

# The formalism of the formal mortgage contract a study in Iraqi law

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## Abstract

The formal mortgage is one of the most important tools of credit, which has benefits for the mortgagor, the mortgagee and third parties, Therefore, the legislator considered it a deed contract, for the mortgagor remains the owner of the mortgaged property In order to obtain the loan amount that he needs, For the mortgagee, as providing the loan to the mortgagor is secured by the mortgaged property, For third parties, the formality of the mortgage makes the third party aware of the existence of the mortgage, is not deceived by the fact of the debtor's financial position, Iraqi law has derived it from Roman law, Which was known as the mortgage, which is decided by agreement of the parties without taking into account the official procedures, And the legal mortgage decided by the provision of law for the minor in the trustee's money, the wife in her husband's money, It was subject matter in both real property and personal property, Then it passed to French law in the thirteenth century, but restricted it to real property, it was approved by the Napoleonic law of three types of mortgages, the mortgage by agreement is required in the formal, the legal mortgage, in which the publicity is not required, with the addition of the judicial mortgage, which is decided by the force of law according to the decision of the judiciary, this mortgage system was entered in Iraq from the first time by a law issued by the Ottoman Empire, Is the law of immovable property documenting debt, Issued on February 25,1910, Its provisions were inspired by French law, Until the issuance of the Iraqi Civil law in 1951, Which abolished the advanced law, the latter regulated the provisions of the formal mortgage, including the formality of the mortgage, in Articles (1285-1320), The legislator has quoted most of its provisions from the Egypt civil law, a little immovable property law documenting debt, but restricted mortgage by agreement only.

**Keywords:** Formal mortgage contract, study in Iraqi law

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## INTRODUCTION

The Iraqi legislator defined the formal mortgage in Article (1258) of the Iraqi Civil law by saying that ((A formal mortgage is a contract whereby the creditor acquires a real right on a property of appropriation to him intended for the discharge of his debt, Under this right, shall take priority over creditors without security and creditors with security subsequent in rank, to recover his right from the price of that property in whatever hand is)).

**II. Characteristics of a formal mortgage.** Formal mortgage has characteristics that distinguish it from other contracts, either as a right or as a contract.

**a. Characteristics of a formal mortgage as a right.**

(1) The formal mortgage is a right by agreement with respect to its source in the Iraqi Civil law that does not arise except by an agreement, but the informal agreement is not sufficient to creation it, so the formal mortgage is only created by registering it in the Real Estate Registration Department according to Article 1286 of the Iraqi Civil law.

(2) The formal mortgage is a real right, as it gives the mortgagee the advantage of the real right, which is the right to pursue and priority, whereby under the right of pursue the mortgagee can enforce over the mortgaged property in the hands of any person to whom the ownership is transferred, and by virtue of the right to priority, the mortgagee collects his right from the price of the mortgaged property in preference to other creditors.

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- (3) The formal mortgage is a right subordinate to the original right and is based on that:-
- (a) The formal mortgagee has two characteristics. As a mortgagee, he has the general security right that all creditors have over the debtor's money, and he also has a real right that concentrates in the mortgaged property, so the creditor becomes, according to the mortgage, a mortgagee and does not lose his status as a creditor without security
  - (b) The formal mortgage does not exist independently, but there must be a valid obligation that is based on it to discharge it, the general rule is that the formal mortgage does not exist until after the existence of the original security obligation, Nevertheless, it is valid for potential obligations that are decided to security a formal mortgage, as it is valid that the mortgage exists before the potential obligations, as is the case in the formal mortgage securing the opening of a credit.
  - (c) The formal mortgage is followed by a secured obligation, existence or not, as well as validity and invalidity.
- (4) The formal mortgage is a real estate right, meaning that it usually subject matter only in an immovable.
- (5)The formal mortgage, as a general rule, is an indivisible right, so all of the mortgage and every part of it is considered a security of all the debt and every part of the debt which secured by the mortgaged property, Article 1294 has included this provision by saying ((Every part of the property mortgaged or the properties mortgaged are a security for all the debt, every part of the debt is secured by the property mortgaged or the properties mortgaged as a whole)).
- (6)The formal mortgage is a right related to the finances and value of the property mortgaged, does not exceed itself, because the attachment to discharge, the discharge, is from the finances, and this is what Article 1304 of the Iraqi Civil law stipulates by saying ((Mortgagee discharge, their rights before the creditors without security from the price of the formal mortgaged property or from The money that replaced this property, and each of them receives his right according to his rank)).

