the activity shall be carried out by a merchant for the purposes of facilitating his business. For Example: A is a merchant who rents a store to keep his

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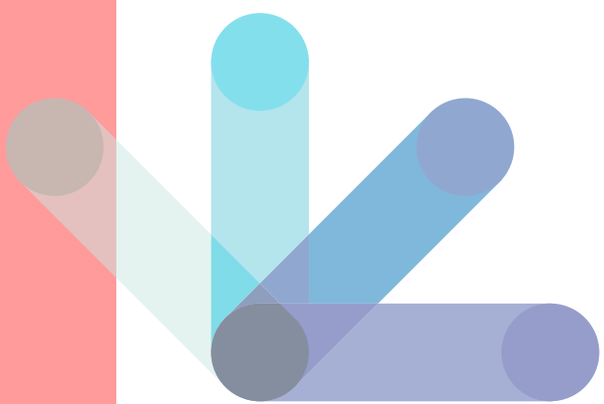
goods, consequently, such activity is deemed to be commercial because it is carried out for the purpose of the business. But if the trader rent a store to keep some un-needed furniture at his home, such activity is not considered to be a commercial activity since it is not related to his business and such activity dose not facilitating his business.



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Commercial Papers (Negotiable Instruments)

In the business environment, most transactions do not take place in terms of money. In actual fact, businessmen may not like to carry huge a mount of money in their pocket. As a result businessmen needed a certain mechanism to enable them to facilitate business dealings. Businessmen adopted a new method of exchanging documents called commercial papers or negotiable instrument as substitutes for money.

The term "commercial papers" may be defined as instruments that are written according to forms determined by the law, representing a right for specific sum of money payable on mere sight or after a definite or determined time. The Jordanian Commerce Law No. 12 of 1966 discusses the 'Commercial Papers' under sections 123- 289. According the Jordanian Commerce Law, main commercial papers are as follows:

1- **Bill of Exchange**: it can be defined as a written instrument according to forms determined by the law, which contains an unconditional order by one party called a "drawer", to a second party called a "drawee", in order to pay to a third party called a "payee" or the "holder (bearer) of the instrument", a specific sum of money at mere sight or at a definite time or determinable future time.

2- Promissory Note: it can be defined as a written instrument according to forms determined by the law, whereby its maker promises to pay a specific sum of money, at mere sight or at a definite time or determinable future time, to the order of another person called "the beneficiary" or the "holder (bearer) of the instrument."

3- Cheque: it can be defined as a written instrument according to forms determined by the law, which contains an order issued by a person who is the drawer to another person who is usually a bank (the drawee), to pay to the order of a third person or to the holder of the cheque (the beneficiary) a specific sum of money at mere sight.

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The Jordanian Commerce Law does not indicate that dealing with commercial papers are deemed to be commercial activities, although the above mentioned law contains the statutory provisions that govern the commercial papers. Consequently, there is an argument whether dealing with commercial papers is deemed to be a commercial activity or not. The Jordanian Cassation Court settled the argument by holding that the promissory note is deemed to be a commercial paper by virtue of its nature non-withstanding whether or not it was issued by a trader or non-trader, and regardless if the issuing the commercial papers related to a commercial activity or a civil one.

The consequences that resulted from distinguishing between commercial activities and civil activities

Distinguishing between a commercial activity and a civil activity has significant legal importance related to the applicable rules. These consequences are as follows:

1- Joint Liability among Debtors

Section (426) of the Jordanian Civil Code 1976 provides that "Joint liability among debtors shall not arise except by agreement or a provision in the law". It is clear form the section above that individuals shall not be jointly liable with each other unless there is an agreement or a provision of law.

However, the situation is different in relation to commercial debts whereby two individuals or more assume a commercial debt, then they shall be jointly liable for the settlement of such debts. This is stipulated in the Jordanian Commerce Law No. 12 of 1966, section (53) (1). The same applies to a commercial guarantee where the guarantors shall be jointly liable with each other and with the debtor.

Apparently, the objective of imposing the doctrine of joint liability in commercial obligations is the reinforcement of trust and creditability between merchants whereby the applicability of the general provisions of the Civil Code would be restricted by the Commerce Act.

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2- Judicial Respite

Article 334 of the Jordanian Civil Code of 1976 provides that "performance shall be executed immediately by the debtor unless there is an agreement or a provisions to a different effect. But the Court may in exceptional cases grant the debtor a reasonable period of time for performance"

However, granting a respite to a debtor who is under a commercial obligation may inflect a serious damage on the creditor, thus Article 56(1) of the Commerce Law of 1966 provides that the courts may not grant a debtor who is under a commercial obligation a respite for payment except under evidently special circumstances, such as events that might happen and are entirely outside the control of the debtor and that is called force mejeure. Examples of force majeure are wars, natural disasters, or economic crises.

The objective of the Commerce Law in not granting a respite to the debtor who is under a commercial obligation is to avoid any serious damages that may reflect on the creditor who will be incapable of fulfilling his obligations and then be at the risk of being bankrupted, whereby the applicability of the general provisions of the Civil Code would be restricted by the Commerce Act.

3- Proof

Article 72 of the Jordanian Civil Code states that there are six means to prove rights. They are as follows: 1. writing 2. testimony 3. presumptions 4. Inspection and Expertise 5. Admission 6. Oath.

Given that the applicability of the general provisions of the Civil Code would be restricted by the Commerce Act, Article 51 of the Jordanian Commerce Law of 1966 states that commercial obligations, whatever their amount, should be proved by all means of proof. The rule in civil obligations is that if the amount exceeds 100 JD it can not be proved except in writing.

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4- Prescription

Article 449 of the Jordanian Civil Code of 1976 states that the prescription of civil obligations is fifteen years whereby a legal action cannot be brought before courts. While According to the Jordanian Commerce Law of 1966, section (58), the prescription of commercial obligation is ten years unless the law stipulates a shorter period.

5- **Bankruptcy**

Bankrupt can be defined as anyone whom property vests in the trustee in bankruptcy and the bankrupt is deprived of his power to deal with the property. Article 316 of the Jordanian Commerce Act states that bankruptcy is defined as the process by which a merchant who stops payment of his commercial debt is declared bankrupt and his property administered for the benefit of his creditors. Bankruptcy proceedings are initiated by a petition upon which the competent court (The Court of First Instance) make a bankruptcy order. Apparently, bankruptcy only applies to merchants and such a system shall not be applied to non-merchants.

6- Jurisdiction

The consideration of an activity as a commercial one means that according to Article 44 of the Jordanian Civil Procedures No. 24 of 1988, judicial competency in bringing a legal action against the trader would be decided according to his or her domicile or the place of contracting or the place of performance of the subject-matter of the contract.

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The Merchants

The Jordanian Commerce Law No. 12 of 1966, section (9) defines 'merchants as:

1- Individuals whose professions are to conduct commercial activities;
2- Companies whose domain is commercial.

It is obvious from the definition above that a merchant may be a natural person and also an artificial person where the Act provides expressly the word 'Companies'. We will discuss the issue of traders meantime and deal with companies at a later stage.

It is clear that conducting the commercial activities is not enough for the individual to become a trader in the legal sense, consequently, traders should meet three requirements which are as follows:

1- The professional pursuit of trade.
2- The person shall carry out the commercial activities in his own name and for his own account.
3- The proper qualifications and capacity for trading.

Those three requirements will be discussed in turn.

1- The Professional Pursuit of Trade

Traders should carry out commercial activities regularly and continuously as a profession to gain a profit. Thus, a person who conducts commercial activities but not on a regular or continuous basis as a profession shall not be considered a trader. Apparently, his activities might be commercial or civil. For example, if a doctor buys stocks and reselling them again at profit regularly, such activity is a commercial one but the doctor shall not be considered as a trader since carrying out that activity is not his profession.

However, the Jordanian Commerce Law No. 12 of 1966, section 10 states that persons who run a small trade or simple business (simple traders) where they rely much more

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on their own physical built than their reliance on a cash capital to derive some form of profit to secure their living, such as door to door salesman, daily paid salesman shall not be governed by the duties of commerce such as keeping commercial books, registration in Commercial Registrar nor shall they be governed by the provisions of bankruptcy and protective arrangement from bankruptcy.

There are some exceptional cases on the rule of profession, where some persons shall be consider traders though they do not conduct commercial activities as a profession. The reason behind that is that the legislature intends to protect third parties who deal with such persons. Those persons are as follows:

1. Any person who announces to the public, by the newspapers, journals or any other means, about business premises established by him for commerce, shall be considered a trader even if he does not take on trade as his normal profession (The Jordanian Commerce Law No. 12 of 1966, section 11)

2. Officials and judges, who are legally prohibited from conducting commercial activities, shall be subject to the statutory provisions as it relate to protective arrangement from bankruptcy and bankruptcy (The Jordanian Commerce Law No. 12 of 1966, section 14).

3. The government and its departments, municipalities, committees, and societies that enjoys artificial entities shall not be deemed traders. However, the statutory provisions of the Commerce Law shall govern commercial activities carried out by such entities (The Jordanian Commerce Law No. 12 of 1966, section 13).

2. The person shall carry out the commercial activities in his own name and for his own account

It is not enough to consider a person as a trader to carry out commercial activities as a profession, rather he should execute these activities in his own name and for his own account. Consequently, persons such as employees and workers who work in stores are not considered traders because they work in the name of the employers and for

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their benefit. In actual fact, the employees are subject to the employer's instructions and supervision. Similarly, directors of companies are not deemed to be traders because they work on behalf of the company not for their own account.

3. The Capacity for Trading

The Jordanian Commerce Law does not provide any statutory provisions in relation to the capacity for trading, but Article 15 provides that the capacity for trading shall be governed by the Jordanian civil code (JCC). Section (43) of the JCC provides:

> 1- "Every person who attains full age, enjoys his mental powers and is not interdicted shall have full capacity to exercise his civil rights".
> 2- "The age of majority shall be eighteen full solar years".

Despite section (43) (2) of the Jordanian Civil Code provides that the age of majority shall be eighteen full solar years, the Legislature stipulates special age of majority for conducting some specific commercial activities. The Law stipulates that the age of majority of a person who carries the activities of commercial agency shall be twenty full years.

In actual fact, Section 43 of the JCC is addressing minors. According to the section (43) of the JCC, a person who has not reached the age of eighteen is incapable to enter into a valid contract. A person who is below the age of eighteen years is called a minor and that minor has no full contractual capacity to enter into binding contract. The stages of capacity of minors may be classified into three stages:

1- The stage of non-discerning minor

This stage starts from birth of a child to the age of seven. The minor at this stage called the non-discerning minor. Agreements with the non-discerning minor does not create any legal rights and obligations between the contracting parties and then such agreements are void. In this regard, Section (117) of the JCC provides:

> "The non-discerning minor shall have no right to dispose of his property and all his dispositions shall be void".

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2- The stage of discerning minor:

This stage starts from the full age of seven years to the age of eighteen years. This has been stated in Section (118) (3) of the JCC. The validity or invalidity of the discerning minor's agreements depends on the following circumstances:

- The discerning minor's agreements are valid if they are absolutely beneficial. (Section 118 (1) of the JCC).
- The discerning minor's agreements are void if they are absolutely harmful (Section 118 (2) of the JCC).
- The discerning minor's agreements which vary between benefit and harm are deemed to be valid subject to two conditions:
  1- If such agreements are approved by the guardian within the limits of his original power of disposition , or
  2- If such agreements are approved by the discerning minor after he attains the age of majority which is an eighteen full solar years. (Section 118 (2) of the JCC).

3- The stage of full capacity

This stage starts as soon as a minor attains the age of majority which is an eighteen full solar years. (Section 43 of the Jordanian Civil Code).

The Defects of Capacity in the JCC

It is not enough to be eighteen years of age, still it is required to be in full control of one's mental capacity and that the capacity are nor affected by any of the defects of capacity. The Jordanian Civil Code states four defects which may affect the capacity which as follows: 1- Lunatic (Insanity), 2- Idiocy, 3- Prodigality (Inadvertence). We will study them in turn.

1- **Lunatic (Insanity):** It can be defined as a mental disease giving rise to a defect of reason which makes a person not responsible in law for his action. According to the Jordanian Civil Code lunatic may be a blinding lunatic

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(habitual insanity) and non-blinding lunatic (recurrent insanity). As far as the validity of the binding lunatic (habitual insane) dispositions is concerned, the insane's dispositions shall be deemed as the dispositions of the non-discerning minor, where all his dispositions shall be void. But the disposition of the non-blinding lunatic (recurrent insanity) shall be considered as the dispositions of a sane person if he is in a phase of discerning where all his dispositions are valid. (See Article 128 (2) of the JCC).

2- **Idiocy:** It can be defined as a mental illness not amounting to a lunatic where the affected person (idiot) has not completely lost his mental faculties of thinking. Such a person is incapable of forming a rational judgment. The idiot's dispositions shall be deemed as the dispositions of the discerning minor. (See Article 128 (2) of the JCC).

3- **Prodigality (inadvertency):** It can be defined as not being a mental illness but it is a term refers to a person (prodigal) who can not be trusted to look after his own property where he spends a lot of money carelessly (See Article 127 (2) of the JCC).

An interdiction shall be imposed on the prodigal. Thus, a guardian shall be appointed by the court to look after the prodigal's property. Neither the father, grandfather nor the guardian appointed by either shall have the right of the guardianship over the prodigal. The court alone shall have the right to appoint a guardian over him. Regarding the prodigal's dispositions, the Jordanian Civil Code distinguishes between dispositions carried out by a prodigal before and after the interdiction. The prodigal's dispositions before the interdiction shall be considered valid and enforceable unless the other party exploits the prodigal. But the prodigal's dispositions after the interdiction shall be deemed as the dispositions of the discerning minor where they considered valid if absolutely beneficial and shall be void if absolutely harmful. Regarding the dispositions which vary between benefit and harm, it shall be considered valid subject to the approval of the

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guardian or the approval of the discerning minor after he attains the age of minority (See Article 129 of the JCC).

The Permitted Minor To Trade (judicial capacity)

"Judicial Capacity" can be defined as the capacity which is acquired by a discerning minor who attains the age of fifteen years and who is permitted by the guardian and the court or by the permission of the court alone if the guardian refrains from giving the permission to trade, to conclude contracts and make all dispositions in order to gain experience. In case that the guardian who gave the permission to the minor dies or dismissed from his guardianship, his permission shall not become void. In this regard, Section (119) of the Jordanian Civil Code provides:

"The Guardian may with license from the court deliver to the discerning minor who attained the age of fifteen years a part of his property and permit him to trade in order to gain experience, and permission may be absolute or restricted"

Apparently, the permission is absolute when it is not confined to a type of business or restricted to a sum of granted money where the permitted minor is free to carry out all type of business or he may invest all his granted money in a business.

Section (120) provides that: "the minor who is permitted the dispositions covered by the permission shall be considered as a person who attained the full age". As a result, such person may run a business and do all the legal activities such as buying, selling, letting-out, mortgage, and make contracts related to movables and immovable.

Article 121 of the JCC states that the guardian may interdict the permitted minor and invalidate the minor's permission and this shall be made by the permission of the court.

Article 122 of the JCC states that if the guardian refrains from giving the permission to trade without valid justifications, the court may give the discerning minor the permission to trade and carry out specific dispositions covered by the permission, if so, the guardian can not interdict on the

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discerning minor thereafter. The court is the only competent authority –after giving the permission- that can impose a interdiction on the discerning minor.

Article 123 of the Jordanian Civil Code 1976 adds that the guardian of the minor is his father followed by the guardian appointed by his father. If the father of the discerning minor died and did not appoint a guardian, the guardian of the minor shall be the lawful grandfather followed by the guardian appointed by the lawful grandfather. If the lawful grandfather died and did not appoint a guardian, then the guarding shall be the guardian appointed by the court.

The Capacity of A Foreigner

According to Article 12 (1) of the Jordanian Civil Code, the general rule is that the civil status and capacity of persons shall be governed by the law of the state of which they are nationals, however, the Civil Code made an exception to this general rule by providing that a foreigner is deemed as acquiring full capacity of age though he might be a discerning minor according to his nationality law, given that the financial transaction should be carried out in Jordan. The reason behind such exceptional case is that the Jordanian Legislature affords the legal protection to the Jordanians who contract with foreigners of incomplete capacity.

Legal Obligations of Merchants

The Jordanian Commercial Code imposes specific legal obligations on any person acquires the capacity of a merchant. These obligations are as follows:

1- Keeping Specific Commercial Books.
2- Holding a Commercial Title.
3- Publicity by way of registration in the Commercial Registry.
4- Registration in the Chamber of Commerce.
5- Prohibition of Unfair Competition.

The following paragraphs will discuss obligations number one and two due to their particular importance.

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1- Keeping Specific Commercial Books.

The Jordanian Commercial Law provides that a merchant whether a natural person or an artificial person shall keep specific commercial books. These books varies according to the nature and importance of his trade.

The advantages of keeping commercial books

1- Keeping commercial books shows the exact financial position of the trader and it enables the trader to know the rights and liabilities related to his trade.
2- In case that the trader ignores keeping receipts, bills, invoices and relevant documents of the financial transactions he had carried out, the commercial books which contain these financial transactions may be deemed as a mean of proof of the lost receipts, bills, invoices and all relevant documents.
3- Keeping commercial books is necessary in case of bankruptcy where the competent court may make sure by the financial operations entered into the commercial books whether the trader is the causative factor of bankruptcy or not.

Bankrupt can be defined as anyone whom property vests in the trustee in bankruptcy whereby the bankrupt is deprived of his power to deal with the property.

4- Keeping of commercial books is necessary for the taxation purposes where entering the financial operations into the commercial books shall facilitate estimating the trader's income tax and then avoiding random estimating.

Types of Commercial Books

There are two types of commercial books

A- Compulsory Books

B- Voluntary (additional) Books

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A- Compulsory Books:

Section (16) of the Commerce Code provides:

Each merchant shall keep at least the following three books:

1- Day-book.

2- Correspondence Book.

3- Inventory Book.

1- Day-Book: It can be defined as the book in which shall be recorded, day-by-day, all transactions relating to his commercial activities and to be recorded, month-by-month, all expenses spent on himself and his family. It is obvious that all the financial operations carried out by a trader shall be entered into the day-book day-by-day such as (selling, buying, paying debts and issuing commercial papers). Regarding the private expenses related to the trader and his family, its shall be recorded month-by-month.

2- Correspondence Book

The trader should keep in this book exact copies of the originals of all correspondences of the business such as telegrams, bills, receipts, invoices, commercial papers and invoices sent or issued by him for the purpose of his commercial activities.

3- The Inventory Book

The trader should entered into the inventory book all accounting transactions related to cash money or money deposited in the bank, creditors, debtors, partners, revenues and expenditures. The trader should organize the inventory book at the end of the financial year in order to establish the annual balance sheet and the profit and loss account.

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B- Additional Books (Voluntary Books)

In addition to the compulsory commercial books, a trader may keep a additional books and that what is called voluntary books such as books in which may be recorded day-by-day transactions before being finally documented in the compulsory books.

The Mode and Duration of Keeping the Commercial Books

The Jordanian Commerce Law shows the mode of keeping the compulsory commercial books only without providing information on organizing the voluntary books. Section 17 provides that the compulsory commercial books shall be kept in chronological order, without any blank, and without writings in the margins, erasure, crossing out, scraping, or insertion between the lines. The reason behind that is to prevent the trader from changing the entries. Section 18 of the Law stipulates also that the pages of daybook, correspondence book and inventory book shall be numbered, signed and stamped by the Commercial Registrar.

Regarding the duration of keeping the commercial books, section 18 of the law provided that a trader shall keep these books for a period of ten years from the date of closing and marked up by the Commercial Registrar.

Despite the fact that the Commerce Law is silent about the mode and the duration of keeping the commercial books in case of discontinuation of the commercial activities by the trader, it might be suggested that the trader should present the commercial books to the Commercial Registrar to have them marked to that effect

Perusal of Commercial Books

It is a general rule that a person can not be forced to produce evidence against himself. Despite the fact that the commercial books contain the trader's trade secrets where perusal of these commercial books may result in disclosing such secrets, the Jordanian Commerce Law provides exceptional circumstances that perusal of commercial books may be possible. A perusal of commercial books may be a partial perusal or a comprehensive perusal.

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1- Partial Perusal of Commercial Books

The partial perusal of commercial books means that the litigant (the trader or the other party) has the right to peruse only a part of commercial books (extracting what is of relevance to the conflict only). The justification of such limitation is that the commercial books contain the trader's trade secrets, original prices, names of customers, the resources of commodities, etc.

The Jordanian commerce Law provides that the court may at the request of either litigant or without such request to order the trader to present his commercial books to extract what is relevant to the conflict of the involved parties. The court usually peruses directly the commercial books or may peruse them through an expert appointed by it to that effect.

2- Comprehensive Perusal of Commercial Books

As it has been mentioned above, the commercial books contain the trader's trade secrets, so perusal of these commercial books may result in disclosing such secrets. Thus, the court may not order he trader to produce his commercial books for the comprehensive perusal unless the conflict in question is related to inheritance, division of joint property, partnership, protective arrangement from bankruptcy and bankruptcy.

1- Inheritance: inheritors have the right of comprehensive perusal of commercial books in order to know his share of the legacy.

2- Division of joint property: In case of a conflict over the division of joint property, the partner has the right to present a petition to the court for a comprehensive perusal of commercial books in order to now his share in the collective ownership.

3 - Partnership: Section 596 of the JCC states that the partners may personally examine the records and documents of the partnership. In effect, this entitle the partners of the partnership to peruse its commercial books. Article 24 (1) of the Jordanian Companies Law

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also provides that each partner may inspect the account, books, records and registers of the partnership either personally or by delegation.

4- Protective Arrangement from Bankruptcy and bankruptcy

Bankrupt can be defined as anyone whom property vests in the trustee in bankruptcy and the bankrupt is deprived of his power to deal with the property. However, Article 290 of the Jordanian Commerce Law provides that any trader having suspended payment of the commercial debts, within ten days following such suspending, has the right to apply to the Court of First Instance, where the head quarter of his business is located, asking the court to call his creditors for a protective arrangement form bankruptcy.

The petition shall be made by a report in which he shows the reasons for suspension of payment and attached to the report the compulsory commercial books. The same if the trader files a petition in bankruptcy to the competent court (section 316). It is obvious that in both cases of bankruptcy and the preventive arrangement from bankruptcy, the trader is obliged to produce to court his commercial books for a comprehensive perusal in order to show that he is not the causative factor in bankruptcy.

2- *Holding A commercial Title*

A commercial title is used for distinguishing a trader from another trader. The objective of having a commercial title is to enable the public to distinguish the identity of a trader from another one, and for that reason the law stipulates that a trader must carry out his commercial transactions under his commercial title and write it on the façade of his business premises.

Once the commercial title is registered in the Commercial Register, no other trader may use such title for his trade which is of a similar kind. If the commercial title of a trader is similar to a commercial title previously entered in the Register, the new registrar must add to his commercial title such particulars as would distinguish him from the trade title already registered (section 42 of the Jordanian Commerce Law).

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Article 40 of the Commerce Law provides that a trader must conduct all his commercial transactions and endorse his papers related to his commercial activity by a specific name called the commercial title, and he shall write his commercial title on the façade of his business premises.

Apparently, the elements of the trader's commercial title differ as if the trader is an individual trader or artificial trader.

1- An individual trader

The commercial title of an individual trader consists of his first name and surname such as (The Store of Ali Hassan). The trade has the right to add whatsoever to his commercial title relevant to the kind of trade for which is designated such as (Ali Hassan for Electronic equipment), but such right is subject to that the addition does not cause any misleading or confusing in regard to his identity.

Section 43 of the Commerce Law provides that a commercial title may not be disposed of independently of the business premises unless it is explicitly or implicitly provided as such.

2- Companies

Due to the importance of commercial companies in the modern economic life, it is essential to designate the following paragraphs for the general rules of companies and the special rules applicable to each kind of commercial companies provide by the Jordanian Companies Act (1997).

The existing Jordanian Companies Law (1997) and its predecessors do not define a company. But section 582 of the Jordanian Civil Code defines the Partnership in General as:

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"A contract by virtue of which two or more persons undertake to contribute in a financial project by providing share of property or work in order to exploit that project and share the loss or profit that results therefrom".

The analyses of the definition of a 'company' reveals the essential elements of a valid company:

- There must be a contract
- There must be an association of two or more persons
- There must be sharing of profit and loss amongst all partners

It is obvious that companies which enjoy the artificial legal personality will acquire the capacity of a trader if its domain is commercial. The companies whose domain is commercial are those forms of companies provided by section 6 of the Companies Act No.22 of (1997) which are as follows:

1- **General Partnership**
2- **Simple Limited Partnership**
3- **Limited Partnership with Shares**
4- **Limited Liability Company**

- **General Partnership**: It can be defined as the company that consists of a number of natural persons, not less than two not more than twenty who are jointly liable for the company's obligations to the full extent of their assets (see section 26 of the Jordanian Companies Act).

  It is clear that the number of the partners in this kind of companies is restricted to be not less than two not more than twenty, but the number of partners may increase due to inheritance and that should be in accordance to the provided statutory provisions.

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It is clear also that the partners are jointly liable for the company's obligations to the full extent of their assets. All partners are jointly liable for the company's obligations, so a partner joins the general partnership, with other partners, shall be jointly liable for the company liabilities incurred before and after joining the company, to the extent of all his assets. This liability shall be transferred to his executors after the death of the partner within the limits of the amount inherited. A partner who withdraws from the general Partnership shall not be liable for the company's liabilities that are incurred after the registration of his withdrawal.

Finally, it is clear that each partner in a general partnership shall be deemed a merchant; consequently the bankruptcy of the company will lead to the bankruptcy of all the partners.

- **Simple Limited Partnership**

A limited partnership is a company consisting of one or more jointly liable partners who are liable for the company's liabilities to the full extent of their assets, and one or more limited partner(s) who are not liable for the company's liabilities except only to the extent of the value of his or their respective share(s) in the capital. (see section 41 of the Jordanian Companies Act).

- **Limited Partnership with Shares**

A limited partnership with shares is a company formed of the following two categories of partners:

(a) General Partners: their number shall not be less than two and they shall be liable for the company's debts from their personal property.

(b) Limited Partnership: their number shall not be less than three, and each partner shall be liable for the company's debts in proportion to his shares in the capital. (see section 77 of the Jordanian Companies Act).

It must be noted that the Jordanian companies Law specifies the capital of the Limited partnership with Shares to be not less than one hundred thousand Jordanian Dinars (see section 78 of the Jordanian Companies Act).

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- **Limited Liability Company**

A limited Liability company is a company formed by two persons or more. The company's liability shall be deemed independent from the liability of every shareholder in the company. Each partner shall be liable only to the extent of his share in the capital. The capital of the company shall not be less than thirty thousand Dinars (see section 53 (a) of the Jordanian Companies Act).

It must be noted that subject to the approval of the Controller of companies, the Limited Liability Company may be formed by one person only or it may become owned by one person (see section 53 (b) of the Jordanian Companies Act).

Having discussed the main forms of companies according to the Jordanian Companies Act, it must be mentioned that regarding considering shareholders as traders or not, shareholders in the unlimited partnerships shall be deemed merchants because they practice the commercial activities in the name of the partnership and they are jointly liable for the debts of the partnership from their won individual funds and property if the partnership assets are insufficient to satisfy the creditors. The same applies to partners who are liable for the companies' liabilities to the full extent of their assets. But partners whom liabilities are confined towards the company's creditors only to the extent of his share in the capital would not be considered merchants.

According to the Jordanian Commerce Law, companies whose domain is commercial are deemed traders, thus such companies are subject to the duty of holding a commercial title. The Commercial title of companies differs according to the type of a company.

1- **General Partnership**: The commercial title of the general partnership consists of the names of all the partners. Its name may be confined to the name of one or more of the partners with insertion of the phrase "and his partners" or "and partners". The Companies Law stipulates that the commercial title shall always comply with the existing status. This means that if one of the partner dies or withdraws from the company, the commercial title shall be amended according to the new status of the company where such amendment should include the existing partners and the insertion of the new partner if one joins the company. But if all the partners die and the title of the company was registered in their names, the inheritors- with the approval of the controller- can keep the partnership's title if it has been proved that the companies title

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has acquired an outstanding fame (see sections 10 of the Jordanian Companies Act).

2- **Simple Limited Partnership**

The commercial title of simple partnership should be composed of the names of the general partners. If there is only one general partner in the limited partnership, it should be added the phrase “and partners” to the title. The name of the limited partners should not be mentioned in the title of the company. if it is mentioned, he shall be deemed a general partner (see sections 42 of the Jordanian Companies Act).

3- **Limited Partnership with Shares:**The title of the limited partnership with shares shall be composed of the name of one or more of general partners, provided that the title is followed by the phrase “Limited Partnership with shares” in addition to the company’s objectives. The name of the participating partner should not be mentioned in the company title. If his name is mentioned, he shall be deemed as a general partner (see sections 79 of the Jordanian Companies Act).

4- **Limited Liability Company:** The title of limited liability company should have a title derived from its objects, provided that the term “company with limited liability” should be added to the company’s title as well as stating the amount of its capital. Company’s title, capital amount and registration number shall be stated on all of the stationary and print material used in its operations and contracts concluded thereof (see sections 55 of the Jordanian Companies Act).

Proof of Right

People might attempt to evade other's rights in a given factual situation. People are not usually indoctrinated to approve of other's rights. Proof of right in Jordan is regulated by the "law of Proof". The coral concept of this law is to establish in front of the judiciary that the material facts of a given allegation has been materialized in order to enable the judge to apply the law for such proven facts. Ultimately, acquiring one's right needs from the complainant to establish such right in front of the judiciary. Apparently, having a right does not imply automatically that a person who has a right can prove its existence or can enforce such right. As a result, some jurists believe that a non-proven right is equal to a non-existent right.

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Theories of proof

Given that any storytelling in front of the judiciary is always relative, i.e., what is sought by a claimant as an existing right might be sought by a defendant as a non-existing right, the need arises to establish some standpoints that regulate the issue of proof before judiciary. There are three theories of proof: free proof theory, restrictive proof theory, and intermediate proof theory. We will deal with them respectively.

Free proof theory

The disputants in this theory have a wide discretionary power to produce whatever evidences that they might require adequate to prove the case. In return, the judge has a wide discretionary power to weight the evidences brought before him from the disputants and even the judge can interfere to ask for further evidences that he might consider appropriate to proceed in the case. Most legislations adopt this method in criminal cases only whereby there is no punishment without prescribed legal provisions that constitute a punishable crime, while in civil and commercial cases the legislator believes that it would be difficult to guarantee the impartiality of judges and it might create confusion between the disputants as to what would constitute an evidence before the judiciary.

