

## Commercial Books in Arab Countries: Where From and Where To?

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### Abstract

Commercial books play an important role in proving transactions and rights. Arab codes of commerce oblige merchants to keeping commercial books as they reveal the state of affairs of his/her finance and commerce. The purpose of the article is to provide an overview of the legal framework governing commercial books. Arab commercial codes are highly particularized documents, treating many aspects of commercial law in detail. However, these codes somehow missed their marks. Unless Arab commercial codes address the gaps, commercial books cannot be usefully employed. Amendments must be made to Arab commercial codes in the future.

### A. Introduction

Arab countries traditionally have five codes that, collectively, are supposed to contain every legal proposition, or, in other words, the entire body of law.<sup>1</sup> An important code is the commercial code which governs transactions entered into by businessmen. Commercial law is the pragmatic creation of practical men engaged in *commerce*.<sup>2</sup> Created by and for merchants, the commercial system had its own customs, its own rules and regulations, its own tribunals and judges, and its own procedures to adjudicate disputes and enforce awards. But equally important, it was not of general application.<sup>3</sup> It had its own constituency: the commercial law was for commercial affairs only.

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<sup>1</sup> These five codes are usually (1) a code of civil procedure; and (2) a code of criminal procedure, which together set up the civil and criminal court systems and prescribe the rules of evidence and other rules that are used in litigation; (3) a penal code, which substantively defines the various crimes and provides penalties for them; (4) a commercial code, which governs transactions entered into by bankers and businessmen, and (5) a civil code, which provides a residual set of laws that govern all matters not otherwise covered by the four other codes.

<sup>2</sup> See generally J. H. Merryman, *The Civil Law Tradition* 27-34 *passim* (1969).

<sup>3</sup> In *Arab countries*, the *commercial* code prevails over the civil code because the former is a special law in comparison to the general status of the latter. See H. El-Ehwany & N. M. Ibrahim, *Introduction to Law* 85 (2004).

Arab commercial codes followed the French code de *commerce* as a model, but the French code was more a springboard than a matrix.<sup>4</sup> Although the formats are similar, and many of the articles identical, the Arab codes added many provisions of their own and omitted some of the French provisions. For example, the Arab codes rejected entirely the Fourth Book of the French Code which established Tribunaux de *Commerce*, i.e., separate commercial courts.

Arab commercial codes obligate any person who acquires the quality of a merchant to keep certain commercial books which indicate all commercial operations he concludes. The obligation to keep commercial books comes from an old custom adopted by traders since the time of Roman cambists.<sup>5</sup>

Keeping commercial books is important for the benefit of the merchant himself, third parties dealing with the merchant, and the government. For the merchant, commercial books reveal all that is relevant to his trade.<sup>6</sup> For example, a merchant can rely on the information in his books to prove his rights against others. Moreover, commercial books can be used in case of bankruptcy to prove the merchant's good faith and sound practices rather than negligence or deception. In addition, organized commercial books facilitate the liquidator's task upon liquidation and management of the merchant's properties. As for third parties dealing with the merchant, commercial books can be used as evidence against the merchant. Also, the government itself can rely on commercial books to assess due taxes due rather than relying on arbitrary assessments.

The purpose of this article is to provide an overview of the legal framework governing commercial books. This article is composed of three parts. Part two reveals, through a detailed examination, the law of commercial books. It analyzes persons bound to keep commercial books, kinds of commercial books, organization of commercial books, period for keeping commercial books, and role of commercial books in evidence. Part three contains the conclusion.

## **B. The Law of Commercial Books**

The codes of commerce in Arab countries give detailed account with regard to keeping commercial books, the persons bound by this obligation, kinds of commercial books, organization of commercial books, period for keeping commercial books, and the role of commercial books in evidence. The following sub-parts will examine these topics in turn.

### **I. Persons Obligated to Keep Commercial Books**

According to Arab codes of commerce, only merchants, whether individuals or companies, are obliged to keep commercial books.<sup>7</sup> If a person engages in business

<sup>4</sup> See H. S. Shaaban, *Commercial Transactions in the Middle East: What Law Governs?*, 31 *Law & Pol'y Int'l Bus.* 157, at 160-163 (1999).

