

# The Impact of the Concept of Donation on the Debtor's Liability

Marwan M. Saleh<sup>1</sup>, Besan S. Abu Nasser<sup>2</sup>

<sup>1</sup> Assistant Professor, Faculty of Law, Al-Azhar University, Gaza

<sup>2</sup> MS Student, Faculty of Law, Al-Azhar University, Gaza

**Abstract:** *The research indicates that the general guarantee does not prevent the debtor from disposing of their assets; the debtor can sell or gift their property, transfer their debts, settle on their rights, or waive them. However, a donation by the debtor reduces the general guarantee for creditors, who can object to such transactions through an action of ineffectiveness against them. The action of ineffectiveness addresses the positive actions of the debtor that reduce the general guarantee, whereas the indirect action addresses the negative conduct of the debtor, who refrains from increasing the general guarantee for their creditors. An action of Ineffectiveness is not accepted if the debtor's act is material; it must be legal and harmful to the creditors. The three legal mechanisms discussed do not grant the creditor initiating the action any special advantage in recovering their claim but ensure equality with other creditors. Indirect actions are rarely used in practice, as creditors usually prefer the more effective method of attachment in the hands of third parties when their claim is monetary. In the case of donations, the creditor does not need to prove collusion or fraud by the debtor, as harm to creditors is presumed. If the creditor succeeds in an action of ineffectiveness, the transactions deemed harmful are considered void, and both the initiating creditor and other creditors benefit from the judgment, allowing them to participate in the execution against the transferred asset. The discussed legal mechanisms do not grant any creditor a priority in recovering their claims but adhere to the principle of equal distribution among creditors. Thus, the general guarantee serves as a means to protect creditors' rights from the debtor's actions that may reduce the guarantee available for debt repayment. The importance of donations and their impact on the general guarantee is highlighted, along with the necessity to protect creditors' rights through actions of ineffectiveness and actions of simulation, clarifying the differences and significance of each in safeguarding creditors' rights.*

## Introduction:

The legislature has decided to establish a legal system that guarantees creditors the ability to obtain and preserve their rights. This system is based on the concept of general guarantee, wherein all of the debtor's assets secure the repayment of debts. Thus, if the debtor fails to fulfill the creditor's right, the creditor, after obtaining a judicial judgment or other enforceable instrument against the debtor, has the right to enforce it against the debtor's assets through execution and sale at public auction to obtain their right from the proceeds. The legislature also decides that all creditors are equal in the general guarantee, so if the debtor has multiple creditors, their rights are secured by all of the debtor's assets at the time of execution. The equality among ordinary creditors means that they all have the right to enforce the debtor's assets through execution and sale at public auction, sharing the proceeds pro rata according to their debt. Despite the advantages of this legal system, it has apparent drawbacks, such as not restricting the debtor's discretion in managing their assets. Consequently, the debtor retains the freedom to dispose of their assets as they wish, and no one can object to their legal and material transactions. Although the legislature has worked to establish a general guarantee among creditors so they can obtain their rights through this guarantee, it does not prevent the debtor from entering into legal transactions in all their forms. Furthermore, the creditor has no right to object to the debtor's disposal of their assets, nor can they trace the debtor's assets after they have exited their possession. Additionally, the creditor cannot prevent the debtor from incurring new debts. Moreover, under the general guarantee, the creditor cannot prioritize over other creditors whose rights arose after theirs in satisfying their claim. This means that the creditor is threatened by the risk of the debtor's insolvency, which can occur due to actions that diminish their rights and increase their obligations.

## Problem Statement:

Given the novelty of Palestinian laws and their recent entry into the Palestinian legal arena, the current study focuses on answering the following questions:

- What is the concept of donation, and what is its impact on the general guarantee?
- What are the protection mechanisms for the general guarantee?
- What is the nature of the claim of non-enforceability of transactions?
- What is the impact of the concept of donation on other guarantee mechanisms?
- What are the consequences of the claim of non-enforceability of transactions?

## Significance of the Research:

The significance of this research lies in finding the legal avenue through which the creditor can preserve their assets in the debtor's possession. The debtor's disposal of their assets affects the general guarantee of the creditors, prompting them to resort to the judiciary to prevent the enforcement of these transactions against their rights.

### **Research Objectives:**

This research aims to limit actions that harm creditors through diminishing the general guarantee. The debtor's legal actions weaken the general guarantee, which safeguards creditors' rights. Therefore, the legislature has provided means for creditors to preserve the general guarantee and prevent the debtor from committing fraud or collusion to harm them through actions that lead to insolvency or increase it.

### **Research Methodology:**

This research will rely on a comparative and analytical legal methodology, comparing Palestinian law with other Arab laws, especially Egyptian law, in addition to analyzing legal texts to arrive at the legal principles governing these issues.

### **Research Plan:**

- Chapter One: The Concept of Donation and Its Impact on the General Guarantee
  - Section One: Definition of Donation
    - Subsection One: Donation in legal terminology
    - Subsection Two: Donation in Islamic jurisprudence and its legitimacy
  - Section Two: The Impact of Donation on the General Guarantee
    - Subsection One: Definition and Characteristics of General Guarantee
    - Subsection Two: The legal nature of the general guarantee
- Chapter Two: Protection Mechanisms for the General Guarantee
  - Section One: Claim of Non-enforceability of Transactions
    - Subsection One: Definition of the claim of non-enforceability of transactions
    - Subsection Two: Characteristics of the claim of non-enforceability of transactions
  - Section Two: Provisions of the Claim of Non-enforceability of Transactions
    - Subsection One: Consequences of the claim of non-enforceability of transactions
    - Subsection Two: Statute of limitations for the claim of non-enforceability of transactions
- Chapter Three: Impact of the Concept of Donation on Other Guarantee Mechanisms
  - Section One: Indirect Claim
    - Subsection One: Conditions of the indirect claim
    - Subsection Two: Consequences of the indirect claim
  - Section Two: Symbolic Claim
    - Subsection One: Types of symbolism
    - Subsection Two: Conditions of the symbolic claim
    - Subsection Three: Provisions of the symbolic claim

## **Chapter One**

### **The Concept of Donation and Its Impact on General Guarantee**

In the modern era, with the near disappearance of the system of bodily coercion, creditors' rights are now only secured by the debtor's assets. This notion is often expressed by stating that creditors have a general guarantee interest in all the assets of their debtor. Article 234 of the Civil Code reflects this principle by stating, "All the debtor's assets are a guarantee for the fulfillment of his debts, and all creditors are equal in this guarantee, except for those who have the right to priority according to the law." Therefore, this section is dedicated to understanding the concept of donation and the nature of general guarantee as follows:

#### **Section One**

##### **Definition of Donation**

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A debtor has the right to dispose of his assets, allowing him to enter into contracts of exchange as well as donation contracts. The focus of this research is on the debtor making dispositions in the form of donations. The key questions are whether such donations affect general guarantee and whether the creditor has the right to object to these dispositions, particularly when a donation by the debtor could diminish the general guarantee.

### **Subsection One**

#### **Donation in Legal Terminology**

In legal terminology, a donation is defined as a contract whereby one party (the donor) provides something to another party (the donee) without receiving anything in return. In this arrangement, the donor is considered to be making a gift, and the donee is the recipient or beneficiary of the gift.

### **Subsection Two**

#### **Donation in Islamic Jurisprudence and Its Legitimacy**

Islamic jurists did not provide a specific terminological definition for donation but rather defined its various forms, such as bequests, gifts, endowments, and loans, among others. They provided definitions for each type individually. Nonetheless, the general definition of donation according to them is "the voluntary giving of property or benefit by a legally competent person to another without compensation, for the purpose of charity and goodwill."

#### **Donation is legitimized in both the Quran and the Sunnah:**

##### **In the Quran:**

There are numerous verses indicating the legitimacy of donations, as Allah commands us to engage in charity, cooperation in goodness, and offering kindness to others. For instance, Allah says, "Help one another in acts of piety and righteousness. And do not assist each other in acts of sinfulness and transgression" (Quran 5:2), and "It is prescribed for you, when death approaches any of you, if he leaves wealth, that he makes a bequest to parents and next of kin, according to reasonable manners. This is a duty upon the righteous" (Quran 2:180).

##### **In the Sunnah:**

There are many hadiths that emphasize charity and doing good deeds. For example, it is narrated from Umar that he acquired land in Khaybar and came to the Messenger of Allah (peace be upon him) to consult him about it. He said, "O Messenger of Allah, I have obtained land in Khaybar, and I have never acquired wealth more valuable to me than this. What do you command me to do with it?" The Prophet (peace be upon him) said, "If you wish, you can keep the property as an endowment and give its fruits in charity." Umar then gave it in charity, stipulating that it should not be sold, inherited, or given away as a gift. Umar gave it in charity to the poor, relatives, slaves, in the cause of Allah, travelers, and guests, with no harm for the one managing it if they eat from it reasonably or feed a friend without intending to accumulate wealth from it" (Sahih Muslim).

