The Discrimination between National and Foreign Investors in the Lebanese Corporate Law

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Abstract:

A country that treats foreign and domestic investors alike in regards to commercial dealings motivates foreign investors to play a fundamental role in stimulating economy in such country. However, non-discriminatory treatment is sometimes undesirable from the perspective of public policy. Most national laws provide certain measures of discriminating between foreign and domestic investors in order to give its citizens more privileges and advantages over foreign investors. This is applicable in the Lebanese Commercial legal system. This paper discusses the discrimination that is implemented by the Lebanese Commercial Law between Lebanese and non-Lebanese investors specifically in regards to commercial representation and Joint Stock Company. This paper also provides some comparative studies between the Lebanese and the American approach in regards to discrimination between national and foreign investors within commercial companies and commercial representations.

Keywords: law, discrimination, commercial representation, corporation, investors, foreign, comparative law

Introduction:

Lebanese legal system is considered one of the few legal systems that respects equality and does not discriminate between Lebanese and foreign investors/merchants in regards to all legal dealings. This understanding is not true since some of the Lebanese law branches and especially the Lebanese Commercial Law applies and implements discrimination.

Commercial Law is considered one of the most important branches of the Lebanese private Laws. Commercial laws encompass a group of legal rules that deals with and regulates the commercial activities that are based on the fastness and trust in all its activities. Commercial laws and rules are flexible in order to meet not only the domestic commercial needs but also the international ones. Worldwide, commerce is now not limited to be conducted by individuals but by juristic persons, legal entities, such as partnerships and corporations. Those associations are the only entities that are able to handle all industrial, commercial, and economic

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1 Legal entity is “a body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents. A typical example is a corporation.” Bryan A. Garner Thompson, Black’s Law Dictionary, 913 (West, 8th ed. 2004).
medium and giant projects. This is obvious since a single merchant or a sole proprietorship lacks the financial resources, efficiency and productivity that such entities have.

Legal entities can be divided into two types of associations (Association of People and Association of Funds). Each type of those associations has specific elements and characteristics. Association of people, partnerships, is formed based on a close relationship among the partners themselves. The partnership enjoys many advantages such as “the ease of organization and dissolution, informality in management…. the disadvantages are the unlimited liability of partners for partnership debts, difficulty of settling disputes among the partners, the difficulty in transferring a partnership interest, the lack of continuity and the danger of dissolution if a partner withdraws or dies.”2 On the other hand, association of fund, corporation, attracts investors based on the limited liability of its investors, the issuance of securities, the ease of transferability of the investors’ interests, and its perpetuity.

Historically, partnership under the Roman law was the only type of association that was available to investors. During that time, the only factor that brings investors together was the close relationship between the partners. This trend was also adopted in Lebanon. Article 844 of the Lebanese Code of Obligations and Contracts defines Partnership as “a reciprocal contract between two or more parties about a project with the intent to share profit.”3

The concept of association of people lost its attractiveness to the concept of association of fund and especially to the Joint Stock Company. Article 77 of the Lebanese Commercial Code defines the Joint Stock Company as “a corporation in which its capital is divided into negotiable equal shares. Shareholders’ liability for the debt of a corporation is limited to the sum they have invested in the corporation through the acquisition of share.”4 The said Article stipulates that the corporation should have an anonymous name that is different than the name of its investors.

The Joint Stock Company is the implementation of the notion of the democratic state. The lawmakers consider that the Joint Stock Company and a democratic country are similarly managed. For example, every democratic nation has three different branches, that each one of them has a specific function and duty. Accordingly, the executive branch (ministry of council) is responsible to execute and enforce laws, the judicial branch (court), is competent to applies law in the name of the state and provide means to resolve disputes, and the legislative branch (the parliament) is responsible to regulate and legislate. On the other hand; the Joint Stock Company is also managed by three different branches which are the Board of Directors (the executive branch), Auditor (court), and the shareholders (the parliament). The Board of Directors is considered the corporate governance of the company. Auditors are responsible to overview and monitor the board directors’ decisions, and the shareholders are responsible to legislate. The

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3 Code of Obligations and Contracts [C. OAC] [CIVIL CODE] art. 844 (LEB.).
4 Code of Commercial Law [C. CL] [CIVIL CODE] art. 77 (LEB.).
Lebanese lawmakers have put a section that legislates and organizes every single aspect that impacts the Joint Stock Company from the establishment until the termination. This section includes matters that relate to the majority of the board of directors and the process of voting/taking decision in such board. The spirit of the majority of the board of director’s notion has created a discrimination between the Lebanese and non-Lebanese investors. The Lebanese law stipulated that in order to form a Joint Stock Company board of directors, the majority of the board members must be Lebanese. The discrimination that is adopted by the Lebanese lawmakers is not only applied within corporation but it is also implemented by the Legislative Decree 34/67 that deals with commercial representation contracts in Lebanon.\(^5\) This decree triggers many concerns in terms of the discrimination between the Lebanese commercial representative and a foreign one and gives priority to the Lebanese agent over non-Lebanese principle.