<sup>5</sup> See A. A. Leff, *Leff Dictionary of Law: A Fragment*, 94 *Yale L. J.* 2113, at 2238 (1985).

<sup>6</sup> See A. Al-Aqale, *Commercial Law* 98-99 (1995).

<sup>7</sup> See Jordanian Code of Commerce, art. 16; Kuwaiti Code of Commerce, art. 26; Lebanese Code

as a profession in his own name and for his own account and enjoys the capacity to commerce, he is obliged to keep commercial books.<sup>8</sup> The non-merchant is not obliged by such an obligation even if he practiced a single commercial act.<sup>9</sup>

Once a person acquires the quality of merchant, he has the obligation to keep commercial books regardless of gender and ability to read and write. The law does not require that entries in the commercial books be in the merchant's handwriting. Thus, the merchant may ask the help of an accountant to organize his books for him and write his commercial operations. The merchant's nationality does not affect his obligation to keep commercial books. As a result, any foreigner who practices commerce is also obliged to keep commercial books even if the law of his country does not require such an obligation.

Although codes of commerce in Arab countries require any person who acquires the quality of merchant to keep commercial books, the legislators distinguished between large and small merchants. Arab codes of commerce explicitly exclude individuals who pursue a simple profession or small business such as street vendors from keeping commercial books.<sup>10</sup> By adopting this distinction, the legislators took into account the circumstances of small merchants by not wasting their time and burdening them with expenses inadequate to the benefits sought from keeping commercial books. In exempting small merchants from keeping commercial books, Arab codes of commerce did not determine the factors used in deciding when an individual would qualify as a small merchant. These factors, which should be updated regularly to accommodate for different economic conditions over periods of time, may include number of employees and maximum capital.

The commercial company, being a legal person, is also obliged to keep commercial books. The question that arises is whether partners in a company are required to keep commercial books separate from the obligation of the company to keep commercial books. There is no difficulty posed in the case of limited partners since they do not acquire the quality of merchant and thus not obliged to keep commercial books.<sup>11</sup> The obligation to keep those books is that of the company alone. As for general partners in partnerships, limited partnerships or limited partnerships by shares who acquire the quality of merchant upon joining the company, they should be treated as limited partners. In other words,

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of Commerce, art. 16; Moroccan Code of Commerce, art. 19; Oman Code of Commerce, art. 27; United Arab Emirates Law of Commercial Procedure, art. 26; and Yemen Code of Commerce, art. 30.

<sup>8</sup> See D. S. El Alami (trans.), *The Law of Commercial Procedure of the United Arab Emirates* 19-20 (1994).

<sup>9</sup> Single commercial acts refer to those acts that are deemed commercial by the provision of the law with no consideration to the number of times they are practiced even if practiced only once. Single commercial acts include purchasing of movables for the purpose of resale, leasing movables for the purpose of re-lease, and founding commercial companies. See M. E. El-Keky, *Commercial Law* 78-110 (2004).

<sup>10</sup> See Egyptian Code of Commerce, art. 16; Kuwaiti Code of Commerce, art. 17; Jordanian Code of Commerce, art. 10; Lebanese Code of Commerce, art. 10; Oman Code of Commerce, art. 20; United Arab Emirates Law of Commercial Procedure, art. 17; and Yemen Code of Commerce, art. 22.

<sup>11</sup> E. Amoush, *Explanation of the Jordanian Corporate Law* 34, 64 (1994).

general partners should not be obliged to keep commercial books separate from the company's ones because the latter's books are enough and general partners' books will be unnecessary.

## **II. Kinds of Commercial Books**

Arab codes of commerce provide that a merchant has to keep commercial books as necessary to the nature and importance of his commerce especially the daily book and inventory book.<sup>12</sup> This language indicates that the legislator did not specify a certain number of books to be kept by the merchant since the number determined may not be sufficient to reflect the merchant's financial status or could be exaggerated and not compatible with the merchant's commercial activity. For example, the necessary books to one merchant may be unnecessary to another practicing a different kind of activity or the same activity but at a different scale. Thus, the merchant has the liberty to keep books that are necessary to the nature and importance of his commerce. Assessing whether the books kept by the merchant are compatible with the nature and importance of his commerce is an objective issue left to the determination of the court in question on a case-by-case basis.

