

# Enshrining the autonomy of commercial law by the principle of free proof in commercial transactions

تكريس استقلالية القانون التجاري بمبدأ الإثبات الحر  
في المعاملات التجارية

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## Abstract:

Trade law arises from the commercial environment, influenced by its changes and transformations, which has made its rules flexible in order to keep pace with the rapid developments in the trading world.

These rules have made commercial law distinct from other laws, and the determination of the principle of freedom of proof in commercial transactions is the most important application of this so that it becomes unique and imposes upon it the imperative of its autonomy from civil law.

**Key words:** Commercial Law- Freedom of proof- Commercial transactions

## Introduction:

Commercial law is a branch of private law that regulates the relationships between traders and commercial practices. In ancient legal civilizations, it was known in the form of scattered rules contained in general law and was not recognized as an independent legal branch until economic necessities led to the inevitability of establishing a separate legal code that gathers the rules and customs of the commercial profession into a unified group.

The necessity for the existence of unified rules of commercial law, separate from the rules of general law, arose due to the distinct nature of commercial practices. However, this separation does not sever its connection with other laws, especially civil law. Commercial law remains extended to regulate the finer details required by commercial transactions, building upon the fundamental rules governing various obligations associated with these transactions in civil law. Thus, they are complementary and adjacent legal systems in regulating commercial life.

The idea of integration between commercial law and civil law does not consider the rules of commercial law as exceptional rules derived from civil law. Instead, they are rules emanating from the distinct nature of commercial practices and the nature of the commercial professions governed by various customs and practices. Therefore, they have their own characteristics and identity. Returning to the rules of civil law is an exception in regulating commercial transactions, applying only in the absence of specific provisions in commercial law. This is inferred from the stance of the Algerian legislator in enumerating the sources of commercial law under Law No. 96-27, which amends Law No. 75-59 containing the commercial law<sup>1</sup>.

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Commercial law constitutes the commercial environment from which rules and provisions governing traders in their commercial transactions emanate. The Babylonians were known for their commercial activities, leading to the formulation of specific rules for its regulation, such as those governing loan contracts with interest, deposits, brokerage contracts, agency contracts, and partnership contracts. The ancient Egyptians expanded in practicing commercial professions, contributing to the internationalization of trade. The Greeks, Phoenicians, and Romans were also renowned for transporting goods by sea, leading to the emergence of rules governing maritime losses. The Romans, in particular, were distinguished for their legal system, especially in civil law, despite the presence of rules regulating bankruptcy and loan contracts to compensate for significant risks, arising from the commercial environment witnessing the activities of foreigners and slaves in various activities necessitating the establishment of a legal framework to regulate them with special rules<sup>2</sup>. With the expansion of the Ottoman Empire, commercial exchanges witnessed a transformation in the type of materials traded, with the marketing of metals and jewelry such as silver and gold. This led to the establishment of banks and their involvement in revitalizing commercial exchanges in countries bordering the Atlantic Ocean such as England, Spain, and the Netherlands, accompanied by the development of rules suitable for this type of marketing and trade exchange between individuals and across different countries<sup>3</sup>.

All these rules emanating from the commercial environment, inhabited by artisans and traders, make commercial law a separate legal branch, due to its characteristics and features that make it an independent legal system with its own provisions and rules in regulating specific activities. These rules do not necessarily have to adhere to the rules of civil law because they do not respond to the requirements arising from the unique nature of commercial activities. Among these characteristics and features is the attribute of speed and credit, which aligns with the movement and circulation of money to achieve profit, contrasting with the possession and acquisition of money, which remain features of civil business and its requirements.

Thus, the autonomy and independence of commercial law are primarily evident in its characteristics, particularly the attribute of speed. Among the components and manifestations of applying speed in commercial life is the principle of freedom of proof, which eliminates all obstacles that could hinder the circulation of money. This principle contributes to creating a flexible environment suitable for the needs of exchanges between traders, facilitating profit circulation.

If the principle of freedom of proof consolidates the attribute of speed in commercial transactions, it is a principle that affirms the independence of commercial law from civil law, considering that this characteristic is distinctive to commercial law rather than civil law.

**It is therefore worth asking the question: To what extent is it sufficient to establish the autonomy of commercial law by applying the principle of freedom of evidence in commercial transactions?**

Accordingly, the issue addresses the search for the scope of the free evidence principle in commercial transactions to be effective in establishing the independence of commercial law, an issue that is addressed by relying on a descriptive and analytical method suitable for studying the requirements of the free evidence principle and its extension to imparting the characteristic of speed in commercial transactions. This issue is addressed by using a descriptive and analytical method that is suitable for examining the requirements of the principle of conclusive proof and its extension to imparting the characteristic of speed to commercial transactions, to make commercial law different and distinct from civil law and all other branches of law (First

Section), and to highlight the existence of a strong relationship between the principle of conclusive proof and ensuring the independence of commercial law (Second Section).