Accordingly, the following question should be asked, can the Lebanese law be considered as a discriminatory law, or can such discrimination be justified since it is only implemented in some laws (Decree 34/67) and in the most important type of corporations which is the Joint Stock Company?

This paper will provide many principles that are deemed to be discriminatory in the Lebanese Commercial Law between a Lebanese and non-Lebanese investors (part I) and the justification of such discrimination that is considered necessary in certain places (part II).

**Part I: the difference between Lebanese and foreign Investors: a kind of discrimination**

Obviously, we can say that in a country like Lebanon that adopts a free economic policy especially in the commerce sector; Lebanese lawmakers issue laws that give equality among all people. Laws that provide equality to all participants in such sector must be applied in all rules of the commercial law, laws of corporations, and laws related to Joint Stock Company. This is true since such company is the most appropriate tool in our economy as we have mentioned before.

However, Lebanese Corporation and Lebanese Joint Stock Company law have some rules that discriminate among investors. Such discrimination is based on the nationality of the investors; thus, it is important to identify the scope (A) and the impact of such discrimination (B).

**A- Scope of discrimination**

The discrimination in the Lebanese legal system between Lebanese citizen and a foreigner is related to who a Lebanese corporation (1) and a commercial representative (2) operates.

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\(^5\) Legislative Decree 34 of 5 Aug. 1967 (Leb.).
1-Concerning the commercial companies

According to our observation to the Lebanese Joint Stock Company laws, the Lebanese lawmakers have imposed certain discrimination requirements in order to form or establish a Lebanese Joint Stock Company. This discrimination is implemented in forming the board of directors of a JSC and by whom the capital will be raised.

a- Board of director

Lebanese Join Stock Company can only be managed by its own investors. In other words, shareholders through the general assembly have the authority to manage the company. However, since the number of the shareholders is huge in most JSC, which preclude them reaching a decision, and since shareholders lack the essential knowledge and skills of management, JSC is managed by a specialized board. Such board is elected by the general assembly from the investors and has the sole authority to manage the daily operation of the company.

Board of director is the corporate governance. Such board is authorized to take all necessary decisions in order to meet the goals that such company is established for.⁶

Lebanese law has stated many conditions that must be in all board of directors such as integrity and honesty in order to avoid any fraud or misuse of power. Those conditions are available in most legal systems. For instance, the American Law imposes fiduciary duty upon all corporate executive. Corporate officers must act in the best interests of the corporate shareholders and not benefit at the corporation’s detriment. Most Business Corporation Acts within the United States have introduced rules that impose harsh penalty in case of bribery and corruption. The Illinois Business Corporation Act of 1983 has mentioned in Section 8.70 an explicit punishment in this regard.⁷ In addition, Federal rules and regulations have also input in this respect. The American Government has enacted many Acts to protect investors,⁸ improve accountability, and increase transparency.⁹

Along with integrity and honesty notion, Lebanese Commercial Code imposes an additional element that must exist in the board of director members. Article 144 stipulates that half of the board of directors must be Lebanese. Lawmakers allow setting aside such requirement if stricter

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⁷ Illinois Business Corporation Act of 1983, Section 8.70. This section to Kickbacks, bribes, Liability of officers or directors. This Section stated that any “Corporate director or officer who commits commercial bribery or commercial bribe receiving as defined in Article 29A of the Criminal Code of 2012, shall be liable to the corporation which he or she serves as officer or director for treble damages, based on the aggregate amount given or received plus attorneys’ fees. A conviction in a criminal proceeding for a commercial bribery or commercial bribe receiving shall be deemed prima facie evidence of the convicted director's or officer's liability under this Section.”
⁸ Sarbanes-Oxley Act is a Federal Law that was issued in 2002 to protect investors. This Act was introduced right after the fall of Enron.
⁹ Dodd-Frank Wall Street Reform and Consumer Financial Protection Act. This Act was issued in 2010 to support the financial stability of the U.S through increasing accountability and improves transparency in the economic system.
commercial special rules, policy, or amendment will be introduced in regards to the nationality of the board of directors. In May 1968, Article 144 of the said code has been amended by a stricter rule.\(^\text{10}\) The amendment requires that the majority of the board of directors must be Lebanese.

Unlike the Lebanese Law, most State Laws in the U.S do not require that the investors and/or the board of directors to be U.S citizens or U.S residents. For example, Texas law does “not restrict who can form or have an ownership interest in a business entity, other than requiring the organizer to be a person capable of entering into a contract.”\(^\text{11}\)

The Lebanese legal system requires that the majority of board of directors must be Lebanese, which established a discrimination between Lebanese and non-Lebanese investors in regards of board of director. Many jurists\(^\text{12}\) have considered that nationality requirement applies on both natural person and juristic person (legal person). Article 144 specifies that the majority of the board of director must be Lebanese whether the member in that board is a natural person or juristic one.