#### **b- Characteristics of a formal mortgage as a contract.**

- (1)The formal mortgage contract is a deed contract, as it does not create unless it is registered in the relevant department fulfills the formality stipulated by law according to Article 1286 of the Iraqi Civil law.
- (2) The formal mortgage contract is a security contract, such as the bailment contract and the pledge contract, because the purpose of the mortgage is securing the debt in order to reach its fulfillment of the price of the mortgaged if it cannot be recovered from the mortgagor's obligation.
- (3) The formal mortgage contract is a binding contract for one side, so the mortgagor is the only one who is deed by it.
- (4) The formal mortgage contract is a contract for a consideration, because the mortgagor does not donate to the mortgagee, but the mortgagor gets amount of loan provided by the mortgagee.

#### **III. The concept of formalism in formal mortgage.**

one jurist defined it as ((A restriction on the principle of contractual freedom, because the will alone is incapable of creating the contract, it is necessary for its validity to complete the formality prescribed in the law, otherwise it is void and no has effect)), others jurist Was defined as ((registration of the contract at the Real Estate Registration Department)),While others combined the previous meanings by saying ((Registration in the competent official department, which is the real estate registration department, meaning that the consent of the mortgagor and the mortgagee are to be written in a deed prepared for this purpose by the real estate registration department in the presence of the employee of the competent in the department)).

**IV. The Legal nature of the formality of the formal mortgage** Iraqi law jurists have viewed that the formalism between parties (registration) is an essential of the contract, at the same time it is a condition for the contract's publicity against third party, Their argument in that the provision of Article (1286) of the Iraqi Civil law in which it is stated ((The formal mortgage is only created by registering it in the registration department, Each of the contracting parties must appoint a chosen place of residence in the country in which the registration was made, each of them shall be given a copy of the mortgage contract deed signed by them after taking Their report in front of the witnesses)).

Where it appeared to them from this provision, that the formal mortgage is an deed contract that is not created, by merely consent or agreement, the agreement must take place in the form prescribed in the law, which is registration in the Real Estate Registration Department, so registration is one of essential of the creating, accordingly if this element fails, a contract is void, The formal mortgage is null and has no effect, it is permissible for everyone has interest to brought to nullity the mortgage, as such the court may decide this nullity by its self.

If the parties' agreement in the mortgage without fulfilling the legally form to creation (i.e. outside the real estate registration department) is not considered an formal mortgage, nor even just a promise of a formal mortgage because must have the formal form as well, there are view that the contract is an indefinite contract contained promise by one of parties to provide formal mortgage, If he does not fulfill his promise, it is impossible to execution of the contract, the right of the other party is limited to claiming compensation, the period of the contract considered lapse if the debt has a period according of Paragraph (c) of Article (295) of the Iraqi Civil law.

#### **V. Conditions of formality in the formal mortgage.**

**The first condition: deed contract, whether it is a promise or the mortgage is complete,** The deed mean is that there is a formal paper in which writes the formal mortgage to be valid, the formal aims to secure that the will is expressed in a valid manner <sup>(i)</sup>.

A question arose about the extent of the formal binding in the consent of the mortgagor and the mortgagee together or not?

The article (306) of the Real Estate Registration Law stipulated that, was conclusive in this matter as it was stated that ((The formal mortgage is registered depending on the acknowledgment of the mortgagor and mortgagee, or whoever represents them in front of the competent employee in the Real Estate Registration Department)), In addition to the state of Article (109/1) of the aforementioned law, in which it is stated ((The legal disposition creation in an one contract council with the offer and acceptance of the parties to the contract or whoever their behalf In the presence of the competent employee after he reads the acknowledgment of them to disposition)).

Some of the jurisprudence said that this article talks about the element of consent in the formal mortgage; the acknowledgment represents the element of consent in the mortgage contract with the offer of the mortgagor, the acceptance of the mortgagee, Therefore, whole requirement related to the validity of the element of consent should be requirement in it, in order to register the mortgage contract With a special registry accordance to the acknowledgment of the creditor and debtor or whoever represents them in front of the competent employee in the registration department.

It is worth noting that the formal mortgage contract may be created outside Iraq and relates to a real estate inside it, Will it be done according to the formality in the country of the creation of the disposition in it, or according to Iraqi law?

