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Legal Regulation of the Condition of Ownership/Possessions Inalienability: A Comparative Critical Analysis

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Abstract

As a general principle, property owners have the right to freely manage their property, and this freedom should not be restricted. However, some Arab legislations have permitted provisions that prevent owners from exercising this right to serve a legitimate interest that may take precedence. Such restrictions should be temporary rather than permanent, and could be supported by strong, legitimate justifications. This research employs a comparative analytical approach to examine the legal framework surrounding inalienability conditions, aiming to clarify the true nature of such conditions and differentiate them from similar concepts. We will explore the perspectives of jurisprudence, the judiciary, and legislative bodies regarding this condition and the necessary requirements for its validity; otherwise, it will be deemed null and void. Furthermore, we will assess how this condition can be invoked against third parties. Additionally, we will delineate the legal nature of this condition and the legal implications imposed by law on any acts that violate it. We will also evaluate the extent of a judge's authority to correct a prohibitive condition rather than declaring it invalid. One of the key findings of this research is the necessity of amending certain provisions regarding conditions that prohibit disposition, allowing judges to rectify them in specific cases rather than automatically ruling them invalid.

Keywords: Inalienability Condition, Owner, Legitimacy of The Emitter, Reasonableness of The Period of Prevention.

Introduction

It is undeniable that one of the most prominent features that distinguish the right of ownership (property or other real rights) is that it gives the owner the power to exercise the authority of this right, either physically/materially such as demolishing a building or making a substantial alteration to it, or legally (whether it involves compensation, exchange, or donation). And why? It is the utmost right owned by the proprietor, and depriving them of it renders them as if they are not a proprietor, or a proprietor of a theoretical, unrealistic ownership.

Hence, it contradicts the nature of ownership rights to entirely or partially deprive the owner of their authority to manage what they possess. Consequently, this deprivation, in both its forms, is legally impermissible due to its contradiction of the fundamental authority vested in the owner, which is the authority to manage it.

In addition, the exercise of the owner's authority over their possessions, without a doubt, contributes to invigorating the circulation of tangible assets, whether real estate or movable property. This plays a significant role in boosting economic activity as funds shift via legal transactions; transferring ownership among individuals. In this regard, restricting or depriving

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the owner's authority to manage their property would detrimentally affect the circulation of these assets within society; it would deprive both individuals and the community of economic benefits from managing and optimally using these assets. Hence, such restriction or deprivation is permissible only under exceptional circumstances and within narrow limits, considering either the public interest or a more compelling private interest that demands care, priority, and protection. Furthermore, this restriction or deprivation should be temporary rather than permanent, in order to preserve the substance of ownership rights.

Ownership of something remains even after surrendering authority or power to use or exploit it for others. As a result, the owner does not hesitate to transfer the right of use (such as by granting another the physical right to use the property for the designated purpose of that property or limiting it to residential purposes, as seen in the act of ceding the right of use and housing). They may also transfer to another the right to exploitation (granting a party the right to benefit from the property), yet despite this, the owner remains the sole owner of that property.

However, if the owner surrenders the right of disposal or agrees to its restriction prohibiting the owner from exercising full control, they have emptied the ownership of its contents and are no longer recognized as the true owner of this money in reality. Therefore, they usually refrain from this renunciation by depriving themselves of such rights or by restricting their general exercise (Al-Fatlawi 2019); and so it seems illogical and unreasonable to let an individual possess complete discretionary authority (use, exploitation, and disposal) over what the individual owns and then, in the same act or in a subsequent one, agree to renounce the most prominent and vital elements of that authority, combining both the thing itself and its opposite simultaneously.

However, if the desired purpose behind this deprivation or restriction of right is to satisfy a legitimate interest that takes precedence in consideration or to conform to a strong justified cause (whether for the sake of the stipulator, or the person of whom the stipulation is made, or for someone else), it is worthier of consideration for a temporary period and not as a matter of perpetuity. In such cases, the law may, as an exception, permit agreement with others on such deprivation or restriction, in recognition of the desired legitimate interest behind this prohibition for a temporary period.

Throughout this research, we will explore the legal framework of prevention from the acting "prevention" clause, to better understand what it is and distinguish it from potential misconceptions or ambiguities. Subsequently, we will explore the stance of jurisprudence, judiciary, and legislation regarding this clause, the preconditions necessary for its validity, without which it becomes null and void, as well as the extent to which this clause is invoked against others. Following this, we will elucidate the legal nature of this clause, the legal consequences placed on actions contrary to this clause, and the extent of a judge's authority to modify a prevention from the acting clause instead of invalidating it.

Research Problem

The prevention clause, in essence, has been a standard condition upheld in jurisprudence and firmly established in legislation in many countries, providing exceptions to the general principle which provides full financial freedom to owners. That is in recognition of the legitimate motives behind imposing temporary deprivation or constraints on management. However, several concerns have made it an ideal field for study and analysis. Among these concerns is the lack of consistency in the nullity penalty prescribed for this condition when it does not meet its legal requirements and some of its provisions outlined by law.

Despite the apparent legal text indicating absolute nullity, as it is in Egyptian law, or relative nullity, as it is in Qatari or Kuwaiti civil law, many jurists, when not able to categorize it into either absolute or relative nullity, regard it as a special type of nullity to resolve the legal impasse resulting from the lack of compatibility of its provisions with those of either absolute or relative nullity. This type of nullity is a new form based on assumption and perception, rather than truth and reality, as it lacks any inherent existence. It was anticipated to find a lawful basis for this penalty within existing and well-known legal systems, given that there are established legal systems in both Islamic and positive law jurisprudence aligning and harmonizing with the provisions prescribed for this clause in the law through the notion of the suspended contract, such that if a legal action arises that violates the condition prohibiting the act, it arises as valid, depending on the interested party's approval of the condition of prohibition (i.e., it is not enforceable against him unless he permits it). The protected party has the option to ward off such suspension, insisting on its lack of enforceability or that it is not invoked against such party, treating it as if it were a non-existent action, or approving it, thereby making it effective and valid from the date of its conclusion and not the date of consent in implementation of the retroactive effect of consent or acknowledgment in the suspended contract.

Research Methodology

As part of that research, I used a comparative analytical method to study and analyse the legal system of inalienability (prevention from disposition) in all its aspects and parts, beginning with discovering its essence (understanding its meaning, distinguishing it from what may be confused with it, and the position of jurisprudence and the judiciary from it) then clarifying the extent to which it can be invoked against others, and a statement of its legal nature and its impact on the legal disposition contrary to the condition. Furthermore, I indicated the extent of the judge's validity to correct the part that violates the condition of prevention from acting instead of ruling on its invalidity in its entirety. In this regard, we are considering the comparative and critical nature of this study by simplifying its aspects in the texts of the laws of several different countries such as France, Egypt, Kuwait, Qatar, Bahrain, and Iraq.

2. The First Topic: Nature of the Condition Prohibiting Disposition

First Requirement-Meaning of the Condition of Prohibiting Disposition and Distinguishing it from Others

Definition-The Egyptian Civil Code legislators (and those in Bahrain, Kuwait, and Qatar) failed to define this condition, leaving this task to jurisprudence (as it is the most capable of formulating such definitions). I can, through the legal texts regulating this condition, define it as "that condition stipulated in a voluntary act (i.e. a legal act, whether unilaterally, that is, by a single will, or from two sides, as in a contract of sale, gift, etc.) to prevent or restrict the authority to dispose of the ownership of a specific thing or any other right in rem besides it, for some time and a valid legitimate stimulus.