Restrictive proof theory

In this theory, the judge does not has wide discretionary power to decide the case, instead, he is bound by the evidences produced by the disputants in order to issue his decree. Clearly, one of the main principles in the judicial system is to achieve equity among disputants. Such principal might be endangered in this method since the judge would be restricted in his search for justice. Clearly, the convictions of the judge would play no role whatsoever in deciding the case which might resulted in injustice.

Intermediate proof theory

In this case, a combination of both free and restrictive theories is evident whereby the judge as a starting point is obliged to take an objective stance to the produced evidences before him by the disputants, i.e., the judge would not interfere, however, at a later stage in the proceeding of the suit, a judge might weight the evidences brought before him and decide upon their productivity in the case. If they are not productive,

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the judge has discretionary power to ask the disputants for further evidences as he might consider appropriate. Clearly, the Jordanian legislator adopts the intermediate method whereby the judge is obliged to consider writing or decisive oath while he is not obliged to consider presumptions or testimonies unless he is convinced that such presumptions and testimonies are productive in the case.

Elements of proof

1. The neutrality of the judge

Although the Jordanian legislator grants judges a discretionary power in deciding upon the productivity of evidences brought before him, the judge cannot himself attempt to secure evidences to one disputant at the expense of other disputant. This would constitute a breach of the principal of neutrality which is a coral principal in judicial proceedings. Moreover, according to Article 3 of the law of Evidence, no judge can reach a decision with regards to the proof of a case on the basis of his personal knowledge of that case or of the disputants involved in the case.

2. The cross-examination of evidences

If a disputant produces an evidence, the judge is required to allow the other disputant to take notice of such evidence and consequently to rebut such evidence. One point must be clear here, if a judge allows a disputant to produce evidence through testimony for example, he must allow the defendant to use equally testimony or other methods to rebut the disputant calim.

3. Clearance of Financial Patrimony of Disputants as a Starting Point

According to Articles 73 and 75 and 77 of the JCC, any debtor is presumed before judiciary as if his financial patrimony is clear unless it is otherwise is proved by a creditor. This is a very important element in the law of evidence since it implies that any claimant (creditor) should produce evidence to establish the contrary. If it has been proven, then the responsibility of the debtor is to produce evidences that negate the claimant's evidences, e.g., the defendant might allege that he paid a certain debt to the creditor and prove the payment. Similarly, a claimant might ask a debtor to conduct an oath to prove his right whereby declining the oath would prove the claimant's case.

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4. No one can produce evidence against himself

As a normative principal, everyone is bound by his acts or omissions whether material or verbal before judiciary as long as it has been proved by the other disputants. Apparently, such acts or omissions would be alleged and established by the other disputant who means that no one can produce evidence against himself. However, there is one exception to this rules whereby a merchant is required by Article 15 of the evidence law to produce his commercial books which might constitute evidence against him. In all cases, the judge can ask any disputant to conduct a complimentary oath to give effect to the commercial books. It must be borne in mind here that any disputant can depend on the other disputant allegations and proof of allegations to prove his case.

Subject-matter of proof

The proof of right is directed towards the factual or legal situations which give rise to right and not directed towards the applicability of the law to a given factual or legal situation. Such matter is completely left to the judge. However, Article 4 of the evidence law states that a material or a legal fact should have the following conditions:

1. The defendant should not accept the existence of material or legal fact in the first place.
2. The material or legal fact should be capable of being proved, e.g., if someone alleges the he owns a land, he should be capable of producing documents establish how he owns that land, i.e., through purchase, endowment, barter…etc.
3. The material or legal fact should be relevant and productive to the dispute before the judiciary, e.g., if there is an allegation to perform certain debt, any evidences that prove that the debtor has fulfilled other debts are irrelevant in deciding the case. Also, if a debtor produces evidence that he paid the debt to anyone except the creditor or his agent, then such evidence is not productive in the case.
4. The material or legal fact should be legal and logic, e.g., no one can prove the existence of right in a debt at gambling since gambling is negating public order. Also, a person aged 20 years can never prove his fatherhood to a person aged 40 years.

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Methods of Proof

Article 72 of the Jordanian Civil Code states that there are six means to prove rights. They are as follows: 1. writing 2. testimony 3. presumptions 4. Inspection and Expertise 5. Admission (declaration) 6. Oath.

Writing

It is a method of proof of a factual or legal disposition through writing. Such method might be through official documentation conducted by governmental officers such as proof of ownership of land. This is deemed to be the strongest method of proof and its authenticity is subject to challenge by others through allegations of forgery (Article 6(1) of the Law of Civil Procedures). Alternatively, official documentation might be confined to approve the date and the signatures of the document by the government officers (public notary) whereby the contents of the document is written by the organizers of such document. As a result, the signatures and dates are subject to challenge on the basis of forgery while the contents themselves are subject to challenge on the basis of defects of consent, e.g., deceit (Article 6(1) of the Law of Civil Procedures).

Also, written documents might be through signed normal documentation where the contents, signatures, and dates are subject to the approval of the organizers of the document only, e.g., sale contract. On the other hand, written documents might be not-signed normal documentation such as a merchants correspondence and commercial books as long as they were sent by that particular merchant.

The rule is that if the amount of the transaction exceeds 100 JD it can not be proved except in writing. Also, if the amount of the transaction is not determined, the rule is that it can not be proved except in writing. However, given that the applicability of the general provisions of the Civil Code would be restricted by the Commerce Act, Article 51 of the Jordanian Commerce Law of 1966 states that commercial obligations, whatever their amount, should be proved by all means of proof.

Testimony

Prior to testimony before the judiciary in order to prove a right of someone, the witness should conduct an oath that his testimony is accurate. It must be noted that

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testimony is confined to material facts and not legal dispositions unless these legal dispositions are less than 100 JD (Article 28 of the Law of Civil Procedures). Having said that, Article 30 of the Law of Civil Procedures sates that if there is an impossibility or hardship in producing a written proof, the judge might utilize testimony, e.g., if there is a dispute between partners, then it is presumed that there would be no written documents.

Presumptions

It can be defined as presuming the occurrence of an asserted certain event if relevant events has been proven. Presumptions might be subject to rebut. For example, if there is a payment of previous rents by the tenant to the landlord, then the judge might presume that the allegations of the landlord that the tenant did not pay the due rents would be baseless. Apparently, the landlord might rebut the tenant's allegations. Alternatively, presumptions might be not subject to rebut. For example, if the judge issue a decision and it has become final through appeal then the same disputants cannot bring the same claim before judiciary given that the subject-matter and the causation of the right was the same (Article 41 of the Law of Civil Procedures). Having said that, given that presumptions might give the judge wide discretionary powers, Article 43(2) of the Law of Civil Procedures states that presumptions is confined to legal dispositions and material facts that can be only proven through testimony.

Inspection and expertise

Inspection means that the judge himself might conduct an examination on site, e.g., disputed land. Expertise means that the judge might assign to an expert the job of investigating the allegations of the disputants on site.

Admission (declaration)

There is similarity between testimony and oath that the first relates to third parties proving of a given case against an accused while the second relates to the accused himself proving of the merits of a claim against him. Declaration should be unilaterally disposed from a person enjoying full legal capacity according to Jordanian law. Moreover, declaration should not negate the factual situations in the case. And finally, once the declaration is done it cannot be withdrawn.

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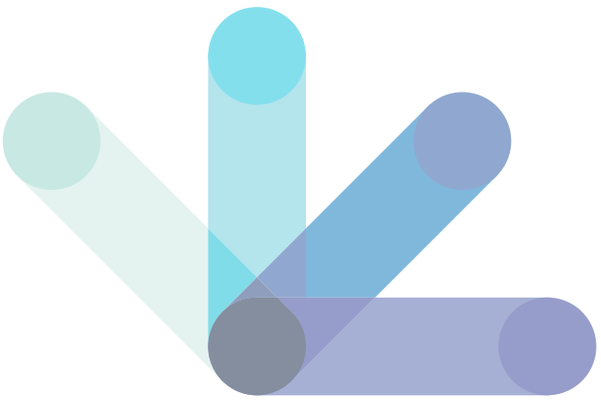
Oath

This is sought to be as final weapon that might be used by a disputant. If a disputant asked his opponent to conduct an oath on the basis of a formula provided by that disputant then he would win the case. If the opponent declines the oath, the disputant would win also. In all cases, the opponent always might use the disputant's weapon by asking him in return to conduct an oath.



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3. Registration in the Commercial Registry

According to Article 22(1) (2) of the Jordanian Commerce Law JCL, registration in the commercial registry is deemed to be a method of publicizing the identity of the trader and his commercial activities and his business premises. As a general rule, within 1 month of establishing a business premises or acquiring a business premises or a branch of a business premises in Jordan by a Jordanian or a foreigner, the trader should apply for the commercial registry (Article 22(1) (2) of the Jordanian Commerce Law JCL). Apparently, establishment in this regard does not mean concluding commercial activities in actual fact as the Syrian Legislator states in Article 24 of the Syrian Commerce Law.

As mentioned before, the Jordanian Commerce Law No. 12 of 1966, section 10 states that persons who run a small trade or simple business (simple traders) where they rely much more on their own physical built than their reliance on a cash capital to derive some form of profit to secure their living, such as door to door salesman, daily paid salesman shall not be governed by the duties of commerce such as keeping commercial books, registration in Commercial Registrar nor shall they be governed by the provisions of bankruptcy and protective arrangement from bankruptcy.

Registration in the commercial registry is a non-decisive presumption that the registrant is a merchant, i.e., it can be rebutted by a claimant. Moreover, the entries in the commercial registry are deemed to be non-decisive evidences for the trader should a dispute arises with regards to his commercial activities, i.e., it can be rebutted by a claimant (Article 35(1) of the JCL).

In this regard, it must be noted that ignorance of such entries excuses no one. Given that registration in the commercial registry is for publicity purposes, according to Articles 30 and 31 of the JCL, anyone can apply for the registrar to receive a certified copy of any entry in the registry provided that the due fees has been paid. Clearly, if the registrant proves his solvency or that a baseless interdiction has been imposed on him then the commercial registrar is obliged to conceal such information because revealing such information would have detrimental effects on the reputation of the trader. Moreover, in order to facilitate public perusal of commercial registry, Article

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32 of the JCL states that all invoices and correspondences of the trader should indicate the place and the serial number of registration in the commercial registry.

Article 23 states that the process of registration is governed by special regulations issued to that effect. Such regulations state that there should be a commercial registrar appointed by the minister of trade and industry whose responsibility is to enter the data of the trader and the registrar is not responsible for such entries should such entries were not correct. In other words, the registrar is not supposed to investigate such entries although the registrar is supposed to ask the applicant to provide him with all relevant documents that support his allegations (it must be noted that French and Lebanese law states that the clerk of the court of first instance of the trader's domicile is the competent authority to regulate the commercial registry).

With regards to companies, Section 4 of the Jordanian Companies Law No 22 of 1997 states that every company formed and registered under this law is considered as a Jordanian artificial entity. Having said that, one might ask if registration in the companies' registrar would release the registrant from the obligation of registering in the commercial registry? In response, Article 9 (1) (b) of the JCL states that companies are considered as traders so logic dictates that they should register in the commercial registry. However, Article 25 of the JCL states that companies are governed by the provisions of the companies law. In actual fact, it is more credible to require the companies to register in both, the companies register and the commerce register as it is stated in Article 34 of the Iraqi Commerce Law and Article 26 of the Syrian Commerce Law.

As regards the procedures of registration in the commercial registry, the applicant must provide the registrar with his full name and address, his nationality, the authorized persons to sign on his behalf, his trade name, the nature of his trade, branches of the business premises, previous business premises owned by the applicant, any trademarks used by the applicant or licensed to be used by him. Apparently, there is a prescribed fees to be paid. If there is any future amendments to the entry, it is the applicant responsibility to provide the registrar with any amendments in 1 month. Such amendments include but not confined to, interdiction, bankruptcy, protective arrangements from bankruptcy, selling or hiring the business premises.

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According to Article 26 of the JCL, any natural trader dies or stops trading or if a company has been subject to dissolution or amalgamated in another company then the registrar should be notified in order to cancel the entry in the commercial registry

Article 29 of the JCL states that the registrar cannot reject any application provided that all relevant documents were produced. In this regard, Article, 37 states that the court of first instance of the applicant's domicile is the competent court to settle any dispute arises between the applicant and the registrar and the decision of the court is not final, i.e., it can be appealed.

As regards the non-compliance with the above-mentioned requirements, Article 33 of the JCL states that the conciliation court of the trader's domicile should issue a decree to fine the law breaker with 20 JD and 1 JD for each day after passage of 15 days after the issuance of the decree. Moreover, Article 34 of the JCL states that any falsified entries in the registry, given that the bad faith of the applicant was proved, would render the applicant responsible to pay a fine from 10-100 JD and an imprisonment sentence from1–6 months or any one of those punishments unless there are special provisions in other laws or criminal law with regards to falsified entries. Apparently, the commerce registrar should rectify any error after the issuance of such decree. It must be noted here that 10 or 20 JD is a trivial sum of money that can be never used as a deterrence measure for potential offenders. As a result, such provisions need to be amended to take reality into perspective.

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The Business Premises

Article 38(1) of the JCL states that a business premises consists of the physical place where a trader conducts his trade and all related rights that are inseparable from conducting trade via such place. Article 38(2) adds that a premise contains material objects such as furniture (such as tables, chairs, carpets, computers and printers and telephone lines), tools (equipments that are used to facilitate the trade and not offered for sale such as machines and delivery cars) and goods (the definition of goods implies that they are offered for sale either as raw materials or being manufactured and either stored in the business premises or not as long as they belong to the trader. Apparently, the goods can be subject to mortgage separately from the business premises).

On the other hand, Article 38(2) states that a premise contains immaterial objects such as customers (they constitute the fundamental element in the business premises because they are the theme of conducting business and their existence depends on the location, prices, quality of goods and customer services, consequently, assignment of a business premises can never produce legal effects if it includes non-assignment of the customers), commercial titles, trademarks, trade names (it might be an inventive name such as crescent store or it might be the trader's first and surname), industrial models and designs, patents, description of goods, licenses (if the sold premises acquire a certain license to perform a certain trade then such license should be automatically transferred to the buyer unless such license was granted to the seller on a personal basis), and rewards (if the business premises was rewarded through participation in a certain event or was granted a certificate that its products achieve certain quality, then selling the premises implies automatic transference of such rewards from the seller to the buyer unless such rewards were granted to the trader on his personal qualification, and tenancy agreements

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With regards to tenancy agreements, normally a trader choose a proper location to conduct his trade whereby such place becomes important for conducting the trade, and normally the trader concludes a tenancy agreement with a landlord to that effect, however, one might ask: if a trader assign his business premises to someone else then would the landlord be obliged to accept the new tenant given that the location is of vital importance to any trader? In response, Article 39 of the JCL states that performance of the above mentioned rights should be governed by related provisions of law. Apparently, from the above mentioned Articles one can deduce that a premise is subject to legal actions such as selling, hiring and mortgage. From this perspective, the financial value of the business premises should take all the above mentioned issues in consideration. Consequently, upon reading Article 39 one can notice that there is no special law that regulates selling, hiring and mortgage of a business premises and therefore reference should be paid to JCC which states in Articles 703 and 705 that the approval of the tenor is a prerequisite of sub-leasing whereby the new tenant would replace the old tenant with all rights and duties. In this regard, Article 5 (3) of the Jordanian Leasing Law states that the above-mentioned practice is a reason of rescinding a tenancy agreement. From this discussion, it becomes clear that assignment of a premise does not imply automatic transference of the right in tenancy from the seller to the buyer.

As regards the legal nature of the business premises, some jurists believe that the financial patrimony of the business premises should be separated from the financial patrimony of the trader who owns the premises. They went further to consider the business premises as if it owns an artificial legal personality. The main criticism for such opinion is that it precludes the assignment of the business premises since the business premise is not within the financial patrimony of the trader. As a result, it is more adequate to consider the business premises as consisting of a gathering of various elements which are regulated legally at various levels, e.g., trademarks, in order to pursue a certain end, i.e., acquiring customers. Consequently, given that acquiring customers is of vital importance in conducting trade, which is an immaterial content of the business premises, the right of the trader on his business premises is an immaterial right that can be compared with intellectual property right. From this perspective, it becomes clear that a business premises is an intangible movable property notwithstanding the brick and mortars (see Article 58 of the JCC).

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As a result, if a trader includes his movable properties in a will then the business premises is included. Besides, the formalities of concluding a legal action related to immovable properties, e.g., sale, hiring, mortgage are not applicable here. In this regard, some argue that if the assigner of the business premises owns the land where the business premises is located then such assignment implies that the assignee is entitles to own such land, however, the law does not consider such land as one of the contents of the premises. However, it must be noted that although according to Article 1189 of the JCC possession of a business premises is a rebutted evidence of ownership, a business premises is not within the wording of this Article since such article is related to tangible properties and the business premises is an intangible property. Consequently, if someone acquires a business premises then such practice is not considered as an evidence of ownership. From this perspective, if A sells his business premises to B with a valid contract then through deceit he sells it again to C whereby C acquire the business premises then C's insistence on the application of Article 1189 is ungrounded. Similarly, if A endows his business premises then such action is not feasible since although Article 566 of the JCC states that a movable can be endowed through delivery from the endower to the endowed, such article is related to tangible properties and the business premises is an intangible property.

The Nature of International Trade

Trade is the basis of the development of economics. Trade can be either national or international. International trade refers to commercial transactions that take place over geographical borders.

International trade can be either free or restricted. US and Europe adopts free international trade where the state regulates, supervises, and adopts polices that encourage trade and investment. In the former Soviet Union, the state was interfering in international trade in order to improve the state economy. In developing countries, like Jordan, international trade is a challenge due to the lack of competitiveness with big economies.

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General Agreement on Tarriffs and Trade (GATT) implies that there should be equal opportunities in the conduct of international trade between the member states. Effectively, this means that countries with big economies will conduct preferential treatment for countries with small economies. However, the agreement stated clearly that any deficiency in the balance of payment of any member state can be a basis for this country to be released from the obligations of the convention.

The Definition of International Trade Law

International trade law can be defined as the legal system which comprises the rules and mechanisms which enable the conduct of international transactions which includes international sale and carriage of goods and services, intellectual property rights, letters of credit and international arbitration.

The Relationship between International trade law and other Laws

It must be clear that international private law deals with conflict of laws in order to decide on the competent law and competent court to hear disputes while international trade law aims to eliminate any conflict of laws.

It must be clear also that marriage contracts between partners of different nationalities are regulated generally according to their family laws while in international trade contract, the freedom of choice and contracting are essential.

It must be clear also that international labor contracts are regulated generally according to the law of the country where the performance of the labor took place non-withstanding the contractual agreement between the employer and the employee while in international trade contract, the freedom of choice and contracting are essential.

It must be borne in mind also that international relationships between sovereigns is regulated by international public law and international conventions while international trade is regulated by international contracts. For example, international trade law does not deal with bi-lateral or multi-lateral agreements between states to facilitate trade

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and exchange of goods and services. It does not deal also with economic or political conventions between states such as the European Union.

International Contracts

International contracts are defined as cross-border contracts that are concluded and performed across borders non-withstanding the nationalities of the contractors, their place of residence and the subject-matter of the contract. For example, Warso convention on Aviation states that the place of departure and the destination of the plane are crucial factors in deciding the status of the aviation contract, non-withstanding the nationalities of the plane, the carrier and the contractors.

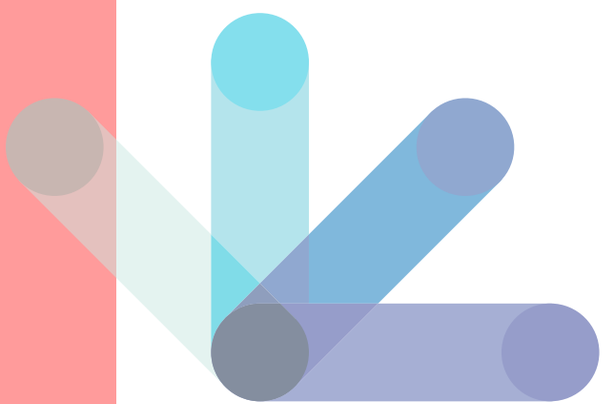
International contractors can stipulate clearly the applicable law in their contract. If they did not do so, there are some indications that can be utilized to deduce the nationality of the contract such as the place of agreement, the place of performance, the nationalities of the contractors, the source and destination of the goods, the language of the contract and the currency of payment.

Characteristics of International Trade Law

1. Tendency for harmonization: Comparative studies of different national laws are highly evaluated as it helps to understand different laws by comparing them with each other. However, there are certain rules of conduct in international trade which derived from international customs in trade among nations. Consequently, the interference of national sovereignties in the formulation of new rules of conduct or developing the existing ones is limited. For example, international contractors resort largely to “Moduled International Contracts” in the formulation of their contracts and to international commercial arbitration in the settlement of disputes. Ultimately, this leads to the harmonization of the law of international trade

2. Reducing the Role of Sovereignties: International trade law is based on cross-border private contracting between individuals of different nationalities. However, it emphasis the cross-border nature of the

transaction rather than the parties of the transaction. Consequently, it views sovereignties as private contractors, particularly, when they approve of “Moduled International Contracts” and international commercial arbitration.



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Parties in International Trade

Parties in international contracts might be natural legal persons or artificial legal persons such as private companies. Moreover, parties in international trade might be states represented by its national companies as artificial legal persons. Furthermore, parties in international trade might be multi-national companies which monopolizes 70% of international trade.

Multi-national Companies:

Globalisation is all around us. The society in which we live is shaped and guided by globalisation. Issues which play such important roles in our daily lives such as economics and politics are related to globalisation and dictate to us where the human race is headed and what the future holds.

What is globalisation? Amongst the other billions of views on globalisation, some of the most widely held beliefs are that globalisation is the new discourse for all forms of politics and economics across our planet, that it will bring the human race forward into a new world where no international borders exist. Others say that globalisation is the rise of capitalist domination, that it is unstoppable, and that human will ultimately suffer. Others believe that globalisation is the end of equality in the world, that globalisation withdraws civil liberties that people are supposed to have.

One of the most common results of economic globalisation is the rise of the multi-national corporations (MNC's). In 1998 there were 53,000 multi-national corporations world wide with 450,000 foreign subsidiaries and global sales of over $ 9.5 trillion. Together the hundred largest MNC's control about 20% of global foreign assets, employ 6 million workers and account for 30% of all world sales. Advances in communications technologies and infrastructure has lead the rise in MNC's and to an increase in international trade.

According to David Held the rise of MNC's are central to the process of economic globalisation. They account for two thirds of world trade and generate large amounts of capital which is then traded on world financial markets and investments. MNC's

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also play a major role in the generation and the 'export' of new technologies for consumers as well a military technology.

Historically speaking, in the sixteenth centuries, there were famous European companies that played a crucial role in the colonization of different nations such as the Eastern-Indian multinational company. This form of companies began to re-proliferate in the industrial revolution in the eighteenth and nineteenth century. Nowadays, such companies re-appear in mid-seventies in a more organized way. For instance, at present, such companies have its headquarter in one state (parent company) and have different branches in different states, and apparently, the priority of such branches is to serve the interests of the main company non-withstanding any potential damage that might occur to national economies where sub-divisions of these companies exist.

From an economic point of view, such practice by multi-national companies facilitates investment across-borders since the branches of the parent company can function easily within the targeted country without any need to be concerned about export restrictions or tarrifs. Moreover, those branches can utilize cheap labor force from the targeted country (which is usually a poor economy country). Furthermore one of the major risks of Multi-national companies is the fact that such companies are reluctant to invest in the transformation of technology to the national economies, consequently, national economies will play the role of the consumers.

There have been many attempts to define Multi-national companies. The International Chamber of Commerce states that such companies consists of one or more national company (s) that work (s) internationally in order to transfer investments among different national sovereigns.

The Economic and Social Council of the United Nations states that such companies can be defined as a project that is in charge of the assets, offices, employees of two or more national sovereignties.

Some leading scholars on international trade believe that such companies must have assets outside the geographical boundaries of one state while the ownership of such

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assets belongs to that particular state. Other scholars require that these companies must have transactions in foreign countries estimated to be around 10%-20% of its total transactions. Other scholars require that such companies must have a board and shareholders of natural legal persons from different nationalities.

In the broadest sense a Multi-national company (MNC) is a company that produces goods or markets its services in more than one country, in the narrowest sense a MNC is "an enterprise, which through foreign direct investment, controls and manages subsidiaries in a number of countries outside its home base".

The Social and economic council of the United Nations has recommended that Multi-national companies must be subject to the supervision of the state (s) where it has branch (s) on the condition that such states must have a share in the capital of such companies or/and a representation in the board of such companies. Having said that, the recommendations are not compulsory. Moreover, such recommendations did not deal with the absence of shares in the multi-national companies or/and the absence of representation in its board. Furthermore, practically speaking, these companies have huge assets and being a shareholder by poor states is not feasible.

Having said that, some countries are dealing firmly with multi-national companies by requiring them to provide an explanation of its potential activities in the state, providing its annual budget, and appoint national citizens of the state as members of the board and legal advisors for the company. Apparently, such policies depend on the economic policies of the state and its desire to provide its citizens with job opportunities.

Legally speaking, the determination of the nationality of natural and artificial persons is crucial in order to decide upon the applicable laws and competent courts to hear potential disputes. From this perspective, multi-national is an unacceptable term. Therefore, it might be replaced by trans-national companies. However, such terminology implies that national sovereignties own and in charge of such companies and its regulation such as national airlines. Unfortunately, this is not the case with private companies which are proliferating in Multi-national companies after the recognition of the importance of privatization on a world-wide level.

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This leads national legislators to pay attention to the nationality of such companies in order to pursue any legal action against such companies. The main criterion was the nationality of the headquarter of these companies. For example, some labor societies are concerned with the salaries that are paid by Multi-national companies to its employees.

This has changed the relationship between employers and employees. A lifetime of work for one company and the associated loyalty it commands no longer exists in today's world, as employees accept that if a company downsizes or relocates they will probably lose their jobs with little or no compensation.

Some multi-national companies specify the applicable law if any potential dispute arises. However, the majority of these companies are silent on the applicable law. Instead, it resorts to the international commercial arbitration to settle disputes and to decide the applicable law. For example, Swedish, Danish and Norwegian airline make a consortium called (SAS) that indicates that the headquarter of the consortium is in the three countries. Moreover, the language of the agreement of (SAS) is in English which implies that the applicable law in any potential dispute is not Norwegian, Danish or Swedish. Consequently, international commercial arbitration is utilized to deal with potential disputes.

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Sources of International Trade

1. Conventions: It might be bi-lateral between two states or multi-lateral between more than two states. The main difference between these two categories is that the later is regulated through international organizations such as the UN. For example, there are the United Nations Convention on contracts for the international Sale of Goods, Geneva Convention on the Negotiable Instruments, Lahay Convention on the artificial legal personality of companies, institutions and associations.

2. International Model Contracts: It can be defined as documents that include general conditions and terms that can be utilized by international traders as an international contract upon the addition of specific conditions and terms such as the names of contractors, description of goods, time and mean of shipment. International Model Contracts includes a general introductory with a clear definition of all terms used in the formulation of the contract, then it specifies the subject matter of the contract, and the obligations of the seller and the buyer, and the shipping of the goods, and the time and the place of the payment, and the remedies of the buyer or seller if the contract is breached, and the applicable law and competent court, and the mean(s) of dispute settlement, and the language of the contract, and the currency of performance, and finally, there might be some appendixes to explain technical matters in the contract such as a manual of certain machines in order to guarantee that such machines function properly and can be maintenaned in the future.

Some of the associations that deal in certain aspect in international trade regulate the formation of international contracts. For instance, London Association for Grain Export has been trying since 1960 to regulate the export of grain from London through 40 versions of international Model Contracts which varies according to the type of the grain, its destination world-wide, means of transportation. Not surprisingly, these contracts were adopted internationally.

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However, such proliferation of international contracts create confusion among traders because of the terminology of such contracts might provide preferential treatment for either the seller (the exporter) or the buyer (the importer). As a result, there has been a movement towards the minimization of any preferential treatment lead by the International Commercial Law Committee and the International Chamber of Commerce.

The minimization of any preferential treatment was based on the marriage of the idea of freedom of contracts in international trade and international customs in international trade. Such marriage enables the formulation of Model contracts that balances the interests of all parties.

It has been envisioned that such marriage will reduce the potential disputes on the formulation of Model contracts, however, in reality, the issue of interpretation of the contractual terms presents a real difficulty. This problem has been augmented by different interpretation in different countries. As a result, the International Chamber of Commerce provides a precise and clear definition for some contractual terms in order to avoid any misinterpretation. Those definitions are called "the Incoterms".

"Incoterms" can be defined as the enactment of international customs in trade. It constitutes a main source of international trade. The main characteristic of "Incoterms" that it is a complementary rules which means that contractors can resort to such rules only if their contract does not specify the meaning of the contractual terms.

For example, "Incoterms" provides a clear definition of what is termed as economic frustration or *force Majeure*. Such definition implies that an arbitrator or national judge is entitled to modify contractual obligations upon the crystallization of economic frustration in order to achieve justice between international contractors. This might happen in "long-term contracts". But it must be clear that international contractors should be impliedly aware of such circumstances, such as the fluctuation in national currencies, before

concluding international contracts. This requirement is not as evident in the interpretation of economic frustration in national contracts.

Also, “Incoterms” provides a clear definition of CIF and FOB contracts by specifying that CIF refers to the buyer’s obligation of paying the cost of the goods, the insurance of the goods, and the freight of goods to the seller before the shipment of the goods in order to conclude the contract, while FOB refers to what is termed as free on Board which means that the insurance and fright costs are the responsibility of the buyer which means that, in effect, the international contract is concluded whether or not the buyer secures the fright costs or whether or not he insures the goods. Apparently, such clarification is crucial in order to determine the responsibilities of the buyer and the seller because the seller disposes of the possession of the goods once it has been shipped and at the same time the ownership of these goods is transferred to the buyer who has not seen the goods yet.

3. Equity and natural laws: It must be clear that the reference here is for equity as it is understood and perceived by the international business community. It must be clear also that equity should be applied in international trade as a complementary source of law in the absence of conventions and International Model Contracts.

The consideration of Equity as a source of international trade law might create confusion in the international business community due to the lack of transparency of the potential awards of arbitrators which in effect cannot be a clear guidance for business persons’ expectations from their contractual agreements. For instance, often, international commercial arbitrators interpret the idea of economic frustration in international trade as a source of obligation on contractors for a just distribution of potential risks, while national legislators view economic frustration as a source of releasing the debtor of his obligation.

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Harmonization of International Trade Law

The idea of the harmonization of international trade law was born in 1900 when the first comparative law conference was held in Paris. The participants made huge efforts in order to understand the peculiar characteristics of each legal system, e.g. the differences between civil law legal systems and common law legal systems. However, the participants concluded that the harmonization is a wishful thinking rather than a realistic approach.

