



Interdiction of the Bankrupt Debtor as a Means of General Guarantee

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ABSTRACT

The relationship between a creditor and a debtor is built on trust. However, the debtor may prove unworthy of this trust due to bad faith or circumstances beyond their control. Since the means approved by the legislator for creditors are extremely important, the absence of these means leads to the general guarantee, which is the subject of protection, being stripped of all its value due to the debtor's tampering and negligence. Therefore, these means received special attention from the legislator. These preventive means relate to the debtor's behavior and obligations, such as the direct lawsuit, the indirect lawsuit, the moot lawsuit, and the lawsuit for non-enforcement of disposition. Additionally, some of these means aim to prevent the debtor from disposing of his assets, such as by interdicting him, the right to imprison him, and seizing his assets as a preventive means to prevent him from disposing of them.

Keywords: Interdiction of the bankrupt debtor, General guarantee, Creditor's right.

Introduction

One of the methods used to uphold the general guarantee for protecting the rights of creditors is through indirect lawsuits, which are lawsuits aimed at preventing disposition, and moot. However, these methods do not fully ensure the protection necessary for creditors' rights. The protection provided by these lawsuits, particularly the indirect lawsuit and the lawsuit for non-enforcement of disposition, is delayed. Creditors typically do not turn to these options until after the debtor becomes insolvent or their insolvency worsens. These measures do not avert the danger from occurring but rather seek to mitigate its impact and safeguard the remaining assets of the debtor.

Each of the three aforementioned lawsuits are preliminary means of enforcement, although the creditor aims to enforce his right, and the creditor is joined by other creditors in enforcing the order. That leads to the creditor avoiding resorting to these means and preferring to resort to more effective legal means such as interdiction of the bankrupt debtor. On the other hand, these aforementioned lawsuits do not provide complete protection for creditors against the debtor's fraud or negligence.

For example, we find that in a lawsuit of non-enforcement of dispositions, the creditor must prove the sum of due and deferred debts for debtors in preparation for proving his insolvency. It is difficult for the creditor to be aware of all of the debtor's debts, especially the deferred ones. In addition, if the contested disposition is compensation, he must prove the collusion of the debtor and the assignee to harm his creditors. Proving this is not an easy matter, and the difficulty of proving leads to the possibility of escaping some of the debtor's actions from the penalty of non-enforcement, which harms creditors and misses the protection guaranteed by the legislator to them.

Research Importance

The significance of this study lies in the prominent position this topic holds within legal studies. It highlights the protection it offers to creditors from debtor's fraud or negligence, ensuring equality between them. Practical life has also shown the consequences of a debtor's intentional or negligent failure to uphold their general guarantee, particularly when their financial situation worsens.

Research problem:

The study problem is represented in the following question:

- When is the bankrupt debtor placed under the interdiction, and what is its effect? Are there any conditions that must be met to interdict the bankrupt debtor? Is the guarantee provided to the creditor sufficient?

Research Methodology

In studying the issue of interdiction on a bankrupt debtor, we relied on analytical and comparative approaches whenever necessary. We will rely on an explanation of the position of Iraqi law, jurisprudence, and judiciary, by analyzing the texts of the Iraqi Civil Code related to this matter and the laws pertinent to the subject under study.

Research Structure

Since the method of interdiction on a bankrupt debtor is one of the means that protects the creditor from the debtor's negligence in exercising his rights, we decided to divide this research into two requirements. In the first requirement, we address the conditions and effects of the interdiction, and in the second requirement, we address cases where the interdiction ends. The research will be accompanied by the most important results and recommendations emerging from this research.

First Requirement: Interdiction conditions and its effects

Interdiction on the debtor is intended to prevent him from disposing of his money. If the due debts of debtors exceed his rights, then he is considered insolvent. He may intend to smuggle his money, which results in weakening the general guarantee of his financial liability (1). Interdiction of a bankrupt debtor is a legal system under which a debtor whose due debts exceed his assets is placed under interdiction, and a court ruling is issued to interdict him based on a submitted request that the competent court is convinced of (2).

The Iraqi legislator has regulated the provisions for interdiction against a bankrupt debtor in Articles 270-279 of the Civil Code. He drew upon Islamic jurisprudence and the Egyptian Civil Code to define it as the insolvency system (3). To comprehend the debtor interdiction system, it is essential to study its conditions and effects.

