



# Conditions Required for the Possibility of Suspended Transfer of Property Ownership upon Payment of the Price in Investment Housing Complexes: A Comparative Study

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## Abstract:

Investment housing complexes are an attractive option for a large segment of society. However, purchasing residential property within these complexes involves several legal details that buyers need to understand and consider. One of the most important details is the conditions for suspending the transfer of ownership of the residential property, which are primarily linked to the payment of the unit's price. The specific conditions for suspending the transfer of ownership vary from one contract to another and from one housing complex to another. Nonetheless, there are some general conditions found in most contracts, such as the agreement between parties on the payment method. Additionally, the payment must be clear and acceptable to the residential property buyer, as well as being written and lawful. This research aims to clarify the purpose of these conditions, which ensure that the investor receives full payment before transferring the ownership of the residential property, while also protecting the buyer's rights and ensuring that the buyer receives the property according to the agreed-upon conditions.

**Keywords:** Transfer of Ownership, Investment Disputes, Price, Housing Complexes

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## 1. Introduction

As a general principle, a sale contract, regardless of its form, is considered an immediate execution contract where the obligations arising from it—specifically, the transfer of ownership and payment of the price—are performed immediately upon the conclusion of the sale. These effects are inherent to the contract and do not depend on the will of the contracting parties, except in cases of specific types of sale contracts, such as those for residential complexes, which require a special procedure mandated by law, such as registration with the real estate registration office due to their nature involving real estate. However, the need for transactions and the evolution of life, coupled with many people's inability to perform immediate payments, has led to a preference for installment sales as a successful solution to many financial difficulties or constraints associated with limited income.

**1.1. Importance of the Topic:** The importance of suspending the transfer of ownership lies in providing the buyer with the advantage of paying in installments according to their financial capacity. However, while this benefit is advantageous for the buyer, it can simultaneously pose a risk to the seller if the buyer fails to meet their payment obligations. This concern drives sellers to secure their right to receive the full price by including a contractual guarantee in the sale agreement, specifically by suspending the transfer of property ownership until the full price is paid. Therefore, in order for the seller to exercise their right to retain ownership until payment is completed, certain conditions that align with the nature of this guarantee must be fulfilled.

**1.2. Problem Statement:** The main issue is that the condition of suspending the transfer of ownership of the sold property in investment residential complexes upon payment as a guarantee—where the seller retains ownership while the buyer takes possession—has not been explicitly detailed in the Iraqi Civil Code No. 40 of 1951. Article 534 only mentions the permissibility of this guarantee, allowing the seller to retain ownership until the full price is paid, without specifying the conditions required for the applicability of this guarantee. This contrasts with comparative legislations (French, Emirati, and Moroccan), which provide more detailed regulations. The significant lack of detailed provisions in the Iraqi Civil Code creates a legislative gap that needs to be addressed to ensure that the condition of suspending the transfer of property ownership serves its intended purpose for the seller.

**1.3. Research Questions:** Several questions arise concerning the conditions for suspending the transfer of property ownership, including:

- What is the nature of the agreement required between the parties regarding the condition of suspending the transfer of property ownership?
- Is actual knowledge of this condition required for the buyer, or is presumed knowledge sufficient?
- Is explicit or implicit acceptance of the suspension condition necessary for the buyer?
- What is the legal status if the buyer remains silent about the condition?
- Is it sufficient for this guarantee to be verbal, or must it be documented in the sale contract?

**1.4. Scope of the Research:** This research will compare the provisions of the Iraqi Civil Code No. 40 of 1951 with the French Civil Code of 1804, as amended by Legislative Decree No. 131 of February 10, 2016, the Moroccan Contract and Obligations Law No. 1913, as amended in 2018, and the UAE Civil Transactions Law No. 5 of 1985, along with relevant judicial applications in Iraq, France, Morocco, and the UAE.