The discrimination stipulated by the commercial law in regards of the board of directors is not the only one. The Lebanese law has made an additional discrimination among the investors themselves. This discrimination applies in any JSC that exist to achieve public services.

**b- JSC for object the concession of public service**

The discrimination between Lebanese and non-Lebanese in a JSC does not stop at the board of directors. However, it has been extended to the investors themselves. Article 78 section 2 of the Lebanese Commercial Code stipulates that “one third of the corporation capital of the JSC that is created to achieve public service must be owned by Lebanese”. In addition, the said article considers that it is unacceptable to transfer those shares to any investors but to the Lebanese, otherwise, the transaction will be deemed void.

The above mentioned article triggers three important comments. First, one third of the corporation capital that is created to achieve public service must be owned by Lebanese. As we mentioned above, the law has added additional rule that discriminate between Lebanese and non-Lebanese investors in regards to commercial law. Thus, Commercial code has imposed that JSC must be managed by a board of directors composed by a majority of Lebanese members. In addition, a JSC that is created to achieve public service, its capital must be owned by Lebanese citizens.

Second, the shares that form the one third of the capital must be nominated shares. Nominated shares are those that contain the name of the investor and must be registered in the corporation

\(^{11}\) Texas Secretary of State.

book in order to give ownership of the share to the investor. Those requirements are mentioned in the Article 455 of the Commercial Code. The said Article stipulates that if “the share is nominated, ownership will not be transferred to the investor until such share is registered under his/her name in the corporation book that has issued such share and ownership will be given based on such registration”. The main objective of imposing such requirement is to assure that the nationalities of the investors who own the one third of the corporation’s capital are Lebanese. This requirement is not mentioned if the transaction is about selling or buying other types of shares such as share to the bearer or share to the order of. Therefore, transferring any other type of shares, expect the nominative one, can be done more easily and without any verification about the nationality of the buyer. Share to the bearer can be sold by handing over such share to the buyer; while share to the order of any new investor can be done by the endorsement of the seller.

Third, the requirement of the Lebanese nationality in regards to the JSC created for public service corporation capital is a mandatory and strict rule. This article forbids transferring nominative shares under any circumstances but to Lebanese, otherwise, the transfer will be void. The strict prohibition is triggered during the establishment of the corporation or even after to avoid any fraud that might happen after the creation of the corporation. Therefore, a JSC established to achieve public service must be formed by at least one third of the corporation’s capital owned by Lebanese and stayed owned by Lebanese citizens. Such discrimination is apparent in the Lebanese commercial law among Lebanese and foreign investors. Realistically, this discrimination inflicts many consequences upon the performance of the Lebanese corporations and eventually upon the Lebanese economy.

2- Concerning the Commercial Representation

Commercial representation is considered one of the most important contracts that impact the Lebanese economy. The Lebanese lawmakers have discriminated between a Lebanese commercial representational agent and a non-Lebanese one. Thus, it is important to discuss (a) the legal framework of the commercial representation contract and (b) the essential aspects of discrimination that Lebanese lawmakers have introduced in the Lebanese commercial law to protect the Lebanese commercial agent.

a. The Legal Framework of the Commercial Representation Contract

The Lebanese Legislative Decree 34/67 that was issued in August 5, 1967 is the statute that governs all the matters that deal with commercial representation. The Legislative Decree defines the commercial representative as an agent who “according to his/her independent occupation and without being bound by an employment relationship negotiates to conclude transactions of selling, buying, renting, or rendering services in which he/she does such, when it is necessary, on behalf, under the name of, and for the account of other merchants or manufacturers.” In addition, Under French law, there are several laws concerning the commercial representation like Article L.134-11 of the commercial law transposed from the European Union Law and the decree number 2010-1310 issued in Nov 2,2010.
Article 1 of the Legislative Decree considers as a commercial representative “a merchant who, for his own account, sells what he buys according to a contract that gives the merchant the capacity of a sole agent or distributor.” This Legislative Decree is considered a special law in terms of a subject and exceptional in terms of substances. Thus, this Legislative Decree was implemented without any retroactivity upon the commercial representatives who acquired such contract before the issuance of the Legislative Decree 34/67.

b. The Essential Aspect of Discrimination between a Lebanese a non-Lebanese Commercial Representative

The Lebanese Legislative Decree 34/67 is considered one of the most discriminatory laws in terms of favoring, protecting and giving advantages to the Lebanese commercial representative in their commercial endeavor. The connotation of the Decree is protected by the notion of public policy, which renders void any agreement to breach or violate the Decree’s scope.

