

The Legality of Doing Business by Aliens in Kuwait in the Light of the Cassation Court's Interpretation of Article 23 of the Commercial Law and A Proposal BY

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Introduction

The Kuwaiti Constitution does not explicitly express the Principle of free trade, despite the fact that it is clearly manifested in some Articles of the Constitution, from which it is possible to derive this principle. The Constitution states that the Kuwaiti society is built on three pillars, namely Justice, Freedom and Equality⁽¹⁾. Also Article 29 has, on one hand, confirmed the guarantee of personal freedom⁽²⁾ and on the other, the equality of all people before the Law, in terms of rights and duties⁽³⁾.

The legislature has regulated the property in general provisions suggesting the idea of free trade i.e., "Private Ownership" is safeguarded and nobody is prohibited to dispose of his property within the limits of the Law⁽⁴⁾. In the light of these provisions the principle of free trade may be formulated. Thus he who buys properties is free to dispose of selling it in order to realize profit. After that the legislature addressed the principle in another concept indicating that compulsory labour may not be imposed on anyone⁽⁵⁾.

(1) Article 7 of the Kuwait Constitution.

(2) Article 30 of the Kuwait Constitution.

(3) Article 29 of the Kuwait Constitution.

(4) Article 18 of the Kuwait Constitution.

(5) Article 42 of the Kuwaiti Constitution.

Apparently the concept of that is not confined to the prohibition of exploitation but extends beyond that, as the important thing is the general expression, not the specific reason.

These provisions were not specifically formulated for the Kuwaiti citizens but for the general public as demonstrated by its generality and exclusiveness of its contents. This is contrary to certain specific provisions pertaining to the citizens, an example of which is the right of the Kuwaiti citizen for the type of work he chooses⁽⁶⁾ this basically means that each person has the right to practice commercial acts in Kuwait. However, the freedom to practice trade is not completely free from all restrictions as stipulated in the Constitution.

There are general restrictions aiming at non-interference with other interests,⁽⁷⁾ i.e. to provide enough legal protection to the national and public interests.

Some other restrictions are aimed at protecting the Public Health, an example of such restriction is the Mandatory Certificate required for the Pharmacist who sells drugs.

However, the legislature may formulate general restrictions in order to exclude specific persons from practicing all types of commercial acts. The intention of this restriction is to protect the local trade from damages that may arise as a result of competition from foreign elements, and in order to single out the citizens to enjoy the benefits arising from prohibiting the foreigner to practice trade. The Kuwaiti legislature has banned in Article 23 of the Commercial Law the non- Kuwaitis to practice commercial acts without a Kuwaiti partner or partners.

Undoubtedly, there are a number of considerations that inspired the legislature to adopt such an approach. First, the citizen is bound to be obedient and loyal to the State. He is also bound to defend it. He is the ambassador and representative for the State, and as such he should be entitled to its wealth without competition from others. It is worth-mentioning, in this context, that all International Treaties including the Conventions of the United Nations support the right of Governments to confine its general welfare to its citizens and to formulate regulations restricting foreigners from entering its territories. Further

(6) Article 41 of Kuwait Constitution, Othman Abdul Malik "Constitutional System and Political Associations in Kuwait", Part 1, 1st edition, Kuwait University, 1989, PP. 265 - 269.

- Mohammed Moqatei, The Role of the Constitutions, In determining the Identity of Persons and Society", Law J, Kuwait University, 3rd Issue, Sept. 1988,P.67, Article 23 of the Commercial Code of Kuwait has authorized non-Kuwaiti to practice any simple trade or minor business activities.

(7) Hosni Al-Masri, "Commercial Law of Kuwait", First Book, Dar Al-Kuwait, 1992, PP.199 - 200.

all the International Treaties pertaining to the elimination of racial segregation containing clauses distinguishing the citizens of the state from the foreigner⁽⁸⁾. Nevertheless, governments adopt different ideologies in organizing commercial laws with regard to the practice of trade by foreigners and normally they resort to the imposition of certain regulatory restrictions.

In France, for example, the principle of reciprocity is pursued, in order for a foreigner to practice trade. Moreover, it is a requisite that the foreigner must have a residence permit, and with the approval of the concerned authorities, the foreigner shall become a legal resident in the Country.⁽⁹⁾

In the United States, foreigners are basically prohibited from practicing trade before fulfilling certain conditions intended to safeguard the public interest; and as well confining the wealth of the country to its citizens. Moreover, the foreigners are not permanently attached to the community and confidence towards them is absent⁽¹⁰⁾.

In the People's Republic of China, foreigners are permitted to own, dispose of their properties to open accounts and to deal in bonds and shares. The owner has the right to exploit, to lease, to sell his properties and to make profits out of these transactions⁽¹¹⁾.

In view of the generalizations of Article 23 of the Kuwaiti Commercial Law as well as exclusiveness of its contents, some foreigners who realized some surpluses in saving funds started practicing trade by entering into contracts with companies, and authorized them to deal in valuable metals and in foreign exchanges on their behalf. Later these Companies claimed to have sustained losses and the foreigners were unable to get back their capital.

Foreigners brought their cases to the Courts demanding the cancellation of the contracts they concluded with the companies and requiring restitution of contracts. In fact the Cassation Court invalidated the said contracts.

In view of the importance of the commercial transactions undertaken by

(8) John Handoll, "Article 48 (4) EEC and Non-National Access to Public Employment", Vol. 13 (4), European L. R. 1982.

(9) Samiha Al-Qallyobi, The Commercial Law of Kuwait, 1974, P. 168.

(10) James Knans and Wang Huijun, " A Comparative Study of the legal Rights and Duties of Lawful Aliens in the United States and the People's Republic of China", 25 San Diego L. R. 1988., P. 327, at 360.

(11) Note No. 10, above, at 3S9.

- Charles O. Agege, "Employment Discrimination Against Aliens : The Constitutional Implications", 36, Lab. L.J. 1985, P. 87.

- Robert Rubin, "Walking A Gray Line ; The Color of Law"test Governing Non-Citizens Eligibility for Public Benefits", 24, San Deigo L. R. 1987, P. 411.

foreigners with the companies as seen on practical applications, and the negative results which emanated from the invalidation of non-Kuwaiti transactions, which in turn caused damage to the national economy, the Kuwaiti legislature amended Article 23, by introducing provisions authorizing the foreigners to deposit their capital funds in banks or in companies and to conclude agreements to invest these capitals on their account and deal in foreign exchanges and in valuable metals.

