

# The Ruling on the Penal Condition Imposed for Delaying the Payment of Debts in Islamic Jurisprudence and Kuwaiti Civil Law (A Legal Jurisprudential Study)

Dr. Ahmad Abdulrahman Al Sheehah

Associate Professor at Amman Arab University, Email: ahmad.alsheha@aaau.edu.jo

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## Abstracts

The evasion of paying debts has become widespread in our contemporary reality. Its causes are usually attributed to the penalty clause included in various contracts, such as compensating the creditor with a sum of money if the debtor is late in paying, which is the practice of usurious banks and some contracts, which results in a legal sin due to the usury that surrounds those transactions, which is forbidden by Islamic law; therefore, there has become an urgent need to study the penalty clause, clarify its nature, explain its ruling, and the rulings related to it, whether in Islamic jurisprudence or Kuwaiti civil law. The nature of the penalty clause, the conditions for its entitlement, and its ruling have been explained, and the most likely opinion is that it is not permissible to stipulate financial compensation for late payment of a debt in a specific amount or at a specific percentage, because it is the forbidden usury of the Jahiliyyah, and it is permissible to stipulate a penalty clause in all financial contracts except for contracts in which the original obligation is a debt, because this is explicit usury, and the most likely opinion is that it is permissible to stipulate compensation for the action of the solvent debtor who delays payment for the actual damage resulting from the loss of the confirmed profit without the lost profit, and the permissibility of financial punishment against the solvent debtor who delays, and spending it in the public interest has a legal direction from the perspective of Islamic policy in order to deter delayers, and that the Kuwaiti Civil Law has invalidated every agreement on usurious interest, in any form, even though it allows the creditor to request compensation under specific conditions, and compensation is optional for the judge and the requirements of justice are taken into account in it.

## 1. Introduction

The problem of this study is represented in the penalty clause stipulated for delaying the payment of debts, as it raises many issues related to explaining its ruling in Islamic jurisprudence and Kuwaiti civil law, clarifying the various justifications of those who say it is permissible, and its scope, and clarifying the legal and Sharia controls related to including it in various contracts, and the relevant legal and Sharia rulings.

This raises many of the following problems:

1- The nature of the penalty clause in jurisprudential and legal terminology.

2- The ruling on including the penalty clause in contracts in Islamic jurisprudence and Kuwaiti civil law.

3- The ruling on the penalty clause in contracts in which the subject of the obligation is not a debt, which includes compensating the creditor with an amount of money if the debtor is late in fulfilling the obligation in Islamic jurisprudence and Kuwaiti civil law.

4- The ruling on the penalty clause in contracts in which the subject of the obligation is a debt, which includes compensating the creditor with an amount of money if the debtor is late in fulfilling the obligation in Islamic jurisprudence and Kuwaiti civil law.

5- The ruling on stipulating late compensation after the occurrence of damage in Islamic jurisprudence and Kuwaiti civil law.

### Importance of the study

The importance of the study lies in the following:

1- It relates to a realistic issue in which people must know the Sharia ruling, especially concerning penalty clauses in contemporary contracts.

2- The seriousness of this topic, especially in this era in which the phenomenon of evasion of debt payment has spread in Islamic societies.

3- Clarify the Sharia ruling on penalty clauses and the controls for including them in contracts, what is permissible and what is not, and clarify the ruling of Kuwaiti civil law.

4- Clarifying the greatness of Islamic law, which has not left a contemporary incident without clarifying the Sharia ruling on it.

5- Protecting individuals from financial transactions that violate Islamic law in light of the spread of dealing in usurious transactions.

6- Continuing the efforts of our ancestors in serving Islamic jurisprudence.

## 2. Literature Review

Al-Zarqa, Mustafa Ahmed Study' Harmful Act and its Guarantee', where the author aims to evaluate guarantee and compensation, focusing on penalty clauses. The researcher employed the analytical approach and comparative criticism between the Islamic schools of thought. According to the study, Islamic law allows penalty clauses within stringent controls to achieve justice between the parties to the contract and avoid exploitation or infliction of harm.

According to Shaaban The study of Zaki al-Din's theory of the conditions attached to contracts in Sharia and law is to investigate the conditions attached to contracts under Shariah and compare them with civil law. Comparing the findings of the study, the study established that penalty clauses are permissible in Islamic law in as much as controls that seek to strike a balance in rights are put in place and that these conditions are on par with the contemporary civil contract laws and intend to protect the aggrieved party in the contract.

The research study of Ibn Taymiyyah – Ahmad ibn Abd al-Halim – compiled between the 14th and 15th centuries in *Majmu al-Fatwa*—provides a set of fatwas dealing with conditions in the Islamic contract. Based on the collection and processing of the fatwas, the study argues that penalty clauses may be lawful in some occasions in as much as they do not entice unfair treatment of one party by the other.

**Al-Bayan** The study titled *The Penalty Clause between Acceptance and Rejection: Comparative Study of Sharia and Law* is a comparative study title, especially between the Shari'ah jurisprudential rules and civil codes regarding the lawful and lawful invalidity penalty clause. The paper also established that the penalty clause is allowed in Islamic Sharia under some conditions and approved its conformity to contemporary laws that state that the injured party has a right to seek redress where they can recover from the other party fair and reasonable compensation without exaggeration.

To this end, the present paper is going to use *Al-Khafif* A study titled "Guarantee in Islamic Jurisprudence" will focus on financial guarantees and the contract penalty clause. Analyzing with the help of jurisprudential rulings and legal texts, the researcher pointed out the admissibility of guarantee and penalty clauses if certain legal restraints that eliminate the arbitrariness and contracts' exploitation are preserved.