Distinguishing the Condition of Prohibiting Disposition from Other Potentially Confusing or Similar Conditions

The analogy between the prevention clause and the sale subject to the condition that the seller retains ownership of the sold item is clear and evident regarding their impact; both clauses prohibit the recipient from engaging in conduct contrary to them. Nevertheless, the difference

remains more explicit and vivid because, although the transfer of ownership in an act containing the prevention clause prevents the recipient from acting, it transfers ownership of the restricted item with all the authorities and elements of ownership - usage, exploitation, and disposal. On the other hand, the sale subject to the condition of the seller retaining ownership of the sold item is a sale dependent upon a standing condition, which is full payment. The fact that the sold item is delivered to the buyer for their use and exploitation does not alter the reality that ownership remains entirely with the seller until complete payment. If full payment is made, ownership retroactively transfers to the buyer as of the date of the condition, rather than the date of payment, under the idea of retroactivity of the standing condition (Mohamed 2010, 15).

The condition of prevention from the disposition of the "prevention clause" in the case of a certain amount differs when excluding such money from the sphere of transactions. The former implies that money, although tradeable and usually subject to numerous dealings among individuals, can still be subject to private ownership. Nonetheless, for a legitimate reason concerning the condition's stipulator or others, there is a prohibition against ownership of this money for a reasonable period. If an asset is removed from the sphere of transactions, it implies that such an asset isn't permitted in any sort of dealings among individuals, meaning private ownership cannot apply to it at all. On the other hand, the reason behind restricting private ownership through the prevention clause is to serve the specific interest of the stipulator for which the prevention clause was prompted. Contrary to this, the law's removal of an asset from the sphere of transactions serves the public interest, whether such interest is represented in ensuring that this money is allocated for the management of public facilities, such as streets, roads, public institution buildings, and public parks which have been legally excluded from the scope of dealings by law to serve the community and its individuals. Additionally, it may serve to preserve public morals and decorum, as happens in the prohibition of transactions involving drugs of any kind, or in the prohibition of videos and magazines containing content contrary to public morals. Moreover, the restriction imposed on property rights or other real rights due to the prevention clause is a voluntary restriction authorized by law. In contrast, the restriction imposed on the amount excluded from transactions by law is a legal restriction mandated by law, offering no individual choice. Lastly, with money that is prohibited from being disposed of, the individual who holds it for the statutory period can gain ownership of it by the statute of limitations, despite the existence of a voluntary condition preventing its disposal, unlike money that the law has excluded from the scope of dealing, as ownership cannot be acquired through the statute of limitations in this case. (Tawfiq and Al-Attar 2004, 80).

The prevention clause also differs from the lack of legal capacity to act. In the first case, despite a person's capability to dispose of their money, they are restricted from doing so for a legitimate reason and within a reasonable period. Conversely, when there is a lack of capacity to act, the person is ineligible to dispose of their money, and someone else acts on their behalf in conducting such transactions (whether as a guardian, custodian, trustee, or another authorized party). (Al-Badrawi 1973, 83; Tawfiq and Al-Attar 2004, 81 § 4).

Second Requirement- The Position of Jurisprudence and the Judiciary on the Condition of Prevention from Disposition

It wasn't uncommon for this clause to be met with resistance and disapproval from the jurisprudential and judicial circles because of the resulting deprivation or restriction it imposes on the owner's fundamental and prominent powers over their property, notably their most substantial and critical power: the authority to dispose of what they own. This condition would

strip the owner of the authority to dispose of their property, eliminating the essence of ownership which provides for its economic value. Additionally, the existence of this clause poses a significant harm to the public interest by restricting such money, which represents the backbone of economic life, from circulation. This prompted initial criticism from legal and judicial officials in France to take an opposing stand on this clause, calling for an absolute nullification, whether temporary or permanent and irrespective of the legitimate motives underlying its existence. However, over time, they reconsidered their opposition. They called for the possibility of acknowledging its legitimacy as long as it was for a limited time and based on a strong or justifiable legitimate motive.

The French jurisdiction, in light of what was affirmed by French Civil Article 537/1, ruled the prevention clause null and void, regardless of its duration (Marty, et Raynaud 1980, 67). Initially, the French Civil Law of 1804 neither regulated nor prohibited this clause. However, as the French judiciary gradually recognized the justifications behind the existence of this clause on certain actions of transferring ownership to achieve legitimate motives and for a limited duration, the judiciary amended its opposing stance and acknowledged its validity, particularly given that this clause is frequently used in wills and donations, provided two restrictions exist: firstly, that there be a serious (i.e., genuine) interest compelling the stipulator, the stipulated, or a third party, and secondly, that the prevention be temporary and not encompass the life of the stipulated party. Article 28/2 of the Decree Law of 1/4/1955 regarding real estate registration also implicitly approved this judicial direction by stating that among the transactions subject to registration are those taking place among living individuals and involving a temporary prevention clause. If this clause is valid, it doesn't permit the seizure of the property that is prohibited from being disposed of. If a transaction violates this clause, the stipulator has the right to demand the nullification of the transaction, even if the recipient acted in good faith (Tawfiq and Al-Attar 2004: 80-81 § 3).

The Egyptian judiciary ultimately adopted the position of the French judiciary in its evolving stance toward this clause. It acknowledged the validity of this clause, recognizing the practical considerations that prompted it and appreciating the legitimate motives sought behind its stipulation, particularly since it applies temporarily rather than indefinitely (Tawfiq and Al-Attar 2004, 80-81 § 3; Abd al-‘Āl n.d., 55). Subsequently, the current Egyptian Civil Code was issued, adopting the position that supports the existence of this condition whenever it is temporary and for a legitimate motive in Article 823. It states that "1-If the contract or will includes a clause governing the prevention of disposition of money, this condition is not valid if it is not based on a legitimate motive and limited to a reasonable period. 2- The motive becomes legitimate when the purpose of the prohibition from acting is to protect a legitimate interest of the operator, the disposer to him or others. 3-The reasonable period may take the life of the operator, the disposer, or others.

In application of that, the Egyptian Court of Cassation ruled that by its jurisprudence, Article 802 of the Civil Law outlines the owner's right to use, exploit, and dispose of a property. Article 823 states "If the contract or will includes a condition that prohibits the disposal of money, this condition is not valid unless it is based on a legitimate motive and limited to a reasonable period, and the motive is legitimate when the purpose of preventing the disposition is to protect a legitimate interest of the operator, the disposer to him or others."

It's worth mentioning that the Civil Law in Iraq completely lacks regulations for the prevention clause, either by permission or prohibition. This has sparked controversy in jurisprudence regarding their interpretation of the position of the drafter of this law regarding this condition.