In practical terms, geographical proximity, such as the Arab Countries, and economic/political mutual interest such as the case between Scandinavian Countries and EU countries in general play a crucial role in the harmonization although at a regional level.

In 1920, the International Chamber of Commerce was established as a non-official organization in order to harmonize international trade law which consists of 40 national chambers of commerce.

In 1920, the International committee of Maritime law was established as a non-official organization in order to harmonize international Maritime law.

In 1926, the International Institute for the Unification of Private International Law was established as a non-official organization in order to harmonize international private law.

In 1955, Lahay Conference for the Unification of Private International Law was established as an official organization in order to harmonize international private law.

After that, the UN has interfered in order to accelerate harmonization through the United Nations Committee on International Trade Law (UNCITRAL)

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Methods of harmonization

1. Agreement on general provisions: In this method, international contractors dealing with certain goods in certain geographical boundaries agree upon general rules to be applied in their contracts. In effect, such practice will reduce conflict of laws. Having said that, international contractors are free to modify such rules as they wish on the condition that substantial modifications are excluded. This idea was adopted by the European Union Economic Committee in contracting over factories' equipments.

2. The enactment of Model Laws by various national sovereignties: Some international organizations provide Model laws as guiding principles to different countries to adopt them and enact them in their national commercial laws. For example, the United Nations Committee on International Trade Law (UNCITRAL) provide a Model Arbitration Law in 1985. This Model has been adopted by many countries worldwide. In actual fact, the Jordanian Arbitration Act of 2001 has adopted these principles. The same adoption happened in England in 1996. Consequently, national arbitration laws do not vary substantially. Similarly, the UNICTRAL has issued its Model Law on Electronic Commerce of 1996 which has been adopted by Jordan through the Jordanian Electronic Transactions Act 2001. In the UK, UNCITRAL Model Law on Electronic Commerce was adopted through the Electronic Communications Act 2000.
3. The codification of customs in international trade law: Some unofficial international organizations are playing a crucial role in this respect. Apparently, national legislators have adopted and enacted these customs in their national commercial laws. For instance, the International Chamber of Commerce (ICC) has codified some of the customs in international trade in the fom of "Incoterms". For instance, the just distribution of risks that emerge from *Force Majeure* between international contractors as opposed to releasing the debtor from his obligation.

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4. International Conventions: Various states agree upon certain provisions to be applied on their international contractors. However, it must be noted that such method is applied only on the participants of the convention. Moreover, such conventions use generally loose and non-definite legal terminology that enables participants to differentiate on an undefined bases between national contractors and international contractors. Consequently, disputes will inevitably arise. For example, Article 99/b of the Jordanian Aviation Law states that:

> " Chicago Convention on International Aviation is applicable with respect to crew unless there is an Article in the above-mentioned law that is deemed to be more appropriate to be applicable."

5. Reference to relevant national Jurisprudence: When international trade disputes arise, national judges are advised, although not required, to acknowledge certain national laws in deciding the dispute. For example, London Court of Appeal has decided that reference must be paid to the French law, rather than English Law, in deciding a dispute governed by Warso Convention on Aviation 1928 in deciding the precise definition of an international aviation contract for the carriage of goods, because the English Court believed that this convention has been influenced to a large extent by French Jurists.

6. Minimizing the reference to various national laws: For example, Article 25/1 of Warso Convention on Aviation 1928 states that

> "international carriers of goods must be responsible for their actions which are to be decided by national competent courts."

Apparently, this would create confusion because reference is made to national laws. As a result, Lahay Convention of 1955 has modified this Article by stating that:

> "Non-withstanding Article 25/1 of Warso Convention on Aviation 1928, international carriers of goods must be responsible for their

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> actions whether or not such actions were consequential of good or bad faith."

However, one of the main problems in harmonization is different interpretations of harmonization by national judges. For example, Article 17 of Warso Convention on Aviation 1928 states that

> "International carriers are responsible for injuries that happen to passengers during the journey"

However, it has been argued that in planes hijacking there are non-bodily injuries which are caused by stress. So, are these damages included in the definition of injuries or not?

Article 256 of the Jordanian Civil Code states that " Any wrongdoer is obliged to rectify any damages caused to a third party". As a result, is it possible to argue that non-bodily injuries are included in hijacking?

It has been argued that Warso convention was agreed upon in France and it has been influenced to a great extent by French Jurists, as a result, reference must be paid to French Law with regards to this issue. French Law differentiate clearly between bodily injuries and non-bodily injuries and that was the spirit of Article 17 of Warso Convention when it was enacted. In other words, the reference of the convention was to guarantee compensation on bodily injuries.

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International Commercial Contracts

Definition and nature of international commercial contracts

International commercial contracts can be defined as contracts that aim to create legal obligations on buyers and sellers across borders non-withstanding the nationality of contractors or the subject matter of the contract or the place of performance. For example, Warso Convention on international aviation emphasis that points of departure and destination must be across borders in order to decide the internationality of the contract non-withstanding the nationality of the plane owner(s), the carrier(s) or the passengers.

There is at present a legal debate on the status of international contracts. Some believe that contractual terms in such contracts should be based on a certain legal system in order to facilitate the determination of the applicable law and the competent court. In actual fact, such opinions interpret the authentication of international contracts with certain public notary, or the stipulation of certain currency in performance, or certain language to be an indicative factor to the applicable law and the competent court.

Others disagree with the above mentioned opinion and argue that the existence of arbitration as a contractual term will eliminate conflict of laws. In actual fact, the existence of arbitration is based on freedom of contract where parties can even agree on an applicable law which is not relevant or even not based on any legal system, instead, it can be based on international customs. As a result, it has been argued that the internationality of a contract implies that the parties are free to decide on the applicable law rather than viewing the choice of a certain law as an implication of the internationality of the contract.

Examples of international commercial contracts

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1. **Know-how contracts:** These kind of contracts deals with the provision of technical assistance in order to transfer the technological applicability of scientific innovations. This means that the subject matter of the contract is intangible and the performance of the contract will be at a long-term. As a result, disputes will inevitably arise.

2. **International finance contracts:** Banks or investment companies or insurance companies might finance certain investments across borders on a long-term basis on the condition that such financial provision would imply close supervision on the activities of the investment. For example, any distribution of any potential profit must be subjected to the approval of the financial provider.

3. **International petroleum contracts:** Companies that deal with extraction and exploitation of Petrol might make a contract with national companies of countries that produce Petrol whereby the foreign company offers the necessary equipments to extract petrol and assigns its property rights in such equipments to the national company in order to generate profits for both companies.

Formation of International Commercial Contracts

1. Negotiation in international commercial contracts

International contracts resort to negotiations before the conclusion of the contract in order to maximize their profits and minimize their losses by reaching to a mutually beneficial form of the contract.

Legally speaking, negotiation guides the intentions and expectations of the contractors in order to produce legal effect in the form of a contract.

Negotiators must enjoy legal capacity to perform actions that produce legal effects. In practice, negotiators would be legal advisors of big companies. So, it might be useful to provide other negotiators with their position and the responsibilities and duties that are assigned to them with regards to negotiations. Besides, negotiators must be able to reach decisions at some points in the process of negotiation. Furthermore, given that negotiations are conducted across borders and different cultures, it is presumed that negotiators must be able to address cultural differences.

Normally, the seller initiate negotiation by providing an offer to participate in negotiation then the seller accept such offer without any obligation on each side to reach an agreement. These negotiations might developed into counter-offers and counter-acceptance. For instance, if the seller states that he is prepared to negotiate the price, this does not imply that there will be reduction. Ultimately, both negotiators are supposed to formulate their final agreement in order to be signed and to create legal obligations on both sides.

It must be noted in international negotiations over contracts that there should be good faith on both parties to reach final agreement because it is presumed that preparations, researches and statistics for such negotiations are money and time consuming. If one negotiator proves the bad faith of the other negotiator

in this respect, he can oblige this negotiator to compensate him on the basis of his omissive responsibility and not his contractual responsibility because the contract has not been concluded yet.

International negotiations over contract is a highly confidential matter particularly with know-how contracts. As a result, negotiators might require certain financial warrantees in order to be paid if one negotiator breach his obligation in confidentiality. Such warrantees must be agreed upon clearly before the start of negotiations such as the form and duration of payment and whether or not such payment must be deducted from the price once the final contract is concluded. The problem might be even more complicated if there is an expert in the negotiation in order to determine the value and the applicability of know-how contracts.

It must be noted that negotiations before the conclusion of the contract can be utilized after the conclusion of the contract as an interpreter of the contractual terms in any potential dispute. However, the contract might stipulate that such negotiations must be disregarded. For example, the General Provisions of the European Economic Committee stipulates that verbal or written negotiations before the conclusion of the contract can never be deemed to have any legal effect.

In certain circumstances, the contractors might include the negotiation as an appendix to their contract. In this case, the negotiations become part of the contract and can be utilized to interpret the contract in any potential dispute. For instance, if there is a dispute over the inclusion of certain terminology in the contract, the arbitrator or the judge can refer to the negotiations to determine the mutual intention of both parties in the insertion of such terminology.

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2. Drafting of international commercial contracts

One of the main issues in drafting international commercial contracts is the avoidance of definite or elastic or illusive or uncommon terms which have the potentiality to be interpreted differently by different people.

As regards the definite terms, if the contract is about the land carriage of grains, there is no need to specify that the carriage should be by rail or by road as long as the grains would be safe in both cases.

As regards elastic terms, if the contract is about insurance of goods, it is not recommended to include statements such as customary or usual risks without specification of such risks.

As regards the illusive terms, if there is a duration of the performance of the contract, it is not recommended to resort to statements such as "the performance should be reasonably undelayed".

As regards the uncommon words, it is recommended to use legal terminology that convey precisely the intention of both contractos, for example, blamable act is different from wrongdoing act. And solidarity is different from guarantees.

Flexible vs. non-flexible and causative vs. non-causative drafting in international commercial contracts

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There are two categories of contracts, on the one hand, there are flexible and non-flexible contractual terms. On the other hand, there are causative and non-causative contractual terms.

As regards the flexible terms, the contractor is obliged to take into account certain characteristics and principles, without specification, in the performance of the contract. This might facilitate the performance of the obligation. However, it might have negative impact in proving that each party in the contract fulfill his obligations.

For instance, if the contract is a about selling a machine, the contractors can mention that the production line of the machine should be marketable and saleable or that such production line matches other production lines in other factories that use the same machine. Also, in piece-working contracts, it might be stated that the subcontractor must evacuate the place as soon as possible. Also, in know-how contracts, contractors might mention that the provider of the expertise must guarantee the function ability of the intended project.

As regards the non-flexible terms, the contractor is obliged to perform his obligations according to certain timetable and certain quantity and certain quality. This might create difficulties in the performance of the obligation. However, it might be easier to prove that each party in the contract fulfill his obligations. Apparently, with regards to fixation of prices, it is preferable to resort to non-flexible terms.

For instance, if the contract is about selling a machine, the contractors can specify that the production line of this machine should be 99% without faults. Also, in piece-working contracts, it might be stated that the subcontractor must evacuate the place in 15 days. Also, in know-how contracts, there might be specification of the number of technicians.

As regards the causative terms, the contractors specify clearly the reasons and objectives of each contractual term. This is useful in claiming that the contract is voidable upon proving the unsuitability of the subject matter of the contract for the intended use by the seller.

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In actual fact, the precise determination of the subject-matter of the contract implies the existence of causative terms in the contract. Accordingly, some Jurists in international trade law believe that the mention of certain ways of packing the shipped goods, diagrams and designations that explain the subject-matter of the contract, and providing manuals for operation and maintenance and supervision of the subject-matter of the contract are indicative factors of the existence of causative terms in the contract.

For example, if the contract is about the purchase of cooling lorries, the causative terms specify clearly the reasons, objectives and the intended use of such lorries and if it proves later that such lorries is not suitable for the purchaser use, the contract would be voidable non-withstanding that such lorries can be used in different fields of cooling.

As regards the non-causative terms, the contractors specify generally the nature and the limits of the obligation in the contract. This might create difficulties if a dispute arise over the contract because the buyer would have difficulties in proving the bad faith of the seller since the seller can allege that the buyer did not specify clearly that he is pursuing a specific substantial characteristic in the subject-matter of the contract.

For example, if the contract is about the purchase of cooling lorries, the non-causative terms implies that the buyer is interested in such lorries in broad terms without specifying clearly his line of business in order to determine the suitability of such lorries to his line of business. Apparently, the contract cannot be voidable on that basis.

3. Preambles of international commercial contracts

Such introduction must include the mutual aims of the contractors and their intent to pursue future transactions together. It might refer to the expertise of the supplier especially in know-how contracts. It might refer also to the need of the importer to the subject-matter of the contract especially in know-how contracts and his obligation to keep any sensitive information secretly.

International trade law jurists argue that preambles can clarify the intention behind choosing certain contractual terms should any dispute arises. Consequently, it should

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be interpreted as a part of the contract non-withstanding whether or not the contractors states that the preambles are part of the contract.

One of the main issues that must be mentioned in the preamble is the language of the contract. Apparently, any contractor might be able to negotiate certain terms in a foreign language before the insertion of such terms as contractual terms, but it is a completely different story to attempt to settle a dispute in a foreign language. In explanation, every contractor would resort to his own language should a dispute arise in order to interpret the terminology of the contract. As a result, the judge or arbitrator must depend on the language of the formation of the contract and might ask the parties to provide him with credited translation of their arguments over a dispute. Moreover, judges or arbitrators might resort to linguistic experts to determine the suitability of the translations.

There are less important issues that might be included in the preambles such as the need to have a license from the state of one of the contractor to perform the subject matter of the contract.

Moreover, there might be agents that represent both contractors, so it would be useful to specify the limits of their powers.

Also, in know-how contracts, contractors might stipulate whether the technology that has to be transferred was invented by the supplier or it was merely acquired by him, and if it was acquired whether or not he has a patent.

Also, in know-how contracts, contractors might acknowledge in the preambles the rapid development of technology which means that what is suitable today is not necessarily suitable in six months time for instance. This is important as it enables contractors to modify certain contractual terms in order to encompass new technological developments for the mutual benefit of the contractors.

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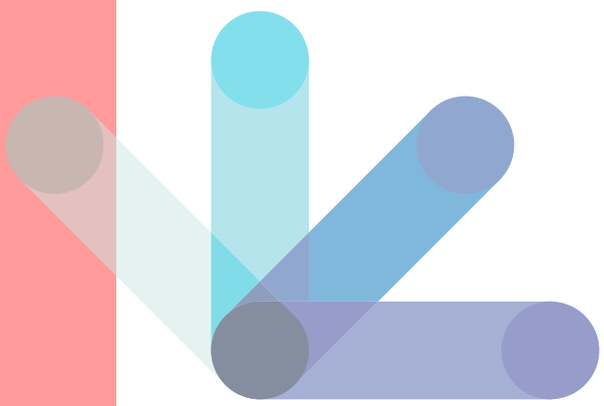

Letters of Credit

Nature and definition

The payment in international trade can be in cash or in the form of bartering (the importer provides the exporter with the necessary ingredients for the final products such as orange for the production of orange juice) or as a certain ratio from the outcome of the sale of the subject-matter of the contract (this is evident in know-how contracts).

These forms of payment can be mixed together. For example, the payment in know-how contracts could be in cash in addition to certain ratio. This provides an advantage to the importer in the sense that he is not enforced to pay a huge amount of money immediately. Normally, the ratios would increase according to a certain scale. For

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instance, it might be stated in the contract that the importer would pay 5% of the outcome in the first 3 years which should not be less or more than 100.000 $.

Apparently, such method of payment entitles the exporter to check the commerce book of the importer to decide upon the ratio of payment. Moreover, it must be mentioned that the contract should specify which party is supposed to pay taxes on the sales of the subject-matter of the contract.

Having said that, the most common way of payment in international trade is in the form of letters of credit which can be defined as a contract between an applicant (the buyer) and a bank to open a bank account where the bank requires the applicant to provide certain warranties such as the shipped goods, and in return the bank is obliged to pay certain amount of money to a third party beneficiary (the seller) upon producing the letter of credit which must be assigned from the applicant to the beneficiary.

By doing so, the buyer guarantee the performance of the seller by shipping the goods on the one hand and invest his money in the bank until it is transferred to the seller on the other hand. By the same token, the seller would be confident that he would get his money from the buyer.

Apparently, the warranties in letters of credit is the shipped goods which are not possessed by the bank. The situation of the bank can be compared with the mortgagee creditor who is not possessing the subject matter of the debt. In some situations where the bank is not confident of the financial credibility of the applicant, the bank might require the applicant to repay the bank upon receiving the shipped goods.

There are essential requirements that must be provided by the applicant such as the full name and address of the beneficiary in order to avoid any resemblance in the names, the duration of the letter of credit, the amount of credit which should match the agreed upon price between the buyer and the seller. If this amount cannot be estimated approximately, it can be estimated in the boundaries of 10% more or less. If there is an exchange of the currency of payment, this issue must be dealt with once the account is opened with the bank.

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It must be noted that the agreement between the applicant and the bank is separated from the international sale contract. Consequently, the bank is not interested in the detailed description of the goods which is the subject matter of the contract between the buyer and the seller. However, it is advised that the applicant should provide a general description of the goods.

On the other hand, the bank must inform the beneficiary promptly about its status with the applicant. Also, the bank must check the letter of credit which is provided by the seller such as the signature of the applicant and that the letter of credit is provided before the termination of the letter of credit (if the letter of credit provides that its duration is, say, for the first half of April 2004, this implies that the 15th of April is included until the end of working hours which are usually from 8-5. If the 15th is an official holiday, then the bank's obligation would be transferred to the 16th). Moreover, the bank must accept the letter of credit on the terms that has been agreed with the applicant. For instance, if there is an insurance policy which deals with certain risks as part of the letter of credit, then the bank should not be entitled to cover different risks.

If the beneficiary provides the bank with the letter of credit but he supply the applicant with bad quality goods or did not ship the goods in the first place, then it has been argued that the breach of the international sale contract would make the letter of credit void so the bank should not pay for the beneficiary. Others argue that the international sale contract is separated from the letter of credit so the bank must pay the beneficiary. The third argument, which is most credible, is that the applicant has the right of placing the deposited money in detain until the dispute between the buyer and the seller is settled. This is logical since the buyer is sought to be as a creditor to the seller and consequently he has the right in detaining the property of the seller in order to fulfill the seller's obligations towards the buyer.

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Types of letters of credit

Letters of credit can be categorized as revocable and irrevocable credit and confirmed and non-confirmed credit. They will be studied in turn.

Revocable vs. Irrevocable letters of credit

In revocable letters of credit, the applicant or the bank can withdraw the opened account by a unilateral disposition, for example, upon the applicant's insolvency. This is apparently not a secured mean of payment to the beneficiary. On the contrary, irrevocable letters of credit cannot be terminated or amended without the consent of the applicant, the bank and the third party beneficiary. It must be noted that the contract between the buyer and the seller should specify that the payment would be in an irrevocable letter of credit. If the contract is silent on this issue, the contract would be interpreted as containing a revocable letter of credit.

confirmed and non-confirmed credit

Non-confirmed letter(s) of credit means that the opened account would not be supported by an other bank. On the other hand, confirmed letter(s) of credit means that the opened account would be supported by an other bank which provide the beneficiary with confidence that the payment would be provided. Confirmed letter of credit cannot be revocable by a unilateral disposition.

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The United Nations Convention on Contracts for the International Sale of Goods CISG (Vienna Convention)

General Overview

In 1930, the Institute of Private Law issued a proposal to unify the legal effects of international contracts on buyers and sellers and sent it out to its members to canvass their opinions. However the World War 2 took place and the attempt was suspended. In 1951 the proposal was formulated again by the Deutch government and the efforts culminated in Lahay conference in 1964. However, the conference was perceived as a failure because some major players in international trade were absent such as India, China and the former Soviet Union. Moreover, in 1964 many countries all over the world were not independent from colonization and therefore they were not able to develop their economies.

In 1978, the united Nations Committee on International Trade (UNCITRAL) addressed the above-mentioned issue through formulating two separate agreements on the formation of international contracts and the legal effects of those contracts on buyers and sellers. By separating the formation of contracts from its legal effects, the endorsing countries were free to decide on which part of the agreement they would conform. Those efforts were culminated by an international conference that produces Vienna Convention on International Sale of Goods. That said, it must be mentioned that Lahay convention and Vienna convention co-exists together at present whereas any country must choose to join either Vienna convention or Lahay convention.

General principles in the convention

Article 7 of the convention provides a clear explanation of the general principles of the convention because it states that any issue that is sought to be within the realm of the convention but without having any provision in the convention to regulate it, would be regulated with reference to the following:

1.The internationality and the unification of the applicability of the convention. 2. emphasis on parties' consent 3. emphasis on international trade customs 4. the existence of good faith between international contractors. 5. The avoidance of

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contract breaching as practicable as possible. 6. the emphasis should be put on the intention of contractors rather than the construction of their statements. We will study those principles respectively.

- National judges are normally referring to their legal systems and their legal education and their national sources of law in order to interpret any legal provision. However, national laws vary considerably and the unified applicability of such laws at a global level is not feasible. On the other hand, in national legal system, the judicial system is supervised by national courts in order to determine the adequacy of judges. However, there is no superior court that is competent to supervise judges at a global level. As a result, Vienna convention states in Article 7 (1) that any judges or scholar must expand his vision in reading the provisions of the convention in order to achieve its goals in harmonization of international trade law. For example, they must refer to the negotiations that precedes the convention in order to understand certain provisions instead of referring to national laws.

- The emphasis on parties consent can be deducted throughout the convention where there is no obligation on the buyers or sellers to abide by the rules of the convention, instead, they are allowed to resort to international Model Contracts or to national laws.

Moreover, the convention does not provide any preferential treatment to either the seller or the buyer. Apparently, the buyer would be normally a developing country which is sought as not being able to negotiate international contracts.

Furthermore, the convention states that if there is an agreement between certain members, who are geographically close together, to apply certain set of rules or their national laws in international contracts, then such agreement would be valid and their membership in the convention would not be affected.

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And finally, the convention emphasis that international contracts are concluded once the offer is consistent with the acceptance without any need for writing which is sought as a mere proof of the existing of the contract. This conforms largely to the speediness and efficiency of the environment of international trade However, the convention acknowledges that some members consider writing as an element of contracting and not a mere proof of the existence of contracts and consequently, Article 12 states that any member can suspend the applicability of writing as a proof and consider writing a an element of contracting .

- Customs refer to certain practices that has been performed for ages which resulted in making people feel that it is compulsory. In international trade, the shipment of certain goods in certain packages would be considered as a custom. The emphasis on international trade customs in the convention derives from the fact that obedience of such customs are sought to be compulsory on both buyers and sellers non-withstanding whether or not they were embodied in their contract. As a result, the convention states that if an international trade custom was not included in the contract, the judge is sought to interpret unmentioned trade customs as if they were intended by contractors to be included in the contract.

Article 9 (2) shed light on the mechanism of such interpretation by judges by stating that buyers and sellers must be considered as if they impliedly agree on the applicability of all customs that they are aware of their existence or that they are supposed to be aware of their existence. Article 9(2) added that the criterion of assessing such awareness should be objective rather than subjective. In other words, the convention does not rely on the educated and informed judgment of either the seller or the buyer with regards to the awareness of customs, instead, it relies on an illusory average third party neutral who is

capable of assessing the existence of such awareness. Moreover, Article 9 (2) states that customs must be widespread in the international trade community and they must be consistently applied in similar contracts in order to be interpreted by judges as if they were included in the contract.

- The emphasis on good faith in the convention is important because it puts clearly that such obligation is not confined to judges when they interpret any dispute that is governed by the convention, instead, such obligation has been extended to buyers and sellers whereby they are obliged to take into account the principle of good faith in their transactions. For example, they are required not to cause any detrimental act towards each other if the subject-matter of the contract has not been transferred from the seller to the buyer.

- The emphasis on the avoidance of contract breaching as practicable as possible was sought to be as a mechanism that can reduce effectively the time and money that have been invested in negotiating and forming the contract. Moreover, it has been conceived that return of goods detrimental effects on the goods and therefore the avoidance of contract breaching must be discouraged.

- Any act or omission of act according to Article 8 (1) of the convention should be interpreted according to the doer's intention as it is perceived or as it should be perceived by the other party. Previous dealings between the parties and the negotiations that precedes the conclusion of the contract would help largly in assessing such perception. Moreover, the "average-man" assessment of perception would be utilized For example, if a French trader conclude a contract with a Jordanian flowers producer to ship flowers to France before the 21st of December. It should be clear that the specification of this date is an indicative factor that the French trader is aiming at selling the flowers in Christmas even though the French trader did not specify that

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clearly. As a result, the "averge-man" criterion would be utilized in this regard in order to assess the seller's liability.

The Jurisdiction of the Convention

The convention deals with sale of goods at an international level and therefore its jurisdiction encompasses both: sale of goods and the fact that such sale is across borders. We will study those two issues in the following pages.

The internationality of the convention

The criterion in assessing the internationality of a certain contract could be either subjective (which includes among other things the nationality of the parties of the contract, or their domicile) or objective (which includes among other things, the place of contracting, the place of the subject matter of the contract or the place of performance).

The convention adopts the objective criterion and states in Article 1 (1) that the jurisdiction of the convention is confined to contracts of sale of goods between two or more parties given that the place of the subject-matter of the contract belongs to one of those parties. Apparently, the convention states that such parties must be nationals of participant states in the convention.

For example, if an Egyptian buyer whose country is a signatory of the convention conclude a contract with an Italian seller whose country is a signatory of the convention and where the subject-matter of the contract is in Italy, then the convention applies.

It must be noted that the applicability of private international law rules becomes irrelevant in this context. In the above-mentioned example, assume that the place of contracting was Greece or Lebanon or Cyprus who are not signatories of the convention and assume that a legal action was brought in Egypt who is a signatory state, then the convention applies although rules of private international law might indicate that Greek or Lebanese law would be applied.

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In another scenario, if the contract was concluded between an Egyptian and a Greek and the subject-matter of the contract was in Egypt and the legal action was brought in Egypt and the contract was concluded in Greece, then according to private international law, Greek law would be applied, however, the convention applies in this scenario.

If the contract was concluded between two non-participant states (say Lebanon and Greece) and they agree that the applicable law in their dispute is the Egyptian law (participant state), then automatically, the convention applies.

And finally, if the contract was concluded between an Egyptian and a Greek in Egypt and they agree that Greek courts are the competent courts to decide any disputes, however, rules of private international law in Greece refer the dispute to the law of the place of contracting, which is Egypt in our example, then the convention applies.

Sale of Goods in Vienna Convention

The convention avoids using the term "commercial" because such term is not easy to define. Moreover, the nature of commercial transactions is that it is always developing and might include various transactions which cannot be categorized clearly. Furthermore, not all jurisdictions provide a clear distinguish between what constitutes a commercial act and a civil act.

However, it is clear that there are two tests that determine the nature of a certain transaction: first, whether such transaction is conducted by a merchant or not (subjective test), second, whether the transaction itself is commercial or not non-withstanding whether or not it was performed by a merchant (objective test).

With regards to the convention, one can deduct that although the convention uses the term (sale of goods), the spirit of the convention can be interpreted to specify that such sale of goods is confined to merchants. Moreover, the convention confines its applicability to contracts that are considered to be commercial contracts.

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The Jordanian legislator defines the concept “sale” in Article 465 of the Jordanian Civil Code by stating that sale is defined as the transference of properties in return for a compensation. Article 478 added that the price is considered to be an element of a valid contract. As a result, the Jordanian legislation implies that barter contracts are concluded in the definition of sale. However, Vienna convention confines its applicability to monetary compensation.

One might ask, if there is a combination between financial compensation and barter, then does the convention applies? For example, if the seller agree with the buyer to pay the price and provide some raw materials that would be helpful in creating the final product that is going to be sold to the buyer, then does the convention applies?

Article 3 (1) of the convention states that if the provision of raw materials was substantial for manufacturing the final product, then the convention does not apply. As a result, the criterion in assessing the applicability of the convention here is the substantiality of the provision of the raw materials in the formation of the final product, non-withstanding its quantity.

For example, if the seller asks the buyer to provide him with 10% of the components of a medicine to be manufactured by the seller, given that such percentage is crucial in dealing with certain diseases while the other 90% of the components helps in preserving the medicine and its flavor and its side-effects on the patient etc, then the convention does not apply.

Similarly, Article 3 (2) states that the convention does not apply if the buyer’s obligation towards the seller was mainly providing labor forces to manufacture certain product to be sold to the buyer. For example, if there is a contract between an Hotel and furniture company to manufacture 50 bedrooms with their labor forces while the hotel would provide the raw materials for such enterprise, then the convention does not apply.

In actual fact the convention states that there are certain contracts which are not included in the convention. They are as follows.

1. immovable property: given that the convention deals with goods so it does not cover immovable properties such as land and buildings. It must be noted that although cars and lorries and ships and planes are movable properties with special descriptions, they are not included in the convention because national legislators places a particular importance on the formalities of concluding such contracts. It must be noted also that intangible properties such as shares in companies and intellectual property rights are not included in the convention. And finally, it must be noted that some countries offer to sell the surplus of its electricity power to other countries. Such sale is not included in the convention because it is not feasible to determine the nature of the subject-matter of the contract whether it is a real property or a personal property. However, it must be noted that although coal and petrol are essential in generating energy, separate contracts for their sale is included in the convention.
2. Barter transactions: such transactions are not covered by the convention even though there might be some monetary amounts. For instance, if the barter is between two objects where the cost of the first is 10.000 dollars and the second is 8.000 dollars and there is an agreement to pay the difference which is 2.000 dollars, then the contract is outside the remit of the convention. However, in this example, if the difference to

be paid in monies is more than the value of the bartered objects then it would be included in the convention.

3. lease for sale contracts: in this contract, the buyer would pay certain premiums on regular basis for a certain object with the intention of buying that object upon paying all premiums. Upon paying all premiums, the seller is obliged to transfer the ownership of that object upon paying a nominal amount of money.
4. consumer transactions: the convention does not apply in consumer transactions with foreign traders given that the purpose of the transaction is personal or family use. For example, if a French tourist bought a souvenir from Egypt to decorate his house, this would not be subjected to the convention. However, the buyer should know or should be perceived as knowing the intention of the tourist. The illusory average man criterion would be utilized here in addition to some indicative factors such as the price, the amount of souvenirs and previous dealings between the buyer and the seller. If this test is not working then the convention applies.
5. Auction sales: such sales are conducted publicly and on a voluntarily basis whereby the sold object would go to the highest bidder. The convention does not apply here because national legislators normally emphasis the importance of protecting the bidders from any potential fraud because of the sensitivity of auction sales.
6. Forced sale: such sales occurs as a result of attachment on property with a judicial writ to that effect.

