

## *Traditional Means of Proof in Commercial Matters*

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### **Abstract:**

*Commercial proof is one of the most vital elements in the realm of commerce, as it plays a key role in ensuring the stability and credibility of commercial transactions. Legislators have given it considerable attention, recognizing its importance in fostering efficiency and trust within the commercial sector. The ability to prove transactions in a swift and reliable manner is essential for the smooth functioning of business activities, and any neglect in regulating this area can lead to significant disruptions in commercial life. Without clear rules governing proof, the commercial sector risks being mired in uncertainty, which could impede the flow of business and negatively affect economic growth.*

*This issue is not solely the domain of legislation. The judiciary, endowed with specific powers, particularly in commercial matters, also contributes to shaping the framework of commercial proof. Courts are tasked with interpreting and applying the law in ways that distinguish between civil and commercial transactions. By employing traditional means of proof, such as written documents, witness testimony, and other established methods, the judiciary helps maintain a balance between flexibility and legal rigor in commercial disputes. This distinction is crucial for ensuring that commercial dealings, which often demand a higher degree of pragmatism and speed, are treated differently from civil matters, where stricter rules of evidence may apply.*

*The reliance on traditional means of proof is essential in maintaining the integrity of commercial relationships. These methods allow for the verification of claims and obligations in a manner that aligns with the dynamic nature of commerce, thus ensuring that commercial law remains effective and adaptable to the realities of modern trade. Through this careful balance, both legislators and the judiciary work together to provide a robust framework that supports the commercial sector and promotes economic stability.*

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**Keywords:** *Commercial proof; Traditional means; Commercial transactions; Judiciary role; Legal framework.*

## **Introduction:**

The process of evidence in civil and commercial disputes between individuals, brought before the judiciary, is subject to specific legal rules. It is not legally acceptable or just for the law and/or the judiciary to allow individuals to submit evidence as they please without defining uniform methods applicable to all individuals according to special rules that apply to categories of legal facts, legal deadlines, and other rules aimed at a comprehensive and uniform system governing the process of evidence. This system should define methods of evidence according to specific concepts, conditions, and specific scopes, and distribute the burden of proof between the litigants within a framework of special rules that ensure justice and the smooth functioning of the evidence process. It should be structured in a way that provides generality and abstraction to the legal rule and is proportional to the burden of proof, especially within the scope of commercial law given the specificity of commercial transactions.

Proof in commercial matters is of **great importance** because rights claimed therein are devoid of any value if evidence is not provided regarding their legal source. Therefore, it is true to say that "evidence is the backbone of the life of a right and the complexity of its benefit." The importance of evidence is also evident in resolving disputes, as one cannot enjoy a right without evidence supporting it. If the inability to provide the required evidence is proven, it becomes impossible to assert the right or the legal position claimed by the individual. This makes the theory of evidence one of the most important and applicable legal theories before the courts.

The division of evidence varies depending on the aspect from which the evidence is viewed. If we consider evidence as a pre-prepared means of proof in the future, we divide it based on its probative value into mandatory methods for the judge and non-mandatory methods. Mandatory methods are those where the law specifies their probative value and does not leave it to the discretion of the judge, such as writing, confession, and oath. Non-mandatory or persuasive evidence for the judge includes witness testimony, judicial presumptions, inspection, and expertise.

We also consider evidence as directly related to the incident to be proved, thus dividing the methods of proof into direct and indirect methods.

Studying the topic of "Traditional Means of Proof in Commercial Law" requires addressing the following **problem**: What is the validity of proof in commercial matters using traditional means?

This will be done through employing a **descriptive approach** and following the following plan:

- First: Direct Evidence.
- Secondly: Indirect Evidence.

## **First: Direct Evidence**

This section is dedicated to studying direct evidence, which includes writing, passing through exhibits or witness testimony.

**1. Writing** :Writing is one of the most important means or methods of proof, as it provides parties with guarantees that other forms of evidence do not offer. Therefore, legislators have made it one of the fundamental means of proof regarding legal transactions, recognizing its absolute evidentiary power. Through writing, all legal facts can be proven, whereas testimony or judicial indicators have only limited probative force<sup>1</sup>.