One opinion contends that since Iraqi civil law lacks provisions similar to Articles 823 and 824 of Egyptian civil law regarding the prohibition of disposal, this absence can only be interpreted as the law abstaining from enforcing it, not recognizing its validity, and not allowing its inclusion in contracts. Essentially, the fundamental principle is the freedom to trade money, and prohibiting the owner of disposal contradicts this principle, stripping the owner of one of their essential authorities over their property, in addition to conflicting with the principle of financial transaction freedom (Al-Nahi 1960, 105). On the other hand, another opinion argues that in the absence of specific regulations in Iraqi civil law, general principles apply which stipulate that every condition agreed upon between the two parties to act, which is not prohibited by law and does not contravene public order and morals, is a valid condition that must be respected. Therefore, the prohibition of disposal, when there is a serious interest necessitating it and for a specified duration, is a valid and obligatory condition (Al-zanon 1954, 62 § 58). A third opinion goes on to say that the general principle is that it is not permissible to agree on a condition preventing disposal when the law does not permit it, especially since it conflicts with the principle of freedom of circulation and strips the owner of the most important elements of his authority over his property, except in cases stipulated by the law. In such cases, the prohibition clause is permissible. It may be disposed of provided that it is for a legitimate motive and a specific period (Al-Baldawi 1975, 295).

3. The Second Topic: Conditions for Validity of the Condition of Prohibiting Disposition

For the prevention from disposition clause to be valid, the following conditions must be met:

- The inclusion of this condition in a voluntary act (any contract or will).
- The prevention must serve a legitimate purpose.
- The prevention should be for a reasonable period.

First Requirement-The Inclusion of this Condition in a Voluntary Act (any contract or will)

This condition is not considered unless it is contained in a voluntary act, whether this act is two-sided such as a contract or unilateral such as a will (See: Al-Sada 1978, 166; Ghanem 1959, 80; Abd al-‘Āl n.d., 56; Mohamed 2010, 116 § 98; Salah 2020, 153).

This condition is more frequent in donation contracts such as gifts and bequests, based on the fact that the donor is in a position of power that gives him the authority to stipulate such a condition on the recipient, who typically does not object to including this condition, especially if the recipient is a rightful beneficiary of the donation. However, this does not preclude the inclusion of such a condition in exchange contracts. For instance, if the seller agrees with the buyer not to dispose of the sold item until the full price is paid.

It's most common for this condition to be incorporated into transactions that transfer ownership of an item to the recipient. However, this does not limit its incorporation into non-ownership-transferring transactions. For instance, it could be incorporated into a mortgage contract where the creditor stipulates that the debtor is not permitted to dispose of the mortgaged property before the entire debt is settled. Similarly, such a condition may exist in a unilateral binding promise to sell, where the promisee stipulates that the promisor shall not dispose of the promised property throughout the duration of the promise.

It should be noted that this condition may be included regardless of the type of money subject to the prohibition of disposal, be it movable property or real estate. However, concerning

movable property, the effectiveness of this condition might be affected due to the principle of possession in movable property favouring the possessor.

It is worth noting that this condition may only occur in a specific act issued by a person for the benefit of another, whether from two sides or one side. Therefore, it's not allowed to stipulate it independently of any disposition issued by the person. The owner does not have the authority to impose this condition upon themselves to restrict their disposal of specific assets of their own as it would result in serious harm to their creditors. That is because this condition would restrict creditors from seizing and executing the restricted assets as a legal consequence of the prohibition of disposal. This opens the door to manipulation and evasion of debt repayment through this condition (Ahmed 2008, 63 § 31).

There is a difference of opinion regarding the validity of incorporating this condition into a promise to sell, where the promisee stipulates that the promisor shall not dispose of the money promised to be sold during the term of the promise. One opinion defends the validity of this condition provided that it's for a specified duration and serves the interest of the promisee by ensuring that the promisor doesn't dispose of the promised money during the term of the promise (Al-Sanhori 2004, 8/508; Ghanem 1959, § 38). However, some oppose the permissibility of this condition in a promise to sell because prohibiting disposal indicates the inadmissibility of seizing the promised money which could conveniently be used as a pretext to harm creditors. Based on this argument, opposers suggest that whenever a debtor desires to harm their creditors, they could deliberately make a promise to sell, including the condition of prohibition of disposal, making creditors unable to seize the property (See: Mansour 1965, § 44; Salama 1975, 138; Al-Sharqawi 1974, 54; Tawfiq and Al-Attar 2004, 82). In our view, we tend to follow the first opinion; because if we were to consider the risk of possible misuse of any right, license, or interest, we would not allow anyone to exercise those rights. Therefore, whenever a strong justification exists for the benefit of the stipulator, the stipulated, or the third party in the prohibition of disposal condition, and it's for a specified duration necessary to protect that interest, it would constitute a valid condition, regardless of whether it's a sale or a promise to sell.

Second Requirement-The Legitimacy of the Emitter

This requires that the prohibition adheres to legitimate purposes dictated by the interest of the person making the restriction, the interest of the recipient, or the interest of others. This is to prevent or limit the owner or another holder of the real right from exercising their power over their right and to ensure this condition doesn't conflict with the concept of public order. This condition is based on a legitimate and serious interest that justifies the legal permission in the agreement between the parties involved resulting in harm to the owner due to depriving the owner of their authority to dispose of their property for the benefit of another more deserving and protectable private interest. Whether it is the interest of the obligated owner, the stipulator, or others.

The criterion of legality or illegality is flexible, allowing the trial court to exercise its discretionary power in assessing, based on the circumstances and context surrounding the prohibition of disposal, the validity or invalidity of the prohibition. This assessment isn't subject to appellate court scrutiny, since it falls within the trial court's discretionary authority, as long as it is based on reasonable grounds. In application of this, the Egyptian Court of Cassation ruled that "and based on the ruling of this court - the condition preventing disposal is valid if it is based on a legitimate motive and is limited to a reasonable period, and the motive is legitimate if the

intent of preventing disposition is to protect a legitimate interest of the disposer, the recipient, or a third party. Assessing the legitimacy of the interest that the condition is intended to protect and the reasonableness of the period specified for its validity falls within the authority of the judge of the matter and is not subject to the appellate court so long as the judgment is based on justifiable reasons."

An example of a condition where the stipulator has a legitimate interest would be when the seller stipulates to the buyer not to dispose of the sold item before full payment is received. Similarly, grantors may also impose upon recipients the condition that the money cannot be disposed of during the usufruct period, provided they retain the right of usufruct over the money throughout their lifetime, fearing that the recipient might dispose of it to the detriment of the grantor.

One example of a condition intended to safeguard the interest of the recipient (to whom it is to be disposed of, or stipulated) is a father donating a building to his son, stipulating that the latter cannot dispose of it for a certain period until he matures demonstrating responsible behaviour, for fear that the son might squander the gifted property due to impulsiveness or rashness.

An example of a condition in which another party's interest is sought is when a person donates property to another with the stipulation that the recipient pays its price as arranged income to an orphan or widow in need for either of their lifetimes, as well as not dispose of this property throughout either of their lifetimes. If the recipient breaches their commitment to provide the agreed-upon income, the orphan or widow has a right to sell the property at a public auction.

It's worth noting that unlike Qatari legislation, which outlined the description of legitimacy within the condition (Ghazal and Al-Abasiri 2015, 24), the Bahraini Civil Law (and preceding Kuwaiti Civil Law) stipulated the description of authority, without mandating the description of legitimacy, stating "for a strong emitter." This description is deemed better than the description of legitimacy prescribed by the Qatari legislature to avoid instances where a prohibition from disposal occurs for trivial reasons, even when the prohibition is justified by legitimate interests.