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Formation of contracts under Geneva Convention

Formation of contracts in the general theory of contracting is concerned with the consistency of offer and acceptance and the defects in this context such as duress and fraud and the lack of legal capacity, subject-matter of the contract, the casual relationship between the subject-matter and the parties. Having said that, the drafters of the convention believe that harmonization of such issue would be challenging because such issues are peculiar to every national system. However, the convention addresses only the offer and acceptance. We will study these two obligations in turn.

Offer

Geneva convention states in Article 14 that an offer is an invitation to conclude an international contract. Such invitation should be directed towards a person or a definite set of persons.

One must distinguish between an "invitation to treat" which is provided by the buyer or the seller and a valid offer. An offer is made where a person(s)-offreror(s)- unequivocally expresses to another person(s)-offeree(s)- his willingness to make a binding agreement on the terms specified by him if they are accepted by the offeree(s). The offer must be definite without any vagueness or illusion because the court might held that there is no contract if the offer is insufficiently certain. This case might arise in enquiries and replies with regard to the lowest possible price. It might arise also in "invitations to treat" which can be defined as an invitation to enter into negotiations which may lead to the making of an offer. Such invitation might includes meeting between potential contractors, exchanging mails, faxes and e-mails, and inspection of the subject-matter of the contract.

Article 14 of the Convention states that "an offer which is not targeting certain individual(s) is deemed to be an invitation to treat unless the offeror specify an intention to the contrary". In actual fact, if the offer is not specifying its potential

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objects and it is directed at the general public, then it cannot be said that it is a legally valid offer, instead, it is termed as an invitation to treat. The legal justification for that is the fact that the intention to enter into a legally binding obligation should be stated clearly by both contractors. Such intention is evident in the offer but not in the invitation to treat.

For instance, if an international contractor states on TV that he is offering a certain goods in the field of medicine, then it cannot be said that this is a contract, instead, it is an invitation to treat. But if the international contractors provide professionals in the medicine industry with catalogues explaining the advantages of his products and its price and guarantees and his willingness to provide the products with the specified conditions in the offer to whomever require him to do so, then this would be more specific and categorized as an offer. Apparently, such catalogues expresses the clear intention of the seller to enter into a contract.

Form of the offer

The convention does not require any particular form to convey the offer unless national laws have some reservations on this point. The Jordanian Law states that there is no requirement that a contract should be in writing except where so provided by the statute such as insurance contracts for proof purposes. In other words, verbal contracts are producing legal effects. However, it must be noted that the requirement of writing is considered to be the strongest form of proving the existence of a contractual agreement once a dispute arises.

Legal effects of the offer

Article 15 (1) states that the offer is deemed valid once it is communicated to the offeree either verbally or in writing in his place of business or his business postal address or his personal residence or his home postal address or his usual place of residence (This situation would only be acceptable if there are no business or home residence such as an hotel address).

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Apparently, the offer becomes valid when it is received by the offeree or his representative or his agent and not when the offeree actually becomes aware of the terms of the offer upon reading it. However, there is a large legal debate presently about the effectiveness of depending on this criterion in electronic communications. In other words, would an offer conveyed to the offeree is valid once it has been transmitted from one computer to the other, or once it has been read by the offeree once he checks his e-mail. The debate favors the argument that the former situation is more logical to constitute an offer because it is compared with offline communication.

Withdrawal of an offer

We have mentioned before that in international negotiations over contracts that there should be good faith on both parties to reach final agreement because it is presumed that preparations, researches and statistics for such negotiations are money and time consuming. If one negotiator proves the bad faith of the other negotiator in this respect, he can oblige this negotiator to compensate him on the basis of his omissive responsibility and not his contractual responsibility because the contract has not been concluded yet.

Having said that, if there is a valid offer and not a mere invitation to treat, then Article 2 of the convention states that the offeror can withdraw his offer provided that such action takes place before the acceptance is provided or if both the acceptance and the withdrawal were communicated to the offeror and the offeree at the same time.

However, the convention states in Article 2 that there are situations were the offer cannot be withdraw where there is a clear indication in the offer to that effect or if this indication can be deduced from the wording of the offer.

In some situations, the offer would be limited by a certain period of time, say a week, and then the acceptance should be provided within this limits. If the offer is sufficiently providing the intention to enter into a contract, then it would be binding on the offeror should an acceptance was provided within this period of time. Apparently, by the end of the week, the offer would be dead.

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In other situations, the circumstances and the following consequences of an offer would constitute an irrevocable offer. The objective criterion in assessing this issue would be utilized. For example, if a Jordanian sport club advertise his intention to perform a bid to provide the players with certain uniform, then a Jordanian company indicate their intention to participate and contact an English company to provide the materials to manufacture the uniform which offer the Jordanian company with prices and willingness to export the materials. As a result, the Jordanian company participate in the bid. If the English company revoke the offer and the Jordanian company win the bid, then such revocation is not acceptable. This issue would be determined by an average person in the field of international trade and not the Jordanian or the English companies in question.

Acceptance

Acceptance means the indication of the offeree's consent on the terms an conditions of the offer without modifications. Such acceptance might be explicit by wording statements to that effect or implicit by performing the obligations in the offer such as shipping certain goods to the offeror.

If the offeree is silent, Article 18 states that silence cannot be interpreted as acceptance unless there is a real indication that silence can be interpreted in this way, i.e., previous dealings between the offeror and the offeree where silence implies acceptance

If someone receives an offer and responds by saying "I accept the offer with certain modifications", this is not an acceptance at all but rather a "counter-offer" which will only give rise to a contract once it is accepted by the other party. Apparently, when the offer is met by a counter-offer, the original offer becomes dead and no longer available for acceptance.

Legal effects of the acceptance

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There are four opinions with regards to the legal effects of the acceptance. First, some argue that once the acceptance is provided, non-withstanding whether or not it was communicated to the offeror, then the contract is concluded and it will produce legal effects immediately. However, although from an effectiveness of speeding commercial activities standpoint, this idea would be plausible, but from due process of law standpoint, this is not plausible since producing an acceptance is an expression of intention to be legally obliged and logic dictates that such intention should be communicated to the offeror so he becomes aware that he becomes legally bound as well. Moreover, there could be no guarantees whether or not the offeror has withdraw his offer so the intention of the potential contractors can never be said that they have met in actual fact.

Second, some argue that the acceptance must be sent to the business premises, home address, or usual place of residence of the offeror, non-withstanding whether or not it was received actually by the offeror. This was sought to be as providing the finality of the declaration of the acceptance which has been mentioned above. In this scenario, the notification would substitute the actual awareness of the acceptance by the offeror which in effect would face the same criticisms mentioned above.

Third, some argue that the acceptance should be communicated to the offeror in person, non-withstanding whether or not the offeror is aware of the actual content of the acceptance. The same criticisms above are evident here.

Four, some argue that the actual awareness of the terms and conditions of the acceptance by the offeror should be evident in order to consider the contract as a valid contract. This scenario emphasis the importance of actual awareness and this scenarion is plausible since it emphasis that as long as the offeror's intention was communicated clearly to the offeree then the offeree's intention must be communicated clearly to the offeror. However, from an effectiveness of speeding commercial activities standpoint, this idea would be non-plausible.

Having said that, The Institute of Private International Law in Rome attempts to balance the interests of effectiveness vs. due process of law by adopting the second argument with regards to the legal effects of the acceptance. Actually, many national

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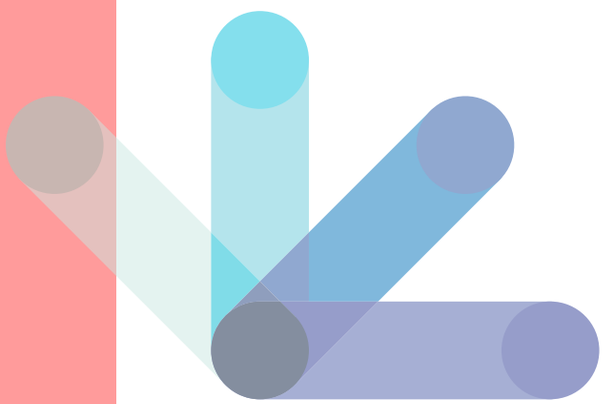
legislations adopt the same criterion. The Jordanian legislator adopts the same criterion in Article 101 of the Jordanian Civil Code. As a result, Articles 18 and 23 of the convention adopts the same criterion by stating that the acceptance becomes valid once it is communicated to the offeror and the contract would be valid according to the Convention. Moreover, Article 24 states that the acceptance is deemed valid once it is communicated to the offeror either verbally or in writing in his place of business or his business postal address or his personal residence or his home postal address or his usual place of residence (This situation would only be acceptable if there are no business or home residence such as an hotel address).



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Legal Effects of Vienna Convention on Buyers and Sellers

The Conventions deals with buyers and sellers obligations under the Convention under four categories: 1. General obligations on the buyer and the seller 2. Buyers' obligations and breach of such obligations 3. Sellers' obligations and breach of such obligations 4. Common obligations on the buyer and the seller. We will study them in turn.

General obligations on the buyer and the seller

This part of the Convention regulates certain issues that are repeatedly mentioned throughout the Convention. They include the following.

1. Substantial breach: Article 25 of the Convention states that "non-performance of a party would be considered substantial if it results in depriving the other party from an expected benefit from the contract unless the non-performing party or any average third person cannot expect that benefit upon non-performing his obligations".

Upon reading this Article one notice that there are two conditions of a substantial breach. They are as follows:

   a. substantial breach includes non-performance of an obligation and performance which is not in accordance with the contractual terms.
   b. The deprivation of the benefit of the contract from the other party should be subjectively important to that party. As a result, the quantity of the loss is not as important as the quality of the loss. For example, if the contract is about supplement of materials for a one day public exhibition within 24 hours and there was delay for another 24 hours, then such delay would be considered substantial because the exhibition would end before the supplement.

2. Notification of breach: Article 26 states that "any breach of the contract should be preceded by an adequate notification to the other

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> party about the nature of the breach". This means that automatic breach of contracts is not possible. Apparently, the drafters believe that the nature of the environment of international trade is based on mutual confidence and good faith between contractors which implies proper notification prior to breach an existing obligation.

In this context, it must be noted that proper notification means a proper assessment by the notifier of the possibility that the notified is actually aware of the notification. For example, if the contract states that a notification should be served on the notified in a week, it is not considered to be proper to notify him in the last day through snail mail which might take days, instead, electronic notification would be considered appropriate.

3. Amendments and cancellation of the contract: Article 29 states that "any future amendments or cancellation of the contract should be subjected to an expressed approval of contractors unless there is a contractual provision in a written contract that any amendments or cancellation should be in writing. Having said that, the convention emphasis that actual behavior of contracts may constitute a ground for breach non-withstanding the requirement of writing."

For example, if there is a written contract to provide 100 cars in a written form that states that any amendments should be in writing, and it has been agreed that provision should be in five installments in five years. Suppose that the purchaser asks the seller to amend the provisions of the contract verbally after the first installment and the seller was silent on this suggestion and amend the provisions in the contract actually but without documenting this, and the purchaser carries on doing his obligations

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according to the verbal amendments in the next installments, however, in the final installments, he refers to the original agreement between them which is in writing. In this scenario, it has been said that the purchaser is not obliged to accept the last installments and pay the price because the actual behavior of the seller indicates that the written agreement was amended.

4. Compulsory execution of the obligations: In the general theory of contracting, if the contract stipulates that performance of debtor's obligations should be carried out in accordance with the provisions of the contract, e.g., the delivery of the agreed upon goods without deficits in return of payment in the way prescribed in the contract, and that the performance should be executed by the specific person(s) mentioned in the contract without any third party's interference, then the contract is said to be that it includes compulsory execution. For example, if there is a contract between A and a certain painter to paint certain portrays, then the obligation should be executed by that painter in particular without any psychological or physical pressure to be exerted by A. Such execution is considered to be a compulsory execution.

Article 355 of the Jordanian Civil Code states that "if the nature of the obligation in the contract is compulsory then it should be executed by the stipulated contractor(s) unless such performance resulted in suffering hardship by that contractor(s). In this case the creditor can ask the debtor for compensation unless such compensation would cause substantial damages to the creditor". For example, if the performance of the contract includes the delivery of a certain product which has been demolished, then insistence on performance on that particular subject-matter would cause hardship to the debtor.

Apparently, all these issues are to be decided by the trial judge. The court can release the debtor from his obligations if the performance will cause hardship. However, if the non-performance, including the compensation, would cause hardship to the creditor, then the judge is supposed to provide a preferential treatment to the creditor at the expense of the debtor.

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Having said that, it must be noted that a notification must be served on the debtor before bringing a legal action either for compulsory execution or for compensation. Without which, the judge would dismiss the case.

It must be mentioned here that the compensation is an alternative choice in all cases since the compulsory performance of the obligation is the normative measure. As a result, neither the debtor or the creditor can insist to resort to compensation if the debtor is capable of performance whatever the amount of compensation unless both of them did not raise any objection on this matter. Silence in this regard would be interpreted as an acceptance of the compensation (the situation is the opposite in the English legal system that insists that priority should be for compensation and not compulsory execution).

The Convention adopts a middle-ground solution. Article 28 states that "if there is an obligation of performance on a party, national judges should not insist on compulsory execution unless their national laws consider that similar obligations should be compulsory performed." It must be noted here that reference to national laws does not mean reference to private international law rules, instead, it means reference to national laws as they are applied on nationals of the state in similar circumstances. Apparently, such measure is not achieving harmonization of international trade.

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Sellers' Obligations

Article 30 of the Convention states that the seller is obliged to ship the agreed upon goods and transfer the entitlement of property and all related documents that might constitute a right on the property, e.g., the insurance to the seller.

Upon reading the above-mentioned Article, one can notice four issues: First, shipping the goods is a generic term because the convention does not differentiate between actual shipment which implies actual possession of the goods by the seller after having been shipped by the seller on the one hand, and constructive shipment which means the entitlement of the buyer the right of disposition of goods without actual possession or without having the goods shipped from the seller to the buyer on the other hand. In other words, in constructive possession, the subject-matter of the contract would be possessed by the buyer prior to conclude the contract, e.g., if the buyer is possessive mortgagee, and upon the conclusion of the contract, the ownership would be transferred to the buyer. In this case apparently there is actual possession but there is no performance of shipment although the buyer has the right of ownership over the subject-matter.

Second, related documents to the subject-matter includes, but not confined to, bill of lading, insurance policy, inspection certificate, medical certificate if needed, authorization of import and export of the shipped goods. Apparently, parties can agree on whatever documents they deem relevant.

Third, the shipped goods should not be subjected to a third party rights on the goods such as ownership, mortgage or lease, or even intellectual property rights, non-withstanding whether or not the buyer can prove his ownership of the shipped goods before courts. This has been discussed thoroughly in Article 41. Apparently, the idea behind the inclusion of such Article is a protective measure to the buyer as proving rights in courts would require legal expenses that should not be entitled by the buyer. If such legal actions arise, then the expenses would be paid by the seller.

It must be clear that in some cases, the goods would not pass the customs office of the buyer's country, e.g., if it is affected by nuclear weapons, then the seller would not be

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responsible in this case. Instead, it is the buyer's obligations to check on this matter with his national authorities.

However, there are two exceptions to Article 41. They are as follows: (1) If the buyer was aware of the third party rights and does not object either explicitly or impliedly, then the seller is not responsible. Apparently, such awareness constitutes bad faith from the buyer.

(2) If the right of third parties arises as a result of directions provided by the buyer, then the seller would not be responsible. Such issues of third parties rights normally arises in intellectual property rights on the subject-matter of the contract. The justification for releasing the seller of his responsibility is the fact that assessment of third parties rights by trial judges should be based on the performance of those rights in the final destination of the goods, which is the buyer's country normally or a designated country, consequently, buyer's awareness of potential infringement on third parties' rights and national laws in this regard is more evident than the seller's awareness of such laws. Clearly, sellers in international trade are not expected to know national laws of their customers.

Having said that, if the seller can deduce that such instructions from the buyer, or the approval of the buyer's awareness of potential breach by the seller, would constitute a breach on third parties' rights, and the buyer can prove this issue, for example, if the buyer proves that the seller is aware of national laws of the buyer's country or national laws of a designated final destination of the goods, then the seller would be responsible.

And fourth, and most importantly, the consistency between the shipped goods and the description of goods in the contract. In actual fact, Article 35 emphasis this point by specifying that such consistency implies the quantity, quality, and packaging.

Jurisprudence in international trade law requires that consistency in this regard means that the usage of such goods should match similar goods shipped for similar purposes.

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Moreover, the shipped goods should be useable as specified by the buyer given that such usage has been communicated clearly from the buyer to the seller upon signing the contract. For example, if there is an agreement to ship 10 jeep cars from England to a company extracting oil from Saudi Arabia and the buyer explained the nature of the desert to the seller during the negotiations or in the contract itself, then the non-suitability of the cars to function properly in the desert would constitute a breach of the seller's obligation of consistency between the description of goods in the contract and the actual status of the goods.

Apparently, in the above-mentioned example, if the buyer delegate some employees in the company to investigate the cars before shipment and they approved of them, then the seller can claim that he is not breaching his obligation in the contract. This is based on Article 35 (3) of the convention which states that the seller is not responsible for lack of consistency between description of goods in the contract and actual status of them if the buyer is actually aware of that inconsistency.

In actual fact, Article 35 (3) adds that actual awareness of the buyer is not necessary since perceived awareness would be sufficient. For example, if there is a contract to sell grains and it has been agreed that the seller would store the goods for a comparatively long period in his own stores, it is generally assumed that such storage will inevitably cause damages to the grains and the buyer would be conceived as knowing such issue without the need of notifying him on that by the seller. Apparently, the seller is not responsible in this case.

Furthermore, if the sale of goods resulted from offering a sample of the shipped goods by the seller to be approved by the buyer prior to conclude the contract, then the shipped goods must match the sample. For example, if the contract is about shipment of clothes manufactured from certain materials which have been sent as a sample to the buyer by the seller, it is assumed that the final product of clothes should contain the agreed upon material including the color if it is of particular importance to the buyer.

Besides, packaging of shipped goods should be according to the terms of the contract, if this issue is not dealt with in the contract, packaging should be according to

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customs and average third party assessment. For example, roses and electronic equipment requires utmost care in packaging.

And finally, Article 36 requires that consistency should be evident upon signing the contract and any defects which appear at later stages are not the responsibilities of the seller unless there is a guarantee on the shipped goods. One might ask here, if the delivery of goods was prior to the agreed upon time of delivery and certain defects appear in the non-guaranteed goods, then it has been said in Article 37 of the Convention that the seller would be obliged to amend the defects on the condition that such amendments would not cause detrimental effects to the buyer, if not, the buyer can claim compensation from the seller.

Having said that, Article 38 requires the buyer to investigate the shipped goods as soon as practically possible and notify the seller with the exact nature of defects, otherwise the buyer would lose his right in claiming compensation or withdrawal from the contract on the basis that there is inconsistency between the description of the goods and its actual status. Upon reading Article 38, one can notice that investigation of goods and notification of defects by the buyer are of particular importance with regards to seller's obligations.

As regards the inspection, it might be carried out by a specialist or the buyer himself or anyone delegated by the buyer to that effect (the buyer might entitle the carrier of the goods to inspect it before being loaded). And apparently, it should be carried out as soon as feasibly possible. If the inspection requires dismantling the goods and technically it requires huge effort by the buyer, or if the circumstances of the deal requires the re-direction of the shipment before it arrives its final destination, then such period of time must be taken into consideration. In all cases, if the inspection was feasible and the buyer does not perform it as soon as possible then the seller would be released from his obligation in consistency between the description of goods and the actual status of the goods. Apparently, all these issues are to be determined by the trial judge.

As regards the notification, the convention states that the upper limit for such notification is two years unless the guarantee of goods exceed this period (in this case,

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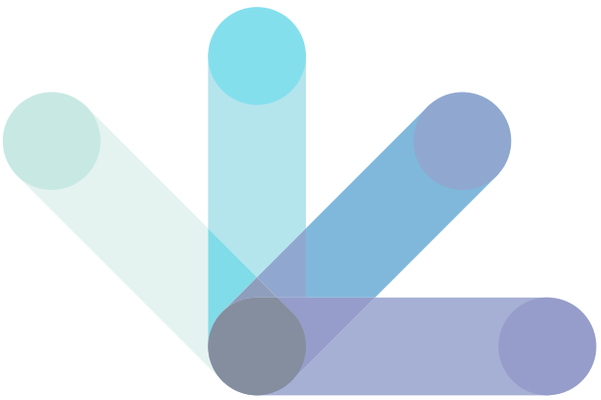
the contractual obligations would have priority over the provisions of the convention). If the investigation was initiated during the two years period and concluded after their passage, then the notification would not have any legal effects on the seller because it is important for the stability of transactions. Apparently, this can be compared with the right of prescription.

However, Article 44 states that the buyer can claim a compensation or reduce the price for any defects after the lapse of the two years of notification provided that he can produce a justifiable reason for the delay or he can prove the bad faith of the seller (the awareness of the seller of the defect upon shipment). This matter would be entitled by the trial judge to assess if the delay is justifiable or not.



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The Consequences of Breaking the Seller's Obligations

There are 3 consequences of breaking the seller's obligations according to Vienna Convention, first, compulsory execution of the obligations, second, repudiation of the contract, and third, reduction in the price. They will discuss them in details.

compulsory execution of the obligations

The idea behind compulsory execution is to reduce as practically as possible the resort to repudiate the contract. The reference in this issue would be national laws where the legal action has been brought according to conflict of laws in private international law. Usually compulsory execution implies fines to be imposed on the seller, allowance to the buyer to buy similar goods at the expense of the seller, and amendments to the subject-matter of the contract to match the description of the goods in the contract.

Having said that, Article 46 of the Convention states that the compulsory execution should be based on five conditions. First, there should be substantial breach of the seller's obligation in performance according to the contract as mentioned above.

Second, the compulsory execution should be upon notifying the seller of the defect(s) of the goods or within reasonable time after the delivery of goods (apparently, the seller should notify the buyer that he is prepared to rectify any defect(s) and how and when he would do so). It must be noted here that actual awareness, not personal notification, of the notified would suffice.

Third, the buyer should grant the seller a reasonable time to amend any defect(s) provided that the buyer did not breach the contract. Apparently, this condition conforms to the principle of good faith among international contractors whereby it is

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sought that there should not be a race to the bottom to breach the contract, instead, the notion of compensating the buyer should be much more evident. In actual fact, if the time that has been given to the seller by the buyer to amend the breach is not sufficient, then the trial judge is supposed to take that into consideration in assessing the good faith from the buyer non-withstanding if there is a substantial breach in the contract.

Fourth, the seller would be obliged to provide all the expenses of the amendment(s). This includes the expenses which might result from the buyer's undertaking of amending the defect(s)

And fifth, the amendments of the defect(s) should not impose insurmountable burden on the seller, e.g., if such amendment can be carried out by experts from the buyer's country, then there is no need to require experts from the seller's country.

Upon reading Article 46, one can easily notice that its applicability is confined to the non-consistency between the actual status of the goods and its description in the contract, therefore, the impossibility of performing the seller's obligation, e.g., if the agreed upon goods in the contract has perished, or if there is delay in the delivery of goods, particularly, if the date of delivery is of particular importance to the buyer cannot be rectified by compulsory execution and such scenarios cannot be within the wording of Article 46.

However, Article 49 states that if the buyer notify the seller that he would have no problems in receiving the subject-matter of the contract albeit delay and the seller insist on non-performance, then the seller would be considered as if he is substantially breaching the contract and therefore would be within the wording of Article 46.

Repudiation of the contract

International contracts are normally countervailing contracts whereby the performance of an obligation is mutually exclusive between the parties of the contract, i.e., non-performance of the seller's obligation entitles the buyer to equally

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non-perform his obligation by not paying the price or repudiate the contract and bring a legal action for a compensation.

Normally, the buyer should notify the seller about his intention to breach the contract unless the contract provides otherwise (actual awareness, not personal notification, is required here). However, if there is a repudiation for the contract accompanied by a legal action for a compensation, notification to the seller by the buyer about his intention in breaching the contract is compulsory.

Apparently, the seller can provide defenses for not breaching the contract and even claim a compensation from the buyer for bringing a legal action against him which might affect his reputation in the environment of international trade. All these issues are to be assessed by the trial judge.

Reduction in the price

Article 50 of the Convention states that if there is a defect(s) in the goods then the buyer can reduce the price non-withstanding if that price has been paid or not or if it has been paid in installments. The amount of reduction of the price in this case is entitled by the buyer albeit there is a certain limitation, namely, the amount of such reduction should not exceed the difference between the actual value of the delivered defected goods at the moment of delivery and the value of such goods if it has not been defected.

For example, if there is an international contract to sell one hundred tons of wheat with a certain quality, priced at 200 $ for the ton and it turns out that 40 tons were with less quality whereby the ton is priced at 150, then the buyer can reduce the price according to the following formula: 60 multiplied by 200 plus 40 multiplied by 150 which resulted in 18000, whereby if the goods were not defected then there value would be 100 multiplied by 200 which resulted in 20000, so the difference is 2000 $ which should be the amount of reduction.

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However, the situation might become complicated if there is a difficulty in assessing the value of the subject-matter of the contract at the moment of delivery, e.g., if the subject-matter is a historical paintings. In this case, the initial assessment of the amount of reduction in price would be entitled by the buyer but the final assessment would be entitled by expert to be decided by the trial judge.

It must be noted in this context that reduction in price by the buyer does not mean that he cannot claim a compensation for the defect(s) in the goods. Such compensation that is accompanied by a reduction in the price is called complementary compensation. Apparently, the buyer can choose between compensation, complementary compensation or mere reduction in the price. However, normally, the compensation would be equal to the amount of reduction in the price.

It must be noted also that if the seller deliver the defected goods prior to the date of performance and the seller is prepared to amend the defects before the actual date of delivery, then there can be no reduction in the price.

And finally, it must be noted that according to Article 52 of the Convention, if the seller provides more than the amount that has been agreed upon in the contract which might resulted in storage expenses, then the buyer can ship back the extra amounts to the seller at the expense of the seller, or store this extra amount at the expense of the seller, or accept the extra amount in return of paying a reduced price for the extra amount (apparently, the buyer would be obliged to pay the full amount of the price for the agreed-upon amount of the subject-matter in the contract).

Buyer's Obligations

The Convention states that the buyer should pay the price of the delivered goods as agreed in the contract and should receive the goods as described in the contract.

As regards reception of the goods, Article 60 states that, within reasonable limits, the buyer should exert all efforts to receive goods such as being present in the port of delivery in case there is a need to unload and un-package the goods and pay any due customs to the customs office.

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As regards the price, it might be stated in the contract explicitly, or impliedly, e.g., the price of one Ton of wheat would match the market price of wheat at the day of contracting, performance, or any other day. If the contract is silent on the price, it would be interpreted as the market price of the subject-matter on the day of contracting (Article 55).

However, if the determination of the price of the subject-matter is not feasible, e.g., if the sale is about valuable paintings where the estimation of the price is not easily possible, then it has been agreed that the non-stipulation of the price in the contract would make the contract voidable.

The currency of the performance is an issue to be determined in the contract, if not, it has been agreed that reference should be paid to the national currency of the seller and the rate of exchange should be calculated according to the seller's stock exchange market on the day of the performance of the payment (apparently, this issue would be solved if there is a letter of credit whereby the parties agree on the currency of performance).

The place of performance of the payment is an issue to be decided in the contract, if not, the buyer is responsible to deliver the price at the seller's place of business. If the seller ask the buyer to perform the payment in another place-not the seller's place of business- then the buyer should do so and ask the seller to bear the expenses of such re-direction of the payment (Article 57(2)).

The Consequences of Breaking the Buyer's Obligations

The discussion of the buyer's consequences of breaking his obligations coincide to a large extent the above mentioned discussion on the seller's consequences of breaking his obligations.

The seller can ask for compulsory execution of the buyer's obligations, i.e., the payment of the price and receiving the goods, on the condition that the seller is fulfilling his obligations and not breaching the contract. For example, the seller can require the competent court to appoint a person to receive the goods and warehouse them at the expense of the buyer, or to sell the goods in the buyer's country after claiming a compensation from the buyer, or to impose an attachment on the buyer's

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property which resulted in a forced sale to such properties with a judicial writ to that effect. In this regard, Article 63 (2) states that:

"unless the seller has received notice from the buyer that he will not perform…the seller may not resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance".

There is one case worth mentioning in this regard, if the contract states that the shipment of the goods is conditioned on the buyer's provision of certain qualifications and features of such goods, and the buyer delayed the provision of such qualifications or fails to provide them in a reasonable time after receiving a notice to that effect from the seller, then according to Article 65, the seller can make such specifications and re-inform the seller on this and giving the buyer a reasonable time to respond to such measure. If the buyer fails again to respond, such specifications would be binding on the buyer.

The Buyer's responsibility upon perish of the goods

There are various forms of maritime activities that will be discussed in the following pages.

- ***F.O.B Sales (Free on Board)***

An F.O.B sale is one by which the sold item is delivered by the seller at the port of shipping, on board of the vessel designated by the buyer, for its transport. The buyer in the F.O.B sale shall arrange the transportation contract, and apparently notify the seller within reasonable time of the name of the vessel designated for the transport, as well as the venue and date set for shipping. Consequently, the seller is not responsible for the goods in this kind of sale from the moment of delivering the goods on board. However, the buyer may entrust the seller with the conclusion of both transport and

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insurance contracts for the goods, and the relationship between the seller and the buyer in this respect shall be governed by the provisions of the agency contract.

- **F.A.S. Sale (Free Alongside Ship)**

F.A.S sale has much of common with F.O.B sale. This kind of sale is not used frequently. The seller shall deliver the goods alongside the ship nominated by the buyer ate the agreed port. The responsibility for loading goods and the expense of doing so are the buyer's responsibility.

- **C.I.F Sale (Coast, Insurance and Freight)**

C.I.F sale is the most important contract based on the carriage of the goods by sea. It is concluded when the seller undertakes to pay the price of the sold goods, the maritime insurance charges, and the freight costs. Apparently, the seller shall conclude a transportation contract for the goods with a reputable carrier, and shall choose a suitable vessel to carry goods. The seller shall buy an insurance policy for the sold item from a reputable insurer covering the risks of transport and shall assume all the coasts and expenses required thereof.

- **C. and F. Sale (Coast and Freight)**

It is a sale by which the seller undertakes to pay the price of the sold goods and the charges of freight only, so, the seller shall not buy the insurance policy for the sold goods.

- **Arrival Sale Contracts (ex-ship contracts)**

It is a contract by virtue of which the seller undertakes to deliver the goods to the buyer from the ship at the agreed port of arrival. Apparently, if the seller fails to deliver the goods, the buyer is not liable for the price, or if he had paid the price, then he can recover it.