### **A. Official Documents.**

**a. Definition of Official Documents** : Article 324 of the Civil Code stipulates : "An official contract is a contract in which an official, a public officer, or a person entrusted with a public service certifies, according to the legal forms and within the limits of his authority and jurisdiction, what has been done or received from relevant parties"<sup>2</sup>.

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<sup>1</sup> Mohammed Hassan Qasim, *Principles of Evidence in Civil and Commercial Matters*, (Lebanon, Al-Halabi: Legal Publications for Publishing and Distribution, 1st edition, 2003), p.109.

<sup>2</sup> Article 324 of Decree No. 75-58, Signed on September 26, 1975, regarding the amended and supplemented Civil Law, Official Gazette No. 78, dated September 30, 1975.

Based on the legislative definition of an official document, three conditions must be met in an official paper:

- Issuance of the official document by a public official, public officer (authenticated), or person entrusted with a public service.
- The issuance of the document within the scope of their authority and jurisdiction.
- Adherence to legal formalities in drafting the official document.
- The official document acquires absolute probative force.

**b. Probative Value of Official Writing:** When an official document is presented, its appearance indicates its official status, such as containing the signature or official stamp of the public official and the signatures of relevant parties. This serves as a legal indication of its official status.

Those who rely on it are exempted from acknowledging their opponent's rejection of it or providing evidence of the authenticity of the signatures it contains. However, this indication is not conclusive. Those who claim that the document was not issued by a public official or a person entrusted with public service have the right to provide evidence of this by challenging the authenticity of the document according to the law. They can claim forgery of the document or falsification of the data contained within it, which is a moral forgery that renders the event unrecognized in its falsified form<sup>1</sup>.

## **B. Informal Documents:**

**a. Definition of Informal Documents :** Informal documents refer to any written paper drawn up by ordinary parties without the intervention of official parties. There are two types: the first type is informal documents prepared in advance to serve as evidence, and therefore they are signed by those they are binding upon. The second type is informal documents not prepared for evidence, yet they may be used as such. They often lack signatures, but nonetheless, they are given

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<sup>1</sup> Youssef Zouk, *Validity of Modern Means of Proof*, Doctoral Thesis in Law, Faculty of Law and Political Science, University of Tlemcen, Algeria, 2012-2013, p. 40.

probative value in evidence, with their strength and weakness varying depending on the elements of proof available within them<sup>1</sup>.

**b. Types of Informal Documents:** Informal documents prepared for evidence are those prepared for evidence. Algerian law defines them under Article 327 of the Civil Code, which stipulates two conditions for the validity of a prepared informal document: the condition of writing and the condition of signature, as follows:

- **Writing:** In an informal document prepared for evidence, it is required that it contains writing indicating the purpose for which it was prepared, meaning that the writing should relate to the event for which this document was created to serve as evidence. However, the omission of writing to express one or more non-substantive statements does not affect its probative value in evidence. It is not a requirement for the validity of an informal document to be dated unless the law specifies otherwise. This is the case with commercial papers such as checks Article 472 of the Algerian Civil Code<sup>2</sup>, bills of exchange Article 390 of the Civil Code<sup>3</sup>, and promissory notes Article 456 of the same law<sup>4</sup>, which require mentioning the date and specific details. Failure to comply with this does not constitute a ground for nullity. If multiple dates appear on the informal document, the latest date should be considered unless forgery is proven.

- **Signature:** The signature is the essential and fundamental requirement for the existence of an informal document. The signature refers to a person putting his name, title, or any other writing that

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<sup>1</sup> Mohammed Hassan Qasim. Op cit, p. 135.

<sup>2</sup> Article 472 of Decree No. 75-59, which includes the Commercial Law, amended and supplemented by Law No. 22-09, stipulates that: The check shall contain the following details:

1. Mention of the word "check" included in the text of the instrument itself in the language in which it is written.
2. An unconditional order to pay a certain amount.
3. The name of the person to whom payment must be made (the drawee).
4. Statement of the place where payment must be made.
5. Statement of the date of creation of the check and its place.
6. Signature of the issuer of the check (the drawer).

<sup>3</sup> Article 390 of Decree No. 75-59, which includes the Commercial Law, amended and supplemented by Law No. 22-09, op cit.

