

Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication

الأحكام القانونية والعقدية للشركات التجارية بين ضوابط الأخذ بها وأولوية الإحتكام إليها

Ben amour Aicha*, Ahmed Ben Yahia Al-Ouncharisi University, Tissemsilt

benammour.aicha@univ-tissemsilt.dz

Received: 25/02 /2025

Accepted: 29/04 /2025

Published: 13/05 /2025

Abstract:

Commercial company law comes from both written laws (like commercial and civil codes) and unwritten sources. Article 1 bis of the Commercial Code outlines these sources. The "company contract" is also a crucial source. Because of the principle of *pacta sunt servanda*, this contract holds the same legal weight as codified statutes and established practices. Therefore, the company contract is a fundamental part of the legal framework governing commercial entities

Commercial companies are primarily subject to the mandatory provisions of the Commercial Code. In the absence of a specific provision, the mandatory rules of the Civil Code apply, followed by established commercial practices. If the issue remains unresolved, the company's articles of incorporation are consulted. If there is still no applicable provision, the supplementary rules of the Commercial Code and the supplementary rules of the Civil Code.

Keywords: Company Contract, Legal Source, Contractual Source, Basic Law, Subsequent Contract.

Introduction:

Civil law serves as the foundational legal framework, with the stipulations and regulations of commercial law acting as exceptions, primarily due to their inherent attributes of expediency and credit facilitation. In situations where particular provisions are not applicable, it is essential to consult civil law, as articulated in Article 1 bis of the Commercial Code¹. The underpinnings of commercial law are categorized with legislation as the principal official source, succeeded by civil law and pertinent professional standards.

With regard to commercial companies, they are governed by written legal sources on the one hand, and unwritten sources on the other, such as commercial custom. Added to these are contractual sources represented by the company's basic law and any subsequent amendment thereto. However, the diverse sources of commercial companies' law are characterized by specificity, in terms of diversity and the priority of their application to related disputes.

Accordingly, we pose the following problem: **What are the controls for adopting the legal and contractual sources of commercial companies' law? And on what basis can certain provisions be favored over others in resolving commercial companies' legal disputes?**

To address this issue, we employed an analytical approach concerning the regulations governing all commercial entities, as well as those pertaining to individual companies in isolation. Additionally, we utilized a descriptive method to examine and organize the relevant sources. We

* Corresponding Author

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

also employed the comparative method, which we adopted to compare the legal texts between all companies in the Commercial Code or the Civil Code.

The research is divided into two separate parts: the initial part examines the legal bases of commercial companies, whereas the latter part explores the contractual underpinnings of these organizations.

Section One: Legal Sources of Commercial Companies

The word "source" denotes the origin from which the regulations governing commercial enterprises are derived. In this context, we interpret law in a wide sense to encompass legislation enacted by the legislative body, either as commercial law or civil law, along with professional standards considered as unwritten law.

Because the competent judge in any dispute applies, in the first instance, official legal sources, whether the dispute is civil or criminal, which is the case for commercial disputes, he refers to the Commercial Code in its Article 1 bis, which has characterized these sources in the Commercial Code, followed by the Civil Code and professional standards when appropriate.

The provisions of the Commercial Code do not contain a specific reference to the sources governing the law of commercial companies. Consequently, in this context, we must consider the sources of commercial law as a broader legal framework. This is not considered a shortcoming on the part of the legislator, but rather he has subjected all commercial transactions, including commercial companies, to the Commercial Code (Subsection One).

In this context, our approach was informed by the organization of these sources as outlined in the Commercial Code, which includes a clarification of the distinctions between mandatory and supplementary regulations for each legislative or customary source (Subsection Two).

Subsection One: Legislative Sources of Commercial Companies

The legislative sources consist of laws enacted by the legislative authority, notably the Commercial Code, which governs commercial activities and defines the categories of natural and legal merchants. Furthermore, the Civil Code functions as the overarching legal framework that applies in circumstances where the Commercial Code lacks explicit regulations².

Given that we are working within the realm of commercial law, a distinct area, we must adhere to the principle of "**specialia generalibus derogant**" (specific provisions take precedence over general ones). Consequently, it is essential to consider the regulations stipulated by commercial legislation and to prioritize its application in the relationships that occur among merchants³, followed by the Civil Code. Custom is recognized by the legislator as a tertiary source of commercial law, thereby serving as one of the foundational sources for the law governing commercial companies. This corresponds to the concept that "the branch follows the origin," since commercial enterprises constitute a distinct branch that has been clearly defined in the fifth book of the Commercial Code.