Article 66 states that in inland and maritime activities alike, loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his

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obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

For example, if there is a contract to sell 100 Tons of wheat where the delivery is in the business premises of the seller from 1st of October 2004 until 25th of the same month. Apparently, the seller is responsible for any perish of the wheat during this period until the actual delivery of the goods to the buyer. If the buyer came after the lapse of the agreed upon time to transfer the wheat to his own country, then any perish of the goods would be the buyer's responsibility (in this example, if the delivery of goods is not in the business premises of the seller, then he would not be responsible at all given that the seller transferred the entitlement of the ownership without the actual possession to the buyer).

Common obligations on the buyer and the seller

These common obligations can be categorized under the following categories: potential breach, delivery in installments, compensation, interest, exemption, legal effects of breach and maintenance of goods. They will be examined in the following pages.

potential breach

Potential breach of contracts arise when there is justifiable suspicion from one party that there will be non-performance by the other party before or upon the performance date, such as, potential collapse of national currency or governmental prohibition of importing certain products or serious financial difficulties. In this case, the convention provides the suspicious party the freedom of not fulfilling his obligations (payment of the price) but without breaching the contract.

Apparently, the buyer should notify the seller on his intention and wait the response which would be either the seller's approval of the buyer's allegations and provide willingness to pay compensation to the buyer, or the seller's counter-claims that he

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would be eligible to perform his obligations and that the buyer's suspicion is groundless. Such assurance by the seller is sought to be in writing.

In this regard, Article 84 of the Convention states that if the seller was required to refund the price, he must also pay interest on it from the date on which the price was paid. On the other hand, the buyer must account to the seller for all benefits which he has derived from the goods or part of them. Having said that, the following conditions should be fulfilled:

a. According to Article 71(1), the suspicion should arise after the conclusion of the contract, therefore, if the other party prove that the suspicious party was aware of the potentiality of non-performance then there could be no suspension of performance.

b. The potential of non-performance should be evidently serious and cannot be solvable in the near future, e.g., if the buyer agree with the seller that the later would provide the former certain materials that are used in fixing certain machines, then it turned out that the seller's country imposed limitations in exporting such materials, as a result, the seller would resort to other materials with less quality in order to perform his obligations to the seller. In this scenario, the buyer can suspense his obligations with the seller (the payment of the price). Having said that, it must be noted here that if the seriousness of non-performance was accompanied by a substantial breach of one party's obligations, then the other party can breach the contract instead of suspending the performance of his obligations after a proper notification.

c. The potential of non-performance should be related to the subject-matter of the contract, i.e., if the seller can or cannot perform other obligations, this should not be an indicative factor in performance of the obligation under question.

It must be noted here that delay in performance which arise in potential breach should not be included in the agreed-upon time of performance of the contract. For example, if an English car company agree with a Jordanian trader to deliver ten cars on the 1st of April in return of paying half the price upon signing the contract and the other half

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upon delivery. If the English company learned before the 1st of April that the Jordanian trader has financial difficulties and would not be able to perform his obligations on the 1st of April and stop manufacturing the cars. As a result, the Jordanian trader assures the English company on his financial situation by producing a guarantee letter from a credible bank and the English company resume the manufacturing of the cars. Apparently, such delay cannot be seen as breaching the seller's obligation.

It must be noted also that if the seller shipped the goods with a carrier after entitling the buyer to receive the goods through a bill of lading, then the seller discovers the buyer's not eligibility of performance, in this case, it has been argued that the seller can instruct the carrier not to deliver the goods to the buyer unless the buyer has endorsed the bill of lading to a third party.

Delivery in installments

Article 73 address the delivery in installments whereby the performance of the contract would be according to specific times, e.g., if there is a supplement of cars where the buyer would pay the price in installments upon each delivery, in this case, one might ask: is lack of performance at one stage implies the voidability of other stages although there was appropriate performance throughout?

The Article states that the breach should be directed to the particular phase of non-performance without extending this effect to prior and later phases of performance on the condition that such practice would resulted in substantial breach, however, if there can be justifiable suspicion that non-performance at certain stage implies future non-performance, then the other party can breach his obligations provided that the breach is substantial and that there is proper notification.

It must be noted also that the performance of the contract in phases might be interconnected and interdependent, for example, if there is a contract to provide certain parts of a machine at certain phases provided that those parts are dependent on

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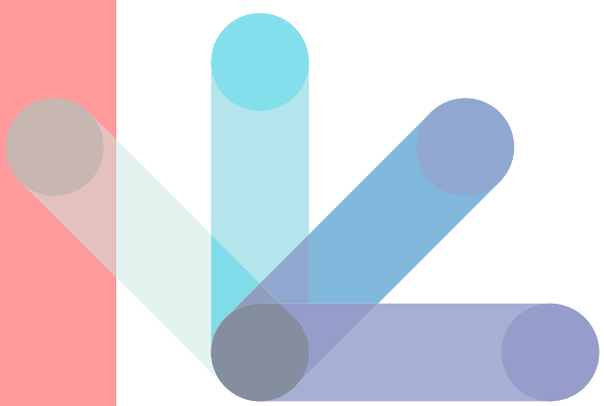
each other in order to secure the functionability of the machine at the final stage, in this case, the buyer would not gain any advantage of breaking his obligation in paying the price for a certain phase if the seller breaks his obligation in that phase, as a result, non-performance of a certain phase by the seller implies the possibility of breaching the contract by the buyer non-withstanding prior or later performances by the seller.



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Compensation

According to Article 74 of the Convention, compensation arises as a result of non-performance of one party's obligations or non-performance according to the terms of the contract. The criterion in assessing the damage(s) that require(s) compensation that results from non-performance is subjective, i.e., the contractor should expect the damage, and objective, an illusory third party should expect the damage, non-withstanding whether or not there is a substantial breach or termination of the contract.

Article 76 states that compensation might include financial sum that match the loss that resulted from non-performance. It must be noted here that the calculation of monetary sum should be according to the market price of the subject-matter of the contract in the place of performance, which is normally the buyer's place. Moreover, the calculation of such monetary sum should be in accordance with the market price of the subject-matter of the contract at the time of delivery and not any other time to be decided by the party who is entitled for compensation. Apparently, these are protective measures to the non-performing party since the claimant can decide to claim a compensation when the market price of the subject-matter increases. This is in line with the spirit of the convention which emphasis the good faith between the contractors.

If the compensation is accompanied by termination of the contract, Article 75 entitles the claimant(if he is the buyer), in addition to the compensation, to buy similar goods from the seller, and if the claimant is the seller, to re-sell the goods by the buyer. However, re-buying or re-selling should be within reasonable limits and reasonable time frame which are to be decided by an objective test, non-withstanding whether or not such reasonability is in accordance with the terminated contract.

Interest

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Article 78 states that interest should be imposed on the party who is not performing his obligation in paying the price (the buyer). The calculation of such interest starts from the presumed day of performance. Apparently, the payment of interest is obligatory non-withstanding the materialization of compensation or breach of the contract, and non-withstanding whether or not national laws of the contractors impose interest on national transactions or not. And finally, the calculation of the interest should be according to the applicable law in the contract with regards to interest law which is agreed upon between the contractors or to be decided by the competent court.

Exemptions

Article 247 of the Jordanian Civil Code provides that Force Majeure is an impossibility of performing a contract that resulted from events outside the control of the contractors and without their influence and it is a basis for releasing the non-performing party of his obligation whereby the other party cannot claim compensation on that basis and the contract would be automatically deemed as invalid.

In contrast, the International Chamber of Commerce (ICC) has codified some of the customs in international trade in the fom of "Incoterms". For instance, the just distribution of risks that emerge from *Force Majeure* between international contractors as opposed to releasing the debtor from his obligation.

Article 79 (1) states that "a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoid or overcome it or its consequences". It must be noted here that Article 79(4) states that the party who fails to perform must give notice to the other party of the impediment and its effects on his liability to perform in order to be entitled for exemption.

Clearly, Article 79(1) is discussing *Force Majeure* without referring to such term. However, the use of the word "impediment" might not be proper since such word is an elastic term that includes the impossibility of performance or mere hardship in performance. As a result, the determination upon the impossibility (which is the

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traditional expression of *force majeure*) or the hardship (which might be overcomed if the party exert exceptional efforts in order to perform his obligations) is not clear. In actual fact, the hardship might be temporal (there might be a protest in the buyer or seller's country) or permanent (there might be restriction on importing certain products which happen to be the subject-matter of the contract). From this perspective, if the impediments are not stipulated in the contract, this issue was left to judges to decide on it in the light of international customs in trade and the International Contracts Model.

In effect, Vienna convention states that the non-performing party would be released from compensation only and the contract would be considered valid whereby the buyer can claim back his money if the seller cannot ship the agreed upon goods with or without interest as he wish, or the seller can claim back his goods if the buyer cannot pay the price (if there is de-valuation of national currency of the buyer) and claim certain amount of money in return for possible use of the goods by the buyer.

On the other hand, there are certain contracts in the environment of international trade whereby one contractors assign part of the performance of the obligation to a third party, e.g., in international construction contracts, there might be subcontractors responsible collectively to the main contractor in the final performance of obligation toward the other party in the contract. In such case, if one of the subcontractors does not fulfill his obligations to the main contractor which by definition would result in the main contractor not fulfilling his obligation towards the other party in the contract, is it possible to consider that as an impediment and within the wording of Article 79(1)?

The Convention answer is yes, given that there is hardship or impossibility of performance between the main contractor and the subcontractor. Having said that, it must be noted that the main contractor cannot claim compensation from the subcontractor because they would be governed by Article 79(1) which excludes compensation. Actually, claiming compensation from the subcontractor by the main contractor without paying compensation to the other party in the contract according to

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Article 79(1) of the Convention, would be an unjust enrichment for the main contractor.

And finally, Article 80, which is sought to be as an extension to Article 79, states that "a party may not rely on the failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". In effect that means if the seller did not perform his obligations due to the fact that the buyer did not provide the specifications and the measurement of the subject-matter of the contract that has been agreed upon, or did not provide required permission from the customs office to import the subject-matter of the contract, or did not provide the required vehicles to carry out the subject-matter of the contract from the agreed upon port of arrival, then the seller would be released from his obligation. By the same token, if the buyer did not perform his obligation in paying the price because the seller did not specify the bank whereby the buyer should transfer the price, then the buyer would be released from his obligations. In both cases, the seller or the buyer can claim compensation from the other party.

Legal Effects of Breach

At a normative level, non-performance of a party's obligation(s) entitle the other party to claim back the paid price including the interest to be calculated from the day of payment, or claim back the goods in their original condition in addition to monetary amounts that match potential use of the goods before the return. This represents the legal effects of breaching the contract.

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The Convention addresses restitution by emphasizing the importance of distinguishing between the return of the goods in their original situation before delivery and the return of goods with defects or modification. Apparently, defects and modification of the returned goods require compensation. But one must be careful here because the Convention does not require exact match between the goods before and after the delivery, instead, it requires that match to be evident to a large extent.

If the goods perish while it is in the possession by the buyer, he cannot claim breach of the contract or substitute goods due to the impossibility of the restitution. However, Article 82(2) of the Convention states that there are certain exceptions to this rule: first, if the impossibility of making restitution of the goods in the condition in which the buyer received them is not due to his act or omission, second, if the perish of goods resulted from the buyer's examination, and third, if the goods have been sold in the normal course of the buyer's business or have been consumed by the buyer in the normal course of the buyer's use before the buyer discovered or ought to have discovered the lack of conformity.

One might argue that the buyer in the third exception might be unjustly enriched because he consumed the goods and achieved benefit from such use on the one hand, and he has been enabled by the wording of Article 82(2) to claim the paid price upon breaching the contract. In response, it must be clear here that the "paid price" in this case should accommodate the reality of consumption by the buyer so it should be the difference between the actual paid price and the monetary amount that match the use or consumption by the buyer. This is in accordance with the wording of Article 84(2) which states that "the buyer must account to the seller for all benefits which he has derived from the goods or part of them.

And finally, upon breaching the contract, it is important to emphasis that rights and obligations of both parties as stipulated in the contract should not be terminated. For instance, other compensations, beside the compensation that is due upon breaching the contract, should be paid, also, the mechanisms of settlement of disputes as stipulated in the contract should be effected.

Maintenance of Goods

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As regards the seller, Article 85 states that if the buyer is in delay in taking delivery of the goods or if he fails to pay the price in the agreed upon time, and the seller either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable to preserve them.

As regards the buyer, Article 85 states that if the buyer take delivery of goods and perform his right in rejecting the goods if they did not match the description in the contract, he is obliged to retain the goods at the expense of the seller on the condition that such detain will not incur hardship on the buyer. Apparently, if the seller or any of his agents are present at the place of performance, the buyer has no obligation in taking delivery.

In both cases, Article 88(1) of the Convention entitles the party who preserve the goods to sell them if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or paying the price or the cost of preservation, provided that reasonable notice to that effect has been served on the other party.

It must be noted here that if the goods would perish soon, then the party who preserve the goods is obliged to sell them non-withstanding serving a notice to that effect to the other party.

And finally, the Convention does not impose a certain way of selling the preserved goods, however, customs in international trade states that auction sale under the auspices of the competent court is the most proper way to conduct such selling.

Internet Characteristics and OADR

Introduction

OADR can be efficient in that it encourages the resolution of disputes in the environment within which the dispute arose. This might give credit to the whole process. However, inevitable questions will arise: Is there any relationship between ADR characteristics and internet characteristics? Do internet characteristics affect ADR and how? Do internet characteristics impose limited choice on ADR?

In response, this chapter will explore the nature of OADR and how the novel qualities of the internet are shaping it. In order to do so, it is important to examine internet

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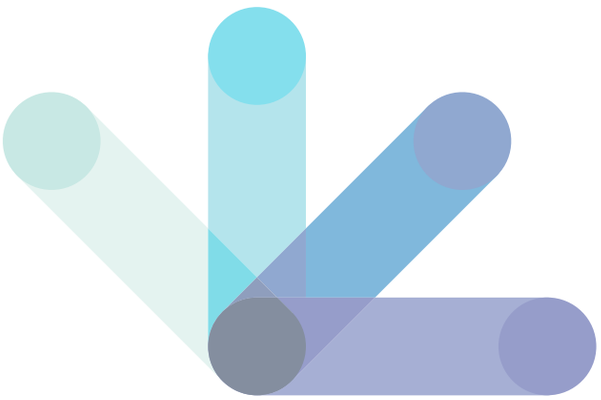
characteristics and their implications for ADR, and to analyse the constraints and opportunities when one intervenes at a distance, and to study the role and function of the World Wide Web in such process. So, the main methods of OADR, which are online mediation and online arbitration will be presented here in order to analyse how far traditional ADR methods must be adapted in cyberspace, so that what may not be possible to duplicate in cyberspace can be redesigned in order to enhance equitable dispute settlement. After that, the role of online technology in the improvement of the role of third party neutrals in OADR will be presented in order to analyse how far traditional techniques of third party neutrals must be adapted in cyberspace, so that what may not be possible to duplicate in cyberspace can be redesigned in order to enhance equitable dispute settlement.



Internet Characteristics

There is a strong reason to believe that the differences between the internet and prior communication technology are so much greater than the differences between pre-and-post telegraph technologies, which reduced communication time from weeks to minutes, or between pre-and-post telephone technology, which dramatically reduced the cost and enhanced the frequency of trans-jurisdictional communication. Indeed, the internet is more than just another communication medium, like telephone or telegraph or fax or mail. While technically forming only the most recent development in a long series of technological innovations, the internet forms a complex network that provides it with novel system characteristics, distinguishing it from other modern forms of media.

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Although other forms of modern media together display many individual features of the internet, none of them alone incorporates all of them. Generally, there are four major differences between the internet and other communication mediums.

First, the internet is inherently an easily accessible global market with variety of goods and services, and this is unprecedented. Consumers can shop around the clock from merchants around the world. Likewise, businesses can reach customers world-wide quickly and at low cost. Global networks and electronic commerce, at high speed and low cost, are presenting an unprecedented opportunity to increase, significantly, the possibility for individuals and companies to transact easily twenty four hours a day, seven days a week, regardless of constraints of distance, time zones, local cultures, geographic borders, and legal frameworks. For example, the numerous online auction sites that match buyers and sellers from disparate geographic locations would have been unthinkable without a vast network through which multiple parties share information and communicate in various ways to reach agreement.

As much as the internet is a network of networks, it is a network of relationships. And as much as the internet is a collection of technologies, it is a collection of communities. For many, the internet differs from other technological innovations in that it has, in and of itself, become a community to millions of people. Indeed, the internet now has the structure that could be associated with a real society, such as, online banking, online health care, and online education. People in virtual communities exchange knowledge, conduct commerce and do just about every thing people do in real life. In this regard, Ethan Katsh, a leading writer on OADR, has noticed that:

> Cyberspace is more than a data network…it is a community unto itself.

Relatively little attention has been directed to how the internet fosters the building of business relationships. Many of the businesses that are participating in the e-commerce phenomenon are the results of individuals joining together with other individuals in ways that allow expertise and creativity to be applied at a distance.

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Groups can establish online corporate entities, tightly control participation in, reach agreements on or modify rules more rapidly via online communication. This new global formula of business-relationships could not have flourished without the advent of the internet. As a result, business relationships are entering a new digital era in which, just as conflicts could reasonably be expected to grow as online transactions increase, conflicts can be expected to grow as online collaborations increase.

The internet gives global connectivity because information technology techniques make it possible for anyone to transmit significant quantities of information to anyone else over virtually any distance, and virtually instantaneously. That kind of global reach is not true with older technologies such as telephone and telegraph services. Users of older technology had to make special arrangements to extend their reach across national boundaries, but this is not the case with the internet.

Second, unlike the mass media era in which one-to-many form of communication predominated, the potential of the many-to-many form of communication is created by digital technology. Therefore, network communities allow for greater decentralisation.

In cyberspace, communication transcends time, space and physical reality. The internet has effectively changed the users' assumptions about both time and space, duration and distance. Accordingly, the internet is not simply a new channel of communication.

Besides, the internet facilitates the storage, retrieval, review, comparison, annotation, classification, and reuse of information more than other communication mediums.

The internet is the only medium that allows all elements of many types of commercial transactions to be conducted electronically. It should be noted however that such transactions could be conducted through a combination of electronic and non-electronic mediums (e.g. internet and telephone).

Third, the internet makes it possible for participants to communicate asynchronously. Asynchronous communication takes place when parties are not communicating at the

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same time. Asynchronous communication has the enormous advantage of 24 hour availability. A person can send an e-mail, for instance, at any time of the day to be read at the recipient's convenience. This is of particularly great value where time differences make synchronous contact difficult. Unlike communications media that tie up the entire channel in real time during transmission, the internet breaks information into discrete packets of bits that can be transmitted as capacity allows. Packets are labelled with the address of their final destination, and may follow any of a number of different routes from computer to computer until reaching their final destination, where they are reassembled by the recipient machine.

Fourth, and most importantly, although the internet may be perceived as an established tool of communication, research, and entertainment, the very characteristic of the internet which offers most potential, namely, interactive characteristics, is often not fully appreciated. Interactivity implies establishment of dialogue between the distant users through electronic mails (e-mails), chat conference rooms, and web forums, such as audio and video conferencing. The internet makes it possible for participants to communicate interactively without being present in the same place. Indeed, the internet has changed the image of the computer as something that calculates and computes to an image of a machine that enables interaction between individuals. Although the level of interactivity online may not be able to match the level of interactivity in face-to-face encounters, the online environment can enable internet users to express themselves efficiently and appropriately. Interactive technologies may bring people together and move them from behind their computer screens to a virtual setting. It is not the same in quality as being in the same room, but it will bring many of the same benefits.

Internet Characteristics and ADR

Although there is a difference between ADR and online ADR dispute resolution mechanisms, which is obviously the use of the internet as a medium to conduct the proceedings of the later, such difference should neither be overestimated nor underestimated.

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It should not be overestimated because OADR is essentially a change in venue rather than in approach. Indeed, the online ADR process does not differ very much from the offline process, except for the fact that other form of communication, i.e. the internet, is used than in face-to-face procedures. In actual fact, ADR has evolved with the development of commerce, and online ADR will refine ADR rather than making any radical new departures. Online ADR would thus not represent a major shift, and the choice for the parties between online ADR and ADR would be dictated by considerations of economics and convenience, informed by the relative importance that they ascribe to face-to-face interaction.

Equally, the difference between ADR and OADR should not be underestimated because the internet technology can enhance traditional ADR mechanisms. Online ADR mechanisms, through the use of the internet, have contemplated the lack of person-to-person contact in cyberspace and the scope of the electronic marketplace. Online ADR would make electronic trade more efficient by not only adapting dispute settlement rules to new technologies and media such as the internet, but by taking advantage of these new tools to streamline trade transactions. This conversion between ADR and new technologies, such as the internet, is sought to be the backbone of online ADR. Indeed, online ADR is not just a virtual reverberation of ADR; it rather evolves ADR through the deployment of computer networks and software applications and the utilisation of communication technology.

While the characteristics of the space in which parties meet are not very important for ADR to be successful, the nature and design of virtual space in which online ADR occurs is extraordinary important if not critical. This is due to the fact that the nature of the online space will shape how expertise is delivered and the manner in which the parties will be able to interact. Technological applications can enhance the expertise of the third party neutral and thus do more than simply deliver the expertise of the third party neutral across the network. In this regard, it is important to recall that technological applications are metaphorically called the “fourth party” by Katsh and Rifkin, two leading authors on OADR, because they can add authority, quality, trust, and enhance the chances of the success of the process.

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Broadly speaking, computer networking does not replace other forms of human communication. Instead, it increases the range of human connectedness and the number of ways in which people are able to make contact together. This requires online neutrals to adapt their communication skills from face-to-face interaction to screen-to-screen interaction.

As a result, although many traditional ADR systems draw their strength from face to face interactions, online ADR should not seek to replicate those conditions. Instead, it should use the advantages of online technology to forge a new path. This new path should focus on using the networks to maximise the power of technology, which may be missing in face to face encounters, instead of duplicating the richness of face to face environment. From this perspective, it is not surprising that a growing number of traditional ADR providers have begun to offer online ADR services to complement existing offline ADR mechanisms. This is reasonable as the line between ADR and online ADR will increasingly become blurred.

At this stage, it seems appropriate to discuss separately internet characteristics and mediation, internet characteristics and arbitration, and internet characteristics and third party neutrals.

Internet Characteristics and Mediation

Mediation can be described in various ways. One of the best descriptions of mediation that it is an extension of direct negotiations between parties to a dispute in which a neutral third party acts as intermediary to facilitate those negotiations, identifies the issues in dispute, gathers facts, develops options, considers alternatives, and assists in finding a voluntary solution that is satisfactory to both parties. Indeed, effective mediation entails a careful balancing act between emotive management, fact finding, issue spotting, and communication enhancement.

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Currently there is very much interest in the online possibilities of mediation. Mediation cannot avoid being affected by the new IT technology because communication is central to mediation to lessen tensions and reach agreement. Mediation is a process in which the mediator will have many decisions and choices to make as to how to interact online with the parties. Much of the power of mediators resides in their control over the process of communication. Mediators are extremely sensitive to communication. Mediation also is a process in which how communication is structured between the parties, and between the parties and the mediator, is often the basis for agreements reached by the parties. Indeed, mediation is a back and forth process of communication seeking a mutually acceptable resolution.

Now more than ever, there is a need to define exactly what online mediation is, before the process is so variably presented on the internet that the meaning of the word itself becomes blurred and confusing. Indeed, with unclear goals and unspoken assumptions, the development of meaningful qualifications and standards in mediation is difficult to envision.

Consequently, the very characteristic of mediation, which are considered to be the weaknesses of mediation in the offline world, namely, the voluntary nature of the process, and the very characteristic of mediation, which are considered to be the weaknesses of mediation in the online world, namely, the virtual nature of the process must be analysed carefully.

Voluntary Nature of Electronic Mediation

The electronic mediation process typically begins when a claimant registers with an OADR provider which offers electronic mediation. In some cases, an OADR link can be placed on the electronic business web site, informing users that by clicking on that link, they can fill out a complaint form. The OADR provider then appoints a mediator, if the parties cannot agree among themselves. The mediator uses the

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information provided by the claimant to contact the defendant and invite him or her to participate in OADR proceedings.

There is no applicable law in accordance with which the dispute is decided in mediation. Instead, mediation is a process that is governed wholly by agreement of the parties, and relies upon the good faith engagement of both parties and the mutual goal of resolution for success.

If the parties are to submit to mediation they must first agree upon the terms on which they are to submit. The parties agree on the procedure, and they are at all times in control of the timetable, the agenda, and ultimately the outcome.

Then, the mediator checks the background documents presented by the participants, and identifies the particular issues to be addressed. An exchange or series of exchanges occur between the parties with the intervention of the mediator as the parties attempt to settle the dispute. The participants are asked to propose solutions to the identified issues and challenges. The proposed solutions are consolidated and synthesised by the mediator, and used to develop more concrete proposals. The participants are asked to respond to the identified proposals. At the end of the mediation, the mediator fills out a dispute closure form clarifying the outcome and any agreements reached.

In principle, both parties can abandon the procedure at any stage without giving reasons and this will apparently bring the conciliation phase to an end. In other words, neither party is bound to reach agreement through the mediation process. Mediators may terminate mediation if requested by one or both of the parties. Mediators may terminate mediation also if in their opinion, the process is likely to prejudice one or both of the parties; one or both of the parties is using the process inappropriately; one of the parties is delaying the process to the detriment of the other party; and if it appears that a party is not acting in good faith. For example, in "*internetneutral.com*, an OADR provider, the mediator has the discretion to terminate the mediation, when in his or her judgement; further mediation will not resolve the dispute.

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By all means, the mediator has no power to issue a decision or impose an outcome on disputing parties. In other words, decision-making authority rests with the parties over both process and substantive issues. Clearly, mediation's lack of enforceability, because the mediator's decision is not binding, is a major drawback as it may discourage parties from attempting it in the fear that time will be wasted during which other dispute resolution mechanisms could have been proceeding. Consequently, the possibility of non-participation in mediation can be high. From this perspective, it has been argued that the conception of mediation as a voluntary and an informal process is viewed as presenting the greatest danger of abuse by inept or unscrupulous practitioners. This is particularly true in the internet disputes settlement context. Indeed, because internet users are not physically proximate in their virtual communities, their level of commitment is likely to be low.

Although some OADR providers, such as *Squaretrade.com*, work to encourage the defendant party to respond to a case, it does not guarantee that he or she will participate as their process of mediation is entirely voluntary.

In this regard, it was recommended in the "WIPO Final Report on the Management of Internet Domain Names and Addresses" that it would not be desirable to incorporate voluntary process such as mediation as part of a dispute resolution policy for domain name disputes.

That said, it must be stressed that although mediation is a voluntary and an informal process, it is structured. The mediation process does not develop in a legal vacuum since equity is the deciding factor in the whole process, and the parties' understanding of the legal rights and obligations, which may be conflicting, certainly plays a role in

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the process. Besides, mediation always takes place in the shadow of the law. This means that mediation takes place with the parties being aware that the law, looming in the background, is a force that should enter into any calculations of how one develops and pursues a strategy for resolution. This means also that mediation participants should take the law into consideration when setting out a strategy in the mediation procedures. Clearly, mediators take into consideration the substantive law in helping to mediate the issues. And most importantly, if both parties agree at the end of mediation that they want the resolution that they have crafted to be binding, they can have the mediator draft it in a formal way for them to sign. Ultimately, mediation must rely for its existence in the legal order upon some law rendering it valid and effective.

Besides, self-determination is a fundamental principle of mediation. Self-determination is the right of parties in mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. For this particular reason, it may be argued that mediation agreements are usually promptly implemented. The participation of the parties in formulating the resolution in mediation increases the likelihood that the parties will base agreement on their core interests and that they will adhere to the final agreement. Structures allocating more control and autonomy to the parties, such as mediation, will increase the likelihood that any agreement reached is based on parties' consent and their relevant interests. From this perspective, being less formal than other methods of dispute settlement, mediation better lends itself to the internet with its decentralised and technical nature as a network of the networks because the mediation process offers participants an enhanced role to play in dispute resolution. In this context, David Post, a leading author on cyberspace argues that our very conception of what constitutes justice in the online context could be based on an emerging non-coerced individual choice.

The idea of enhancing the role of participants in dispute resolution in cyberspace is particularly true in certain online settings that focus on creating communities of buyers and sellers, such as auction web sites. In auctions web sites, where buyers and sellers are strangers to each other with uncertain identities or reputations, and where online auction sites assume no responsibility for any problems that may arise between buyers and sellers, which result in a high risk environment in the extreme, mediation may create a more real level of trust. In actual fact, as much as mediation can provide

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a platform to reach a mutually acceptable outcome by the parties in an auction web site, it can guarantee the auction web site users to keep on using the web site in the future.

Virtual Nature of Electronic Mediation

Noticeably, interaction among the parties and the mediator may make the difference between whether mediation is successful or not as it provides indications on the degree of trust, the willingness to reach an agreement, and the parties' genuine concerns and interests. Expert mediators are famous for reducing stress and conflict during the mediation sessions through the use of light-hearted quips and jokes. Along this line the calm and steady demeanour of experienced neutrals represents the bountiful soil from which successful settlements grow.

But all of these traits often fall flat in the online environment because the ability of human beings to communicate clearly and effectively with one another is diminished. This is due to lack of face-to-face encounters and absence of visual and auditory clues such as body language and tone of voice.

The absence of facial expressions, gestures, and other non-verbal bodily clues can work against the development of trust in online communications because such absence develops void communication, which is quickly filled by psychological doubts and fears projected towards those with whom they are in contact. Reduced communication clues give greater role to the perceiver's own goals, assumptions and mindset in interpreting the communication. Also, the reduced communication clues of most online communications create an atmosphere of heightened ambiguity. This increased ambiguity leads to one party misconstruing the other and possibly assuming that he or she has less sinister motives. For instance, in the offline world, a given utterance can take on quite different meanings depending on whether it was said with a smile or not. This could be difficult to be interpreted online. Equally, a calming

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remark that is typed out online may seem patronising and offensive. As a result, parties engaged in online communications appear to be more willing to engage in risky interpersonal behaviour, such as threats, and may adopt a more aversive emotional style. This could obviously become a real problem regarding two individuals, already not trustful towards each other, who are trying to reach an online solution to their disagreement.

Although such clues may be missing in electronic mediation, and although these traditional clues are not easily transferred over the internet, the physical separation may actually benefit the parties. Physically separated parties are more likely to negotiate effectively because a large part of the emotional element involved with a face to face negotiation is removed. Face-to-face negotiations are fraught with issues ancillary to the actual resolution of the dispute itself. Therefore, the internet has the capability to give both parties to the dispute a confidential tool that is available twenty four hours a day, seven days a week, which encourages both sides to realistically evaluate their dispute in absence of personality conflicts and posturing. Indeed, because the computer screen separates the parties, they cannot focus on each other presence. Instead, they are forced to focus on the substantive issues on the screen. This will reduce the tension level between the parties.

