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The Legal Regulation of transactions Related to the Commercial Establishment

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Abstract:

The most important transactions that may apply to a commercial business include its sale, contributing it as an in-kind share to a company's capital, leasing its management, and pledging it as an intangible movable property. The owner of the commercial business has the right to exploit it personally and may exercise all property rights over it, whether through use, exploitation, or disposition.

In this context, the owner may transfer the commercial business through sale or retain it for usufruct. Additionally, without relinquishing ownership, the seller may offer it as security for the repayment of debts by pledging it.

key words:

commercial business – contract – sale – lease – pledge.

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Introduction:

The commercial business (goodwill) is considered one of the most important concepts in commercial law, as it represents the legal and economic tool for practicing commercial activities. It constitutes the framework through which various transactions aimed at generating profit are carried out. The commercial business has acquired a central position in modern legislation due to its effective role in stimulating economic activity and organizing relations between traders and business partners.

The commercial business is characterized as intangible movable property that includes a set of material and moral elements which together form an independent economic unit, such as clientele, commercial reputation, and trademark, in addition to equipment, tools, and machinery. This concept enables the merchant to exploit its components in order to carry out continuous and regular activity, which has made it subject to legal transactions such as sale, pledge, and lease.

The importance of studying the commercial business lies in its role as a key factor in ensuring the stability of commercial transactions and protecting the rights of parties involved, including regulating the transfer of ownership, defining the scope of liability, and providing legal security for investors. For this reason, its rules have become fundamental pillars in contemporary commercial law[1].

Based on the above, a central issue arises: To what extent is it permissible to conclude transactions involving the commercial business? And what is the legal validity of these contracts?

These transactions will be examined through two sections:

-**The first section** will be devoted to the sale of the commercial business.

-**The second section** will address the lease and pledge of the commercial business.

[1] *Houria Bournane, Détermination de la nature juridique du fonds de commerce, Revue Al-Moufakkir, Vol. 3, No. 1, 2008, p. 99.*

Section I: The Sale of the Commercial Business

The sale is considered one of the most important transactions involving the commercial business, as it constitutes a key tool in managing economic activity. Due to its importance, the legislator has regulated it with special provisions in the Commercial Code, from Articles 79 to 117, which differ from the general rules of sale under the Civil Code. This distinction arises from the specific nature of the commercial business as a commercial act and as intangible movable property.

A) The Formation of the Sale of the Commercial Business

The sale contract is formed based on both substantive and formal conditions.

1- Substantive Conditions

For the sale of a commercial business to be valid, it must satisfy the essential substantive elements required for any contract: consent, subject matter, and cause.

Consent must exist, be issued by a legally capable party, and be free from defects.

Due to the increasing number of lawsuits seeking to annul sales contracts because the buyer was misled, courts have expanded the grounds for annulment based on mistake. This includes cases where the seller conceals from the buyer the existence of a court ruling ordering the closure of the commercial business for operating without a license[1], or when the seller provides misleading information regarding the profits achieved by the business.

The subject matter of the sale is the commercial business itself, which consists of a set of material and moral elements. These elements may include a patent, if it forms part of the business assets.

It is important to note that moral elements are essential and the commercial business cannot be sold without them, unlike material elements. French courts have held that there is no valid sale of a

[1] *Nadia Foudhil, Le droit commercial algérien, 9th edition, Diwan of University Publications, Algeria, 2007, p.181.*

commercial business when what is transferred is a non-independent activity operating for only a few months and lacking a customer base.

Therefore, the sale does not need to cover all components of the commercial business. It may be limited to only some of its elements. In such a case, the rules governing the sale of the commercial business still apply, provided that the sold elements include the essential components necessary to constitute the business.

As for the cause (reason), the purpose the obligor seeks to achieve, it must exist, otherwise the contract is void. The cause must also be lawful, non-illusory, and not fictitious. The cause stated in the contract is presumed to be real unless proven otherwise, and the burden of proving simulation lies on the party alleging it.

In this context, the cause relates to the objective achieved through the exploitation of the commercial business. Therefore, the subject matter of the obligation must be lawful, otherwise the contract is void.[1]

If a party undertakes for an unlawful cause or for a cause contrary to public order or morality, the contract shall be voided.[2]

2- Formal Requirements of the Contract for the Sale of a Commercial Business

The Algerian legislator has subjected the contract for the sale of a commercial business to special formal requirements, namely official written form and publication procedures.

