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by K.H. Ameli

(Revised)

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Iranian Law of Loss of Profits in International Arbitration

By K.H. Ameli*

Abstract

This paper discusses the Iranian law of loss of profits in international arbitration. It examines the Iranian civil procedure law, which on its face does not allow recovery of lost profit, and various other fields of Iranian law, which allow loss of realizable profits, especially in international commercial arbitrations, applying Iranian law. It concludes that the unavailability of the loss of profits provision under the Civil Procedure Code should be limited to speculative profits consistent with other provisions of Iranian law and practice.

Executive Summary

The new Iranian Civil Procedure Code of 2000 on the face of it does not allow lost profit, while the Criminal Procedure Codes of 1999 and 2014 expressly allow it, as did the old Civil Procedure Code. Loss of profit is also expressly or impliedly accepted as remedy under the Civil Code, the Commercial Code, Civil Responsibility Act and other Iranian laws. Some Iranian domestic arbitral awards reject lost profits claims based on the recent Civil Procedure Code, while international arbitral awards, applying Iranian law have allowed such claims. The unavailability of lost profit in the new Civil Procedure Code is supposed to be based on an old view of the Imamiah (Shia) school of Islamic law, which however respectable does not seem convincing and sensible any longer or reconcilable with Iranian law.

Availability of loss of profit in breach of contracts is crucial to the principle of *pacta sunt servanda* under Iranian law, Islamic law, general principles of law and international business law. Otherwise, binding contracts become revocable for convenience by either of the parties. There is no sensible reason to limit the availability of realizable lost profit to criminal cases and exclude it in contract cases, whereas the sanctity of contracts requires at least an equal treatment. The new Civil Procedure Code also recognizes liquidated damage clauses, which may include lost profit. Various other laws also provide for loss of profits. Therefore to avoid the inconsistency, the unavailability of loss of profits under the Civil Procedure Code should be interpreted as limited to speculative loss of profits, as held by prominent Iranian authorities and international arbitral awards applying Iranian law.

Discussion[1]

The new Iranian Civil Procedure Code of 2000, in Article 515, Note 2, provides that "Damages arising from loss of non-profit (adam o-naf'a) are not recoverable," although the primary provision of Article 515 allows "recovery of damages for the delay in performance of an obligation or its non-performance [] which the claimant *has incurred or would incur*" as well as recognizing liquidated damage clauses, which may include loss of profits.[2] Article 267 on damages caused by experts also provides that "Damages and losses arising from loss of non-profit (adam o-naf'a) are not recoverable."[3] The Civil Procedure Code of 2000 for the first time superseded the Civil Procedure Code of 1939, which in Article 728 provided that "recoverable losses may arise from loss of property or loss (ruining / wasting) of profit (taofit manfe'at) which would have been obtained by performance of the obligation." In a critical treatment of the issue, it has been suggested that the Guardian Council, which is part of the Iranian legislative process, did not allow recovery of lost profit in the new Code because in its view lost profit is not recoverable in Imamiah school of Islamic law,[4] especially when the Guardian Council has allowed it as loss of "possibly realizable profits" (manafe'a momken ol-hosoul) in the Criminal Procedure Codes of 1999 and 2014. Despite the traditional significant difference of the terms for lost profit in Islamic and Iranian law and their equal treatment in modern practice, it seems that certain ambiguity still persists and for that reason the original terms are used when necessary.

The application of the Civil Procedure Code to arbitration and in particular international arbitration however remains questionable. The Civil Procedure Code, Article 477, in Part Seven on Arbitration is explicit that "In the proceedings and the award, the arbitrators are not subject to the provisions of the Civil Procedure Code, but they must apply the

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1 Considering that the legislative history of laws and judgments are not published, examination of Iranian law issues mainly is limited to doctrinal works and literature.

2 Iranian Civil Procedure Code, Article 515: "The claimant is entitled to seek from the respondent in the Statement of Claim, in the course of proceeding or separately, recovery for damages of the proceeding, delay in performance of an obligation or its non-performance due to the failure of the respondent in performance or its refusal, which the claimant has incurred or would incur as well as recovery of equivalent value for non-delivery or delay in delivery of the relief sought for direct losses and losses caused. Following the proceedings, the court shall determine the amount of said damages in the judgment on the principal claim or in a separate judgment, requiring the condemned party to pay the damages. In the event that special contract is concluded between the parties concerning damages, that contract shall apply.

> Note 1. Demand for damages subject of this Article does not require submission of separate Statement of Claim unless where the claim for damages is sought independently or after the closure of the proceedings.
>
> Note 2. Damages arising from loss of profit are not recoverable and damages for late payment are recoverable in statutory instances."

3 Civil Procedure Code, Article 267: "When one of the disputing parties incurs losses due to the fault of the expert, the loss may be recovered where the expert's fault is the principal cause. Damages and losses arising from loss of profit are not recoverable."

4 Mehdi Shahidi, 3 *Civil Law: Effects of Contracts and Obligations*, Item 136, p. 258, Majd Publishers, Tehran (1386/2007).

provisions concerning arbitration." Similarly, the 1997 International Commercial Arbitration Law, Article 36.1 provides that "Arbitration of international commercial disputes specified in this Law shall be exempt from the arbitration provisions stipulated in the Code of Civil Procedure and other rules and regulations."[5] Also concerning the applicable law, Article 27, last paragraph, adopting the UNCITRAL Model Law (1985), Article 24(4), provides that in applying the rules of law to the substance of the dispute "In all cases, the 'arbitrator' shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." Nevertheless, the practice is not uniform, as some awards have treated the unrecovrability of loss of profits provision of the Civil Procedure Code as a matter of merits, which will be seen below.

