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# Punitive Damages in the Liability for Contract Violation in the Legal Systems of Iran and England

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**Abstract:** *The punitive damages are a type of non-repairable damages which occur due to the insolence and carelessness in the damaging behavior of the defendant, paid to the interest of plaintiff by the order of the court, to punish the defendant and prevent the repetition of similar actions by him and the other members of the society. The punitive damage in the civil lawsuits (including contract lawsuits and civil liability lawsuits) are issuable and the main basis for issuance of such a damage is the deterrence and punishment. The punitive nature of such a crime has led some to consider it as having a penal nature, so they oppose awarding of it for private lawsuits. On the contrary, some totally deny the penal nature of this damage and consider it to be a fully civil case. A contract-breaching behavior and existence of an element that justifies the punishment are the indicator of application and identification of the punitive damage, be it happening in the violation of a contractual commitment or as an action causing a constructive trust. The extent of the punitive damage is determined by the court based on the case's conditions. There are controversies and clashes of ideas on the insurability of the punitive damages, however, it should be noted that insuring such a damage is to some extent incompatible with its objectives. The current study, through the use of the descriptive-analytical method, has aimed at answering the question of whether the punitive damages can be applied for contracts' domain or not? It has also dealt with the explanation of different kinds of contract violations and compensation of the damage inflicted by the contract violation.*

**Keywords:** *Contract violation, Punitive damage, Compensation, Legal system of Iran, Legal system of England.*

## INTRODUCTION

The punitive damages are one of the known and frequently used entities in most of the common law legal systems, especially that of England, however it has a weak position in the Iranian legal system, to the extent that in the Persian literature, it has been less discussed and it is unknown even to most of the authors of the legal discussions. In the international aspect, and reacting to the measures of the countries that have sentenced Iran to the payment of punitive damages, and also, due to the issuance of the sentences against Islamic Republic of Iran by the foreign courts under the title of punitive damages, this entity incompletely entered the legal system of Iran as a counteract measure through the adoption of "the Law of the Jurisdiction of the Islamic Republic of Iran for Civil Proceedings against Foreign Governments in 1999" and its Amendment Law in 2000. With the revision of these laws, this process was finally completed in the law of the

same name on 07/03/2012. By adoption of this law, the Iranian courts, through numerous sentences, have issued punitive damages against the foreign governments. Indeed, the Iranian legislator, in 2012, through the adoption of the "Amendment of the Law of the Jurisdiction of the Islamic Republic of Iran on Civil Proceedings Against Foreign Governments" has obliged the Iranian courts to issue sentences for the payment of this kind of damage in the international cases and on the condition of counteracting. The Implementing Regulations of "the Law on the Jurisdiction of the Islamic Republic of Iran for Civil Proceedings against Foreign Governments" was adopted in 2013 and the amendment of Implementing Regulations was also adopted in 2014.

The origin of this legal entity is the common law and especially the legal system of England, however, it was rapidly expanded to other countries and aimed such objectives as deterrence of the society by issuing the deliberate damage.

### **First Discussion: The Possibility of Application of Punitive Damages in Contractual Liability**

The course of the current evolution of contracts' law indicates that in most of the legal systems of the world, the contractual liability has been identified as one of the most important guarantees for the performance of contractual liabilities (Ranjbar, 2012, 12), and wherever a weak point exists, the judicial procedure has aided the law. However, in some legal systems, including that of Iran (which is based more on the jurisprudential foundations), this issue has been neglected and only in a few Articles, it has been briefly and ambiguously dealt with, and the judicial procedure has also not played an effective role.

Generally, there are two types of contractual liability execution guarantee: performance of contract and guarantee of legal implementation. In some cases, the contractual liability comprises a contractual reaction to the breach, i.e. the parties to the contract, during the conclusion of it or prior to it, determine an amount of money as the damage, so that it would be paid to the obligee in case of the non-performance (the same collateral noted in Article 230 of Iranian Penal Code). Nevertheless, in most of the cases, the contractors, while concluding the contract, are less concerned with the non-performance of the contract and how to deal with it. It has led the contractual liability to be more of a performance and the legislators opt for the adoption of efficient regulations to compensate all the damages inflicted to the obligee and guarantee the people's rights (ibid, 42-45).

Studying the regulations of different countries as well as the international conventions on the damages due to the breach of the contract, "the principle of full compensation for damages arising out of the breach of contract" can be inferred. According to this principle, all the damages arising from the breach of the contract must be compensated in a way there remains no damages uncompensated, and yet, the harmed party is not in a better position than the performance of the contract, after damage compensation (Ranjbar, 2012, 21-27). In this regard, we can see that in most legal systems (including that of Iran), the principle is restoration and compensation of the damages inflicted to the damaged party, and damages such as the punitive damages, which lead to the punishment of breaching party, have not been as welcomed.