<sup>4</sup> Refer to Article 456 of Decree No. 75-59, which includes the Commercial Law, amended and supplemented by Law No. 22-09, op cit

signifies his identity on the informal document by his own hand. Algerian legislation does not provide a specific definition of the signature, so it can be defined as: "A visible mark, sign, or handwritten statement that a person habitually uses to express his consent to a specific action or legal transaction." If the contract is binding on both parties, both parties must sign it. If it is binding on one party only, only the party committing to it is required to sign<sup>1</sup>.

**- Informal Documents Not Prepared for Evidence:** These are enumerated in Articles 329 to 332 of the Civil Code and include: letters, telegrams, commercial ledgers, household registers and papers, and endorsement on a promissory note indicating the discharge of the debtor's liability<sup>2</sup>.

**2. Witness Testimony or Evidence:** This section is dedicated to studying the concept of witness testimony first, then discussing the probative value of witness testimony or evidence.

**A. Concept of Witness Testimony :** Witness testimony is the statement made by an individual before the judiciary regarding an event that occurred involving another party and resulted in rights for that other party. This event disclosed by the witness must have been perceived by them either through hearing or sight. For example, witnessing a contract between two parties and testifying based on what was heard or seen. Witness testimony is an account provided by a person who is not a litigant in the judicial proceedings regarding certain actions, including taking an oath to testify about what they saw or heard, or what they comprehended through any of their sensory perceptions.<sup>3</sup>

It is a requirement for the witness to be of legal age and fully competent. Testimony from an expert witness is accepted and heard without an oath and is used as evidence. Additionally, the witness must not have been convicted of a crime for which the sentence has not yet expired. Their testimony is heard as evidence.

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<sup>1</sup> Mohammed Hassan Qasim. Opp cit, p. 145.

<sup>2</sup> Articles 329-332 of Decree No. 75-58, which includes the amended and supplemented Civil Law, opp cit

<sup>3</sup> Nabil Ibrahim Saad, Hamam Mohammad Mahmoud Zahrane, *Principles of Evidence in Civil and Commercial Matters*, (Beirut: New University Publishing House),p 121.

There are circumstances where witness testimony is permissible, such as in commercial matters (Article 333 of the Civil Code), material facts, and civil actions involving amounts not exceeding one hundred thousand dinars.<sup>1</sup>

**B. The probative value of witness testimony or evidence:** If the restriction of proof is the norm in civil matters, then the freedom of proof is the norm in commercial matters according to Article 333. Hence, witness testimony holds absolute strength in these matters. The rationale behind this is that commercial transactions are based on trust on one hand, and speed on the other, whether in their conclusion or execution.

However, there are commercial matters that the legislator mandated to be in writing for proof, either because their existence cannot be conceived without writing, such as commercial papers where the law not only requires writing but also specific conditions to be met, or because they take a long time and entail special importance, as is the case with commercial company contracts, ship sales contracts, their leasing, insuring them or the cargo in maritime loans<sup>2</sup>.

**C. The judge's authority in accepting proof by evidence in commercial matters:** The judge can allow the litigant to prove his claim in commercial matters without being restricted by the value of the disputed transaction, He can also order an investigation on his own or at the request of the litigants, He may refuse the litigant's request to prove by evidence if sufficient evidence from the circumstances of the case convinces him otherwise.

**D. The validity of commercial registers:** Originally, it is not permissible for an individual to fabricate evidence for themselves. However, commercial law departs from this principle, allowing merchants to keep commercial registers that can be used as evidence in their favor. Other merchants who contest this can disprove it through various means, including evidence and indications, The validity of commercial registers as evidence depends on the nature of the transaction between merchants or between a merchant and a non-merchant.

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<sup>1</sup> Article 333 of Decree No. 75-58: Encompasses the amended and supplemented Civil Law, opp cit.

<sup>2</sup> Nabil Ibrahim Saad, Hamam Mohammad Mahmoud Zahrane, opp cit. p 125.