Following the decision of the Cassation Court which invalidated the commercial contract of foreigners, which in fact proved unsuccessful due to its inconsistency with the principles of the commercial law - as shall be stated later - and the failure of the legislature to properly define Article 23 of the Commercial Law, because depositing funds in the banks is characterized as commercial act or activity. We shall confine our study to demonstrate the extend of the restrictions imposed on foreigners in practicing trade or commercial acts in the State of Kuwait.

Later, we shall shed light on the problems arising from the violation of Article 23 of the Commercial Law, which is basically the annulment of the foreigners commercial contracts (Chapter One).

In the Second Chapter, we shall present the point of view of the Cassation Court in respect of Article 23 prior to its amendment.

In Chapter Three, we shall discuss Article 23 after its amendment and submit recommendations to the proposed approach.

CHAPTER ONE

EXTENT OF RESTRICTIONS IMPOSED UPON FOREIGNERS TO ENGAGE IN COMMERCIAL ACTS IN KUWAIT.

The Kuwaiti legislature prohibited the foreigners, in accordance with Article 26 of the abolished Commercial Law and in Article 23 of the current Commercial Law, to practice commercial act without having Kuwaiti Partner and without the Kuwaiti Partner owning not less than 51 of the total capital of the company.

It is vital to determine the scope of this restriction, and the results emanated due to the failure of specifying any explicit penalty to be imposed, should any violation is committed in respect of Article 23 of the Commercial Law.

First : Scope of Restriction Imposed Upon Foreigners:-

This restriction clearly forbids foreigners from practicing trade or commercial act inside Kuwait without sharing a Kuwaiti Partner who will own the majority of the Share Capital of the Company. Such a restriction will naturally enable the Kuwaiti Partner to assume direct responsibility over the administration of the Company⁽¹²⁾.

It should be noted that practicing commercial acts according to the provisions of the Commercial Law - as distant from civil acts - comprises buying and selling movable and immovable properties, buying and leasing movable properties, hiring of movable properties and services of person with the intention of leasing same, as well as all operations which are consistent or similar to the said operations⁽¹³⁾.

Moreover, the foreigner is prohibited to practice commercial acts as stipulated in Article 5 of the Commercial Law on account that it is a commercial activity regardless of the designation or objective of the person practicing it. However, the subsidiary commercial acts are included in the prohibition on grounds that it is a civil activity transformed into commercial acts due to its linkage or facilitating Commercial acts or transacted by a merchant⁽¹⁴⁾ i.e. the

(12) Hosni Al-Masri, n. 7, above, at PP. 199 - 201.

- Tharwat Ali Abdullaheem, "Commercial Code of Kuwait", Dar Al-Bohooth Al-Ilmiya, Kuwait, 1975, P. 171.

- Tamah Al Shammari, Commercial Companies Law of Kuwait, 1987, P. 118.

- Aziz Al-Okaili, Commercial Law of Kuwait, First Part, 1988, P. 192. - Samiha Al-Qalyobi, no. 9, above, at 167.

(13) Article 4, The Commercial Code of Kuwait, Hosni Al- Masri, n.7, above, PP. 122 - 161.

(14) Hosni Al-Masri, n. 7, above PP. 162 - 172. - Aziz Al-Okaili, n. 12, above, at P. 154. - Abe Zeid Radwan, Lectures in Commercial Law, Part I the Theory of Commercial Transactions and Trade, PP. 50 - 57.

concept of commercial acts include those activities which are civil acts in nature - but the merchant practices it in connection or to facilitate his commercial activities, such as when he concludes an insurance contract with insurance company to protect his goods from fire or theft.

A foreigner is prohibited to conduct business transactions such as speculations even if he is not a merchant.⁽¹⁵⁾

This is because the restriction imposed upon him is not only confined to the continuous practicing of trade which in the end may lead to professionalism and the acquisition of the capacity of a merchant but extends beyond that and covers even individual commercial transactions. The fact is that the Commercial Law covers all commercial transactions conducted by merchants or by any person seeking profit even if he is not a merchant.⁽¹⁶⁾ In fact, an individual who conducts an incidental commercial transaction without practicing trade as a profession can not be regarded as a merchant.

Nevertheless, this specific individual transaction shall be governed by the provisions of the Commercial Law⁽¹⁷⁾.

Only, in this way it is possible for the citizen to pick up the fruits arising from the restriction and avoid any competition from the foreigner. This can only be achieved by extending the scope of the restrictions to cover all commercial acts and to include even separate and incidental transactions⁽¹⁸⁾.

It is meant by foreigners all non-Kuwaitis. However there is exception to the GCC citizens who are referred in Article 2 of the Uniform Economic

(15) Article 3 of the Commercial Code of Kuwait.

(16) Article 1 of the Commercial Code.

(17) Article 15 of the Commercial Code.

(18) The Cassation Court Decision No.1989/47 in 14-5-1989, unpublished. The Court said, "Dealing in currency which is considered as a financial transaction and exchange, is a commercial act, even if happened one time and the person involved is not a merchant, pursuant to Article 5 of the Commercial Code. The Contract mentioned therefore, considered to be a Commercial Act, and the prohibition mentioned by Article 23 has occurred, although the defendant is not trade professional".

However, it can be said that "Practicing Trade", this expression have been used by Article 23 of the Commercial Law, - may denotes, when interpreted strictly, to practice commercial acts continuously, but not doing one Commercial Act. Therefore, if non- Kuwaiti wanted to practice trade continuously he has to get a Kuwaiti partner, but doing commercial acts occasionally, according to a vice versa interpretation of Article 23, may not infringe the Article. Again, practicing trade does not mean always, a profession, in which may lead to the earning of the characteristic of merchant, to a person practicing trade, because Article 13 of the Commercial Code - mentioned as a condition to earn the characteristic of a trader to take the commercial acts as a profession.

Agreement between Gulf Co-operation Council Countries promulgated in Law No. 58 of the year 1982 which stipulates that "Member States agree in accordance with the relevant executive provision to treat the citizens of any member state on equal footing with the nationals of each member state without discrimination or distinction in the following fieldsfreedom to practice economic activities ". The implementation of this agreement requires that Kuwait must conclude a separate agreements with the rest of the Gulf "States" and pass relevant Laws pertaining to its enforcement. In fact the Minister of Commerce and Industry has passed a resolution permitting the Gulf Co-operation Council Citizens to practice retail trade in Kuwait.⁽¹⁹⁾

The Prohibitions pertaining to the venue, depends upon the place where the transaction is executed. For example, if a commercial transaction was concluded outside the State of Kuwait between a foreigner residing in Kuwait and a Kuwaiti national, and the venue of execution of the contract was Kuwait, then the transaction shall come within the scope of prohibition. But if the transaction was concluded in Kuwait and its execution takes place outside Kuwait, the foreigner shall not be considered to have violated Article 23.