**1.5. Structure of the Research:** The research will be divided into three sections:

1. Existence of an Agreement Between the Parties
2. The Requirement for the Suspension of Property Transfer to be Known and Acceptable to the Buyer
3. The Necessity for the Agreement to be Written and Legal

**2.1. Existence of an Agreement Between the Parties:** In the sale of property within residential complexes, which are considered future sales, the parties may agree to include certain guarantees in their contract that serve their mutual interests. The use of the suspension of ownership as a guarantee by the seller necessitates an agreement between the seller and the buyer prior to the transfer of ownership of the residential property. This agreement must be known and accepted by the buyer. The suspension of ownership represents a new mechanism for deferring property transfer, designed to protect the seller against the buyer's inability to pay, particularly in cases of insolvency or bankruptcy. An agreement between the parties to suspend the transfer of ownership until the full payment is made does not conflict with general rules. The transfer of ownership upon contract formation is not required; the seller can condition the transfer on the payment of the price. This condition is optional and does not have effect unless clearly stated by the seller, separate from the main contract.

According to the Iraqi Civil Code, Article 534 permits deferred payments for property sales, allowing the seller to agree with the buyer that ownership will not transfer until the full price is paid, even if the property is delivered. This is in contrast to the UAE Civil Transactions Law, which allows the transfer of ownership upon the sale agreement but permits suspension under certain conditions. Moroccan law explicitly allows for the suspension of property transfer until payment is complete, and French law also recognizes this option, although it is viewed as an exception rather than a requirement.

**2.2. Requirement for the Suspension to be Known and Acceptable to the Buyer:** The buyer's awareness and acceptance of the condition to suspend the transfer of ownership are crucial. This condition

must be included in the sale contract or another agreed-upon document such as an invoice, delivery note, guarantee letter, or certification. The buyer's knowledge and acceptance are necessary for the enforceability of the condition. This section will address whether actual knowledge is required or if presumed knowledge suffices, and whether acceptance must be explicit or can be implicit. Iraqi law allows acceptance to be inferred from conduct or prior dealings. Other legal systems, such as UAE, Moroccan, and French laws, provide various approaches to acceptance, including both explicit and implicit forms.

### **3. Necessity for the Agreement to be Written and Legal**

The agreement to suspend the transfer of ownership must be clearly stated, either within the main contract or as a separate document. The necessity for this agreement to be written and lawful ensures that it is enforceable and meets legal standards. This section will explore whether verbal agreements suffice or if written documentation is mandatory.

The research will conclude with a detailed analysis of how these conditions are regulated in different legal systems and propose recommendations for addressing the legislative gaps in Iraqi law to align with comparative practices. Alternatively, "or" "may" are terms that indicate permissibility rather than obligation between the parties in a contractual sale agreement where the payment is deferred, either in full or partially. The term "exceptionally" means deviation from the general rules of sale under civil law. According to the general rules of sale in civil law, ownership of the sold item should transfer to the buyer immediately upon the contract's formation. However, the legislator permits the seller and buyer to agree to suspend the transfer of ownership of the property, which means a temporary delay of one of the most important effects of the sale contract, namely the transfer of ownership. This is considered an exception to the general rules. Since the condition of agreeing to suspend the transfer of ownership is permissive and exceptional, certain conditions must be met, the most important of which are:

1. The condition must be explicitly stated without ambiguity.
2. The agreement must be signed by the seller and buyer or their representatives.
3. There is no need for a separate contract document to regulate the terms of suspending the transfer of ownership; it is sufficient for this to be included in the property sale contract itself or another document agreed upon by the parties. The seller has the freedom to include this agreement in a separate document or within the general terms of the original sale contract, although this freedom is restricted by the buyer's acceptance.

A question arises: Can the suspension of property ownership transfer in residential complexes be applied partially to some of the property but not others? And when should this suspension be agreed upon?