Even though Arab codes of commerce gave the merchant the liberty to keep the commercial books necessary to the nature and importance of his commerce, these codes set a minimum number of books that the merchant has to keep whatever the nature and importance of his commercial activity. These books are: the daily book and the inventory book.<sup>13</sup> Consequently, commercial books in the codes of commerce are divided into two main categories. First, books that are absolutely obligatory including the daily book and the inventory book. All merchants regardless of the nature and importance of their commercial activity must keep these two books. Second, books that are relatively obligatory. These books are numerous and might be either obligatory or elective to the merchant depending on the nature and importance of his commerce. In addition to these books, the legislators required that the merchant keep a copy of all correspondence and other documents sent or received and which relate to his commerce. The following subsections will examine both kinds of obligatory books, absolute and relative, and files of correspondence.

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<sup>12</sup> See Egyptian Code of Commerce, art. 21; Kuwaiti Code of Commerce, art. 26; Jordanian Code of Commerce, art. 16; Lebanese Code of Commerce, art. 16; Oman Code of Commerce, art. 28; United Arab Emirates Law of Commercial Procedure, art. 26, and Yemen Code of Commerce, art. 31.

<sup>13</sup> *Id.*

## 1. Absolute Obligatory Books

Absolute obligatory books include the daily book and the inventory book. The daily book is the book that includes the details of the commercial enterprise's daily life. The merchant has to enter in the daily book all commercial operations concluded in his commercial profession such as purchases, sales, and loans.<sup>14</sup> These operations have to be entered daily and in detail, i.e. operation by operation whereby the book becomes an easy tool to check the merchant's real financial status.<sup>15</sup> Moreover, the merchant has to enter in the daily book his personal withdrawals such as the sums or expenses spend by the merchant on himself and his family and donations.<sup>16</sup> However, in contrast to commercial operations, personal withdrawals of a merchant are not detailed to protect his privacy and that of his household.

The legislators, by imposing these entries, sought to determine, in case of bankruptcy, to what extent the merchant spent on himself and his household. If it is proven that his spending on his personal life was not compatible with that of his commerce, he might be considered bankrupt by neglect and therefore deprived of the right to an arrangement of bankruptcy with his creditor.

If the merchant uses only one daily book to register daily details of all commercial operations, it might be difficult to benefit from the entered data especially if the merchant has numerous operations. In order to avoid this problem, the legislator should allow the merchant to use supporting daily books in addition to the original books to prove the details of different kinds of commercial operations.<sup>17</sup> For example, the merchant, when he deems it necessary, may use a supporting book for purchases and another for sales. In this case, the details of each operation are entered daily in the corresponding book. It is enough to register these operations in the daily book periodically, for example at the end of each month. If the merchant neglects to transfer the total of his operations to the original daily book, each supporting book becomes an original one related to the operations registered in it.

In addition to the daily book, the merchant is bound to keep another book called the inventory book. The inventory book includes details about the existing goods at the end of the financial year and a copy of the balance sheet (annual budget).<sup>18</sup> The merchant should also register in the inventory book all profits and losses resulting from his commercial operations.

<sup>14</sup> See Egyptian Code of Commerce, art. 22.1; Kuwaiti Code of Commerce, art. 28; Jordanian Code of Commerce, art. 16.a; Lebanese Code of Commerce, art. 16; Oman Code of Commerce, art. 28.1; United Arab Emirates Law of Commercial Procedure, art. 27.1; and Yemen Code of Commerce, art. 32.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Among Arab codes of commerce, only the Egyptian and United Arab Emirates codes provide for this possibility. See Egyptian Code of Commerce, art. 22.2; United Arab Emirates Law of Commercial Procedure, art. 27.2.

<sup>18</sup> See Egyptian Code of Commerce, art. 23; Kuwaiti Code of Commerce, art. 29; Jordanian Code of Commerce, art. 16.c; Lebanese Code of Commerce, art. 16; Oman Code of Commerce, art. 29; United Arab Emirates Law of Commercial Procedure, art. 28; and Yemen Code of Commerce,

## 2. Relative Obligatory Books

The daily and inventory books are the minimum required from a merchant regardless of the nature and importance of his commerce. However, the merchant can also be required to keep any other book necessary to his commerce.<sup>19</sup> Thus, the merchant can keep a cashier book where the incoming and outgoing money is registered, commercial papers book where dealings in commercial papers such as checks and promissory notes are registered, and grand book that gathers all operations entered in any of the previously mentioned books.