The legal analysis of penalty clauses in civil contracts is covered in *Al-Wasit fi Sharh Al-Qanun Al-Madani*, written by *Al-Sanhouri* The study was based on legal analysis and criticism of the provisions of the Civil Code. If penalty, the conclusion of the study shows that the Civil Code recognizes the penalty clause as a means of compensating the injured party, which is justified by justice and logic.

In his study, *Ibn Abidin* In the book *Al-Durr Al-Mukhtar ala Rad Al-Muhtar* (*Ibn Abidin's* commentary), the author tries to compile legal opinions on penalty clauses in contracts. The commentary analyzed fatwa collections, while the study focused on the balance of interests and the absence of penalty provisions that are unjustified to the parties.

**Al-Zuhayli's** The research study is on "Compensation for Damage from a Delaying Debtor," applying a jurisprudential analytical method to explore the chances of compensating the creditor if the debtor delays. In conclusion, the authors proposed that in Sharia law, the creditor can be compensated for loss suffered by procrastination while calling for accountability mechanisms to prevent creditors from acting whimsically.

The work entitles the penalty clause discussed by *Shaaban, Zaki al-Din* Provides a subject prolegomenon on the validity of the penalty clause using the analytical, comparative method between Sharia and positive laws. The study also concluded that the penalty clause is allowed under Shariah in cases where there is no exploitation, and it also clarified the call to moderation of the amount of compensation to do justice to the injured party.

### 3. Research Methodology

As for the method that I will follow in this study, it is a combination of the inductive method, the comparative analytical method, and the descriptive method, as follows:

First: The inductive method: This is done by inducting the texts related to the subject, referring to the books of ancient and contemporary jurists and law books.

Second: The comparative analytical method: I analyze, comment on, and explain the opinions of the jurists I have, comparing them as much as possible and using the analytical method as the most appropriate method in legal studies and the comparative method as the general Sharia and the basis for deriving the provisions of the law.

Third: The descriptive method: I describe this material as it appeared in its original sources without any addition, subtraction, or interference from me except formulating the idea.

#### Research Procedures

First, I will refer to sources, references, and studies related to the research topic.

Second, If the jurisprudential issue is a matter of agreement among jurists, I mention who transmitted this agreement and what supports it from the books of the schools of thought.

If the issue is a matter of disagreement among jurists, I follow the following approach:

- Defining the point of disagreement and dispute among jurists, so I mention first what the jurists agreed upon, then I follow it with what they disagreed upon, and that is in the issues in which there is agreement and disagreement in their details.
- Presenting the sectarian opinions according to the historical sequence of the emergence of the school unless there is a benefit in presenting or delaying.
- Mentioning the reason for the disagreement among jurists, so if I find someone who mentioned the reason among scholars, I agree. Otherwise, I strive to mention what seems to be the reason for the disagreement among jurists.
- I strive to provide evidence for the statements by mentioning the evidence of the proponents and explaining the evidence—if any—otherwise.
- Discussing the evidence and what can be used to answer it is what appears to me to be weak. As for the evidence with a share of consideration, I do not discuss it or explain its strength because not discussing it is evidence of my conviction in it.
- Mentioning the researcher's chosen statement after stating the statements of the schools of thought and their evidence and discussing them, according to what appears to me from the evidence, what the rules of Sharia indicate, and its general objectives, and its moral generalities, and following that by mentioning the reasons for the choice.
- Clarifying the decisions of the jurisprudential assemblies and the legal standards related to the research topic.

Third: Attributing the noble verses by mentioning the name of the surah and the verse number.

Fourth: Graduating the prophetic hadiths mentioned in the research, following the following method:

If the hadith is in the two Sahihs of Bukhari and Muslim - may Allah have mercy on them - or in one of them, I limited myself to adding it.

Fifth: Documenting information and opinions from legal and religious texts. Sixth: Pay attention to the Arabic language rules, spelling, and punctuation.

### Research Plan

This research consists of an introduction and three chapters, as follows:

#### Introduction

First: The legitimacy of borrowing and the obligation to pay debts

Second: The problem of insolvency and evasion of paying debts and the Islamic Sharia's treatment of them

The first chapter: The meaning of the penalty clause and its ruling in Islamic jurisprudence and Kuwaiti civil law.

The second chapter: The ruling on the penalty clause, which includes compensating the creditor with money if the debtor is late in paying in Islamic jurisprudence and Kuwaiti civil law.

The third chapter: The ruling on stipulating late compensation after damage occurs in Islamic jurisprudence and Kuwaiti civil law.

#### Introduction:

First: The legitimacy of borrowing and the obligation to repay debts:

1- The legitimacy of borrowing:

Borrowing is legitimate for the following reasons:

First: The Holy Quran

Allah the Almighty says: {O you who have believed, write it down when you contract a debt for a specified term.} [Al-Baqarah: 282]

The point of evidence: The legitimacy of borrowing debts in financial transactions between people.

Al-Qurtubi (671 AH - 7/1273 AD - 13) said: "It includes all debts unanimously."

Second: The Prophetic Sunnah

There is more than one hadith proven in the honorable Sunnah that indicates the permissibility of borrowing, including what was narrated by Ismail bin Ibrahim bin Abdullah bin Abi Rabi'ah, on the authority of his father, on the authority of his grandfather, who said: The Prophet, may God bless him and grant him peace, borrowed forty thousand from me, then money came to him,

and he gave it to me, and said: "May God bless you in your family and your wealth. The reward for a loan is praise and repayment."