The study of Islamic law sources indicates that there is no consensus of Imamiah school of Islamic law scholars that loss of profits is not recoverable but that it is a nonbinding majority view, limited to loss of profits of a craftsman due to false imprisonment.[6] False arrest or imprisonment however today is a crime punishable under the 1996 Islamic Criminal Code of Iran,[7] carrying with it responsibility for loss of realizable profits as well as all material and moral damages under the 2014 Criminal Procedure Code and its earlier version of 1999.[8] It is not clear why the unrecoverability of loss of profits in a criminal matter based on a majority opinion has been generalized and extended to civil matters under the Civil Procedure Code, when recoverability of loss of profits itself has been recognized under the Criminal Procedure Code and there is no basic distinction between the sources of liability for damages in Iranian and Islamic law. Consensus of Islamic scholars on a matter may not be generalized or extended to other matters in

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5 Iranian Law on International Commercial Arbitration Law of 1997: http://www.trac.ir/law.aspx?id=25

6 Sheikh Mohammad Hassan Najafi, 37 *Jawaher al-Kalam in Commentary on Islamic Law* 39-40, deceased in 1266 HQ/1849 AD, Mahmood Quchani, ed., Najaf (1398 HQ/ 1978 AD); Mohaqeq Helli, 3 *Sharay al-Islam,* Abolqasem Yazdi, Persian trans., pp. 1256-57, Tehran U. Pub., Tehran (1368/ 1990).

7 Islamic Criminal Code of 1996, Article 583: "Anyone from government authorities or officers or the armed forces or other persons who without an order from competent authorities in cases other than where arrest of persons is authorized under the law, arrests or imprisons a person or by force hides a person in a place shall be convicted to imprisonment of one to two years and payment of fine of six million to eighteen million rials." The Code, Articles 570 and 621 also criminalize deprivation of personal freedoms and abduction or hostage taking, respectively.

8 Criminal Procedure Code of 2014, Article 14: "The plaintiff may seek compensation for all material and moral losses and damages and realizable profits arising from the crime.

> Note 1. Moral damages consist of pain and suffering and personal, family and social honor and integrity. The court may in addition to monetary damage in the judgment order other methods to compensate the damage such as requiring apology, publication of the judgment in the press and the like.
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> Note 2. Possible realizable profits may only pertain to instances of wastage. Also the provisions for realizable profits and payment of moral damages are not included in the Sharia fixed Tazirat and Dieh penalties."

Criminal Procedure Code of 1999, Article 9: "A person who incurs losses and damages arising from occurrence of a crime [] and demands them is called private claimant or plaintiff. Recoverable losses and damages are as follows:

> 1. Material losses and damages, which arise as a result of commission of the crime.
>
> 2. Profits which are possibly realizable and the private claimant is deprived of and incurs their loss as a result of commission of the crime."

Islamic law,[9] let alone a majority opinion.

The Imamiah "majority opinion" on unrecoverability of loss of profits of a craftsman due to false imprisonment is not based on any primary sources of Islamic law, that is, the Koran and the tradition of the Prophet of Islam, his daughter or the Twelve Imams succeeding him, or for that matter on a consensus of the Imamiah scholars, but a purely legal analysis that a free person cannot be usurped for he is not property and manpower does not constitute an independent property.[10] In contrast, the view of other prominent Imamiah scholars supporting responsibility for loss of profits of the falsely imprisoned craftsman is based on the fundamental principle stated by the Prophet that "there is no harm or harming in Islam," the Koranic principle of equal recompense for wrongs (Ch. 42:40), that manpower constitutes property as it can be hired and exchanged for value, and so it may be controlled (hand rule) as with intangible property rights, when such a person is otherwise employed, wage earner or active in business rather than indolent, and that such compensation is required by reasonable persons.[11] There is however no disagreement among Imamiah scholars that usurpation of property rights in tangible property requires compensation for loss of profits, based on interpretation and analysis of primary sources of Islamic law.

The 1928 Civil Code, Article 320, based in Imamiah school of Islamic law, is explicit that "In respect of profits arising from usurped property, each usurper is liable for profits derived during the period the usurped property was in his charge as well as the period of subsequent usurpations even if he received no profit therefrom." Under Article 308,[12] usurpation is considered as unauthorized control in another person's property rights, including intangibles, security rights, priority rights and rights to enjoyment and use of public amenities and commons,[13] a definition covering equivalent and quasi-usurpation. The expansive definition of usurpation includes the "hand" rule based on the Prophet saying, "The hand must return what it has taken." Thus, under Articles 310 and 631, usurpation also arises when the contracting party denies the rights of his counterparty to a

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[9] Abolhassan Mohammadi, *Principles of Inference in Islamic Law*, Item 182.1, pp. 187-88, Tehran University Publishers, Tehran (1390/ 2011).

[10] *Op. cit*, Sheikh Najafi.