The critics, stating that the contractual damage is usually aimed at the compensation of the obligee's loss for the breach of contract (and not preventing the non-performance), believe that the obligor should not be forced to implement through assignment of the punitive damages as the penalty for breach. The traditional view mentioned above on the contractual damage led to the opposition of some of the attorneys with the issuance of punitive sentences in contractual lawsuits. The advocates of the punitive damages, reacting to this inference, believe that the compensatory sentences have not been as successful in obtaining the intended goals (including full restoration and compensation of the damages to the harmed party). The reason is also that the harmed parties due to the breach as a result of different conditions, such as the breach in the executive system, bring a lawsuit against the breaching parties and even if they do so, in many cases, the damage assigned by the courts have been nominal and does not compensate for all the damages and expenses inflicted to the claimant (such as the lawyer's fee, unpredicted mental damage, etc), and it is less than the extent

needed for the compensation of the damage. Therefore, regarding the deficiencies and problems, the punitive damages can fill this gap. Through gradual acceptance of the punitive damages in some contractual lawsuits, it seems that the reparation damages have been transformed out of their traditional role and have taken a function beyond the reparation and compensation of the damages (Abak, 2014, 79-80).

Therefore, in spite of the widespread opposition against the awarding of punitive damages in contractual lawsuits, the courts, in addition to the civil liability lawsuits, have also sentenced to this damage in some cases of the breach of contract. However, sometimes the punitive damages can be also considered for the contractual conflicts. In fact, it seems that there is an increasing inclination for the awarding of such damage in the contracts. Now, in this discussion, it was sought to respond the question whether the court, based on the realization of conditions for claiming the punitive damages, can be asked to issue the payment of such damages when the contracts are breached or not? In this regard, it has been said that “in the absence of statutory authorization, punitive damages usually cannot be recovered in the breach – of – contract actions. Punitive damages are sometimes recoverable in tort actions in which the breach of contract is tangentially involved”. In addition, it has been said that: “it is possible that exemplary damage might be available where the breach of contract is a tort”. On the contrary, some believe that in the breach of contract also the defendant can be sentenced to the payment of punitive damages and some even believe that the breaching party more deserves the payment of such damages (Sanderse, 2008, 2).

#### **First Chapter: The Punitive Damages as a Condition in Internal Contracts**

There are controversies on awarding the punitive damages for the breach of the contracts, however, some have not included the breach of the contract in their definition of punitive damages. With the assumption that the punitive damages can also be used for the contracts, questions arise that if in an internal contract in the Iranian law, the parties to the contract have predicted punitive damage, will such condition be correct and binding? The simple answer is that the punitive damage can be among the types of penalty clauses. Another question is that whether the forum, including the court or arbiter, are bound to observe it or not? In the foreign literature, it has not been discussed, however, responding to the question whether the condition of issuance of the sentence to the payment of punitive damages is void or not, or whether such condition lapses the contract or not, the invalid and the invalidating conditions must be investigated.

According to the Article 232 of the Civil Code: “the following conditions are of no effect though they do not nullify the contract itself:

- 1- Conditions which are impossible to fulfill
- 2- Conditions which are useless and unprofitable
- 3- Conditions which are not legal”

Obviously, the condition of punitive damages is not considered impossible. This entity, as it is acceptable and administrable for the lawsuits against the external states, can be accepted for internal lawsuits. About the profit and usability of this condition also there could be no doubts. Also, in terms of illegality of this condition, including its opposition to the law or ethics, or the public order, or being contrary to the legal requirements of Islamic Shariah, it is not true for punitive damages, since when it is said that the condition must guarantee a legal profit, i.e. the legislator has not banned following that condition, and the very fact that the legislator has not done so, the subject of the contract is eligible for the legitimate interest. Also, the realization of this condition is neither opposed to the requirements of the contract nor an unknown condition ignorance of which leads to the ignorance of price and penalty clause. This condition, according to Article 233 of the penal code, is not also among the nullifying conditions. Therefore, according to Articles 10, 223, 232, and 233 of the Penal Code, the condition of punitive damages for the contract can be considered to be correct. However, definitely, the issuance of such sentences requires just, wise, and innovative judges who do not slay the justice and

jurisdiction of the parties' will in the altar of unawareness and imitation (Darab Poor and Soltani Ahmad Abad, 2015, 81-82).