The meaning of the evidence: The Prophet - may God bless him and grant him peace - borrowed a debt to help the poor and to equip himself with it in the way of God Almighty and other similar forms of goodness.

Third: Consensus

Muslims have agreed on the legitimacy of borrowing.

Ibn al-Mundhir (319 AH-4/931 AD-10) reported the consensus when he said: "Everyone we know from among the people of knowledge has agreed that borrowing dinars, dirhams, wheat, barley, raisins, dates, and whatever is similar to it from all other foods that are measured and weighed is permissible."

He said: "They agreed that whoever borrows something is permissible to borrow, and someone like him responds to him, saying that it is permissible."

## 2. Obligation to pay off debts:

Debts must be paid off when due, based on the following evidence:

First: The Holy Quran

- The Almighty says: {And pay it to Him with goodness} [Al-Baqarah: 178]

The evidence: doing good in paying off debts and paying them in the best possible way.

Al-Saadi (1956) said: "This is commanded in everything established in people's debts to a person. The one with the right is commanded to follow what is good, and the one with the right is commanded to pay it with goodness."

Second: The Prophetic Sunnah

On the authority of Abu Hurairah, may God be pleased with him: The Messenger of God, may God bless him and grant him peace, said: "Delaying payment by a wealthy person is injustice, so if one of you is pursued over a debt, let him pursue it.

- The meaning of the evidence: The obligation to pay debts to discharge one's responsibility, and delaying this is a type of injustice. Ibn Hajar (852 AH - 9/1449 AD - 15) said: "What is meant here is delaying what is due to be paid without an excuse."

Second: The problem of insolvency and evasion of paying debts and how Islamic law deals with it

If the due date for paying debts comes, the creditor demands the debt from the debtor, but the debtor may be unable to pay the debt and be insolvent. Here, Islamic law urges him to give his time until his situation becomes more accessible. God Almighty says: {But if he is in hardship, then grant him respite until it is easy for him. But if you remit it through charity, it would be better for you if you only knew about it.} [Al-Baqarah: 280].

Ibn Rajab (795 AH-8/1393 CE-14) said: "Whoever has a debt, he is not asked to pay it back even if he is insolvent, but rather his financial situation is considered. God Almighty said: {But if he is in hardship, then let there be postponement until it is easy for him to repay.} [Al-Baqarah: 280]. Most scholars agree with this, unlike Imam Shuraih (78 AH-1/697 CE-7), who said: The verse is specific to usurious debts in the pre-Islamic era, and the majority took the general wording..."

The creditor may deliberately not pay the debt, procrastinate, and evade fulfilling it. Islamic law has dealt with this without any procedure, as follows:

1. Request for compulsory fulfillment:

- The debtor must pay his debt to the creditor when the time for payment comes, but he may refuse to pay the debt despite his ability; in this case, the debtor has no choice but to take this to court, and the judge forces the creditor to pay the debt.

- The jurists distinguished between whether the debt he owes is fungible and what he has is similar, in which case, the judge forces him to pay the debt from what he has, and whether the debt is fungible and what he has is valuable, so they differed:

The majority of jurists, the two companions of Abu Hanifa (150 AH-2/767 AD-8) (Abu Yusuf (182 AH-2/798 AD-8) and Muhammad ibn al-Hasan (189 AH-2/804 AD-9)), the Malikis, Shafi'is, and Hanbalis, went to force the judge to force the debtor to sell what he had and pay off his debt, and they exempted his necessary needs from that.

Abu Hanifa (150 AH-2/767 AD-8) held that the judge should detain him until he pays his debt without compulsion to sell.

2. Sequestration of the bankrupt debtor:

The majority of jurists Permitted placing a bankrupt debtor under guardianship, and they provided evidence for that as follows:

1. - What was narrated by Al-Bayhaqi (458 AH - 5/1066 AD - 11) on the authority of Ibn Ka'b bin Malik, who said: Mu'adh bin Jabal (18 AH - 1/639 AD / 7) may God be pleased with him, was a handsome, easygoing young man, one of the best young men of his people. He was never asked for anything except that he gave it to him until he was in debt and his wealth was closed. So he spoke to the Messenger of God - may God bless him and grant him peace - about speaking to his creditors on his behalf, and he did so, but they did not give him anything. If anyone had been left with the words of anyone, Muadh would have been left with the words of the Messenger of God. May God bless him and grant him peace. He said: So the Prophet, may God bless him and grant him peace, called him, and he did not stop until he sold his property and divided it among his creditors. He said: So Muadh, may God be pleased with him. He stood up, but he had no money.

The meaning of the evidence: The Prophet, may God bless him and grant him peace, seized Muadh's money, may God be pleased with him, and sold it to cover a debt he owed.

2. What Malik (179 AH-2/795 AD-8) narrated with his chain of transmission that a man from Juhayna used to outpace the pilgrims and buy mounts. He would make them expensive. Then, he would speed up his journey and outpace the pilgrims. He became bankrupt, and his case was referred to Umar ibn al-Khattab, who said: As for what follows. "O people, al-Usayfi', Usayfi' of Juhayna, was pleased with his religion and honesty. By saying, "The pilgrim has gone ahead, and he has already taken a loan, turning away. Now, he has become indebted to him. So whoever has a debt, let him come to us in the morning. We will divide his wealth among them. And beware of debt, for its beginning is worry, and its end is war."