If, however, a foreigner sells properties owned to him inside the country, but had originally purchased these properties in order to sell, the deal shall be considered as violating Article 23. Again, the deal would have been a breach of Article 23, had it been concluded in Kuwait between a Kuwaiti citizen and a foreigner and executed inside Kuwait. In conclusion the limits of the ban depends upon the venue of execution⁽²⁰⁾.

If we assume that this is the only way through which the problem could be solved and the foreigner be banned from practicing trade and thus protecting the national trade from damages inflicted as a result of the foreign competitors, it is imperative that a company be established in Kuwait. If the purpose of the company is investing capital funds abroad, dealing in foreign currencies at International money markets and entering into Contracts with foreigners living in Kuwait to invest their capital funds abroad. By doing so a breach of Article 23 shall be avoided.

The Commercial Acts which the foreigner is prohibited to practice are those from which benefits can be gained and not those activities which no gains would be obtained. An example of this is the issuing of a cheque for the payment of a

(19) Decision No. 2/1987, Kuwait Al-Youm No.1702, and Decision No. 45/1983 allowing G.C.C. citizens practicing economic activities in Kuwait in the area of establishing Hotels, restaurants and working with them.

(20) The Cassation Court Decision No. 198/1988, unpublished. For other opinion, See, the Cassation Court Decision No.47/1989, in 14/5/1989.

sale contract by a cheque book holder, because these activities does not bring about any returns and hence no competition is involved, the Kuwaiti Commercial Law considers the issuing of negotiable instrument in itself a commercial act.

Secondly _ The Start of the Problem:-

Facing this stringent and extensive prohibition, some foreigners with surplus capitals in saving funds entered into contracts with certain investment and exchange companies, authorizing them to deal on their behalf in precious metals, foreign exchange and commodities in international foreign markets. However, after a short period, it was reported that the said companies failed in their transactions and lost all the capital entrusted to them. The foreigners were dissatisfied with these results and all amicable negotiations to reach any settlement were failed. So they had no other alternative except to take their case to the court and to demand a Judgement which may nullify the contracts they concluded with the exchange companies in order to get back the amounts they have deposited with the exchange companies⁽²¹⁾.

The Cassation Court ruled that the ban stipulated in Article 23 of the Commercial Law is related to the (Public Code) i.e., a mandatory article that contracting parties are unable to contract out, aiming to protect principles and standards which are sacrosanct as to require maintenance at all times (or Public Policy). In France (ordre public). However, Article 23 aims at protecting the public economic interest which takes precedence over all personal interests.

Therefore, since the contracting parties have violated provision relating to the (Public Code) or public economic policy the penalty shall be the complete nullity of the contract in accordance with Article 184 of the Civil Law which stipulates that null Contracts shall have no effect and any individual or third party in connection thereof may assert its invalidation.

(21) The (cassation) Court Decision No. 116/1987, Unpublished.
- The (Cassation) Court Decision No. 198/1988, Unpublished.
- The (Cassation) Court Decision No. 176/1988, Unpublished.
- The (Cassation) Court Decision No. 47/1989, Unpublished.

CHAPTER TWO

Assessing the Attitude of the Cassation Court in light of the Principle of the Commercial Law and the Contents of Article 23 prior to Amendment.

INTRODUCTION:-

It is apparent at first instance from what has been stated earlier, that the decision of the Court focuses on a general Principle based on the fact that the contracts of foreigners - contrary to the provision of Article 23 - which involve the purchase of movable and immovable properties with the intention of selling ; the transactions involving the purchase of movable properties in order to lease; operations involving the hiring of movable properties and services of persons with the intention of leasing and all other similar activities of the same brand and intention shall be considered as null and void.

This is due to the fact that these activities if practiced by foreigner may violate Article 4 and 5 of the Commercial Law, because it is considered as a Commercial activity. The reason being, it violates specific order pertaining to the (Public Code) i.e., violating Article 23 of Commercial Law.

The strictness of these Provisions may arise questions as to, they are contradicting with the principle of protecting the (ostensible circumstances or apparent position) i.e., an innocent third party dealing with a person in a position appeared to the public to be truth, while in fact is not, should be protected, e.g. person contracted with De facto Company his transaction is legitimate, and in case of a transaction concluded with an apparent agent. Moreover, Article 23 should be interpreted in connection with the rest of the Provisions of the Commercial Law.

First : Protection of the (Ostensible Circumstances) :-

It is not difficult to say that the civil environment is different from the commercial environment. The first is characterized by its stability and consistency as well as by the variety of civil transactions. The second is characterized by the quickness and sequentiality of commercial transactions. For that reason Civil activities are described to be formal - contrary to other from which it has been drafted in a manner that its procedures have simplified in

order to expedite its execution.⁽²²⁾

It is clear that, when there is a violation to a Mandatory Provision in civil environment, transaction may be invalidated, it is very difficult in Commercial environment because it shall involve a chain of consecutively linked transactions and contracts which if cancelled shall create serious problem capable of destabilizing the whole commercial transactions and at the same time undermine the Principle of protecting the credits . Therefore the case here is different, because it does not involve a separate transaction but a whole package of transactions, the settlement of which shall be difficult to fathom or contain. The principle of protecting the (ostensible circumstance) is considered to be one of the firmly established Principles of the Commercial Law. A quick glance at these provisions shall prove the authenticity of this statement. In case the buyer is declared bankrupt before the price is paid but after the goods are entered into his ware houses, the seller may not claim recession of the sale or the recovery of the goods, and he shall forfeit his right to the privilege thereon, and any provision tending to enable the seller to recover the goods or to maintain his privilege thereon shall not be effective towards the body of creditors.⁽²³⁾

The best applications of the principle of protecting the (ostensible circumstances) is manifested in the theory of De facto Company. The company which is formed improperly shall exercise its activities until a judgment is issued by the Court invalidating its contract. All of the company's transactions concluded prior to the judgment are legally binding to the parties involved, even if the reasons for it are affecting the (public code). The prime motive of the legislator emanates from his keenness to maintain the stability of the transactions which were concluded in good faith and to support the principle of protecting the (ostensible circumstances).⁽²⁴⁾

However, there are provisions in Article 96 of the Commercial Companies Law No. 15 of 1960 which stipulates that if a law suit demanding the

(22) Aziz Al-Okaili, n. 12 above, at 14 - 19.