### **Second Chapter: Evaluation of the Punitive Damages in Different Kinds of Contract Breach**

Different kinds of the breach of contract are the deliberate and non-deliberate breach. Regarding the fact that for issuance of a punitive sentence in the legal liability lawsuits, the defendant behavior must have specific features (being deliberate, malice, bold or indecent behavior, etc.), it is also true for cases of breach of contract, and consequently, the non-deliberate breaches would not be subject to the punitive sentence.

The deliberate breach is divided into two groups: opportunist and substantial. The opportunist breach does not increase society's wealth. The breaching person is benefited through owning a larger share of profit than the non-breaching party. On the contrary, the substantial breach leads to the increase in society's wealth since it lets the breaching party to, through breach of contract and compensation of the non-breaching party's damage, still benefit from the profits. The use of punitive damages to prevent the opportunistic breaches of the contract is substantial since such breaches, based on the definition, do not increase the social wealth. However, there are doubts and controversies about the use of punitive damages against substantial breaches (Boroumand, 2017, 237).

Historically, before the emergence of justice alongside the common law, the legal system of England (common law in specific) has not had the guarantee of specific performance. In terms of non-performance of the contract, the common law could only sentence to the payment of the compensation to the party sustaining the loss due to the non-performance. The contractual obligations' lawsuit, which is used to guarantee the contract is, in fact, a lawsuit modeled from the lawsuit due to the assault and violation of the property, and the conviction may just end in the payment of the compensation. This performance may, in some conditions, not be sufficient and the benefits of the contractor may require that he/she attain the obligation in his favor. No lawsuits let the attainment of such result before the common law court, however, with reference to the court that executed the justice principles, the order of obligatory implementation of the contract that obliges the obligor to fulfill his commitments exactly, would be issued (Boroumand, 2017, 238). On the contrary, the deliberate breach includes any kinds of intentional breach.

In the economic evaluation of the law, the deliberate breach of contract is of two types: "opportunistic breach" and "substantial breach". If the breaching party tries to attain more than what he has obtained in the negotiation with the expense of the non-breaching party, it would be considered as the opportunistic breach. For example, a person maliciously refuses to pay the damage after the other party has fulfilled the obligation, hoping to reduce the contractual price. On the contrary, it would be a substantial breach if the breaching party finds a situation much better than the breach that he can compensate for the damages of the non-breaching party and still profit. For example, if the manufacturer of a goods can make a profit from breaching the contract he has established with the person 'A' and selling it to the person 'B' as much as he can compensate for the damages of the A and still benefit from the contract, it would be efficient for him to breach his contract with A. In case the breaching party is obliged to compensate for the damages of the non-breaching party, it would be a Pareto Efficient Breach (Boroumand, 2017, 241).

Each of the two breaches has their own characteristics and there are controversies about the awarding of the punitive damages for each. In the following, this subject have been discussed.

### **Clause One: Exemplary Damages in case of Substantial Breach**

One of the objectives of the conclusion of a contract is its performance. Therefore, the damage compensation regulations must be designed in a way to prevent non-performance. In this regard, in their point of view, the more the extent of the damage, the higher the intention for the performance will be. Therefore, the economists, treat the performance bond as a price as if committing a specific behavior has a price. As the rise in the price of a specific good reduces the demands for it, the intensification of the legal performance bonds

related to a specific behavior can also reduce committing that action. The sum of these factors has led the advocates of the exemplary damages to consider this extra-preparation damage as a means for motivating the obligor to perform the contract and avoid the non-performance (Cooter, 1982, 12). On the contrary, many of the courts and interpreters, for the negation of the exemplary damages, have resorted to the “theory of the substantial breach”. This theory is one of the well-known theories of economic analysis of the contracts whose main foundation is the economic efficiency.

The substantial breach is the case in which at least the condition of one party becomes better due to the breach of promise, and no harms are inflicted upon any of the parties. According to the substantial breach theory, when the expense of the performance is more than the contract profit, breach of it would be more efficient than its performance (Cooter, 1982, 340), and accordingly, if the defendant has been in a better situation after complete compensation of the plaintiff, and he can make more profits through the allocation of the resources needed for the performance of the other contract, the breach would be socially more optimal. Therefore, the court should not punish such breach since it leads to better use of the resources and through the creation of more wealth, the society would also benefit from it (Farber, 1980, 1444). So, if as a result of different factors, the performance expense for the defendant becomes more than the mental value of performance for the plaintiff, the expenses of exemplary damages would be more than the reparation damage and thus, issuance of the punitive sentence would not be efficient. In this case, the obligor can breach the contract and pay the damage (Ansari, 2011, 39). Although judge Pazner has allowed the issuance of the substantial damages for the prevention of opportunistic breach of the contract, he does not consider such damages for other deliberate breaches. He stated that: even if the breach is deliberate, it cannot be necessarily blamed. The obligor may truly find out that his performance is more valuable to another party (third party). If so, the promotion of his breach of contract is substantial in case he compensates for actual damages of the obligee. If he is forced to pay more than that extent, the substantial breach might be prevented and the law does not want to be the cause of such a result. However, it has been stated in the opposition that Pazner’s interpretation has been wrong, since allowing someone to breach the contract and compensation of the damages is not as efficient as forcing him into paying the punitive damage by threat or negotiating with the contractor for releasing from the first contract.