This hadith indicates the legitimacy of donation, as it establishes the basis for the legality of endowment (waqf), which is considered a form of charity and good deeds.

### **Section Two**

#### **The Impact of Donation on General Guarantee**

The effect of an obligation is its execution, whether voluntarily or compulsorily. This execution certainly has an object it applies to, which varies depending on the nature of the creditor's debt. If the creditor's debt is ordinary, its execution does not attach to a specific asset of the debtor but extends to all the debtor's assets, meaning all positive components of the debtor's financial estate. In other words, this debt is secured by the entirety of the debtor's assets. Hence, the term "general guarantee" is used for the creditor or creditors alike.

### **Subsection One**

#### **Definition and Characteristics of General Guarantee**

General Guarantee means that:"

1. All of the debtor's assets guarantee the fulfillment of his debts.
2. All creditors are equal in this general guarantee unless a creditor has the right to priority according to the law" (Article 234 of the Civil Code).

Thus, the general guarantee established for the creditor against the debtor, represented by the creditor's right to compulsory execution on the debtor's assets to fulfill his right, constitutes a general guarantee in terms of its scope, as it applies to all of the debtor's assets except those exempted by law (Imran, 2007).

All of the debtor's assets serve as general guarantee for the creditors. However, if a creditor has specific security, it applies to a particular asset of the debtor, giving that creditor priority over others. General guarantee for creditors is equal among all creditors, with no creditor having priority over another unless they hold specific security such as a lien or mortgage (Al-Sanhouri, 1956), as indicated in the second paragraph of the previous provision.

The debtor's financial estate represents only general guarantee, providing no more than security, which means that the creditor does not have any direct right to the debtor's estate as long as he has not initiated attachment proceedings on a specific asset. Consequently, the debtor remains in control of his financial estate and retains the authority to dispose of and manage his assets. Indebtedness does not deprive the debtor of the freedom to dispose of and manage his assets (Al-Ahwani, 1996).

Given that the debtor has the freedom to dispose of his assets, any disposition of a specific asset, even if it existed at the time of the debt's inception, is valid against the creditors. The asset is removed from the general guarantee and cannot be executed upon by the creditors. Once disposed of, it exits the financial estate, meaning it is no longer part of the general guarantee, and the creditor cannot pursue the disposed asset in the hands of the transferee. Therefore, within the relationship between the debtor and ordinary creditors, the debtor's freedom to dispose of his assets presents a risk to the creditors' rights. The disposition may deplete the financial estate of its positive elements, leaving it insufficient to cover the debts, thereby increasing its negative elements represented by the creditors' rights. Additionally, this freedom of disposition may result in the preferential treatment of one creditor over another, thereby harming the rights of the remaining creditors.

It should be noted that, although the general guarantee encompasses all of the debtor's assets, the legislator has excluded certain assets from execution due to specific considerations. These include assets that cannot be transferred to others, such as the right of habitation and the right of use. Humanitarian and compassionate considerations also prevent the execution against certain assets of the debtor, such as his bed, clothes, and necessary food and personal items (Al-Far, 1999).

On the other hand, general guarantee does not conflict with specific security but rather supplements it. Therefore, it serves as general guarantee for both ordinary creditors and preferred creditors, such as the secured creditor. All ordinary creditors are equal before general guarantee, and if the debtor's assets are insufficient to fulfill all debts, his assets are divided among the creditors proportionately, with each creditor receiving a percentage of their claim equivalent to the value of the debtor's assets and the total amount of his debts (Imran, 2007).

The general guarantee for ordinary creditors on their debtor's estate requires clarification of its distinctive characteristics, as follows:

**First: All of the Debtor's Assets Guarantee the Fulfillment of His Debts:**

This means that the creditor, upon the maturity of his debt, can execute against all the debtor's assets in his possession at the time of execution, whether these assets were in the debtor's estate at the inception of the debt or acquired afterward up until the time of execution. The creditor's right to execute against these assets is referred to as the general guarantee for creditors.

The principle of general guarantee is essentially an expression of the unlimited personal liability imposed on the debtor. It represents the creditor's right to forcibly satisfy his claim from the debtor's assets. Therefore, the debtor's retention of the right to perform various types of dispositions is based on the fact that the creditor's right does not attach to a specific asset but rather to the debtor's entire estate. The creditor's right to execute extends to the debtor's assets at the time of execution and includes everything the debtor has acquired, even if obtained after the obligation arose. This ensures the creditor can forcibly fulfill his right from the debtor's assets, regardless of when the assets were acquired (Al-Saud, 2010).

General guarantee plays a significant role concerning all obligations, whether arising from contracts, beneficial acts, harmful acts, or law. Consequently, all of the debtor's assets are considered security for fulfilling his debts without distinction (Saad, 2013).

The debtor's assets include all movable and immovable properties and debts held by third parties. Assets in the possession of lessees, depositaries, borrowers, and holders of usufruct rights all remain within the debtor's financial estate, and creditors have the right to seize these assets, while these possessors retain a right of retention until their rights associated with holding these assets are fulfilled.

Despite general guarantee encompassing all of the debtor's assets at the time of execution, certain assets are excluded from general guarantee. These assets cannot be transferred or seized and, therefore, fall outside the scope of general guarantee. Such assets include the debtor's right of habitation and right of use, in addition to certain assets exempted from seizure for humanitarian reasons and the debtor's circumstances, thus excluding them from general guarantee.

**Second: All Creditors Are Equal in General Guarantee**

Ordinary creditors of a single debtor have equal rights to all assets within their debtor's estate, regardless of when their rights originated or when the assets were acquired. Therefore, an earlier creditor cannot claim preference over a later creditor concerning

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the assets that were part of the debtor's estate when they first dealt with the debtor. Similarly, a later creditor cannot claim to exclude an earlier creditor regarding assets acquired by the debtor after the earlier creditors' rights arose.

Accordingly, no creditor has priority over another due to the precedence of their debt. The earlier creditor is on equal footing with the later creditor; there is no priority based on the date the debt arose or the type of debt (Al-Ahwani, 1996). A creditor with a commercial debt is equal to a creditor with a civil debt; for example, a civil creditor may execute against a commercial enterprise. No preference is given to a larger debt over a smaller debt, nor is there discrimination among creditors based on the due date of the debt or the source of the rights.

Despite this equality, it is a legal equality, meaning that each creditor may execute against the debtor's assets. The initiative of one creditor to execute does not prevent other creditors from also executing. However, this equality does not necessarily result in actual equality among creditors.

As a result of this equality, if the proceeds from the sale of all the debtor's assets are insufficient to satisfy all the debts, these proceeds should be distributed among the creditors pro rata, i.e., in proportion to their respective claims. This reveals the risk to an earlier creditor, who is placed on equal footing with a later creditor, receiving only a percentage of their debt. Hence, an earlier creditor is disadvantaged by subsequent debts.

### **Third: General guarantee Does Not Grant the Right to Follow Assets Out of the Debtor's Estate before Execution**

General guarantee does not provide creditors with the right to follow an asset that has left the debtor's estate before execution. If the debtor sells an asset, it is removed from the general guarantee, and an ordinary creditor cannot pursue it in the buyer's hands, unlike if the creditor had specific security over the asset. The sale contract issued by the debtor is enforceable against the creditor unless the creditor invokes the legal recourse granted by law. Consequently, any asset that exits the debtor's estate before execution is no longer part of the general guarantee, and the creditor cannot track or execute against it.

Moreover, general guarantee does not confer a right of preference among ordinary creditors. In contrast, it does provide such a right among secured creditors, such as those with a privilege or a mortgage. Therefore, a creditor who has obtained specific security for their debt, such as a mortgage or security interest in a specific asset, or if the law has granted them a privilege on the debtor's assets or a specific asset, has the right of preference over other ordinary creditors and those lower in rank. It is noteworthy that the Egyptian legislator has not specified the reasons for this preference (Abu Al-Saud, 2010).

## **Subsection Two**

### **The Legal Nature of the General Guarantee**

In fact, the right to general guarantee arises immediately upon the creation of the obligation without the need for any further formalities. As a result, the right to general guarantee only materializes in practice when the creditor resorts to compulsory execution against the debtor's assets. General guarantee is essentially an expression of the unlimited personal liability imposed on the debtor, allowing the creditor to forcibly satisfy their claim by executing against the debtor's assets.