To answer this: The suspension of property ownership transfer cannot be partial. The purpose of suspending the entire property transfer is to ensure the seller receives the full payment for the sale. Thus, the buyer cannot acquire half of the residential property without acquiring the other half if only half of the payment is made, nor can they circumvent this condition by paying most of the installments. This provides complete protection to the seller against the buyer. As for the timing of agreeing to suspend the transfer of property ownership in residential complexes, it is not an issue since ownership only transfers upon registration at the property registration authority. The timing is dependent on the registration process, which in turn depends on the full payment by the buyer.

### **4. Second Requirement: The Suspension of Property Ownership Transfer Must be Known and Accepted by the Buyer**

Knowledge and acceptance by the residential property buyer of the condition to suspend property ownership transfer in the event of non-payment do not pose any problem if this condition is included in the contract terms of the property sale or any other document agreed upon by the parties, such as an invoice, delivery receipt, guarantee letter, or certification. In this case, the buyer's acceptance of the property sale contract is considered complete with all the terms and conditions agreed upon. However, issues may arise if the condition of suspension is mentioned in the general terms of the property sale

contract. This condition is only enforceable against the buyer if they are aware of and accept it. Knowledge of the suspension condition enables the seller to enforce this guarantee against the buyer.

The question here is: Is it necessary for the buyer to have actual knowledge of the condition to suspend property ownership transfer, or is it sufficient if they are presumed to have knowledge?

Some legal opinions suggest that actual knowledge by the buyer is necessary when the condition is included in the general terms of the contract, and the presumption of knowledge cannot be applied due to the significant guarantee this condition provides to the seller. If this condition is included in the original sale document and is clearly and explicitly stated to the buyer in a manner that a reasonable person can understand, then it is sufficient that the buyer is able to understand the content as per the reasonable person standard.

Once the buyer's knowledge of the suspension condition is established, the issue of acceptance arises. The validity of the suspension condition depends on the buyer's acceptance, and mere knowledge does not suffice. Acceptance can be explicit and clear, or implicit and inferred from circumstances and evidence. Explicit acceptance is straightforward and can be expressed in any form. Article 79 of the Iraqi Civil Code states: "An offer or acceptance can be made orally, in writing, or by a common gesture, even by a mute person, and by any conduct that indicates agreement." Article 1113 of the French Civil Code states: "A contract is formed by the meeting of the offer and acceptance, which express the parties' intent to contract. This intent can be shown by a statement or clear conduct." Article 132 of the UAE Civil Transactions Law mirrors this, stating: "The expression of intent can be in words or writing and may be in past or present tense if it refers to the present, or by customary gestures, even by a mute person, or by actual conduct indicating agreement." Article 25 of the Moroccan Obligations and Contracts Law states: "When a reply to the offer is not required from the offeror, or when commercial practice does not require it, the contract is concluded as soon as the other party starts performance. Silence may constitute acceptance, especially if it concerns prior dealings between the parties."

As for implicit acceptance, it can be proven if the buyer performs the contract knowing that there is a possibility of suspension of ownership in case of non-payment. Acceptance of the suspension condition does not need to be in writing, as the mere execution of the contract with full knowledge of the suspension condition constitutes acceptance.

In comparative legal systems, there is a difference in approach. Some systems consider silence as acceptance if the buyer is aware of the condition, while others, like the Iraqi Civil Code, the UAE Civil Transactions Law, and the Moroccan Law, recognize silence under certain conditions as acceptance. The Iraqi Civil Code, for example, considers silence as acceptance in specific exceptional cases such as:

1. Previous transactions where the buyer had accepted the same condition.
2. When the nature of the transaction or commercial practice suggests the buyer would not reject the suspension condition.
3. When the offer from the seller benefits the buyer, providing them with credit and facilitating property acquisition while ensuring strong protection for the seller in case of non-payment.

In comparative systems, for instance, the UAE Civil Transactions Law and Moroccan law, the mere execution of the contract indicates acceptance of the suspension condition. The French Civil Code, however, initially required explicit acceptance but has evolved to recognize implicit acceptance if the buyer is fully aware of the condition and it is clearly state **Acceptance of the Condition Stated**.