The deduction of supporting the exemplary breach states that sometimes, the non-performance of a contract is more efficient. The seller might have received a better offer from a second buyer, or the buyer might have received a better offer from a second seller. The seller may find out that the performance expenses are increased or the buyer may not consider the former value for the performance. For example assume that a manufacturer has come to an agreement for the manufacturing of a goods with a person A. After the conclusion of the contract, the person B gives him an offer higher than person A. If the manufacturer can make profits from selling the goods to person B, it would be enough to compensate the person A’s damages, and still profit from the contract, it would be efficient for him to breach his contract with A and sell the goods to B. The goods would be finally at the hands of the party who mostly values it. In addition, the seller conditions would be improved and A’s conditions would not be worsened, which would lead to Pareto efficiency. The exemplary damages prevent from the substantial breach since such breach requires the breaching party to pay more than the actual damages of the non-breaching party.

In the inference of the prevention from substantial breach, it is assumed that the breaching party willingly agrees to the compensation of the actual damages of the non-breaching party, and he does not intend to abuse the lawsuit costs to avoid the payment, or does not force the non-breaching party into agreement for the payment of a damage less than the actual one. In this deduction, it is assumed that the expectation damages are paid. In fact, the non-breaching party is put in a situation as well as the performance condition. However, it is obvious that in some cases, the non-breaching parties are not compensated for emotional damages, the attorney’s fees, etc. If the breaching party is not completely liable for the damages inflicted to the non-breaching party, there are intentions to breach the contract even when the breach is not efficient.

The punitive damages prevent the substantial breach, however it does not encourage the inefficient performance. Indeed, it seeks to encourage the obligor to negotiate with the obligee. In other words, the efficiency also supports the expansion of punitive damages' liability beyond the opportunistic breach, i.e. those which are theoretically efficient (Boroumand, 2017, 243-248). The substantial breach theory does not consider the breach of contract to be unjust to the obligee, but vice versa, it takes it as an option for the obligor in the framework of the motivational system for the promotion of the efficiency and guiding the resources towards the most valuable usage (Weinrib, 2003, 73-74). In spite of the above-mentioned points, the substantial breach theory is intensely criticized by many of the lawyers. It has led to doubts in authenticity and correctness of the inferences based on this theory, for the negation of the punitive damages.

Some of the criticisms are related to this theory itself (beyond the punitive damages). One of the most important criticisms of this theory are its conflict with some of the contractual law principles in a way that some authors believe that this theory contradicts the principle of freedom of contracts. According to this principle, the people are free in setting their contractual communications and if the legislator creates an obstacle on the implementation of the people's will, it would not be fair. Therefore, with regards to this principle, the parties, if they agree (indeed if it's not contradictory to the public order and the binding regulations), can clearly anticipate in the contract that one of the parties can breach it through the payment of the damage. However, with the application of the substantial breach theory, the role of the parties in the determination of their contractual rights is ignored (Friedmann, 1989, 23).

Another fundamental criticism of this theory is that some consider it to be opposed to the ethics since keeping a promise is a moral principle emphasized in many legal systems. In fact, in the critics' point of view, in the economic analysis, the man is declined to the efficiency and the ethical values have faded. As a result of the abolishment of the ethical values, the conflicts have increased and costs have been imposed. Consequently, the efficiency of the contractual system has been reduced (Ansari, 2011, 559-560). Besides the criticisms against the substantial breach theory itself, it seems that there are also problems in the preassumptions of this theory. The substantial breach theory is based on the assumption whose authenticity is doubted, and in most cases, these assumptions are not true. For example, one of the preassumptions of this theory is that in all cases of breach, the non-breaching party identifies the breach and the breaching party, after the breach and voluntarily, compensate for the other party's damage, and he does not intend to impose the lawsuit costs upon him (and in other words, the probability of the liability of breaching party is equal to one). However, in most cases, this assumption is rare, because in many contracts, especially in the insurance contracts and the consumers contracts, due to different constraints such as the limited awareness of the parties, the harmed party does not know that the contract has been breached (specially if the breached task is an implied legal obligation and not a contractual condition), and even if he be aware of this issue, the obligor usually would not pay the damage voluntarily, and the obligee is made to bring a lawsuit. In addition, the doctrine of the substantial breach has not considered and internalized the social harms and damages inflicted upon the social values due to the breach of contract. The non-allowance of the punitive damages leads to the overestimation of the profits made from the breach and underestimation of the damages inflicted to the harmed party, as well as promoting the inefficient deliberate breaches. In other words, if the breaching party fails to compensate the other party's damages completely, the plaintiff would suffer damage and the defendant would also be encouraged to breach, which itself would lead to insufficient allocation of resources.