[11] Nasser Katouzian, 1 *Civil Liability: Extra-contractual Obligations*, 8th Ed., Items 97 and 104, pp. 242-44 and 252-53, Tehran U Pub., Tehran (1387/2008), citing Sayyed Ali Tabatabai, 2 *Riadh al-Masael*, Book on Usurpation, Moqaddas Ardebili, *Sharhe Ershad*, Ibn Qudameh, 5 *Al-Moghni*, p.225, Mirfattah, *Anawin*, p. 289, and Sayyed Mohammad Jawad Ameli, 6 *Meftah al-Karamah*, p. 225; Sayyed Hossein Safai & Habibollah Rahimi, *Civil Liability: Extra-Contractual Obligations*, Items 73-75, pp. 118-28, SAMT Publishers, Tehran (1390/2011), citing Sayyed Ali Tabatabai, 12 *Riadh ul-Masael* 263, deceased 1192 HQ/ 1778 AD; Shahid Thani, 12 *Masalek al-Afham*, p. 160, martyred 1558, Maaref Islami Pub. 1401 LH/1980AD, Moqaddas Ardebili; Mohammad Jawad Moghnieh, 5 *Feqh al-Imam Jafar al-Sadeq* 15, deceased 1979, Sebtain Pub., Beirut (1984); Abolqasem Khoei, 2 *Mesbah al-Feqaha* 36, deceased 1411 LH/ 1991 AD; Abolqasem Mirza Qomi,1 *Jame'a al-Shatat* 169, deceased 1231 LH/ 1816; and more importantly, the late Imam Khomeini, 1 *Ketab al-Bay* (Book on Sale) 20, deceased 1989.

[12] Civil Code, Article 308: " Usurpation is the assumption of another's right by [oppression]. Laying hands on another person's property without authority is also considered usurpation." *The Civil Code of Iran*, trans. M.A.R. Taleghani, Rothman & Co, Littleton, Colorado (1995), as other Civil Code provisions. All other translations are by the present writer.

[13] Katouzian, 2 *Civil Liability, op. cit.*, Items 483-84, pp. 217-19.

property in his charge, under Article 261 where the owner does not ratify an unauthorized sale pursuant to which the subject-matter has been delivered to the purchaser or under Article 366 when a party to an irregular sale contract refuses to return the subject-matter received.[14] And under Article 309 even where usurpation does not arise if a person prevents an owner from possessory treatment of his property without himself assuming control of it, he may still be liable for damages including loss of realizable profits due to destruction or causation.

In contract law, the universal principle of *pacta sunt servanda*, that contracts are binding, is enshrined in the Koranic verse of "O ye who believe! Fulfill all contracts"[15] and the prophetic saying that "Believers must fulfill their contracts." Under the Iranian Civil Code, Article 219, "Contracts made according to law are binding on (shall be complied with by) the parties and their successors, unless they are cancelled by mutual agreement or rescinded for a legal reason." Also Article 10 provides that "Private contracts shall be binding on the contracting parties provided they are not contrary to the express provisions of the law."

The Civil Code, Article 184 divides contracts to irrevocable, revocable, optional, unconditional and conditional categories. Articles 185 and 186 provide that neither party may revoke an irrevocable contract, save in specified circumstances, while either party may revoke a revocable contract at he pleases. Under Article 954 a revocable contract is rescinded by the death of one of the parties or his imbecility where mental maturity is essential. And Article 187 provides that a contract may be irrevocable by one party but revocable by the other. The revocable contracts are limited to contracts of deposit, loan of tangible property and agency under Articles 611, 638 and 678, while under Article 787 the mortgage contract is revocable for mortgagee and irrevocable for mortgager. Thus, under Articles 10 and 219 all nominate and innominate contracts, including sale, lease, hire and carriage, partnership, loan and guarantee, are binding and irrevocable unless otherwise specified by law or agreed to by the parties.[16]

In Iranian law, specific performance of obligations or payment of damages in lieu thereof is the remedy for breach of contracts. The remedy seeks to place the aggrieved party so far as possible in the same position he would had the contract been performed as the basic consequence of breach of obligations and no harm rule. Thus, damages including loss of

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[14] Civil Code, Article 310: "If a person to whom some property has been lent or with home the same is deposited or who holds a property under similar titles should deny the same, he is considered a usurper as from the date of denial.
Article 366: "Where a person takes delivery of the subject matter of a sale under an irregular sale, he must return it to the owner; and if the subject matter of the sale is lost or damaged, he shall be liable for it and for profits from it."
Article 631: "[] And if the owner is entitled to the restitution of the property and demands such restitution, and the person in possession of the property refuses to return the property though capable of doing so, the possessor shall be liable for any destruction, damage or defect from the date of the demand for restitution, even if these are not related to his acts."

[15] Koran, Ch. V, Maida (The Table Spread), verse 1.

[16] Sayyed Hossein Safai, 2 *Introductory Course on Civil Law: General Rules of Contracts*, 6th Ed., p. 24, Mizan Legal Foundation, Tehran (1387/2008).

realizable profits may be recovered so long as they are foreseeable at the time of contracting, directly arise from the non-performance and are established with reasonable certainty in the ordinary course of business, needless to prove fault. Since it is foreseeable at the time of contracting, loss of profits is considered a direct rather than consequential damage. It is also obvious that specific performance and payment of damages in lieu thereof each includes a major element of realizable profits as part of economic value of property and property rights for their useful life, which is merged in their price readily ascertainable by market value, comparable sales or by the application of other valuation methods. Iranian law also recognizes recoverability of goodwill of commercial outlets, the market value of which the court determines by reference to experts.[17] Therefore, the preoccupation with unavailability of speculative profits should not prevent realizable profits for breach of contracts, especially when they are also recoverable in extra-contractual and criminal cases.