Given this connection between general guarantee and the creditor's right, it may initially seem that general guarantee is merely a component of the creditor's right or inherent within it. Therefore, both compulsory execution, which underpins general guarantee, and voluntary execution may appear to be stages of the same process.

Moreover, general guarantee differs from specific security. General guarantee provides the general scope of protection for the ordinary creditor, constituting the minimum level of protection guaranteed by law to the ordinary creditor as a general rule. In contrast, specific security is a special form of protection or special security obtained by the creditor through a specific agreement with the debtor, a statutory provision, or a judicial ruling.

## **Chapter Two**

### **Protection Mechanisms for the General Guarantee**

Given the importance of general guarantee for creditors, which instills confidence in their debtors and encourages them to lend or engage in deferred transactions, and to preserve this trust which is the foundation of transactions, the law provides creditors with three types of means to protect this general guarantee. These means ensure that creditors can monitor their debtor's actions. The law grants three actions for this purpose, of which we will focus on the action for nullity of dispositions, and briefly outline the others as follows:

#### **Section One**

##### **Claim of Non-enforceability of Transactions**

Studying the action for nullity of a debtor's disposition against the creditor requires defining it and its characteristics.

##### **Subsection One**

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### Definition of the claim of non-enforceability of transactions

The action for nullity of a debtor's disposition against a creditor is an action brought by the creditor to challenge one or more dispositions made by the debtor that harm the creditor, seeking a declaration that such disposition or dispositions are unenforceable against them(Imran, 2007).

This action plays a significant role in maintaining general guarantee. It is granted by law to a creditor to contest a positive disposition made by the debtor, such as a donation, which harms the creditor or the group of creditors by reducing the general guarantee over the debtor's assets. Generally, debt does not prevent the debtor from disposing of their assets, and such dispositions are usually enforceable against creditors(Duwas, 2005). However, this principle can be detrimental to creditors since the debtor's disposition can either increase their financial standing and enhance general guarantee, or reduce it, leading to a lesser guarantee for creditors and a potential need for an equal distribution among them(Al-Sanhouri, 1982).

If the debtor's disposition is made in good faith, it typically increases the general guarantee. However, if the disposition is made in bad faith, intending to harm the creditors, the law allows creditors to challenge the disposition through this action, seeking its nullity against them. In any case, if the disposition is a gift, it is not enforceable even if the debtor acted in good faith and without fraud(Yassin).

It should be noted that this action is specific, aiming to render the debtor's disposition unenforceable against the creditor, rather than nullifying the disposition itself between the debtor and the third party. Thus, the disposition remains valid between the debtor and the third party, but it does not take effect against the creditors if the creditor successfully brings the action and invokes it against the debtor. In such cases, the disposition is considered as if it never occurred with respect to the creditor.

A lawsuit of nullity of actions is subject to several conditions, some of which relate to the creditor, others to the debtor, and others to the impugned action, as follows:

#### First: Conditions related to the creditor:

1. The creditor's right must be due for performance: For a creditor to challenge the actions of their debtor on the grounds of nullity of actions, it is required that the creditor's right be due for performance(Imran, 2007). Thus, if the creditor's right is not yet due, meaning it is deferred and the maturity date has not yet arrived, the creditor cannot file a lawsuit of nullity of actions. Similarly, if the obligation is subject to a suspensive or additional condition, the creditor cannot challenge the debtor's action on the grounds of nullity until the condition is fulfilled or the deadline arrives. Conversely, if the right is subject to a voidable term or condition, the creditor can exercise their right to file the lawsuit. This is because a voidable term or condition does not prevent the right from being due for performance. It is also linked to the condition of entitlement that it must be free from dispute(Al-Gamal, 2000). It is not necessary for the amount to be specified, as in the case where the creditor is seeking compensation for damages resulting from an unlawful act. In such a case, the creditor can use their right to file the lawsuit even if the amount of compensation is yet to be determined(Imran, 2007).

Moreover, a lawsuit of nullity of actions is considered more serious than an indirect lawsuit, as an indirect lawsuit does not require the creditor's right to be due for performance; rather, it must be free from dispute. In an indirect lawsuit, the creditor brings the case in their own name against the debtor who has harmed the creditors by diminishing the general guarantee. This is in contrast to an indirect lawsuit where the creditor acts as a representative of the debtor(Al-Sanhouri, 1982).

2. Establishment of the creditor's interest in challenging the nullity: A lawsuit cannot proceed without interest, as this is the basis for accepting the lawsuit regardless of the nature of the creditor's claim. Thus, it is a requirement for the creditor to have an interest in bringing the lawsuit, which lies in making the action ineffective against them, preventing the debtor from becoming insolvent, ensuring their solvency, and protecting their general guarantee on the debtor's assets. This interest is linked to whether the debtor's action harms the general guarantee, either by rendering the debtor insolvent or increasing their insolvency, or by increasing the debtor's general guarantee. If the action results in a decrease in the general guarantee and renders the debtor insolvent or increases their insolvency, the creditor has an interest in filing the lawsuit. Conversely, if the action does not result in insolvency or an increase in insolvency, and the debtor remains solvent, the creditor does not have an interest in filing the lawsuit.

Additionally, there is no interest for the creditor in bringing their claim if the action is not subject to attachment or if it is related to pledged property owned by another person. Finally, the condition of interest is considered a condition for the initiation and termination of the lawsuit, meaning that the interest must remain valid until the judgment is rendered. If the interest is lost through the fulfillment of the creditor's right or the deposit of the equivalent amount with the court treasury, the creditor cannot continue with the lawsuit due to the loss of interest.

3. The creditor's right must precede the debtor's action(Duwas, 2005): This is an inherent condition, as a creditor whose right arises after the action cannot challenge that action. Therefore, the creditor's right to challenge the action must precede the action in question. The basis of this condition differs depending on whether it arises from harm to others or from a condition

of fraud issued by the debtor. In the former case, the idea of harm after the action is weak because the creditor has assumed a weak guarantee when their right arose after the action, and therefore cannot claim harm. In the latter case, fraud cannot be conceived unless the creditor's right arises after the action. Fraud is not conceivable if the creditor's right arises later than the action (Al-Ahwani, 1996).

The crucial factor is the date of the conclusion of the action, not the date of its declaration (Abu Al-Saud, 2010). Accordingly, the conditions for a lawsuit of nullity of actions are met if the creditor's right exists before the action is concluded, even if it is not yet due for performance or is disputed in terms of its amount. If the debtor makes a donation, the creditor cannot file the lawsuit unless their right precedes the donation. Similarly, a donation cannot be a ground against others unless its date is proven, and so must the date of the creditor's right.

An exception to this is the concept of fraud by the debtor if they conclude an action before the creditor's right arises with the intention of harming the creditor. Fraud is established if the debtor knows that the creditor's right will arise after the action (Imran, 2007). For example, if the debtor makes a donation while seeking a loan, they intend to harm the lender.

4. What is not required of the creditor: Apart from the mentioned conditions, no other conditions are required of the creditor. Their right does not need to have a specified amount. It is permissible for someone who has suffered damage to challenge the actions of the person responsible for compensating for this damage, even if the amount of compensation has not yet been determined.

Similarly, the source of the creditor's right does not matter, whether it is a contract, a unilateral will, a harmful or beneficial act, or whether it is established by law. There is also no distinction in challenging the action of nullity between an ordinary creditor and a creditor who has a real subordinate right because the purpose of the lawsuit is to preserve the general guarantee. The general guarantee is important not only to the ordinary creditor but also to the superior creditor who has a subordinate real right since merely repaying their debt may not suffice. Therefore, what remains of the debt is returned to them as an ordinary creditor under the general guarantee.

Moreover, the location of the creditor's right does not matter; it may be a sum of money, an act, an abstention from acting, or the delivery of a specific item (Marqus, 1957). Also, it is not required that the creditor holds an enforcement document because a lawsuit of nullity of actions is similar to an indirect lawsuit, and a declaratory lawsuit is not part of enforcement procedures.

## **Second: Conditions Concerning the Debtor:**

### **1. Encompassment of the Debt by the Debtor's Asset**

This condition is considered one of the fundamental prerequisites, as the creditor's right to challenge is not established if the debt is secured by a specific asset that is subject to another creditor's lien. This is because such an asset is not part of the general guarantee for the creditor, but is specifically secured for the creditor with the lien. Therefore, the debt must encompass all the debtor's assets. Conversely, if a creditor has specific security on a certain asset that is sufficient and exceeds the value of the debt, and the debtor disposes of other assets not related to the secured asset, the creditor has no grounds to challenge such disposition. Consequently, the debt must encompass all the debtor's assets under the principle that all the debtor's assets are security for the repayment of his debt, unless there is specific security on a particular asset that is sufficient to cover the debt, in which case the creditor has no interest in challenging the disposition as fraudulent.