## 3. The Correspondence File

According to Arab codes of commerce, the merchant must keep a copy of correspondence, invoices, and other documents sent or received in connection with his commercial activity.<sup>20</sup> The merchant is bound to keep a copy only of the correspondence and other documents related to his commerce as these documents are crucial in proving commercial operations. Thus, the merchant is not bound to keep a copy of his private correspondence.

The codes do not require any kind of commercial book for correspondence and other documents, rather a simple file. This is confirmed by the fact that Arab codes of commerce did not stipulate the obligation to keep a copy of correspondence in the same provision which contained types of commercial books that should be kept. Instead, the codes assigned a specific provision to correspondence documents.

The obligation to keep a copy of correspondence and other documents falls upon any merchant. The exemption of small merchants is limited to commercial books only.<sup>21</sup> As mentioned earlier, the aim of this exemption is to avoid burdening

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art. 33. The budget is a reflection of the merchant's positive and negative status at the end of the financial year. The budget takes the form of a list or table of two columns, the first representing the enterprise's assets and including its rights i.e. movables and fixed properties belonging to the merchant as well as his rights on third parties, and the second representing liabilities including the enterprise's debts i.e. the merchant's obligations to third parties as well as the enterprise's capital for it is considered a debt vis-à-vis its owner. *See* K. D. Larson *et al.*, *Fundamental Accounting Principles* 123-138 (2005).

<sup>19</sup> *See* Egyptian Code of Commerce, art. 21; Kuwaiti Code of Commerce, art. 26; Jordanian Code of Commerce, art. 16; Lebanese Code of Commerce, art. 16; and United Arab Emirates Law of Commercial Procedure, art. 26.

<sup>20</sup> *See* Egyptian Code of Commerce, art. 24; Kuwaiti Code of Commerce, art. 31; Jordanian Code of Commerce, art. 16.b; Oman Code of Commerce, art. 28.2; United Arab Emirates Law of Commercial Procedure, art. 30; and Yemen Code of Commerce, art. 35.

<sup>21</sup> *See* Kuwaiti Code of Commerce, art. 17; Jordanian Code of Commerce, art. 10; Lebanese Code of Commerce, art. 10; and United Arab Emirates Law of Commercial Procedure, art. 17. According to the Egyptian code of commerce, rules of commercial law are not applicable at all to those who are engaged in small retail trade or simple profession. Thus, if the merchant owns a small business with few expenses and resulting in an income guaranteeing his livelihood, he is neither bound to keep commercial books nor a copy of all correspondence related to his commerce. *See* Egyptian Code of Commerce, art. 16.1.

small merchants with high expenses incompatible with the benefits of keeping commercial books. This is not the case in keeping copies of correspondence sent and received by the merchant for this he does not incur high expenses.

### III. Organization of Commercial Books

The legislator was eager to set some formalities for the organization of commercial books to guarantee the precision and accuracy of the entered data and prevent any fraud. Commercial books should not include any blanks, deletions, or any writings in the margins or between the lines.<sup>22</sup> This rule aims at preventing the merchant from changing data in the books by writing between the lines or in the margins or adding by filling the blanks. In case a mistake is discovered in an entry, it can be corrected by making a new entry with the date of its discovery.

The pages of daily and inventory books should be numbered before being used and signed and stamped by the commercial register office or public notary.<sup>23</sup> The purpose of numbering and stamping is to prevent the addition, shedding or replacement of new pages, or even shedding the whole book and replacing it with another. At the end of the financial year, the merchant has to present the daily and inventory books to the commercial register office in order to ratify the number of pages used during the year. When the pages of one of the books are completed, the merchant should present it to the register's office to signal the end of its pages.<sup>24</sup> Thus, the merchant will be unable to remove the last pages. It is evident that the rules concerning numbering and signature were originally set to organize the daily and inventory books, but they should also be respected in any other commercial book kept by the merchant when required by the nature and importance of his commerce.