The distinction between contractual and extra-contractual liabilities in the Civil Code (Articles 219-231 and 301-337) merely emphasizes the remedies for contractual liabilities, while their common source of liability is breach of obligations under Iranian and Islamic law.[18] The rules on liabilities for breach of contractual obligations may be supplemented by the rules set forth for liabilities arising from non-contractual obligations under the Civil Code and other laws, which more specifically provide for loss of profits as well as moral damages and additional consequences for breaches committed willfully or by fault.[19] The application of same rules in particular is seen in the provision for private cause of action for damages, including loss of realizable profits, arising from commission of crime, which may independently be brought before the civil court or pursued before the criminal court even where the public cause of action of the crime for one reason or another is waived, terminated or has failed due to an acquittal judgment under the Criminal Procedure Code of 2014, Articles 14-17 and 20.[20]

Because law is the basic source of remedies for breach of contracts and custom is also the law, the distinction of the three sources of remedies under the Civil Code, Article 221, has been considered of no substantive significance in Iranian law.[21] Further, custom is an implied term of contracts under Articles 225 and 356 and there is strong presumption that custom requires compensation of damages for breach of obligations such that there is no need for its express mention in the contact or the law.[22]

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[17] Lessor and Lessee Relations Act of 1997, Articles 6 and 10; Lessor and Lessee Relations Act of 1977, Articles 18-19 and 28-29.

[18] Nasser Katouzian, 4 *Civil Law Course, General Rules of Contracts, Performance of Contract*, Item 821, p. 201, 5th Ed., Entesharco Pub., Tehran (1387/2008); Safai & Rahimi, Civil Liability, Item 55, p. 94.

[19] *Id.*, Item 58, p. 98.

[20] See also the older version in the Criminal Procedure Code of 1999, Articles 9-12.

[21] Safai & Rahimi, *op. cit.*, Item 56, pp. 95-96.

[22] Katouzian, *op. cit*., 4 *Civil Law Course, General Rules of Contracts, Performance of Contract*, Items 852 and 854, pp. 269 and 272; Safai, op. cit., pp. 219-20.

Thus, the Civil Code provides:

> Article 221. "If a person undertakes to perform or abstain from doing something, he shall be liable for damages suffered by the other party if he fails in his undertaking, where compensation for such damages is provided for, or the undertaking is regarded by custom as containing provision to this effect or by law the said failure gives rise to liability."
>
> Article 222. "In case of failure to comply with an undertaking, the judge may, with due regard to the above Article, authorize the beneficiary of the said undertaking to perform it himself and order the defaulting party to pay the expenses incurred."
>
> Article 227. "The party who fails to perform his undertaking will be obliged to pay damages only when he is unable to prove that non-performance was not due to some external cause that cannot be attributed to him."
>
> Article 230. If in a transaction it is stipulated that in case of failure the defaulting party should pay to the other a sum of money as compensation, the judge may not sentence him to pay more or less than the sum he has bound himself to pay.
>
> Article 328. "Anyone who destroys any property of another person shall be liable and must replace it with its equivalent or pay its value, whether the destruction is intentional or unintentional, and whether the property destroyed is a corporeal property or usufruct; and if he renders the property deficient or defective, he shall be liable for the diminution in its value."
>
> Article 331. "Anyone who causes the destruction of a property must replace it with its equivalent or pay its value; and if he causes deficiency or defect in the property, he must pay the depreciation in its value."

Moreover, the Civil Code, Article 535 also recognize loss of profits in holding the agent liable to the owner for "equivalent value," which is usually contract value, when the agent does not farm under a farming contract and pursuant to Article 536 for loss of "difference" in the produce and other damages due to lack of care in farming. Thus the Civil Code provides:

> Article 535. If the agent does not cultivate and the period of the contract expires, the [owner] is entitled to [equivalent value].
>
> Article 536. If the agent does not exercise customary care in cultivation and thus causes produce to diminish, or any other loss to affect the [owner], the agent shall be liable for the difference.

The Civil Responsibility Act of 1960, Article 1, provides for compensation of material and moral damages arising from intentional or negligent conduct harming the life, health,

property, freedom, honor, business fame or any other rights, which clearly include contractual rights. Articles 5 and 6 provide for compensation of loss of total work power and its reduction as well as future losses.[23] The Revised Commercial Code of 1969, Article 133, is explicit that "Losses referred to in the Article includes damages and loss of profits."[24] The Labor Act of 1989, Articles 18 and 29 provide for all damages including lost wages of the worker if the employer unjustifiably prevents him from work such as his arrest by the authorities due to employer's complaint, which is subsequently dismissed by the dispute resolution authorities.[25]

Thus, damages in Iranian law may be material, moral and bodily, where material damage includes property *in rem*, intellectual property, profits and legitimate rights that can be valued in monetary terms, moral damage covers pain and suffering, mental anguish and besmirched personal, family and social reputation, and bodily harm consists of material and moral harm to the person of the victim his family and those under his support, although bodily harm is traditionally seen as a combination of material and moral damages.[26] The terms damage, loss and harm are used interchangeably and without a distinction and its recoverability is not limited to property damage. To be clear, contract rights constitute property rights and are considered as movable property under the Civil