Despite the principle of freedom of proof applied in commercial matters, as provided under Article 30 of the Commercial Code, which allows commercial contracts to be proven by official documents, private documents, accepted invoices, correspondence, parties' account books, testimony, or any other means accepted by the court, the legislator has deviated from this rule in the case of the sale of a commercial business. The legislator has imposed a special formality,

[1] *Mohamed Saïd Jaafour, Introduction aux sciences juridiques, Dar Houma, Algeria, 2005, p.230*

[2] *Article 97, amended by Order No. 58-75 dated 20 Ramadan 1395 corresponding to 26 September 1975 (replacing the repealed Article 96 under Law 10-05 dated 20 June 2005): "If a contracting party commits for an unlawful reason or a reason contrary to public order or morals, the contract is null and void.*

which is the requirement of an official written document, as provided under Article 324 bis 1 of the Civil Code.[1]

Article 79 of the Commercial Code[2] confirms this requirement, stating that every voluntary sale, promise of sale, or any transfer of a commercial business,whether conditional, made through any type of contract, resulting from partition or auction, or contributed as an in-kind share in a company's capital, must be proven by an official document, otherwise the act is void.

These provisions clearly classify the sale of a commercial business as a formal contract. The mere consent of the parties is not sufficient for its formation; the legislator requires a strict formality, official written form, and no other form of proof is admissible before the courts. This formality is not merely an evidentiary requirement but a constitutive element of the contract itself.

In addition to the requirement of official form, the legislator has also subjected the sale of a commercial business to specific publication procedures[3]. According to this rule, any transfer of a commercial business under Article 79 must be announced within fifteen days of its date. The buyer must publish a summary or notice in the Official Bulletin of Legal Announcements and in a newspaper specializing in legal announcements within the district or province where the commercial business operates.

For mobile commercial activities, the place of publication is the location where the seller is registered in the Commercial Register.

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[1] Article 324 bis 1 of the Civil Code, which states: "In addition to contracts that the law requires to be in a formal form, contracts involving the transfer of ownership of real estate, property rights, commercial or industrial premises, or any of their elements must, under penalty of nullity, be executed in a formal form.

[2] Article 79 of Order 59-75 dated 26/09/1975, containing the Commercial Code, J.R. 101, which states: "Any voluntary sale or promise of sale, and more generally any transfer of a commercial premise, even if conditional or under another type of contract, or involving the transfer of a commercial premise by partition, auction, or contribution to a company's capital, must be proven by a formal contract, otherwise it is null and void.

[3] Article 83 of the Commercial Code.

The summary or notice must be preceded by the registration of the contract transferring ownership, or by the declaration required under registration law in cases where no contract exists; otherwise, the transfer is void.[1]

Under penalty of nullity, the published summary must include: the dates, amounts, and reference number of the transaction, the date of the contract, the names, surnames, and addresses of both the new and former owners, the type and location of the commercial business, the agreed price including costs, the valuations used as a basis for registration fees, the deadline for filing oppositions, and the elected domicile within the jurisdiction of the court.

Publication is made from the eighth to the fifteenth day after the first notice, and the announcement must appear in the Official Bulletin of Legal Announcements within 15 days from the first publication.[2]

B) Execution of the Sale of a Commercial Business

The execution phase involves the obligations of both the seller and the buyer, along with the legal effects arising from the sale. The details are presented below:

1- Obligations of the Seller

The seller's obligations include: delivering the commercial business, guaranteeing hidden defects, guaranteeing against eviction, and guaranteeing against personal acts.

a. Delivery

Delivery is one of the most important obligations of the seller, enabling the buyer to possess and benefit from the commercial business. The seller must also preserve the business until delivery, as stated in Article 364 of the Civil Code: "The seller must deliver the sold item to the buyer in the condition it was in at the time of sale."

Delivery includes the sold item and its accessories and must occur at the time and place agreed upon in the contract. In the absence of agreement, delivery must take place immediately upon conclusion of the contract.

[1] *Paragraph 2 of Article 83 of the Commercial Code.*
[2] *Article 83, paragraph 5 of the Commercial Code.*

Since the commercial business consists of both tangible and intangible elements, each must be delivered in a manner appropriate to its nature.[1]

Examples:

Merchandise is delivered by placing it at the buyer's disposal

If stored in warehouses, delivery occurs by handing over the keys.