For such restrictions to be justified, strong justifications and compelling reasons must be given. The description of legitimacy is crucial in every case and any condition or clause, even if it is not explicitly stipulated in the contract, to avoid conflicting with the concept of public order.

Third Requirement: The Reasonableness of the Duration of Prevention

It is neither legally permissible nor logically acceptable that the prevention from acting is permanent as it deprives the rightful owner of their authority to dispose—a concept that's fundamentally impermissible. The extension or prolongation of its duration unreasonably extends past the original need that initially justified its allowance, violating the general principle that prohibits the deprivation or restriction of an individual's right to dispose of their property, which leads to substantial harm to the owner and considerable damage to society as a whole through the suppression of the positive impact of circulating this restricted asset on the market. This is emphasized in the explanatory memorandum of the preliminary draft of the Civil Law, which states, "Extending the condition is not valid, nor is making it for a longer period than the necessity that called for it..."

As a result, the conditional nature of this prohibition constitutes an inherent description necessary to legalize its implementation. However, the question remains: what is the standard adopted for conditioning the validity of the prohibition clause? Is it a rigid or flexible criterion?

The legislator (whether in Egypt, Bahrain, Kuwait, or Qatar) did not opt for a strict stance, not

allowing the inclusion of the prevention clause unless it's for a limited time which represents a maximum limit that may not be exceeded. Rather, he adopted a flexible criterion where the prohibition shall be sufficient for a reasonable period.

The determination of the reasonableness of the duration of prevention from disposition falls within the discretionary authority of the trial court, which it assesses in light of the necessity or interest that warrants this prevention and the duration that is required to achieve it without causing detriment to the owner from the authority to dispose of their right, ensuring that the purpose of this prevention is legitimate. However, if the court has established valid reasons for its decision, it will not be subject to scrutiny by the Court of Cassation. Essentially, the issue of reasonableness is a factual matter subject to the court's objective assessment.

According to Article 823/3 of the Egyptian Civil Code, the duration of restriction can last for the lifetime of the disposer, disposed to, or third party, without being excluded from the description of reasonableness. So long as the court considers this duration reasonable (Al-Sanhori 2004, 640; Salah 2020, 161).

If it so happens that the prevention duration is determined by the duration of the disposer's lifetime and the disposed-for died during the former's lifetime, the heirs (acting as general successors to the disposed-for) would inherit the obligation not to dispose in the face of the disposer. Similarly, if the prohibition is set for the disposed of, for the entire lifetime, and the disposer passes away through the lifetime of the disposed-for, then in that case, the heirs (acting as general successors to the disposer) inherit the right that their predecessor had to not act against the disposed-for. Furthermore, if the prohibition is specified for the lifetime of another party, and the disposer dies during the other party's lifetime, the same commitment to prohibition transfers to the general successors of the disposer, and they are prohibited from disposing of the assets in the face of that other party throughout their lifetime (Al-Sanhori 2004, 640; Salah 2020, 161).

If the aforementioned conditions are met, the condition of prevention of disposal is valid. The disposer is deprived of the right to dispose of this money for the duration of the imposed restriction. If this condition is violated and the money is disposed of, a request for annulment may be made by the affected party. This annulment serves the benefit of the party who had this condition imposed upon them for the realization of their interest. Consequently, such annulment is not absolute, although some legal viewpoints deem the contract that violates this condition to be void. This interpretation stems from the explanatory memorandum of the Egyptian Civil Law, which indicates the state of an absolute void due to the incapability of the money to be disposed of under this condition.

These conditions must be met for the condition of prevention of disposal to be valid. Therefore, if one of the conditions is not met, the condition is invalid. In such an event, the condition is regarded as having never existed, in which case there is no effect on the validity of the transaction in question, as long as nothing upon its formation renders it void. When it becomes apparent, however, that the existence of such a preventive condition was the primary motive for concluding the same transaction for either of the parties or one of them, then respectively, the condition and the transaction become void under the partial nullity theory of contracts.

The standard adopted in declaring the nullity of the condition alone or the original transaction along with it-due to the absence of valid conditions for the condition's validity- depends on the intention of one or both parties to the transaction, inferred by the judge based on the original

contract's context and circumstances. If the judge can separate the invalid condition from the original transaction, then only the invalid condition becomes void, while the original transaction remains valid. However, if it's impossible to separate the two and the original transaction is intrinsically linked to the invalid prevention condition, making it impossible to dissociate, both the condition and the transaction become void.

It is important to keep in mind that the effect of the condition preventing disposal is limited to restricting intentional disposal of the money prohibited from disposal. Consequently, ownership of the money that is restricted from being disposed of can be transferred for involuntary reasons. For instance, the transfer of ownership of the money, which the owner is prevented from disposing of upon their death, can pass to their heirs through inheritance, or it might transfer to someone who gains ownership through prescription. This condition doesn't exclude money from the sphere of transactions entirely, but its impact is confined to preventing intentional disposal.

This condition may be included in the same conduct in which the disposed-for received the right of ownership or other real rights. Moreover, it could be included in a subsequent agreement, serving as an amendment reflecting the mutual intent of the parties involved. In such cases, necessary registration procedures must be carried out about this agreement if the restriction is related to real estate, giving rise to an objection, where the agreement could be invoked.

Perhaps the question that arises here revolves around the extent of the judge's authority to correct the condition prohibiting action instead of ruling its invalidity, which raises the question, Does the judge have this authority or not?

Examining the necessary legal conditions required for the validity of the prohibitive condition shows that the judge does not have the authority to exercise discretionary power to amend or rectify the prohibition clause if the conditions are not met, instead of ruling it void in its entirety. However, when it comes to the duration of the prohibition on disposal, things differ. If this violation occurs regarding the duration of the prohibition, the duration agreed upon exceeds the level of necessity that justified its use so much that it exceeds what is considered reasonable, thereby removing it from the realm of rationality—a necessary description that should not be separated from the specified duration of the prohibition for it to be legally permissible—then it becomes the judge's discretionary power within the limits of their authority adjusting the duration of the prohibition as necessary to meet this need without excess.

Unlike other instances when individuals exceed legally defined maximum limits for personal or real rights, there is no specific legal provision expressly allowing the judge to exercise this authority. For example, concerning debt as a personal right, if the involved parties agree upon a specific amount of usurious interest (compensatory or delay interest) exceeding the statutorily defined maximum, the excess interest doesn't render the entire interest void. Rather, the judge invalidates excess amount beyond the allowed limits, while it remains legally valid. Similarly, the law has set a maximum limit of sixty years for the right of pre-emption as one of the original real rights. If the parties agree to a pre-emptive duration exceeding sixty years, the judge has the authority to reduce this duration to comply with legal requirements. This is mentioned in Egyptian Civil Code Article 999, stating, "It is not permissible to determine a period exceeding sixty years. If a longer period is specified or left unspecified, the pre-emption is considered established for a period of sixty years."

However, it is not required for the judge to exercise his discretionary power in rectifying the condition by reducing the duration of the prohibition that exceeds the reasonable period to its

reasonable length, as a legal requirement for the validity of this condition. This falls within the judge's scope of discretionary authority granted by the law when assessing the reasonableness or unreasonableness of the agreed-upon prohibition period, relying on the circumstances of every case individually. This does not differ much from the judge's usual discretionary power in many other instances, such as when assessing the good or bad faith of the contracting party, or when evaluating the legitimacy or illegitimacy of the contracting party's intention in generally in any contract, or specifically when agreeing on a prohibition of disposal clause.