### **2. Insolvency of the Debtor:**

Insolvency is the condition that restricts the debtor's freedom to dispose of his assets. For the creditor to challenge the debtor's dispositions as fraudulent, it is required that such dispositions cause the debtor to become insolvent. If the disposition does not lead to the debtor's insolvency, no harm can be conceived. Insolvency in this context can be evidenced through a sale conducted at a significantly undervalued price, or a purchase where the price exceeds the value of the purchased item (Abu Al-Saud, 2010; Abdul Salam, 2000). It may also be an inherently harmful disposition if it is a gratuitous transfer, where the harm is evident from the reduction of the general guarantee and the removal of the gifted asset from it, leading to the debtor's insolvency.

The required insolvency under this condition is actual insolvency, which is considered to occur when the debtor's debts exceed his assets. Therefore, it does not require the legal declaration of insolvency, i.e., a court judgment declaring insolvency. Moreover, it is not only about the disposition causing insolvency; the debtor might already be insolvent, and the disposition further exacerbates the insolvency. If the debtor's disposition does not lead to insolvency or increase it, it does not harm the creditors. As long as the disposition does not lead to such outcomes, the creditor has no interest in challenging it, adhering to the principle that there is no action without interest. The burden of proving the debtor's insolvency falls on the creditor (Imran, 2007).

The Egyptian legislator has alleviated the burden of proof through Article 239 of the Civil Code, which states: "If the creditor claims the debtor's insolvency, he only needs to prove the amount of debt owed, and the debtor must prove that he has assets equal to or exceeding the value of the debts".

Additionally, there must be a causal relationship between the challenged disposition and the insolvency or the increase in insolvency. If the debtor's condition worsens without a connection to the disposition, the challenge for fraudulent conveyance is not permissible (Al-Ahwani, 1996).

The state of insolvency must persist at the time of filing the lawsuit and during its proceedings. If the debtor becomes solvent before the creditor files the lawsuit or during its proceedings due to an inheritance, a gift, or winning a significant prize, the lawsuit should be dismissed due to the lack of one of its conditions.

### **3. Fraud and Collusion:**

Fraud is considered one of the most important conditions for an action to set aside fraudulent conveyances. In fact, the purpose of this action is to address fraud by the debtor. This means that it is not sufficient for the debtor's disposition to cause his insolvency or increase his insolvency; if the disposition involves a contract for consideration, there must be fraud by the debtor aimed at reducing the general guarantee to harm the creditors. The legislator also considers the debtor's knowledge of his insolvency as presumptive evidence of fraud (Abu Al-Saud, 2010).

However, if the disposition is a gratuitous transfer, fraud by the debtor is not required, as the nature of the gratuitous transfer inherently implies fraud without the need to prove the debtor's knowledge that the transfer would lead to his insolvency. This is reflected in Article 238(2) which states: "If the disposition is gratuitous, it is not effective against the creditor, even if the recipient of the gift is in good faith, and even if it is proven that the debtor did not commit fraud." Therefore, if the debtor makes a gratuitous transfer, such as a gift, the creditor is not required to prove the debtor's fraud or insolvency. This contrasts with transfers for consideration, where the recipient of the gift has no interest except in losing a benefit, while the creditor suffers harm. Preventing harm to the creditor takes precedence over benefiting the recipient of the gift.

Additionally, concerning the transferee, it is not required for them to be aware of the fraud, as is evident from the aforementioned text.

### **Third: Conditions Related to the Challenged Disposition:**

#### **1. The Disposition Must Be Legal (Al-Sanhouri, 1956):**

The disposition made by the debtor must be a legal act, whether it is a unilateral act such as waiving a debt or relinquishing a real right like usufruct, easement, or mortgage, or a bilateral act whether it is for consideration or a gratuitous transfer, such as sale, settlement, partition, or gift. Therefore, the creditor has no right to challenge the debtor's material acts with an action to set aside fraudulent conveyances. For example, if the debtor commits an intentional or negligent unlawful act causing harm to another, resulting in a liability for compensation, the creditor cannot challenge this act with an action to set aside fraudulent conveyances. However, the creditor can challenge the agreement determining the compensation amount between the injured party and the liable party with an action to set aside fraudulent conveyances if other conditions are met, as this agreement is considered a legal act. Additionally, if the debtor commits a negative material act that the creditor cannot challenge with an action to set aside fraudulent conveyances, such as allowing a third party to take possession of his property until it is acquired by adverse possession, the creditor has the right to interrupt the adverse possession period before it is completed by exercising the debtor's rights, known as the indirect action.

#### **2. The Disposition Must Be Impoverishing (Al-Sanhouri, 1956):**

The legal act made by the debtor must be impoverishing, which it is if it reduces the debtor's rights or increases his obligations. For example, if the debtor gifts property to another or releases a debtor from a debt, this results in the removal of an asset from the debtor's estate without consideration. Similarly, if the debtor sells property for an inadequate price, this reduces his rights. The same applies if the debtor borrows money or undertakes to fulfill a natural obligation or an obligation to contribute to a company, as all these acts increase the debtor's obligations and thus reduce the creditor's security and expose them to the risk of not recovering their debts or lead to the necessity of an insolvency distribution.

Therefore, the creditor cannot challenge the debtor's refusal to enrich himself, such as refusing a gift offered to him or declining to be released from a debt, as this does not reduce the general guarantee. Accordingly, the creditor cannot challenge the debtor's



refusal to accept a gift or to accept a release from debt. This is because it is not the creditor's role to increase the debtor's rights or decrease his obligations, but rather to preserve the general guarantee by ensuring its positive elements (Mohammed, 1999).

The law considers certain actions as impoverishing, such as the debtor's payment to one of his creditors or granting one creditor a special privilege that gives him priority over other creditors in collecting his debt. This is considered to reduce the proportion that each creditor receives when dividing the debtor's assets in an insolvency distribution (Mohammed, 1999).

The legislator has exempted from this condition the debtor's waiver of the statute of limitations defense. Although this act is not considered impoverishing according to the concept of impoverishment, the legislator allows the creditor to challenge it with an action to set aside fraudulent conveyances, considering that the debtor's waiver of the statute of limitations constitutes an apparent obstinacy that should not be permitted (Sultan, 1957).

### **3. The Disposition Must Be Detrimental to the Creditor:**

The law requires that the challenged disposition be detrimental to the creditor, as stipulated in Article 237 of the Civil Code. Therefore, the criterion for considering a disposition subject to challenge is its detrimental impact on the creditor. Not every disposition by the debtor is detrimental to creditors. For instance, the debtor may make a disposition that removes an asset from the general guarantee without harming the creditors if the asset is exempt from seizure and execution and thus excluded from the general guarantee. Furthermore, a disposition may be harmful to some creditors and not others. Creditors whose rights existed before the disposition that caused the debtor's insolvency may be harmed by the disposition, whereas those whose rights arose after the disposition cannot object to it. For example, a disposition involving mortgaged property, whose value is fully covered by the mortgage, would not be detrimental to the creditors. Additionally, waiving the exercise of a right that is recognized for the debtor and which leads to acquiring rights or reducing obligations is not considered impoverishing (Marqus, 1957).

#### **Subsection Two**

##### **Characteristics of the claim of non-enforceability of transactions**

The action to invalidate dispositions is one of the legal remedies ensuring that creditors are not adversely affected by the debtor's actions and cannot contest dispositions made by the debtor, safeguarding the general guarantee from depletion. Consequently, this action possesses the following distinctive features:

##### **First: Safeguarding the General guarantee:**

The law has established various legal remedies to protect the general guarantee, including the action to invalidate dispositions. This action is based on the premise that the general guarantee serves as a safeguard for creditors, ensuring the repayment of their debts by the debtor. Thus, the primary objective of this action is to preserve the general guarantee from depletion, as the debtor's actions may diminish it. Therefore, the legislator has provided specific measures to uphold the interests of creditors. If the debtor's actions enhance the general guarantee and are beneficial to the creditor, there is no incentive for the creditor to challenge the validity of these dispositions. Conversely, if these actions diminish the general guarantee, thereby jeopardizing the creditor's ability to recover their debt or leading to partial repayment in case of distribution among creditors, the legislator's intent is to shield the general guarantee through this legal remedy.