Article 1 of the said Decree stipulates that “a commercial representative must be a Lebanese and must have a physical address in Lebanon.” The strict nationality discrimination between Lebanese and non-Lebanese citizens that is imposed by this article has two exceptions in. First, this article applies only for the future and preserves all rights and privileges that were acquired before the issuance of this decree. The consequences of excluding non-Lebanese citizens from becoming a commercial representative in Lebanon do not retroactively apply upon them if they had acquired their rights under the old law. Second, this article respects and honor reciprocal treatment. Article 1 of the Legislative Decree legally authorizes a non-Lebanese citizen to act in Lebanon as a commercial representative as long as reciprocity exists between Lebanon and the non-Lebanese citizen’s country.\(^\text{14}\)

The discrimination that is mentioned in the Legislative Decree applies on all commercial representatives whether they are natural persons or legal entities. The Lebanese Law distinguishes in this respect between association of people and association of funds. Article 1 of the Legislative Decree stipulates that “if the commercial representative is a company such company must, a) if the company is an association of people and/or Limited Liability Company the majority of the partners be Lebanese, the majority of the company’s capital is owned by Lebanese, and the manager who has the authority to sign on the behave of the company to be Lebanese, b) if it is an association of funds” the law requires that “the shares of the company is nominated ones, majority of the company’s capital owned by Lebanese, one third of the members of the board of director Lebanese, the chairman/chief executive officer/the appointed person from the CEO and the general manager who is responsible of all or part of the employing matters are Lebanese.” The Lebanese law puts limits not only on the natural person who is interested to act as a commercial representative, but also on all types of juristic persons as well.

\(^{14}\) This legal norm that exists in Lebanon cannot be found in the French law that gives the possibility to a foreign commercial representative, specially a European citizen to perform his work on the French territory without any restriction.
The significance of Article 1 is the set of strict obligations stipulated by the Lebanese Law. The Legislative Decree requires the majority of the shareholders to be Lebanese and the majority of the company’s capital to be owned by Lebanese. The rationale behind requiring these two components is to guarantee that the decision maker in the company is in the hand of a Lebanese citizen. This is true since a company could be owned by a majority of shareholders who are Lebanese but the majority of the company’s capital is owned by non-Lebanese, which gives the management control to the non-Lebanese. The Legislative Decree requires in regards to the association of funds that all the top management officers to be Lebanese.

The Legislative Decree stipulates the jurisdiction of court that is competent to view cases that are related or based on disputes concerning commercial representation contract. Article 5 of the Decree gives an exclusive jurisdiction to the Lebanese courts to view and settle disputes that are arisen from the commercial representation contract regardless of any other agreement. This Article restricts the autonomy of the parties to choose the law and court that are suitable to settle their dispute that might arise from such contract. This aspect will be discussed in details in the following part.

B- The Impact of the Discrimination:

The main inevitable outcome of the discrimination between a Lebanese and non-Lebanese citizen is the exclusivity jurisdiction of the Lebanese court over all corporations and commercial representation disputes. This outcome is worth to be discussed in the following parts.

a-Concerning the commercial companies

The discrimination based on nationality among investors in terms of managing the JSC has many consequences. Those consequences are either clearly stated in some of the Lebanese Commercial Code Articles such as the exclusivity of Lebanese courts over any case a Lebanese SJC is a party in such dispute 1) or the voidance of the company’s contract as a sanction of not meeting the Lebanese majority condition 2).

1. The exclusivity of Lebanese courts

The law that must apply over any case involves a JSC and the court that has jurisdiction over such case is based on the nationality of the Corporation. Since the corporation, as a legal entity, has a nationality that differs from its shareholders, it is important to specify the nationality of the corporation in order to 1), knowing the extent of privileges of the company based on rules and regulation stipulated in the law of the country where it is incorporated , 2) specify the country in which it has the right to protect any given corporation in the international arena, 3) identify the law that the corporation will be abide by in terms of establishment, management, dissolution, liquidation, and termination. Since the nationality of a corporation has a paramount of

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15 Most likely the commercial representation contract is formed by a Lebanese agent and non-Lebanese principle.
importance, how can a corporation obtain a citizenship? So, how can we identify the nationality of a corporation?

A corporation, as a legal entity, will acquire the citizenship of the country where its headquarters is registered in\(^\text{16}\). According to this concept, if the headquarters of any given corporation is in Lebanon, the corporation will be considered Lebanese. In order to apply what it has been mentioned above including the majority of the Lebanese nationality (board of directors and capital) Article 78 of the Lebanese Commercial Code stipulates that “any JSC that is established in Lebanon must have its headquarters in the Lebanese jurisdiction, hence, this corporation will be considered Lebanese corporation per se”\(^\text{17}\).

The main factors that give the nationality of any given JSC in Lebanon are 1) the establishment of the JSC in Lebanon according to the Lebanese law/rules and 2) the headquarters of the corporation must be in Lebanon. Consequently, if a corporation has satisfied the above two elements, such corporation will be governed exclusively by the Lebanese courts based on Article 78 of the Lebanese Commercial Code. However, an important question can be raised in this situation, what are the consequences if a corporation does not honor the wording of Article 78 in terms of headquarters or the Lebanese majority?