Some of the jurisprudence said that general rule in contracts are govern by the law of the country which was done create of the disposition in it according provision state of Article (26) of the aforementioned law, Nevertheless, some of them say that the formal mortgage is creation in a foreign country regarding real estate in Iraq is not considered creation even if it is emptied in the formal formality according to the law of that country, but must be to perfection of creation through registered with the Real Estate Registration Department, accordance to several arguments:-

- (1) Article (1286 Iraqi Civil law) explicitly provides this.
- (2) The formal effect is not limited to protecting the mortgagor and the mortgagee, but also for third party, therefore the contract must be subject to the law of the country in which the mortgaged property is located (lex rei situs).
- (3) The formalism contain two element, external formalism elements (The law of the country of creation applies to it), element essential formalism (the law on the location of that money applies to it, If it is formally related to a property), so the Iraqi law applied, according to Article (25/2) of Iraqi Civil law.

Above was supported by some of the jurisprudence with reference to the articles (24, 1268) of Iraqi Civil law and article (305) of the real estate registration law.

While some <sup>(ii)</sup> viewed that the subject matter of the contract whenever real estate, then here the formality of the legal disposition is mixed with the subject matter, because the formalism in the formal mortgage is related to the publicity so subject to the law of the location of the money, not to the law of the form of disposition.

It remains to be question about the promise of a formal mortgage. Is formalism considered a necessity in it?

Article (91) of the Iraqi Civil law stipulates that ((1- The contractual promise whereby both contractors or one of them undertake to create a specific contract in the future, is not valid unless the matter essential of the contract is determine to be created, also determined the period which it must be created in it, 2- If the law requires to the contract fulfill a specific formality, then this formality must also be taken into account in The contractual promise that includes a promise to create this contract)).

Iraqi jurisprudence has in two directions:

The first: views the possibility of a promise of a formal mortgage, relied on the aforementioned state.

The second<sup>(iii)</sup>: believes that it is not possible to create the promise of a formal mortgage, despite that the legislator has put the general rule above, he believes that it is impossible to observe the formality required for the contract in the contractual promise, then that prevent the possibility of creating the promise of mortgage, this is justified by the fact that the promise of formal mortgage only be born personal rights between the parties of mortgage, while registration in the Real Estate Registration Department is limited to the real rights contained in the property (be born right real is being publicity against the world).

Indeed, the promise of formal mortgage accordance with the provisions of the  
Civil Iraq law may create the judicial mortgage?

So if he formation a promise of a formal mortgage that fulfills all elements, the promisor not formation the final contract during the period which he must formation in it, then the jurisprudence questions about the right of the promisee, whether he is confined to demanding compensation or for him to extract a judgment from the court deciding that the contract between them will take place and the judgment takes the place of the contract, Who should be registered?

The jurisprudence answered this in the affirmative, rely on the state of Article (102) Egypt Civil Law, which stipulates ((If a person promises to formation a contract, then declines, the other party of contract sues him requesting the execution of the promise, the conditions necessary for the perfection of the contract, especially those related to formalities, are fulfillment, so the judgment when has the power of the adjudicated thing (decision that depleted all methods of appeal) takes the place of the contract)), because this article is an application of the general rules that regulate the compulsory enforcement of the debtor whenever possible, it is the same as the provision of the article (246/1) of Iraqi Civil Law, so can create judicial mortgage.

**The second condition: specification of deed mortgage**, the specification of the mortgage decomposes into the specification of the mortgaged property and the specification of the secured debt, the specification of the mortgaged property, the Article (1290) of the Iraqi Civil Law indicated that the mortgaged property must be specification, by saying that ((1- It is permissible for the formal mortgage just on a real estate or a real right, 2- The mortgaged property must be valid to deal, sell and to must be specific)).

The specification of the secured debt reference to it in Article (1293) Iraqi Civil Law, it says ((It is permissible a formal mortgage as a security for a future debt or a debt pending on a condition or a contingent debt, so it may be secured to open a checking account, provided that the amount of the guaranteed debt is specified in the mortgage contract, Or the maximum to which this debt ends)).

## VI. The formalism effect of the formal mortgage.

The formalism effect of the formal mortgage for mortgagor, the mortgagor some of rights where the mortgagor remains the owner of the mortgaged property, so has the right to dispose of it, whether the disposition is material or legal, when the disposition is material must not reduce the value of the mortgaged property as waste the building, the mortgagor has the right to dispose all legal disposition such as selling, donation, etc. so long as it subsequent the deed mortgage, it is not considered effective against the mortgagee.

Also, the formal mortgage does not deprive the mortgagor from using and exploiting the mortgaged property, so he may lease it as well as take all the proceeds of the mortgaged property such as the rent, take what results from the fruits in the mortgaged property.