##### **Second: Confronting Positive Conduct by the Debtor:**

The concept of the general guarantee does not inhibit the debtor from engaging in lawful actions. Regardless of the nature of these actions, the debtor has the right to undertake them. For instance, if the debtor declines a gift intended for them, their stance is negative, resulting in the gift not contributing to the general guarantee. In such instances, the creditor is not entitled to challenge the validity of the dispositions; instead, they may pursue an indirect claim if the legal criteria are met. However, in the context of challenging the validity of dispositions, it involves confronting positive conduct by the debtor in executing lawful actions. If the debtor makes a donation that diminishes the general guarantee by depleting the donated amount from it, the creditor has grounds to file the claim. Therefore, this legal remedy falls under the category of actions addressing positive conduct by the debtor.

##### **Third: Not a Nullity Claim:**

The consequences of the action to invalidate dispositions include the preservation of the ongoing validity of the disposition between the debtor and the third party. Therefore, raising the claim does not result in the nullification of the dispositions. Nullity only occurs between contracting parties. There is no scenario where someone considered a third party in a contract seeks its nullification. The third party cannot demand the nullification of the disposition; rather, they can only assert its non-enforceability against them (Al-

Sanhoury, 1956). Additionally, this is not a claim for compensation. If it were a compensation claim, it would be for specific compensation. Instead, it is the enforcement of the debtor's obligation not to harm the rights of the creditor. It is inconceivable that such a disposition, if enforceable against the creditor, would cause harm for which compensation would be awarded.

## Section Two

### Provisions of the Claim of Non-enforceability of Transactions

The provisions of the action to invalidate dispositions revolve around understanding the consequences of accepting the claim and the statute of limitations for such claims. They are summarized as follows:

#### Subsection One

##### Consequences of the claim of non-enforceability of transactions

The action to invalidate dispositions does not result in nullity but renders the dispositions unenforceable against creditors. Therefore, its consequences are determined based on its aim of safeguarding the general guarantee for creditors. These consequences can be categorized into three parts: those related to the creditor filing the claim, those concerning other creditors, and those regarding the relationship between the debtor and the appointed agent.

##### First: For the Creditor Filing the Claim:

If the creditor succeeds in the claim, the disposition made by the debtor against the creditor becomes unenforceable. Consequently, if the disposition diminishes the debtor's assets, those assets are considered as if they had not left the debtor's estate. Thus, the creditor is entitled to execute on the assets or the gifted property as if they were still part of the general guarantee. Similarly, if the debtor's disposition increases their liabilities, such as borrowing money, buying property, or assuming new debts, the new creditor does not take precedence over existing creditors. If the debtor subsequently fulfills this new obligation, it does not apply to the creditor filing the claim (Imran, 2007).

##### Second: For Other Creditors:

The legislator ensures equal treatment among creditors. If the court rules in favor of one creditor in a claim to invalidate dispositions, all other creditors benefit from this judgment. They are entitled to participate with the creditor filing the claim in executing on the disposed assets, provided that the disposition caused them harm. Each creditor with prior rights to the disposition and an entitlement to payment can participate with others in sharing the debtor's assets upon distribution.

##### Third: Regarding the Relationship between the Debtor and the Appointed Agent:

Since the action to invalidate dispositions does not result in nullity but renders the disposition unenforceable, the disposition remains valid and enforceable between the debtor and the appointed agent, subject to its legal consequences. Consequently, the following legal consequences arise (Al-Adawi):

1. Whatever remains after the creditors have executed on the disposed assets belongs to the appointed agent and their heirs, not to the debtor or their heirs.
2. The appointed agent has the right to assert against the debtor all claims related to the disposition, such as warranty claims, entitlement claims, contract termination claims, or nullity claims.
3. The appointed agent has the right to assert against the debtor claims for unjust enrichment if the conditions are met, as the creditors have already received their rights from their assets.

In essence, creditors' rights take precedence over those of the appointed agent. The appointed agent cannot override the creditors in executing on the disposed assets, and their rights remain enforceable against the debtor according to the nature and type of the disposition.

#### Subsection Two

##### Statute of limitations for the claim of non-enforceability of transactions

Article (234) of the Civil Law states that the claim to invalidate dispositions becomes time-barred after three years from the day the creditor becomes aware of the cause of the non-enforceability of their disposition. However, in all cases, it becomes time-barred after fifteen years from the date of the disposition. From the above text, it is evident that the claim to invalidate dispositions expires after three years, not from the date of the disposition or the date the creditor becomes aware of it, but from the date they become

aware of the cause of its non-enforceability against them. Consequently, the creditor may become aware of the disposition without realizing its potential to cause insolvency or increase their liabilities. Additionally, it expires after fifteen years from the date of the disposition, regardless of whether the creditor was aware of the disposition or its non-enforceability early on.

## Chapter Three

### Impact of the Concept of Donation on Other Guarantee Mechanisms

Due to the drawbacks of the general system and with the aim of mitigating them, the legislator provided other means to protect it besides the previous ones, such as the claim to invalidate dispositions. However, these other means may not affect the idea of donation and its protection. The claim to invalidate dispositions is the one that confronts a positive position from the debtor by making a donation. In contrast, the other claims face a negative position, represented by the indirect claim, in addition to the symbolic claim. This can be elaborated as follows:

#### Section One

##### Indirect Claim

The indirect claim is a means by which the creditor preserves the general guarantee by utilizing the debtor's rights that they neglect or deliberately damage to prevent other creditors from obtaining their rights from the general guarantee. The indirect claim arises when another person has a right, and the debtor owes them but fails to utilize their right, leading to the potential loss of this right. It is in the creditor's interest to preserve their debtor's rights to enter into the general guarantee. Therefore, to protect the creditor, the law grants them the indirect claim, through which they intervene on behalf of their debtor, utilizing the debtor's rights that they have neglected to assert. Thus, the creditor is acting on behalf of the debtor to claim their right. It is evident that the legitimate interest of the creditor gave them the right to intervene and utilize the debtor's rights that they neglected, thus prioritizing the creditor's legitimate interest over the debtor's right to use their rights or not (Ibrahim, 1995; Mohammed, 1999).

When the creditor utilizes their debtor's rights, they are considered a legal representative of the debtor. However, this representation is a special type, as the representative acts in their own interest rather than the principal's interest, contrary to the established rules of legal representation.

#### Subsection One

##### Conditions of the indirect claim

The conditions of the indirect claim can be categorized into those related to the creditor and those related to the debtor, as well as those related to the right utilized by the creditor on behalf of the debtor. These conditions are as follows:

##### 1. Conditions Related to the Creditor (Al-Sanhouri, 1982):

There is only one condition required of the creditor, which is that their right exists, meaning it is established and not contested. It is not necessary for the right to be due for payment or for the amount to be known. Therefore, if the creditor's right is contested by the debtor or is certain, such as the right of an heir before the death of the testator, the creditor cannot utilize the indirect claim. However, if the creditor's right is contingent upon a condition or is deferred to a fixed term, they can still use the indirect claim even if the right is not yet due for payment. Additionally, a person compelled to perform an unlawful act can raise an indirect claim against the person responsible for the damage, even if the amount of compensation is unspecified. The reason for allowing this is that the indirect claim is not a coercive enforcement measure, so it does not require the right to be due for payment and the amount to be known. Furthermore, the creditor does not need an enforceable instrument to use the indirect claim because the objective is to preserve the general guarantee for the creditor rather than enforce the debtor's assets. Moreover, the source of the right to use the indirect claim can be a contract, a beneficial act, a harmful act, individual will, or the law.

The condition for the existence of the creditor's right is both initial and final, meaning that the right must remain valid and exist throughout the period of consideration of the indirect claim by the judiciary. Therefore, if the defendant fulfills the creditor's right during the trial, the condition for the existence of the right ceases, and the claim should be dismissed.

##### 2. Conditions Related to the Debtor:

Three conditions must be met by the debtor for the creditor to utilize the indirect claim:

- The debtor must refrain from using their right, leading to their insolvency or an increase in their insolvency.

- The debtor must be involved as a defendant in the claim.

These conditions are explained in detail as follows:

**a. Debtor's Silence Regarding the Use of Their Right:**

For the creditor to utilize their debtor's rights, the debtor must remain silent about using their rights. The justification for the creditor using their debtor's rights and filing a claim against the debtor lies in the debtor's negligence or intentional harm to the creditors by refraining from using their rights. Therefore, it is in the creditor's interest to intervene in the claim filed by their debtor against the debtor to monitor and prevent collusion between them. If the debtor actively seeks their rights and takes action in this regard, the indirect claim cannot be accepted by the judiciary(Saad, 1992).

In case the debtor takes a positive stance by utilizing their rights after the creditor has filed an indirect claim against them, the creditor must stop their actions and allow the debtor to pursue the claim themselves as the original party. It is the creditor's burden to prove the debtor's negligence by demonstrating their failure to use their rights that they were obliged to use. If the debtor wishes to refute this, they must prove that there is still sufficient time for them to use this right(Kamel, 1992).