In general, Arab codes of commerce do not address whether a merchant can organize his commercial operations in reduced form such as microfilm, computer, or any other modern technical.<sup>25</sup> The merchant may have an interest in using microfilms or computers because they save time and space in allocating his commercial books and documents over an extended period of time. Therefore, Arab codes of commerce should be modified to allow merchants to use modern

<sup>22</sup> See Egyptian Code of Commerce, art. 25.1; Kuwaiti Code of Commerce, art. 30.1; Jordanian Code of Commerce, art. 17; Lebanese Code of Commerce, art. 17; Oman Code of Commerce, art. 30; United Arab Emirates Law of Commercial Procedure, art. 29.1; and Yemen Code of Commerce, art. 34.

<sup>23</sup> See Egyptian Code of Commerce, art. 25.2; Kuwaiti Code of Commerce, art. 30.2; Jordanian Code of Commerce, art. 18; Lebanese Code of Commerce, art. 18; Oman Code of Commerce, art. 30; United Arab Emirates Law of Commercial Procedure, art. 29.2; and Yemen Code of Commerce, art. 34.

<sup>24</sup> See Egyptian Code of Commerce, art. 25.3; Kuwaiti Code of Commerce, art. 30.3; and United Arab Emirates Law of Commercial Procedure, art. 29.2.

<sup>25</sup> The United Arab Emirates Code of Commerce, in art. 38, permitted a merchant to use computer or other modern technological device in organizing his commercial operations. See Q. A. Al-Wtaidi, Commercial Books and Their Probative Force in Light of Widespread Use of Computer in the Economic Field, in Conference Proceedings on Law, Computer, and the Internet, Faculty of Sharia and Law-United Arab Emirates University, Vol. 2, 673-675 (2004).

technologies.<sup>26</sup> Additionally, reduced copies must have the same evidentiary value as the originals of books and documents provided that certain formalities such as numbering and signature are observed.

#### IV. Time Framework for Keeping Commercial Books

In view of the importance of commercial books as a tool to prove the entered commercial operations, the legislator required from the merchant and his heirs to retain the books and documents relative to the entries for a period of ten years.<sup>27</sup> The period of ten years runs from the date of closing the book or from the date of sending or receiving the correspondence and other documents related to commercial activity.

The ten-year period during which the merchant has the obligation to keep commercial books is by no means a prescription of the rights entered therein.<sup>28</sup> In other words, there is a separation between the merchant's obligation to keep commercial books during the ten-year period and the lapse of the rights in these books by prescription. Each right is prescribed according to its own period or after fifteen years as stipulated in the general rules of prescription.<sup>29</sup> As for the ten-year period, the effect of its expiration is limited to the creation of a presumption concerning the merchant's discarding of his books and documents. However, it serves the merchant's best interest to keep commercial books and documents even after the expiration of the ten-year period until the rights therein prescribe for these books have great evidentiary value.

<sup>26</sup> For example, there have been calls in Jordan to amend the Code of Commerce to accommodate the new technologies in maintaining commercial books. Thus far, Jordanian courts do not recognize the use of technology in organizing commercial books. These courts found merchants in violation of the law because they used computers in organizing their operations. *See A Call to Amend the Code of Commerce*, 73-74 Auditor Magazine 35-36 (October 2007).

<sup>27</sup> *See* Kuwaiti Code of Commerce, art. 32; Jordanian Code of Commerce, art. 19; Lebanese Code of Commerce, art. 19; Moroccan Code of Commerce, art. 26; Oman Code of Commerce, art. 31; and Yemen Code of Commerce, art. 36. The period is five years in Egypt and United Arab Emirates. *See* Egyptian Code of Commerce, art. 26; United Arab Emirates Law of Commercial Procedure, art. 31.

<sup>28</sup> Prescription is a mode of barring of actions as a result of inaction for a period of time. *Prescription* is not merely a mechanism for the release of debts; rather, it is a mode of extinction of claims. Thus, *prescription* extinguishes the legal right of enforcement; it does not extinguish the underlying obligation. *See* M. Jalili, *Time Bar Clauses in Saudi Arabian Contracts*, 13 International Construction Law Review 488, at 490-91 (1996). *See also* D. V. Snyder, *A Symposium: The Case of Natural Obligations*, 56 Louisiana Law Review 423, at 425-428 (1995).