First (conditions for interdiction of a bankrupt debtor): Article 270 of the Iraqi Civil Code stipulates that: "A bankrupt debtor whose due debt is more than his assets if his creditors have reasonable grounds to fear that he may hide or transfer his assets to another person, they may petition the court to prevent him from disposing of his assets or transferring a debt to another party. In such cases, the court may impose an interdiction." Additionally, Article 271/1 specifies that "interdiction shall be enforced through a court ruling issued by the court of first instance upon the request of any creditor"

From the above, some conditions must be met for the debtor to be interdicted, as follows:

1. That the debtor's assets are insufficient to pay his due debts, as a condition for the debtor's interdiction is that his assets are insufficient to pay his due debts. This means that the debtor's debts have become more than his assets, so the basic condition for requesting interdiction against the bankrupt debtor is the insufficiency of the debtor's assets to meet the due debts (4).

Therefore, an interdiction on the debtor does not guarantee that his assets are sufficient to cover the debts he owes. It is not permissible to interdict him for a debt that is under dispute or for a debt that is undisputed but not yet due for payment. However, the debt must be payable, even if the debt requiring interdiction is not final (5). The burden of proving bankruptcy lies with the creditor filing the lawsuit, who must prove that the debtor's assets are less than his due debts (6).

Among the judicial applications in this regard, the Egyptian Court of Cassation ruled that: "Insolvency is nothing more than a legal condition that benefits from the insufficiency of the debtor's assets to meet his due debts. It is based on a reality that has signs that witness it, and whoever claims that his debtor is insolvent must prove his insolvency by proving the facts indicating this without requiring the debtor to prove that his wealth covers the debt" (7).

2. The request for interdiction must be based on reasonable reasons:

Article 270 of the Iraqi Civil Code states that: "A bankrupt debtor whose due debt is more than his assets if his creditors fear the loss of his assets or fear that he will hide them or put them in the name of someone else. Their fear was based on reasonable reasons and they refer to the court to seize him from disposing of his assets or admitting a debt to another person, the court will place him under interdict".

It is clear from the text of the article that if the debtor is insolvent and his creditors fear the loss of his assets or fear that he may smuggle or conceal them by putting them in the name of a third party, such as his father, son, wife or a relative under a moot contract that he enters into with them. Their fear has reasonable reasons, the creditors may impose an interdiction on this debtor by the competent court (8).

Therefore, for a creditor to request the debtor's interdiction, the request for interdiction must be based on reasonable reasons that led the creditors to fear the loss of the debtor's assets by his actions and deeds. Such as the creditors' fear that the debtor will hide or smuggle his assets if they are money or movable assets (9).

3. An interdiction ruling is issued by the competent court:

For the debtor to be interdicted, a ruling must be issued by the Court of First Instance based on the request of one of the creditors according to what was stipulated in Article 271 of the Iraqi Civil Code previously mentioned.

The Egyptian legislator allowed the debtor to file an interdiction lawsuit himself or request one of his creditors (10) that is in the Court of First Instance to which the debtor's domicile belongs, and not the District Court. The court has broad discretion to decide whether to declare the debtor insolvent or reject it despite the fulfillment of its conditions (11). In Iraqi law, the judge has discretionary authority to rule on interdiction based on his right to assess whether the reasons on which the interdiction request is based are reasonable and justified (12). Accordingly, the Iraqi legislator restricted the request for interdiction to the creditor exclusively, unlike the Egyptian legislator, which granted it to the debtor and the creditor. The Egyptian legislator did well in what he permitted, and the Iraqi legislator should have followed his example. Therefore, we propose to amend Article 271/1 of the Iraqi Civil Code to state, "the interdiction shall be by a ruling issued by the Court of First Instance based on the request of the debtor himself or one of the creditors' requests, provided that the court considers the lawsuit as a matter of urgency".

The reason for the debtor's request to declare his insolvency is that the debtor may have an interest in declaring his insolvency. This is if his debts are multiple and his creditors insist on requesting them, or they seize all of his revenues and deprive him of what is necessary for his expenses. So, his interest in declaring his insolvency is to obtain the maturity dates for current debts if his circumstances allow him to be granted these deadlines. Or to obtain an alimony report for him that will be deducted from his seized revenues so that he can live from it until his assets are liquidated. Therefore, the debtor may submit to the court a request to declare his insolvency, and he is a plaintiff in the insolvency declaration lawsuit. His creditors are sued so that they are the defendants, and this is often a subsidiary lawsuit (13). For these reasons, the researcher proposed amending Article 271/1 of the Iraqi Civil Code as mentioned above.