- Samiha Al-Qaylobi, n. 9 above, at 58 - 73.

- Hosni Al-Masri, n. 7 above, at 72 - 84.

- Muhammed Al-Sharkawi, "Commercial Law", 1st part Dar Al Nahza Al-Arabia, 3rd ed., 1986-pp.71 - 75.

(23) Article 620 of the Commercial Law of Kuwait.

(24) Tamah Al Shammari, n.12 above at 133 - 140.

- Abu Zeid Radwan, "Commercial Companies in Kuwait",

Dar Al Ketab Al-Hadeeth, Kuwait, 1978, PP.82-110.

- Moflin Awad Al-Kotha, de facto Company in Comparative Law,

Abeer Al-Ketab Publications, 1985, PP. 408-440.

invalidation of the De facto Company's Contract is not submitted within five years from the date of its establishment the right of any third party to file a case against the company shall cease to be valid. The main reason behind this rule is that the De facto Company had already entered into a series of consecutive transactions which may result in serious damages of these contracts were cancelled.

It is also a measure intended to protect the (ostensible circumstances) and an element of stability for transaction.

On the other hand, if a company is established between Partners, a Kuwaiti and a foreigner, with 51 % of the capital shares for the Kuwaiti Partner and after a while the Kuwaiti Partner withdraws from the partnership, the Company shall be considered as illegal and invalid and violating the Partnership terms and conditions of the (General Code) or public policy. However, the transaction concluded with third parties prior to liquidation shall be legally binding. From this juncture, it is possible to judge the foreigner who breaches Article 23, with that foreigner practicing trade under the umbrella of the De facto Company, i.e., same principle should be applied to both situations on the pretext of protecting the (ostensible circumstances) and particularly in this case both of them are acquiring the capacity of a merchant. Article 14/3 of the Commercial Law states that if a person banned from practices trade, he shall be considered as merchant if he breaches the rule and shall be governed by the Commercial Law.

The community is keen to obey the Law and execute the provisions thereof. However, the Law safeguards the stability of transactions and the legal statuses established in good faith in order to avoid the anarchy that may prevail in the event that legal dispositions are cancelled retrospectively on the pretext of a breach to the (General Code).⁽²⁵⁾

The principle of protecting the (ostensible circumstances) in the Kuwaiti Commercial Code is highly evident in the way a person may acquire the capacity of merchant in accordance with the Article 14/2, despite the fact that he is only acting as a frontage e. g. a Defacto Company exploited by the covert person e. g. a foreigner who is escaping from the Law imposed upon him or running after special interest.

In this context the legislature makes no distinction between the foreigner who practices trade in his name and continues until such time he becomes professional and acquires the capacity of merchant in accordance with Article 14/3 of the Commercial Law and the foreigner who practices trade secretly behind somebody else, because both of them are acquiring the capacity of a merchant. If a foreigner practices trade properly and correctly, while under

(25) Tamah Al-Shammari, n. 12, above, at 138.

cover, a situation which is rampant in Kuwait - he shall be subjected to the Laws exactly in the same manner if he practices trade directly. The only difference is that the first used devious methods, which he shouldn't be rewarded while the other has practiced trade straight forwardly.

Therefore in the absence of explicit rule of invalidating the Commercial transactions of the foreigner, as the case may be in the Kuwait Commercial Law, it is imperative that the protection of the (ostensible circumstances) and legal positions established in good faith be given priority.

Secondly : Banning and its relation with Competency.

The ban imposed upon a foreigner to practice trade in Kuwait is different from the competency of practicing trade. The foreigner may have reached 21 years of age and there may be no impediment to competency nevertheless he may be prohibited from practicing trade. Competency is specified by age and subject to specific and exclusive conditions⁽²⁶⁾. It does not include the ban imposed upon the foreigner to practice trade. Because if the ban is connected to the competency requirement, the foreigner who practices trade will not acquire the capacity of merchant, and his commercial transactions may be invalidated.

Article 14/3 of the Commercial Law stipulates that if a person banned from practices trade, he shall acquire the capacity of trader if he breaches the rule and will be subject to the Provisions of the Law. It is exactly what has been meant by some Jurists "It is easy to distinguish between the provision, regulating the ban on the foreigner to practice trade and the rules laid down competency if the foreigner practices trade inside Kuwait territory. In this case the person shall be under obligation to bear responsibility of all the transactions undertaken, and shall acquire the capacity of merchant and may declare bankrupt in the same manner as the citizen, in the meantime he shall be subject to the punishments stipulated in case of violation of the Commercial regulations and he may be stopped from practicing trade."⁽²⁷⁾

This is the first approach of the Appeal Court that addressed "defraud, or deviate" of the Provisions of Article 26 of Commercial Law (Abolished and Replaced by Article 23 in the Current Law) which forbids non-Kuwaitis to

(26) Civil Law of Kuwait, Articles Nos. 84 - 109.

(27) Samiha Al-Qaylobi, n.9, above, at 166.

- Al Baroudi and Al-Awini, Commercial Law, Cairo, 1987, P. 189.

- Hosni Al-Masri, n.7 above, at 200.

- Tharwat Ali Abdutraheem, n. 12, above at 170.

- Ali Al-Obaidi, "Studies in Commercial Law of Morocco", Al-Rabat 1st ed., 1966, pp. 56 - 57.

practice trade in Kuwait, has effect only on banning non-Kuwaitis from continuing practicing trade, and has no effect or impact upon the ownership of the shop⁽²⁸⁾.

If we closely examine the problems encountered by foreigners in practicing commercial acts in Kuwait, we shall realize that the ban imposed upon them is merely administrative. According to the general principle, invalidating transaction implemented only when there is discrepancy in competency or the contract formed improperly. In the meantime the said administrative ban is not always strictly enforced, i.e., invalidating transaction in breach despite the fact that is associated with the (General Codes).

In fact the person who practices trade without permit, his transaction may not be invalidated for lack of administrative permit. In light of that, the Cassation Court in Kuwait has ruled that the broker is entitled to remuneration for the job he has performed even if he has no permit or license from the Ministry of Commerce and Industry or register or record his dealings or even not taking the trouble to draw the selling contract of the real estate on the form prepared for that purpose. He may not even hand over a copy of the transaction to the relevant authorities in accordance with Resolution No. 10/1981 of the Ministry of Commerce and Industry.