The meaning of the evidence: the legitimacy of placing a guardian over the bankrupt debtor. It was discussed that it is weak.

3. Because he is under guardianship and needs to pay off his debt, it is permissible to sell his property without his consent, similar to a minor or a fool.

4. Abu Hanifa (150 AH-2/767 AD-8) held that it is not permissible to place a bankrupt debtor under guardianship because there is no guardianship over his money and because placing him under guardianship is a waste of his humanity. However, if payment can only be made by force, the judge forces him to sell not to consume people's money unjustly. God Almighty said: {O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent.} [An-Nisa': 29].

5. Imprisonment of the debtor: The creditor may submit a request to imprison a wealthy debtor who refuses to pay his debt.

## Chapter One

The meaning of the penalty clause and its ruling in Islamic jurisprudence and Kuwaiti civil law

- Different contracts may include what is known as a penalty clause. For example, a contracting contract may contain a penalty clause that obligates the contractor to pay a certain amount for each day or week when he is late in completing the work.

- It is established that the penalty clause is a modern clause that was not known to the earlier jurists, which requires explaining its content, its jurisprudential basis, and its ruling in Islamic jurisprudence and Kuwaiti civil law, as follows:

First: The nature of the penalty clause:

This word is composed of two words: the condition and the penalty, and the explanation of both is as follows:

### 1- The condition:

The condition in the language:

Its origin is (sharat), and (the condition) is well-known, and it is the obligation and commitment of something in a sale and the like, and its plural is (shrutu), and he stipulated for him and upon him such and such, he stipulates and stipulates a condition, and he stipulated upon him. The condition: like the condition, and he stipulated it and stipulated for him in his estate, he stipulates



and stipulates, and he stipulated for the employee, he stipulates a condition. And (the condition) its plural is (shara'it). (The condition) with two fat-has is the sign. Moreover, (the signs) of the Hour are its indications.

Condition technically:

A condition may mean what the Sharia requires for the validity or necessity of something, such as the condition of the validity of worship or the condition of the necessity of a contract. It is defined as "what necessitates nonexistence from its absence, and its existence does not necessitate existence or nonexistence in and of itself."

The contracting party may obligate himself to an obligation in the contract; thus, the condition is linked to the contract. Al-Hamawi (1687-17) said: "The condition is an obligation to do something that did not exist, in something that did exist in a specific form."

2. The penalty:

Punishment in language: Al-Jazā'ī is derived from the word "jazā'," and its root is "jazā" (to reward), the letters jīm, zay, and ya': the standing of something in place of something else and rewarding it. Al-Jazā': the reward for something, he rewarded him with it and for it, and he rewarded him with a reward and a recompense; and the saying of Al-Hutay'ah: Whoever does good will not be deprived of his reward. Furthermore, (jazahuhu) for what he did, he rewards him (jaza'an) and (jazahuhu) have the same meaning. It is said that I rewarded so-and-so, I rewarded him with a reward, and I rewarded him with a reward.

Reward technically: wealth, sufficiency, reward, recompense, and punishment for disobedience. God Almighty said: {The only reward of those who wage war against God and His Messenger and strive after corruption in the land will be that they will be killed or crucified or have their hands and feet cut off on opposite sides or be exiled from the land} [Al-Ma'idah: 33]. God Almighty also said: {And the recompense for an evil act is an evil act like it} [Ash-Shura: 40].

Second: The ruling on the penalty clause in Islamic jurisprudence

Contemporaries differed on the ruling on the penalty clause. Some considered it impermissible and prohibited its stipulation, while most contemporaries permitted it. This is explained as follows:

The jurists differed on its legitimacy in two opinions:

The first opinion: The penalty clause is impermissible, considering it an innovated condition with no basis, and it is like two sales in one sale that is prohibited.

The second opinion: The penalty clause is permissible, considering that permissibility is the basis for conditions, provided that it does not contradict the Qur'an, the Sunnah, or consensus.

Evidence for the first statement:

1- On the authority of Aisha, may Allah be pleased with her, that the Prophet, may Allah bless him and grant him peace, said:

"What is the matter with men who stipulate conditions not in the Book of Allah? Whatever condition is not in the Book of Allah is invalid, even if there are a hundred conditions. Allah's judgment is more just, and Allah's condition is more binding. And loyalty is only for the one who frees."

Evidence for the second statement:

1- The Almighty's saying: {O you who have believed, fulfill contracts} [Al-Ma'idah: 1].

The point of evidence: The penalty clause is a type of conditional agreement between the two parties to the contract; therefore, it must be fulfilled like the rest of the contracts.

The prevailing opinion:

The validity of the statement that the penalty clause is permissible is likely due to the strength of the evidence of those who say it is permissible and the weakness of those who forbid it. Moreover, because the basic principle regarding contracts and conditions is permissibility and validity, Sheikh al-Islam Ibn Taymiyyah (728 AH - 8/1328 AD - 14) said: "The basic principle regarding contracts and conditions is permissibility and validity, and nothing is forbidden or invalidated from them except what the Shari'ah indicates is forbidden and invalidated."

Its validity is confirmed by the interest it contains, closing the doors to chaos, preventing tampering with the rights of servants, and causing them harm. It was, therefore, in the interest of considering it valid and binding when agreeing to it and acting by it.

The jurisprudential basis of the penalty clause:

Contemporaries differed in explaining the jurisprudential basis of the penalty clause, with multiple opinions, as follows:

The first opinion: The penalty clause is derived from the sale of the deposit.