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[23] Civil Responsibility Act, Article 5: If as a consequence of harm to the body or health of a person, there comes about body defect, work power reduction or total work power loss or that it brings about an increase in his cost of living, the harm doer is responsible for all said damages. Considering the circumstances of the case, the court will determine whether the payment of compensation should be on installment basis or lump sum and in case of installment, the extent and amount of any security. In the event that consequences of bodily harms are not ascertainable at the time of judgment, the court has a right to reconsider its judgment in two years from the date thereof.
Article 6. In the event the harmed person dies, the damages shall include all costs, in particular the burial costs. If death is not immediate, the costs of health care and damages arising from work power loss during illness shall be included in the damages. In case at the time the harm occurred the harmed person was legally required or it is possible to become required later to support a third person and as a result of his death the third person is deprived of such right, the harm doer has to pay a reasonable amount of allowance to be determined by the court for the period the harmed person would ordinarily be possible to live and required to support the third person. In case at the time of the harm, the fetus of the third person is formed or the child is not yet borne, that person would be entitled to the allowance.

[24] Statutory Bill on Partial revision of the Commercial Code [on Joint-Stock Companies], Article 133: Directors and managing director of the company shall not enter into transactions similar to the company transactions, involving competition with the company's operations. Any director violating the provision of this article shall be liable to compensation of losses resulting therefrom. Losses referred to in this article include damages and loss of profit.

[25] Labor Act, Article 18: If the worker is arrested due to complaint by the employer and the arrest does not result in a conviction decision by the dispute resolution authorities, the arrest period shall be included as part of the worker's service record and the employer is duty bound to pay the worker his wages and benefits in addition to compensation of losses and damages pursuant to judgment by the court.
Note. The employer shall pay at the minimum fifty percent of the worker's monthly salary to his family as on account for the period his situation remains not determined by the said authorities.
Article 29. In the event that the dispute resolution board determines that the employer has caused suspension of the worker's contract, the worker shall be entitled to damages arising from the suspension and the employer shall reinstate the suspended worker in his past work position.

[26] Katouzian, *op. cit.*, 1 *Civil Liability*, Items 97-99, pp. 242-246; Safai & Rahimi, *op. cit.*, Items 72-73 and 83, pp. 118-20 and 140.

Code, Article 20,[27] more specifically under the Civil Procedure Code, Article 13.[28] Iranian law does not distinguish between property rights *in rem* and *in personam*, although for clarification purposes it is occasionally used. "The term 'property' includes all things and rights having economic value," whether material property or rights *in personam*.[29]

The conflict on recoverability of loss of profits between the Civil Procedure Code and the prior general and particular laws as well as with concurrent and subsequent Criminal Procedure Codes cannot be resolved by simple resort to the principle of supersession or treatment of the important and valid general rules of others laws as special and thereby restricting them to the point of uselessness. Due to the significance of the issue, prominent Iranian law authorities have opined that the Civil Procedure Code provision on unrecoverability of loss of profits must be interpreted as applicable to speculative profits to maintain any validity for it in view of the importance of the general principle of recoverability of loss of realizable profits in the Iranian legal system.[30]

As with actual damages (damnum emergens), loss of profits (lucrum cessans) needs to be established with certainty. However, as with every other legal concept, the certainty, which usually pertains to the future, has to be reasonable in the ordinary course of business in order to fully compensate the loss and at same time avoid the speculative one. While foreseeability of loss of profits is at the time of contracting in contract case as with all other events, it is at the time of injury in extra-contractual cases, absent circumstances demanding earlier time. Therefore, profits realizable with reasonable certainty must be recoverable whether in contract, tort or criminal matters, a rule recognized in the Criminal Procedure Codes of 1999 and 2014, and the amount of which may be determined with the assistance of experts.

Both Criminal Procedure Codes refer to the loss of profits as "possibly realizable profit," although the 2014 Code adds "to the extent it is considered as wastage". However, the commentators agree that in any event the term "possibly realizable" here must be

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[27] Civil Code, Article 20: All debts, such as loan, price payable for goods sold and rents, are considered movable for court jurisdiction purposes even if the goods sold or the objects rented are themselves immovable.

[28] Civil Procedure Code, Article 13: In commercial disputes and disputes concerning movable property arising from contracts and agreements, the claimant may refer to the court in which district the contract or agreement is formed or where the obligation is to be performed.

[29] Naser Katouzian, *Introductory Course on Civil Law: Properties and Ownership*, Item 1, p. 9, 23th Ed., Nashr Mizan Pub., Tehran (1387/2008).

[30] Katouzian, *op. cit*., 1 *Civil Liability*, Item 97, p. 243; Katouzian, *op. cit*., 4 *Civil Law Course: General Rules of Contracts*, Item 822, p. 205; Safai & Rahimi, op. cit., Item 75, p. 127 & n. 2; Safai, *op. cit*., p. 211; Abdolhossein Shiravi, *Critique and Review of the Civil Procedure Code Provisions on Contractual and Late Payment Damages*, 3 Journal of Qom Institute of Higher Education, No. 9, p. 7, at 25-33, (1380/2001); Abdollah Shams, 1 *Civil Procedure*, Item 725, p. 390, 23rd Ed., Derak Pub., Tehran (1389/2010), Alireza Barikloo, *Civil Responsibility*, 2d Ed., p. 67 (1387/2008); all of which *also cited* in Safai & Rahimi, *op. cit.*, p. 127, n. 2 *and quoting* the Judiciary Legal Department Advisory Opinion 7/11081, dated 24.11.1380/13.02.2002, repeated later as Advisory Opinion No. 7/7904, dated 10 January 2005 (21.10.1383), and which the present writer has referred to in the text as a 2005 advisory opinion and quoted in n. 49, *infra*.

interpreted as "certainly realizable" in all cases according to the general law of damages.[31] So long as occurrence of the loss of profit may be established, the ascertainably of its scope is a matter of means and recovery may not be denied due to the difficulty, which at any rate should work against the wrongdoer rather than the aggrieved party.