The reason why the legislator classifies every person breaching the ban and practice trade as a merchant is that he is concerned to bring these persons under the controls of the Commercial Law and to the procedures laid down for bankruptcy as well as to the principle that any Commercial debt, joint obligor shall jointly be liable for such a debt. It is also a measure of protection of the rights of third parties who contracted with these merchant in good faith. It might be in his interest, if the foreigner abided by his contractual obligations, even if he was more qualified for compensation from the foreigner due to the damages arising from the cancellation of Contracts. It might be assumed that it is a measure involving the protection of the legal statutes which were established in good faith and also undermining the principle of protecting the (ostensible circumstances).

In this context the legislator is inclined to support the principle of protecting the (ostensible circumstances) and the stability of the transactions when he is overlooking the Pre-qualification discrepancies of the foreigner who is concluding commercial contracts with another party in Kuwait. Article 23 of the Law pertaining to the regulation of transactions involving foreign elements states that all financial transactions concluded and executed in Kuwait with a

(28) Mentioned by Samiha Al-Qaylobi, n.9 and above, at 166, (Case No. 202/68, Unpublished).

foreigner not possessing the capacity of trade for reasons unknown to and beyond the capacity of the other party, shall not breach or avoid the transaction and all his obligations shall be considered valid and legal ⁽²⁹⁾.

In the light of the foregoing provisions there are two conflicting principles. The first principle pertains to the principle of protection of unqualified person, i.e., (has no competency) by making his contract voidable.

The second principle advocates the principle of protecting the (ostensible circumstances) (Public economic interest) with a view to stabilizing the transactions and instilling the spirit of confidence and trust into the commercial environment. At this particular point the legislature has taken into consideration the difficulties involved in ascertaining the competency of the foreigner in accordance with the laws of the state he belongs to. However, this principle is not applicable except in financial transactions. But according to Article 97 of the Kuwaiti Civil Law the foreigner has no right to adhere to the invalidation of his transactions, in the event that he is incompetent, if claimed that he is competent or to resort to tricks which may help him to hide his incapacity, otherwise lead to a conviction that he is competently qualified.

**Thirdly . Interpreting Article 23/1 Invalidating
foreigner's Contracts In Connection with
Article 14/3 facilitating his acquisition of the capacity of merchant.**

The Kuwaiti legislature mentioned the conditions required for the capacity of merchant in Article 13/1 of the Commercial Law by saying "Any person carries out commercial transactions in his name, who possesses the required competency and make such transactions as his profession shall be considered a merchant". On the basis of this Article there is no other alternative except to engage in commercial activities, because it is the only activity that enables the person practicing to acquire the title of merchant (Provided that the rest of the conditions are met⁽³⁰⁾).

So that foreigner who does not practice commercial activities, he may not

(29) Hasan Al-Hedawi "Conflict of Laws in Private - International Law of Kuwait", Kuwait University, 3rd ed., 1974, PP. 149 - 152.

(30) - Abu Zaid Radwan, n. 14 above at 59 - 66.

- Hosni Al-Masri, n. 7 above at 179 - 217.

- Tharwat Abdulraheem, n. 12, above, at 148 - 174.

- Aziz Al-Okaili, n. 12 above, at 159 - 195.

- Samiha Al-Qaylobi, n.9 above, at 133-173.

acquire the title of merchant. In the event that all foreigner's commercial contracts were cancelled, in which concluded contrary to Article 23 of the Commercial Law, and in accordance with Article 187/1 of the Civil Law the contracting parties shall be restored to the State they were before entering into these Contracts i.e., as though these Contracts were never concluded on the pretext that any legal contract shall not be binding according to Article 184 of the Civil Law. Therefore, How can a foreigner acquire the title of merchant in accordance with Article 14/3 which states that "Any person prohibited by Law.....to practice trade, who carries on trade, such person shall be deemed to be a merchant" while he actually did not practice any trade ?

It is implicitly understood that a foreigner may acquire the title of merchant, even though he violates Article 23 and practice trade, in order to make his transactions binding to him. The legislature has thus, come up with one exemption to the principle of the requirement of practicing trade for the acquirement of merchant title. This occurs when a person assumes the character of merchant by advertisement through the mass media. He shall assumed as a merchant although he does not practice any commercial transaction. However, this, personification can be disapproved. The legislature has drawn up this exemption in order to safeguard the (ostensible circumstances) which led the third party to trust the person who pretended to be a merchant. It is not correct to assume that foreigner acquired merchant's title in this case exceptionally and the aim behind granting the title of merchant to a foreigner when their contracts are cancelled is intended to ensure that they should not escape from their obligations towards other merchants and to subjugate them to the bankruptcy procedures, because exemptions should clearly expressed without any dubiety that foreigner's Contracts should be cancelled when they violate the ban. On the other hand, How will the situation look if the foreigner is accustomed to practicing trade without being professional? In this case, the foreigner shall not be qualified for the title of merchant and shall not be subjected to the bankruptcy regulations. Undoubtedly this is unfair for the third parties who dealt with the foreigner when cancelling their Commercial Contracts, which may be a favor to the foreigner. Undoubtedly the annulment of Commercial Contracts concluded by the foreigner prior to his acquisition of the capacity of merchant is unfair and unjust for third parties who traded with him, and it might be to his advantage, because he will not be subjected to the bankruptcy procedures.

Fourthly : (The General Code) and Convenience

It is a firmly established dictum in legal affairs that if the contracting parties violate a rule pertaining to the (General Code), the contract shall be considered null and void. If a foreigner practices trade in Kuwait without the knowledge of

his counterpart that he is a foreigner, it shall not be assumed that they have violated the provisions of Article 23, because the other party did not intentionally violate the rule. In this context the Roman Principle which says "Ignorance of the fact excuses but ignorance of the Law does not excuse" can be applied.

Nevertheless, the case may differ in the event for example that the Ministry of Interior granted a foreigner by virtue of services performed by him and for the sake of national interest, the right to practice trade in Kuwait, under an agreement concluded between him and the Ministry. Such an agreement shall be considered invalid, because it breaches the public economic interest. In light of that if the other party entered into a contract not a Waring that his counterpart is a foreigner, it is possible to say that the Contract is violable to the benefit of the other party on grounds that he transacted with the foreigner without knowing his identity. If however, he had a Pre-knowledge of the foreigners identity, he should not take advantage of his own wrong by requesting invalidation. Again the general principle says that "No man can take advantage of his own wrong", and consequently if the person who transacted with the foreigner was aware of his identity and the deal resulted in disadvantage for him, he is not entitled to ask for invalidation so as not to take advantage of his own wrong. However, if the foreigner is gaining from the deal it can't be invalidated and therefore it might be suggested that a penalty should be imposed upon him equivalent to double the amount he gained from the deal. However, this action can't be enforced without explicit rule. The legislature has not provided for in the Commercial Law any specific penalty upon the foreigner for illegally practicing trade in the same as those sentenced on crimes detrimental to honor and faith and a bankrupt, in the same manner as in Commercial transactions⁽³¹⁾, otherwise there will be no respect for the rules pertaining to the (General Codes) as long as the penalties relating to violation thereof are absent⁽³²⁾.