### **First Section: Consolidating the Principle of Freedom of Proof for the Attribute of Speed in Commercial Transactions**

The principle of freedom of proof is considered one of the applications of the attribute of speed in commercial transactions governed by commercial law<sup>4</sup>. Therefore, it has become necessary to consolidate this principle to facilitate the performance of commercial practices. The Algerian legislator has adopted an important stance in this regard by enacting several legislative texts that stipulate the consolidation of this principle in response to the attribute of speed in commercial transactions.

Thus, studying the requirements of the principle of freedom of proof as a contributing factor to consolidating the independence of commercial law entails examining the inevitabilities of this principle in regulating commercial transactions (First Demand). Subsequently, it is essential to explore the applications of this principle in the legislative system to assess the extent to which the legislator responds to regulating this principle according to the inevitabilities presented in the regulation of commercial transactions (Second Demand).

#### **First Demand: The Necessity of the Principle of Freedom of Proof in Conducting Commercial Practices**

The marketing of most goods and services subject to commercial practices is characterized by rapid fluctuations and changes in prices, as well as the rapid deterioration of goods. Therefore, it is necessary for the rules and provisions of commercial law governing these practices to be formulated in a manner that responds to this speed, so as not to be a cause of hindrance to the circulation of profits among traders.

In response to the practical necessity dictated by the speed of conducting commercial transactions, the Algerian legislator has established the principle of freedom of proof in several texts applicable to these transactions. Thus, the consolidation of this principle in regulating commercial life was not an end in itself but rather a practical necessity, stemming from the need to facilitate the performance of commercial transactions.

Commercial law governs commercial transactions that require simplicity and speed in their performance, and cannot tolerate delays and hindrances in arranging the obligations between the parties, especially in terms of their proof. This necessitates that commercial law responds to the requirements of these transactions and avoids the legislature imposing restrictive rules on proof in a manner that would impede the characteristics and advantages of these transactions.

There are numerous economic considerations that compel the legislator to consider the principle of freedom of proof in executing commercial transactions between individuals. These transactions are diverse and constantly evolving in the commercial and economic world, seeking to facilitate the circulation of money to achieve profit. Thus, restricting the proof of these transactions with the provisions governing civil transactions is impractical. Commercial transactions are linked to the vital interests of consumers and enhance the wealth of traders<sup>5</sup>, necessitating that their regulation reflects their economic considerations. Considering the contracts and business activities undertaken by traders in their profession and trade, in terms of their quantity, repetition, and continuity, it is unreasonable for the legislator to restrict them with the same formal rules known in civil transactions carried out by individuals who do not possess deep knowledge of their details. This allows the legislator to restrict them in their conclusion and

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proof, safeguarding the interests of the weaker party in the transaction and ensuring the implementation of transactions in good faith.

The true historical origins of the principle of freedom of proof can be traced back to Islamic law, based on what is mentioned in verse 282 of Surah Al-Baqarah, which establishes the system of freedom of proof in every trade conducted by individuals among themselves. Allah Almighty says: "O you who have believed, when you contract a debt for a specified term, write it down...except when it is an immediate transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it..." This verse indicates that restricting proof to writing applies to civil transactions, while commercial transactions are exempt from this restriction, considering the importance that Allah has placed on the system of freedom of proof in regulating these transactions. It is a system that aligns with the characteristics of these transactions, which are based on speed in conclusion and execution, making proof of them necessary by all means dictated by the nature of these transactions.

**Second Demand: Aspects of Consolidating the Principle of Freedom of Proof in Commercial Transactions:**

Due to the necessity and need to determine the system of freedom of proof in commercial law in order to facilitate the performance of commercial practices, the Algerian legislator responded to this need by consolidating the principle of freedom of proof in several legislative texts.