A question arises concerning the necessity of registering the prohibition of disposal clause if it pertains to real estate. To answer this question, we must distinguish between the two scenarios (Al-Sanhori 2004, 519 § 320; Mansour 1965, 114 § 48; Khalifa n.d., 103):

1. First Scenario: If such a clause is stated in the same disposition that conveys the right to the real estate, whether it is a contract or a will, and this disposition is registered, then its registration automatically serves as a registration of the clause by extension.
2. Second Scenario: If the clause is included in an agreement separate from the original disposition, this additional agreement containing the clause must be registered.
4. The Third Topic: Scope of the Condition of Prevention from Disposition

The general principle is that the will, or intent, of the parties that creates the prohibition of disposition clause, determines its scope by indicating the types of dispositions the transferee is prohibited from making. This could include dispositions that transfer ownership, such as a sale, or establish other property rights, like a mortgage or usufruct.

However, if the clause is stated without having specified the scope of the prohibition, the scope must be interpreted in light of the intent or purpose behind the clause. This would naturally imply preventing the person subject to the clause from disposing of ownership of the property, whether wholly or partially, either for or without compensation. Additionally, it implies the prohibition of mortgaging the property, given that a mortgage could eventually lead to a disposition of the mortgaged property if the debtor fails to pay it back. In such cases, the mortgagee would have the right to seize and sell the property at a public auction to recover the owed money, giving them preference over other unsecured and subsequent creditors (Shanab 1974, 263; Al-Badrawi 1973, 96; Al-Mahdi 2005, 95; Salah 2020, 163).

First: Does the Scope of the Prohibition Include the Establishment of a Usufruct or Easement on the Property Prohibited from Disposal?

A school of jurisprudence went on to argue that the prohibition includes these rights – Usufruct & Easement - because they represent a form of partial disposition of the property, and the prohibition implies a ban on any form of disposition, in whole or in part (Mohamed 2010, 122 § 101). On the other hand, another school believes that under such a scenario, the prohibition does not extend to these two rights, as their establishment does not abolish ownership of the property from the financial assets of the transferee (Al-Sanhori 2004, 8/518 § 320).

In my opinion, the scope of the prohibition is limited to dispositions that transfer ownership, such as a sale or any transaction that leads to the transfer of ownership (such as a mortgage). Other types of dispositions are not covered by the prohibition unless explicitly mentioned in the prohibition clause. In such situations, the prohibition would include them as a matter of respect for the agreement, given that a legitimate and serious interest justifies it (Al-Sanhori 2004, 8/518 § 320).

Second: Does a Will Fall Within the Scope of the Prohibition?

One view in legal jurisprudence holds that a will does not fall within the scope of the prohibition, because although it is considered a form of disposition, it is a disposition that takes effect after death. The transferring of ownership in a will is linked to a natural event, namely death, and thus should not be subject to the prohibition. On the other hand, others claim that a will is a type of disposition that leads up to the transfer of ownership upon death, and thus should be included in the prohibition to fulfill the intended purpose behind it, particularly if the clause is established for the benefit of the transferor or a third party (See: Al-Sanhori 2004, 018; Al-Badrawi 1973, 96; Shanab 1974, 264; Ghanem 1959, § 41; Tawfiq and Al-Attar 2004, p. 88; Mansour 1965, 106 § 46; Al-Mahdi 2005, 95; Salah 2020, 163).

In my opinion, there is no objection to allowing a will if the prohibition of disposition clause is stipulated for the benefit of the transferee, as the transferee would have the right to waive their benefit by bequeathing the property that was prohibited from being disposed of, especially since the transfer of ownership doesn't take place immediately but is instead tied to an involuntary event, which is death.

However, if the clause is stipulated for the benefit of the transferor or a third party, the transferee may not bequeath the property without their consent, since they hold an interest in such a prohibitive clause and can choose whether or not to waive it.

Third: Do Administrative Acts Fall within the Scope of such Prohibition?

Administrative acts are intended to manage, invest, and preserve property without causing its disposition or removal from the possession of the owner. As such, these acts should not fall within the scope of the prohibition on disposition, unless an explicit stipulation prohibits certain administrative acts, such as leasing. In such cases, leasing would not be allowed as long as a legitimate and serious interest exists that justifies the prohibition (See: Al-Sanhori 2004, 518; Al-Sadda 1978, 117; Salama 1975, § 46; Shanab 1974, § 252; Tawfiq and Al-Attar 2004, 87; Mohamed 2010, 122 § 101).

The division of jointly owned property does not fall into the scope of the prohibition, as it is viewed as a declaratory act, and not a transfer of ownership.

Fourth: Do Physical Acts Fall Within the Scope of Prohibition?

It is clear that the prohibition on disposition not only applies to legal dispositions but also covers physical acts that interfere with the essence of the prohibition. Such physical acts can compromise or defeat the intended interest behind the prohibition, just as legal dispositions can. It is therefore not permitted for the transferee to demolish a property, such as a building, that falls within the scope of the prohibition. Additionally, they cannot alter or modify the property or change its intended purpose if such actions would affect its economic value. For example, converting a lush garden into a garbage dump or transforming a residential building or hotel into a waste storage (Al-Sharqawi 1974, 56 § 20).

However, the transferee may carry out physical acts that do not clash with the essence of the prohibition or harm the interest for which the prohibition was established. For instance, the transferee may perform necessary renovations and repairs to the building or even add new floors that do not compromise its structural strength or weaken it. They may also change the purpose of the building in a way that enhances its value, such as turning a residential building into a hotel (Salah 2020, 163).

It is worth mentioning that if the prohibition on disposition is conditioned on a substitution clause, then the property may be disposed of by the conditional substitution. This means that the new property will replace the old property in kind, subject to the condition of prohibition with the same restrictions agreed upon in it (See: Tawfiq and Al-Attar 2004, 88-89; Mansour 1965, 106; Mansour 1959, 190; Ghanem 1959, 89; Al-Sadda 1978, 176; Salama 1975, 147; Mohamed 2010, 123 § 102).

Moreover, unforeseen circumstances may occur that are outside the control of either party after the agreement on the condition, necessitating physical actions regarding the property that is prohibited from disposition. For example, if the property is on the verge of collapse due to a floor or earthquake (or other similar events outside either party's control), the property owner may petition the court to carry out the necessary physical actions and substitute the property under the same conditions that ensure the purpose of the prohibition is achieved (See: Tawfiq and Al-Attar 2004, p. 89; Mansour 1965, 106; Ghanem 1959, p. 89; Al-Sadda 1978, 176; Salama 1975, 147; Al-Bey 2002, 112; Mohamed 2010, 123 § 102; Salah 2020, 163).

Fifth: Is it Permissible to Seize Property Subject to a Prohibition on Disposition?

Affirming the validity of a prohibition on the disposition of a specific property legally implies that the seizure of that property is not permissible. This is because seizure involves disposing of the seized property by auctioning it at a public auction and then distributing the proceeds among creditors, which contradicts the prohibition on disposition (Al-Sanhori 2004, 8/519 § 320; Salah 2020, 163; Mohamed 2010, 124 § 104).