First Branch: Commercial Law

Commercial law means Order 75/59 relating to the Commercial Code, amended and supplemented by Legislative Decree 93/08⁴, Order 96/27⁵, Law 05/02⁶, as well as Law 20/15⁷ and Law 22/09⁸, which is what is termed as the amended and supplemented Commercial Code.

Regarding commercial companies, the Commercial Code includes mandatory provisions specific to each company individually, other provisions common to all companies, and finally provisions specific to some companies with common characteristics.

First: Provisions Specific to Each Company in the Commercial Code

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

The Commercial Code encompasses a range of regulations that pertain specifically to corporate provisions, which are characterized as mandatory rules. These rules possess the attributes of binding legal standards, which individuals are not permitted to contravene by mutual consent. Describing it as mandatory is not related to the fact that it orders or prohibits but rather means that its ruling cannot be bypassed or evaded. If individuals agree to violate it, their agreement is void, as the will of individuals is not considered here if it violates a mandatory legal rule⁹, as it is considered a necessary restriction for establishing order in society¹⁰. Compulsory regulations reflect the application of legal authority. As a result, lawmakers frequently establish these actions through directives and restrictions.¹¹.

Some of its applications in the Commercial Code include:

1. With regard to general partnerships: The rules concerning general partnerships can be found in Articles 551-563 of the Commercial Code. Notably, Article 551 delineates the defining features of a general partnership. These features are classified as public order regulations, thereby establishing them as mandatory rules that cannot be contravened. Key aspects include the joint liability of partners, the requirement for partners to possess commercial capacity, and the attainment of merchant status.

2. With regard to limited liability companies: The regulations outlined in Articles 564 to 591 of the Commercial Code provide essential guidelines. For instance, Article 564 addresses specific characteristics, including limited liability and a restricted number of partners, along with additional stipulations concerning the company's designation. Consequently, the legislator has implemented stringent mandatory provisions that must be adhered to; any deviation from these rules may lead to invalidity or the imposition of penalties.¹²

3. Joint Stock Company: As stipulated in Article 592, paragraph 1, and related sections of the Commercial Code, a joint stock company requires a minimum of seven shareholders for its formation. Additionally, the legislation establishes a minimum capital threshold that must be met for the formation of the company¹³. The obligation of each shareholder is confined to their investment in the company's capital, indicated by their shares. Shareholders are responsible for losses only up to the value of their shares.

Second: General Provisions Common Among Certain Companies

The Commercial Code comprises comprehensive regulations relevant to enterprises exhibiting similar characteristics. This classification includes share-limited partnerships, joint-stock companies, simplified joint-stock companies, single-member companies, and limited liability companies. The legislator employs a cross-referencing methodology, enabling the resolution of specific issues by referencing the provisions applicable to a fundamental category of company.

This approach avoids repetitive restatements of common regulations. However, the legislator also uses *exceptions to exceptions*, designating specific rules for particular company types. An example is the governance of partnerships limited by shares; this pertains to the rules governing joint stock companies while omitting elements concerning their management hierarchy, including the board of directors, management board, and supervisory board¹⁴.

Third: General Provisions Applicable to All Commercial Companies

The "general provisions" applicable to all commercial companies are detailed in Article 544 of the Preliminary Chapter of the Commercial Code. These encompass shared regulations, such as the classification of companies as commercial based on form or subject matter, the requirement for official written articles of association, and registration and publication procedures¹⁵. Additional shared provisions pertain to companies with legal personality¹⁶, grounds for nullification¹⁷, liquidation processes, and common violations and penalties¹⁸.

Fourth: Regulations Pertaining to Specific Laws

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

The Commercial Code contains indirect references to specific laws and regulated activities, such as the minimum capital requirements stipulated in insurance laws¹⁹, or those applicable to banks and financial institutions²⁰. The capital requirements for banks and financial institutions are higher than those for standard joint stock companies, underscoring the essential function of the banking sector within the national economy and its vital role in maintaining financial stability²¹.

Second Branch: Civil Law

Civil law serves as the general legal framework for various legal domains. Given that commercial law only recently gained functional and organic independence, the Commercial Code often refers to civil law in the absence of specific provisions.

Thus, civil law principles are consulted, first focusing on company-specific rules and then, if necessary, on the general principles of contract law.