**b. Debtor's Insolvency or Increase in Insolvency:**

The debtor's silence regarding the use of their right must lead to their insolvency or an increase in their insolvency. If the debtor has sufficient assets to settle their debts, there is no justification for the creditor to intervene and utilize the debtor's rights, even if the debtor is negligent in using their rights. The insolvency required in this condition is actual insolvency, not legal insolvency, meaning that the debtor's assets become insufficient to settle their debts without the need for a court judgment declaring insolvency(Saad, 2013).

It is the creditor's responsibility to prove the debtor's insolvency by demonstrating the amount of the debtor's debts. If the debtor wishes to refute the insolvency claim, they must prove their solvency by showing that they have sufficient assets to pay off their debts or increase them.

**c. Inclusion of the Debtor as a Defendant in the Lawsuit(Al-Sanhouri, 1982):**

It is imperative to include the debtor as a defendant in the indirect lawsuit for it to be admissible before the judiciary. Such inclusion can be instigated either by the creditor or through the debtor's voluntary intervention or through being summoned by the plaintiff or the court. The objective behind involving the debtor in the lawsuit is to render any judgment issued therein enforceable against or in favor of them. Failure to include the debtor in the indirect claim results in its dismissal.

Furthermore, the debtor's engagement in the lawsuit may prompt them to adopt an affirmative stance, thereby initiating the lawsuit themselves. In such an event, the creditor's role is restricted to overseeing the debtor to prevent negligence in defense or collusion with the plaintiff aimed at detrimentally affecting the creditor.

It is worth noting that this requirement pertains to instances where the creditor files a lawsuit before the judiciary utilizing the rights of their debtor. However, if the creditor exercises the debtor's rights through avenues other than judicial proceedings, this precondition is inapplicable.

There is no obligation to involve other creditors in the lawsuit, as the debtor represents them, and as long as the debtor is contested in the lawsuit, the court's judgment is binding on all creditors pursuant to the principle of res judicata.

The creditor is not required to formally notify the debtor prior to initiating the indirect claim against them since the creditor's objective in this lawsuit is to preserve the general order, not to place the debtor in a position of default in fulfilling their obligations.

**3. Conditions Related to the Right Utilized by the Creditor on Behalf of the Debtor:**

The creditor has the right to claim all the rights of the debtor that the debtor has neglected to exercise. The creditor may claim any personal right the debtor has against a third party to perform an act, refrain from an act, or provide something. Additionally, the creditor may claim any real rights the debtor has against a third party, such as the right of ownership, the right of usufruct, or the right of servitude.

While, as a general rule, the creditor is permitted to claim the debtor's rights against third parties, there are two exceptions to this rule, which are(Mohammed, 1999):

### **a. The First Exception: Rights Related to the Person of the Debtor:**

The creditor cannot claim the rights of the debtor against third parties if these rights are personal to the debtor. This is because such rights are based on considerations that relate to the debtor's person, and allowing otherwise would violate the debtor's personal freedom.

#### **The Rights Related to the Person of the Debtor Are Limited to Three Groups:**

##### **1. The First Group: Non-Pecuniary Rights:**

These rights are not included in the general guarantee for creditors. Therefore, the creditor cannot exercise these rights on behalf of the debtor. Examples include personal rights, political rights, and family rights. A creditor cannot nominate the debtor for parliamentary membership or a public office, cannot file a paternity suit to establish the debtor's lineage from a specific person, and cannot exercise the right to divorce on behalf of the debtor. These are non-pecuniary rights connected to the person of the debtor, even if they result in certain financial entitlements.

##### **2. The Second Group: Pecuniary Rights Based on Personal Considerations of the Debtor:**

There are certain financial rights connected to the person of the debtor that the creditor cannot exercise on behalf of the debtor. Examples include the right to revoke a gift if a reason for revocation exists according to the law, the right to compensation for moral damages, the author's right to publish or not publish their work, and the stipulator's right to revoke a stipulation in favor of a third party (Al-Sanhouri, 1956).

##### **3. The Third Group: Rights Related to the Management of the Debtor's Affairs or Contingent on the Declaration of Their Will:**

To preserve the debtor's personality and freedom and avoid imposing a form of guardianship over them, the creditor cannot manage the debtor's assets, accept an offer directed to the debtor concerning a profitable transaction, accept a gift directed to the debtor, request the recovery of a common share on behalf of the debtor, or invoke the right of preemption on behalf of the debtor. These rights are not considered rights in the strict sense but rather privileges that do not have financial value and therefore do not enter into the general guarantee for creditors. Their exercise is subject to the debtor's discretion alone.

However, there is an exception for the privilege of invoking the statute of limitations (Sorour, 2008), where the law permits the creditor to invoke the statute of limitations on behalf of the debtor. This is because invoking the statute of limitations is considered an option, not a privilege. Creditors can use their debtor's options through indirect lawsuits, as options do not aim to acquire new rights but to confirm previously acquired rights by the debtor. Examples include accepting a bequest, which is a unilateral legal act that takes effect after the testator's death, where the role of acceptance is to confirm or bind the bequest. Another example is the acceptance by the beneficiary of a stipulation in favor of a third party, where the beneficiary's right arises without the need for acceptance, and acceptance merely prevents the stipulator from revoking the stipulation.

The prohibition on the creditor's use of the debtor's rights connected to their person is for the debtor's benefit. The rules governing indirect lawsuits are not of public order, so the debtor can waive this right and allow the creditor to exercise their personal rights. Conversely, the debtor can also stipulate that the creditor cannot use any of their rights, even if the right is not connected to the debtor's person.

### **b. Rights Not Subject to Seizure:**

Rights that cannot be seized are not included in the general guarantee for creditors. Since the creditor's aim in using an indirect lawsuit is to preserve the general guarantee, they cannot exercise the debtor's rights that cannot be seized. Therefore, the creditor cannot claim the debtor's right to alimony from a third party, the right of use, or the right of habitation, as these rights cannot be seized and do not fall within the general guarantee for creditors.

#### **Subsection Two**

##### **Consequences of the indirect claim**

The effects of the indirect claim are determined based on the purpose of this claim, which is to preserve the general guarantee for the creditors. There are effects concerning the debtor, the creditor, the defendant in the indirect claim (i.e., the debtor of the creditor), and other creditors, as follows (Ibrahim, 1995):

### **First: Effects of the Indirect Claim Concerning the Creditor:**

The judgment issued in the indirect claim indirectly benefits the creditor by entering the right into the general guarantee for the creditor. The creditor can then take enforcement measures on the debtor's assets according to the law to secure their right. This implies that the right becomes part of the debtor's liabilities, and therefore, the creditor does not enjoy any privilege or advantage over other creditors because they initiated the indirect claim. Instead, they share equally in the execution of the asset or right that has become part of the debtor's liabilities due to the indirect claim. Additionally, if other creditors have specific security such as a lien or privilege, they take precedence over the creditor who initiated the indirect claim, and there may be nothing left for the latter.

### **Second: Effects of the Indirect Claim Concerning the Debtor:**

The creditor's initiation of the indirect claim does not limit the debtor's authority to act regarding the right subject to the claim. Since the creditor acts as a representative of the debtor in initiating the claim, the debtor retains the right to act in any manner regarding their right. For example, if the right pertains to land ownership, the debtor can sell, mortgage, or exchange it, whether to a third party or to the alleged usurper in the claim. Similarly, if the right is a debt owed to the debtor by a third party, the debtor can waive it, transfer it to another, or settle it, and the creditor cannot initiate the claim unless objected to through the required formalities.

### **Third: Effects of the Indirect Claim Concerning the Defendant (Debtor of the Creditor):**

The creditor initiates the indirect claim as a representative of the debtor and not on their own behalf. Therefore, concerning the defendant debtor of the creditor, the situation remains unchanged, as if the debtor had initiated the claim themselves. Consequently, the defendant debtor must defend against the creditor's claims with all defenses available against the debtor, whether these defenses existed before or after the initiation of the claim. For instance, the defendant debtor can invoke set-off, fulfillment, merger of obligations, discharge, or any other grounds for debt extinguishment against the creditor, and they can also argue the invalidity or termination of the contract if the debtor breached their obligations. However, the defendant debtor cannot raise any defenses arising from their relationship with the creditor initiating the claim since the creditor acts as a representative and not on their own behalf.