Regarding the issue of silence, French civil law provides in Article 1120, as amended by the legislative decree dated February 11, 2016, that: "Silence is not considered acceptance unless otherwise indicated by law, customs, commercial relations, or specific circumstances." The French judiciary has previously upheld this principle. In a decision by the French Court of Cassation, it was stated: "If silence, in principle, does not by itself equate to acceptance, this is not the case when circumstances allow interpreting this silence as acceptance." Another decision indicated: "The existence of prior commercial relationships is not sufficient

to prove agreement on the retention of title condition; explicit agreement must be made before or at the time of delivery of the goods." However, this decision has since been revised, as noted in a later ruling by the French Court of Cassation, which stated: "In the absence of written commercial agreements, the acceptance of each good sold can be inferred from the circumstances, particularly when there are prior commercial relationships, through previous invoices containing the retention of title and the buyer's receipt of the goods without objection."

A question arises: Can a subsequent knowledge of the buyer regarding the condition of suspending the transfer of ownership be considered acceptance? Or can the inclusion of this condition in a supplementary document to the original contract be considered implicit acceptance?

A buyer of residential property might be surprised to find that the condition of suspending the transfer of ownership was mentioned in other contractual documents that were not known to them until after their acceptance was given, such as in a document not received by the buyer until after accepting, or mentioned in an advertising sticker at the contract execution site without any indication that the document had contractual force. Jurisprudence is divided on this issue into two opinions: the first view considers the buyer's silence and lack of objection as acceptance based on the principle that silence in such circumstances is deemed acceptance, as the buyer should disclose and declare their refusal of such a condition. The second view argues that the buyer's silence should not be considered acceptance, as accepting silence could obligate the buyer to something they did not intend to commit to, and acceptance must be a clear expression of intent. This expression of intent can be either explicit or implicit; explicit being through writing, indication, or verbal communication, and implicit being deduced from unequivocal circumstances. Silence, in their view, is akin to negation rather than acceptance, especially when acceptance imposes obligations or waives rights.

After reviewing the legal conflict, we lean towards the opinion that according to Article 81 of the Iraqi Civil Code, which states: "1. Silence is not attributed to a person, but silence in a situation where disclosure is needed is considered acceptance. 2. Silence is considered acceptance in particular if there is prior dealings between the parties and the offer pertains to this dealing or if the offer results in benefit to the recipient, as well as silence by the buyer after receiving the purchased goods as acceptance of the conditions mentioned in the price list," it is clear that outside the cases mentioned in this article, the silence of the residential property buyer cannot be deemed acceptance, especially if the condition of suspending the transfer of ownership is mentioned in a supplementary document rather than the original document. Furthermore, even with prior dealings between the seller and the buyer similar to such a sales contract, silence should not be considered a definitive rule for all transactions. Each legal act has its own specifics in terms of formation, execution, and consequences, and thus silence should not be automatically interpreted as acceptance by the buyer.

## **5. The Agreement on Suspending the Transfer of Ownership of Residential Property Should be Written and Legal**

Some legislations require that the condition of suspending the transfer of ownership in residential complexes be written. It is not sufficient for this condition to be merely an agreement between the parties to be effective against the buyer's creditors; it must also be written, either in the contract itself or in another document attached to the original contract, such as official or informal writing, or any written document issued by the seller that makes the condition known to the buyer, like model contracts, letters, telegrams, etc. Referring to Iraqi legislation, the Iraqi and UAE legislations recognize the validity of the condition of suspension. For Iraqi legislation, Article 534 of the Iraqi Civil Code addresses the condition of suspending the transfer of ownership but does not require writing explicitly as some legislations do, like French and Moroccan laws, which specify that the agreement on suspension must be written clearly, leading to certain difficulties in organizing this condition as a guarantee in the absence of a comprehensive legal system for it. We hope the Iraqi legislator will address this legislative gap by adding a new provision stating: "The agreement on retaining ownership must be in writing."