2. Consequences of Non-Compliance with the Legal Dispositions

Article 144 of Lebanese Commercial Code does not clearly mention the sanction of not complying with the rule related to the Lebanese majority condition inside the board of director. However, Article 78 of the Lebanese Commercial Code states that any JSC that is established to achieve public service will be under voidance if one third of the corporation capital was not owned by Lebanese or given to non-Lebanese investors.

The voidance mentioned in Article 78 of the Lebanese Commercial Code is the voidance that is based on selling shares that consist one third of the corporation capital to non-Lebanese investors. Unlike Article 78, Article 144 of the Lebanese Commercial Code does not mention the type of the sanction that can be imposed in case of violating Article 144. Article 144 only indicates that the majority of the board of director must be Lebanese. Based on our observation, the sanction that should be invoked in such case is voidance, dissolution, of the corporation. This is true since board of director is considered the most important constituency in any given corporation. Thus, if the establishment of board of director is defected the corporation itself will be defected too.

It is important to mention that Article 78 of the Lebanese Commercial Code gives an exclusive jurisdiction to the Lebanese courts regarding disputes involve JSC. This exclusivity is given as long as the headquarters of such JSC is in Lebanon. This Article is imposed regardless any

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\(^{17}\) Code of Commercial Law [C. CL] [CIVIL CODE] art. 78 (LEB.).
otherwise agreement between the parties themselves. Even thought Corporation is considered, to some extent, as a contract that is based on the parties’ autonomy; however, the Lebanese law inflicts some exceptional rules upon such autonomy. This exception is mentioned in regards of court jurisdiction. For example, if the parties decide in the corporation constitution that if any dispute may arise later; such dispute will be settled by arbitration or by an American or French court. Such clause or agreement will not be implemented, the agreement is considered void, and the Lebanese courts will assume jurisdiction. This exception, according to the Lebanese law, is considered a public policy rule that can never be negated.

b- Concerning the Commercial representation

Article 5 of the Lebanese Legislative Decree 34/67 generates many arguments in regards the rejection of accepting settling commercial representation disputes through arbitration. The said Article mentioned that “regardless any other agreement” the court where the commercial representative conducts its business is competent to settle all disputes that is related to the commercial representation contract. The connotation of Article 5 inflicts many observations. First, this Article is a public policy article, which no one is capable to challenge it even though it restricts the autonomy of the parties. Second, restricting the competency to the court where the commercial representative conducts its business that is mentioned in Article 5 would be applied in conjunction with Article 1. As mentioned before, Article 1 requires that the commercial representative must be Lebanese and his/her commercial representation must be in Lebanon. Consequently, the Lebanese Courts would have a compulsory jurisdiction over all commercial representation disputes that may occur regardless. This conclusion triggers the following question, what is the impact of the arbitration clause in a commercial representation contract? The Lebanese leading jurisprudential thoughts considers that arbitration is unacceptable in a commercial representation dispute. They considered that the exclusive jurisdiction to the Lebanese courts to view cases that deal with commercial representation is a public policy matter18, a rule that is related to the international private law19, and a rule that is based on the public policy theory of protection and direction.20

If the arbitration is forbidden in regards to cases related to commercial representation, is this norm still applied in case of the existence of an international treaty between Lebanon and a foreign country that accepts arbitration in such case?

This difficulty is created according to Article 2 of the Lebanese Code of Civil Procedure that considers international treaty overrules any positive national law. In other words, in case of

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18 Maher S. Mahmasani, La Représentation Commericale en Droit Libanais [The Commercial Representation in the Lebanese Law], 252 (Nemnom eds., 1st ed. 1972) (Leb.).
20 Jihad Rizkallah, Commentary on a Decree of the 4th Chamber of the Lebanese Supreme Court, 3 Al-Adl L.J. 285, 285 (Jan 11, 2005) (the refutation of arbitration in commercial representation disputes) (Leb).
conflict of law between international treaty and a Lebanese national law, the Lebanese Code of Civil Procedure considers that the international treaty prevails. Article 2 of the said Code instigates the following questions. What would happen if an international treaty between Lebanon and a foreign country allows arbitration in matters related to commercial representation? In this case, should we apply the Article 5 of the Legislative Decree 34/67 since it is a public policy rule, or Article 2 of the Lebanese Code of Civil Procedure that gives the international treaty a higher situation than the national law?