The basis of the similarity is that both are estimates of compensation: the penalty clause estimates compensation in the event of breach of contract, and the deposit estimates compensation in the event of withdrawal from the contract.

However, there are many differences between them, including the following:

1- Unlike the penalty clause, the seller is entitled to the deposit when the buyer withdraws from the contract, whether that harms him or not, as the creditor is not entitled to compensation unless there is harm.

2- It is not permissible to modify the deposit, unlike the penalty clause, which is characterized by the permissibility of its modification.

3- The buyer has the choice in the sale of the deposit between completing the contract or leaving the deposit. As for the contract that includes the penalty clause, the debtor is obligated to implement it as long as possible, and he has no choice.

4- The majority of jurists are against selling the deposit, as it is a disputed principle, so the penalty clause cannot be derived from it.

The second opinion: The grading of the penalty clause by analogy to the lease. Some I went to grade it by analogy to the lease. They provided evidence for that with what Al-Bukhari (256 AH-3/870 AD-9) narrated in a suspended form on the authority of Ibn Awn, on the authority of Ibn Sirin, a man said to his hirer: "Move your camel, and if I do not travel with you on such and such a day, then you have one hundred dirhams." So he did not go out, so Shurayh said: "Whoever makes a condition upon himself willingly and not under duress, then it is upon him."

This is discussed in the same way that the sale of a down payment was discussed because this is like a lease, and a lease is, in reality, a sale of benefits, so the analogy is not valid. Then, Shuraih was disagreed with by the majority of jurists.

The third opinion: Applying the penalty clause to the mortgage and guarantee

It is discussed that the fact that the penalty clause is in the contract's interest may not be disputed. However, its likening to a mortgage and a guarantor is not apparent because the mortgage is not compensation for harm. However, instead, the right is collected from it, and as for the guarantee, if what is meant by it is a guarantee, then it is like a mortgage, and if what is meant by it is a guarantee of the debtor's body, then there is nothing in it of compensation.

The fourth opinion: The penalty clause is a new condition:

- Since the penalty clause is a new condition that cannot be derived from what came before, it is permissible because the original condition is valid. Its goal is to close the doors to chaos and tampering with the rights of God's servants and to push people to fulfill contracts and abide by them.

Conditions for eligibility of the penalty clause

The penalty clause must be enforced in order to be eligible for payment, including:

First condition: There must be a breach of the agreed-upon condition, expressed by the presence of an error because the penalty clause is not due from the debtor if there is no breach of the agreed-upon condition.

Second condition: There is no legitimate excuse in Sharia for not fulfilling the contract within the specified time.

That is why the Fiqh Council's decision states: "The penalty clause shall not be enforced if the party upon whom it was imposed proves that his breach of the contract was due to a reason beyond his control..."

The decision of the Council of Senior Official Scholars in Saudi Arabia stated: "The penalty clause stipulated in contracts is a valid condition that must be taken into account, unless there is an excuse for breaching the obligation that requires it and is considered legally, in which case the excuse is a nullifier of its obligation until it is removed."

Third: The rule of the penalty clause in Kuwaiti civil law:

The Kuwaiti Civil Law generally permits the creditor to request compensation for the debtor's delay in fulfilling his obligations, provided that the delay harms him. Article 293 of the Kuwaiti

Civil Law stipulates that: "When it is impossible to perform the obligation in kind, or there is a delay in it, the debtor must compensate the creditor for the harm that has been caused as a result, unless the debtor proves that the failure to perform or the delay was due to an external reason for which he has no hand." The result is that Kuwaiti civil law explicitly permits the principle of compensation for delays in fulfilling obligations in general, by what is stated in this article.

The question arises about the ruling on stipulating compensation as a penalty between the contracting parties in Kuwaiti Civil Law: Article 302 of the Kuwaiti Civil Law states that "If the subject of the obligation is not a sum of money, the contracting parties may estimate the compensation in advance in the contract or a subsequent agreement."

This means that it is permissible to agree in advance on the estimation of the compensation due in the event of the debtor's breach of one of his contractual obligations, known as the penalty clause or agreed compensation. This is done by including it when concluding the contract between the two parties or in a subsequent agreement.

#### Conditions for Entitlement to the penalty Clause in Kuwaiti Civil Law

Certain conditions must be met for the penalty clause to be due if the subject of the obligation is not a sum of money , and they are:

1. There is an error on the debtor's part: If there is no error, compensation is not due.

The Court of Cassation ruled that "it is established - in the judgment of this court - that late payment fines in the field of contracting contracts are considered a penalty clause or agreed-upon compensation that is subject to the control of the court of subject matter in terms of entitlement and assessment. The contested ruling concluded from the facts of the case, the agreement of the two parties, and the deposited expert report that the respondent was late in completing the contracting work on 11/8/1999 until the time of payment of the last installment in November 1999, without claiming that this was due to the appellant. Therefore it was entitled to a late payment fine estimated by the court at 10% of the contract value, which is 1,700 dinars. Since this conclusion of the ruling is permissible and falls within the court's discretionary authority of subject matter in this regard, the objection to it for this reason is baseless."

2. If the creditor suffers no harm: If the creditor does not suffer any harm, he is not entitled to compensation, even if the contracting parties agree to this. This is what is stipulated in Article 303 of the Kuwaiti Civil Code, which states that: "The agreed-upon compensation shall not be due if the debtor proves that the creditor did not suffer any harm. ... Any agreement to the contrary shall be null and void." It is clear from the text of Article 303 that the agreement stipulates the element of harm, so compensation shall not be awarded if the debtor's failure to fulfill his obligation does not harm the creditor.