First: Specific Provisions for Companies in Civil Law

The Civil Code dedicates specific provisions to certain named contracts, including sales, leases, and partnerships. The Civil Code addresses partnerships in Chapter Three of Title Seven (Articles 416 to 449), divided into five sections: definition of a partnership agreement, legal personality, and:

- Section 1: Formation of a company (Articles 418-426)
- Section 2: Management of a company (Articles 427-431)
- Section 3: Effects of a company (Articles 432-436)
- Section 4: Dissolution of a company (Articles 437-442)
- Section 5: Liquidation and division of a company (Articles 443-449)

Recourse should first be made to these specific provisions in the Civil Code, which are categorized as property-related contracts in Title Seven. Article 416 defines a company as a *named* contract governed by specific rules. In the context of civil law, a company can be understood as a contractual arrangement that is governed by the voluntary agreement of its partners. These individuals unite with a shared objective of achieving success in their enterprise, engaging in collaborative efforts to generate profit, and distributing both profits and losses among themselves.

Second: Contract Law as a General Source of Obligations

As a contract²², A corporation functions within the scope of general contract law, which enables contracting parties to define the creation, arrangement, and relationships of the contract with outside parties. However, governmental regulation and oversight aimed at enhancing public welfare have curbed the principle of freedom in contracting.²³

A company's contractual nature entails rights and obligations for its parties and for the legal entity recognized as separate from its partners. The legislator does not address all aspects of general provisions, such as the requirements for consent, capacity, object, and cause. Consequently, These elements are regulated by the foundational principles of contract law as delineated in Chapter Two of Title One of the Civil Code, which addresses the Sources of Obligation.

Third Branch: Customary Law

Customary law serves as a source for commercial law. According to Article 1 bis of the Commercial Code, customs are recognized as a legal source for issues related to commerce and interactions among traders, to which judges refer. Introduced by Ordinance 96/27, this provision marks a new direction for the Algerian legislator, granting commercial custom a status not present in the older Commercial Code, which subjected legal sources to general principles²⁴.

However, the role of custom in commercial companies must be clarified. An examination of the laws governing companies reveals no explicit reference to custom. Custom, as an unwritten source of commercial law, arises from consistent patterns of behavior in specific situations, coupled with a belief in its binding nature. Commercial custom pertains to transactions among

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

traders. While many of its provisions have been codified, some areas of commercial activity, such as maritime transactions, remain governed by custom. The significance of custom as a legal source for commercial enterprises is constrained due to the existence of explicit regulations, notably the contractual provisions specified in the company's articles of association

Therefore, any conflict between custom and statutory law (such as civil or commercial law) favors the mandatory written rules, which cannot be overridden. However, in the case of supplementary legal rules, custom takes precedence due to its stronger binding force. Custom can be further divided into specific and general customs, as well as unified national or international customs, each with its own priority. Specific customs for a particular activity take precedence; if no resolution is found, general customs apply²⁵. Custom is distinct from conventional practices, as it is binding on the parties, while conventional practices are repeated agreements without a sense of legal obligation. Thus, conventional practices are not a source of commercial law unless the parties explicitly or implicitly intend to adopt them, and the party invoking them bears the burden of proving their existence and acceptance²⁶.

It should be noted that Article 1 bis of the Commercial Code seemingly places civil law and custom on equal footing²⁷, which raises the question of precedence when a rule in civil law and a customary rule conflict. Mandatory rules cannot be violated²⁸, whether through tradition or consensus. In relation to supplementary provisions, it is advisable to consider the prevailing practices within the community or the expressed intentions of the parties as articulated in their contract, contingent upon the legislator's assessment of their application as a secondary concern.

Subsection two: Hierarchy of Legal Rules Based on Binding Force

Having identified the legislative sources relevant to commercial companies, we now turn to the order of precedence among these legal texts. As previously mentioned, the Commercial Code takes primary recourse, followed by the Civil Code.

As is well known, legal rules are categorized as either *mandatory* or *default* rules. Therefore, regarding commercial company sources, the question arises: which type of rule takes precedence in application—mandatory or default rules?

First Branch: Application of Mandatory Rules in the Commercial Code, Followed by Mandatory Rules in the Civil Code

The compulsory provisions outlined in the Commercial Code are to be implemented in accordance with Article 1 bis of that code, highlighting the fundamental importance of these legal requirements, which aim to maintain public order. When the parties involved in a contract have failed to come to a consensus, default rules are then consulted. In other words, unless there is an alternative agreement, the requirements outlined in these regulations must be adhered to. The purpose of these legal provisions is to enhance the intentions of the contracting parties, particularly in instances where they have not adequately addressed a specific matter within their contract. As a result, the rules that address gaps in the parties' intentions are called *default rules*.