<sup>29</sup> In commercial matters, the prescription period is ten years. *See* Jordanian Court of Cassation Case No. 2209/2003, Adaleh Center Publications (17 Nov. 2003). *See also* Egyptian Civil Code, art. 374; Iraqi Civil Code, art. 429; Jordanian Civil Code, art. 449; Kuwaiti Civil Code, art. 438; Moroccan Civil Code, art. 387; Syrian Civil Code, art. 372; and United Arab Emirates Civil Code, art. 473.



## V. The Role of Commercial Books in Proof

The law grants commercial books a probative force in proof. The probative force of commercial books in proof differs depending on the position of the merchant if he is the plaintiff or the defendant and on his opponent's quality, whether he is a merchant like him or non-merchant. As a general rule, a person cannot make an evidence for himself based on documents he made. Despite that, the commercial legislator allowed the merchant to use the data entered in these books as evidence against his opponent.

### 1. The Probative Force of Commercial Books in Evidence For and Against the Merchant

Arab codes of commerce stipulate that commercial books are accepted as evidence in actions brought by or against merchants.<sup>30</sup> However, in order for the merchant to rely on the data entered in his commercial books in proving the right he claims, two conditions shall be fulfilled. First, litigation should be related to commercial act.<sup>31</sup> Second, litigation has to be between two merchants. The reason behind this condition is that, the opponent being a merchant, he has the obligation to keep commercial books.<sup>32</sup> Hence, the judge can verify plaintiff's claim by comparing the data relative to the claim in the books of both parties.

No problem arises when the comparison reveals that data in both books are identical, for this means that the merchant was right in relying on his books. However, if there is a difference between the data in both books, the court should not give priority to the data in one book over the other. It could ask the plaintiff merchant to provide other evidence.

The legislators, in codes of commerce, addressed the probative force of the merchant's books as evidence against a non-merchant. A merchant can rely on his own books to prove a transaction against his civilian customer if bound to keep commercial books, to his opponent the non-merchant; for instance if a merchant supplied products, food or other goods to one of his clients. Thus, this exception is not applicable if the debt constituting the object of the litigation is related to any cause other than the supply such as paying back a sum of money that the merchant had previously loaned the non-merchant. However, the data entered in the merchant's commercial books constitute a definite argument to prove his claim against his opponent the non-merchant. The matter is left to the discretion of the court.

<sup>30</sup> See Egyptian Code of Commerce, art. 28; Kuwaiti Code of Commerce, art. 33; Jordanian Code of Commerce, art. 20; Lebanese Code of Commerce, art. 20; Moroccan Code of Commerce, art. 20; Oman Code of Commerce, art. 33 & 34; United Arab Emirates Law of Commercial Procedure, art. 36; and Yemen Code of Commerce, art. 38.

<sup>31</sup> *Id.*

<sup>32</sup> A merchant may not be able to use his commercial books as evidence against another merchant not bound to keep commercial books. This is the case when the merchant owns a small handicraft and therefore is not subject to the provisions of commercial law. However, in this case, the judge may consider the plaintiff's books a presumption to the validity of his claim.

Data in the merchant's books constitute evidence against him.<sup>33</sup> Any person dealing with the merchant has the right, in case of litigation, to rely on the entries in the merchant's books to prove his claim; regardless of whether he's a merchant or not, and regardless of whether the debt is commercial or civil. Commercial books have a probative force against their owner because the data included in them is considered a written confession from the merchant. The merchant's opponent may not divide the data entered in a commercial book and disregard others. However, it seems logical and fair that merchant's opponent who obtains evidence for himself through the merchant's commercial books may not divide the data entered and disregard what goes against his claim. In other words, data entered in the merchant's books is indivisible.<sup>34</sup> For example, if a merchant enters in his books that he sold a certain good to one of his clients at a price to be paid at a later date, the client does not have the right to require the delivery of the good based on the entry proving the sale. He may choose between using all the entries in the book or disregarding them and finding other evidence to his claim.

Although data is considered a confession by the merchant owning these books and may be used against him, it is not deemed a definite argument. In fact, data is merely a non-judicial confession and its degree of argumentation is left to the judge's discretion. The judge may consider the data as evidence against the merchant who owns the commercial books or he may not consider it at all.