Moreover, not all agreements violating rules pertaining to the (General Codes) shall be destined for absolute invalidation. The Article of Memorandum of Association of Companies stipulate that all Partners must share in profits and losses in order to comply with the purposes and motives of the Company.

Article 13 of the Kuwait Company Law provides that Memorandum of Association of a Company may be revoked at the request of a Partner deprived

(31) Article 25/2 of the Commercial Code states that any person contravenes this Provision shall be penalized by imprisonment for a period not exceeding one year and a fine not more than two hundred and fifty Kuwaiti Dinars or by either of these two penalties, together with the closure of the business concern in all cases.

(32) A.T.H. Smith, "Offences Against Public Order", Sweet & Maxwell, London, 1987, P. 1-6.

from participation in profits or at the request of those partners upon whom the burden of the losses falls. This rule is related to the (General Code), and therefore an agreement shouldn't be reached in order to deprive such partner to annulling the clause or the contract of the company i.e. the contract of the company will be valid unless a request to cancel it is presented by any partner deprived from participation in profits or at the request of those partners upon whom the burden of losses falls. Therefore, why should the infringement of the ban stipulated in Article 23 be an absolute invalidation? The legislature did not provide for a penalty for infringement of the ban, but on the contrary formulated provisions and principles implying the soundness of contracts which are in breach to Article 23. Therefore, a foreigner who violated Article 23 and concluded contracts should be deprived from requesting annulment of contract particularly if he suffers losses on the assumption that annulment was not ruled for his own benefits, and as well, he should not take advantage of his own wrong. Taking the courts decision as guidance, if a citizen enters into a contract with a foreigner and suffers losses he shall have the right to ask for annulment of the Contract. Undoubtedly this will cause instability of transactions which in turn shall deprive the commercial transaction of the confidence enjoyed immediately after enforcement.

In addition, the general tendency of agreements contradicting with the (public economic interest) shall be violable, in the same manner as agreements violating the standard of procedures with the intention of gaining legal interest exceeding the amount fixed by the legislature. The debtor alone has the right to ask for the annulment of the clause. Therefore, the violation committed by a foreigner in respect of Article 23 shall enable the Kuwaiti citizen who transacted with him to ask for the invalidation of the contract if he desires so, provided that his dealings were based on good faith not foreigner himself.

However, the tendency of cancelling Contracts may consequently lead to adverse results and possibly to the extent of cancelling Contracts concluded by a foreigner as a buyer from a Kuwaiti merchant with the aim of selling it later which in fact is considered as valid commercial transaction even he did not sell it.

For these considerations it is possible to say that the approach of the Court in cancelling contracts concluded with foreigner and infringing the ban provided in Article 23 is inappropriate. Thus the legislature was forced to intervene in accordance with the Decree Promulgating Law No. 45 of the year 1989 to introduce amendments to Article 23 and on certain provisions of the Commercial Law issued by Decree Promulgating Law No. 68 of the year 1980.

CHAPTER 3

Amendment of Article 23 of the Commercial Law

In order to avoid the foregoing problems, the legislature amended Article 23 of the Commercial Law and introduced Provisions entitling the foreigner the right to deposit capital funds in banks or in companies or entering into a contract with banks or companies to invest these funds in his favor. The amendment also permits the foreigner to deal in foreign currencies, precious metals, provided that these transactions are consistent with the purpose for which the companies were originally established.

The legislature has indicated in the explanatory Memorandum of that amendment by saying "As a result of the practical applications which demonstrated the significance of the transactions conducted by non-Kuwaitis with local banks, Investment Companies and local exchange companies, the invalidation of these transactions shall cause damages to the banking and financial operations in Kuwait and may bring about negative results contrary to the objectives of the legislature which aimed at protecting the local trade and safeguarding the national investment from damages that might be caused as a result of competition from foreigners"⁽³³⁾.

In view of the importance of that amendment it was immediately enforced and granted a retrospective enactment on transactions concluded prior to its promulgating thereby superceding all pending suits at courts. The Scope of the said amendment is stated as follows :-

First: Amendment Limitations:-

The amendments introduced into the trading sphere of foreigners were so limited that it could hardly escape notice at the first glance. Although the legislature has permitted the foreigners to practice small businesses and profession which yield small profits sufficient only to secure their subsistence e.g., Roving Sellers and small shop owners, the legislature refrained from issuing licenses except to Kuwaitis in accordance with Article 2 of Law No.32 of the year 1969 in respect of Regulations of business Shops.⁽³⁴⁾ The legislature has

(33) Explanatory Note of the Law No. 45/1989.

(34) However, it can be said that any Article contrary to the Provisions of the Commercial Law No. 68/1980, shall be repealed, pursuant to Article 1 of the Commercial Code which states that "The Commercial Law Promulgated under Law No. 2 of 1961 shall be cancelled and suspended by the Commercial Law annexed hereto. Any stipulation contrary to the Provisions therein shall also be repealed". Thus Article 2 of the Law No. 32 of 1969 shall be also repealed.

confined the scope of trading permitted to foreigners to the depositing of Capital funds in banks or in Companies or concluding agreements with these banks or Companies in order to invest the said funds in their favor and deal in foreign currencies and precious metals provided that said activities are within the purposes of the companies concerned. This lead to the fact that foreigner should closely examine the purposes for which the companies were established, as he had to bear the responsibility, unless in case of fraud and adulteration are committed by the companies he is dealing with. On the other hand, foreigners are prohibited to entrust his capital funds with natural persons not competent for investing. This prohibition is stated in Article 23 as amended which also permits him to deposit his capital funds only in licensed banks and companies. In fact a problem will be created when a foreigner entrusts his capital with a natural person with no competency or obligation to the commercial law like revision of documents, books and records and subject to bankruptcy regulations.