In instances where there is a discrepancy between a commercial provision and a civil provision, the commercial provision shall take precedence, irrespective of its date of enactment. This aligns with the interpretative principle that a specific rule takes precedence over a general one, provided that both provisions are of equal standing. However, if one provision is mandatory and the other is interpretive, the mandatory provision takes precedence, as it is not permissible to agree to deviate from it.

Second Branch: Application of Default Rules in the Commercial Code, Followed by Default Rules in the Civil Code

In relation to the standard provisions outlined in the Commercial Code, deviation from them is permissible and does not entail any legal consequence. However, if there is no agreement to deviate from them, they must be applied. It can be interpreted that the legislator is conveying to

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

the parties involved the necessity to adhere to the established agreements in the absence of a mutual understanding, or alternatively, to comply with the terms they have collectively consented to, given that the contract serves as the governing framework for the parties involved.

In the absence of a contractual agreement to the contrary, we refer to the provisions established in the Commercial Code. If these provisions do not provide a resolution, we then resort to the default provisions of the Civil Code as an alternative. The rationale for the existence of these default provisions, despite the possibility for parties to mutually agree to deviate from them, is their role as protective measures. They ensure that the legal framework does not completely undermine individuals' autonomy in organizing their relationships and exercising their will.

Finally, the permissibility of agreeing to deviate from the provision prescribed by a default legal rule does not mean that these rules become optional guidelines for individuals. These regulations are indeed legal rules in the comprehensive sense, and they possess binding authority. The sole prerequisite for their enforcement is the lack of any agreement that contradicts their stipulations²⁹. In instances where a commercial dispute is presented to a judicial authority, and both a mandatory provision from the Commercial Code and a relevant provision from the Civil Code are identified, the provision from the Commercial Code shall be prioritized. This is due to the principle that a specific rule takes precedence over a general one without nullifying it. Furthermore, if both provisions are default rules, the default rule from the Commercial Code will be applied, again based on the principle that specificity restricts generality.

Conversely, in the context of regulating commercial entities, legislators heavily depend on the provisions established by the parties within the corporate contract. These stipulations serve as a contractual source endowed with legal validity, which judges may utilize for reference. The legislator has delineated the parameters for their acceptance and the order of priority for their application, potentially allowing them to supersede legal statutes in this context.

Section two: Contractual Sources of Commercial Companies

Algerian legislators perceive the firm as a contractual entity that operates under the regulations established by both the Civil Code and the Commercial Code. This viewpoint emphasizes how crucial these legal frameworks are to the regulation of businesses. This contract is an essential and defining element for the formation of commercial firms and their acquisition of legal identity, regardless of the nomenclature used—*founding contract*, *basic law*, or any variations thereof, including the commercial company contract.

The formation of commercial enterprises' validity is closely linked to compliance with formal requirements. Any shortcomings in these formalities can lead to a specific type of nullity and may also bring about various legal implications. These implications include the implementation of the *de facto* company doctrine and the rectification of the formal contract, acknowledging obligations that were in existence prior to the company's registration in the Commercial Register.

It is imperative to elucidate the function of a company's contract as a fundamental source of law for commercial entities (Subsection 1) and to analyze its comparative status among the various sources relevant to commercial companies (Subsection 2).

Subsection one: The Company Contract as the Basic Law of Commercial Companies

A company's contract represents a fundamental component that must satisfy specific formal criteria to ensure its enforceability, which includes compliance with legal regulations and procedural standards. This contract reflects the principle of "freedom of contract" and acts as a significant reference point in the event of disputes concerning its interpretation or execution.

First Branch: Concept of the Company Contract

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

In Article 416 of the Civil Code, the legislator delineates a company as a specific type of contractual arrangement. Furthermore, Article 418 clarifies that this form of contract is formal rather than founded on mutual agreement. To be deemed valid, the company's contract must be in written form and accompanied by a copy of the legally established founding contract for registration with the Commercial Registry. Furthermore, a summary of the contract is required to be disseminated in both the Official Gazette of Legal Announcements and a daily publication. These provisions also apply to any amendments made to the contract.