To deliver the clientele, the seller must provide the buyer with all documents and information necessary to contact and deal with customers. As for "endorsing" the buyer to customers, the prevailing view is that the seller is not obligated to do so unless expressly agreed in the contract, although it is customary for both parties to circulate notices informing customers of the transfer and introducing the new owner.[2]

The seller must also deliver all accounting records kept during the three years preceding the sale.[3]

b. Guarantee Against Eviction and Hidden Defects

The seller guarantees that the buyer will not be disturbed in enjoying the whole or part of the commercial business, whether the disturbance arises from the seller himself or from third parties.[4]

If a third party claims ownership of the business, or any of its components, such as a patent, and the court rules in their favor, the seller must compensate the buyer.[5]

The seller also guarantees hidden defects, even if he was unaware of them. However, the seller is not liable for defects the buyer knew of at the time of sale.[6]

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[1] Article 364 of the Civil Code, which states: "The seller is obliged to deliver the sold item to the buyer in the condition it was in at the time of the sale

[2] Ben Zawawi Sofiane, Sale of Commercial Premises in Algerian Legislation, Master's Thesis in Law, University of Frères Mentouri, Constantine, 2012/2013, p. 40.

[3] Samiha Al-Qalyoubi, Summary of Commercial Law: Commercial Activities, the Merchant, Industrial and Commercial Property, Dar Al-Thaqafa Al-Arabiya, 1st edition, Egypt, 1972, p. 375.

[4] Article 82 of the Commercial Code.

[5] Article 371 of the Civil Code.

[6] Article 379 of the Civil Code.

A defect must: be hidden and unknown to the buyer, exist at the time of sale or delivery, and be significant enough to reduce the value or benefit of the business.

Example: discovering that the licenses granted to the business were withdrawn before the sale.

Since the seller must guarantee that no third-party disturbance occurs, he must also refrain from personally carrying out any competing acts, such as opening a competing business with the intention of harming the buyer. If the seller breaches this obligation, the buyer may claim damages, request the closure of the competing business, or seek rescission of the contract[1].

It should also be noted that if the buyer fails to pay the price or part of it, the seller may pursue two paths:

-Specific performance, compelling the buyer to pay through attachment and sale; or Contract rescission, treating the sale as if it had never occurred, with the right to claim damages[2].

2- The Buyer's Obligations

In a sale contract, the buyer assumes several obligations, namely the obligation to take delivery of the subject matter, the obligation to pay the agreed price, and the obligation to bear the contractual expenses.

a. Obligation to Take Delivery:

The buyer is required to take delivery of the business premises within the time agreed upon in the contract. If no such agreement exists, reference must be made to the customary practices prevailing in this matter. In the absence of an applicable custom, the buyer must take delivery of the business premises immediately upon the conclusion of the sale. The costs of taking delivery are borne by the buyer unless a custom or agreement provides otherwise.[3]

b. Obligation to Pay the Price:

The buyer is obligated to pay the price at the time and place agreed upon in the sale contract. The agreement also determines the method

[1] *Article 109 of the Commercial Code and the following articles regarding the conditions for a rescission lawsuit.*

[2] *Nadia Foudil Previous reference page 254*

[3] *Article395 from the cvil code*

of payment, whether it is to be made in installments or in a single payment. In many cases, the price is paid in installments due to its substantial amount.

c. Payment of Contractual Expenses:

Registration fees, stamp duties, real estate advertising fees, notarization fees, and other related expenses are borne by the buyer unless legal provisions stipulate otherwise[1]. If the seller pays any of these contract-related expenses, the seller is entitled to recover them from the buyer. These expenses are considered an integral part of the price; therefore, the seller enjoys the same preferential right regarding them as with the price itself, meaning priority over other creditors. The seller may also request specific performance or seek rescission of the sale if the buyer fails to fulfill these obligations.[2]

3- Effects of the Sale of a Business Establishment

The sale of a business establishment, once registered and publicized, results in the transfer of ownership from the seller to the buyer. It should be noted that certain elements forming part of the business establishment require special procedures for the transfer of ownership under specific legislation, such as patents, literary and artistic property rights, trademarks, and industrial designs. In such cases, the special procedures prescribed for each of these elements must be followed.