Whether the necessary certainty for realizable profits is strong suspicion or possibility,[32] it has to be reasonable in the ordinary course of business, in the sense that considering the continuation of the circumstances at the time of contracting or harm in other cases, the future loss is more likely to occur in the event of breach such as future health care costs of a patient, future wages of a worker ordinary earned and now deprived from due to an injury or liability for the fruits of an orchard in blossom when the trees are destroyed or have died due to lack of irrigation.[33] What is necessary to exist at the time of harm is not the future profits, but their cause, such as fruit trees in blossom or contracts on the basis of which future profits would be potentially realizable.[34] Therefore, the extent of the future loss may be established with the assistance of experts on the basis of more likely to occur and if that is not possible other methods may be used, including installment payments and revisiting the decision in two years as provided in the Civil Responsibility Act, Articles 5 and 6, referred to above.[35] Thus the inability to assess the extent of the loss is not by itself sufficient to deny the claim, as it would only reward the wrongdoer.

Moreover, in international arbitrations applying Iranian law recourse may be had to custom and trade usage for compensation of lost profits, under the Civil Code, Article 221 where compensation for such damages is provided for by custom, absent express provision in law or the contract, as contract terms are supplemented by custom under Articles 220 and 225.[36] The 1997 Law on International Commercial Arbitration, Article 27 (3) "In all cases, the 'arbitrator' shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." Article 27 (3), barrowed from the UNCITRAL Model Law (1985), Article 24 (4), although may be narrower than the Civil Code provisions, it has been interpreted without limitation in a number of international commercial arbitral awards made in Iran, including one discussed below. Trade usage covers international trade law rules and practice, also referred to as the *lex mercatoria* or law merchant as well as trade usage and

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31 Katouzian, *op. cit.*, 1 *Civil Liability*, Item 97, p. 243; Safai & Rahimi, *op. cit.*, Item 75, p. 127.

32 Safai & Rahimi, *op. cit.*, Item 75, p. 127.

33 Katouzian, op. cit., 1 *Civil Liability*, Items 122-23, pp. 278-80;

34 *Id.*, Item 97, pp. 243-45, citing Mirfattah, *Anawin*, pp. 95-96.

35 *See*, Safai & Rahimi, *op. cit*., Item 63, pp. 102-103.

36 Civil Code, Article 220: "Contracts not only bind the parties to perform what is expressly laid down in them, but the parties are also bound by all consequences which by custom or practice follow from the contract or follow it by virtue of law."
Article 225: "When something is recognized by custom and practice as usual in such a way that the contract covers it even if it is not expressly mentioned therein, that thing is considered to be mentioned in the contract."

practice.[37] The UNIDROIT Principles of International Commercial Contracts codify general principles of law and the *lex mercatoria* in good measure[38] and "share the unofficial status of *lex mercatoria*."[39]

The UNIDROIT Principles, Article 7.4.2 (1) provides for "full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which [the aggrieved party] suffered and any gain of which it was deprived," that is loss of profits. Article 7.4.4 also recognizes that "The non-performing party is [] liable for harm which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as being likely to result from its non-performance." Article 7.4.3 on certainty of harm provide:

> (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
>
> (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.
>
> (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

The proof of harm, including future harm, with reasonable degree of certainty ordinary requires a balance of probabilities of more likely than not, that is, 50 percent or greater likelihood to establish it, standard which originated in Anglo-American law, but which is well received generally. In cases where the harm or its extent can be established with less than a 50 percent likelihood, "[t]he practice of tribunals suggests that, in such a case, it is more likely that a tribunal will award damages either for loss of a chance under Art. 7.4.3 (2) or in its discretion under Art. 7.4.3 (3). However, a tribunal should not decline to award damages for loss of profit simply on the basis of the complexity of the case."[40]

Practice

The practice of the Iran-United States Claims Tribunal concerning loss of profits claims in breach of contracts, with which the present writer has been involved as a member, dates to the period before the Civil Procedure Code of 2000 and deal with disputes, which

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[37] *Fouchard, Gaillard & Goldman on International Commercial Arbitration*, Emmanuel Gaillard & John Savage, eds, no. 1513, pp. 844-845, Kluwer, The Hague (1999), citing the well-known ICC Case No. 3896, *Framatome and others v. Atomic Organization of Iran*, Award on Jurisdiction of 30 April 1982.

[38] UNIDROIT Principles, Preamble, first para.: "These Principles set forth general rules for international commercial contracts."
Third para.: "They may be applied when the parties have agreed that their contracts be governed by general principles of law, the *lex mercatoria* or the like."

[39] *Commentary on the UNIDROIT Principles of International Commercial Contracts*, Stefan Vogenauer & Jan Kleinheisterkamp, eds, Preamble I, para. 7, p. 28 and p. 50, n. 185, Oxford (2009), ("UNIDROIT Commentary").