From my point of view, there is no objection to the validity of a seizure for a debt against the transferee when the prohibition is set up for their benefit. In contrast, seizure should not take place if the prohibition is for the benefit of someone else, such as the transferor or a third party, unless one of the parties gives consent to the seizure.

The party with an interest in the prohibition clause should challenge the seizure of the property subject to the prohibition by demonstrating the existence of the prohibition to prevent such seizure (Mohamed 2010, 124 § 104).

It is also clear that the existence of a prohibition on disposition doesn't prevent the transfer of ownership of the property subject to the prohibition for any voluntary reason. This includes scenarios like inheritance (considering the transfer of the effects of the prohibition from the predecessor, such as the testator, to their heirs) if the property is expropriated for public benefit or if the possessor gains ownership through adverse possession (Tawfiq and Al-Attar 2004, 88; Shanab 1974, 264; Mohamed 2010, 123 § 101; Salah 2020, 163).

5. Fourth Topic: The Extent to which the Prohibition on Disposition Can Be Asserted Against Third Parties

When the party subject to the condition disposes of property that is subject to a prohibition on disposition, can the prohibition be asserted against 'innocent' third parties, i.e., those who received the property in violation of the prohibition?

There is no doubt that a third party can only be bound by the prohibition if they know of it. This knowledge can be determined by notifying them of the prohibition through a registered letter with acknowledgment of receipt, an official document, or any other method that supports the interested party in proving the third party's awareness of such prohibition, such that the notification does not require a specific form. Moreover, when the property subject to the

prohibition is real estate, knowledge of such prohibition can be determined if the act containing the prohibition was registered in the documentation office. If the prohibition was included in a subsequent agreement following the act transferring the property, that agreement must also be registered with the office to be enforceable against third parties. Moreover, if a third party, without any formal notification, becomes aware of the prohibition through their means, and yet proceeds to deal with the party subject to the prohibition anyway by entering into a transaction that transfers ownership of such property, the interested party can assert the prohibition against that third party, rendering the conflicting transaction null and void in a relative sense for the benefit of the party for whom the prohibition was established.

Conversely, if it is shown that a third party has no knowledge of the prohibition and no reasonable means to know of such prohibition, then the prohibition cannot be asserted against them. In consequence, the transaction conducted in violation of the prohibition will be valid and effective, despite its conflict with the prohibition on disposition.

This principle can be found explicitly stated in Article 817 of the Kuwaiti Civil Code, which reads: "1. The prohibition or restriction on disposition cannot be asserted against third parties unless they are aware of it at the time of the transaction or have the means to know it. 2. If the property is real estate and the act containing the prohibition is registered, the third party is deemed to be aware of the prohibition from the time of registration." Similarly, Article 850/1 of the Qatari Civil Code mandates that this prohibition be based on a legitimate cause, stating: "If the contract or will contains a condition prohibiting the disposition of property, this condition is not valid unless it is based on a legitimate cause and limited to a reasonable duration." Additionally, Article 776 of the Bahraini Civil Code states: "A) The prohibition or restriction on disposition cannot be asserted against third parties unless they are aware of it at the time of the transaction or had the means to know it. B) If the property is real estate and the act containing the prohibition is registered, the third party is deemed to be aware of the prohibition from the time of registration."

6. The Fifth Topic: Legal Nature of the Prohibition on Disposition Clause

The legal doctrine has differed over the nature of the prohibition on disposition clause. One stance among scholars holds that it represents a limitation on the transferee's capacity to dispose of the property subject to prohibition (Al-Jamal 2000, 380 § 266). However, this opinion is disputable because a lack of capacity is determined by the ability of a person to discretion. This is related to their age and not to the acts themselves. An individual lacking capacity is not prevented from performing acts but is only restricted from doing so personally. In other words, they can perform these acts through their legal representative. In contrast, the prohibition on disposition directly prevents the obligated party from disposing of the property itself; therefore, it constitutes an objective prohibition related to the property subject to the prohibition.

Another stance holds that this clause involves removing the property subject to the prohibition from the realm of transactions (Al-Badrawi 1973, 97; Al-Sanhori 2004, 8/653; Shanab 1974, 268). This view is subject to criticism because, despite the clause, the property does not fall out of the sphere of transactions; it remains the property of the transferee. Ownership may transfer through involuntary means such as inheritance, adverse possession, or expropriation. Furthermore, despite the existence of this clause, such property can still be invested or exploited through leasing. Finally, property can only exit the realm of transactions either by its nature or by legal provision; it cannot be determined by mere will (Mohamed 2010, 128 § 106).

A third opinion contends that this clause creates an obligation for the obligated party to refrain from actions regarding the property subject to the prohibition (Al-Badrawi 1973, 97; Siwar 2019, 104 § 94). This perspective is also subject to critique, as accepting it would imply that the penalty for violating the prohibition clause is the annulment of the original transaction and the return of the property to the transferor. This contradicts the established nature of the penalty for violating the clause, as the conflicting transaction is invalidated without extending the invalidity to the original transaction. Moreover, this opinion is untenable when the prohibition clause serves the interest of the transferee, as it is unreasonable for an obligation to refrain from action to benefit the obligated party. Instead, it is natural for this obligation to serve the interest of the party benefiting from the clause.

A fourth viewpoint claims that this clause, rather than imposing a real obligation on the individual obligated party, imposes a real obligation on the property itself rendering the property non-transferable (Mansour 1965, 111 § 47). However, this view is under scrutiny because the concept of a real obligation is inherently ambiguous and lacks clarity. Furthermore, it is not applicable in cases where the prohibition on disposition is established for the benefit of the owner (the transferee), as it is inconceivable for a burden to be placed on the property for the benefit of its owner. Even if such a scenario were conceivable, there would be no obstacle to considering the owner's act in violation of the prohibition clause established for their benefit as a valid transaction. This is because, upon performing this act, they would have implicitly waived the burden or obligation imposed for their benefit.

Our views align with those of the majority of Egyptian scholars, who, due to the difficulty in categorizing this clause within known legal systems, view it as a restriction on the owner's powers to dispose of the property they own. This creates a modification in the ordinary system of ownership based on the will legally authorized to impose this restriction. It represents an independent legal system that permits the will to limit the power of disposition over the property for a specified duration and a legitimate cause (Ghanem 1959, 86, Mohamed 2010, 5/129 § 106; Salah 2020, 155).

7. The Sixth Topic: Consequences of Violating the Prohibition on Disposition Condition

If a Disposition is made in Violation of the Prohibition on Disposition Condition, what are its Legal Consequences?

Section One: The Position of the Egyptian Civil Code

It is apparent from the provisions of the Egyptian Civil Code regarding the regulation of this transaction that such a transaction is deemed void. When found in court rulings, legal texts, or specialized legal writings, such terminology is directly interpreted as absolutely null rather than relatively null. Article 824 of the Egyptian Civil Code states: "If the condition prohibiting disposition stated in the contract or will is valid according to the provisions of the preceding article, any transaction violating it is deemed void." This ruling is explicitly referenced and affirmed in the explanatory memorandum for the preliminary draft of the civil code, stating: "If the condition is valid and violated, the violating transaction is deemed void due to the non-disposability of the property."

