

# Secured transactions: an Iraqi perspective

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In this Article, we will examine various tools available to secure a transaction in Iraq. We will start with property securities, then move to personal securities, and finally examine a number of arrangements that benefit creditors. This Article aims to illustrate the advantages and disadvantages of each type of security and provide some practical comments on the use of each in Iraq.

## Property securities



Property securities are securities that attach to specific property and allow the secured creditor to satisfy its debts from the burdened property. We will divide property securities into two categories: retention of title; and pledges or mortgages. Retention of title operates by transferring the title to the secured creditor or through the secured creditor retaining title, for example in the case of credit sales. Iraqi law expressly allows retention of title arrangements in the context of credit sales and retention of title can be achieved by contract terms in the credit sale contract. If the secured creditor is not the seller, or holder of title to the property, then adequate contractual arrangements need to be entered into to enable the secured creditor to retain title, for example, sale and leaseback arrangements. Iraqi law does not impose special requirements on the creation of retention of title securities.

The main advantage of retention of title is that where the creditor is solvent, at the time of the transaction and no fraud has been perpetrated on other creditors, the asset to which the secured creditor retains title does not form part of the bankruptcy estate of the debtor and the secured creditor is not affected by third party claims. The disadvantage of retention of title is that the secured creditor cannot take benefit of the security enforcement procedures, i.e. judicial sale and enforceable deficiency instruments, and must take possession of the asset and dispose of it themselves. A secured creditor who is unable to fully collect

through disposal of the title-retained assets does not lose their contractual claim for the deficiency, but must bring fresh proceedings separate from those to reclaim possession if it is not relinquished voluntarily.

Moving away from retention of title, the other form of property security available in Iraq includes mortgages and pledges. For our purposes, mortgages are security interests in real estate and pledges are security interests in everything other than real estate. Like all other interests in real property, mortgages have to be registered to become valid in Iraq. Registration of a mortgage at the land registry is not a mere perfection requirement for it to become binding on third parties; it is a validity requirement even against the owner of said property if they were the debtor. Properly registered mortgages can be possessory or non-possessory. Registered mortgages are enforceable without the need for a judicial decision. Judicial intervention is only necessary if a dispute arises that cannot be conclusively settled before the public executor and the debtor initiates judicial proceedings to stop enforcement; registered mortgages cannot be denied and generally do not include complicated conditions that have to be satisfied before enforcement, therefore, litigation can be avoided with careful drafting.

Pledges in movables, including tangibles and intangibles, must be possessory and the debtor must part with possession in favour of the secured creditor or a third party. A commercial pledge is enforceable through expedited judicial procedures that are determined by the court. Pledges are commercial if the underlying transaction giving rise to the pledge is commercial for either the debtor or the secured creditor. Therefore, most pledges can satisfy this requirement.

Secured creditors taking advantage of mortgages and pledges need to be aware of privileged rights, which take precedence over a secured creditor's right to collect from the proceeds of the secured property. Common privileges are listed below in their order of priority:

- the costs of legal proceedings incurred in the common interest of all creditors for the preservation, sale and distribution of the property;
- amounts due to the (State) Treasury for taxes and other duties;
- expenses incurred for the preservation of, and repairs of a nature necessary to a movable of the type in question;
- the following debts are, to the extent due in the last six months:
  1. amounts due to servants, clerks, workmen and every other wage-earner for wages and salaries of whatever kind;
  2. amounts due for foodstuffs, clothes and medicines supplied to the debtor and his dependents; and
  3. alimony due to the debtor to those to whom he must pay it.
- amounts disbursed for seeds, manure and other fertilisers and insecticides, and amounts disbursed for cultivation and harvesting are secured by a privilege over the crop for the production of which they have been spent;
- rents of buildings and agricultural land for three years or for the term of the lease if less than three years, as well as any other right to the lessor pursuant to the lease, are all secured by a privilege over all attachable movables and agricultural produce in the leased property and belonging to the lessee;
- amounts due to hotel proprietors by a traveller for accommodation, food and expenses incurred for the traveller's account are secured by a privilege over the effects brought by the traveller to the hotel or its annexes; and
- the price and associated costs which accrue to the vendor of a movable so long as the movable sold retains its identity, without prejudice to the rights acquired by a bona fide third party and subject to commercial rules.

One of the more notorious and first in priority privileges that can deplete the sale proceeds or slow down recovery by the secured creditors is amounts due to the state. Lenders, in particular, are advised to obtain proof of tax clearance from their borrowers and an obligation to keep their tax records updated to avoid problems in collection.

Iraqi law does not recognise the concept of foreclosure in mortgages or pledges and therefore, with the

exception of retention of title, a secured creditor must always follow the relevant procedures to enforce the pledge or mortgage in question. There are also no floating charges or similar concepts in Iraq, all securities that attach to property must identify the property burdened by the security. However, mortgages and pledges can be validly entered into with the expectation that they attach to future assets not acquired at the time of creation of the security interest, provided that other perfection requirements such as registration and/or possession are met. All assets that can legally be the subject matter of transactions can be pledged or mortgaged.

## **Personal securities**

A personal security allows a secured creditor to satisfy the secured debt from the assets of a guarantor in addition to the initial creditor. The most basic form of a personal security under Iraqi law is joint and several liability because it allows a successful claim to be enforced in full against all named judgement debtors. Joint and several liability is not assumed if multiple parties enter jointly into one contract and requires either express or implied agreement or a mandatory legal provision giving rise to joint and several liability. A personal guarantee does not automatically create joint liability and a secured creditor must first collect from its debtor before the guarantor is liable for the secured debt. This provision can be varied by agreement. Iraqi law does not require a specific formality for personal guarantees. Disputes over the existence of a personal guarantee are frequently viewed as questions of proof rather than questions of validity. Personal securities can never be enforced without a judicial decision; the only exception to this rule is a personal security offered before a public executor in the course of enforcement of another enforceable instrument.

## **Assignments and commercial papers**

So far, we have examined traditional forms of security however, creditors are increasingly relying on alternative tools to secure their rights. Assignments of the proceeds of a project or an investment are now a common form of security. Unlike many common law jurisdictions, an assignment is not automatically revocable at the discretion of the assignor under Iraqi law. An assignment needs to be distinguished from a mere agency that allows the agent to enforce and collect on behalf of the principal because an agency relationship, even if the agent has an interest, is always revocable by the principal and agreements otherwise are prohibited on public policy grounds. An assignment of benefits does not need the consent of the third party who furnishes said benefits to be valid. A third party to an assignment of benefits only needs to be notified of the assignment and the assignment becomes enforceable from the date of notification.

Commercial papers are another common method of securing transactions. Iraqi law recognises three types of commercial papers: promissory notes; bills of exchange; and cheques. Iraq has ratified the Geneva Convention dated 7 June 1930 providing a uniform law for bills of exchange and promissory notes. Promissory notes are treated as an instrument of credit and are always negotiable even if they state otherwise. Promissory notes also have the least creation formalities among the other commercial papers under Iraqi law. Cheques are considered an instrument of payment and would freeze the amounts in question if used as a security. Bills of exchange share a lot of features with promissory notes but involve a third party who undertakes to pay on behalf of the drawer. Commercial papers create an independent payment obligation separate from the underlying transaction and are enforceable instruments without the need for a judicial decision under Iraqi law. If commercial papers are authenticated in a manner that prevents denial, for example before a notary public, they can be an effective tool for creditors.

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