Second: The effects of interdiction on the bankrupt debtor:

The issuance of a judgment of interdiction against the bankrupt debtor has important effects, some of which concern the debtor and others concern the creditors:

1. Effects of interdiction on the debtor:

Judgment of interdiction against the debtor has several effects, including:

- A. The debtor's actions are not enforceable against the creditors: If the interdiction claim document is registered, any action of the debtor that would reduce his rights or increase his obligations will not apply to the creditors. However, the debtor may, despite being unable to dispose of his property, dispose of it, even without the consent of the creditors. Provided that it is for the equivalent price and that the buyer deposits the price in the court's treasury until it is distributed according to the distribution procedures (14).
- B. An expense report for the debtor: The legislator allowed the president of the competent court for interdiction to decide on an expense for the debtor, based on a petition he submits, to be paid from his seized revenues (15). The legislator has made this decision to protect the debtors and show mercy to them if their source of income is cut off. This gives the debtor the right to request the provision of necessary expenses for themselves and their dependents until their assets are liquidated, in case creditors seize their assets and they are left without any means of support (16).

2. The effects of interdiction on creditors:

The issuance of the ruling has the following effects on creditors:

- A. Maturity for all deferred debts: The issuance of an interdiction ruling shall result in the extinguishment of the terms of all debts linked to a term, making them due for payment. However, the interest for the period that has been extinguished by the extinction of the term should be deducted from these debts (17). This measure is taken by the legislator to ensure equality among creditors (18).

It is worth noting that the extinguishment of the term of creditors' debts includes all ordinary and privileged creditors. So, these do not negate their privilege in that they have, like ordinary creditors, the right of general guarantee over the debtor's assets (19).

However, the judge may, upon the request of the debtor, the rule to extend the deadline or period for deferred debts. The judge may also grant the debtor a period for current debts if it is deemed by the circumstances to be necessary and the most successful means to secure the interests of both the debtor and the creditors collectively (20).

- B. Taking executive procedures against the debtor: The legislator allowed each creditor to take procedures in his name to recover his rights. That is, creditors reserve their right to take individual procedures to recover their rights. The lawsuit filed by the creditor to obtain his rights after the judgment declaring the debtor's bankruptcy is not directed against the debtor, but rather to the official receiver appointed by the court to manage the debtor's assets (21), and the official receiver is a representative of the person concerned by law (22). As for judicial receivership, some have defined it as "depositing the thing placed under the jurisdiction of a specific person by order of the court if the interest so requires" (23).

Second requirement: Cases of ending the interdiction

The interdiction of the debtor ends with a ruling issued by the Court of First Instance, based on the request of each interested party, in four cases, according to the procedures stipulated in the Iraqi Civil Law, as follows:

First: Cases of ending the debtor's interdiction:

Article 278 of the Iraqi Civil Code states: "Interdiction ends with a ruling issued by the Court of First Instance based on the request of every interested party in the following cases: 1-when it is proven that the debtor's debts do not exceed his assets. 2-when the creditors, or some of them, accept to release the debtor from some of his debts. So, that the remaining debts do not exceed the amount of money he has. 3- When the debtor repays his debts that have fallen due without the interdiction having any effect on them being due. In this case, the terms of the debts that have fallen due under the interdiction shall return to what they were before. Provided that the debtor has paid all of their installments that have fallen due. 4- When three years have passed from the date of issuance of the interdiction ruling" (24).

It is clear from the previous text that the interdiction of the debtor ends in the following cases:

1. If it is proven that the debtor's debts no longer exceed his assets:

Debts here mean what was due for payment at the time of the interdiction of the debtor and what was deferred and then due according to the interdiction ruling. Provided that, certainly, the end of the interdiction did not harm the creditors whose debts were fixed at the time of its determination (25). This assumption is fulfilled in the event that the debtor receives an inheritance or a gift from others, and his assets exceed his debts or at least satisfy these debts. It is not a condition for the end of the interdiction that the debtor pays his debts, as it is sufficient for his assets to become sufficient to pay these debts (26).
2. Acceptance of the creditors, or some of them, to release the debtor from some of his debts:

According to the second paragraph of Article 278 of the Iraqi Civil Code, the interdiction ends when the creditors, or some of them, accept to release the debtor from some of his debts. So, that the remaining debts he owes do not exceed the amount of money he has.

Based on the above, if some of the creditors release their debtor from some of their rights to him so that the remaining debts, he owes do not exceed the amount of money he has, then the interdiction ends with a ruling issued by the Court of First Instance based on the request of everyone concerned.

Some believe that there is no justification for mentioning this case, since the first one includes it (27), and the researcher supports this opinion and suggests canceling the second paragraph of Article 278 of the Iraqi Civil Code.
3. The debtor voluntarily pays his debts:

When it is proven that the debtor has fulfilled all his due debts, without the interdiction having any effect on their due debt, then the interdiction ends. In this case, the maturities of the debts that have been due by the interdiction return to what they were before, provided that the debtor has fulfilled all the installments that have fallen due (28).