Indeed, some authors, though accepting the above two assumptions (i.e. voluntarily payment of the expecting damage by the breaching party and sufficiency of the reparation damage), still reject the substantial breach theory and believe that the breach of the contract by the obligor and payment of the damage is not the only way to avoid the insufficient performance, but the obligor can be released from the commitment and negotiate with the obligee. In this regard, these authors believe that the issuance of the punitive damage sentence in such cases does not mean the insufficient performance, since possibly, this damage would encourage the probable breaching party who intends to get released from the contract, to negotiate with the obligee (instead

of breaching the contract). In other words, in this state, the negotiation is more efficient than the onesided breach, since the negotiation costs are less than the costs needed for proving the damage (however, this issue is usually excluded in some legal systems like that of Iran in which the principle is the requirement of performance other than payment of the damages) (Abak, 2014, 84-86).

### **Clause Two: The Punitive Damages in the Opportunistic Breach**

Another type of deliberate breach of contracts is the opportunistic breach. As we know, due to the informational deficiencies, the logical limitations of the agents, and the operational costs, the parties of the contract are not able to predict all the probabilities and consequently, conclude a complete contract. Therefore, most of the concluded contracts between the parties are incomplete and these limitations lead to the opportunistic behavior (Ansari, 2011, 480-482).

The opportunistic breach is a state in which the obligor behaves in a way not expected contractually by the other party (but not necessarily opposed to the clear conditions of the contract). It leads to transference of the wealth from the non-breaching party to the obligor (Muris, 1981, 521). As a result, the breaching party, at the expense of the non-breaching party, profits more than expected and creates higher value for himself. In cases in which the person, after the performance by the other party, maliciously refuses to pay with the hope of reducing the contractual price, again a kind of opportunism has happened (Dodget, 1999, 652). Therefore, in cases in which the people behave opportunistically, a type of malice is latent in their behavior in a way that the opportunist seeks to increase his own benefits from the contract at the expense of the other party. It has made the economic analyzers to search for a proper performance bond to prevent opportunistic behaviors. One of these performance bonds is punitive damages.

According to most of the researchers, the opportunistic breaches of the contract are inefficient since on the one hand, the harmed parties through different methods including more research on potential partners, more detailed contract formulation, more resources spent on overseeing the other party's performance, etc. expend their resource for protecting themselves against opportunism (and therefore the contractual costs are increased) and on the other hand, the opportunist person may expend his resource to search for ways to evade the performance of the contract or make the identification of his breach more difficult, and consequently, waste the resources and abolish the wealth and social welfare. The opportunist breaches not only do fail to create wealth but also they actually waste it. Compensatory damages are not enough to prevent such breaches and thus, the punitive damages seem to be necessary (Boroumand, 2017, 237-242). The advocates of the economic analysis of the rights believe that there is a type of implied obligation to observe the goodwill and fair dealing in any contracts (especially the insurance contracts) which restricts the parties' freedom and prevent opportunistic behavior. Therefore, the parties to the contract are bound to observe this principle and breach of it would lead to liability (Abak, 2014, 88).

Judge Bazner, as one of the prominent scholars in the field of economic analysis of rights, with consideration for the possibility of failure to identify the opportunistic breach, agrees with the awarding of punitive damage for the cases of opportunistic breach (such as giving excuse for termination of a contract of employment, sabotage, and malicious refusal to pay debt) since such breach does not lead to the increase in social welfare. And with the determination of exemplary damage and necessitating the opportunist person to transfer all the profits made through the breach of contract to the obligee, the breach would become worthless to him and accordingly, the opportunistic behavior would be prevented. Most authors believe that the issuance of the exemplary sentence for malicious breach of the contract does not mean compromising the traditional principle (lack of awarding exemplary damage in the breach of contract) and the behavior of the breaching party in this state, would lead to the civil liability in a way that some call it "the tort of malicious breach of the contract" (Diamond, 1981, 428).