However, it's worth noting that this nullity, given the fact that it can only be invoked by a party with a vested interest—whether the party who imposed the prohibition condition, the one to whom it applies, or a third party—the court cannot rule on it by its authority. Moreover, this nullity may be lifted with the approval of the interested party, making it difficult to classify as

an absolute nullity. Also, it cannot be categorized as a relative nullity, because that is determined for the benefit of one of the parties to the contract only and does not apply to third parties. Here, the nullity may apply for the benefit of the one who imposed the condition or for the benefit of a third party, both of whom are not parties to the violating transaction but are merely outsiders concerning it.

Furthermore, relative nullity can be eliminated upon approval of the party with an interest in invoking nullity. However, consent from the party who has the condition imposed for their benefit may not suffice to eliminate this nullity in certain cases, for instance, if this condition was stipulated for the benefit of a minor with an extravagant guardian or an adult with insufficient experience. In such cases, consent from an extravagant guardian or an inexperienced adult is insufficient; the approval of the party imposing the condition is necessary to achieve the intended purpose of this condition. Therefore, among most legal scholars, the prevailing position is that this nullity represents a special type of nullity, subject to the rules of nullity to the extent that the intended purpose of the prohibition condition is achieved (Ghanem 1959, pp. 90-91; Mansour 1965, 116; Tawfiq and Al-Attar 2004, 91; Shanab 1974, 268).

Perhaps this is what the explanatory memorandum of the Kuwaiti Civil Law indicated, stating: "...the legislator had to choose between two approaches in determining who has the right to invoke nullity. The first approach, as indicated by the provisions of the Egyptian law and the laws derived from it and defended by some scholars, is that the nullity is absolute; thus, anyone with an interest may invoke it, and the judge may rule on it on their own accord, even if not requested, by his authority, and it cannot be validated. The second approach, advocated by some scholars and adopted by Sudanese law, restricts the right to invoke nullity to the stipulator, the party who imposes the condition, which is always in their interest, even if the condition was intended for the benefit of others. Merely a moral interest suffices for them to have the right to invoke nullity, as well as for those for whom the condition was imposed, provided they are not the party who imposed it. This is based on the premise that this condition was intended to achieve a specific benefit for a certain person, so this person should have the right to adhere to this invalidity and be able to waive this right through approval of the violating transaction, which then becomes valid. This view concludes that the provisions regarding this nullity do not fully align with those governing absolute nullity or relative nullity. Instead, they revolve around the purpose intended by the prohibitive condition. The legislator favoured adopting this latter view."

From my perspective, the idea of a special type of nullity is a newly hypothesized concept that lacks a logically acceptable foundation. We may resort to it at times to avoid the predicament of searching for an accurate description of the addressed situation, considering it a simpler path to acceptance of the proposed solution when we are incapable of classifying the penalty under a suitable description and its provisions. Hence, we believe we can invoke the idea of a suspended contract here and apply its provisions to the transaction that violates the prohibitive condition, rendering it valid between the two parties involved but ineffective against the party with a vested interest in this condition unless such a party approves it. Provisions like that correspond to this new type of nullity, and cannot be attributed to either of the two traditional types (absolute or relative nullity).

From my standpoint, categorizing the penalty for the transaction violating the prohibitive condition represents a logical and acceptable foundation more than assuming the existence of a third type of nullity that does not exist besides in the imagination of those who endorse it. Moreover, what is the need to hypothesize that does not exist and search for it in the realm of

assumptions and fantasies? (It is expected that legal provisions should not be based on assumptions and fantasies but instead based on facts and reality.) We have the theory of the suspended contract (whether in Islamic jurisprudence or the jurisprudence of positive law, the essence of the idea in both is the same), which establishes that whoever disposes of the property belonging to them in a manner that harms another person's legal right or legitimate interest regarding that property suffers from that disposal, which is ineffective against that other party unless it is approved. Therefore, the other party cannot invoke it against them, and they can treat it as if it does not exist. At the same time, they can also approve the violating transaction, making it effective against them not only from the date of approval or acknowledgment but retroactively effective from the date of the violating transaction, by the idea of the retroactive effect of approval or acknowledgment (Farag 1969, 369; Al-Fatlawi 2019, 165-166).

Section Two: Position of the Laws of the GCC (Kuwait, Qatar, and Bahrain)

Suppose a transaction is carried out in violation of the prohibition on disposition clause. In that case, the interested party, under these laws, may request the annulment of the transaction that violates this prohibition. This shows that the lawmaker's intention in the aforementioned countries is to consider such a violation as a relative nullity, especially since the court does not rule of its own accord but rather based on a request from an interested party. Article 816 of the Kuwaiti Civil Code states: 1- "If the prohibition or restriction condition is valid and the obligated party acts contrary to the condition, each stipulator and the party for whose benefit the condition was established may annul the transaction. 2- Nevertheless, the transaction that violates the condition is valid if approved by the stipulator, unless the condition was established for the benefit of a third party." Article 851 states: "1- If the prohibitive condition is valid and the obligated party acts contrary to the condition, each of the stipulators and the party for whose benefit the condition was established may request the annulment of the violating transaction. 2- The violating transaction is valid if approved by the stipulator. The party for whose benefit the condition was established may also approve this transaction unless it conflicts with the motive upon which the condition was based." Article 775 of the Bahraini Civil Code also states: "A)- If the prohibition or restrictive condition is valid and the obligated party acts contrary to the condition, each of the stipulators and the party for whose benefit the condition was established may annul the transaction. B) Nevertheless, the transaction that violates the condition is valid if approved by the stipulator unless the condition was established for the benefit of a third party."

Upon scrutinizing the penalties imposed for violating the prohibition on disposition in these mentioned laws, we note the following two observations:

- **First Observation:** The laws granted the right to annul only to the stipulator (the first party) and the beneficiary of the condition (the third party to whom the condition is made), and did not render nullity an inevitable consequence of violating the prohibition on disposition. This attribute of nullity aligns it more closely with relative nullity than absolute nullity. However, it still varies in some aspects from relative nullity because these two parties that authorised to request annulment are not parties to the transaction that violates the condition itself, but rather third parties concerning it. This runs counter to the principles of relative nullity that do not allow for annulment by anyone other than the parties to the contract for whom nullity was established.
- **Second Observation:** The laws ruled the violating transaction to be valid if approved by the stipulator, without clarifying whether the third party for whom the condition was stipulated has the same right to approve or validate such transaction. This implies that while the third party may legally have the right to petition the annulment of the violating transaction, they do not have

the right to validate or approve such transaction.

Thus, we see that even under the scope of these mentioned laws, the nullity of the transaction that violates the prohibition on a disposition can be considered a special kind of nullity, governed by the general rules on nullity to the extent necessary to achieve the intended purpose of the prohibitive condition.

Under the aforementioned laws, it is evident that the stipulator has the right to approve the violating transaction, thereby stabilizing the contract as valid retroactively from the date of its formation and not from the date of approval, as the approval has a retroactive effect. Nonetheless, if the restriction on disposition is stipulated for the benefit of a third party, the stipulator cannot approve it. In this case, the stipulator, along with the third party, has the right to request annulment of the restriction-violating transaction. The right to annul the transaction is granted to any party with a legitimate interest in requesting such annulment. However, the right to validate or approve the transaction is reserved exclusively for the stipulator.