The consolidation of the principle of freedom of proof is a requirement of the specificity involved in conducting commercial transactions. Article 30 of Order No. 75/59, which includes the Commercial Code, as amended and supplemented, allows proof in commercial matters by any official or customary document, an accepted invoice, messages, ledgers of merchants, evidence, or any other means deemed acceptable by the court<sup>6</sup>. This provision aligns with the content of Article 333 of the Civil Code<sup>7</sup>, which states that in non-commercial matters, if the legal transaction exceeds 100,000 Algerian dinars or is of an unspecified value, proof cannot be provided by witnesses unless there is a provision to the contrary. Thus, the Algerian legislator has entrenched the principle of freedom of proof in commercial transactions, allowing proof of disputes presented before the judiciary in various ways, including witness testimony and evidence, within the limits of what is equivalent to or exceeds this value. The Supreme Court has consistently affirmed the necessity of expanding the scope of evidence in commercial matters and considering it a consolidation of the principle of freedom of proof under Article 333 of the Civil Code<sup>8</sup>.

From the text of Article 328 of the Civil Code, one can derive implications for consolidating the principle of freedom of proof in commercial transactions and restricting proof in civil matters regarding evidence through customary contracts. According to this article, to accept customary contracts as evidence in civil disputes before the judiciary, the customary contract must have a documented date, and its validity in proof is limited to this date. However, proof in commercial transactions through customary contracts is permitted even if the date is not documented, aligning with the simplicity characteristic of commercial exchanges and the legislature's adaptation to the speed imposed by these activities in commercial life.

It is evident from the foregoing that the principle of freedom of proof facilitates the performance of commercial practices due to its simplicity in conducting commercial activities. The legislator has entrenched it in response to the characteristics and features unique to these activities, which differ from civil activities. In the aforementioned legislative texts, the legislator has ensured the consolidation of the principle of freedom of proof in commercial activities, aligning with the flexibility inherent in these activities. The legislator also aimed to create a legal

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system adaptable to market fluctuations, making it easier for traders and economic actors to market their products instead of restricting their performance and execution with constrained proof requirements, which would hinder business operations, cause product damage, and incur losses for traders and economic agents<sup>9</sup>.

**Second Section: The Relationship between the Principle of Freedom of Proof and the Independence of Commercial Law:**

The consolidation of the principle of freedom of proof in the provisions of commercial law can be attributed to the practical necessities dictated by the specificity of the transactions governed by this law. These transactions are inherently distinct from civil transactions in their conclusion, execution, and proof before the judiciary, necessitating the establishment of a legal system specific to them. This makes commercial law a legal branch independent of civil law, an independence affirmed by the inability to extend and generalize these characteristics to actions governed by civil law, despite the relative non-absolute nature of this independence due to exceptions stipulated in several legislative texts.

Therefore, studying the relationship between the principle of freedom of proof and the independence of commercial law in this topic includes elucidating the justifications for the independence of this legal branch in the field of proving commercial transactions (First Demand) and examining the scope of the application of the principle of freedom of proof in commercial law and the extent of its impact on consolidating this independence (Second Demand).

**The first requirement: Achieving flexibility in regulating commercial transactions:**

The enshrinement of the principle of freedom of proof in commercial law was not an end in itself, but rather it was necessitated and imposed by the practical conditions and requirements of regulating commercial exchanges, as commercial transactions have their own distinct characteristics that necessitate the establishment of a system tailored to them.

By their nature, commercial transactions require, in their regulation, the preservation of the property of speed and ease of procedures in their conclusion and execution. The speed, which is the foundation and pillar of commerce, requires that the proof of commercial transactions be free, flexible, and unrestricted, because restricting their proof leads to hindering the circulation of wealth, money, and profits among traders. Therefore, affirming the principle of freedom of proof in commercial transactions was a factor and a reason for confirming the independence of commercial law.

The legal philosophy of enshrining the principle of free proof is based on the assumption of trust among traders and economic actors. Not all transactions in their professional and vocational lives require commitment to their writing and documentation to arrange their legal effects. This is not only because it disrupts the pace of commercial activities but also complicates these activities and incurs potential losses in goods and products affected by these activities, thus deviating from their goal of profit-making. Therefore, it was likely that the requirements of these activities would be met by building them on the element of speed and confidence to enhance the freedom of their proof from the restrictions known in civil transactions. This leaves full validity for acknowledgment, testimony, evidence, and indications in proving commercial transactions, regardless of their value or whether they are of unspecified value.

The establishment of rules of free proof in regulating commercial transactions aims to achieve flexibility and simplicity in their conclusion and execution, as well as the purpose of protecting non-traders in their position. This allows them, under Article 11 and subsequent articles of the Commercial Code, to resort to requesting the use of a merchant's books in proof

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against them by extracting evidence of the debt owed to others in the face of the merchant who owns those books. This indicates the flexibility of the proof system through means that encourage protecting stability in transactions and facilitating proof<sup>10</sup>.

