

## **The Legislative and Jurisprudential Discrepancy Regarding the Advance Payment: A Comparative Analytical Study**

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### **Abstract**

This study aims to determine the ruling on advance payment in Arab laws. Determine the contracts it enters into by tracing the texts of the statutes under study. And analyzing them to understand their provisions, reviewing the most important jurisprudential positions. As well, analyzing rulings, and judicial jurisprudence. The study reached several results, including the discrepancy in legal positions in determining the purpose of the advance payment. Some laws considered it to be an option of cancellation, while others considered its purpose to be an irrevocable option. Additionally, there is a discrepancy in identifying the party with the right to cancel the contract if an advance payment implies cancellation. The study recommended adopting the position of the Kuwaiti and Saudi laws in regulating the advance payment provisions, especially the cooling-off period option and the methods to determine this period.

**Keywords:** Advanced payment, Option of cancellation, Irrevocable option, Cooling off period.

### **Introduction**

The legal rule regarding the contract stipulates that the contract is the law of the contracting parties. It is not permissible for one of the contracting parties alone to modify or revoke what was agreed upon or to cancel it except with the agreement of both parties. Typically, contracts are altered or annulled through mutual agreement or by a court ruling (Knapp, 2023). Practical life and legal changes have led to the increasing use of compensation contracts in transactions such as sales and rentals. One common feature in these contracts is the option for advanced payment. This option allows either party involved in the contract to cancel their obligation by paying a predetermined fee as outlined by the law. If the party who made the advanced payment cancels, they forfeit it. If the party who received the advanced payment cancels, they must refund the payment along with

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an equal amount. Islamic jurisprudence, which influenced Jordanian and other Arab legislation, allowed advanced payments in sales and rent (Arabi, 2021). Arab legislation varied in interpreting whether advanced payments were irrevocable or could be canceled.

The issue stems from inadequate regulation of advanced payments in most legislation. There is no clear basis for determining the cooling-off period for cancellations, except in Kuwaiti civil law. The Kuwaiti legislator established a basis that allows one party to consider a breach as a cancellation if the other party fails to fulfill their obligation within the specified period (Decree Law Kuwait No. 67 of 1980; Al-Humaidi, 2014 ).

The significance of this study lies in the growing prevalence of contracts involving advanced payments, particularly in sales and lease agreements. The legal and judicial debate surrounding advanced payments in such contracts has garnered attention for research, given the legislator's emphasis on honoring the intentions of the parties involved.

Regarding prior research, (Dayeh, 2005) focused on the legislative withdrawal of contracting in consumption contracts, as did (Al-Enezi, 2018) in their study on the option to withdraw from contracting in Kuwaiti law.

Through our study, we try to address the right of cancellation from the advanced payment as a specific form of contracting, its source is the will of the contracting parties and its legal significance. Our study examines the new Saudi Civil Transactions System. This changed the rules for canceling transactions by limiting the option to the party who made the advanced payment, rather than the recipient. This prompts us to analyze this legal standpoint in light of varying legal opinions and positions on the laws being studied.

### **Literature review**

The advanced payment is an amount of money paid by one contracting party to the other at the time of contracting, (Sultan, 2017. p 75; Adrian, & Griffoli, 2023). The purpose of paying the advanced payment is either as an option to cancel, so each contracting party retains his right to withdraw from the contract, provided that the one who decided to withdraw must bear the loss of its value if he paid it. Or refund it and the like if the one who canceled it is the one who received it (Sultan, 2017. p 74). This is according to the legislative positions that will be discussed and analyzed during this study. While Article (107) of the Jordanian Civil Law No. (43) of (1976), published in the Official Gazette on page (2) of Issue (2645) dated August 1, 1976, states: "The payment of the advanced payment at the time of concluding the contract indicates that each of the contracting parties has the right to cancel it unless the agreement stipulates otherwise. "Also, Article

(74) of the Kuwaiti Civil Code also stipulates that: (The payment of the advanced payment, at the time of concluding the contract, indicates that both parties have the option to cancel it unless it appears that they intended otherwise or custom dictates otherwise). While Article (92) of the Iraqi Civil Law No. (40) of 1951 states: “1- Payment of the advanced payment is considered evidence that the contract has become irrevocable and cannot be canceled unless the agreement stipulates otherwise.

