

Taking Security Over Commercial Business in Qatar

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Introduction

Security is of paramount importance in relation to commercial lending. However, a commercial borrower must be able to carry on its business without the requirement of obtaining the lender's consent on day to day matters.

Under English law, the common form of security is by way of an "all assets" fixed and/or floating charge pursuant to a debenture in favour of the lender. A floating charge is a form of security that may be taken by a lender over a company's present and future assets, whether such assets are identified or not at the time the floating charge is created. The assets can be tangible (raw materials, stock, plant and machinery) or intangible (intellectual property or goodwill). Unlike a fixed charge, under a floating charge the company is generally at liberty to deal with such assets (including selling and adding to the charged assets) until such time when the charge crystallises (usually upon an occurrence of an event of default).

The English law concept of a floating charge is not recognised under Qatari law. By contrast, under Qatari law a series of different forms of pledge may need to be created depending on the type of asset, each such pledge with its own set of creation and perfection requirements.

Qatari Commercial Code - Mortgage over Commercial business

The mortgage over commercial business (or fonds de commerce) is the closest Qatari law embodiment to the English law floating charge. There are practical limitations to the mortgage over commercial business making it a more cumbersome form of taking security in Qatar. One such limitation is that any asset mortgaged under the mortgage over commercial business must be readily identifiable and in existence at the time of creation of the mortgage over commercial business. Future assets cannot be secured under the mortgage over commercial business document, rather, an addendum to the mortgage over commercial business would need to be executed by the parties from time to time to secure the asset.

Articles 53 to 59 of the Qatari Commercial Code Law No. 27 of 2006 set out the relevant provisions relating to mortgages over commercial business.

Article 53 of the Commercial Code states, "The Business can be mortgaged. In the event that the mortgage is not clearly described, the mortgage shall be in respect of the trade name, the right of lease, contact of customers and commercial reputation (goodwill)."

The term "Business" has the following meaning (under Article 36 of the Commercial Code):

"The Business possesses the store and the relevant rights. The Business includes a number of tangible and intangible elements, especially the merchandise and the commercial furniture, industrial machines, contact of customers, the trade name, the right to lease, trade marks and names, patents, licenses and

industrial samples.”

Accordingly, each type of asset listed above may be “mortgaged” as part of the mortgage over commercial business. In effect, it is the going-concern (i.e. the business itself) that is being mortgaged. For certain types of assets, additional approvals may be required. For example, any vehicular machinery such as a mobile crane or cement truck would not be captured under such mortgage.

Each of the assets subject to the mortgage over commercial business must be listed in a schedule attached to the mortgage agreement. Failure to clearly set out the assets to be mortgaged would only create a mortgage over intangible rights described under Article 53 of the Commercial Code.

The primary advantage of a mortgage over commercial business versus a pledge over movables is that the former is registered on the Commercial Register at the Ministry of Economy and Commerce. Accordingly, the mortgagee’s name would be recorded in the Commercial Register, and the record would serve as notice to all third parties that the mortgagee has a mortgage over the commercial business of the company. However, the mortgage itself would be over only specific movables (i.e. movable objects that are listed in the mortgage agreement).

Formalities of the mortgage over commercial business dictate that it must be created in writing and executed by the parties (or their authorised representatives) before the Ministry of Justice. The agreement forming the basis of the mortgage over commercial business must contain the list of assets that are to be mortgaged (including any serial numbers which readily identify the asset). The mortgage over commercial business agreement is then registered with the Commercial Registry office at the Ministry of Economy and Commerce. Priority is obtained on the basis of first in time of the date of registration on the commercial registry.