## **Second Discussion: the Types of Compensation of Contractual Obligation Damages in the Legal systems of Iran and England**

In terms of the necessity of compensation of all the damages (financial, emotional, physical, economic), it has been stated that apparently, none of the legal rules and regulations have noted the necessity of compensation of all the damages. While most of the lawyers believe in the principle of the necessity of compensation of all the damages, this issue has been nullified by most of the jurists. On the contrary, in terms of complete compensation of the damages, it has been stated that considering the reparation characteristic of the civil liability, the compensation must be proportionate to the damage and in order for it to be so, it should be sufficient and complete. Therefore, evaluating the damage, it should be tried to not consider a compensation less than the damage, or something more than the extent of the damage inflicted to the harmed party (Ghesmati Tabrizi, 2015, 160).

Judging whether in the law of England and generally, the common law, a principle titled complete compensation of the damages has been accepted or not, is so a difficult task, and different aspects of this system must be taken into consideration: over time, the legal system of England has been directed to this orientation that 'voluntary breach of contract' has been realized as the right for the obligor, and a theory has been proposed named the substantial breach of contract, which was previously evaluated. According to this theory, the obligor is allowed not to perform his obligations on the condition that he should compensate any damages to the obligee, with the justification that whenever the obligor feels that by allocating the resources needed for performance of a contract to another contract, he can attain more profit, he is allowed to breach the contract and spend his resource for more profitable contract. This way, the obligor is benefited and at the same time, totally, by the generation of more wealth, the society would also benefit from the contract. The rights of the obligee of the first contract are also guaranteed in a way that the obligor is bound to compensate all the damage to the obligee. Anyways, this theory relies on the preassumption that all the damages to the obligee are compensated and no harms would be inflicted to him by the breach of contract. In other words, the preassumption of this theory is the complete compensation of the damages. In the legal system of England, there is the precise categorization of the damages. All types of damages have been identified more or less, and the possibility of compensation of them has been realized. There is also another point that strengthens the existence of the principle of complete compensation of the damages in this system (Ranjbar, 2012, 49-50).

## **First Chapter: Compensation of the Damages of the Breach of Contractual Obligations in Iranian Law**

The discussions related to the damages due to non-performance has been dealt with in the second topic of the third chapter (the effects of contracts) in the Iranian Civil Code. Unfortunately, the few Articles noted in this discussion (Articles 226 to 230) merely express some conditions, obstacles, and forms of receiving compensation, briefly. In Article 226, the legislator has determined the conditions for claiming the damage- and not comprehensively- while in cases such as sustaining the damage, the existence of the legal relationship, certainty, predictability, and directness have been proposed as other conditions involved in the creation for claiming damages by the legal theory. The legislator in Articles 22 and 229 also denotes the preventive role of compulsion in the creation of the right to claim the damage. Among the two remaining articles also, Article 228 has dealt with one of the compensable types of the damage, which is the delay damage, and Article 230 has dealt with the performance bond. It seems that the scarce and scattered regulation in the different Iranian codes cannot be sufficient for this vast domain, specially when in lines with the economic needs of the societies and expansion of the contracts and exchanges, specifically in the international level, the issue of damages and the regulations for evaluating them have especially become the center of attention. It necessitates the structural revision of the Iranian regulations and setting a comprehensive system for the compensation of the damage due to contractual breach (Sabet Aghlidi, 2015, 32).



In this regard, firstly the different types of compensable damages must be clearly determined in Iranian law. The two clear instances of it are the decision-making about the loss of prospective profits and the emotional damages about which the legislator has not acted decisively. About the loss of prospective profits, Article 728 of the Former Civil Procedure Code, Note 2, Article 515 of Civil Procedure Code, and well known jurisprudential comments, which does not consider the loss of such profit to be recoverable, have arisen numerous controversies about the recoverability or non-recoverability of this loss, followed by many interpretations. Passing through all the controversies, the legislator performance based on the jurisprudential comments on non-recoverability of this loss as opposed to the principle of complete compensation of the damages in the current international proceedings. The explanation is that the most authenticated international documents have clearly included the loss of prospective profit among the most important compensable damages. The CLSG Article 74, PICC 2010 Article 7.4.2, and PECL 9:502 are among such international documents (Asadi and Ahmadi, 2015, 86-87).