Conversely, the company shall be administratively controlled by the concerned authorities particularly if it were a Company engaged in financial business and specifically licensed for that purposes in order to avoid fraud to which the foreigner might be exposed. In addition the Company may be more capable than the ordinary person in handling these capitals. Moreover, the legislature has drawn up the formats and terms of agreement or relation between the foreigner and the Investment Company. Such a relation may take one of the following forms :-

- Entering into a Contract whereby the foreigner shall depositing the funds and hence becomes the creditor, and the Company becomes the debtor with a provision that the Company shall return the deposited amounts on request or at the date of maturity plus the profit or interest percentage.⁽³⁵⁾

The advantage of this type is the minimum risk involved especially for the foreigner.

- The Second type provides for an amount of freedom for both the foreigner and the Company. An Investment Contract may be concluded under which the Company shall have the right to invest according to the conditions stipulated in its license which includes trading in Foreign Exchange and precious metals in favor of the foreigner. In this case the Company often acts as an agent for the foreigner and may trade under its name, but to the foreigner's credit and perhaps this relation may develop into a Joint Venture Company between them.

If, however, the foreigner practices these activities as a profession he shall acquire the capacity of merchant and shall be required to comply with

(35) Hosni Al-Masri, "Commercial Law - Banking Dealings" 1987, PP. 8 - 20.

obligations of merchants including bankruptcy regulations.

It should be noted that if the foreigner practices business under a Joint Venture Company, on his own account but on the Company's name, he shall be breaching Article 23 of Company Law which stipulates that Kuwaiti citizens must own the majority of Shares in any Joint- Venture with foreigners. However, in most cases the Investment Company may be a Partner in the Job it is performing while the foreigner is Partner in Cash Capital or in properties which also means violation of Article 23 which stipulates that majority of Company Capital must be owned by Kuwaiti Partner or Partners, but the Ministry of Commerce and Industry has issued the license to the Kuwaiti company which is supposed to be practicing trade independently.

However, if the Company enters into a Contract with a foreigner whereby the foreigner shall become the Principal and the Company shall become the agent who is performing the Commercial activities in favor of the foreigner. This transaction is regarded as exemption to the Article stipulating that majority of shares must be owned by the Kuwaitis.

On the other hand, the legislature did not succeed in formulating Article 23 as amended of the Commercial Law, because he could have sufficiently used the term Companies without adding the term banks on the assumption that each bank is a Company. Likewise he should not have used the expression "the agreements they concluded to invest these Capitals". Also there was no used to add the expression "the amounts they are depositing" on the assumption that every amount deposited in the bank is regarded as investment. Besides this, the foreigners previously were not forbidden to deposit their Capital in banks because depositing Capital in banks was seen to be a Working Capital and not an Investment Capital which is liable to risks.

Secondly : Problems arising from Article 23 as amended

As stated earlier the legislature has permitted the foreigner to deposit his capital funds in companies for Investment purposes. It can be understood that the legislature has implicitly characterized the depositing of funds in banks as commercial activity without addressing the risks involved or mentioning that these activities are subject to the speculation criteria stipulated in the Provisions of Article 3 of the Commercial Act, the practice of which the foreigner is not permitted. However, this characterization shall put the legislature in an envious position and its consequences may even affect the Kuwaiti citizen. This is because the legislature has prohibited the Civil Service employees of the government in accordance with the Provisions of Article 26 of the Decree Promulgating Law No. 15 of the year 1979 in respect of Civil Service, to practice Commercial, Industrial and Occupational enterprises except those activities

permitted by the Civil Service Commission. The logic behind forbidding Civil Servants to engage in commercial activities is clear. The Civil Servant is required to focus all his efforts and energy towards his job and he should not manipulate and utilize the secrets under his disposal to his personal interests.

However, the Civil Service Commission has made exceptions in this respect and gave the Civil Servant the right to practice some commercial activities e.g., to deal in land, real estate, and securities as well as selling and buying financial bonds provided that such activities shouldn't lead to professionalism or participation in the incorporation of Joint Stock Companies, but not become a member of the Board of Directors.⁽³⁶⁾

We have general remarks in connection therewith :-

First : We see that the prohibition imposed upon the Civil Servant to practice the commercial activities stated therein is a prohibition relating to the (General Code). The legislature has started with the expression which states "The Civil Servant is prohibited" together with the contents of the Public Interest which the legislature aims at protecting, which is based on the fact that the Civil Servant must devote his efforts and time to his Job and to distance himself from exploiting his position to achieve personal interests out of the secrets and influence under his disposal.⁽³⁷⁾

Therefore if a Civil Servant enters into a Commercial Contract, such a Contract must be invalidated on pretext that it is related to the (Public Code) and consistent with the verdict passed by the Cassation Court in regard to foreigners engagement in commercial activities. The aim should be summarized that similar rules should be passed in respect of these two matters which are united in cause i.e., for the sake of protecting the national policy and the absence of explicit clauses in the Commercial Law and in Civil Service Law stating whether these Contracts are legitimate or not.

As far as we know, no single Commercial Contract concluded by a Civil Servant was ever invalidated. Apparently that is attributed to the enormous penetration and involvement of civil servants in commercial affairs in Kuwait, either by practicing Commercial activities that does not require license or obtaining license through a relative who is not a Civil Servant. In the latter case both the Civil Servant and his relative acquire the capacity of trader in accordance with Article 14/2 of the Commercial Law.

(36) Civil Service Council Decision No. 8 of 1981 on 17/12/1981, Kuwait Al-Youm, No. 1390, Year 28, P. 5.

- A Del Al-Tabtabaei, " The New Kuwaiti Civil Service Law", Kuwait University, 1983, PP. 255 - 257.

(37) Article No. 25 of the Civil Service Law No. 15 of 1979 imposes restrictions on employee to engage in certain activities.

The result is that it is impossible to invalidate the tremendous number of Commercial Contracts which will undoubtedly - if enforced - shake off the stability of commercial activities and also undermine the (ostensible circumstances)⁽³⁸⁾.

It is logical therefore that one single rule be applied to both cases, i.e., either invalidating the Civil Servants Contracts in the same manner as foreigners or legalizing the foreigners Contracts in the same manner as Civil Servants, so that one rule is applied in both cases, this avoiding any contradiction in the Jurisdiction.

Secondly : on reviewing the commercial activities excluded from the ban imposed upon Civil Servants, we find that the legislature did not include the act of depositing Capital funds in banks by Civil Servants. This leads to the conclusion that depositing funds by Civil Servants are prohibited in accordance with Article 23 as amended because it is considered as commercial activity, (even the ordinary deposit) and such contract if concluded shall be invalidated. In all circumstances, civil servant who violates this condition shall be subjected to disciplinary measures even though the Provision of Article 23 are confined to foreigners. The principle states that the important matter is the general wording and not the specific reason.