**a. Validity of Commercial Registers Between Merchants:** law grants merchants the right to rely on their commercial registers as evidence in disputes involving commercial matters if the registers are well-maintained. Article 13 of Algerian commercial law states : "Courts may accept well-maintained commercial registers as evidence between merchants for commercial transactions".<sup>1</sup>

For a merchant's registers to be considered valid evidence, three conditions must be met<sup>2</sup>:

- The dispute must involve two merchants, meaning two individuals obligated to maintain commercial registers. The judge will verify the information by comparing the registers of both parties. If the entries match, it may be difficult for the judge to discern the truth. However, if there are discrepancies, the court may favor the well-maintained registers over the poorly maintained ones.

- The dispute must be deeply rooted in commercial activities for both parties. If a merchant sells goods to another merchant for the purpose of resale, then the latter cannot object to the use of commercial registers because it is considered a commercial transaction. However, if the other merchant purchased the goods for personal use, they cannot rely on the commercial registers because it would be considered a civil transaction.

- Furthermore, the commercial registers that a party relies on must be well-maintained. This is because the recorded data must meet criteria for accuracy and seriousness, If the commercial registers are not well-maintained, they cannot be considered as evidence in court. However, the judge may still consider them and draw conclusions from them to complement other evidence in the case.

**b. The validity of commercial registers against non-traders:** Commercial registers cannot serve as evidence against a non-trader who does not keep such registers. However, litigants are allowed to use a

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<sup>1</sup> Article 13 of Decree No. 75-59, dated 20 Ramadan 1395 corresponding to September 26, 1975, regarding the Commercial Law, amended and supplemented by Law No. 22-09: Signed on May 5, 2022, Official Gazette No. 32 dated May 14, 2022.

<sup>2</sup> Nougui Nabil, " Rules of Evidence in Commercial Law According to Algerian Legislation", *Tabna Journal of Academic Scientific Studies*, Vol.5, no.2, (University Center of Brikat 2022), pp. 435 - 436.

trader's commercial registers to extract evidence to support their case. Litigants may also request the supplementation of an oath from either party, provided certain conditions are met<sup>1</sup>:

- The dispute must involve goods traded by the merchant to a non-trader. For example, if the dispute concerns food products, or if it involves a loan granted by the merchant to a non-trader, then the commercial registers may be considered.

- The debt under dispute must be provable through evidence. For instance, if the value of the debt does not exceed 1000 Algerian dinars, as stipulated in Article 333 of the Algerian Civil Code, then it may be proven through evidence.

- When the judge decides to accept the commercial registers as evidence, either party may be required to take a supplementary oath. This gives litigants the freedom to choose who will take the oath among them.

**3. Expertise** :Expertise has become a method of proof, especially in certain technical matters where it is difficult for the judge to comprehend or ascertain their truth without the assistance of a specialist expert. Therefore, expertise is a means of investigation in all branches of the judiciary, whether civil, criminal, commercial, or administrative. Expertise varies and includes initial expertise, counter expertise, new expertise, and complementary expertise.

**A. Definition of Expertise** :Expertise refers to a procedure related to a subject that requires familiarity with technical information to extract evidence from it. This definition encompasses any work by someone who has knowledge of relevant information useful in extracting evidence, whether it involves investigation or not, thus including all types of expertise at any stage of the procedure. Additionally, it involves giving a technical or scientific opinion from professionals in the industry, art, or specialty. The judge appoints them regarding an issue related to proof in criminal cases, and the decision in that case relies on the expert's opinion,

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<sup>1</sup> Nougui Nabil, *opp cit*, p. 436.

which constitutes evidence subject to the judge's discretionary power and conscience<sup>1</sup>.

**B. Probative Value of Evidence from Expertise:** The court is not bound by the expert's opinion or the information contained in their report. However, if the court does not consider the expert's opinion, it must justify excluding the results of the expertise (Article 144 of the Civil and Administrative Procedures Law). Therefore, the expert's opinion for the court is considered advisory rather than definitive<sup>2</sup>. As for challenging a judgment requiring expertise, whether through appeal or cassation, it is only permissible with the final judgment in the dispute, according to the provisions of Article 145 of the same law<sup>3</sup>.

## Secondly: Indirect Evidence

This section is dedicated to studying indirect evidence, which includes circumstantial evidence and confession.

**1. Circumstantial Evidence :** Circumstantial evidence is what the judge or legislator deduces from a known fact that implies an unknown fact. Therefore, circumstantial evidence is considered indirect evidence because it does not directly state the incident under consideration but rather another alternative incident.