On the emotional damages also, the existence of Article 212 of the General Penal Code, Article 9 of the Code of Criminal Procedure adopted in 1951 and Article 171 of the Constitution on the Acceptance of Intellectual Damage, on the one hand, and the Guardian Council's Opinions on the Non-Shariah Receipt of Intellectual Damage Reflected in Note 1 to Article 30 of the Press Law of 1985 and Article 58 Islamic Penal Code, on the other hand, have all arisen numerous controversies in this regard, however, the judicial procedure has not accepted the emotional loss so far, based on the legislator measures in Article 9 of the General Penal Code and the Guardian Council's opinions. It is also opposed to the proceedings predicted in the international documents. For example, the PICC 2010 Article 7.4.2 and the PECL Article 9:501 have considered the emotional loss to be recoverable. All these ambiguities and lack of clarities in terms of different types of recoverable damages in Iranian law can be seen while the legislator's undertone in Article 221 of the Civil Code is such that it even casts doubt on the principle of entitlement to compensation. According to this Article: "if any party undertakes to perform or to abstain from any act, he is responsible to pay compensation to the other party in the event of his not carrying out this undertaking, provided that the compensation of such losses is specified in the contract or is understood in the contract according to customary law or provided such compensation is by law regarded as guaranteed". The legislator in this Article, has considered the acceptance of receiving the damage to be on the condition of mentioning it in the contract or anticipation of it in the customary law and convention, while creation of this right, despite the existence of the conditions and lack of obstacles, must be, with the passage of mandatory performance of obligation, a definite task and not a conditional one. In fact, the legislator, instead of realization of the right of obtaining such damage as a principle, has introduced it as an exceptional task. An exception that seems would be faced with the maximum acceptance, at least by the conventional judgment. This view of the legislator, i.e. considering the recovery of the damage to be an exception, indeed not to the mandatory performance, but to the impossibility of the performance, for a subject in which the reparation methods of breach of contract is in most cases more efficient and optimal, is a fundamental weakness. In order to structuralize the contractual obligation damage compensation, as was mentioned, firstly the legislator should make clear different kinds of recoverable damages. Then, the regulations for the evaluation of this recoverable damage must be provided, so that it would be out of this unpredictable and arbitrary state in order for the parties to correctly evaluate the contractual risk-taking and its extents and be able to, through tools such as insurance, cover it. otherwise, by keeping the evaluation regulations in the shade, the possibility of the specification or optimal coverage of the risk-taking is practically impossible due to unpredictability. It is especially important in the communications of the merchants in the domestic and international domains (Hoseini Modarres and Golshani, 2013, 34).

## **Second Chapter: Compensation of the Damages of Breach of Contractual Obligations in Iranian Law**

There are four types of compensation of damages due to contractual obligations breach in the legal system of England. These four types can be classified into two groups: in the first group, there are cases in which the

criterion for damage compensation is the actual loss of the harmed party. In the second group, the damage compensation criterion is not the damage inflicted to the harmed party. The compensatory damage is placed in the first group, and the restitution damage, nominal damage, and punitive damage are placed in the second group. In the following, the investigation of them have been dealt with (Asadi and Ahmadi, 2015, 88).

#### **First Clause: Compensatory Damage**

The compensatory damage is aimed at the compensation of the harmed party damage due to the breach of contract. Therefore, the compensatory damage is the most important and frequent sentence for the damage. It is the basis and foundation for compensation of the damage in the law of England. One of the results of the compensatory being of the damages is that the basis for obtaining the damage is the loss inflicted to the plaintiff and not the profit he has received. This principle has many exceptions: regardless of the damages that have objectives other than compensatory objectives (nominal, punitive, restitution damages), the authors of the law of England have mentioned other cases in which the foundation for payment of damage is not the damage inflicted to the plaintiff, such as the breach of employment contract. In such a condition, it is possible that the employee, through being employed in a better institution, would not practically undergo a loss, and on the other hand, his employee also has not practically profited from this breach. In such a condition, the damage that might be received, would not be categorized under any of the mentioned types (Asadi and Ahmadi, 2015, 88-89).

#### **Second Clause: Restitution Damage**

In this type of damage, the harming party would retribute any profits obtained from the breach of contract. The basis for restitution damage is prevention from unjust enrichment of the breaching obligor, and not the damage actually inflicted to the obligee. Firstly, it was assumed that the price paid as the restitution damage can be restituted when a general breach of the obligation happens, i.e. when the plaintiff has not received any parts of the performance. However, most of the academic scholars of the law have criticized this principle. Today, most of the lawyers believe that the money paid must be proportionate to the breach of the obligation, be it total or partial (Asadi and Ahmadi, 2015, 96). The highly frequent application of the restitution damage that well manifests the weakness of other types of damage compensation in the law of Iran, is the breach of intellectual property contracts. In these contracts, it is possible that through the breach, practically no damage is inflicted to the other party, or the breaching party may make more profit than the plaintiff from the breach of contract, but the plaintiff also has benefited from it.