According to a group of Muslim jurists influenced by Maliki and Hanbali jurisprudence, advanced payment is considered part of the sale or rent transaction. In the case of the buyer purchases goods and pays a sum of money upfront to the seller (Frolova, 2017). If the sale is completed without cancellation, the advanced payment is deducted from the total price. However, if the buyer cancels, the advanced payment belongs to the seller. If the seller cancels, they must refund the advanced payment (Explanatory memo to the Jordanian Civil Law, page 116).

The advanced payment is considered more widespread in sales and lease contracts, although it is expected to be present in any other compensation contract, such as barter. If we adopt the trend that considers the advance payment as an option for cancellation, it can only be applied to binding contracts on both sides.

The legal basis for off-plan sales in Jordanian legislation is outlined in Article 128/A of the Real Estate Property Law No. 13 of 2019. This article states that a promise to sell a property that is under construction is considered a valid and binding contract when the property is registered, and licensed for construction, and no permission to occupy has been issued.....” (Amman Court, 2020). It is possible to agree to provide an advanced payment in a promise to sell a property if the promise is registered with the Lands Department. In solemn contracts, such a promise is considered a final contract. According to Article 106 of the Jordanian Civil Law, if a person promises to enter into a contract but later refuses, and the other party sues for enforcement of the promise” (Sultan, 2017. p 73).

In cases where an advanced payment is made in solemn real estate contracts, its consideration is restricted to the promise detailed in the registered sale of real estate. If the promise is not registered and the seller declines to finalize registration procedures after an advanced payment by the buyer, the agreement lacks legal effect in transferring property ownership. (Al-Sarhan and Khater. p106; Al-Zoubi, 1993. p131).

The Jordanian Court of Cassation ruled that the contract is considered invalid if an amount was paid as an advance based on an invalid contract for a property sale without proper documentation. Such a contract lacks the legal form for validity and does not transfer ownership.

The viewpoints of the jurists differed regarding the legal adaptation of advanced payment (Hawamdeh, 2023). Some of them believe that the contract with the advanced payment is a contract dependent on a suspensive condition, by fulfillment of which the contract is concluded. This condition is that none of the contracting parties will withdraw from continuing the contract during the agreed period. If that period expires without any of the contracting parties withdrawing or canceling, the suspensive condition will be fulfilled and the contract will produce its effects. If any of the two contracting parties cancel the contract. The ruling of the advanced payment shall be applied by losing it if the one who canceled the contract was the one who paid it, and refunding it and the like if the one who canceled the contract was the one who received it. (Ghani, 1970. p105).

Dr. El-Sanhuri considers the advance payment adaptation an alternative obligation, where the contractor is committed to what was agreed in the contract and claims his fixed right therein. But he is released from the commitment, and his right to payment is forfeited if he pays the advanced payment. Thus, whoever performs the provision of the advanced payment- whoever pays it and cancels the contract, loses it. (El-Sanhuri, 2020, p 91).

We will attempt to clarify, respectively, the aspects of the agreement and the difference between the advanced payment and the penalty clause the appointment option, the advanced payment, and the option to cancel.

The distinction between an advanced payment and a penalty clause is that one contracting party breaches his contractual obligation and the other contracting party is presumed to be harmed and this is the basis of the distinction between the two. For example, Article (364/2) of the Jordanian Civil Law stipulates that (...the court may, in all cases, at the request of one of the parties, modify this agreement in a way that makes the estimate equal to the damage), and any agreement that contradicts this is void.

While the advanced payment is a consideration for the contracting parties' right to cancel and is not compensation, whoever pays the advance payment and cancels the contract loses it, even if the cancellation does not result in damage to the other party. (Siwar, 1985. p 87). The explanatory memo to the Kuwaiti Civil Law stipulates that if it is impossible to implement the obligation of one of the contracting parties. This impossibility is considered a cancellation of the contract, the other contracting party shall not be entitled to more than the value of the agreed-upon advanced payment, because he should have expected the other contracting party to cancel the contract and this expectation and possibility is something imposed by the nature of the deposit ruling.