Moreover, participants in e-mediation do not need to respond immediately as they are compelled to do in face-to-face discussions. Participants can more thoroughly consider proposals and develop options. One's immediate response, as a participant or mediator, in face-to-face mediation is not always one's best response. In fact, most mediators, purposefully, breach into caucus because they know the benefits of allowing each side the ability to think without the penetrating gaze of the other side, and the impact of this on reducing the imbalance of emotional power between the parties. The internet offers this opportunity more conveniently. This ultimately increases the agreement-reaching efforts.

Furthermore, disputants should be able, as much as possible, to represent themselves equally in any dispute resolution mechanism, including mediation. Providing equal access to the storytelling process is a critical part of the mediator's job. Online mediation grants both parties an equal opportunity to achieve this goal. Virtual

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mediation may offer an opportunity to avoid some possible biases occasioned by face-to-face mediation because online mediation has its implication on equality between disputants. For example, in offline mediation, usually there is a need to meet with one party more than the other, which is made very complex by the requirement of equal time allotted to both parties. Online meeting, however, can progress concurrently with the joint discussion in e-mediation. Such interaction is impossible in a face-to-face mediation. People, who are physically attractive, articulate, well-educated or members of a dominant ethnic, racial, or gender group, or people who are more glib or persuasive than their co-disputants may find this advantage reduced in electronic mediation.

Online communication may well change ingrained conflict dynamics including dominance and intimidation as it can radically improve some individual's capacity to present themselves and negotiate in the strongest possible fashion, and enable people to overcome barriers that condemn many to insecurity, ineptitude, ineffectiveness during face-to-face meetings.

Internet Characteristics and Arbitration

Arbitration is a private adjudicatory procedure in which the arbitrator, or tribunal of arbitrators, has the power to impose a final and legally binding decision (the award), which can be enforced by the parties in respect of the dispute submitted to arbitration. The arbitration award is meant to be enforceable through coercive power if necessary. A valid arbitration award can be registered with a court and thereafter enforced like a court judgement. Although less common, there is non-binding arbitration (allowing parties to seek further redress in a court of law if a party feels a just decision has not been reached), conditionally binding arbitration (where the arbitrator's decision is binding on the business, for example, only if the consumer agrees to the decision), or partially binding arbitration (binding when accepted by one or both parties). Apparently, the fact that the parties agree to be legally bound by the arbitrator's award distinguishes arbitration from mediation.

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In an international context, arbitration takes place within a well-established international legal framework and is based on established commercial practices. International commercial arbitration system works through the interplay of three layers of legal regulation. The first layer is the private law of parties' contract as embodied in the arbitration agreement. This includes, among other things, the law and procedures governing the arbitration, the power of arbitrator(s), the location of arbitration, and the effect of arbitration awards. Virtually every aspect of arbitration is definable in an arbitration agreement. An arbitration agreement can provide also for one or multiple arbitrators, provide for rules of evidence before the arbitrator, allow or preclude discovery, define the nature of pleading, define the nature of hearing, and set time limits for party's presentation and arbitral decision, and deal with questions concerning the arbiter's competence, appointment, resignation or removal. The second layer of legal regulation is the national arbitration law. A national arbitration law defines the scope of permissible arbitration within the country, and renders arbitration agreements within this scope valid. Most nations have generally similar national arbitration laws that ensure harmonisation of enforcement across jurisdictions. And the third layer of legal regulation is the international enforcement treaties. By far the most important legal instrument regulating international arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which almost every nation has signed. The Convention obligates the

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national courts of signatory states to recognise and enforce arbitration agreements and awards, subject to limited exceptions.

The process of arbitration is an old one. The fact that it is still in use today proves that it is a viable method of dispute resolution. But although arbitration is an old dispute resolution mechanism, it has always demanded innovation. It has always required arbitrators to be both aware of and responsive to the need of its users, as these have changed over time. Today, the development and ubiquity of e-commerce represents a new challenge. It is interesting to recall the Parliamentary debate over the Arbitration Bill 1996, which becomes the Arbitration Act 1996. MP John Taylor (the Minister for Competition and Consumer Affairs) said:

> The Bill will also help to strengthen the competitiveness of the arbitration industry. I feel sure that as well as attracting arbitration business from companies here, the Bill will enhance the attractiveness of London as a venue for international arbitration. International arbitrations are a lucrative source of foreign earnings, but the business is highly mobile. I am confident that the Bill will do much to give London a more secure position in that competitive world and, indeed, advance London as the capital of the arbitration world.

MP Stuart Bell said, while referring to MP John Taylor (the Minister for Competition and Consumer Affairs):

> In the global economy; in the age of the internet; in an age when communication spans the planet with such rapidity and sometimes, with such force; and in an age of domestic and international issues-to which the under-secretary referred-it is clear that our arbitration services need to be able to adapt.

The electronic arbitration process begins typically when a claimant registers with an online arbitration provider, which offers electronic arbitration. In some cases, an OADR link can be placed on the electronic business web site, informing users that by clicking on that link, they can fill out a complaint form. The OADR provider then appoints an arbiter, if the parties cannot agree among themselves. The arbiter uses the information provided by the claimant to contact the defendant and invite him or her to participate in OADR proceedings. Then, the parties begin the online hearing by clarifying the issue in the case, and present their evidence. After the hearing is closed, the electronic arbitrator must reach a decision and render an award within certain time

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limits. The final outcome of the e-arbitration process would be an award imposed by the third party.

Although arbitration is largely a process in which information is obtained and evaluated, unlike mediation, which generally involves a complicated series of interactions between neutrals and parties, arbitration, is a much less complex communications process. Arbitration proceedings may be based only on the exchange of pleadings, evidence, and other written stages. The human factor may not be important in online arbitration as the face to face hearing may not even be necessary. Besides, whereas mediation seeks to improve communication between the parties and therefore requires sophisticated tools of communication, adequate software that allows positions to be stated and documents to be shared may provide a sufficient frame for online arbitration.

That said, it must be recognised that the unavailability of appropriate communication means in arbitration implicates that if the relevant arguments and evidences cannot be adduced by appropriate means, then the process runs the risk of violating fair process. This is the position taken by *E-resolution*, an OADR provider, which stated in Article 16 that although rules of arbitration procedures were based on the United Nations Commission on International Trade Law "UNCITRAL" Arbitration Rules and the International Chamber of Commerce "ICC" Arbitration Rules, they were modified to take into account the special nature of electronic arbitration.

Internet Characteristics and Third Party Neutrals

In ADR, there is a flexible process of receiving and evaluating information, such as, which party to meet with first, what to say to each party, and how to frame and reframe information provided to each party. Generally, the flexibility of ADR allows greater discretion in case management for the third party neutral.

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However, case management in online ADR is a delicate area because the online third party neutral must earn his or her authority from the parties. This is often procured through natural charisma. This trait is difficult to communicate online without seeing a person. Moreover, the third party neutral often relies on ascertaining the veracity of parties by their appearances and demeanours. Apparently, such visual clues may be absent on the internet. Furthermore, it is not unusual in ADR to reach a time when settlement is near, and the third party neutral presses on to preserve momentum. Online ADR, however, may permit the parties to disengage, rethink, and perhaps change their minds, and this may hinder settlement. Thus, online third party neutrals must be cognisant of this reality, and attempt to keep the parties engaged and maintain constant communication. And finally, asynchronous online communications can cause frustration where one party is not available online.

People tend to have an assumption that e-mails, for instance, are read soon after they are sent. When e-mailing, people tend to behave as if they are in a synchronous situation when in fact they are not. This means that any delay in responding can seem provocative. Thus, online third party neutral must be cognisant of this reality, and learn to control information flow. If such issue is not managed carefully, excessive time between communications can have an intensifying effect where parties become less likely to achieve resolution.

That said, the elimination of physical meetings will increase the third party neutral's case management abilities since he or she can take advantage of the parties' separateness to reframe and perhaps lower the tension level between parties. In OADR, such flexibility offers huge advantages to online third party neutrals in terms of freeing them from time and space constraints because technology could be seen as an influence on the process of communication which adds value to the third party

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neutral and thus does more than simply deliver the expertise of the human third party across the network.

Moreover, the opportunities for using the virtual capabilities of electronic media in law-related processes are enormous. For instance, computer facilitated charts, figures, graphs, scales, tables, diagrams can be utilised in OADR proceeding. This could amount to the facilitation of the whole process as it allows otherwise static images to be manipulated in various ways for emphasis or persuasive effect. A certain portion of a diagram, which is an otherwise static exhibit, can be highlighted, zoomed in upon, or emphasised through colours, arrows, etc. The information itself can be presented using other media as well, including video, images, sound, and animation. Thus an electronic bundle of legal documents will be more useable and more expressive than their paper counterparts.

Furthermore, the use of computer technology to search for specific words and phrases can make it easier for the third party neutral to find where a participant(s) is addressing a particular issue in his or her comment. The "word search" puts all of the information that has been gathered in the dispute at the fingertips of the third party neutral so that it can be used most effectively to see key obstacles to agreement and move the discussion forward.

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Besides, because submissions transmitted electronically by parties are recorded automatically by the technology, OADR allows the third party neutral to carefully document each stage of negotiation, which results in easy and centralised management of cases, and similarly allows disputants to check the status of their dispute at any point from anywhere. And whereas printed document bundles have occasional internal cross-references, which readers themselves have to pursue while reading, electronic document bundles will be linked to one another by using hypertext technology, so that users will navigate around electronic bundles as though they were single sets of information. This linkage of relevant documents to one another will enable users to browse across pleadings and evidentiary materials. Also, the use of computer technology enables users to see the language of prior drafts of a document, usually crossed out with a line and displayed in a different colour, alongside the new language being suggested by the other side. This is a good example of how technology can simplify tasks that can be very complicated and aggravating in the offline world. And finally, unlike paper contracts and agreement, the ultimate electronic outcome of OADR can provide a dynamic outcome, which connect the parties to each other, and if desired, through hyper textual documents, to other people and to other source of information in ways that are difficult to imagine with papers.

Third Party Neutrals and Online Mediation-Arbitration

ADR settlement process can proceed from less to more formal dispute settlement mechanisms. In this gradual approach, for disputes that cannot be resolved using mediation, the parties would be required to have their case heard by an arbitrator. Mediation, which is less hostile than arbitration, is not necessarily an alternative to arbitration but may be the first part of a two-stage process. By the same token, given that no resolution can be guaranteed in mediation, arbitration is viewed in this context, as a backup effort to resolve disputes that parties fail to resolve in mediation. This hybrid process, which falls between mediation and arbitration, is called mediation-arbitration or “med-arb”. Accordingly, med-arb system integrates the interest-based approach of mediation, with the power-based role of arbitration.

However, the neutral’s role in such arrangements should be considered carefully and in a balanced way because under hybrid regimes decision-making process becomes complex and may stall the resolution. Therefore, such role should not be confined to

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persuading the parties to reach an agreement, as a mediator does, nor it should be confined to impose a settlement on the parties, as an arbitrator does, but rather to expressing a firm position concerning settlement of the dispute. In other words, such role should facilitate dialogue between the parties to a dispute (mediation) and, if necessary, act as a legal institution called in to help those parties (arbitration).

In mediation-arbitration, the neutral's role can be difficult as he or she needs to strike the right balance between two processes, one is built on a voluntary nature, i.e. mediation while the other is built on a binding nature, i.e. arbitration. This is doubled by a conceived big difference between application of fairness when arbitration is involved and application of fairness when mediation is the process. Such a task is not easy by all means.

Moreover, the idea of the same individual acting as both a mediator and then an arbitrator gives serious misgivings. In view of the confidential and prejudicial information during the mediation process, it is generally considered that the mediator would be compromised to then convert himself into an arbitrator to make a decision on the merits. In these circumstances many parties would not be fully open and frank with the mediator for fear of being prejudiced at the arbitration stage. From this perspective, arbitration should not be offered by the same impartial that offers mediation services. If there is an attempt to mediate a case that is unsuccessful and is then arbitrated, there should be two different neutrals because of the nature of disclosures and the interaction that takes place in the mediation, unless the parties agree to use the mediator as an arbitrator.

If the internet is utilised in mediation-arbitration, it is called online mediation-arbitration or online med-arb. Unfortunately, the neutral's role in online med-arb is not conceptualised clearly by OADR providers. For example, in *SquareTrdae*, an OADR provider, it has been stated that

> Mediators try to resolve the problem through online mediation. If that does not lead to a satisfactory result, parties can ask the mediator to recommend a

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> solution based on each parties' position and on principles of fundamental fairness.

In substance, this means that the mediator no longer mediates, but steps into the role of arbitrator, however, *SquareTrade* failed to notice that.

Third Party Neutrals and the Use of Software

Adequate software could be necessary, indeed indispensable, element for online interactions to be successful. Software is the ingredient that provides the electronic medium with its architecture and functionality. And it is software that allows the existence of effective dispute resolution systems online. From this perspective, OADR structure and process can be improved and enhanced like other software. It is necessary to understand that it will be the emergence of appropriate software that will allow OADR to flourish. As a result, there is a need for further work to refine concepts of electronic discussion and the tools for facilitating such discussions, as opposed to a general discussion without any intended concrete results. In other words, the contribution made by the software should be analysed in terms of its ability to translate the dispute resolution process to a particular medium, i.e., the internet.

If third party neutrals have different tools in front of them, in the form of software, then they can control the online environment. They may decide advantages lie in giving the floor to a party to speak uninterrupted, caucusing, or looking for consensus evaluation on key issues. From this perspective, it has been said that if an online third party neutral does not know how to manage the online platform that is used to work with the parties, and if he cannot effectively use multiple online caucus spaces as compared to offline joint discussion spaces, it does not matter how well he can engage in face-to-face active listening.

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In the meantime, there is some powerful software, which has sophisticated information processing capabilities that may be utilised by online third party neutrals. For instance, there is "OneAccord" software that enhances the ability of parties and neutrals to interact online, and allows parties and neutrals to identify interests and assess priorities in disputes. Then, the software calculates resolutions that may provide each side with more than they themselves might be able to negotiate.

Conclusion

The potential for the use of information technology in Alternative Dispute Resolution is considerable. Information technology might improve and even transform ADR. The internet and the World Wide Web are fundamentally changing the nature of communications and so are likely to exert a massive influence on the development of ADR since it is essentially a complex process of information management, information processing, and communication. Consequently, ADR will be subject to technological limitations as well as advances.

The internet can have an apparent impact on ADR in two quite different ways. First, it can be used to automate existing practices. Second, it can be used to innovate and bring about changes and introduce new ways of working and carrying out tasks. Many of the most substantial and beneficial influences of information technology in Alternative Dispute Resolution will come from innovation rather than automation. Consequently, any limitation in OADR is not inherent in the internet itself as a tool, but rather it is inherent in the users' ability to adapt this tool for the use of ADR in cyberspace.

The question is not so much whether to use the internet or not to conduct the proceedings of ADR, but how we can best integrate online communication strategies

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to support the highest level of participants' involvement and to enhance their ability to reach agreement.

When presented with a new medium such as the internet, one should not simply translate the ADR process into cyberspace. This would be wrong. Instead, OADR should deploy the logic underpinning the prevalent technology to make ADR more efficient and effective for all users in cyberspace.

In fact, OADR stems and differs from ADR at the same time. This illustrates how computer technology and distance communication can change ADR procedures. OADR can be described as a new organism that has roots in the ADR while has qualities acquired from the online environment. In one sense, OADR is simply about the use of new information management tools and communication tools. But it is equally true that these tools change the methods by which disputes are being solved through ADR mechanisms. In short, ADR uses the opportunities provided by the internet not only to employ ADR processes in the online environment but also to enhance these processes.

All in all, the advent of the internet has created challenges and opportunities for ADR. These challenges and opportunities are interconnected inexorably with each other and with internet characteristics. When ADR moves to cyberspace in the form of OADR, it will be conditioned and determined by internet characteristics. Due to some of the characteristics of the internet, such as interactivity, OADR will be an efficient solution. But due to other characteristics of the internet, such as the lack of face to face contact, OADR will encounter serious problems with regard to fair process.

Consequently, it must be pointed out that the legal status of ADR is of particular significance since that status could significantly promote or hinder the availability of online services. As technology and ADR merge, in the form of OADR, it is imperative that the values and standards of ADR serve as the guide posts for technology, rather than the reverse. This is reasonable because although the communication channel in OADR, with its high rate of innovation and rapid pace of development of new technologies, is novel, the foundations of ADR remain the same.

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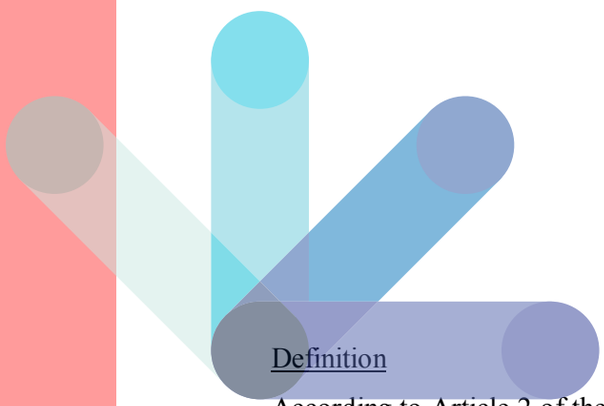

Trade Marks

Definition

According to Article 2 of the Jordanian Trade marks Law, a trade mark is defined as a clear symbol used or has the potentiality of being used by any person to distinguish his or her goods, products or services from others. According to the Jordanian Cassation Court, it is defined as letters, drawings or marks or a combination of them that are used to distinguish someone's goods from others. Some scholars define a trademark as a symbol used by a trader to distinguish his products from other traders. Apparently, the Trade marks law is the most comprehensive and inclusive definition.

It must be borne in mind that a trademark plays a dual role, on the one hand, it represents an entitlement of ownership of movable intangible property, on the other hand, it is an indicative factor on the nature and quality of the goods that attracts the attention of the consumers.

It must be said that in some cases, people registered trademarks without an intention of actual usage of such marks in the foreseeable future. The intention behind

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registration would be preventing others from registering or using such mark by having a legal protection through registration. Normally, resort to such prohibitive registration of such marks would be for preventing any variation of a famous trademark that is registered and used by the holder which might resulted in tarnishing or diluting the value of the trademark. Also, resort to such practice would be for a certain business who is expecting an expansion in the future so as a tactic measure the trademark would be registered without actual usage. In all cases, the registered mark without usage cannot be confiscated given that the holder can prove the necessity of such registration. On that basis, the holder of "Kodak" prevent a company dealing with bicycles to use the brand.

Famous (well-known) Trademarks

According to Article 2 of the law, the Well-Known Mark is defined as the mark with a world renown whose repute surpassed the country of origin where it has been registered and acquired a fame in the relevant sector among the consumer public in the Hashemite Kingdom of Jordan.

Trademarks are qualified as famous if the mark is repeatedly used by the holder and it is well known to the consumers and they trust the mark and the mark is associated with a high quality product and if there are allegations from competitors to confiscate the trademark. If the trademark becomes famous, it becomes more important than the goods themselves and if the holder of the trademark is dealing with more than one kind of goods then all these goods would be associated in the mind of consumers with such famous mark although other goods are not protected by that trademark. From this perspective, the legislator prohibits any infringement of a famous trademark even though the infringement was by a competitor dealing in different lines of business or even across borders if the holder has not registered his famous trademark abroad.

Article 8(12) of the Law states that the trademark which is identical or similar to, or constitutes a translation of, a well-known (famous) trademark for use on similar or identical goods to those for which that one is well-known for and whose use would

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cause confusion with the well-known mark, or for use of different goods in such a way as to prejudice the interests of the owner of the well-known mark and leads to believing that there is a connection between its owner and those goods may not be registered as trademarks.

Article 26 (b) of the law states that if a trademark is well-known and if it is not registered, then its owner may demand the competent court to prevent third parties from using it on identical or unidentical goods or services provided that such use indicates a connection between those goods or services and the well-known mark and provided that there is a likelihood of prejudice to the interests of the trademark owner because of such use.

The importance of trademarks

1. it determines the source of the products or goods and services (products normally referred to industrial outputs while goods normally referred to trade transactions while services referred to intangible benefits generated in the course of trade transactions such as media transmission, health and housing and education services, advertising, transportation and insurance). Such determination facilitates the exchange of goods and products and services between merchants on the one hand and between merchants and customers on the other hand. In fact, there is no need for specific description of goods as mentioning the trademark would be sufficient.
2. It enhances credibility and trustworthiness of traders as it is a strong indicative factor on the special characteristics of a certain product that distinguish it from other products, also it is an indicative factor on the quality and assurance of functionability, also it is an indicative factor on the guarantee of the products, also it is an indicative factor on the ingredients and inputs that are used in manufacturing the products that hold the trademark. From this perspective, a holder of a trademark would save no effort to maintain the credibility of his products in the eyes of his customers and the general public through improving the products and its quality.

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3. it works as an efficient conduit of marketing a product through attempting to use the media to market the trademark instead of marketing the products. Apparently, it is easier to attract the general public to a distinguished symbol rather than unnecessary detailed description of a certain product. From this perspective, persons who would be holders of trademarks are consulting media experts to advice them on fashionable trademarks with certain symbols and decoration which would "sell" should it displayed to a certain targeted sector of the audience.

4. In addition of being a distinctive factor from other producers with regards to customers, potential customers and the general public, a trademark is a decisive factor for customers in deciding whether or not to use a certain product. In effect, this would be an important aspect in the success of any enterprise as it would protect the enterprise from unfair competition from competing enterprises in attracting customers which ultimately resulted in equity.
5. a trademark is an important tool in protecting the interests of customers and consumers since laws of protecting consumers enable claimants through legal conduits of trademarks law to sue any potential infringer of a trademark which would inevitably resulted in confusing the consumers. Apparently, infringers would use deceptive means by claiming wrongly that they hold certain trademark, clearly with less or non-existent quality or defected products in comparison with an original trademark, in order to confuse the consumers.

Elements of a trademark

Article 7 of the Law states that in order to be qualified as a registered trademark, it should has a distinctive feature either in names, numbers, letters, figures, shapes, colors or alike or a combination of them given that such features can be deducted through using the faculty of sight and given that such features constitute part or whole of the trademark.

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Forms of a trademark

1. Names: this might include the name of the trader or the name of the equipments used in the production line or the name of the geographical place of the trade given that such names are designated in a distinctive way such as reshaping the name in squares or circles, or different italics and bolds, colors and sizes, or if the name is affiliated with other symbols in a way that is inseparable from those symbols. It must be noted that names can be attributed to natural and juristic persons and therefore the Jordanian Cassation court states that their approval is essential. If the name belongs to a family, their approval is required (signatures are considered as names in this regard given that signatures are distinguished and unique.
2. letters and numbers: this might include the initials of a name (LM for cigarettes), or a combination of letters and numbers, e.g., 7up for spirits, 555 for perfumes (it must be noted here that one should be careful with using mere numbers as trademarks, for example, 1900 as a trade mark for alcoholic brand might cause confusion to the consumers and lead them to believe that the production date of the drink was that time). Apparently, the usage of letters and numbers as trademarks implies that they are distinguished and unique.
3. Symbols: such as a ship, sun, animal. It must be noted that in some cases one might acquire the name of the symbol as a trademark while someone else is attempting to register the symbol of the name. Clearly, this would result in confusing the public. As a result, the rule of first come first served would be applied by attaching the symbol to the name or the name to the symbol who acquire the trademark first. Apparently, the usage of symbols as trademarks implies that they are distinguished and unique.

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4. drawings: it can be defined as artistic performance, generally but not confined to, the nature. Apparently, the usage of drawings as trademarks implies that they are distinguished and unique.

5. Photos: it might be the photo of the trader or anyone else given that his or her approval has been attained. Clearly, historical photos might be used as trademarks. But one must be careful with photos. In England, the registrar of trademarks refused to grant an applicant a trademark for the photo of Princess Diana on the assumption that, in a way or another, she belongs to the heritage of the United Kingdom. While an application for a trademark for a certain product based on the photo of "Monica Lewinsky" was granted.
6. Stamps and engravings: apparently, the usage of them as trademarks implies that they are distinguished and unique.
7. Colors: abstract colors are not protected as trademarks until they are associated with a certain trademark. If the trademark is not associated with a particular color, all colors would be protected. Apparently, the usage of colors as trademarks implies that they are distinguished and unique.
8. words: apparently, the usage of words as trademarks implies that they are distinguished and unique, and they are not commonly used in the field of business. For example, the word "standard" cannot be registered as a trademark. In this regard, it must be noted that if a trader uses certain words to describe the quality or elements or advantages of his products then such words cannot be considered as qualified as trademarks.

Trademarks prohibited by law

Article 8 of the law states that the following may not be registered as trademarks:

1. Marks which resemble the emblem (symbol) of His Majesty the King or royal crests or the word royal or any other words, characters or representations which may lead to the belief that the applicant enjoys royal patronage.

2. The insignia or decorations of the government of the Hashemite Kingdom of Jordan or those of foreign states or countries unless with the authorization of the competent authorities.

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3. Marks indicating any official designation unless the application of which is demanded by the competent authorities to whom such mark belongs or is under their supervision.

4. Marks which resemble the national flag or the military or naval banners of the Hashemite Kingdom of Jordan or its honorary decorations or insignia or the national, military or naval banners.

5. Marks which include the following words and expressions: "patent", "patented", "by royal patent", "registered", "registered design", "copyright", "counterfeiting is forgery", or similar words or expressions.

6. Marks which are contrary to the public order or morality or which lead to deceiving the public, or marks which encourage unfair trading competition or contain false indications as to their real origin.

7. Marks consisting of figures, characters or words which are commonly used in trade to distinguish or describe kinds of goods or their classes or describe the type or class of goods, unless represented in a special manner

8. Marks identical with or similar to emblems of exclusively religious signification.

9. Marks which contain the picture, name or the trade name of a person, or the name of a body corporate or of an association, unless the consent of the person or body corporate concerned has been obtained. In the case of dead persons, the registrar may ask for consents of their legal representatives.

10. A mark identical with one belonging to a different proprietor which is already entered in the register in respect of the same goods or class of goods for which the mark is intended to be registered, or so closely resembling such trademark to the extent that it may lead to deceiving third parties.

11. Marks which are similar to or identical with the insignia of the Red Crescent or the Red Cross on a white background or the insignia of the red Cross or the Cross of Geneva.

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12. The trademark which is identical or similar to, or constitutes a translation of, a well-known (famous) trademark for use on similar or identical goods to those for which that one is well-known for and whose use would cause confusion with the well-known mark, or for use of different goods in such a way as to prejudice the interests of the owner of the well-known mark and leads to believing that there is a connection between its owner and those goods

13. the marks which are similar or identical to the honorary badges, flags, and other insignia as well as the names and abbreviations relating to international or regional organizations or those that offend our Arab and Islamic age-old values.

Substantial Conditions in a Trademark

Article 7 of the Law states that there are certain conditions for a trademark that would entitle a trademark for a legal protection. They are as follows: distinctiveness, uniqueness, and legality.

Distinctiveness

A mark should be capable of being identified easily among similar marks due to an inherent characteristics that derived from the shape of such mark, e.g., being circular, triangular, etc, or being decorated in a certain way, or being written in a distinguished form of letters. From this perspective, one can argue that a photo of a woman driving a car can never be protected. Also, associating a product with its source or place of origin in a non-distinctive way and rather an abstract manner can never be protected, e.g., coffee beans from Yemen, French cheese, etc. However, it must be noted that such abstraction would be protected if it has been used for a comparatively long time which resulted in associating the product with its source or place of origin. In this regard, Article 7(3) of the Trademark Law states that:

> "In determining whether a trademark has a distinctive character as mentioned here in before, the registrar or the court may, in the case of a trademark in actual use, take into consideration the extent to which such use has rendered the trademark in fact distinctive for the goods in respect of which it is registered or is intended to be registered"

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Uniqueness

A mark is unique when it has not been used before or has not been registered in the trademark registry before. Apparently, such usage or such registration would result in confusing the consumers as to the source of the products produced under the trademark (it must be noted that mere confusion of consumers would constitute non-uniqueness).

It must be noted that with regards to non-famous trademarks the Jordanian legislator adopts the relative uniqueness instead of absolute uniqueness in the sense that a trademark is protected if there are competitor trademarks causing confusion in the same line of business, and not all fields of business (for example, if someone is using a certain trademark in producing perfumes, nothing prevents using the same trademarks in steel industry or painting since there would be no confusion for consumers which would result in breaching unfair competition laws. But using a hand watch trademark to produce wall watches or alarms would create confusion), and that such protection is confined to the Jordanian territories and not world-wide protection (in fact, the trademark law is territorial on the assumption that a certain trademark would be used in a certain market in a certain country, however, the emergence of the internet and new technologies and easiness of traveling and carriage of persons and goods have resulted fundamentally in changing such assumption).

And finally, Article 20(a) of the law states that:

"The ownership right of a trademark shall be for 10 years as of its registration date and may be renewed for 10-year periods under the provisions of this law".

Apparently, if there is no renewal of a trademark after the lapse of one year after the prescribed 10 years for renewal, the trademark would be a communal property that is appropriate to be owned by others.

Legality

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Trademarks should not negate public order (Laws of Prohibiting the Dealings with Israel implies that registering a trademark for a company dealing with Israel is not allowed, for example, registering "Marks and Spenser" in Jordan was refused on that basis) or be in breach with any valid laws, directives or regulations, e.g., Article 3 of the Amman City Council Directive Concerning Advertisement No. 57 of 1984 emphasis on certain formalities of advertising and trademarks advertisement should comply with the Directive.

The Adjective Conditions of Trademarks

First, The Jordanian Trademark law states that the ministry of Trade and Industry should have a special register of all trademarks. In this regard, Article 3 of the law reads as follows:

1. A register named the Trademarks Register shall be kept in the Ministry under the supervision of the Registrar. All trademarks, their owners' names and addresses and the following matters shall be recorded in the Register:
    a. Any transfer, assignment, ownership change or license to use from the owner to third parties.
    b. Any pledge made to a trademark or any restriction to its use.
2. The public shall have the right to review the Trademarks Register pursuant to the regulations issued by the Minister for this purpose and to be published in the Official Gazette.
3. A computer may be used for recording marks and their particulars. The particulars and printouts which are certified by the Registrar shall be an authoritative source.

Second, with regards to the procedures of registration of a trademark, there is a special form at the Ministry of trade and industry that should be signed by the applicant or his agent which might be a lawyer.

The law states that an applicant may be a claimant that his trademark has been used illegally by a third party and he or she has a proprietary right in the mark, or someone

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is using a certain trademark and desire to register such trademark or someone intends to use a trademark.

Apparently, the applicant might be natural or juristic person, trader or non-trader, Jordanian or non-Jordanian given that a proof of entitlement of ownership or right in ownership in a trademark is produced. In all cases, legal capacity is required. The Jordanian cassation court states that if a company is dissolute and there is an application for a trademark, the registrar should consider the application as non-existent as the company itself is non-existent.