Regarding UAE legislation, it mirrors the Iraqi stance in not requiring writing, but some UAE legal scholars argue that writing is necessary to assert the condition against creditors and that the writing should be clear and readable by the residential property buyer, and notarized by a notary public, as ordinary writing is susceptible to manipulation. The condition of suspension should also be registered with the competent authority; otherwise, writing outside the relevant authority is ineffective.

The French legislator has established writing as a formal requirement for the effectiveness of the condition of suspending the transfer of ownership against creditors, following Law No. 335 of May 12, 1980, which specified that the seller could not invoke the retention of title condition unless the agreement on suspension was written. The writing requirement was not essential for the validity of the suspension before the enactment of Law 12 May 1980. This writing is only required to protect the buyer's consent and to be able to invoke the condition against creditors. The French Court of Cassation has considered that the buyer's lack of objection to the written condition, with full knowledge of it, equates to acceptance, regardless of the document (invoice, delivery note, etc.) on which this condition appears. The French legislative decree No. 346 of 2006 explicitly states in Article 2368 that "The agreement on retaining ownership must be in writing."

From what has been discussed, the French requirement for written agreements on suspending the transfer of ownership can be interpreted in two ways:

- **Broad Interpretation:** This interpretation requires the condition to be included in the main contract, and the buyer's acceptance of this agreement must also be written to be valid.
- **Narrow Interpretation:** This interpretation accepts the condition being in any contractual document other than the original contract, such as a certification letter or invoice. In this case, the buyer's acceptance of the contract is deemed inclusive of the condition of suspension. Proponents of this view argue that it aligns better with general civil law principles and acknowledge that the French judiciary accepted the existence of the suspension condition before the 1980 Law. This is also due to the exceptional nature of the suspension condition as a deviation from general sales rules that require immediate transfer of ownership upon contract execution.

In Morocco, the legislation governing the suspension of ownership transfer on payment of the price is regulated by the Obligations and Contracts Code, Dahir of 9 Ramadan 1331 of August 12, 1913, under Title V "Sale with Retention of Title," Article 21-681, which explicitly requires the condition of retention of ownership to be written. Thus, the Moroccan legislator's position is similar to that of the French legislator, requiring the written condition before delivery of the property to the buyer. This provision is a significant exception to the general principles of consensual contracts.

The question arises regarding the legal characterization of the required writing. It is likely that writing is only needed for the condition of suspension to be enforceable against creditors in collective procedures, and not for the validity of the agreement. The legal text only requires the condition to be written, without specifying its nature or form. Thus, a narrow interpretation would suggest a contractual document specifically containing the suspension condition and signed by both parties. However, this may conflict with the commercial practice of quick transactions.

## Conclusion

After studying the topic (Conditions Required for Suspending the Transfer of Ownership of Property on Payment in Investment Residential Complexes), we reached several conclusions and suggestions:

### First: Conclusions

1. The agreement on suspending the transfer of residential property ownership cannot be divided. The purpose of the suspension by the seller is to ensure full payment for the property. Therefore, the buyer cannot own part of the property without paying the full price, nor can they evade this condition by paying most of the installments, thus providing full protection to the seller.

2. Concerning the subsequent knowledge of the residential property buyer about the suspension condition, each legal act has its own specifics regarding formation, execution, and consequences. Hence, silence by the buyer should not be automatically interpreted as acceptance.

3. The suspension of the transfer of ownership of residential property in investment complexes must be in writing. It is insufficient for the condition to be merely agreed upon between the parties; it must be written either in the contract itself or in an additional document.

## **Second: Suggestions**

1. We recommend that the Iraqi legislator, in regulating the suspension of property ownership on payment in investment residential complexes within the Investment Law No. 13 of 2006, specify the conditions for its validity. We suggest the following provision: "The agreement between the seller and the buyer on suspending the transfer of property ownership until full payment must be written, legal, and known to both parties, using clear and explicit language, and signed by both the seller and the buyer or their representatives."

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