Cancellation prevents harm to the other party who anticipated this during the cancellation period. If an impossibility arises after the contract is final or

during implementation, and it is the fault of one party, that party is liable according to standard rules. (Explanatory memo on the Kuwaiti Civil Law, 2007). The penalty clause is a reserve obligation that is not imposed if fulfilling the obligation becomes impossible. This means the debtor cannot fulfill the contract by paying the penalty clause. The advanced payment rule is seen as a cancellation penalty, giving either party the option to forfeit the advanced payment instead of fulfilling their contractual duties. (Al-Jubouri, p 179; Al-Fatlawi, 2020. p 82).

The similarity between the advanced payment and the penalty clause appears when the purpose of the advanced payment is irrevocable – that is, the contract becomes final by paying the advanced payment – according to the legislative position of some countries. For example, Article (44) of the Saudi Civil Transactions System or by agreement of the two parties in accordance with some legislation such as Article (107/1) of the Jordanian Civil Code. In this regard, we are faced with interpreted legal rules that can be agreed to violate their provisions. Therefore, none of the contracting parties has the right to cancel the contract, and the payment of the advanced payment is a partial implementation of the contract. (Siwar, 1985, p 87). The general rules apply if a contract is canceled, resulting in damages. The compensation for the cancellation may exceed or be less than the value of the advance payment. The court can ascertain the contracting parties' intention regarding the deposit's purpose, and whether to confirm the contract or not (Jordanian Court, No. 855/2004).

An optional obligation is an obligation that includes multiple things so that the debtor is discharged if he fulfills one of them (Al-Far 2019. p 166). When there are two or more things, either of them is suitable to fulfill the obligation so that the debtor is discharged by the performance of one of them. For the description of the option to be attached to the object of the obligation, the obligation must be multiplied in such a way that an actual ability for the option is realized. This cannot be achieved unless each of these performances fulfills the conditions of the object of the obligation. Jordanian Civil Article (407) states: (1- The subject disposition may be several things, provided that the debtor is discharged if he pays one of them. 2- The option is for the debtor if it is absolute unless the agreement or law stipulates otherwise).

If these conditions are not met except in one of these performances, then the description of the option is not attached to the place, and the place in which the conditions of the obligation are met is considered to be the one that occupies the debtor's liability and is obligated to perform (Al-Jubouri, p 485).

Part of the jurisprudence holds that the option of cancellation is the basic idea of the option of withdrawal on contracting, which is stipulated in a group of legal options, but using the advanced payment option means applying its rule.

(Dayeh, 2005. P 302). The Jordanian legislator allows for the withdrawal option in contracts, such as in the case of conditions, as outlined in Article 177 of the Jordanian Civil Code. This provision permits the contracting parties to include a withdrawal clause or agree on it afterward for a specified period. If no period is agreed upon, the judge may determine it based on custom. Another example is the option of inspection, as detailed in Article 184 of the Jordanian Civil Code. This provision grants the right of inspection to the party to whom the disposition was issued, even if not explicitly stipulated, provided that the subject of the contract was not observed and an appointment was made. The advanced payment option differs from the withdrawal option in various aspects.

First: in its source. The agreement is the source of the contracting party's obligation to pay the advanced payment. As for the option of withdrawal in the form of modifications stipulated in various legislations, its source is the text of the law. An example of this is the text of Article (10) of the Kuwait Consumer Protection Law No. (39) of 2014 (Without breach to any securities, legal clauses, or better agreement for the consumer, and in what shorter periods are not specified by the Committee given the nature of the goods, the consumer, within fourteen days of receiving any goods, has the right to replace it or return it with a refund of its value without any additional cost.). Or the will of the contracting parties in what is known as a contractual recourse, such as the requirement to try the product in the sales contract and the taste clause. However, in all cases, the legislator determines valid legal bases for determining the period of the use of the withdrawal option or the clause option. For example, in the text of Article 177 of the Jordanian Civil Code mentioned earlier, where the legislator presented the will of the contracting parties. At the same time determined valid bases for determining the period of the withdrawal option, such as the court and customs. (Al-Enezi, Abdul Majeed Khalaf Mansour, his research on the option to withdraw from contracting in Kuwaiti law, page 118).