First: The Writing Requirement

The organization is regarded as a formal contractual entity, indicating that mere mutual consent is inadequate for its formation. Therefore, the will of the parties is not sufficient; rather, it must be cast in a written, not oral, form. If the company is a project in which two or more persons participate, enjoys legal personality, and acquires rights and bears obligations, then there must be a strong guarantee for that, particularly the matter of maintaining legal standings and their consistency. In conjunction with all elements related to the protection of appearances and the interests of the company's creditors.

Consequently, the contract serves as a fundamental condition rather than merely a form of evidence. Nevertheless, it does not come into existence through legal coercion; it must be activated by parties who possess a legitimate interest in the agreement³⁰. The creation of a contract functions as a regulatory instrument for the organization, enabling external entities to review its stipulations before entering into any transactions with the company. Additionally, in the event of a dispute involving the organization, a judge may consider the contract as a principal source of authority, giving it precedence over broader legal principles, in accordance with the legal doctrine that specific provisions take precedence over general ones.

The way documentation is handled varies depending on the type of company. For civil companies, there is no required written form, as stated in Article 418 of the Civil Code, which mentions "writing" in a broad sense, including both formal and informal formats. Conversely, commercial companies necessitate official documentation; failure to adhere to this requirement renders the company's contract invalid, a stipulation that also extends to any subsequent modifications of the contract, with the notable exception of joint venture companies³¹. Non-adherence to the formal requirements established for commercial entities leads to a distinct category of nullity, which encompasses features of both absolute and relative nullity

The statute stipulates that a written form is necessary for the company's contract to be considered valid³². The commercial entity has established a formal requirement for the validation of its claims³³. This approach differs from the established standards of commercial law and usually incorporates the principle of free evidence in commercial matters. In this context, commercial contract is justified by formal documents between partners³⁴. This represents a deviation from the overarching principle of evidentiary freedom within the commercial domain. For external parties, evidence may be established through various means, consistent with the tenets of evidentiary liberty³⁵. According to the **de facto** company theory, the invocation of a company's nullity against external parties due to the absence of written documentation is not permissible. This theory asserts that actions undertaken prior to a ruling of nullity remain valid in relation to third parties³⁶.

Second: Registration and Publication with the National Commercial Register

The articles of incorporation, formally drafted before a notary, must be registered with the National Commercial Register³⁷. This registration acts as a compulsory legal declaration that grants legal status to the commercial company. In contrast, civil companies obtain legal personality upon their establishment—specifically, from the moment their contract is drafted and all necessary components are completed—therefore, they do not need to undergo this registration process. An exception to the registration requirement is a type of joint venture, as it does not possess legal

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

personality. Any amendments to the foundational contracts must also be registered, as these constitute updates to the original articles.

The publishing process involves the distribution of a summary of the article, as well as any subsequent revisions that may occur³⁸. The formation of a legal entity, distinct from its founding partners, is formally communicated through the Official Gazette of Legal Announcements and a nationally recognized daily newspaper by the company's representative. This procedure guarantees that third parties are sufficiently informed about the company's details prior to engaging in any transactions.

The dissolution of a corporation due to failure to adhere to publication requirements cannot be asserted against external parties. However, these external entities maintain the ability to reference the legal status of the organization³⁹. The principle of the **de facto** company is relevant, signifying that activities conducted before the official registration of the company are recognized as valid concerning the entity. This provision is designed to protect the interests of identifiable situations and individuals who participate in transactions in good faith.

Second Branch: Legal Nature of Commercial Company Contracts

Company governance is fundamentally contractual, subject to the general contract rules stipulated in civil law. Specific provisions for company contracts are detailed within the section on property-related contracts in the civil code [416-449].

Contracts are based on the principle of contractual freedom, which permits parties to establish their own terms and organize their business arrangements according to their preferences. Nevertheless, contemporary laws are progressively intervening in the structure of commercial companies through clear and compulsory regulations. This intervention protects the principle of trust and credit prevalent in commercial relationships, which is no longer solely determined by the partners' will but also by the legislator's imposition of mandatory rules. State intervention, however, does not entirely erase the contractual basis, which remains fundamental⁴⁰.

The concept of contract is of significant importance in partnerships or firms, where the contractual aspect is more central compared to capital companies, which are primarily governed by regulatory frameworks. The contractual dimension pertains to the formation of the company, while the regulatory aspect relates to its operational activities. As a result, a company possesses a dual character, incorporating both contractual and regulatory components that align the intentions of the partners with the legal stipulations established by the legislator for each specific type of company. Nevertheless, the legal nature of the company may vary depending on its organizational structure, distinguishing between partnerships and capital companies.