3. That the damage that befell the creditor was the result of an error on the part of the debtor: There must be a causal relationship between the debtor's error and the damage that befell the creditor, such that the debtor's action, whether failure to fulfill his obligation or delay in fulfilling it, is what caused the damage to the creditor.

Suppose the damage is caused by a cause outside the debtor's control, and there is no causal relationship between the debtor's error and the damage caused to the creditor. In that case, the creditor is not entitled to compensation, as if it occurred due to a third party, emergency circumstances, etc.

4. The creditor notifies the debtor: This is to prove the debtor's procrastination in fulfilling his contractual obligations.

- Article 303 stipulates that: "... The court may reduce the compensation from what was agreed upon if the debtor proves that the estimate was greatly exaggerated, or that the obligation was partially implemented." This means that the judge may amend the penalty clause by reducing it if it becomes clear that his estimate was exaggerated or increasing it if it becomes clear that it was less than the damage, as the penalty clause is not a source of the obligation to compensate. However, the conditions required to rule on compensation must be met. However, the benefit of the penalty clause in this case is evident in that it establishes a non-conclusive legal presumption of the occurrence of the damage, so the creditor is not required to prove it. However, the debtor is responsible for proving that it did not occur, so if the debtor proves that the creditor did not suffer any damage, then one of the pillars of liability is no longer in effect, and therefore, the court does not rule on any compensation.

The Court of Cassation ruled that "it is established - in the judgment of this court - that the text in Articles 302 and 303 of the Civil Code and what is stated in the explanatory memorandum to this law indicates the permissibility of agreeing in advance to estimate the compensation due in the event of the debtor's breach of his obligation, which is known as the penalty clause or contractual compensation, and that the existence of the penalty clause presumes that the estimate of compensation therein is proportional to the damage suffered by the creditor, and the judge must implement this clause unless the debtor proves that the creditor did not suffer any damage, in which case the contractual compensation is not due at all, or if the debtor proves that the compensation was greatly exaggerated or that the obligation was partially implemented, in which case the judge may reduce the agreed upon compensation to the extent that is proportional to the amount of the actual damage suffered by the creditor."

Section Two: The ruling on the penalty clause that includes compensating the creditor with a sum of money if the debtor is late in paying in Islamic jurisprudence and Kuwaiti civil law

First: The ruling on the penalty clause that includes compensating the creditor with a sum of money if the debtor is late in paying in Islamic jurisprudence

-The debtor who is late in paying his debt is either insolvent or solvent:

If he is insolvent, then he is given a chance to make things easy, and it is not permissible to oblige him to pay compensation to the creditor for his delay in paying his debts because Allah the Almighty says: {But if he is in hardship, then let there be postponement until it is easy for him} [Al-Baqarah: 280]

Dr. Al-Dharee (2015) said: "The bank is not allowed to demand compensation from the insolvent debtor, and it must wait until he becomes solvent."

The one who allows financial compensation for the damage caused by the debtor's procrastination stipulated that he be a solvent debtor: Sheikh Mustafa Al-Zarqa (1999 AD) said: "The debtor's entitlement to this compensation is conditional on him not having a legitimate excuse for this delay, but rather being a solvent debtor who procrastinates and deserves to be described as unjust, like a usurper."

The penalty clause that includes compensation for the creditor must be stipulated in contracts in which the original obligation is not a debt, either due to failure to perform the work in an agreed-upon manner, delay in performing it beyond the specified time, or delay in paying the debts. The ruling on them differs as follows:

First: The ruling on the penalty clause in contracts in which the original obligation is not a debt for failure to perform the work in an agreed-upon manner or delaying its implementation beyond the specified time.

It is permissible to stipulate a penalty clause in all contracts except for contracts in which the original obligation is a debt. There are three types of contracts in which the obligation is a debt: a loan, a sale for a deferred price, and a salam contract, in which case compensation is considered explicit usury. The Islamic Fiqh Council has decided this: "Fourth: It is permissible to stipulate a penalty clause in all financial contracts except for contracts in which the original obligation is a debt, in which case this is explicit usury. Based on this, this clause is permissible – for example – in contracting contracts for the contractor, a supply contract for the supplier, and an *istisna'* contract for the manufacturer if he does not implement what he has committed to or is late in implementing it".

Second: The ruling on the penalty clause for delaying the payment of debts

It is not permissible to stipulate a penalty clause merely for the delay in paying debts because that is the same as the forbidden usury of the Age of Ignorance. When the debtor becomes due, the creditor says to him: Either pay it or increase it. It does not matter whether the condition of increasing the debt in exchange for the term is when the term is due or at the beginning of it, which is the usury of the Age of Ignorance, as the polytheists said: {Trade is but like usury} [Al-Baqarah: 275], and the creditor says to the debtor: Either pay it or increase it. The prohibition of this type was revealed in the verse: {O you who have believed, do not consume usury, doubled and multiplied. Moreover, fear Allah that you may be successful} [Aal Imran: 130].

The ruling on requiring compensation for actual damage resulting from the loss of certain benefits and gains due to the actions of a solvent debtor who is in default of payment

Contemporary scholars have differed on this matter in two opinions:

The first opinion: It is not permissible to compensate for the specific benefits that a person has lost.