At the same time, the formal mortgage left effect on an the mortgagor, which is the obligation of the mortgagor to confer the formal mortgage right, this obligation does not arise mere the two wills of parties agree to it, nor is it create automatic, but rather it is necessary to take into account the formalism stipulated by the law, this is an application of what is required by the general rules stipulated in Article (247) of the Iraqi Civil Law, by saying it ((The obligation to transfer ownership or any other right in rem to be transferred automatic, If the subject matter of the obligation is a specific thing By itself that is owned by the obligor, without prejudice to the provisions relating to registration)).

The formalism effect of the formal mortgage for mortgagee, if the debt secured by the formal mortgage is due, the mortgagor is not discharged, the mortgagee may enforce the formal mortgage according to his right of the mortgage, also enforce the rest of the debtor's money according to his right to general security, This is provision of the article (1299) of Iraqi Civil Law, execution shall be in accordance with the form and procedures specified by law,

which end with the forced sale of the mortgaged property by public auction, any agreement to the contrary is void, As in two cases, The first case is the agreement to own the mortgaged property of the mortgaged property by the mortgagee (foreclosure), if the mortgagor does not discharge the amount of the loan in the time due, it is considered void this is provision of the article ((1301)) of Iraqi Civil Law.

The second case is that the mortgagee sells the mortgaged property in a friendly manner or when selling it by auction without interference by the judiciary and without permission from the Real Estate Registration Department also considered void.

The formalism effect of the formal mortgage for third party, the right of the formal mortgage is an authority for the creditor mortgaged in the mortgaged property, whereby the debt secured is collected from the price of this property. If it is collected against another creditor, this is called a priority, if he fulfills it against whoever has transferred the property of the mortgaged to him, this is called pursue.

As for the right of priority, it is governed by the rule is the first in time prevails '' nemo dat quod non habet'', However, there are exceptions to this rule, In the case that there are two mortgagees, one of them is a creditor to one of the partners, he is the first in the time, the other is a creditor of all partners, the latter is prior accordance to the rule of respect for the mortgage right created by all partners, or if there are two creditors, one of them is mortgagee he is the first in the time, the other is a creditor with public lien the latter who has the priority, or if there are two creditors, one of them is mortgagee he is the first in the time, the other is a creditors with contractors and engineers lien For the building they created, They will have priority not the mortgagee.

As for the right of pursue, it means the right of the mortgagee to follow chain conveyance of the mortgaged property in order to request execution in the mortgaged against the new owner, In order for the mortgagee to use his right to pursue, four conditions must be met, the first condition is That the mortgagor has disposed of the mortgaged property, either by conveyance his ownership or by creating another real right over it, the second condition is that the secured debt is due at the time of the right to pursue, the third condition is that the mortgage must be valid against who pursue the property in his hands, by registering it before registering the deed of the person to whom the ownership of the property has been transferred or a right in rem, the fourth condition is that the mortgaged property must be in the possession of the legal holder, the latter must be three condition meet are, (1) That the ownership of the mortgaged property is transferred to him or transfer a real right, and can sell it by public auction, (2) That the person whom the mortgaged property is transferred to him shall not be personally responsible for the debt, (3) That the possessor has registered his contract, because if he did not register it, the mortgagee ignore it, the mortgaged property is still for the mortgagor

### **Conclusion.**

The formality of registration of the formal mortgage in Iraqi law is a essential of the contract, but its effect involve the parties of the contract and with its extension against third party at the same time, contrary to the rule of relativity contracts, which limits the effect of the contract on its parties only, the most important effect of formalism the formal mortgage is to give priority to the mortgagee, any mortgage is range accordance the date of registration, this right is against of creditors without security, or mortgagee, and the right of the mortgagee to pursue the mortgaged property in the hands of any person to whom the ownership is transferred in order to enforcement, because the formalism of registration does not prevent the mortgagor of his ownership nor the powers resulting from the right of ownership (disposition, use, exploitation) nor possession, which may lead to creating a conflict between the interest of the mortgagee and third party, therefore, the Iraqi legislature adopted the formalism of registration to protect the mortgagee from those who might object to his right.

### **Financial disclosure**

There is no financial disclosure.

### **Conflict of interest**

None to declare.

### **Ethical Clearance**

All experimental protocols were approved under the Faculty of Dentistry, University of Babylon, Hillah city, Iraq and all experiments were carried out in accordance with approved guidelines.

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