Subsection two: Place of the Company Contract Among Sources of Commercial Companies

The sources of commercial firms differ between commercial and civil legal documents. Upon reviewing various legal texts, especially those related to commercial companies in commercial law, it becomes evident that supplementary or fallback provisions exist when there is no agreement.

Nonetheless, the contract serves as the definitive framework for the parties concerned. The intentions of the parties should be recognized, contingent upon the contract's validity and its compliance with public order and mandatory legal provisions. It is important to highlight that the legislator has not specifically addressed the electronic formulation of corporate contracts, despite the acknowledgment of electronic formats in commercial law and their acceptability as evidence in commercial disputes⁴¹. The legal framework governing e-commerce promotes the formation of electronic commercial entities, mandating that this process be conducted via electronic means rather than traditional methods. In the second paragraph of Article 6 of Law 18/05 concerning E-Commerce, the Algerian legislator characterizes an electronic contract as follows: "The contract

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

... is formed remotely, without the simultaneous and physical presence of the parties, relying solely on electronic communication technology." This definition is pertinent to all contracts, as long as they are established remotely, pertain to commercial activities, do not require the physical presence of the involved parties, and utilize information technology⁴².

Upon the proper formation of a contract, it acquires the force of law (Second). The contract, which functions as the primary governing agreement between the parties involved, holds precedence in its application, superseding any supplementary stipulations found in commercial and civil law (First).

First Branch: Contract as the Law of the Parties

The codification of the parties' intentions in a formal agreement allows it to function as the primary legal framework for the organization. According to Article 548 of the Commercial Code, the initial agreement, once officially recorded, is designated as the articles of incorporation, while any subsequent modifications are classified as the fundamental law. This underscores the importance of the company agreement, transforming it from a mere expression of the partners' intentions into a foundational legal framework that binds the parties to comply with its terms upon their acceptance of its provisions.

Second Branch: Provisions Regulating the Fundamental Law

The provisions regulating the fundamental law of a commercial company relate to both content and form.

First: Content of the Fundamental Law: mandatory and optional data

1. **Company Contract Data⁴³** : The legislator requires a set of mandatory data that must be mentioned in the fundamental law of any company, data that exist only in one type of company, and optional data.

A. Mandatory Data: mandatory data points that must be included are as follows:

A-1- Common to all companies:

- **Company structure:** The legal framework governing the organization specifies the rights and obligations of its partners, which differ based on the particular organizational structure in place. This framework may take the form of a general partnership, a joint stock company, a limited liability company, or a limited partnership.
- **Duration:** If the duration is not specified absolutely or linked to the achievement of a specific purpose, the maximum duration should not exceed 99 years.
- **Address:** The company's official address varies depending on its structure. This address is used for correspondence and agreements with third parties. This also reflects the organizational framework of the company and the legal standing of any partner whose name is included in the company's designation.
- **Headquarters:** This pertains to the site where the business interacts with outside parties, establishing the company's country of origin and national identity.
- **Subject matter:** This pertains to the object of the company's contract, which must be clearly defined. It specifies the permissible activities of the company, ensuring they are legal and compliant with public order and morals.
- **Capital amount:** This refers to the overall worth of cash or non-cash donations. Contributions that rely on labor are not included. It acts as a primary assurance for the creditors of the business. Although financial resources are essential for any business to function, the capital amount differs based on the company's type. In partnerships, there is no required minimum capital, whereas, for joint stock companies, the minimum can differ based on whether the subscription is private or public.

A-2- Mandatory Data Specific to Certain Company Types

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

For instance, a simple limited partnership, as per Article 563 bis of the Commercial Code, must include the following data in its articles of association:

- The amount and value of each partner's shares.
- The share of each general or limited partner.
- The total share of the general partners and their share in profits and losses.

B. Optional Data

The legislator permits partners to establish certain contractual terms in advance within the articles of association or through a later agreement. They can include any information they desire, as long as it does not contravene the mandatory provisions of the Commercial Code, Civil Code, or public order. For example, It is essential to clearly define the scope of the manager's authority within the articles of association, and the manager of a general partnership is required to comply with these provisions. In the absence of such explicit definitions, the manager is held accountable for all actions that benefit the company.⁴⁴ In a similar manner, the law outlines the requirements for decision-making in a general partnership, where the standard is unanimity. Nonetheless, this is regarded as an additional rule to the partners' preferences, indicating that if the partners establish different stipulations in the articles of association, such as a majority vote, the agreed-upon contractual rule will override the supplementary legal regulation found in the Commercial Code.