It is worth noting that the debtor's voluntary fulfillment represents a reason for requesting an end to the state of interdiction, and not the debtor's ability to make voluntary fulfillment. The legislator does not stipulate that to end the state of interdiction in this case, the debtor must have paid all his debts. Additionally, the legislator does not stipulate that to end the state of interdiction in this case, the debtor must have paid all his debts, including those that were fallen due by itself and those that were fallen due by the interdiction because of the fall of the deadlines. Rather, he was satisfied with only the debts that were due on their own without the interdiction having any effect on their maturity. The debts that were due because of the interdiction are not included in this calculation as long as the deadline for paying them has passed. Not yet expired at the time of requesting an end to the interdiction (29).
4. Ending the interdiction by force of law:

Three years have passed since the issuance of the interdiction ruling. Even if the debtor's funds are insufficient to pay his debts (30), keeping the debtor from disposing of his money for more than the period specified by the law for liquidating his assets and recovering the creditors' rights entails restrictions on the debtor and undermines his interests. It also suggests leniency on the part of creditors who failed to exercise their rights to execute the debtor's seized assets due to negligence or with the intent to harm him (31).

On the contrary, the state of insolvency in the Egyptian Civil Law ends by force of law if five years have passed from the date of annotation of the ruling declaring insolvency (32).

It is worth noting that the expiration of the interdiction by force of law differs from its expiration by a judicial ruling. The expiration of the interdiction by force of law is only considered after the period specified by the law has passed, and the state of actual insolvency or bankruptcy may remain. However, the end of the state of interdiction by a judicial ruling led to the actual disappearance of the state of insolvency (33).

The legislator wanted to establish three years from the date of issuance of the interdiction ruling. This decision aimed to balance the interests of both the debtor, by automatically ending the interdiction after the specified period, and the creditors, allowing them ample time to exercise their rights (34).

Second: Procedures for ruling on the end of the state of interdiction:

The interdiction ends with a ruling issued by the Court of First Instance in whose jurisdiction the debtor's last place of residence is located. It does not have to be issued by the same court that issued the interdiction ruling against him, as the debtor's place of residence may change, the same procedures for ruling on interdiction are followed when ruling on the end of the interdiction situation (35).

The end of the interdiction shall be based on the request of every interested party, whether it is the debtor himself, the successor to whom the debtor's money has passed, or one of the creditors themselves. This does not prevent the case from being filed before the court of first instance from which the interdiction ruling was

issued. The court examining the interdiction request must review the interdiction case file, which requires that a lawsuit be filed to lift the interdiction before the same court that issued the ruling (36).

The ruling's decision to end the quarantine can be appealed through standard appeal procedures if it violates the law (37). The normal methods of appeal are opposition and appeal, and the law did not limit the reasons for appeal to the ordinary method; it permitted its conduct regardless of the type of action attributed to the ruling. It is permissible to appeal a court decision because the court made a mistake in extracting the facts or in their assessment. Or made an error in applying the law to the facts, or applied a legal rule other than the one that should have been implemented. Another reason for appeal could be if the procedures leading to the ruling were flawed, or if the ruling itself was invalid due to not considering the conditions required by law when it was pronounced, drafted, or deposited (38).

The end of the interdiction results in the debtor obtaining a decision from the Execution Department to lift the seizure imposed on his funds due to the interdiction, without prejudice to the procedures taken by each creditor on the debtor's assets in his name in particular and for his benefit alone (39).

The end of the interdiction also results in the disappearance of its effects. Therefore, the debtor may dispose of his money without the consent of his creditors. If there are debts whose terms have expired due to the interdiction and have not been paid, the debtor may request that they be returned to their previous terms, provided that he has paid the installments that fell due (40).

As for the creditors, they have the right to take enforcement measures against the debtor's money as they did before. The decision to lift the interdiction that the debtor obtains from the Execution Department does not have a retroactive effect on the measures taken by each creditor in his name and for his own benefit, as these procedures remain valid and enforceable (41).

Conclusion

Finally, after completing our research titled (Interdiction of the Bankrupt Debtor as a Means of General Guarantee), which is nothing more than an attempt to highlight the most important legal aspects surrounding this topic. The conclusion of the research is not a repetition of what the study covered, but rather an embodiment of the most important results that could be reached and an explanation of some of the proposals that we saw recommended, as follows:

First: Results

Interdiction of a bankrupt debtor is a legal procedure in which a debtor, whose outstanding debts surpass their assets, is prohibited from managing their assets. This ruling is issued by the Court of First Instance upon the request of a creditor after the court is convinced of the necessity. It is a prerequisite for the debtor to be declared bankrupt that their assets are inadequate to cover their debts, and that the interdiction request is supported by valid reasons.