Second: The option of cancellation upon the payment of advanced payment is paid to both parties to the contract, while the legal withdrawal option proves to one of the parties to the contract without the other, for example, the clause of trial and the clause of taste.

Third: The cancellation of either party to the contract, if the indication of the advanced payment is the cancellation, means the implementation or application of the advanced payment provision. Therefore, if the one who paid the advanced payment was canceled, he lost it, and if the one who received the advanced payment was canceled, refunded it, and the like. While the option of withdrawal returns both contractors to the state they were in before the contract.

Fourth: the legislator in the option of withdrawal determines a legal period for it, it is inconceivable to use it after its expiration, while the period of the cancellation option in the contract by advanced payment may be determined by agreement of the parties.

Fifth: Contracts in which the legislator grants one of the contracting parties the option of withdrawal are considered irrevocable and final contracts, but the legislator provides protection or advantage to one of the parties to the contract by deciding such an option. (Adnan, 2016. p 628).

Jurisprudence acknowledges that making a contract with an advance payment is a common way to withdraw from a contract, particularly in sales and lease agreements. This allows either party to cancel the contract at their discretion. The party who made the advanced payment forfeits its value if it cancels the contract. (Al-Enezi, Abdul Majeed Khalaf Mansour, *The Option to withdraw Contracting in Kuwaiti Civil Law, A Comparative Study*, *Kuwaiti International Law Journal*, 2, 6<sup>th</sup> Year, 2018, Page 104).

### **Research Methods**

To reach our goal of analyzing legal positions and discussing jurisprudential opinions. The study adopted both the analytical and the comparative methods between the laws under study to reach their provisions and analyze their positions. Also, to determine the standard adopted by these laws in determining the purpose of the advanced payment and its significance. The relevant judicial provisions will also be analyzed and identified, all through a set of references and previous studies in this regard.

### **Results and Discussion**

As previously explained, one legislative position states that the advanced payment allows for the possibility of cancellation as a general rule. While the contract is considered irrevocable if the advanced payment is made according to the agreement as an exception. The other legislative trend views the payment of the advanced payment as an indication that the contract is finalized and allows for the option to cancel with the agreement of both parties. In line with this trend, the Emirati legislator addressed the Civil Transactions Law No. (5) of 1985, wherein Article (148) stipulates the following: 1. Payment of the advanced payment serves as evidence that the contract is irrevocable and cannot be canceled unless agreed upon or customs dictate otherwise. 2. If the contracting parties agree that the advanced payment is a penalty for canceling the contract, each party has the right to cancel. If the party who made the advanced payment cancels, they will forfeit it.

If the party who received the advanced payment cancels, they must refund it accordingly.

Thus, we note the impact of the agreement on the parties involved in determining the purpose of the advanced payment. The judiciary's role was solely to confirm it. The Jordanian Court of Cassation follows a principle and rule to establish the purpose of the advanced payment and its legal provision. It prioritizes the intention of the contracting parties, stating that their intention is the primary factor to consider in applying the legal provision for the advanced payment. If the intention is to make the advanced payment irrevocable, it becomes part of the payer's obligation, constituting partial fulfillment. In this case, the provision for an advanced payment does not apply. However, if the parties intend for each of them to have the option to proceed with or cancel the contract, the payment is considered an advanced payment under Article 107 of the Jordanian Civil Code. (Jordanian Court, 855/2004; Jordanian Court, 254/2004).

The Kuwaiti Court of Cassation has ruled that if the contracting parties do not agree that an advanced payment confirms the irrevocability of the contract, then each party has the option to cancel it. The trial court has the right to conclude from the contract and the circumstances whether the amount paid is part of the price at which the contract was finalized and concluded. Or whether it is an advanced payment that indicates the cancellation for each contracting party (provision of the Kuwaiti Court, 168/ 2023; Provision of the Kuwaiti Court, 994/2008).