Sheikh Ali Al-Khafif - may God have mercy on him - said: "The failure of the person committed to fulfilling his obligation requires, according to Sharia, that he be obligated and forced to do so. If he refuses, his refusal is a sin for which he deserves to be punished until he is punished. As for obligating him to pay money as compensation for the harm he caused by his refusal, which

is not in the form of losing money, it is not permitted by the jurisprudential rules and legal principles that stipulate that taking money can only be done as a donation, or in exchange for money that was taken or destroyed. Otherwise, it is consuming it unjustly. Accordingly, taking it is compensation for harm, and it does not mean that money is permissible according to Sharia, because the basis of compensation in the view of the jurists is to exchange money for money. If money is exchanged for something else, it consumes money unjustly."

This is discussed by saying that compensating for a person who has lost benefits is not considered consuming people's money unjustly, as long as the loss of earnings is certain and proven.

The second opinion: It is permissible to compensate for what a person has lost in terms of certain gains.

This is the most likely opinion, and the Islamic Fiqh Council decided on this: "Fifth: The damage for which compensation is permissible includes actual financial damage, the real loss suffered by the injured party, and the certain gain he has missed."

The decision of the Council of Senior Official Scholars in the Kingdom of Saudi Arabia also stipulated the permissibility of compensation for lost benefit or lost harm. Its text is: "If the penalty clause is customarily excessive such that it is intended to be a financial threat, and is far from the requirements of the Sharia rules, then it is necessary to resort to justice and fairness in this regard according to the lost benefit or the harm suffered..."

As for Arab laws, they have adopted the principle of compensation for all three damages: financial damage, moral damage, and lost gain .

Ruling on requiring compensation for damage resulting from lost profit from a solvent debtor who is in default

-If the debtor's delay and procrastination in paying the debt despite his wealth and ability to pay results in damages represented by the loss of benefits and profits that the creditor would have gained had it not been for the debtor's procrastination, the question arises about the ruling on the procrastinating debtor paying financial compensation for the benefits that the creditor lost or the harm that he suffered if the debtor refused to pay the debt, and he was solvent but procrastinated in paying.

I did not find any statement from our earlier jurists that it is permissible to fine the late payer a financial fine as compensation for the creditor or as punishment for the solvent debtor who procrastinated in paying .

Contemporaries differed on this: whoever saw that this compensation was nothing but an increase in return for the delay, and thus it is usury, prohibited compensation absolutely, even if the creditor found harm; procrastination does not require an increase in the debt, and whoever saw that it is compensation for actual harm, then he permitted compensation. .

They differed on this in two opinions:

The first opinion: It is permissible for the procrastinating debtor to pay financial compensation for the benefits the creditor has lost or the harm he suffered during the delay due to procrastination. Some contemporary scholars have said this .

They relied on the fact that the statement of compensation for the lost financial benefits as a result of the solvent debtor's procrastination is supported by the rules and principles of Sharia and does not contradict the texts of Sharia and its objectives.

The correct opinion: The statement that the money that the debtor must pay is a financial penalty in return for breaching the condition. This is because it is consistent with the contracting parties' purpose in including the penalty clause in the contract; otherwise, if the compensation was in the amount of the damage, there would be no benefit in stipulating the amount of the penalty clause. Do you not see that the damage is paid even if it is not stipulated and that the amount of the damage will be returned if it increases or decreases?

Instead, it is a type of financial penalty that is done with the consent of both parties and is applied even if there is no harm in response to the breach of his obligation. It is similar to a deposit. Because the term has a value in Islamic law, especially in sales, and if the current value is less than the deferred value, why is there no penalty in return for the deferral? It is a condition suspended on the delay and is due upon the occurrence of the delay, even if there is no harm, to avoid resorting to the judiciary and the burden of proving the harm and saving effort and money.

The second opinion: It is not permissible for the debtor who is delaying to pay financial compensation for the benefits that the creditor has missed or the harm that he has suffered during the delay period due to the delay, considering it to be an invalid condition that must not be fulfilled; because it is the forbidden usury of the Jahiliyyah. This is the choice of the majority of contemporary jurists .

It is permissible to compensate for the actual harm, such as litigation expenses, without compensation for lost opportunities and gains.

This is discussed by saying that fining the debtor for litigation expenses is not compensation for the financial harm for the benefits of the money that is withheld, but instead, because it caused the creditor additional financial expenses due to his delay .

The most correct: It is clear from the above that the second opinion is more correct, prohibiting compensation for the debtor's procrastination and that the creditor should not obtain compensation for his debt in exchange for the benefits he has missed in addition to what is due to him; so that the matter does not lead to usury. This is the opinion of the Fiqh Councils and scientific bodies. The Fiqh Council of the Muslim World League issued a decision in its eleventh session in 1409 AH, which states: "If the creditor stipulates or imposes on the debtor that he pays him a sum of money as a specific financial penalty or a specific percentage if he is late in paying on the date specified between them, then it is an invalid condition or loan, and it is not necessary to fulfill it, and it is not permissible, whether the one who stipulated it is the bank or someone else; because this is the usury of the Age of Ignorance, which the Qur'an forbade."

The decision of the Islamic Fiqh Council of the Organization of the Islamic Conference in its sixth session regarding installment sales stated the following: "Third: If the debtor buyer is late



in paying the installments after the specified date, it is not permissible to oblige him to pay any increase on the debt, with or without a prior condition, because that is forbidden usury.

### Section Three: The Ruling on Stipulating Late Compensation After the Occurrence of Damage in Islamic Jurisprudence and Kuwaiti Civil Law

#### First: The Ruling on Stipulating Late Compensation After the Occurrence of Damage in Islamic Jurisprudence

The contracting parties stipulate the penalty clause that includes compensation, and this may be before the occurrence of the damage. As previously mentioned, several problems arise in this regard. Their reason is the lack of an accurate assessment of the value of the damages incurred by the creditor due to the debtor's action. However, if these damages occur and are determined, the question arises about the ruling on stipulating compensation after the occurrence of these damages.