In order to answer this implication, it is important to shed a light on some of the Lebanese Courts decisions. Recently, the Lebanese Northern Civil Court of Appeal\(^\text{21}\) issued a decision, which reversed the verdict of the Lebanese Northern Trial Court on the ground of violating Article 5 of the Legislative Decree 34/67. The Lebanese Trial Court considered that the Lebanese court has no jurisdiction to settle a commercial representation dispute since there was an arbitration clause in the commercial representation contract between the parties. The Trial Court considered that there is nothing mentioned in Article 5 of the Legislative Decree that forbids arbitration in cases related to commercial representation. This is true since arbitration is a legitimate legalized method of settling disputes in Lebanon. The Court of Appeal reversed the Trial Court decision because Article 5 of the Legislative Decree is a compulsory rule of law since it is a public policy matter. The reason behind considering Article 5 of the said decree as a public policy issue is to protect the benefit of the Lebanese commercial representative. It is also to provide a fair treatment to the Lebanese commercial representative under his/her national laws. The Court of Appeal expressly and entirely repeals any agreement/clause that allows arbitration, which excludes the jurisdiction of the Lebanese national courts in cases related to any types of commercial representations whether they are exclusive or not because it violates the compulsory implementation of Article 5 of the Decree. The Court of Appeals assured its decision by adding that “the exclusivity of jurisdiction is obvious according to Article 828 of the Lebanese Code of Civil Procedure, Article 37 of the Code of obligations and Contracts, and the well known arbitral rules that it is prohibited to arbitrate in matters related to issues inalienable rights because they are public policy rules.” In addition, the Court of Appeal considered that Article 5 of the Legislative Decree does not distinguish between foreign courts or arbitration institutions. This is true since if the Lebanese lawmakers want to excluded arbitration from the scope of Article 5, they would have amended or introduced rules of law that reflect such intention. The Court of Appeal states that since there is no amendment that has been introduced and based on the scope of Article 5 of the Decree, the Court reversed the decision of the Trial court and considered that the Court of Appeal that was viewing the appeal has jurisdiction.

\(^{21}\) Mahkamat al-Isteinaf [Isteinaf] [Court of Appeal], North, 4\(^{th}\) Chamber, 31Jan. 2013, Majallat al-Adl [Al-Adl], 2013, p. 1438 (Leb).
In another case, the Beirut Trial Court considers that Article 5 of the Legislative Decree 34/67\textsuperscript{22} is a mandatory rule of law that must be implemented in regards to disputes related to commercial representation regardless any arbitration clause of agreement between the commercial representative and the principle.

The above mentioned Court Decisions are related to decisions that forbid arbitration in cases related to commercial representations without the existence of an international treaty between Lebanon (the country of the commercial representative) and a foreign country (the country of the principle). However, the below mentioned cases are about court decisions that deal with the validity of the arbitration clause in regards to commercial representation in case of the existence of an international treaty that allows arbitration in commercial representation between Lebanon and the country where the principle is from. The Article 711 of 1952 Commercial international Treaty between Lebanon and Republic of Chic made many complexities. The Treaty stipulates the validity and legitimacy of arbitration method as a mean of settling all commercial disputes that might arise between a Lebanese citizen and a Chic citizen. This complexity is evident in the disparity of the Lebanese court decisions. For instance, the Lebanese Supreme Court decision that was rendered in December 12, 1973 stated that the International Treaty between Lebanon and the Republic of Chic must be implement regardless\textsuperscript{23}. That decision was significant at that time because the decision was rendered before the enactment of Article 2 of the Lebanese Civil Procedure that stipulates the hierarchy between international treaty and the Lebanese nation law. In regards to the factual information of the case, the exclusive commercial representation contract between a Lebanese agent and a Chic principle was terminated; the Lebanese commercial representative brought a law suit against the Chic principle before the Lebanese court requesting a compensatory damages because the Chic principle unjustly terminated the contract. The Chic principle’s counterclaim requested that the Lebanese national court is not competent and has no jurisdiction since the bilateral international treaty refers all commercial disputes to arbitration. In another dispute between a Lebanese commercial representative and a Chic principle, the 1994 Lebanese Supreme Court\textsuperscript{24} decision states that the scope of international treaty between Lebanon and the Republic of Chic must be honored in respect to arbitration since Lebanon must respect the international treaty with other countries. In contrast, the Lebanese Supreme Court rendered a decision in 2005 that changed the precedent that was set by the above mentioned decision in regards to the validity of implementation of arbitration clause in case of the existence of an international treaty. The Lebanese Supreme Court considered that Article 5 of the Legislative Decree takes the place of the scope of international treaty between Lebanon and Republic of Chic in regards to commercial representation. The Court states that Article 5 is a compulsory regulation that is enacted to protect the Lebanese agents and no one is capable to

\textsuperscript{22} Gurfat Mahkamat al-Darajat al-Ula [Chamber of First Instance], Beirut, 30 Sep. 2010, Majallat al-Adl [Al-Adl], 2013, p. 990-993 (Leb).
\textsuperscript{23} Mahkamat al-Tamiez [Tamiez] [Supreme Court], 1\textsuperscript{st} Chamber, 12 Dec. 1973, Majallat al-Adl [Al-Adl], 1974, p. 277 (Leb).
\textsuperscript{24} Mahkamat al-Tamiez [Tamiez] [Supreme Court], 4\textsuperscript{th} Chamber, 25 Jan. 1994, Majmouat Baz [Baz], 1994, p. 333 (Leb).
choose not to implement it. The Supreme Court in this decision protected the rights of the Lebanese agent; although, the Supreme Court contradicts the scope of hierarchy of Article 2 of the Lebanese Code of Civil Procedure by giving superiority of national law (Article 5 of the said decree) over international treaty (Article 711 of 1952 Commercial international Treaty between Lebanon and Republic of Chic). The Supreme Court made it clear that the benefit of the Lebanese agent comes first and it is above and beyond the benefit of any non-Lebanese principle. This is true even if the non-Lebanese benefit is protected by an international treaty.\textsuperscript{25}