Clearly the approach of the legislature in this aspect is not appropriate because the act of depositing funds in banks and getting limited profits is beyond the concept of commercial acts in accordance with the speculation criteria provided by Article 3 of the Commercial Law.⁽³⁹⁾ The foreigner was not prohibited to deposit his Capital at banks in order to get Pre-specified interest before the issuance of Article 23 as amended in 1989.

Why then the legislature drafted this provision and cause embarrassment to the Civil Servants, taking into consideration that the majority of the Civil Servants Kuwaiti or foreigners have deposit capital in the Banks whether ordinary or investment deposit.

Also in the event of enforcement of these Provision or implementation of Court opinion, all Contracts pertaining to deposits in banks by foreigners will be invalidated. This indicates the extent of problems arising from invalidating foreigners Contracts contrary to the Provisions of Article 23.

(38) However, Prof. Tabtabaei provides that Article 26 of the Civil Servant Act is not related to the (public code), n. 36. above, at 257.

(39) - Hosni Al-Masri, n.7 above, at 102 - 121.

- Samiha Al-Qaylubi, n.9 above at 74 - 92.

- Tharwat Ali Abdullaheem, n. 12, above at 45 - 65.

- Abe Zeid Radwan, n. 14. above, at 18 - 28.

The Proposed Procedures:

At this point it is necessary to distinguish between Commercial activities which are prohibited for the exercise of foreigners and the activities not included in the umbrella ban or in other words known as Passive Investment.

The idea of trading involves positive actions and perhaps undertakings with clients, while Passive Investment, does not involve positive activity which is Pre-requisite for trade. Passive Investment involves depositing money at a specific place and adoption of Passive attitude towards it, shielded with an atmosphere of anticipation of its growth.⁽⁴⁰⁾

The person practicing trade carries out positive actions with the aim of realizing profits. He hires or purchases commercial premises and works hard to find out a source where he can buy cheap and high quality goods, enters into contracts for transporting and insuring same and consequently stores these goods in warehouses in preparation for selling it. He assumes responsibility for all obligations arising from the Sale Contract contrary to those who deposit their capitals in banks or enters into investment contracts e.g. buying shares and anticipates profits, as they are unable to do anything towards the growth of their value. The growth of passive investment depends upon market fluctuations but Shareholders Companies in which have issued the shares are engaged in real commercial activities.⁽⁴¹⁾

In the United States of America, the person who practices commercial activities is obliged to pay all taxes, while the person practicing Passive Investment shall only be liable to pay fixed amount of Tax levied on the profit accrued from the Invested Capital and not on the Capital itself.⁽⁴²⁾

Likewise the person who assigns his rights by a lease to extract minerals against a fixed amount on the basis of profit percentage is not practicing commercial activities. The same applies to the farmer who leases his land to a lesser in return of agriculture products. These actions are seen for to be Passive Investments on the assumption that the burden of the work falls on a third party. In reality those engage in business acts or commercial activities are often busy with it.⁽⁴³⁾

(40) Joseph Jesnergh, "The Trade or Business of foreign Taxpayers in the United States, " 61, Taxes 1983, P. 972.

- Hosni Al-Masri, "Investment Companies", Dar Al- Nuhza Al-Arabia, Cairo, 1981.

(41) Higgins V. Commissioner - 312 U. S. 212 (1941) rehearing denied, 312 U. S. 714 (1941). Edward A. Newman Devman Devegvan, CCH Dec, 22, 540, 28 TC.1055 (1957).

(42) Joseph Isenbergh, n. 40, above, at 973.

(43) Snell V. Commissioner, 97, F. 2d, 875, 892, where the Court stated that "The word "Business", not withstanding disguise in spelling and pronunciation means busyness, it implies that one is kept more or less busy, that the activity is an occupation".

However, for the purposes of this research we must distinguish between two types of activities, viz, business activities in its narrow and limited concept i.e., the positive business activities and the passive investment which are based on the idea of servicing the capital funds from these premises, there should be a limit which separate the business activities from passive investments in order to deprive the foreigner as well as the Civil Servants from practicing the first and granting them the right to engage in the second. The Prime motive behind this is to prevent the foreigners from penetrating the national economy and competing with the Kuwaiti citizen. In this manner, the foreigner shall be preventing from directing the economy if he is engaged in Passive Investment. On the contrary he shall be directed by Kuwaiti citizen and will not in a position whereby he can change the course of the national economy or harm it. Besides this, the national economy is suffering currently from serious recession and measures should be taken to prevent any outflow of capital funds generates inside the country, while encouraging the flow of capital into the country from abroad.

Moreover, the civil servant should not be engaged in commercial activities which will absorb his efforts or consume his time, and be confined to Passive Investment which based on expectation of return and not in positive activities. Undoubtedly this constitutes an amount of rectification to the prevailing situation whereby civil servants obtain commercial licenses in the name of his wife or relative and later transfers the operation of it to the foreigner. This relation is detrimental to all parties concerned because each party shall acquire the capacity of a merchant in order to protect the (ostensible circumstances) or third parties who contracted with them in good faith.⁽⁴⁴⁾

Therefore, it is vitally important to revise the Provisions of Article 23 as amended of the Commercial Law in order to remove from its text the transactions involving deposits with Companies in a manner that will not render the deposit transactions of foreigners and civil servants as a positive commercial activity, because at least an ordinary deposit may be regarded as a (working capital) i.e. a concept distinct from commercial activities and the speculation standard mentioned in Article 3 of the commercial law is not applied to it. Besides the majority of civil servants have deposit accounts with banks and shall be liable to disciplinary measures in the event that such transactions are viewed to be Commercial⁽⁴⁵⁾.

On the other hand, the legislature should allow foreigner according to Article 23 to engage in simple vocations and small business enterprises as

(44) - Hosni Al-Masri, n. 7, above, at 192 - 193. - Aziz Al-Okaili, n. 12, above, at 168 - 171. - Tharwat Ali Abdulraheem, n. 12, above, at 158-159. - Samiha Al-Qaylobi, n. 9, above, at 150-151.

(45) - Article Nos. 27 - 31, of the Civil Service System No. 15 of 1979.

person, besides being established against any apparent person.

- (c) Article 23 of the Commercial Law must be revised and the provision pertaining to the depositing of capital funds be removed especially ordinary deposit on grounds that such activities are out of the scope of commercial acts. Otherwise it shall be understood to be an implication that the legislature has formulated the transactions pertaining to the depositing of capital funds as a commercial act, which shall be subjected to the Commercial Law.

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