As for the Saudi legislator, in the civil transactions system (Mahasneh, 2023; Awwad, 2024), it went further than previous legislation by considering that the payment of an advanced payment means that the right of cancellation is for the one who paid it only, without the other party who received the value of the advanced payment, as Article (44/1) stipulates (The payment of the advanced payment upon concluding the contract indicates that the payer of the advanced payment alone has the right to cancel the contract. If he cancels it, he does not have the right to recover the amount of the advanced payment, and all of that unless otherwise agreed upon).

We believe that the Saudi legislator has allowed room for agreement on contradicting provisions in the previous paragraph. This position enables the application of the advanced payment provision. However, we align with previous legislative positions of the laws under study, which granted the option of cancellation to both contracting parties. The contract requirements are binding on both sides throughout its conclusion and implementation. It grants equal rights to dissolve the contractual bond within legal controls and this includes the right to cancel.



We believe that the Saudi legislature aligns more with Kuwaiti law in establishing a standard for the period of cancellation. According to this standard, the period of cancellation can be set by mutual agreement of the two parties. If there is no such agreement, the court will determine the period based on customary practices and the specific circumstances of the contract. Similarly, in the third paragraph of the same article, the Saudi legislator considers the silence of the payer of the advanced payment until the agreed-upon period has passed, or the failure to fulfill contractual obligations, as grounds for cancellation.

In the end, after trying to identify the rule of advanced payment, its purpose, and its legal system in the laws under study, we came to several conclusions and recommendations as follows:

### **Conclusion**

The advanced payment is an amount of money paid by one of the contracting parties to the other at the time of the contract as an option to cancel. So both contracting parties reserve their right to withdraw from the contract, provided that the one who decided to cancel must bear the loss of its value if he was the one who paid. Or refund it, and like that if the one who received it canceled the contract. The legislative positions varied in regulating the advanced payment rule as a system established in compensation contracts. Some of them considered that the payment of the advanced payment indicates that the contract has become irrevocable unless the agreement stipulates otherwise. Other legislation considers the payment of the advanced payment an indication of the option to cancel and the possibility of withdrawing from the contract unless the agreement stipulates otherwise. The acceptance of the advanced payment and its provision is envisaged in the promise contained in the transfer of ownership of a property according to the Jordanian Real Estate Property Law.

Jurisprudences differed in the legal adaptation of the advanced payment, as some see a contract with an advanced payment as a contract contingent on a suspensive condition. Others see that a contract with an advanced payment is a contract contingent on a resolutive condition. Others consider it an alternative obligation and others evaluate their legal adaptation to it according to its indication and purpose. If its indication is to cancel, it is considered an alternative obligation, but if its purpose is a security for the performance of the contract. It is considered a form of insurance in kind, in all cases, it can be said that this type of contract was imposed by practical life. It is in line with human nature, which needs to review its contracts based on profit and loss, and is imposed by the custom in societies.

The contractual compensation (penalty clause) assumes that one of the contracting parties breached his contractual obligation and that the other contracting party was harmed. While the advanced payment is considered compensation for the contracting party's right to cancel. If the purpose of the advanced payment is the possibility of cancellation. Then the contracting party must implement his contractual obligation with the possibility of cancellation and its implementation. The subject of the optional obligation includes several things that will discharge the debtor if he fulfills one of them

In jurisprudence, the concept of advanced payment is viewed as the foundation of the withdrawal option. This concept is commonly found in various legal systems, particularly in sale contracts with trial and taste clauses. However, advanced payment differs from the legal withdrawal option in its origin and conditions. These variations, along with others discussed in the research text, set them apart.

### **Recommendations**

- The Jordanian legislator and the Arab laws that are the subject of this study must adopt the position of the Kuwaiti and Saudi legislators in determining the cancellation period when applying the advance payment rule.
- The Jordanian legislator must adopt the position of the Kuwaiti legislator in assuming the impossibility of implementation during the option period due to the error of the other contracting party.

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