### **Fourth: Effects of the Indirect Claim Concerning Other Creditors:**

While the indirect claim is individually initiated, its effects are collective. The judgment in favor of the creditor benefits all creditors. Initiation of the claim by one of them does not grant any advantage or priority in satisfying their right over other creditors. Instead, they share equally in obtaining their right based on the principle of pro rata distribution. If any of them have specific security, they take precedence in satisfying their right. This is because the right adjudicated in favor of the creditor becomes part of the debtor's financial liabilities and not the creditor's personal claim. Similarly, if the creditor loses and judgment is rendered in favor of the defendant, which must be contested by all creditors, neither the debtor nor other creditors can initiate the claim again, as its outcome would be dismissal if the defendant successfully raises the final judgment defense.

In conclusion, although the indirect claim serves the purpose of preserving the general guarantee, it does not grant any advantage or priority to the initiating creditor in satisfying their right from the adjudicated asset or right. Instead, the initiating creditor shares equally with other creditors. Furthermore, the indirect claim does not restrict the debtor's freedom to act regarding the claimed right, potentially leading to its removal from the scope for which it was initiated. Therefore, the practical use of the indirect claim is rare, as creditors often prefer other enforcement methods, such as attachment of the debtor's assets held by third parties.

## **Section Two**

### **Symbolic Claim**

The indirect claim faces a negative situation from the debtor, represented by their silence regarding the exercise of their right. Conversely, the claim of non-execution faces a positive situation from the debtor, manifested in their actions aimed at reducing the general guarantee and harming the creditors. On the other hand, the simulated action claim encounters a scenario where the debtor appears to be acting on their assets while, in reality, they are not. An example of this is when the debtor pretends to sell their property, enters into a sale contract with a relative, and issues a document, called a counter-document, to the apparent buyer, proving that the apparent sale does not exist. This is a simulated action (Mohammed, 1999).

It is evident that the debtor may attempt to conceal their assets by engaging in simulated actions. Therefore, the law provides creditors with a means to protect their right in the general guarantee through the use of the simulated action claim, through which they can prove that the apparent action is not real, and consequently, the asset remains subject to the debtor's disposal, allowing the creditor to enforce their right.

Thus, the simulated action claim is not a claim for the invalidity of the debtor's action but aims to reveal the truth, namely, the actual action performed by the debtor, by proving that the apparent action is simulated, while the concealed action is real.

Therefore, simulation can be defined as the presentation of a specific legal matter contrary to its reality or a description attached to an action contrary to the truth. It involves a simulated apparent action and a concealed real action that nullifies and modifies the effects of the simulated action (Al-Sharqawi, 1992).

The study of simulation necessitates an examination of its types, conditions, and provisions, as follows:

### **Subsection One**

#### **Types of symbolism**

It is evident from the preceding discussion that simulation has two types: absolute simulation and relative simulation. The explanation of each type is as follows:

#### **First: Absolute Simulation:**

Absolute simulation is the type of simulation that responds to the existence of a legal action, presenting the existence of a specific legal action when, in reality, it does not exist. Therefore, the apparent simulated action is non-existent, and the role of the concealed agreement is merely to state the absence of the simulated action, referred to as the counter-document (Sultan, 1957).

An example of absolute simulation is when the debtor pretends to sell their properties through a simulated action to conceal their assets from their creditors. They enter into an agreement with the apparent buyer indicating that the sale is simulated and nonexistent, and that the ownership of the property or properties remains with the debtor. This concealed agreement is termed the counter-document.

#### **Second: Relative Simulation:**

Relative simulation does not respond to the existence of an action but rather to the nature, elements, or parties of the action. In relative simulation, there is a real action between the parties, and the purpose of the simulated apparent action is to conceal a legal aspect of the real action. This aspect could be the nature, elements, conditions, or parties of the action. Therefore, relative simulation can be categorized into three types based on the aspect it addresses (Sultan, 1957; Mohammed, 1999):

##### **1. Simulation by Covering Up:**

This type of simulation conceals the nature of the real action. For instance, hiding a donation contract in the form of a sale contract to evade the formalities required for a donation contract, or vice versa, hiding a sale contract in the form of a donation to deprive the beneficiary of their right of pre-emption. Similarly, hiding a will in the form of a sale contract to execute it against the heirs if it exceeds one-third of the estate.

##### **2. Simulation by Contradiction:**

This type of simulation conceals one of the elements or conditions of the real action. For example, mentioning a fictitious price in a sale contract, differing from the actual price either by an increase or decrease. If it's an increase, the aim might be to hinder the beneficiary's right of pre-emption, and if it's a decrease, it might be to evade the required registration fees. Simulation can also apply to the cause of the contract, such as mentioning in a donation contract that it is based on an illegal service provided by the recipient.

##### **3. Simulation by Diversion:**

This type of simulation conceals one of the parties to the action, making the action appear to be contracted on behalf of another person, not the one mentioned in the contract. The reason for this is that the law prohibits certain individuals from entering into specific transactions until they are in a certain capacity recognized by the legislator. For instance, judges, public prosecutors, lawyers, court clerks, and recorders are prohibited from purchasing disputed rights either in their own name or under assumed names if the dispute falls within the jurisdiction of the court in which they work. If such prohibited individuals engage in the transaction by appointing another person to conclude the transaction on their behalf, this action is considered invalid.

### **Subsection Two**

#### **Conditions for the Action of Simulated Transactions**

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To be accepted by the court, an action of simulated transactions must meet the following conditions (Mohammed, 1999):

**1. First: The Intent of Both Parties to Conceal a Real Transaction Behind an Apparent One:**

This requires the parties to enter into one real concealed transaction and one apparent sham transaction.

**2. Second: The Apparent Sham Transaction Must Reveal Its Simulated Nature and Indicate the existence of a Real Transaction Behind It:**

For instance, If a sale contract states a nominal price, this suggests that the real contract is a gift rather than the apparent sale. In such cases, the rules of simulation are set aside, and the gift is only valid if it is documented in an official deed or if the gifted item is a movable property and has been delivered to the donee.

**3. Third: The Real Transaction Must Be Contemporaneous with the Execution of the Apparent Sham Transaction:**

Contemporaneity here refers to mental rather than physical simultaneity, meaning the intent of both parties to enter into both contracts simultaneously, even if the sham contract is executed at a different time than the real contract.

**4. Fourth: The Creditor's Right Must Be Certain and Free from Dispute:**

The creditor's right need not be due or predate the simulated transaction in question. Additionally, the simulated transaction does not need to harm the creditor for them to challenge it as simulated. The purpose of an action of simulated transactions is to uncover the truth—that the apparent transaction is a sham and the concealed one is real. Therefore, anyone harmed by the simulated transaction can challenge it, even if they are one of the contracting parties.

### Subsection Three

#### Provisions of the symbolic claim

Perhaps simulation is based on three principles that must be distinguished. Firstly, the sovereignty of the will imposes respect for the true intention of the contracting parties, meaning reliance on the hidden action, or what is known as the counter-document. Secondly, apparent situations allow those with malicious intent to rely on the apparent action. Finally, combating fraud may require invalidating the counter-document or both the counter-document and the apparent action together. Additionally, simulation itself is not inherently a reason for nullity. If contracting parties resort to simulation with the intention of circumventing the law, the consequences vary depending on the circumstances. It may result in the disclosure of simulation and the nullity of the real contract due to its illegitimacy, such as a gift under the guise of a sale or loan contract to conceal an unlawful relationship. Alternatively, if the intention is not to conceal an unlawful action but rather to achieve something contrary to the law, the revelation of simulation may prevent the achievement of the purpose intended by the parties. It is evident that simulation is not a reason for nullity, but rather the true intention of the parties must be considered, whether the simulation is absolute or relative. To clarify, the effects of simulation between the contracting parties and the effects of simulation on third parties must be distinguished (Saad, 1992; Ghanem, 1967):

#### First: Effects of Simulation between Contracting Parties:

The real contract is considered between them because the intention of the contracting parties is what matters. It must be shown how the real contract operates between the contracting parties in each type of simulation. In absolute simulation, there is no real legal action, and the simulated action does not conceal a real action. Therefore, if a debtor sells his property simulating it to someone, the ownership of this property does not transfer to the buyer but remains with the seller. Either party and their successors have the right to adhere to this, so if the buyer dies, their heirs cannot claim the sold item based on the premise that the real contract is the one that applies to them. In relative simulation, if done through concealment like hiding a gift as a sale, the gift contract governs the relationship between the contracting parties and their successors. The objective elements regarding the gift contract must be applied, such as the donor being capable of donating. It suffices for the recipient to be capable of engaging in beneficial acts purely beneficial, and the donor is allowed to revoke the gift under specific circumstances defined by law. Creditors of the donor can contest the gift without the need to prove fraud or collusion, after proving the simulation of the sale contract. However, the legislator exempted the formal requirement of the gift contract in this case, thereby the gift remains valid despite not following the required formality in its conclusion (Al-Sanhouri, 1982). The same applies to the will, which is not executed against the heirs beyond one-third of the estate. If the relative simulation is in the form of contradiction, such as mentioning a simulated price in a sale contract, the actual price governs between the contracting parties and regarding their successors, allowing the seller to demand the actual price and the buyer to pay it.