#### **Third Clause: Nominal Damages**

In cases in which one of the parties to the contract has breached it, practically no damage has been inflicted to the other party, a very trivial price has been determined as the damage. Determination of this type of damage is not intended for the compensation of the damages of the harmed party, but it is for the reflection of the hideousness of the breach of contract and is symbolic. In the symbolic damage, the very statement of the court is the best way for compensation. However, this compensation method has definitely not a compensatory aspect. In the law of Iran, unlike that of England, regarding the existence of damage compensation foundations such as the 'principle of harm', an entity such as the symbolic or nominal damage does not exist. Therefore, the mere breach of the contract by the obligor without the infliction of the damage to the obligee would not create any rights for the payment of the damage. Therefore, "the necessity of infliction of the harm" is among the conditions for the creation of the right to receive the damage in the law of Iran (Asadi and Ahmadi, 2015, 97-98).

#### **Fourth Clause: Exemplary Damages**

The exemplary damages have no compensatory effects and are intended to punish and prevent the commission of similar behavior in the future. In fact, the issue of punitive damage arises when the obligor rudely and anomalistically breach the contract. These damages are an exception to the general principle of compensatory being of the damage (Asadi and Ahmadi, 2015, 98). In the calculation of this kind of damages, the behavior of the plaintiff and defendant must be taken into consideration alongside each other, and especially, it should be noted that assignment of which extent of damage would be enough to punish the defendant (Abdollahi, 2004, 93).

Here, the different aspects of the compensatory and punitive damages should be noted. When as a result of an illegal act (be it due to the breach of contract or commitment of a tort) a damage is inflicted to (a) person(s), the compensatory damage is the price needed for the return of the harmed party to the state before the infliction of the damage (Fausten, 2012, 2). On the contrary, in terms of the punitive damages, the main emphasis has been put on the punishment of the convict and prevention of the actual and potential perpetrators from the commitment of that act in the future (Behr, 2003, 109-110).

Another difference between the punitive and compensatory damages is that the compensatory damages are loss-oriented, i.e. since the initial role of compensatory damage is the compensation of the damage inflicted to the harmed party, and it is limited to the same loss, this type of damage is equal to the loss. On the other hand, the punitive damages are wrong-oriented, i.e. the punitive damage extent is not merely calculated based on the inflicted damage and there are other factors that affect its evaluation such as the significance and seriousness of the damage to the plaintiff, the amount of the defendant wealth, the profits obtained from the illegal act, the necessity to detaining the defendant, and similar persons to him from the same infringement, etc. (Behr, 2003, 110-111).

Another difference between these two damages is that the compensatory damage is loss-oriented, i.e. when determining the compensatory damage, the harmed party and the damage inflicted to him are taken more into consideration and the perpetrator, third parties, and the society do not have such effective role in determination of the damage, and the defendant is merely considered as a person who must compensate for the damages to the harmed person. Consequently, the delinquent person is not as emphasized. On the contrary, in the punitive damages, the delinquent is mainly the axis and his illegal act is focused on. Besides, when determining the punitive damages, other persons who are affected by the defendant's behavior are also considered (Behr, 2003, 111-112). In addition, the compensatory damage might be sentenced even for the simple guilt and negligence, while in issuance of the punitive damages (whose aim is punishment), something more than TNA, a simple negligence, is required, and the hideousness and boldness of the defendant's behavior plays an important role in determination of the extent of damage (Curcio, 1996, 344-345).

## Conclusion

The punitive damages are a kind of non-compensatory damages which are sentenced in addition to the compensatory damages in which the defendant has behaved deliberately or maliciously, or with bold guilt. The main objective of this type of damage is prevention and punishment, though it can include other goals such as training, restoration, etc.

Regarding the permission of the law, the jurisdiction of the judiciary of the Islamic Republic of Iran to deal with the civil lawsuits against foreign governments, punitive damages in case of breach of contract and the existence of three pillars of civil liability, is imposed on the offending obligor and it is when that in addition to the occurrence of harming act with its own conditions, also a loss is inflicted to the plaintiff, so that after the causality between the act of the defendant and the loss is proven, the plaintiff can claim the damage. The punitive damage in civil lawsuits, including contractual and non-contractual lawsuits can be awarded (indeed, in case of existence of required conditions and characteristics such as the infliction of the damage, brutal, cruel, bold, fraudulent or malicious behavior by the defendant).

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