Without discussing in this paper the jurisdiction of international courts and classifying the international private law, it is important to mention the norm of the French law in this respect.\textsuperscript{26} The French law stands for the autonomous of the contact between the commercial agent and the principle. The French law considers that the parties into a commercial representation contract have the right to choose the law that should be implemented and the court that has the jurisdiction in case of a dispute between a European and non-European parties. It is worth mentioning that the European Union is trying to synchronize and harmonize the laws that relate to commercial representations. The European Union has done so by organizing many conventions and treaties such as the 1978 Hague Treaty and 1980 the Rome Convention. For example, Article 31 of the Rome Convention stipulates clearly that the parties are bound by the clauses inserted in the contract. Similarly, Article 56 of the Hague Treaty states that the “chosen law between the parties is the one that must be implemented in regards to commercial representation contract.”

Accordingly, in 1910 the French Supreme Court decided in the “American Trading Co”\textsuperscript{27} that the law that should be implemented between the parties is the one that has been chosen by them. The Court added, that in case that there is no agreement in this respect the Court can identify the intention of the parties about which law should be implemented on the commercial representation dispute from the content of the contract or from the norm/tradition of the commercial representation contract. However, is it possible to consider the public policy rule as a legitimate reason to validate the discrimination implemented between the Lebanese and foreign investors?

**Part II: the Discrimination between Lebanese and Foreign Investors: A necessary Discrimination**

It could be valid to discriminate between the nationalities of the investors in a JSC based on its characteristics. This is true since a JSC is considered one of the most important types of business


\textsuperscript{26} It is important since the Lebanese legal system is based and influenced by the French legal system.

organization in Lebanon (A) in terms of what such corporation might affect the Lebanese economic public interests (B).

A- The Characteristics of JSC: the First Discriminatory Validation

JSC is a corporation that is capable to have a vital number of shareholders. JSC is an entity that is formed after the accumulation of the required capital and not after the agreement of the shareholders. JSC has many characteristics than any other types of business organizations. Among its important characteristics, JSC provides its shareholders with limited liability 1) and a limited affordable amount of capital for registration purposes 2).

1. Shareholders’ Limited Liability

JSC, as an association of fund, provides its investors with one of the most important characteristics that not many business organizations can provide; which is limited liability. Shareholders’ personal liability is limited to the amount of their contribution in the corporation. In another word, shareholders personal assets are immune from any claims of the corporation’s creditors. Lebanese law does not provide such characteristic, limited liability, to any type of association of people. For instance, Lebanese Partnership Law considers that partners are jointly and severally liable unlimitedly of the partnership’ debts. This is true since such law gives more impact to the partners themselves and their relationship than their contributions. Partners have the ability to involve in the management and the decision making process. In addition, by operation of law, all partners are considered merchant; consequently, they will be bankrupt if the partnership stops paying its debts. Partners will be affected unlimitedly by any decision that will be taken by the partnership. On the other hand, JSC that is based on the accumulated capital more than on investors, Lebanese lawmakers finds that investors care less about the corporation itself; however, they care more about their investments. Accordingly, corporation as an entity must be protected from undependable investors who try to become a member in the board of directors. In principle, corporation is managed by the investors; however, based on the amount of investors and the free transferability of shares, such management becomes difficult. As a result, management will be bestowed upon a small group of Lebanese people, board of director, who easily can meet in in a regular basis.

2. Imposing Limited Amount of Capital

While observing the difference between partnership and corporation, it is important to mention the following observations. First, Commercial Law does not dictate a specific capital for registration purpose for partnership. This is true since partners in a partnership are responsible from their personal assets to cover all the partnership’s debts. Unlike partnership, Commercial Law requires that all JSC must deposit 30 millions Lebanese pound in a local bank for registration purposes. On the other hand, American Corporate Law is not unified in this aspect.

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28 Bankruptcy in Lebanon can only be triggered toward merchant who stops to pay his/her commercial debts.
since Corporate Law is a state regulated code. However, after a close scrutiny, the majority of States in the U.S do not require any minimum capital for incorporation in either publicly or privately held corporation. 

The minimum requirement that is imposed by the Lebanese Law is incorporated by the liability theory of the corporate investors. The major reason of imposing capital is to provide minimum amount of accountability to the corporate creditor and to limit the liability of the investors. Thus, the discrimination between Lebanese and foreign investors is not based on racism. However, such imposing limited amount of capital aims to protect the SJC by limiting the investors from abusing their authority. In addition, such capital will sever as the only resort for the corporate creditors to collect their money since the corporate creditors are not allowed to claim their rights from the investor’s assets. Accordingly, we can say that the discrimination between Lebanese and foreign investors is not based on racism but it is created to safeguard the Lebanese public and economic interests.