If the simulation is done to evade the application of a rule leading to the nullity of the concluded action, such action is void. Therefore, if a judicial figure purchases a disputed right under a false name, the sale contract is void, whether between the contracting parties or regarding their successors. The burden of proving simulation falls on the claimant, whether they are the contracting parties or their successors. The proof should not be limited to writing unless a certain threshold that can only be proven in writing is met. However, if the purpose of simulation is to circumvent legal provisions and conceal an unlawful act prohibited by law, the claimant has the right to prove the simulated action using various means of evidence, including indications and proof, regardless of the value of the action and even if it is documented in writing. An example is when the apparent contract states that the debt is a loan while it is actually gambling debt, or when it states that the contract is a sale while it is a gift contract to maintain an unlawful relationship. If the intention of the simulation is not to conceal an unlawful action but rather to achieve something contrary to the law, the revelation of simulation prevents the achievement of the purpose intended by the parties through simulation. For example, mentioning a price lower than the actual price in a sale contract to reduce registration fees does not void the sale. If the simulation of the sale is exposed, the registration department has the right to collect the full fees according to the actual price. If the claimant fails to prove the apparent contract's simulation, the apparent contract governs the relationship between the contracting parties and is considered evidence between them and against their successors (Mohammed, 1999; Al-Sanhouri, 1982).

### **Second: Effects of Simulation for Third Parties:**

The term "third parties" refers to anyone whose rights are affected by the simulated action. This includes ordinary creditors of both contracting parties and the private successors of each, as well as neighbors or guarantors regarding the simulated actions performed by the owner. It also includes the debtor concerning the simulated transfer made by the creditor (Mohammed, 1999).

Third parties have the right to adhere to the hidden real contract, just as a bona fide third party has the right to adhere to the apparent simulated contract. This can be explained as follows (Sultan, 1957):

#### **1. Right of Third Parties to Adhere to the Hidden Real Contract:**

Third parties have the right to adhere to the hidden real contract if they have an interest in doing so because this contract represents the true intention of the contracting parties. In such cases, the third party must prove the simulation of the apparent action that harms them. To do so, they must use all means of evidence, even if the simulated action cannot be proven in writing due to not being a party to it. For example, a creditor of a seller with a simulated sale contract has the right to challenge the sale contract, prove its simulation, and adhere to the hidden real contract to hold the seller liable. Similarly, if the simulated action is a sale but the actual action is a gift, it is in the interest of the creditor of the donor to prove the simulated action and adhere to the actual gift to challenge it without the need to prove fraud or collusion. Additionally, it is in the interest of private successors, such as the second buyer or the creditor with a mortgage, to adhere to the apparent simulated contract to assert their rights.

#### **2. Right of Bona Fide Third Parties to Adhere to the Apparent Simulated Contract:**

A bona fide third party has the right to adhere to the apparent simulated contract if it is in their interest to do so. A bona fide third party is one who is unaware of the simulation and believes the apparent contract to be genuine. This right is based on the principle of reliance on established transactions and the obligation to rely on the recognized intention. Sometimes, it is in the interest of a third party, such as the creditor of the buyer, to adhere to the apparent contract until the purchased property enters the buyer's liability. Similarly, it is in the interest of the second buyer to adhere to the apparent simulated contract until ownership of the property transfers to them. Likewise, it is in the interest of the mortgage creditor or the usufructuary to adhere to the apparent contract to benefit from their rights. Bona fide is presumed, and anyone alleging bad faith must prove it.

There has been disagreement in jurisprudence regarding whether the acknowledgment of the real contract by the contract's date negates the good faith of the third party. Some scholars argue that the acknowledgment aims to inform people of the action taken on the property, thus negating the good faith of the third party, who should have known about the real action (Sultan, 1957; Ghanem, 1967). Others argue that the acknowledgment of the real contract constitutes a simple presumption of knowledge, and it is the right of the third party to negate it by proving their ignorance of the real contract when dealing with its predecessor (Al-Sanhouri, 1982). We tend to favor the former opinion, considering that the purpose of acknowledgment is to inform people of legal actions and to definitively resolve any disputes (Mohammed, 1999).

#### **3. Conflict of Third Party Interests:**

Since third parties have the right to adhere to either the hidden real contract or the apparent simulated contract according to their interests, their interests may conflict. In such cases, the law favors the interest of the third party adhering to the apparent simulated contract, applying the principle of apparent status or common mistake generates rights. Accordingly, if the interests of the creditor

of the apparent seller conflict with the interests of the creditor of the apparent buyer, the interests of the latter prevail if they act in good faith and adhere to the apparent contract(Al-Adawi).

#### 4. The Statute of Limitations Does Not Apply to Simulation Claims:

Simulation claims are not subject to the statute of limitations, whether in the relationship between the contracting parties or concerning third parties. This is because the purpose of a simulation claim is to reveal the truth, namely that the apparent action is simulated and non-existent, which constitutes an ongoing fact that does not expire, and thus, the statute of limitations does not start running(Al-Sanhouri, 1982).

#### Conclusion:

From the extensive research conducted, the following conclusions can be drawn:

1. The general guarantee does not deprive the debtor of the right to dispose of their property. They remain free to dispose of their property, whether they have a real right to it, allowing them to sell or donate it, or if they have a debt, allowing them to transfer it. They also have the right to settle the debt or waive it, either partially or fully.
2. Donation by the debtor diminishes the general guarantee for creditors, who may challenge this action on the grounds of the ineffectiveness of the transactions, as it does not apply to them as if this money had not been excluded from the general guarantee.
3. The claim of ineffectiveness of transactions presents a positive position for the debtor by enabling them to undertake legal actions that diminish the general guarantee. In contrast, the indirect claim presents a negative position for the debtor, who refrains from increasing the general guarantee for their creditors.
4. The claim of ineffectiveness of transactions does not accept if the debtor's action is merely financial but must be a legal action that is harmful to the creditors.
5. All three aforementioned methods do not give the claiming creditor any advantage or preference in enforcing their right from the property in dispute but fall under the rule of equal division among creditors.
6. The indirect claim is practically rare, as it is preferable for a creditor, if their right is represented by a sum of money, to resort to an effective enforcement measure, such as seizure of the debtor's property.
7. Proof of collusion and fraud by the debtor is not required in donation cases since damage to creditors is presumed. It is also not necessary for the recipient of the donation to act in good faith since their intention is to receive the donated money, while the creditor aims to avoid harm resulting from the action and diminish the general guarantee.
8. If the creditor succeeds in the claim of ineffectiveness before the judiciary, this results in the ineffectiveness of the debtor's actions that harm the creditors, considering the action as if it did not happen and did not exclude it from the general guarantee. Additionally, the claiming creditor and other creditors benefit from this judgment, allowing them all to participate in enforcing the money involved.
9. In the claim of ineffectiveness of transactions, the creditor challenges a new action taken by the debtor with the intention of harming the creditors, while in the simulation claim, the creditor challenges a simulated action by the debtor aimed at harming the creditors.
10. The claim of ineffectiveness of transactions is considered more dangerous as it represents a restriction on the debtor's freedom to act, whereas in the simulation claim, the creditor's aim behind challenging the debtor's action is to prove its simulation and rely on the truth without overriding the debtor's will in the action.

#### Recommendations :

1. **Clarification of the debtor's rights in disposal:** The Palestinian legislator should clarify the debtor's rights in disposing of his assets, affirming his freedom to sell, transfer, or relinquish them, in accordance with appropriate legal conditions and provisions.
2. **Providing protection for creditors against harmful donations:** The Palestinian legislator should explore ways to provide additional protection for creditors against donations that may deplete the general guarantee available to them, with particular attention to cases of donations with clear intent to harm creditors.
3. **Encouraging indirect dispute resolution methods:** The Palestinian legislator can encourage the resolution of disputes through indirect methods such as mediation and arbitration, to facilitate the settlement of disputes between debtors and creditors in a manner that serves the public interest and preserves the rights of the parties.
4. **Providing a legal framework for guarantor protection:** It is incumbent upon the Palestinian legislator to provide a legal framework to protect guarantors from harmful actions by debtors that may affect their interests, along with providing effective mechanisms to ensure justice in cases of dispute.

5. Regular review and updating of laws: The Palestinian legislator should conduct regular reviews and updates of laws related to financial and legal relationships between debtors and creditors, to ensure the continuity of laws and their alignment with economic and legal developments.

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