## 2. Methods of Submitting Commercial Books Before Courts

According to the general rules, a person may produce evidence before the court to prove his claim. If a person decided to keep documents to himself and not present them before the court for they do not serve his interest in the claim, his opponent may not oblige him to do so.<sup>35</sup> In other words, a person may not be obliged to present evidence against himself. However, Arab codes of commerce did not follow these general rules. To the contrary, Arab codes of commerce allowed the opponent to demand the merchant to produce his books.<sup>36</sup> The court *ex officio* may order the presentation of the books.<sup>37</sup> In sum, obliging the merchant to submit his books before the court may take one of two forms: presentation and communication.

### a. Presentation

Presentation means submitting a commercial book to the court and putting it at its disposal to deduce the data related to the litigation at hand. Commercial books can be presented before the court upon its own initiative or request of the

<sup>33</sup> *Id.*

<sup>34</sup> M. K. Taha, Commercial Law 173 (1988).

<sup>35</sup> See M. A. El-Qudah, Rules of Evidence 44-46 (1994).

<sup>36</sup> See Egyptian Code of Commerce, art. 28.1; Kuwaiti Code of Commerce, art. 33; Jordanian Code of Commerce, art. 21; Lebanese Code of Commerce, art. 21; Moroccan Code of Commerce, art. 22; Oman Code of Commerce, art. 35; United Arab Emirates Law of Commercial Procedure, art. 34; and Yemen Code of Commerce, art. 40.

<sup>37</sup> *Id.*

opponent.<sup>38</sup> The legislators did not impose any restrictions on the presentation of commercial books to court. Hence, the court has the right to order the merchant to present his books regardless of whether litigation is over a commercial act or civil one, or whether the merchant's opponent is a merchant himself or not.

The court may undertake to examine the book by itself or can use the help of an expert for this purpose. At any rate, examination should be limited to the data related to the litigation at hand unless it is difficult to get to this data. In this case, it is inevitable to look at all or most of the book's sheets. The court or expert assigned by it should not, under any circumstances, allow the opponent to view the books, for the data entered in them is confidential and should not be revealed to a third party. The court or expert must view the book in presence of the merchant or his representative and under his supervision.

If the merchant refuses to present books for review without valid reason, the court has the right to consider that a presumption that the facts to be proven through the books are true. However, the court may entertain the merchant's desire to protect his commercial secrets and overlook this presumption. At the end, the matter is left to judge's discretion.

#### *b. Communication*

Communication means that the merchant relegates his books to his opponent so the latter may view their data and deduce what might prove his claim.<sup>39</sup> Thus, communication differs from presentation as to the person who has the right to examine the data in the commercial books. In case of presentation, the court or the expert assigned by it has the right to view commercial books. While, in case of a communication, the right to view the commercial books and deduce evidence to the claim is given to the opponent.

Communication includes high risk for the merchant who owns the commercial books because it allows his opponent to know the details and secrets of his business. This being the case, the legislations of various Arab countries were content with communication and allowed it in limited cases.<sup>40</sup> The merchant's opponent does not have the right to view his commercial books except in commercial and civil litigations related to inheritance, matters of common properties, companies, and bankruptcy.<sup>41</sup>

In case of the merchant's death, every person having a right to the inheritance may ask the court to oblige the person who has the deceased merchant's books to submit them for viewing the data in order to determine the value of the inheritance

<sup>38</sup> *Id.*

<sup>39</sup> See Egyptian Code of Commerce, art. 28.2 & 3; Kuwaiti Code of Commerce, art. 33; Jordanian Code of Commerce, art. 20; Lebanese Code of Commerce, art. 21; Moroccan Code of Commerce, art. 24; Oman Code of Commerce, art. 35; United Arab Emirates Law of Commercial Procedure, art. 35; and Yemen Code of Commerce, art. 37.

<sup>40</sup> A. Ziadat & E. Amoush, *Nutshell of Jordanian Commercial Legislations* 66-67 (1995).