B- Public Interest Concern: the second Discriminatory Validation

It has been clearly mentioned in this article that the major reason of the discrimination between the Lebanese and foreign investors is based on safeguarding the public economic interests 1) and respecting/abiding by the public policy rules 2).

1. Economic Public Interests

According to many juristic, the condition that is imposed by Article 144 of the Lebanese Commercial Code in terms of having the majority of the members in the board of director Lebanese citizens is an adequate condition. The rational behind this condition is to accommodate the Lebanese public interests thru Lebanese JSC. In addition, Lebanese citizens are the only ones who know the needs of their country and how investments can be implemented.

In order to protect the economic public interests, Lebanese Commercial Law Article 148 requires that every member of the JSC board of directors to own a minimum number of fully pre-paid shares (security shares). This number of shares will be mentioned in the JSC bylaws as long as it is not less than one percent of the capital. The reason of Article 148 is to protect the corporate creditors and the investors from any wrongdoing act committed by any member of the board. Therefore, members of the board of directors are jointly liable of any mistake done by them thru the security shares.

Furthermore, Article 148 of the Lebanese Commercial Code requires that every board member must be honest, loyal, act in the best interest of the corporation, and have a clear criminal record. In other words, no member must have been indicted by any felony including but not limited to bankruptcy, counterfeit, fraud, and bounced check in Lebanon or abroad. Thus, the condition of

the majority aims to have good Lebanese citizens in the JSC who are aware of the needs of the Lebanese economic public interest.

2. The Lebanese Public Interest

Public interest is a collective term describing the various economic, political, social binding rules that aim to protect the public interest of any given jurisdiction.

The main objective that the Lebanese Commercial Code considers that the majority condition in the JSC is a public policy is to make such rule binding and obligatory.

It is true that the law considers corporation as a contract based on the mutual consent of all investors. However, lawmakers have the right to interfere with the autonomy of the parties as long as they feel necessary. Apparently, this is clear in Article 78 of the Lebanese Commercial Code, which stipulates the Lebanese majority “regardless of any consent…”

Lebanese lawmakers have put many conditions and requirements upon the JSC that are not applicable over any other types of Lebanese business organizations. In addition, such corporation is under lawmakers’ close scrutiny to protect the Lebanese public interests. JSC as a business vehicle is the only entity that can collect big amount of money that is needed to invest it in huge business ventures. Consequently, if any wrong happens with the money collected, the whole Lebanese public/economic interests will be enormously affected. In this regards, it is important to mention that before 1977, Lebanese Commercial Code used to subject the establishment of JSC to a governmental permit. Article 80 of such Law stipulates that JSC will not be established but with a permit given by the Lebanese government. However, the Legislative Decree number 54/77 removed such requirement. 30

Conclusion:

Lebanese law is considered one of the most laws that respect human rights and equality. It also forbids discrimination between people based on nationality, ethnicity, and gender. However, based on what was mentioned above in this paper, it is obvious that it is not the case in regards to commercial representation. The Lebanese Commercial Law discriminates between a Lebanese and non-Lebanese parties in many aspects. If the discrimination is adopted in regards to establishing and managing Lebanese corporations, it is more severe in regards to the laws that deal with commercial representational matters. As it was mentioned, the discrimination includes matters that relate to the majority of the board of directors at the Lebanese joint stock company (the process of voting/taking decision in such board). The majority of the board of directors has made a kind of discrimination between the Lebanese and non-Lebanese investors. In addition, the Lebanese Legislative Decree 34/67 that addresses the issues of commercial representation gives priority to the Lebanese agent over non-Lebanese principle. The Decree gives an exclusive

30 Legislative Decree 54 of 16 Jun. 1977 (Leb.).
jurisdiction to the Lebanese court to view any dispute in this regards, and applies the Lebanese law upon such dispute. The legal trend of ignoring the autonomy of the parties to choose the law or the court that is competent is related to public policy. This trend was clearly based on the numerous court decisions that give the Lebanese courts a jurisdiction to settle these disputes. This exclusive jurisdiction that is given to the Lebanese courts was applied to protect the interests of the Lebanese agent. The scope of Legislative Decree is applied regardless any agreement between the party who choose not to, or in a case of international treaty that is considered a superior to any Lebanese Legislative Decree. This legal norm that exists in Lebanon can be found neither in Europe nor in the United States that consider the autonomy of the parties in any commercial dealings. The European legal system and the American legal system respect the decision of the parties and give them the freedom to choose any law that should be implemented in case of dispute and any court has jurisdiction in such case.

The discrimination that is implemented in the Lebanese legal system might be acceptable in rare cases, but it is not in many others. This discrimination is not acceptable and does not support the international commercial activities. The Lebanese lawmakers should amend some of those laws and especially the Legislative Decree 34/67 and finalize the inconsistency of the court’s trend in regards to the Lebanese court exclusive jurisdiction or respecting the autonomy of the parties.