Moreover, if commercial transactions have what distinguishes them from civil transactions in the field of proof, then the regulation of each of them will be different, so that the speed of commercial activities requires a proof system that is in line with this speed and the simplicity of the procedures known in performing these activities. Whereas civil individuals lacking experience in performing many of their civil life transactions necessitate the exclusion of speed in their execution and performance, considering that these individuals need time for management and caution. Therefore, commercial law is influenced by political, social, and economic factors, which lead to the rapid changes in its provisions to keep up with the changes brought about by these factors, unlike civil law, which is characterized by stability and consistency in regulating the transactions it governs. Additionally, civil transactions require written guarantees for transaction stability, which necessitates the separation between the civil business system and the commercial business system in this field. This is reflected in regulating the theory of proof in both commercial law and civil law, resulting in the recognition of the independence of commercial law from civil law.

The facilities introduced by commercial law in proving commercial transactions cannot be reflected in civil life, nor can the complex formalities in the civil transaction system be transferred to the commercial world because civil life is characterized by stability and caution. Moreover, this would lead to the instability of civil transactions and the difficulty of proof before the civil judiciary, especially since holding commercial books is an obligation known only to traders, and this would hinder trade regardless of the importance of its activities and contracts<sup>11</sup>.

The decisions of the Supreme Court have settled on consolidating flexibility in applying the rules of proof in commercial transactions. In its decision dated 29/06/1985, it ruled that proving a civil lease contract is subject to the written contract or lease receipts and cannot be proven as stated by the judge of the court of first instance and the judges of appeal by long-term exploitation of the premises and registration in the elderly fund<sup>12</sup>. It also ruled in its decision dated 05/10/1985 that witness testimony alone is not sufficient to prove the regular payment of civil rent dues at the end of each month. Therefore, the appeal against the decision appealed against was wrong in applying the law and not relying on witness testimony to prove the fact of paying rent out of place<sup>13</sup>. Additionally, it stated in its decision dated 15/02/2000 that relying solely on an invoice issued by the opponent in the dispute to judge the other opponent based on the content of this document is invalid except for the acceptable invoice stipulated in Article 30 of the Commercial Code<sup>14</sup>. Furthermore, it added an important clarification in its decision issued on 09/04/2008 that the rules of proof in commercial transactions vary depending on the parties involved. It stated that they are subject to the proof rules set forth in commercial law when both parties to the transaction are merchants or when the debtor is a merchant, while they are subject to the proof rules stipulated in civil law when the debtor is a non-merchant. Since the debtor was a non-merchant in the current case and the debt was essentially written, its discharge or proof of payment can only be done in writing<sup>15</sup>. Additionally, it was mentioned in its decision issued on 04/02/2009 that excluding the testimony of two witnesses as a means of proving commercial contracts contradicts the provisions of Article 30 of the Commercial Code, which expanded the scope of proof<sup>16</sup>.

**The second requirement: Scope of Application of the Principle of Free Proof in Commercial Transactions:**

From the texts that regulate the rules of proof in commercial transactions, it is evident that the legislator did not make the regulation of the principle of free proof contingent on the general system. Thus, there is no requirement to adhere to a specific arrangement for presenting means of proof before the judiciary in commercial transactions. It is understood from this that there is a possibility for the parties in these transactions to agree on adopting or following a specific method of proof between them, and the judge does not exclude this choice considering that proof is not related to the general system in commercial matters. This can be confirmed by the fact that the determination of the system of free proof in commercial transactions reflects the independence of commercial law, especially after it became clear that the application of this system to civil transactions, where proof methods are restricted and subject to the general system, cannot be generalized and cannot be violated.

The necessity of this independence remains despite the existence of some exceptions to the application of the principle of free proof in commercial transactions<sup>17</sup>. The presence of exceptions to the application of the principle in commercial transactions does not diminish the status of commercial law among the various branches of law, as it remains an independent law in its own right.

Many texts in civil law and commercial law refer to cases where the principle of free proof is deviated from in contracts and commercial transactions. For example, the official writing requirement in concluding a company contract under Article 418 of the Civil Code, which stipulates that a company contract must be in writing under penalty of nullity. This nullity also applies to all amendments to the contract if they are not written in the same form as the contract itself. Similarly, the legislator imposed the writing requirement in the sale of a commercial establishment under Article 79 of the Commercial Code, which explicitly states that the sale contract of a commercial establishment or the promise to sell it, as well as any commitment to waive it, even if conditional or involving the transfer of the commercial establishment by division, auction, or contribution to a company's capital share, must be in writing. Additionally, the legislator required writing in commercial transactions contrary to the general principle of commercial proof, such as in proving a commercial property mortgage under Article 120 of the Commercial Code, which explicitly states that this contract must be proven by an official contract. The writing requirement also applies to the lease contract of a commercial property under Article 187 of the Commercial Code, which stipulates that lease contracts concluded from the date of publication of this law in the official gazette must be drawn up in the official form under penalty of nullity, without extending this restriction to the renewal of lease contracts concluded before the publication of this law in the official gazette, as the renewal of previous lease contracts remains subject to the rules of free proof that were in force at the time of concluding the original contract according to what Article 187 bis 1 of the Commercial Code added.