[40] *Commentary on the UNIDROIT Principles of International Commercial Contracts*, Stefan Vogenauer & Jan Kleinheisterkamp, eds., p. 881, Oxford (2009).

arose before 19 January 1981, when the Algiers Accords were concluded. The Tribunal has recognized the availability of lost profits as a matter of law, although it had to disallow them in a number of cases due to the force majeure conditions of the Islamic Revolution for the period of September 1978-July 1979, the takeover of the American Embassy and its personnel during 4 November 1979-19 January 1981 and the Iraq war from September 1979 to August 1988. Nevertheless, the IUSCT has awarded lost profits in *Dic of Delaware v. TRC*,[41] involving breach of contract in a housing project before the unset of the general strikes and the Revolution, holding that "the Claimants are entitled to use as part of their damages, monies they would have earned but for TRC's actions." Thus, in allowing the claim "The Tribunal approximates as of 17 June 1978 a somewhat in excess of fifty percent (50%) completion for Phase II and one hundred percent (100%) completions for Phases I and IA," where the claimant had asked for 77% completion of Phase II.

Moreover, in expropriation, in particular, contract expropriation cases, the IUSCT has not shied away from allowing goodwill and future profitability in the valuation of the going concern. Thus, in *AIG* [42] the Tribunal held that "the appropriate method is to value the company as going concern, taking into account not only the book value of its assets but also such elements as goodwill and likely future profitability, had the company been allowed to continue its business under its former management."[43] In *Starrett*,[44] chaired by Judge Lagergren, the Tribunal accepted a Discounted Cash Flow analysis with certain adjustments, although the present writer dissented for incomplete application of the DCF.

In *Amoco International Finance*,[45] chaired by Judge Virally, while disagreeing with the application of DCF, the Tribunal recognized that going concern value included intangible assets, goodwill and commercial prospects, providing that:

> Going concern value encompasses not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights (supply and delivery contracts, patent licences and so on), as well as goodwill and commercial prospects. Although those assets are closely linked to the profitability of the concern, they cannot and must not be confused with the financial capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation (*lucrum cessans*).
>
> The value of a going concern -- of Khemco in this case -- is "made up of the values of the various components of the undertaking separately considered, and of the undertaking itself considered as an organic totality -- or going

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41 *Dic of Delaware, Inc., Underhill of Delaware v. Tehran Redevelopment Corp.*, Award No. 176-255-3 (26 Apr. 1985), 8 Iran-US CTR 144, 169 and 171.

42 *American International Group, Inc. v. Iran*, Award No. 93-2-3 (19 Dec. 1983), 4 Iran-US CTR 96.

43 *Id.*, at 109.

44 *Starrett Housing Corp. v. Iran*, 314-24-1 (14 Aug. 1987), 16 Iran-US CTR 112, 220-1.

45 *Amoco International Finance v. Iran*, Award No. 310-56-3 (14 July 1987), 15 Iran-US CTR 189.

> concern -- therefore as a unified whole, the value of which is greater than that of its components parts," to take the words of the award in the AMINOIL case. AMINOIL, supra, para. 178, 21 Int'l Legal Mat'ls at 1041. The arbitral tribunal in that case added that account should also be taken "of the legitimate expectations of the owners." This last remark, however, has to be understood in relation to a previous finding of that tribunal, which noted that this concept of "legitimate expectations" had been used by the parties in their contractual relations with a specific meaning. In the present Case, the legitimate expectations of the Parties can only be deduced from the history of the concern and from its various components, as well as from the terms of the Khemco Agreement, taking into account the circumstances prevailing at the time of the taking. Finally, the liabilities of Khemco at the valuation date have to be deducted from the total value so determined.[46]

In *Phillips Petroleum*,[47] chaired by Judge Briner, the Tribunal primarily relied on the claimant's DCF analysis with certain adjustments relating to (a) the quantity of oil that could reasonably have been expected at the time of expropriation to have been available pursuant to the claimant's contractual rights, (b) to anticipated oil prices during the remaining years of these contractual rights, and (c) to the risks that the buyer of the claimant's rights would reasonably have foreseen at the time of expropriation. Thus, the Tribunal stated:

> The Tribunal recognizes that the determination of the fair market value of any asset inevitably requires the consideration of all relevant factors and the exercise of judgment. In the absence of an active and free market for comparable assets at the date of taking, a tribunal must, of necessity, resort to various analytical methods to assist it in deciding the price a reasonable buyer could be expected to have been willing to pay for the asset in a free market transaction, had such a transaction been possible at the date the property was taken. *Any such analysis of a revenue-producing asset, such as the contract rights involved in the present Case, must involve a careful and realistic appraisal of the revenue-producing potential of the asset over the duration of its term, which requires appraisal of the level of production that reasonably may be expected, the costs of operation, including taxes and other liabilities, and the revenue such production would be expected to yield, which, in turn, requires a determination of the price estimates for sales of the future production that a reasonable buyer would use in deciding upon the price it would be willing to pay to acquire the asset.* Moreover, any such analysis must also involve an evaluation of the effect on the price of any other risks likely to be perceived by a reasonable buyer at the date in question, excluding only reductions in the price that could be expected to result from threats of expropriation or from other actions by the Respondents related thereto.

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[46] *Id.*, paras. 264-65, 15 Iran-US CTR 189, 270-71.

[47] *Phillips Petroleum v. Iran*, Award No. 425-39-2 (29 Jun. 1989), paras. 111- 12, 21 Iran-US CTR 79, 122-24.