The party bound by such restriction has no right to pursue the annulment of the violating transaction, despite the restriction being stipulated for their benefit, as it is unreasonable and illogical to allow the violator to benefit from their violation. In addition, the party bound by the restriction has no right to validate the transaction that violates the prohibitive condition, since such a right is granted only to those authorised by law, and the law does not grant such a right to the violator.

It is also worth mentioning that since the party in ownership of the property (the party bound by the restriction) has violated their contractual obligation by disposing of the property despite the restriction, the stipulator is entitled, under general principles of termination of the contract, to pursue legal action requesting the termination of the original contract between the parties, in which the restriction was stipulated. This stems from the fact that the violator's act of disposing of the property constitutes a clear breach of their contractual obligation, which gives the right to the stipulator to request termination of the contract and, if warranted, seek compensation for any resulting harm.

It is established from the rulings of the Egyptian Court of Cassation that although Article 824 of the Civil Code provides for the nullity of any transaction that contravenes a condition prohibiting disposition, and does not address the initial contract comprising such a condition, this does not prevent the contracting party (who stipulated this condition) from seeking to terminate the contract by the general rules governing termination in bilateral contracts, provided that the condition prohibiting disposition is a fundamental term of the contract, without which the contract would not have been made.

In such cases, the violation of this condition by the other contracting party constitutes a breach of one of their fundamental obligations, giving right to the other party to seek termination of the contract by Article 157(1) of the Civil Code, which is considered a supplementary provision to the parties' will. Thus, this right is granted to both parties by law, and the contract is implied to include it even if it is not explicitly spelled out, and the parties cannot be deprived of this right, nor can its scope be restricted, except by explicit agreement.

What is the ruling in the event the stipulator seeks for the annulment of a transaction that violates the prohibition clause, whereas the third party, for whom the condition was stipulated, approves the violating transaction?

The law confers the right to approve a violating transaction of the prohibitive clause only on the stipulator, and therefore, the third party is not entitled to approve such transaction, regardless of whether the stipulator requests the annulment or not. Consequently, the stipulator's annulment request would be upheld, and the third party's approval of the transaction would have no effect.

What is the ruling if the stipulator approves the transaction violating the prohibition while the beneficiary of the condition requests its annulment?

The stipulator does not have the right to approve the violating transaction if the condition was stipulated for the benefit of a third party. Therefore, the beneficiary of the condition, in this case, the third party, has the right to pursue the annulment of the violating transaction.

What is the Statute of Limitations for the Action to Annul a Transaction in Violation of a Condition?

Due to the absence of an explicit provision that specifies a designated period for the expiration of the action to annul a violating transaction, this claim is governed by the general rules of limitation. Hence, the ordinary or long-term limitation rules, which extend for fifteen years, apply to it. Accordingly, the right of the interested party to assert the annulment of this transaction becomes ineffective after three years from the date of knowledge of this violating transaction, but not exceeding fifteen years from the date of the violating transaction itself.

Thus, Article 374 of the Egyptian Civil Code states, "An obligation shall be extinguished after the lapse of fifteen years, except for cases where a specific provision in the law indicates otherwise, and except for the following exceptions." Article 365 of the Bahraini Civil Code states, "The action for a personal right shall not be heard after the lapse of fifteen years, except for cases in which the law specifies a different duration and for the cases stipulated in the following articles." Article 438 of the Kuwaiti Civil Code states, "The action for a personal right shall not be heard after the lapse of fifteen years, except for cases in which the law specifies a different duration and for the cases stipulated in the following articles." Article 429 of the Iraqi Civil Code states, "The action for an obligation, whatever its cause, shall not be heard against the denier after it has been left without legal excuse for fifteen years, taking into account what is provided for in specific provisions."

Conclusion

Undoubtedly, the general principle is that denying the owner the authority to dispose of their property, whether through a voluntary act (a voluntary or legal transaction either unilaterally or between two parties) or restricting this authority -- is fundamentally prohibited. This is because it entails stripping the owner of one of the most significant powers they hold over their property, in particular, the power of disposal, not to mention its collision with the principle of the freedom of commerce. This tendency has negative repercussions for individual owners and society as a whole, as it hinders the circulation of tangible assets, adversely affecting the reality of economic life. Despite this, however, the legitimate interests of individuals have led both legal scholars and legislation to permit such deprivation or restriction (whether these interests are represented by the stipulator's interest, the stipulatee's interest, or the interest of a third party). This is in recognition of these interests, especially since it is not an eternal deprivation that obstructs the owner's most critical and prominent authority over their property—namely, the power of disposal—but rather temporary limitations reasonably necessary to achieve the intended goal of that restriction. We have concluded this study with the following results:

1. The stipulation should not be invoked except when its validity conditions are met. In other words, it needs to be included in a voluntary transaction (such as a contract or a will) so that it would not be used as a means of evasion to exclude part of a person's assets from the general protection afforded to creditors.
2. A legitimate interest must exist that justifies that restriction for a specified period, not indefinitely; otherwise, the stipulation would be void.
3. The nullity of the condition prohibiting disposition affects the validity of the original transaction in which it is contained. The initial transaction remains valid between its two parties so long as it has not been invalidated by any of the flaws of absolute or relative nullity. If, however, it turns out that one or both parties would not have consented to this original transaction without the incorrect prohibitive stipulation, then both the transaction and the stipulation would be invalidated, in line with the general principles concerning the partial invalidation of contracts.
4. If the prohibition clause was validly established and a violation of such clause occurs by an action that breaches its provisions, that violating action is deemed void. As viewed by most scholars, this constitutes a special type of nullity, as it deviates from the general rules known about nullity. As such, it differs from both absolute and relative nullity, although I, along with others, believe that the sanction for this violation of the prohibitive stipulation should revert to the idea of the contract's integrity to harmonise this sanction with its provisions.
5. The prohibitive stipulation can only be invoked against its parties and their general successors. For others, it cannot be enforced unless it is established that they had constructive knowledge or could have known, presumably or hypothetically, through available means or opportunities for knowledge, even if actual knowledge of the transaction has not been realized. Accordingly, this stipulation can be enforced against third parties provided that the legal transaction containing such a stipulation has been publicly registered.

We propose that some provisions regarding the prohibitive stipulation be amended to explicitly allow the judge to correct it in certain cases where such correction is permissible. For instance, if there is an agreement prohibiting disposal for a duration that exceeds its intended purpose, the judge should intervene at the request of an interested party to reduce the duration to a reasonable extent that achieves its intended goal without exceeding it, rather than declaring it entirely void, so that the intended interest behind the prohibitive stipulation is not lost.

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- Appeal No. 750 of year 41, session of 12/31/1975, p. 1746.
- Appeal No. 1180 of the year 49, session of 3/24/1983, Y. 34, part 1, p. 763,
- Appeal No. 794 of the year 52 - Session of 3/31/1985, Y 36, Part 1, Page 536, Rule 112.
- Appeal No. 306 of 53, session 2/19/1987, rule 64, Y 38, p. 280.
- Appeal No. 2903 of 1957, session of November 16, 1989.
- Appeal No. 4145 of the year 74 Session of 2/5/2011 Technical Office 62, Law 97, p. 587.
- Appeal No. 2312 of 69 BC, Rental Departments, 1/3/2014 session.