The Supreme Court has affirmed in many of its settled decisions the relative aspect of the application of the principle of free proof in commercial transactions. For example, in its decision dated 30/04/1989, it clarified that judges who decided to reject the claim of the claimant who requested the defendant to execute the promise to sell the commercial base, based on the fact that the claimant did not prove the agreement of the parties in the absence of the official contract according to Article 79 of the Commercial Code, their judgment was applied correctly<sup>18</sup>. Additionally, in its decision dated 05/01/1992, it confirmed that every waiver of a commercial establishment, even if conditional or issued under another type of contract, and the guardian must manage the minor's money like a cautious person and be responsible for this management

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according to the general rules of the law, and since it was proven in the current case that the waiver contract was not concluded in its official form, the decision that was issued - aside from the error - in the appellants' request to return to the previous positions and ruled to dismiss, was issued subject to nullification and annulment<sup>19</sup>. Furthermore, a decision was issued by the Joint Chambers of the Supreme Court on 18/02/1997 stating that the official form in the contract of sale of a commercial establishment is a necessary condition for its validity, and failure to comply with this condition is considered a violation of the law and leads to the nullity of that contract. While it is true that the customary contract related to the sale of a commercial base includes personal obligations on the seller and the buyer, it is considered void because it is subject to legal procedures related to the general system. Therefore, the judge cannot correct them by ruling on the parties to resort to the notary to perform the sale procedures, and the judges of the subject matter must rule the nullity of the customary contract related to the sale of the commercial base and return the parties to the state they were in before concluding the contract according to the provisions of Article 103 of the Civil Code<sup>20</sup>.

Thus, it becomes clear from the foregoing that the independence of commercial law is linked in many practical aspects to the system of free proof dictated by the nature of the transactions governed by this law. However, the relative application of this system to commercial transactions does not detract from the autonomy of commercial law and does not cast doubt on its reality as a distinct legal branch from civil law.

### **Conclusion:**

Commercial law is characterized as the law of the commercial environment, influenced by its changes and requirements. This makes its rules flexible and straightforward, aiming to keep pace with the continuous developments in this environment and to be a law that aligns with the needs of economic development.

The flexibility of the rules of commercial law allows it to stand alone as a branch of law independent of civil law. The most significant aspect of this independence is the regulation of the field of proving commercial transactions through means and methods that enhance the simplicity of the provisions of commercial law on one hand and reinforce its independence on the other. The different rules of proof between regulating commercial transactions and civil transactions affirm the necessity of the separation and independence of the two laws.

However, the independence of commercial law from civil law is relative, not absolute, due to the need for provisions of civil law in many cases of regulating commercial transactions. Moreover, in the realm of proof before the judiciary, commercial judges often resort to the specific means of proof stipulated in civil law when adjudicating disputes arising from commercial transactions. Sometimes, the legislator deviates from the principle of free proof to impose restricted and prescribed means of proof in civil law on commercial transactions. However, this relative independence does not diminish the distinctiveness of commercial law on the other hand, as it remains a distinct law from civil law due to the nature and specificity of the transactions it regulates. Furthermore, this independence is not solely dictated by the system of free proof but extends to other standards and regulations in systems that commercial transactions adhere to. These include the use of commercial documents in accounting and banking transactions, the application of solidarity rules presumed between traders unlike civil transactions, and the application of bankruptcy rules in facing traders, which enhance the principle of credit in a way not known to the rules of civil law. This makes the independence of commercial law not solely dependent on the system of free proof but extends to several other systems that affirm its independence derived from the commercial environment it regulates, rather than being an end in itself.



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6- In a decision issued by the Commercial and Maritime Chamber of the Supreme Court, it was stated that "the exclusion of witness testimony as a means of proving commercial contracts is contrary to Article 30 of the Commercial Code, which expanded the field of proof.

Refer to:

- Decision of the Supreme Court, Commercial and Maritime Chamber, No. 513057, issued on 04/02/2000, Supreme Court Journal, No. 01, 2010, p. 162.

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