In this regard, Article 11 (1) states that

> Any person claiming to be the proprietor of a used or proposed to be used trademark who is desirous of registering such trademark shall apply in writing to the registrar in the prescribed manner.

Third, with regards to the registrar's authority, the law states that he should check on the proposed trademark to decide whether an identical or similar or confusingly similar mark has been granted a trademark prior to the application, or whether identical or similar or confusingly similar mark has been under consideration. The law allows the applicant himself or his agent to examine the register in this regard. If the register was convinced that there is no infringement on an existent trademark he would authorize the application form or demand certain amendments. The applicant can object for such amendments. If there is a demand for certain an amendment or modifications on the application form by the registrar, the applicant's silence would be interpreted as an acceptance to withdraw the application to rectify the errors. In this regard, Article 25 states that

1. Any person aggrieved by non-insertion in the register or removal from the register of any entry made without sufficient cause to justify such entry, or by any entry unfairly remaining on the register, or by any error or defect in any entry standing in the register, shall have the options of submitting an application in the prescribed manner to the high court of justice, or make such application to the registrar in the first instance.

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2. The registrar may, at any stage of the proceedings, refer any such application to the high court of justice, or he may after hearing the parties, determine the case between them, subject to appeal to the high court of justice.

3. The high court of justice may, in any proceeding brought before it under this Article, decide on any question that may be necessary or expedient to decide in connection with the amendment of the register.

4. In the event of falsification in the registration, the registrar may himself apply to the high court of justice under the provisions of this Article.

5. An application for removal from the register of a trademark on the grounds that there is no justification for its registration, or on the grounds that the registration of the trademark creates an unfair competition must be made within five years as from the registration of the trademark (It is obvious here that the 5 years is a prescription right starts from the date of registration and not the application date because the right of a potential objector, which is the fundamental basis of the prescription right, starts at the date of registration while the right of the holder and consequently the holder's prescription right starts at the registration date).

6. Any order of the high court of justice amending the register shall direct that a notice of the amendment be served upon the registrar by the party in whose favor the decision was issued and the registrar shall, upon receipt of such notice, amend the register according to the pronouncement of the decision.

Upon reaching a decision on the application, the registrar should issue a decision to accept the trademark as it has been proposed or with amendments. Apparently, such publication of the decision is necessary for any potential objection by third parties. Article 13 reads:

"When accepting an application for the registration of a trademark, whether such acceptance be absolute or subject to conditions or limitations, the registrar shall, as soon as possible after such acceptance, published the application in the prescribed

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manner. Such publication shall include all the conditions and limitations subject to which the application has been accepted."

Moreover, Article 27 states that the registrar may on a request made in the prescribed manner by the registrant:

1. Correct any error in the name or address of the registrant.
2. Enter any change in the name or address of the registrant.
3. Strike off any goods or classes of goods from those for which a trademark is registered.
4. Enter a disclaimer or memorandum relating to a trademark, if that disclaimer or memorandum does not in any way extend the rights given by the existing registration of such trademark, or
5. Cancel the entry of a trademark in the register.
6. Any decision of the registrar made under the provisions of this Article shall be subject to appeal before the high court of justice.

Furthermore, with regards to any amendment of the entry in the trademark register, Article 25 states that

1. Any person aggrieved by non-insertion in the register or removal from the register of any entry made without sufficient cause to justify such entry, or by any entry unfairly remaining on the register, or by any error or defect in any entry standing in the register, shall have the options of submitting an application in the prescribed manner to the high court of justice, or make such application to the registrar in the first instance.

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2. The registrar may, at any stage of the proceedings, refer any such application to the high court of justice, or he may after hearing the parties, determine the case between them, subject to appeal to the high court of justice.

3. The high court of justice may, in any proceeding brought before it under this Article, decide on any question that may be necessary or expedient to decide in connection with the amendment of the register.

4. In the event of falsification in the registration, assignment or transfer of a registered trademark, the registrar may himself apply to the high court of justice under the provisions of this Article.

5. An application for removal from the register of a trademark on the grounds that there is no justification for its registration according to the provisions of Article 6) 7 or 8 of this law, or on the grounds that the registration of the trademark creates an unfair competition in respect of the applicant's rights in the Hashemite Kingdom of Jordan, must be made within five years as from the registration of the trademark.

6. Any order of the high court of justice amending the register shall direct that a notice of the amendment be served upon the registrar by the party in whose favor the decision was issued and the registrar shall, upon receipt of such notice, amend the register according to the pronouncement of the decision.

Finally, Article 28 deals with applications for the insertion in the register of entries relating to amendment or substitution of the classes of goods. It reads

1. The minister of commerce may, from time to time, on the strength of a motion by the registrar and approval of the council of ministers, set down regulations, prescribe such forms and generally do such things as he thinks expedient for empowering the registrar to amend the register, whether by making new entries or varying entries therein, to the extent which may be requisite for the purpose of securing conformity between the designation therein of the goods

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or classes of goods, in respect of which the trademark is registered, with any amended or substituted classification that he may order to be entered.

2. In exercising any power of those conferred on him in accordance with the aforesaid, the registrar may not make any amendment of the register that may result in adding any goods or any other class of goods to those goods or classes of goods in respect of which a trademark is registered. However, the provisions of this paragraph shall not affect any aspect in relation to the goods which the registrar believes the application of the provisions of this paragraph shall involve undue complexity and shall not prejudice the rights of any person.

3. A proposal for the amendment of the register shall, for the purposes of the aforesaid, be notified to the registered proprietor of the trademark affected. The said registrant may appeal to the high court of justice, provided that the proposal shall be published. Likewise, any person aggrieved by the proposal may oppose the amendment before the registrar on the grounds that the proposed amendment contravenes the provisions of the preceding paragraph. The decision of the registrar on any such opposition shall be subject to appeal to the high court of justice.

Fourth, with regards to potential objections by third parties, Article 14 states that

1. Any person may within three months as from the date of the publication of an application for the registration of a trademark, or within such other time as may be prescribed, file with the registrar a notice of opposition to the registration of such trademark.

2. A notice of opposition shall be given in writing in the prescribed manner and shall include a statement of the grounds for the opposition.

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3. The registrar shall send a copy of such notice of opposition to the applicant who shall, within the prescribed time after the receipt of such notice, send to the registrar in the prescribed manner a counter-statement including the grounds on which his application for the registration of the trademark is based. If he fails to do so, he shall be deemed to have abandoned his application.

4. If the applicant sends a counter-statement, the registrar shall furnish a copy thereof to the person or persons opposing the registration, and shall after hearing the parties, if necessary, and considering the evidence, decide whether, and subject to what conditions, registration is to be permitted.

5. The decision of the registrar may be appealed to the high court of justice.

6. An appeal made under this Article shall be submitted within twenty days as from the date of the decision of the registrar. When debating such appeal, the high court of justice shall hear the parties and the registrar, if necessary, and shall issue a decision determining whether, and subject to what conditions, registration is to be permitted.

7. On hearing any such appeal, any party may, either in the manner prescribed or by special leave of the high court of justice, bring forward further evidence for the consideration of the high court of justice.

8. In the course of an appeal under this Article, no further grounds for the opposition to the registration of a trademark shall be demonstrated by the opponent or the registrar other than those stated by the opponent as here in above provided, except by leave of the high court of justice hearing the appeal.

The Jordanian Cassation Court states that, given that legal capacity conditions are fulfilled, it is clear that any person can bring an appeal non-withstanding whether he has a direct interest in bringing such action. Actually, the notion of preventing fraud of the general public would be sufficient.

Fifth, with regards to the registration date, Article 15 states that

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1. If the application for the registration of a trademark was accepted and has not been opposed, and the prescribed time for opposition expires, or having been opposed and the opposition has been decided in favor of the applicant, the registrar shall register the said trademark, on receiving payment of the prescribed fee. The trademark shall then be registered as from the date of the application for registration. In the case of an application of a foreign trademark, the trademark shall be registered as from the date of application for registration in the foreign country, and such date shall be deemed for the purposes of this law to be the date of registration.
2. On the registration of a trademark the registrar shall issue to the applicant a certificate of the registration of such trademark in the prescribed form.

Sixth, with regards to the duration of registration, Article 20 states that

1. The ownership right of a trademark shall be for 10 years as of its registration date and may be renewed for 10-year periods under the provisions of this law.

Also, Article 21 states that

1. The Registrar shall renew the trademark registration upon a request from its registrant pursuant to the provisions of this law.

Clearly, a trademark holder can keep his mark infinitely provided that he regularly keep renewing it and there is no legal objection for his entitlement of ownership. If 1 year passes after the extinguishment of the right in holding a trademark without renewal, it would be considered as a constructive abandonment.

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Seventh, with regards to the legal effects of registration, Article 32 states that a certificate purporting to be under the hand of the registrar as to any entry shall be prima facie evidence of the entry having been made and of the contents thereof.

In essence, that means the registration process is affirmative and not creative of the existence of right in a trademark by being an indication of a usage or potential usage of a trademark by the holder of the trademark. This means also that once a legal dispute arise, producing a certificate of a trademark represents an evidence of the existence of ownership which might be rebutted by others who might be users or potential users of a trademark before it has been registered by the applicant for registration.

Foreign Trademarks

Given that substantive and adjective conditions of a national trademark have been fulfilled, Article 41 deals with a foreign trademark that can be registered in Jordan. The Article reads as follows

1. If the Kingdom is bound by a bilateral agreement or is a member to an international convention which grants a reciprocal protection to the trademarks registered with any of them (reference is paid here to Madrid Convention for Trademarks Protection of 1891), then any national of the state member to the agreement or convention may file an application to the registrar to protect his trademark. Also, he shall have the priority right to those who filed prior applications in the Kingdom for that trademark provided that he files his trademark application in the Kingdom within six months of the following day to his application in his home country. In this case the registration date shall be regarded as the date of filing the actual trademark application in that country. He shall not have the right to file any civil or criminal lawsuit before the actual date on which his trademark has been registered in the Kingdom.

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2. The provisions which provide temporary protection for the trademarks on the goods displayed in national or international exhibitions which are held in the Kingdom shall be governed by the regulations to be issued for this purpose.

Also, Article 42 states that an application for the registration of a trademark under Article 41 shall be made in the same manner as for an ordinary application under this law, provided that an application for the registration of the mark has already been duly made in the country of origin.

On the other hand, if a foreign applicant for a trademark desire his trademark to be translated to Arabic, he can demand that such translation, whole or partial, is conducted through a certified (accredited) translator (apparently, in the application form, if there are non-Arabic documents related to the trademark, it should be translated to Arabic through an accredited translator).

It must be noted that according to Article 34, no person shall have the right to file a lawsuit to claim damages for any infringement upon a trademark not registered in the Kingdom. However, he shall have the right to apply for the Registrar to cancel a trademark registered in the Kingdom by a person who doesn't own it after it was registered abroad. The decision issued by the Registrar may be appealed under this law to the High Court of Justice within 60 days of its notification date.

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Right of Ownership in a Trademark

Given that a trademark is an intangible movable property, one can enjoy a right of ownership and disposition in such property such as transference of ownership or endowment. However, one might argue if such disposition is inseparable with the disposition of the store which is owned by a trademark holder? In other words, can a trademark holder transfer his ownership in the trademark without transferring his ownership in the store? In response, some legislations, such as the French legislation, allows separate disposal. The Jordanian legislation in the Trademark Law of 1952 adopts completely opposite stance whereby it emphasized that the existence of a trademark is associated with a store to conduct commercial transactions and that the non-existence of a store would imply automatically the non-existence or invalidity of a trademark. However, the Trademark Law of 1999 states in Article 19 that:

1. It shall be allowed to assign or to pledge the trademark without the ownership transfer of the business concern using the mark in distinguishing its products or to assign or pledge the business concern itself.

2. The ownership of the trademark shall be transferred with the ownership transfer of the business concern if it closely relates to it unless otherwise is agreed upon.

3. If the business concern ownership is transferred without the trademark, the transferor may continue using the trademark for the goods registered for.

4. The assignment or pledge of a trademark shall not be invoked against third parties except as of the recordal date thereof in the register and shall be published in the Official Gazette.

5. The Implementing Regulations to be issued by the Minister for this purpose and to be published in the Official Gazette shall determine the procedures for trademark assignment, pledge and all legal disposals of the trademark.

It must be noted that the English Trademark law allows separate disposition as long as such disposition is not causing confusion to the public.

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It must be noted in this regard that if several persons whether natural or juristic are attempting to register in Jordan identical or similar trademark at the same time with the trademark registrar in the same field of business (it must be said here that such occurrences are rare because the registrar normally receives the applications either in person or through post chronologically) then Article 17 states clearly that:

> Where separate applications are made by different persons to be registered as proprietors of trademarks which are identical or closely resemble each other, in respect of the same goods or description of goods, the registrar may refuse to register any of such persons until their rights in respect of such trademarks have been established either:
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> 1. by reaching between themselves to an agreement which meets with the approval of the registrar, or
> 2. by the high court of justice to whom the registrar shall refer the dispute in the absence of such agreement (in which case the court might grant all applicants the right in holding the trademark)

It must be noted also that if several persons are attempting to register a trademark on the assumption that they were using the trademark in their business without registration with the trademark registrar then Article 18 states that

> 1. In a case of honest concurrent use of a trademark or under circumstances which in the opinion of the registrar make proper the registration of the same trademark in the name of more than one person, the registrar may permit the registration or such a trademark or any trademarks which closely resemble it, for the same goods or class of goods in the names of more than one person, subject to such conditions and limitations as he may think fit to impose.
> 2. A decision of the registrar under this Article may be appealed to the high court of justice, and the court shall on appeal have the same powers as are by this Article conferred upon the registrar.
> 3. An appeal under this Article shall be submitted within thirty days as from the date of the decision of the registrar.

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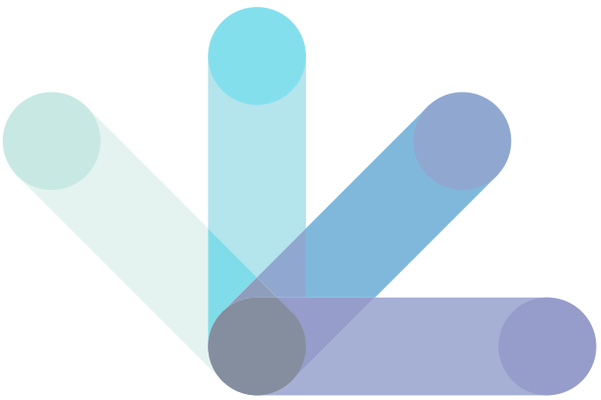
And finally, it must be noted that if an owner of a trademark cease to exploit his trademark due to dissolution of his business or any other reason then the registrar upon application to that effect allows the remaining partners who wish to carry on doing business under that trademark to do so on the condition that the ownership of such trademark would be divided among them (apparently, if the remaining partners after the dissolution is only one person then he cannot carry on doing the business under the same trademark. Assume that there are two partners in a company where a dispute took place between them which lead to the dissolution of the company then none of them would be able to carry on doing the business under the same trademark).



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The Extinguishment of a Trademark

As long as the holder of a trademark is fulfilling all conditions (such as non-usage in different lines of business and not negating public order) and keep renewing his trademark within the prescribed time in law, he would be entitled for ownership of the trademark. However, non-usage of a trademark, explicitly or implicitly, because of an intention of a trader to abandon trading in a certain product protected by a trademark holder or stopping the usage of such mark to protect a particular product with the intention of keeping the trade in that product or the intention to abandon the trademark and the product all together or the intention to leave the trade would cause the abandonment of the ownership of the trademark. In such case, the trademark would be owned by the general public that can be registered by any person given that it has been cancelled from the register of trademarks. Moreover, the trademark would not be legally protected either in civil law or criminal law including the holder's right in exploitation. Having said that, Article 22 deals with cancellation of a trademark for nonuse, it states that

1. Whoever is interested may apply to the registrar for the cancellation of any trademark registered in the name of a third party if its registrant has not actually used it continuously for a period of three years preceding the application unless the registrant proves that nonuse has been due to special circumstances in the trade or to justifiable reasons which prevented use.

2. Use of the registered trademark by third parties under the authorization of its owner shall be regarded as use for the purposes of continued registration under the provision of Paragraph 1 of this Article.

3. The Registrar shall permit, before he issues his decision on the cancellation application, the two parties to present their pleadings. The Registrar's decision shall be subject to appeal before the High Court of Justice.

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Upon reading Article 22 one can notice that the existence of an intention to relinquish the trademark by the holder as a reason for non-usage is necessary to cancel a trademark while nonuse due to special circumstances in the trade or to justifiable reasons which prevented use cannot be a basis for cancellation. In this regard, a suit has been brought before the Jordanian cassation court claiming that a Lebanese company who has a trademark for its products in Jordan cannot keep the trademark because of non-usage on the basis of Article 22 (1) because the notion of justifiable reasons was not met. The claimant proved that the Lebanese company during the civil war in Lebanon was able to sell and market its products abroad without problems so the non-usage of the trademark in Jordan was not justified.

Legal Protection of trademarks in Civil Law

Article 256 is considered as the basis of legal protection of registered trademarks in Jordan. Besides, if someone is infringing on other's trademark, the injured can sue the infringer on the basis of competition law by bringing an unfair competition plea. In this regard, Article 34 of the Trademarks law states that: "No person shall have the right to file a lawsuit to claim damages for any infringement upon a trademark not registered in the Kingdom. However, he shall have the right to apply for the Registrar to cancel a trademark registered in the Kingdom by a person who doesn't own it after it was registered abroad".

Having said that, it must be noted that with regards to unregistered trademarks, Article 3(a) of the Unfair Competition Law No. 15 of 2000 states that "Any concerned party may claim compensation for the damages caused to him as a result of any unfair competition". As a result, one might claim compensation in civil law on that basis. Besides, Article 2 of the Unfair Competition Law states that:

A. Any competition contradictory to the honest practices in the commercial and industrial activities shall be deemed one of the unfair competition acts and particularly the following:

    1. The activities that may by nature cause confusion with entity, products or commercial or industrial activities of one of competitors.

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2. Untrue assumptions in practicing trade, whereby such practice causing deprivation of trust from one of the competitors' entity, products or industrial or commercial activities.

3. The data or assumptions which use in commerce may mislead public in respect to the product's nature, methods of manufacturing, properties, amounts, and availability for use.

4. Any practice that reduces the product reputation, cause confusion in respect to the product general shape or presentation, or mislead the public on declaring the product price.

B. If the unfair competition related to a trademark used in the kingdom either being registered or not and causes public misleading, provisions of paragraph (A) of such article shall be applied.

Legal Protection of trademarks in Criminal Law

If the trademark is registered in Jordan, it would be protected in criminal law. The acts which constitutes infringement include actual infringement, participating in infringement, attempts to infringement, inducement for infringement, forgery of a registered trademark, non-justifiable use of a registered trademark, sale or acquire for sale or offer to sale goods protected by an infringed trademark. In this regard, Article 38 states that

1. Whoever committed with the intention to cheat any of the following deeds shall be penalized by an imprisonment term of no less than three months and no more than one year, or a fine of no less than 100 Jordanian Dinars and of no more than 3000 Jordanian Dinars or by those two penalties:

    a. Whoever counterfeited a trademark registered under this law, imitated it in any other way that misleads the public, or affixed a counterfeit or imitation mark on the same goods for which the trademark has been registered.

    b. Whoever illegally used a trademark owned by another on the same class of goods or services for which that trademark is registered.

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c. Whoever sold or possessed for the purpose of selling or offered for sale goods bearing a trademark whose use is regarded as an offense under paragraphs (A) and (B) of this Article if he was cognizant (aware) of that beforehand. (It is clear here that it is irrelevant if the seller creates profit or not, and whether the sale was for one time or more. Clearly, the buyer is not responsible unless he resold the goods after knowing that they are not bearing a legal trademark. Moreover, with regards to offer for sale, it is irrelevant if the offer was made by an owner or the possessor of the goods bearing the infringed trademark).

2. Notwithstanding what is mentioned in paragraph 1 of this Article, whoever sells, or offers for sale, or possesses for the purpose of selling goods bearing a trademark whose use is regarded as a contravention under the items (A) and (B) of paragraph 1 shall be penalized by a fine of no less than 50 Jordanian Dinars and no more than 500 Jordanian Dinars.

3. The provisions of paragraph 1 of this Article shall apply to whoever started to commit any of those acts provided for in this Article or aided or abetted (induced) another to commit it.

Legal Orientation of the Crime of a Trademark Infringement in Criminal Law

As it is the case with any other crime, the conditions of the material element which is the fact of infringement should be fulfilled and the conditions of the fraudulent intention of the offender should be evident and the prescribed punishment should be provided. The combination of those elements constitutes a crime.

Material element

There should be infringing acts conducted by the offender with regards to the trademark. It must be clear that infringement might take the form of forgery whereby the infringer copy wholly or to a large extent the trademark to be used on identical or

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similar goods protected by the legal trademark, or the form of counterfeiting whereby the infringer would insert certain amendments and decorations to the trademark to be used on identical or similar goods protected by the legal trademark. Such acts should confuse the public as to the source or affiliation of the goods and cause unfair competition. Also, such acts should not be approved by the owner of the trademark (the offender might prove that his acts were approved by the owner and then the material element of the crime would not be evident, consequently, the owner of the trademark can rebut the claims of the offender by proving that his approval was not attained). Apparently, infringing acts might include the usage of a legal trademark to market a product protected by that trademark or replacing the ingredients of a product protected by a trademark (this is evident in fuzzy drinks, alcoholic drinks and perfumes).

Having said that, it must be clear that deciding upon a trademark infringement is an issue left to the trial judge because it is a factual matter. Apparently, the trial judge can resort to experts to decide on this issue. The cassation court, which is a court of law, cannot interfere here unless there is a breach of law. However, there are some guiding principles to decide upon the factuality of the infringement:

1. The judge should investigate the similarities rather than the differences between the legal and the infringed trademark.

2. Reference should be paid here to the normal third party neutral consumer in assessing the mislead or to the normal third party neutral merchant in assessing unfair competition. Reckless or overly aware person is irrelevant here.

3. In deciding upon the infringement, the trial judge should assess such infringement by keeping in mind the separation of the legal and infringed trademark when they are displayed to the public. In other words, an infringed trademark usually would not be displayed next to the legal trademark in a given store, instead, they would be separated in different stores which would make it more difficult for the consumer to decide upon the legal or infringed trademark.

Fraudulent element

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There should be an intention to create detrimental effects on other competitors (unfair competition) and an intention to mislead the public as to the source or affiliation of the infringed trademark. Without such intention (bad faith) there can be no crime. It must be noted here that mere suspicion and not the actual materialization of unfair competition or mislead of the public would be sufficient. In this regard, an implied assumption of the existence of bad faith by the infringer is the norm unless the infringer establishes otherwise. An implied assumption means that bad faith is not an absolute presumption which can be rebutted. All means of the proof of good faith is available to the infringer. Apparently, all these issues are left to the trial judge. For example, the infringer might prove that the holder of the trademark has approved of the infringement or that the infringement has not caused unfair competition or mislead the public or that the infringer was not aware of the fact that the infringed trademark is owned by someone else. Apparently, such assumption of the infringer's bad faith is based on the notion that a registered trademark is a presumption that it has been published in the official gazette and others took notice of its publication. Article 5 reads:

The register kept under this law shall at all convenient times be open to inspection by the public, subject to such regulations as may be prescribed. A certified copy of any entry in such register shall be given to any person requesting the same after payment of the prescribed fee.

Also, Article 13 reads:

When accepting an application for the registration of a trademark, whether such acceptance be absolute or subject to conditions or limitations, the registrar shall, as soon as possible after such acceptance, cause the application in the manner in which it has been accepted to be published in the prescribed manner. Such publication shall include all the conditions and limitations subject to which the application has been accepted.

Confiscation, Destruction and Detention of Goods Protected by an Infringed Trademark

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Article 39 of the Trademark law deals with precautionary measures in trademarks protection, particularly, confiscation and destruction and detention of trademarks. It reads as follows:

1. When filing a civil or criminal lawsuit, the owner of a registered trademark may, while reviewing the case, ask the court, provided that he submits a bank or monetary guarantee which the court accepts, for the following:

    a. To stop the infringement.

    b. To make a precautionary seizure of the goods in regard of which the infringement has been committed whenever they were.

    c. To preserve the evidence relating to the infringement.

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    a. Before filing a civil or criminal lawsuit, the owner of the trademark claiming infringement may request the court to take any of the measures provided for in paragraph 1 without notifying the defendant if it is proven that he is the owner of the trademark and that his rights were infringed or that the infringement is imminent or that it is likely

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he will sustain irreparable damage or if it is feared that the evidence will be hidden or destroyed provided that the application is accompanied by a bank or monetary guarantee accepted by the court. The defendant may appeal this decision within eight days of the date of its notification or understanding of it.

b. If the trademark owner doesn't file his lawsuit within eight days of the court's decision, all the measures taken in this regard shall be null and void.

3. The defendant may claim damages if it is proven as a result of the lawsuit that the plaintiff is not rightful in his lawsuit or he hasn't filed a lawsuit during the prescribed period.

4. The court may decide to seize the goods, materials for packaging, wrapping and advertising, plates, seals, and other tools and materials predominantly used in affixing the trademark on the goods or which the infringement was made with or stemmed from. The court may order to destroy them or to dispose of them for noncommercial purposes (clearly, the court has discretionary powers in seizures and destroy as the Article uses the term "the court may…". For instance, if the goods which are protected by an infringed trademark are of a good quality, the court may decide to sell them and distribute their price among charitable institutions. Apparently, the legislator believes that such strong measures should be taken because of the sensitivity of an infringement of a trademark since it is related to the reputation of the trademark holder and because of the widespread usage of an infringed trademark and because infringement might affect the credibility of the business environment in general).

It must be said finally that the Egyptian Trademark Law requires the infringer once the infringement has been proven to publish the judgment in daily newspapers at his expense in order to clarify any ambiguity that might arise in the public mind because of the lawsuit. The Jordanian legislator does not attempt this notion.

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Commercial Titles

A commercial title is used for distinguishing a trader from another trader. The objective of having a commercial title is to enable the public to distinguish the identity of a trader from another one, and for that reason the law stipulates that a trader must carry out his commercial transactions under his commercial title and write it on the façade of his business premises.

Once the commercial title is registered in the Commercial Register, no other trader may use such title for his trade which is of a similar kind. If the commercial title of a trader is similar to a commercial title previously entered in the Register, the new registrar must add to his commercial title such particulars as would distinguish him from the trade title already registered (section 42 of the Jordanian Commerce Law).

Article 40 of the Commerce Law provides that a trader must conduct all his commercial transactions and endorse his papers related to his commercial activity by a specific name called the commercial title, and he shall write his commercial title on the façade of his business premises.

Apparently, the elements of the trader's commercial title differ as if the trader is an individual trader or artificial trader.

1- An individual trader

The commercial title of an individual trader consists of his first name and surname such as (The Store of Ali Hassan). The trade has the right to add whatsoever to his commercial title relevant to the kind of trade for which is designated such as (Ali Hassan for Electronic equipment), but such right is subject to that the addition does not cause any misleading or confusing in regard to his identity.

Section 43 of the Commerce Law provides that a commercial title may not be disposed of independently of the business premises unless it is explicitly or implicitly provided as such.

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2.Companies

Due to the importance of commercial companies in the modern economic life, it is essential to designate the following paragraphs for the general rules of companies and the special rules applicable to each kind of commercial companies provide by the Jordanian Companies Act (1997).

The existing Jordanian Companies Law (1997) and its predecessors do not define a company. But section 582 of the Jordanian Civil Code defines the Partnership in General as:

> "A contract by virtue of which two or more persons undertake to contribute in a financial project by providing share of property or work in order to exploit that project and share the loss or profit that results therefrom".

The analyses of the definition of a 'company' reveals the essential elements of a valid company:

- There must be a contract
- There must be an association of two or more persons
- There must be sharing of profit and loss amongst all partners

It is obvious that companies which enjoy the artificial legal personality will acquire the capacity of a trader if its domain is commercial. The companies whose domain is commercial are those forms of companies provided by section 6 of the Companies Act No.22 of (1997) which are as follows:

1.General Partnership
2.Simple Limited Partnership
3.Limited Partnership with Shares
4.Limited Liability Company

- **General Partnership**: It can be defined as the company that consists of a number of natural persons, not less than two not more than twenty who are

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jointly liable for the company's obligations to the full extent of their assets (see section 26 of the Jordanian Companies Act).

It is clear that the number of the partners in this kind of companies is restricted to be not less than two not more than twenty, but the number of partners may increase due to inheritance and that should be in accordance to the provided statutory provisions.

It is clear also that the partners are jointly liable for the company's obligations to the full extent of their assets. All partners are jointly liable for the company's obligations, so a partner joins the general partnership, with other partners, shall be jointly liable for the company liabilities incurred before and after joining the company, to the extent of all his assets. This liability shall be transferred to his executors after the death of the partner within the limits of the amount inherited. A partner who withdraws from the general Partnership shall not be liable for the company's liabilities that are incurred after the registration of his withdrawal.

Finally, it is clear that each partner in a general partnership shall be deemed a merchant; consequently the bankruptcy of the company will lead to the bankruptcy of all the partners.

- **Simple Limited Partnership**

A limited partnership is a company consisting of one or more jointly liable partners who are liable for the company's liabilities to the full extent of their assets, and one or more limited partner(s) who are not liable for the company's liabilities except only to the extent of the value of his or their respective share(s) in the capital. (see section 41 of the Jordanian Companies Act).

Limited Partnership with Shares

A limited partnership with shares is a company formed of the following two categories of partners:

(b) General Partners: their number shall not be less than two and they shall be liable for the company's debts from their personal property.

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(b) Limited Partnership: their number shall not be less than three, and each partner shall be liable for the company's debts in proportion to his shares in the capital. (see section 77 of the Jordanian Companies Act).

It must be noted that the Jordanian companies Law specifies the capital of the Limited partnership with Shares to be not less than one hundred thousand Jordanian Dinars (see section 78 of the Jordanian Companies Act).

- **Limited Liability Company**

A limited Liability company is a company formed by two persons or more. The company's liability shall be deemed independent from the liability of every shareholder in the company. Each partner shall be liable only to the extent of his share in the capital. The capital of the company shall not be less than thirty thousand Dinars (see section 53 (a) of the Jordanian Companies Act).

It must be noted that subject to the approval of the Controller of companies, the Limited Liability Company may be formed by one person only or it may become owned by one person (see section 53 (b) of the Jordanian Companies Act).

Having discussed the main forms of companies according to the Jordanian Companies Act, it must be mentioned that regarding considering shareholders as traders or not, shareholders in the unlimited partnerships shall be deemed merchants because they practice the commercial activities in the name of the partnership and they are jointly liable for the debts of the partnership from their won individual funds and property if the partnership assets are insufficient to satisfy the creditors. The same applies to partners who are liable for the companies' liabilities to the full extent of their assets. But partners whom liabilities are confined towards the company's creditors only to the extent of his share in the capital would not be considered merchants.