Circumstantial evidence is divided into judicial and legal circumstantial evidence. Judicial circumstantial evidence, as stated in Article 340 of the Civil Code<sup>4</sup>, is left to the discretion of the judge to deduce any circumstantial evidence that the law has not specified. Legal circumstantial evidence, on the other hand, is deduced by the legislator from circumstances that are likely to occur Article 337 of the Civil Code states that legal circumstantial evidence<sup>5</sup>, if established in favor of the

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<sup>1</sup> Fadil Al-Aysh, *Explanation of Criminal Procedure Law between Theoretical and Scientific Aspects with the Latest Amendments*, (Dar Al-Badr for Publishing and Distribution, Beirut, 2008), p. 347.

Mohammed Zahdour: *Summary of Civil Methods of Proof in Algerian Legislation According to the Latest Amendments*, (Algeria, 1st edition, 1991), pp 203-204.

<sup>2</sup> Mohammed Saeed Namour ,*Principles of Criminal Procedures*, (Amman, Dar Al-Thaqafa for Publishing and Distribution, 2005), p. 240.

<sup>3</sup> Mohammed Zahdour,opp cit, p 165.

<sup>4</sup> Article 340 of Decree No. 75-58: Encompasses the amended and supplemented Civil Law, opp cit.

<sup>5</sup> Mohammed Hassan Qasim: op cit, p. 245.

claimant, relieves them from the burden of direct proof they were initially responsible for. This means that if circumstantial evidence is found in favor of the claimant, it exempts them from the burden of direct proof they were originally tasked with.

**A. Confession :** This section is dedicated to studying the definition of confession first and then moving on to the probative value of confession in evidence secondly.

**a. Definition of Confession:** Confession is defined as a personal acknowledgment of an allegation directed towards an individual by another person, as defined by Algerian legislator in Article 341 of the Civil Code<sup>1</sup>: "Confession is the acknowledgment of the opponent before the judiciary of a legal incident claimed against them, during the course of the related lawsuit."

**b. The Probative Value of Confession in Evidence :**The Algerian legislator stipulates the probative value of confession through Article 342 of the Algerian Civil Code, stating<sup>2</sup>: "Confession is conclusive evidence against the confessor, and confession cannot be separated from its owner except if it is based on multiple facts and the existence of one fact does not necessarily imply the existence of the other facts." From the content of this article, it is evident that judicial confession is conclusive evidence against the confessor, and it cannot be retracted or divided.

## **Conclusion:**

Through the provided information, it is possible to reach consecutive results and recommendations:

### **A. Results:**

- Legislation in our laws has dedicated the principle of freedom of proof in commercial transactions, exempting them from the provisions of written evidence. This grants parties involved in commercial relationships the freedom to prove their transactions

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<sup>1</sup> Article 341 of Decree No. 75-58: Includes the amended and supplemented Civil Law, op cit.

<sup>2</sup> Article 342 of Decree No. 75-58: Includes the amended and supplemented Civil Law, op cit.

in the manner they deem appropriate. This is because commercial contracts often require speed and simplicity in their execution.

- Commercial registers have full validity as evidence against the merchant who issued them, regardless of whether the opposing party is also a merchant or a non-trader. This applies whether the debt is commercial or civil, and whether the registers are regular or irregular. The data contained in the registers is considered equivalent to a written acknowledgment issued by the merchant personally. Consequently, the principle of non-division of acknowledgment must be applied when the registers are regular, The opposing merchant must either accept them in their entirety or reject them entirely.
- If the original official document exists, then its official copies are considered valid evidence as long as they match the original, unless contested by either party. In case of dispute, the original document is referred to.
- The authenticity of a handwritten document is considered valid evidence against all individuals for what is written in it, except for the date, which is valid only if the date is fixed.
- The verbal contract is binding between its parties, but this bindingness does not extend to third parties unless its date is proven.

## **B. Recommendations:**

- The necessity of expanding digitization in the field of commercial transactions allows documents and records to be used as evidence electronically.

It is incumbent upon the Algerian legislator to clarify the validity of traditional means of proof and how to utilize them to facilitate the judge's task and safeguard the rights of litigants.