Section II: Lease and Pledge of the Commercial Business

In addition to transferring ownership of the commercial business, the latter may also be the subject of two other important operations: free-management leasing (gérance libre) and pledging the commercial business. These will be addressed under the following two subsections:

[1] *Article393 from the Civil Code*

[2] *Article 147 of the Commercial Code provides the following: "Registration and data entry shall be carried out in accordance with the applicable legislation if the sales or transfers of commercial premises include patents, licenses, trademarks, designs, or models."*

A) Free-Management Lease of the Commercial Business

This operation consists of a contract through which the owner of the commercial business allows another person, called the lessee-manager, to freely exploit the business, bearing all resulting risks and damages, in exchange for a specified monetary amount known as the royalty or free-management rent.

1- The Importance of Free-Management Leasing

This type of contract benefits both parties:

For the owner of the business:

It allows them to obtain financial income in the form of rent while retaining ownership of a business they no longer wish, or are unable, to operate personally.

This may also serve as a preparatory step toward eventually transferring ownership of the business[1].

It constitutes a practical solution when the owner cannot personally run the business due to lack of experience, legal incompatibility of their profession with commercial activity, or where the business was inherited by a minor.

For the lessee-manager:

It allows them to manage and freely exploit a commercial business without immediately purchasing it, or without purchasing expensive components such as patents or licenses.

2- The Legal Nature of the Free-Management Lease

This contract differs from a simple lease because the lessee operates the business independently without any supervision or control from the owner. Hence, it is called a "free-management contract."

The lessee acquires the status of a trader (or artisan, if the business has an artisanal character)[2].

The contract must be drafted in official form and published within fifteen days of its date in the Official Bulletin of Legal Announcements.[1]

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[1] *Louzi Khaled, Guidelines for Distinguishing Between Commercial Premises Lease and Lease of Property Dedicated to Business Activities, Journal of Real Estate Law and Environment, Vol. 6, No. 1, 2018, p. 110.*

[2] *Article 203 of the Commercial Code.*

3- Validity Conditions of the Free-Management Lease

The validity of this contract requires several conditions relating to:

a. The Lessor (Owner)[2]

- Must have had trader status for at least five years, or must have worked as a manager, commercial director, or technical director for at least five years.

b. The Lessee-Manager[3]

- Must be legally capable of conducting commercial activities.
- Must register in the Commercial Register.
- Must indicate on all documents bearing his signature: his name, his commercial-register number, and his status as lessee-manager of a commercial business.

c. The Leased Business

Must consist of a full commercial business containing both material and intangible elements.

The lessor must hold the right to lease the premises connected to the business [4].

4- Effects of the Free-Management Lease

a. Effects Regarding the Parties

The lessor's debts related to operating the business become immediately due, especially if the lease threatens their recovery.

Before publication of the lease contract, the lessor and the lessee-manager are jointly liable for all debts[5].

- The lessee becomes a trader, if not already one, and must comply with all trader obligations.

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[1] *Abdelaziz Maqfoulji, The Most Important Contracts Concerning Commercial Premises, Journal of Legal and Political Research and Studies, Vol. 6, No. 2, 2017, p. 149.*

[2] *Article 205 of the Commercial Code.*

[3] *Article 204 of the Commercial Code.*

[4] *Article 78 of the Commercial Code.*

[5] *Article 209 of the Commercial Code.*

- The lessee must continue operating the business in accordance with its purpose while preserving its two essential intangible elements: clientele and commercial reputation.
- The lessee must preserve all elements received and pay the rent on time.
- Sub-leasing the management without the lessor's approval is prohibited.

b. Effects Regarding Third Parties

Creditors of the lessor may fear for the guarantees securing their debts. To protect them, the legislator explicitly allows them [1] to request the court to declare the debts immediately due.

Creditors of the lessee-manager are protected by Article 209 Commercial Code[2], which holds the lessor jointly liable with the lessee for debts until publication of the lease contract and for six months thereafter.

At the end of the lease, all debts contracted by the lessee during the management period become immediately due [3].

B) Pledge of the Commercial Business

The Algerian legislator regulates the pledge of a commercial business to allow traders to use it as security for their debts while continuing to operate it normally.