Consequently, this data varies depending on the company's structure and is subject to the partners' desire to include it. Within the same structure, one company may include contractual clauses while another does not. Therefore, the former is subject to contractual clauses at the expense of supplementary rules, while the latter is necessarily subject to supplementary rules.

In conclusion, it is important to recognize that agreements made after the establishment of the articles of association, which modify certain provisions, serve to update and modernize the articles in a manner akin to the amendment of a legislative statute. Consequently, these agreements result in a revised contractual rule that possesses legal authority and takes precedence over supplementary legal regulations.

Second: Provisions Relating to the Form of the Articles of Association

The articles of association must be formalized using an official template and executed in the presence of a qualified legal professional, specifically a notary. A copy of the completed document is required to be submitted to the National Commercial Register Center and published in the Official Gazette. Any modifications to this document must comply with the same procedural requirements.

It is important to emphasize that joint stock companies, as well as other organizations subject to comparable incorporation regulations, are required to develop a preliminary draft of their articles of association. This document serves as the initial proposal submitted by the founding partners of the joint stock company, indicating their intention to create the entity. Legal stipulations mandate that this proposal be prepared in collaboration with a notary and subsequently filed with the National Commercial Register Center for documentation purposes⁴⁵. The regulatory framework for the establishment of partnerships limited by shares is largely analogous to that of joint-stock companies. As a result, the incorporation process requires the collaborative preparation of a draft of the articles of association with a notary, compliance with all necessary procedural requirements, the convening of a founding general assembly, and the subsequent ratification of the articles of association. This process must culminate in the registration and publication of the partnership⁴⁶.

In summary, the recognized hierarchy of sources relevant to commercial entities dictates that, in the case of a dispute, the adjudicating judge must give precedence to the obligatory provisions specified in the Commercial Code. This should be succeeded by the ancillary provisions

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

of the Civil Code, customary practices, the revised articles of association, the supplementary rules of the Commercial Code, and, finally, the additional regulations of the Civil Code.

Conclusion:

Commercial enterprises rely on a wide range of sources, including statutory laws such as commercial and civil codes, as well as unwritten customs. However, the applicability of the latter within commercial entities is relatively restricted. Augmenting these regulations is the company's contract, a consensual source wherein parties explicitly articulate their intentions by incorporating provisions, provided they do not contravene mandatory rules or those pertaining to public order. This elucidates the distinctiveness of commercial companies' sources, characterized by the coexistence of legal statutes and contractual agreements. When legal stipulations are met and neither public order nor mandatory regulations are violated, the contractual agreement possesses a legal validity that supersedes even supplementary legal norms. Nonetheless, a critique of the legislator pertains to the exclusion of commercial customs from the legislative framework established during the formulation of commercial law provisions, despite their crucial function in addressing commercial disputes, especially those of an international nature. As a result, the following recommendations are presented:

Revising the Legal Framework: Reformulate the legal statutes governing commercial enterprises by incorporating a provision that delineates the hierarchy of sources for commercial companies. This entails designating the fundamental statute as a consensual source with precedence in application, even over supplementary regulations.

- Formalizing Electronic Incorporation Agreements: Regulate the electronic articles of association, given the increasing prevalence of electronic commercial enterprises. Legislative intervention is imperative to recognize the electronic articles of association as a source with the same force and priority as traditional articles of association.

References:

¹ Article 1 bis of Ordinance No. 75-59 dated September 26, 1975, containing the Commercial Code, Official Gazette (J.R.) No. 101 dated December 19, 1975, as amended and supplemented: "The Commercial Code applies to relations between merchants, and in the absence of a provision therein, the Civil Code and professional customs shall apply as necessary."

² Any law includes in its provisions mandatory and supplementary rules, all of which are binding, and this applies to the Commercial Code.

³ Nadia Fodil, Algerian Commercial Law, Commercial Activities, Merchant, Commercial Place, University Publications Office, 6th Edition, 2004, p. 39.

⁴ Legislative Decree No. 93-08 dated April 25, 1993, amending and supplementing Ordinance No. 75-59 dated September 26, 1975, containing the Commercial Code, Official Gazette No. 27 dated April 27, 1993.

⁵ Ordinance No. 96-27 dated December 9, 1996, amending and supplementing Ordinance No. 75-59 dated September 26, 1975, containing the Commercial Code, Official Gazette No. 77 dated December 11, 1996.