Suppose the subject of the obligation is neither a debt nor a sum of money. In that case, the provisions above apply to

these contracts, and the provisions related to stipulating compensation for non-payment of debts are applied, considering that these financial damages are considered. Suppose the compensation results from these actual damages and the natural loss suffered by the injured party due to this damage. In that case, it is permissible to stipulate compensation for them, and there is no difficulty in determining and calculating the actual loss and real damage that the creditor has suffered in this case.

The most likely opinion - as previously detailed - is that it is not permissible to stipulate such compensation for the debtor's procrastination so that the matter does not lead to usury. This is what the decisions of the Islamic jurisprudence councils and academic bodies have adopted.

#### Second: The ruling on stipulating late compensation after the occurrence of damage in Kuwaiti Civil Law

- If the two parties stipulate late compensation after the occurrence of damage, the question arises about the ruling on that in Kuwaiti Civil Law:

- If the subject of the obligation is a sum of money, and what is stipulated in Article 305 of the Kuwaiti Civil Law is met, then that stipulation is void.

- If the conditions previously mentioned in Article 306 of the Kuwaiti Civil Law are met, that the subject of the obligation is a sum of money and that the debtor is solvent and procrastinating and did not fulfill it after being notified, and the creditor proves the unusual damage that has befallen him as a result of that and the creditor raises his request for compensation, the court may rule on the debtor to pay compensation that takes into account the requirements of justice.

Suppose the subject of the obligation is not a sum of money, and the debtor proves that the estimate stipulated in the late compensation was greatly exaggerated or that the obligation has been partially executed. In that case, He shall refer his case to the judiciary to request a compensation reduction per the provisions of Article 303 of the Kuwaiti Civil Code. If the

damage exceeds the value of the agreed-upon compensation, then by the provisions of Article 304 of the Kuwaiti Civil Code, the creditor may not demand more than this value unless he proves that the debtor has committed fraud or a gross error.

#### **4. Research Results**

Finally, these are the most important results that I have reached through the research, which I present in the following points:

- The penalty clause is an obligation in which the two contracting parties agree to specify a compensation due in the event of a breach of the contract or a delay in its implementation, which results in damage.

The penalty clause may be associated with the original contract or included in a subsequent agreement.

- The most likely opinion is that the penalty clause is permissible, considering that permissibility is the origin of conditions, provided that it does not contradict the Qur'an, Sunnah, or consensus, and because it is in the interest, and closes the doors of chaos, and prevents tampering with the rights of servants, and causing them harm.

Multiple statements indicate that Contemporaneous scholars differed in explaining the jurisprudential basis for the penalty clause, and the most likely opinion is that the penalty clause is a new condition.

- The penalty clause amount must be due if the agreed-upon condition is breached, and there is no legitimate excuse in Sharia for not adhering to the time limit.

- In Kuwaiti civil law, it is permissible to agree in advance on the penalty clause, whether in the contract drawn up between the two parties or in a subsequent agreement between them, provided that the subject of the obligation is not a sum of money.

- Certain conditions must be met for the penalty clause to be due if the subject of the obligation is not a sum of money in Kuwaiti civil law, namely: the existence of an error by the debtor, that the creditor suffers some harm, the existence of a causal relationship between the debtor's error and the harm that befell the creditor, and the creditor's notification of the debtor: the purpose of which is to prove the debtor's procrastination in fulfilling his contractual obligations.

According to Kuwaiti civil law, the judiciary may reduce the compensation from what was agreed upon if the debtor proves that the estimate was greatly exaggerated or that the obligation was partially implemented. If the damage exceeds the value of the agreed-upon compensation, the judge shall not rule to increase the compensation unless the creditor proves that the debtor committed fraud or gross error.

The creditor and the debtor may not stipulate financial compensation for late payment of the debt in a specific amount or by specifying a specific percentage. This is because it is the forbidden usury of the pre-Islamic era.

Stipulating a penalty clause in all financial contracts is permissible except for contracts in which the original obligation is a debt; this is explicit usury.

- The most likely opinion is that it is permissible to stipulate compensation for actual damage resulting from the loss of benefits and certain gains due to the action of the solvent debtor who delays payment.

- The most likely opinion is that it is not permissible to stipulate compensation for damage resulting from the lost profit of the solvent debtor who delays payment so that the matter does not lead to usury, and this is what the decisions of the jurisprudential councils and scientific bodies were issued with. The opinion is that financial punishment is permissible, and its spending in the public interest has a legal direction if the guardian sees it as a matter of Islamic policy to deter those who delay payment.

- It is permissible to compensate for actual damage to the creditor, such as litigation expenses, without compensation for lost opportunities and gains.

- The Kuwaiti Civil Law invalidates any agreement on usurious interest in any form.

The law allows the creditor to request compensation through the judiciary if the subject of the obligation is a sum of money and the debtor does not pay it after being notified despite his ability to pay. The creditor proves that he has suffered unusual harm as a result. Compensation is optional for the judge and takes into account the requirements of justice.

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See the second section, which deals with the ruling on stipulating compensation in contracts in which the obligation is a debt and vice versa.

See Section Two, which stipulates compensation for non-payment of debts.

See: Legal provisions for requiring compensation, Section Two.