Pledging the business does not give the pledgee the right to use or exploit it unless the debt becomes due and remains unpaid.

1- Conditions of the Pledge of a Commercial Business

In addition to the general substantive conditions of any contract (consent, object, cause, and freedom from defects), the legislator added special conditions regarding the pledgor and the business subject to pledge:

- The pledge contract must specify the elements included in the pledge, such as: trade name, commercial name, leasehold right,

[1] *Article 208 of the Commercial Code.*
[2] *Article 209 of the Commercial Code.*
[3] *Article 211 of the Commercial Code.*

clientele, commercial reputation, equipment, machinery, patents, licenses, trademarks, industrial designs…[1]

- The existence of a valid debt must be established.
- The pledgor must be the owner of the business or at least one of its components.
- The pledgor must have full legal capacity.
- The pledge must be established by an official document, otherwise it is void[2] , in addition to mandatory publication procedures.

2- Effects of the Pledge of a Commercial Business

Even though the pledge does not grant the pledgee the right to use the business, the pledgee enjoys several rights:

a. Right of Priority and Right of Pursuit

The right of priority allows the pledgee to recover the debt from the proceeds of selling the business before other creditors, particularly in cases of bankruptcy or judicial reorganization[3].

The right of pursuit allows the pledgee to seize the business even if ownership is transferred to a third party, although this is rare due to the legal requirement to clear all debts before registering the transfer.[4]

b. Protection of the Pledgee's Rights

To protect the pledgee, they must be informed of any operations that may affect the value of the pledged business. The pledgee may object to any operation that threatens their interests.

Conclusion:

The Algerian legislator has dedicated numerous provisions to regulating commerce and the practice of commercial activities. Thus,

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[1] Article 119 of the Commercial Code.

[2] Article 120 of the Commercial Code.

[3] Farid Kerkaden, Guarantees of the Pledgee Creditor in the Contract of Possessory Pledge of a Commercial Business, Legal Researcher Journal, Volume 7, Issue 1, 2016, p. 280

[4] This right of pursuit is rare in practice, since the procedures for registering the transfer of ownership of a commercial business require the settlement of all outstanding debts attached to the business before the transfer of ownership is officially registered.

it has defined the conditions required to acquire the status of a trader and clarified the obligations imposed on anyone holding this status, whether a natural or legal person. The legislator has also provided a rich legal framework for the commercial business, the legal acts involving it, and the mechanisms for protecting it from unfair competition.

However, despite the extensive legal arsenal established by the Algerian legislator, it has not succeeded in fully protecting traders nor safeguarding the freedom and right to engage in commercial activities. This is due to the widespread phenomenon of informal trade, the failure of many commercial practitioners to comply with legal obligations, and the weakness of monitoring and oversight of commercial activities.

Therefore, we propose a set of recommendations, the most important of which are:

The need to activate oversight mechanisms responsible for monitoring traders to verify, first, their eligibility to acquire trader status, and second, their compliance with all regulations governing their activities, such as practicing only the activity declared to the Commercial Register, and respecting tax obligations, among others.

Enriching the rules that protect the commercial business from unfair competition, as well as strengthening regulations on electronic commerce, which should be encouraged in our country to keep pace with the developments achieved by this field in other nations.

The Algerian legal system governing electronic commerce, primarily Law No. 05-18 of May 10, 2018, relating to electronic commerce, does not keep up with the massive global revolution witnessed in communications and information technology.

The commercial business, as an independent legal concept, requires specialized regulation for the contracts relating to it. These contracts should not be subjected to general rules without proper legal adaptation.

Anyone who buys, pledges, or leases a commercial business must ensure that the contract includes all necessary tangible and intangible

components of the business and comply with all formal requirements, such as contract drafting, publication when required, and precise identification of what is being sold, pledged, or leased.

It is advisable, when drafting a contract, to include clauses that safeguard the rights of both parties in case of changing market conditions, decline in commercial reputation, or loss of clientele, since the intangible value of the business is particularly vulnerable to fluctuation.

Moreover, contracts involving the commercial business deserve further academic study, especially regarding the protection of the buyer, creditor, or lessee, and the extent to which current legislation or judicial practice adequately protects these rights in real-life situations (such as in cases of trader bankruptcy, business transfer, or change of commercial activity).

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