⁶ Law No. 05-02 dated February 6, 2005, amending and supplementing Ordinance No. 75-59 dated September 26, 1975, containing the Commercial Code.

⁷ Law No. 15-20 dated May 5, 2022, amending and supplementing Ordinance No. 75-59 dated September 26, 1975, containing the Commercial Code, Official Gazette 32 dated December 30, 2015.

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

⁸ Law No. 22-09 dated May 5, 2022, amending and supplementing Ordinance No. 75-59 dated September 26, 1975, containing the Commercial Code, Official Gazette 32 dated May 14, 2022.

⁹ <https://www.siyassa.org.eg/News/18588.aspx> Dr. Walid Abdel Rahim Jaballah, Components of Legislative Drafting, Publication date: May 22, 2023.

¹⁰ Ahmed Boukerzaza, Mandatory Rules and Supplementary Rules: Distinguishing Between Mandatory and Supplementary Rules Based on Application Conditions, Journal of Human Sciences, No. 39, June 2013, p. 203.

¹¹ Ibid., p. 204.

¹² This is the case regarding violations of the mandatory information in the company's name, which are punishable by penalties stipulated in Article 804 of the Commercial Code.

¹³ Article 594 of the Commercial Code.

¹⁴ Article 715 bis (3) of the Commercial Code.

¹⁵ Articles 544 to 550 of the Commercial Code.

¹⁶ Chapter Four of Book Five of the Commercial Code, Articles 716 et seq.

¹⁷ Section Three of Book Five of the Commercial Code, Articles 733 et seq.

¹⁸ Chapter Three of Book Five of the Commercial Code, Articles 837 et seq.

¹⁹ Law No. 06/04 relating to Insurance, issued on February 20, 2006, Official Gazette No. 15, issued on March 12, 2006.

²⁰ Regulation No. 08-04 dated December 23, 2008, concerning the minimum capital of banks and financial institutions operating in Algeria, Official Gazette, 72, for the year 2008, December 24, which stipulated that the minimum for banks is 10 billion DZD and 3.5 billion DZD for financial institutions.

²¹ Djeldjel Redha Mahfoud, Establishment of Banks and Financial Institutions, Journal of Research in Law and Political Science, Volume 03, Issue 02, 2018, p. 86.

²² Article 416 of the Civil Code.

²³ Samiha El-Kalyoubi, Commercial Companies, 5th Edition, Dar Al-Nahda Al-Arabiya, 2011, p. 7.

²⁴ Daoud Mansour and Saed Al-Agoun, The Status of Custom in Algerian Commercial Law, Alustad el Bahith Journal for Legal and Political Studies, Volume 4, Issue 2, 2019, p. 515.

²⁵ Muhammad Hassan Al-Jeer, Saudi Commercial Law, King Fahd National Library, 1996, p. 26.

²⁶ Muhammad Hassan Al-Jeer Previous Reference, p. 27.

²⁷ Nadia Fodil, Previous Reference, p. 36.

²⁸ Ibid., p. 41.

²⁹ Ahmed Boukerzaza, Previous Reference, p. 205.

³⁰ Mortada Nasser Nasrallah, Commercial Companies, Al-Irshad Printing Press, Baghdad, 1969, p. 39.

³¹ Article 795/2 of the Commercial Code.

³² Article 418 of the Civil Code.

³³ Article 545 of the Commercial Code.

³⁴ Proved in writing, Article 418/2 of the Civil Code and Article 545 of the Commercial Code.

³⁵ Article 30 of the Commercial Code.

³⁶ Article 545/3 of the Commercial Code and Article 418/2 of the Civil Code.

³⁷ Article 549 of the Commercial Code.

³⁸ Article 548 of the Commercial Code.

³⁹ Article 417 of the Commercial Code.

⁴⁰ Samiha Qalyubi, Previous Reference, p. 8.

⁴¹ Law No. 18/05 relating to E-Commerce, issued on May 10, 2018, Official Gazette No. 28, issued on May 16, 2018.

"Legal and Contractual Provisions of Commercial Companies: Between the Controls of Adoption and the Priority of Adjudication"

⁴² Majdoub Osama and Ghania Bateli, The Electronic Company Contract, Journal of Rights and Political Sciences, University of Khenchela, Volume 9, Issue 1, 2022, p. 975.

⁴³ Article 546 of the Commercial Code.

⁴⁴ Article 554/1 of the Commercial Code.

⁴⁵ Article 604 of the Commercial Code.

⁴⁶ Article 715 bis (3), Paragraph 3 of the Commercial Code.