Second: Recommendations

We suggest that the Iraqi legislator amend the text of Article 271/1 of the Civil Code, following the example of the Egyptian legislator, which granted the interdiction request to the debtor and the creditor so that the Article is as follows:

1. The interdiction shall be by a ruling issued by the Court of First Instance based on the request of the debtor himself or the request of one of the creditors, provided that the court considers the case as a matter of urgency.

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10. Article 250 of the Egyptian Civil Code, No. 131 of 1948, stipulates that insolvency shall be declared by a ruling issued by the court of first instance to which the debtor's domicile belongs, based on the request of the debtor himself or the request of one of his creditors, and the case shall be heard expeditiously.
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12. Abdul Majeed Al-Hakim, Abdul Baqi Al-Bakri, Muhammad Taha Al-Bashir: *Civil Law and Provisions of Commitment*, part 2, previous source, p. 157.
13. Suleiman Markus: previous source, item 198, p. 402.
14. Muhammad Abdel-Zaher Hussein: previous source, p. 163.
15. Article 272 of the Iraqi Civil Code stipulates that it shall be spent on the interdicted debtor and those obligated to support him during the interdiction period from his own money. If the creditors imposed the interdiction on his revenues, the president of the court responsible for the interdiction may decide for the interdicted person, based on a petition he submits, an expense to be paid from his seized revenues.
16. Fawzi Kadhim Al-Mayahi: *Iraqi Civil Law, Jurisprudence and Judiciary, Provisions of Commitment, Effects of Commitment*, 1st edition, Part 9, Al-Samaa Press, Baghdad, 2022, p. 289.
17. The first paragraph of Article 273 of the Iraqi Civil Code stipulates that the interdiction ruling results in the dissolution of all deferred debts owed by the debtor, and deducts from these debts the amount of the agreement or legal interest for the period that has fallen due to the fall of the term.
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20. The second paragraph of Article 273 of the Iraqi Civil Code stipulates that the court may, upon the request of the debtor and in the face of the concerned parties among his creditors, rule to keep the term for a period concerning deferred debts, it may also grant the debtor a deadline for due debts if it deems that this measure is justified by the circumstances and that it is the best way to guarantee the interests of the debtor and all creditors.
21. Dara Hammada: previous source, pp. 107-108.
22. The Egyptian Court of Cassation has defined judicial receivership as a precautionary measure, and the judgment issued therein is not a judgment on a measure that is capable of financial execution in itself, but rather a determination that the receiver has the legal capacity to perform the task assigned to him to the extent stipulated in the judgement – See: Egyptian Court of Cassation Ruling No. 36, Judicial Year 22, session 2/10/1955. 6, p. 652, quoted by Dr. Moawad Abdel Tawab: *Reference in the Commentary on the Texts of Civil Law, Volume Eight, Deposit - Custody - Gharar Contract - Kafala*, 7th edition, Library of the World of Thought and Law, Egypt, 2004, p. 29.
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30. Dara Hammada: previous source, p. 108.
31. Abdul Majeed Al-Hakim, Abdul-Baqi Al-Bakri, Muhammad Taha Al-Bashir: *Civil Law and Provisions of Commitment*, Part 2, previous source, p. 162.
32. Article 262 of the Egyptian Civil Law No. 131 of 1948 stipulates that the state of insolvency ends by force of law when five years have passed from the date of annotation of the ruling declaring insolvency.
33. Hassan Abdo Ahmed Al-Saraji: previous source, p. 1379, item 1547.
34. Abdul Qadir Al-Far: previous source, p. 119.
35. Hassan Ali Al-Dhanun: previous source, p. 126.
36. Fawzi Kadhim Al-Mayahi: *Iraqi civil law, jurisprudence and judiciary*, previous source, p. 295.
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38. Ahmed Abu Al-Wafa: *The Theory of Provisions in the Law of Procedures*, 4th edition, Mansha'at Al-Maaref, Alexandria, 1989, clause 388, p. 706.
39. Article 279 of the Iraqi Civil Code stipulates that the debtor has the right, pursuant to the ruling issued ending the interdiction, to obtain from the execution Department a decision to lift the quarantine imposed

on his funds due to the quarantine, and this is without prejudice to the measures taken by each creditor on the debtor's funds in his name in particular and for his benefit alone.

40. Muhammad Abdal-Zaher Hussein: previous source, p. 164.
41. Hassan Ali Al-Dhanun: previous source, p. 127.