According to the Jordanian Commerce Law, companies whose domain is commercial are deemed traders, thus such companies are subject to the duty of holding a commercial title. The Commercial title of companies differs according to the type of a company.

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General Partnership

The commercial title of the general partnership consists of the names of all the partners. Its name may be confined to the name of one or more of the partners with insertion of the phrase “and his partners” or “and partners”. The Companies Law stipulates that the commercial title shall always comply with the existing status. This means that if one of the partner dies or withdraws from the company, the commercial title shall be amended according to the new status of the company where such amendment should include the existing partners and the insertion of the new partner if one joins the company. But if all the partners die and the title of the company was registered in their names, the inheritors- with the approval of the controller- can keep the partnership’s title if it has been proved that the companies title has acquired an outstanding fame (see sections 10 of the Jordanian Companies Act).

Simple Limited Partnership

The commercial title of simple partnership should be composed of the names of the general partners. If there is only one general partner in the limited partnership, it should be added the phrase “and partners” to the title. The name of the limited partners should not be mentioned in the title of the company. if it is mentioned, he shall be deemed a general partner (see sections 42 of the Jordanian Companies Act).

Limited Partnership with Shares

The title of the limited partnership with shares shall be composed of the name of one or more of general partners, provided that the title is followed by the phrase “Limited Partnership with shares” in addition to the company’s objectives. The name of the participating partner should not be mentioned in the company title. If his name is mentioned, he shall be deemed as a general partner (see sections 79 of the Jordanian Companies Act).

Limited Liability Company

The title of limited liability company should have a title derived from its objects, provided that the term “company with limited liability” should be added to the company’s title as well as stating the amount of its capital. Company’s title, capital amount and registration number shall be stated on all of the stationary and print

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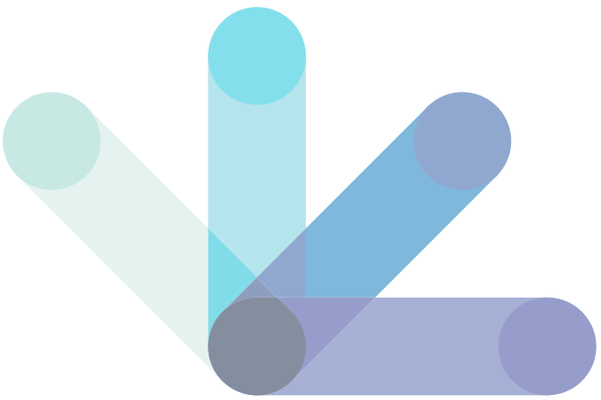
material used in its operations and contracts concluded thereof (see section 55 of the Jordanian Companies Act).



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Trade Names

Trade names are governed by the provisions of Trade Names Law No. 30 of 1952. Article 2 states that a trade name is the expression used by a trader whether natural or juristic to distinguish his activities and his store from other traders. Apparently, a trader might use the trade name on the façade of his store or on his correspondences. However, such expression should not be the name or surname of the trader or the initials of the name and the surname in which case it would be the commercial title of the trader (Article 41 (1) of the Jordanian Commerce Law). As a result, trade names might be describing the activities of the trader, e.g., Arabic Kitchen, conservative woman, golden shoes etc. in order to attract consumers and to advertise the goods as long as such names are not negating public order and morals and it has not been registered before (a trade name should be unique and distinctive). Apparently, a trade name is identifying the store and the activities of the trader to distinguish his from other traders while commercial title is distinguishing the identity of the trader from other traders. Clearly, in contrast with commercial titles, trade names are not compulsory on traders (Article 40 of the Jordanian Commerce Law).

Article 3 of the Trade Names Law require the trader to register his trade name in writing with the registrar of trade names within 14 days after the actual usage of the trade name by the trader. According to Article 5 of the law, any amendments should be notified to the registrar within 14 days of the actual amendment. According to Article 11 of the law, any false entry in the register by the registrant due to his bad faith would subject the registrant to be imprisoned for no more than one month or paying a fine of no more than 20 JD or both of them

According to Article 13 of the law, the registrar should provide the registrant with a proof of his ownership of the trade name. According to Article 18 of the law, any one in the public domain can investigate the register of the trade name and have a copy of any entry in the register.

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According to Article 10 of the law, if the trader did not register his trade name, he cannot claim legal protection for that name unless he proves that he has justifiable reasons for delay in registration and the court must be convinced with such reasons. According to Article 15 of the law, if the trader stops his trading or stop the usage of the trade name in his trade, he should notify the registrar within one month, otherwise, he would be subjected to pay 20 JD as a fine. According to Article 16 of the law, the registrar can refuse any registration that he believes it would confuse the public or cause unfair competition between traders. The registrar decision is subject to a final appeal with the minister of trade and industry which is a stark weakness in the law since any appeal should be directed to the judiciary (the court of first instance is the competent court with regards to trade names).

As regards the legal effects of the registration of a trade name, the registrant shall have the right of ownership on that name including selling, hiring, mortgaging the name (Section 43 of the Commerce Law provides that a commercial title may not be disposed of independently of the business premises unless it is explicitly or implicitly provided as such while with regards to trade names this condition was not mentioned). Also, he can exploit the trade name by using it in his correspondences and the façade of his store. And finally, he can sue infringers at both criminal law and civil law levels.

Article 435 of the Jordanian Penal Law sates that anyone using deceptive measures such as producing unreal assumptions about his goods to increase or decrease the value of goods which ultimately affects the supply and demand rule would be imprisoned for no more than one year and paying a fine no more than 100 JD. The punishment would be doubled if the practice was related to crucial goods such as wheat, grains, sugar, and oil.

At the civil law level, besides the basis of the omissive responsibility in torts, trade names are protected implicitly in the Unfair Competition Law No. 15 of 2000. Article 2 reads as follows

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A. Any competition contradictory to the honest practices in the commercial and industrial activities shall be deemed one of the unfair competition acts and particularly the following:

1. The activities that may by nature cause confusion with entity, products or commercial or industrial activities of one of competitors.

2. Untrue assumptions in practicing trade, whereby causing deprivation of trust from one of the competitors' entity, products or industrial or commercial activities.

3. The data or assumptions which use in commerce may mislead public in respect to the product's nature, methods of manufacturing, properties, amounts, and availability for use.

4. Any practice that reduce the product reputation, cause confusion in respect to the product general shape or presentation, or mislead the public on declaring the product price.

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The Relationship between Trademarks and Domain Names

Given the increasing commercialization of the internet, organizations frequently seek the registration of a domain name which creates an obvious link with their trademarks in real life activities. However, the interoperability between trademarks and domain names is a complex issue. This complexity is based mainly on the assumption that domain name space is and should be an extension of trademark space. This assumption is both unwarranted and unwise. In order to show the weakness of the above-mentioned assumption that domain name space is and should be an extension of trademark space, it is useful to define both trademarks and domain names.

A trademark is a word or symbol which acts to identify a product so as to distinguish it from other products provided by others. The law related to trademarks was developed to resolve disputes between competing businesses where one business adopts and uses a trademark that is identical or confusingly similar to that of another. This law is found both in statutes and in the common law action of passing off.

In basic tenets of trademark law, there are two types of infringement; infringement that causes a likelihood of confusion, and infringement that dilutes the value of a trademark. As regards the former, the issue is not whether the marks themselves would be confused to each other, but rather whether the use of a similar mark will cause consumers to confuse the source of the goods. As a result, in traditional trademark context, to find a likelihood of confusion, courts look at set of factors such as the similarity of products for which the name is used, the strength of the complainant's mark, and actual confusion. As regards the latter, trademark dilution is defined as the lessening of the capacity of a famous mark to identify and distinguish goods, and thus impair the value of the trademark, even if the use of a mark does not produce a likelihood of confusion. In other words, trademark dilution permits the owner of a unique trademark to block someone's actions regardless of whether the owner and other party are in competition with each other or that the actions give rise to confusion or not. Instead, the purpose of the dilution statutes is to protect a famous trademark from damage caused by the use of the mark in non-competing endeavours. So the trademark owners do not have to show that infringes' action was actually caused marketplace confusion. In general, in deciding whether the mark is distinctive

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or famous, there are non-exclusive factors that should be taken into account, such as, the duration and extent of use of the mark in connection with the goods, the duration and extent of advertising and publicity of the mark, the degree of the recognition of the mark in the trading areas and channels of trade, and the nature and extent of use of the same or similar marks by third parties.

Dilution may take one of two forms, blurring or tarnishment. Dilution by blurring involves using a strong mark for unrelated purposes until it is no longer a strong mark or until it ceases to possess its power to attribute goods to their source. This will result ultimately in whittling away of an established trademark's selling power. Dilution by tarnishment occurs when a famous mark is linked to poor quality products, or otherwise displayed in a derogatory manner, which leads to hurt the reputation of the owner of the trademark.

But, in order to understand what is meant by domain names, one must define domain names within the context of the World Wide Web, the internet, and the Internet Protocol (IP). From a technical standpoint, the Web, the internet, the IP, and domain names are different conceptions. The Web is a multimedia portion of the internet. It is important to notice that the web is not a component network of the internet at all, but a service provided over the internet. The pages of a web are most often written in a format, like a word processing format, that can be read by browsers such as Netscape or Internet Explorer. The most common format is called Hypertext Mark-up Language (HTML), which includes the ability to build in links to other pages or services within a page. The web uses a specific protocol, the hypertext transfer protocol (HTTP), to transfer documents written in HTML. The web is made up of individual "sites" each of which may contain text, graphics etc. Internet Protocol (IP) addresses are represented as strings of digits divided into parts or fields. For example: 124.33.45.112. But using these numerical strings is somewhat inconvenient; consequently, the IP address system has been overlaid with a more user friendly system of domain names which serve as identifiers of the web sites.

From those two definitions of a trademark and a domain name, one can notice that both trademarks and domain names share the same legitimacy of existence, i.e., to allow merchants to establish reputations, protect their goodwill from fraud and confusion, and ensure that consumers can identify the actual source of the merchant's

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products. However, the delivery of such tasks leads to substantial differences between a trademark and a domain name.

Since trademarks are names designated to identify the source and affiliation of goods, they are not used to locate goods. But domain names, due to the technical nature of the internet, are inherently used to both identify and locate goods. Domain names are partly functional (a computer user's address on the internet and the vehicle which enables a user to locate other internet users) and partly an indication of the origins of goods. Therefore, the application of trademark law to domain names, with their dual nature, might be problematic. It appears that the possibility of confusion, or more precisely, the standard of confusion, between trademarks and domain names is much higher on the internet than traditional trademarks confusion. As a result, the criterion of confusion, which is applied in trademark disputes, cannot be applied effectively in domain names disputes.

For instance, the interoperability of the dilution and likelihood of confusion of trademarks on the internet should be underlined clearly. In *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*, the operator of an adult entertainment web site registered the domain name "candyland.com". The court granted a preliminary injunction claiming that the adult-oriented web site was likely to dilute the value of the trademark which is owned by Hasbro, the maker of the "Candy land" children's board game. This was perceived as diluting the wholesome nature of the name and causing irreparable harm to Hasbro, notwithstanding the fact that an average consumer would not be confused into thinking that he or she would buy a child's board game from a cyber-sex web site, and therefore leaving the web site as soon as they realise that this web site is not the particular web site that they are looking for.

Besides, there are some limitations on the resolution of domain name disputes. In *Pitman Training Ltd and Another v. Nominet UK and Another*, the Pitman publishing company was established in 1849. In 1985 the various divisions of the business were sold. The defendant acquired the publishing business, and the plaintiff acquired the training business. An agreement was reached at that time providing for the continued use of the Pitman name by the new users. In 1996, a request was submitted by the defendant to "Nominet UK", the organisation which administers the "UK" domain

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name system, seeking the registration of the “pitman.co.uk”. The plaintiff made a totally independent request for the allocation of the same domain name. Applying “first come, first served” rule, “Nominet UK” allocated the domain name to the defendant. The High Court held that the plaintiff had not demonstrated a reasonable prospect of succeeding in its action because relief in such action can only be granted in support of some viable cause of action, however convenient the grant of that relief might appear to be.

Clearly, this happens when “the first-come, first-served” internet domain name registration policy collided with trademark law; simply the domain registrant does not own the disputed trademark, but he or she got there first.

Furthermore, domain name disputes are not viewed only as an infringement of an existing registered trademark, domain name disputes could exist where two or more companies, each with legitimate claims to the name, want to use the name in their domain names. With different categories of goods in the trademark register, the same name may have been allocated to a number of persons. The existence of many national trademark regimes is likely to result in further duplication. But, due to technical constraint on the domain name system, only one trademark owner can own a domain name which corresponds to his or her trademark. In actual fact, given that the internet is a large marketplace without boundaries of any kind, where geographical boundaries and different lines of business are combined together in one marketplace, it has been conceived that companies in different line of business (non-competing class of products) and different geographical locations, whose trademarks did not formerly conflict, now have to fight over a single domain name.

In theory, a domain name registration could be held by a person who owns an identical trademark in one country, while there is another party with an identical trademark registered in another country. Each of the parties might bring a successful action in its own jurisdiction. The problem arises because the Domain Name System (DNS) gives rise to registrations that result in a global presence, while trademark rights traditionally gives rise to rights that are exercisable only within the territory concerned. There is an intersection of a global medium, such as the internet, with historical, territorially based system that emanate from the sovereign authority of the territory, such as trademark system.

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Even in the same jurisdiction, solutions for domain name disputes might be difficult. For example, if there is a Leeds lock company and Leeds computer store, under the current internet naming system, neither one will be able to block the other from using the word “Leeds” as a web domain name in the commercial top level domain name “com”. At the same time, one of them will not be able to include its trademark in its domain name, since there can be only one “Leeds.com”.

The same applies to well-known trademarks, such as “Thrifty”. It is permissible to use the name thrifty for a car rental company, a drug store, and a gasoline station at the same time, because the three businesses are so different that consumers are not likely to be confused by the same name. However, the car rental company is presently using the domain name “Thrifty.com”.

And finally, there might be a domain name consisting of the initials of the name of a corporation that is well-known in one country, while there is another corporation with the same initials to its name that is well-known in another country. In some cases, domain names were registered to other companies who shared an acronym or a name with a more well-known counterpart, and therefore shared a legitimate claim to the name.

The following example might illustrate this point. The domain name “aba.com” is registered to the American Bankers Association, “aba.org” to the American Birding Association, and “aba.net” to a company called “Ansaback” which provides electronic mail services. All appear *bona fide* organisations, but there is no room left for the perhaps better known American Bar Association whose web site has to use the less intuitive domain name “abanet.net”.

That said, it becomes clear that the numerous instances of abusive domain name registration will definitely result in internet users’ confusion and an undermining of public trust in the internet. However, given that there are widely divergent levels of technical comprehension of domain names, the complexity of technical nature of domain name disputes can be handled and controlled through OADR because third

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party neutrals' expertise could be useful in dealing with certain aspects of the legal-technical setting of domain name disputes.

It appears safe to presume that the third party neutrals in domain name disputes should understand that one of their primary tasks is to analyse carefully the relationship between trademarks and domain names. Many arbitrators, for example, are intimately familiar with domain name disputes, and, thus, bringing a greater level of expertise than would be evident in a court of law. This expertise will enhance a deep understanding of the peculiarities and particularities of domain name disputes, and ultimately result in more fair and just decisions. OADR in general, and e-mediation in particular, as a process of facilitating negotiations between parties, would be an attractive way of resolving domain name disputes because those disputes require some creativity in finding solutions.

The Conceptualization of the Term "Use" of a Domain Name.

The crystallization of what constitutes "use" of a domain name on the internet is a perplexing issue. In order to be an infringement, the domain name owner must create confusion by promoting the confusingly similar domain name. Accordingly, mere registration of a domain name as an internet address, without further promoting or advertising, is not infringement. As a result, many uses of a domain name on the internet would not give rise to trademark rights. However, this contradicts one of the primary purposes of trademark laws, which are sought on one hand, to eliminate deceitful practices in commerce that involve the misuse of trademarks, and on the other hand, sought to eliminate other forms of misrepresentations which do not involve any use of what technically be called a trademark. In *British Telecommunications Plc., Virgin Enterprises Ltd., J Sainsbury Plc., Marks & Spencer Plc., and Ladbroke Group Plc. v. One in a Million and Others,* commonly known as "One in a million" case, a slew of domain names were registered with the U.S. registry (NSI), such as "marksandspencer.com", "bt.org", "virgin.org", "britishtelecom.net". The court stressed that mere registration of a domain name was not, in itself, passing off or infringement of a trademark, rather it was a pattern of activity that amounted to a threat of passing off because it was a deliberate practice, with a clear intent, to deceive people as to the origin of the domain.

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In an ICANN case, *Telstra Corporation Limited v. Nuclear Marshmallows*, a company called "Nuclear Marshmallows" registered the domain name "telstra.org", but did not use it for any purpose. Another company called "Telstra" already had a registered trademark for "telstra". It was stated that Nuclear Marshmallows had used the name in bad faith simply by not using it. In this case, it has been emphasised that:

> The concept of domain name being used in bad faith is not limited to positive action; inaction is within the concept.

A similar conclusion was reached in *Maritz, Inc., v. CyberGold, Inc.* case. The court held that although the defendant's web site was not operational yet, plaintiff's claim was not necessarily premature. In the court's opinion, the defendant was doing business by merely giving information about the upcoming services.

The analysis of the above-mentioned cases might suggest that there is a need to differentiate between domain name warehousing and domain name speculation in order to decide on what constitute "use" of a domain name on the internet. While domain name speculation is the business of registering infringing domain names, most likely, for sale to others, domain name warehousing is not necessarily a misuse.

Domain name warehousing takes place when firms acquire domains with the same name as a trademark they have registered for some valid reasons, even though they have no intention of using the domain. They may do so in order to prevent someone else from using it and causing customer confusion. Sometimes, a firm may register a domain name before registering a trademark as part of a process of preparing a new campaign. Actually, some retailers began their online operation by putting up non-transactional sites to provide company and product information, possibly to generate interest.

As a result, it is imperative that any decision that may be made by an OADR provider upon a dispute over what constitutes a "use" of a domain name should consider the following factors collectively (a) the existence of registration of both a trademark and

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a domain name (b) the existence of factors which lead to confusion (c) an interchangeable analysis of the existence of registration, and the existence of factors which lead to confusion.

The Existence of Bad Faith in Domain Name Disputes.

Bad faith in a trademark dispute is the intention to create confusion in order to exploit the goodwill connected with a trademark. In *British Telecommunications Plc., Virgin Enterprises Ltd., J Sainsbury Plc., Marks & Spencer Plc., and Ladbroke Group Plc.* v. *One in a Million and Others*, the court indicated that the court should consider the intention of the defendant to appropriate the goodwill of another or enable others to do so.

However, the articulation of what constitute bad faith in domain name disputes is a difficult task. For example, in *Sporty's Farm LLC v. Sportsman's Market, Inc.*, the U.S. District Court found that defendant's operation of the "sportys.com" web site was unlikely to cause confusion, but diluted plaintiff's registered mark. The court held, however, that the defendant's dilution was not wilful. But surprisingly, the Second Circuit held that defendant's actions showed bad faith intent to profit.

Similarly, WIPO's Final Report on the Management of Internet Domain Names and Addresses proposes that every registrant should be required to make:

> A representation that, to the best of the applicant's knowledge and belief, neither the registration of the domain name nor the manner in which it is to be directly or indirectly used infringes the intellectual property rights of another party.

In a typical domain name dispute, however, if A and B both have registered the same trademark in different sectors of business and/or different jurisdictions, and both of them are aware of the other's registration of the trademark, only A can register a domain name that reflects his or her trademark on the internet. This is due to technical constraint on the domain name system where only one trademark owner can own a domain name which corresponds to his or her mark. Accordingly, it is virtually impossible that A can give a good faith representation that a contemplated domain name, which reflects his legitimate right to reflect his own trademark as a presence on

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the internet, and at the same time, prevent B from registering his mark on the internet, does not directly or indirectly infringe the intellectual property rights of B.

Equally, the UDRP provides in paragraph 4(a) that a complainant must assert that the domain name has been registered and used in bad faith. Paragraph 4(b) of the UDRP, provides for evidence of the registration and use of a domain name in bad faith, such as, circumstances indicating that the registration or acquisition of the domain name was primarily for the purpose of selling or renting the domain name registration to the complainant, who is the owner of the trademark, or to a competitor of the complainant, for valuable consideration, or that the registration of the domain name was to prevent the complainant from reflecting the mark in a corresponding domain name, or to disrupt the business of a competitor, or for the mere intention of attracting internet users for commercial gain to a particular web site by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of goods or services.

These measures, nevertheless, do not provide structural criteria to what might suffice to rebut that showing by the defendant. For example, if a plaintiff submits evidence that the registrant offers to sell a disputed domain name for a particular consideration; this is sufficient evidence to a case of abusive registration. But the defendant may show that the offer was in response to a request from the plaintiff. In fact, it is hard to see how it could be bad faith to respond to a solicitation of a bid, especially, if there is a dispute between the parties and the offer was part of a settlement. In the WIPO case, *Gordon Sumner and p/k/a Sting* v. *Michael Urvan*, the panel remarked that the complainant tendered evidence that the respondent had offered to sell the domain name to him. The respondent countered that such offer was only made in response to a solicitation from the complainant. Accordingly, the panellist concluding that merely responding to an offer of sale did not constitute evidence of bad faith as required by section 4(b) (i) of the UDRP.

This is duplicated by the fact that dealing with a multitude of registrations of a well-known trademark, with the availability of a plethora of variations and deceptively

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similar marks, makes detection and monitoring of bad faith in the infringement of a well-known trademark a daunting challenge. The variations on domain names are virtually endless. For example, even if http://www.mcdonalds.com web site is registered to McDonalds Corp., the well known company, another unaffiliated party in, say, Italy could register http://www.mcdonalds.it web site, as its domain name.

Also, there are cases where an extremely minor variation or a misspelling can cause a huge damage to a well-known trademark. This makes detection and monitoring of bad faith in the infringement of a well-known trademark a daunting challenge. For example, the http://www.intel.com web site, where the (I) and (E) are transposed, could become http://www.entil.com, which can cause a huge damage to "INTEL", the well known trademark in the field of technology and computers.

And finally, a domain name could be a logical choice for the domain name holder, but it coincidentally could be very similar to, or actually someone else's existing trademark. This could be called an unintentional overlap of names. For example, in *French Connection Limited v. Antony Toolseeram Sutton*, the plaintiff could not establish passing off against a defendant who had registered the domain "fcuk.co.uk". The defendant established that "fcuk" is a well-known term in internet circles (as a term used to avoid censors) and had this meaning long before the plaintiff adopted it. The court found that the defendant's argument was a creditable defence to the charge of intentional passing off.

As a result, it appears safe to presume that OADR providers should understand that one of their primary tasks in domain name disputes is to determine adequately the good faith of a registrant because although bad faith clauses are designed to give the parties flexibility, they often cause problems due to its uncertainty.

Non-commercial Uses of Domain Names

In any commercial dispute setting, a definition of the boundary between unfair and unjustified misappropriation of another's property, either tangible, intangible, or intellectual property, on the one hand, and fair use or justified non-commercial use, on the other hand, is very important. As a result, consideration needs to be given to the

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way in which the distinction between commercial and non-commercial use of a domain name is conceptualised. This distinction must accommodate the diverse nature of the internet users. One must not lose sight of traditional non-commercial internet uses because the internet is not exclusively a medium of commerce.

The assumption that the internet is an exclusive medium of commerce might open the door to an overall unjust result in domain names dispute resolution. Any overzealous implementation of measures proposed for the protection of intellectual property may result in significant limitations on other important rights and interests on the internet.

Conflicts can arise between trademark holders, and persons with indisputably legitimate interest in a mark, although this legitimacy is not deriving from a trademark right in a commercial sense. These are non-trademarked, yet legitimate uses of words, names and symbols. In the ICANN case, *Bruce Springsteen v. Jeff Burgar and Bruce Springsteen Club*, the panel observed:

> The internet is an instrument for purveying information, comment, and opinion on a wide range of issues and topics. It is a valuable source of information in many fields, and any attempt to curtail its use should be strongly discouraged.

There are domain name registrations which are justified by legitimate free speech rights. However, although fundamental free speech interests, including parody and criticism of famous corporations, are stated in WIPO's Final Report on the Management of Internet Domain Names and Addresses, UDRP in 4 (c) (iii), states that a legitimate non-commercial use of a domain name will be denied protection if the registrant has an intent to tarnish the complainant's trademark. It does not appear, therefore, that the UDRP gives an adequate weight to free speech interests.

Without a doubt, the use of the conception of tarnishment is not appropriate, since it raises freedom of speech concerns that non-commercial users are entitled to. It seems clear that a web site designed to attack a company's labour practices or its environment record might be considered to show intent to tarnish a mark. Moreover, there are various meanings of tarnishment. Sometimes even gentle criticism of corporations such as comparative price and quality advertisement has been held to be

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tarnishment. Furthermore, the articulation of a concept such as "international tarnishment" seems to be broad enough to reach parody sites such as the "RoadKills-R-Us" (available online at http://www.rru.com), and criticism sites such as Mcspotlight.org (available online at http://www.mcspotlight.org).

Suppose that an online company called "verizon.com" registered the domain name "verizonsucks.com", as a precautionary tactic. However, a hacker registered "verizonreallysucks.com". Because the intent of the registrant of the latter domain name is to ridicule the newly formed company and not to make a profit, one can argue that the bad faith intent to profit has not been crystallised. It might be said accordingly that (trademarksucks.com) domain names, for example, may be protected as free speech because of their communicative content, while (trademark.com) domain names, which serve merely as source identifiers, are unprotected as free speech platforms.

In view of the inter-relationship between domain names as commercial indicators, and domain names as freedom of speech platforms, it is imperative that OADR providers expand their field of vision to understand the human rights implications of the domain naming system, and in particular freedom of speech and expression. From this perspective, it appears safe to presume that OADR providers must understand that one of their primary tasks in domain name disputes is to determine adequately whether disputants are interested in free expression, or they are in the business of acquiring domain names which might prove valuable to business enterprises, and selling such domain names to the business for a profit.

The Content of the Web Site

The ways in which HTTP protocol and HTML language operate allow a user to construct pages which can refer to or include material from other sites. There are many cases where a web site plucks an image as a trademark from another web site and incorporates the image into its own web page. If an author of a web page includes a link to materials protected by a trademark, which allows the browser to access these materials, then this author may be held responsible for trademark infringement. In fact, the effect is the same regardless of whether the web page author incorporates the materials directly into his web page, or whether he configures his web page so that whenever it is accessed, the page automatically downloads and incorporates the

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infringed materials. This practice can be even more complicated by "inlining", which is a form of hypertext mark-up language in which the creator of a web page can embed other content by using a textual reference describing where on the network the infringed material is located. This creates an extension to trademark problems and can be a major source of confusion on the internet because if there is a disputed domain name, the trademark holder cannot sue all web sites that have a hyperlink, deliberately or not, to lead customers to the disputed domain name.

For example, in *Playboy Enters v. Frena*, the defendant's subscription computer bulletin board service distributed unauthorised copies of plaintiff's copyrighted photographs bearing Playboy's registered trademark. After analysing the distinctiveness of Playboy's mark and the likelihood of confusion created by Frena's (the defendant) use of the mark, the court found that the defendant had infringed Playboy's registered trademark.

Consequently, a strong argument in favour of infringement could be made if the infringed mark is being used prominently on the internet homepage content, rather than just in the internet address. It appears safe to presume therefore that OADR providers should understand that one of their primary tasks in domain name disputes is to concentrate on whether or not there is a likelihood of trademark confusion concerning the actual contents of the web site, rather than the domain name itself.

Domain Names and Search Engines on the Internet

Ironically, while simply putting up a web site does not mean that many people will visit it, the way that various internet search engines work enhance the likelihood that even the most obscure web sites can find viewers. For example, when an internet user searches for the word "delta", the famous "Delta Airlines" web site may not appear on the first page on an "Alta Vista" search report.

The problem of search engines on the internet was not resolved by the addition of Top Level Domains (TLDs) extensions to domain names, such as (.com), (.uk), because these TLDs are insufficient to avoid internet users' confusion. A trademark infringement occurred when search engines on the internet pointed to a particular web site, notwithstanding the existence of TLDs. For example, in theory, both the Austin

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Intellectual Property Law Association (AIPLA) and the American Intellectual Property Law Association (AIPLA), can register both “aipla.com” and “aipla.org”.

Besides, the use of upper case letters and a period to separate a domain name into two parts, in order to differentiate between two domain names, is insufficient to avoid confusion, since a search engine would treat the two domain names indifferently, i.e. notwithstanding the upper case letters and separated periods.

Even if a disclaimer has been put up at a web site, it would not reduce the chances of confusion and deception of internet users, since a disclaimer might confuse the search engine itself and cause the web site to be shown as a “hit” which the “internet surfer” would then visit.

Therefore, it appears safe to presume therefore that OADR providers should understand that one of their primary tasks in domain name disputes is to concentrate on the confusion that might arise from search engines.

Reverse Domain Name Hijacking

Domain name disputes are not related only to the appropriation of a well-known trademark from real space, but the appropriation of a cyber trademark with or without formal mark registration. This practice is called “reverse domain name hijacking”.

In reverse domain name hijacking, the owner of a trademark intimidates the legitimate holder of a domain name to surrender his or her domain name after the investment of considerable amount of time and money and human creativity into his or her internet-related businesses.

Unfortunately, UDRP wording did not eliminate the practice of reverse domain name hijacking. For example, Article 4 (c) (ii) has indicated by implication that trademark owner is always called “complainant”, notwithstanding the fact that domain name holder could be a complainant for a reverse domain name hijacking. Moreover, UDRP stated in Article 6 that the domain name holder shall not name ICANN as a party in any domain name dispute proceeding, but it does not mention the same action done by the trademark holder.

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Instead of defining a balanced public policy, the UDRP increases the rights of trademark holders at the expense of domain name holders. This raises a fairness issue in domain name disputes context; namely, this preferable treatment of the trademark owners at the expense of domain name holders on the assumption that all domain name holders are cyber-squatters.

However, the UDRP should be more cautious and more balanced as it might unfairly expose domain name holders acting in good faith to costs in responding to complaints brought against them. Those costs may be so burdensome that internet users give up domains rather than defend themselves. There is a need to provide more justice in this context by balancing the interests of both disputants; trademark owners, domain name holders. Indeed the broader view of doing business on the internet implies the protection of all stakeholders. Therefore, it appears safe to presume therefore that OADR providers should understand that one of their primary tasks in domain name disputes is to concentrate on reverse domain name hijacking.