<sup>41</sup> See Egyptian Code of Commerce, art. 28.2 & 3; Kuwaiti Code of Commerce, art. 33; Jordanian Code of Commerce, art. 20; Lebanese Code of Commerce, art. 21; Moroccan Code of Commerce, art. 24; Oman Code of Commerce, art. 35; United Arab Emirates Law of Commercial Procedure, art. 35; and Yemen Code of Commerce, art. 37.

and his portion in it. Also, according to the community property system and the resulting common patrimony between spouses, if the marriage between the merchant and his wife is terminated by divorce or death, the spouse has the right to view the merchant's books in order to determine his share.

In case a company is dissolved and liquidated, partners have the right to ask the court to view the company's books so that each one may determine his share upon dividing it. Non-managing partners in partnerships and limited partners in limited partnerships have the right to view, during the existence of the company, its books and documents in order to monitor managers' work.<sup>42</sup> In joint stock companies, this right is given to auditors.

If the merchant is declared bankrupt because he stopped paying his commercial debts, the court has the right to order him to submit his commercial books to it or to the trustee of bankruptcy, as representatives of the creditors, to view them.<sup>43</sup> This will allow them to know the assets and liabilities in order to determine the share of each creditor upon the division of the bankrupt's properties. Also, in case the merchant asks for an arrangement of bankruptcy with his creditors, the court may order him to present the books to the supervisor of the arrangement, as a representative of the creditors, in order to determine whether the conditions for such an arrangement are fulfilled and whether the merchant is capable of executing the arrangement or not.

### **C. Conclusion**

Commercial books play an important role in proving transactions and right. Arab codes of commerce obliged merchants to keeping commercial books as they reveal the state of affairs of his finance and commerce. Although Arab codes of commerce address many aspects of commercial books such as the persons bound by this obligation and kinds of commercial books, there remains some gaps that need to covered.

In exempting small merchants from keeping commercial books, Arab codes of commerce did not determine the factors used in deciding when an individual would qualify as a small merchant. These factors may include the number of employees and maximum capital. In addition, it is unclear if partners in a company are required to keep commercial books separate from the obligation of the company to keep commercial books.

If the merchant uses only one daily book to register daily details of all commercial operations, it might be difficult to benefit from the entered data especially if the merchant has numerous operations. In order to avoid this problem, the legislator should allow the merchant to use supporting daily books in addition to the original books to prove the details of different kinds of commercial operations. It is evident that the rules concerning numbering and signature of commercial

<sup>42</sup> See R. W. Hamilton, *Corporations Including Partnerships and Limited Liability Companies: Cases and Materials* 62-73 (2001).

<sup>43</sup> See E. Naseef, Vol. 4: *Bankruptcy* 493-495 (1986).

books were originally set to organize the daily and inventory books, but they should also be respected in any other commercial book kept by the merchant when required by the nature and importance of his commerce.

Arab codes of commerce do not address whether a merchant can organize his commercial operations in reduced form such as microfilm, computer, or any other modern technical. The merchant may have an interest in using microfilms or computers because they save time and space in allocating his commercial books and documents over an extended period of time. Therefore, Arab codes of commerce should be amended to allow merchants to use modern technologies. Reduced copies must have the same evidentiary value as the originals of books and documents provided that certain formalities such as numbering and signature are observed.

Arab codes should provide further details with regard to the probative force of commercial books in evidence. For example, these codes should grant the merchant the right to disprove the data of his books for instance by proving that data was mistaken. Arab codes should provide principles that govern examination of commercial books. For example, examination should be limited to the data related to the litigation at hand unless it is difficult to get to this data. In this case, it is inevitable to look at all or most of the book's sheets. The court or expert assigned by it should not, under any circumstances, allow the opponent to view the books, for the data entered in them is confidential and should not be revealed to a third party. The court or expert must view the book in presence of the merchant or his representative and under his supervision".

Arab commercial codes are highly particularized documents, treating many aspects of commercial law in detail. However, these codes somehow missed their marks. Despite their obvious excellence (the materials are arranged logically, and, by and large, the rules and definitions are clearly and concisely phrased), the commercial codes still lack provisions with regard to commercial books. Unless Arab commercial codes address the gaps, commercial books cannot be usefully employed. Arab codes were drafted long before the development of modern technologies and this century's phenomenal increase in sophistication of *commerce* and commercial transactions. Amendments must be made to Arab *commercial* codes in the future.