> One such method of analysis, and the method used by the Claimant, is the Discounted Cash Flow ("DCF") analysis, which calculates the Claimant's prospective net earnings over the term of the JSA and discounts them to give their value at the date of taking, using a discount rate that takes into account the perceived risks. In that connection, the Tribunal does not understand the Claimant's calculations of anticipated revenues from the JSA as a request to be awarded lost future profits, but rather as a relevant factor to be considered in the determination of the fair market value of its property interest at the date of taking. The Tribunal recognizes that a prospective buyer of the asset would almost certainly undertake such DCF analysis to help it determine the price it would be willing to pay and that DCF calculations are, therefore, evidence the Tribunal is justified in considering in reaching its decision on value.

This is not however to suggest that in quantification of lost profit in breach of contract cases an arbitral tribunal should apply the DCF method, but that goodwill and future profitability may be established with reasonable degree of certainty in assessment of lost profits by methods appropriate to the task such as the accruals/profit and loss, the P&L, basis, adopted in the recent ICC award seen below.

Considering that Iranian court judgments are not published, recourse may be had to the advisory opinions of the Judiciary Legal Department as a window to the court practice, however limited. A recent ICC award, discussed below, has considered that although not binding, the advisory opinions may have persuasive authority and used as a guideline by courts. An Advisory Opinion of 2009[48] makes it clear that the assessment of certainty of the loss of profits is for the judge to decide, so long as its cause in in place as the taxi driver for his loss of profits for the period of his injury and medical treatment. This is so notwithstanding that he may not have a taxi at all (because he can ordinarily rent one), or that he may have another accident, or that his taxi may break down, or that he may fail to pay for the taxi's maintenance or take care of it himself if it is his, or that he may not

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[48] The Advisory Opinion No. 7/2480 dated 14 July 2009 (23.4.1388), Presidential Legal and Parliamentary Deputy Directorate of Statutory Drafting, *Criminal Procedure Code Annotated*, 8th Ed., Article 9 (2), n. 27, p. 73, Tehran (1390/2011) states: "The possibly realizable profits and loss of non-profits are distinct. In view of the Criminal Procedure Code, Article 9 (2), the possibly realizable profits are those whose cause of existence has been realized. Such profits are recognized as in existence by custom and by law. If someone destroys such kind of profits he must compensate for damages arising from said action, *such as equivalent fees of a taxi driver for the period of his unemployment due to injury and medical treatment when he has been unable to work.* Whereas, in view of the Civil Procedure Code, Article 515, Note 2, profits which hypothetically (b-e ehtemal) occur in the future, such as loss of non-profits which would have been realized from timely performance of an obligation, that is, *profits whose cause of existence has not occurred and they are hypothetically receivable (mohtamel ol-wosoul), such as if a shop was delivered on time or opened for business, the lessee (shopkeeper) would have made business income, engaged in purchase and sale and made a profit in this way.* Such kind of cases are considered loss of non-profits, damages for which are not admissible, because of the difficulty of proof of certainty of the profits in case of performance of the obligation, *which cannot be found on the basis of the ordinary course of events.* That is, it is possible that in the absence of the action or inaction of the faulty respondent such profits would not have been realized either. In any event, assessment and determination of the instances covered by the possibly realizable profits and the [inadmissible] loss of non-profits is for the judge to decide in each case." (Emphasis added.)

keep himself in working condition or out of trouble with others, and more importantly not make a good income. All these negative factors are excluded by taking into account the ordinary course of events, because a taxi driver in the ordinary course of events takes care of all them. Therefore, the ordinary course of events is assumed rather than excluded when the claimant is a taxi driver, a professional, and so the cause for his realizable profits is in place. This would equally apply when a going concern, like a shop or an amusement park, is closed down unlawfully, as an earlier advisory opinion observes.

A 2005 advisory opinion,[49] paragraph 1, also shows that the conditions for realizable loss of profits are readily met when the cause of their existence is provided by for example a contract, whose operation would habitually result in profits for claimant, even if the profits cannot not be assured, because by custom and by law they are considered as existing. As the trees in bloom habitually require various works of timely irrigation, pesticide sprays, weeding, trimming and harvesting, so does a supply or work contract, requiring a number of tasks that had to be performed under the contract, non-performance of which due to breach is not allowed to have a role.

Because the claim for lost profits on such a contract qualifies as realizable profit under paragraph 1 of the opinion, it cannot by definition be considered as hypothetical under paragraph 2. The loss of profit, not allowed under paragraph 2, is for indirect damages in connection with delayed performance of a supplier in the flour delivery and delayed production and sale of the pastry by the baker rather than direct damages. The supplier however is not released from performance of his obligation under the contract; he is only not responsible for the market price reduction during the delay and the lesser income of the baker, which may have other causes. So long as he pays for his non-performance in terms of contract value, the issue of loss of profit does not arise.

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[49] The Judiciary Legal Department, Advisory Opinion No. 7/7904, dated 10 January 2005 (21.10.1383), Presidential Legal and Parliamentary Deputy, Directorate of Statutory Drafting, *Civil Procedure Code Annotated*, 7th Ed., Article 515, Note 2, n. 1, p. 440, states:

1. The possibly realizable ("*momken ol*-hosoul") profits are those for which the cause of existence has been provided, such as trees in bloom when the blossoms are to produce fruits, and the fruits are considered as the benefits since habitually they are to emerge in the future. These benefits are considered by custom and by law as existing, and if someone causes the loss of these benefits, he must compensate the damage thus incurred. They are called possibly realizable ("*momken ol-hosoul*") profits, which are not the same as assured ("*qatee ol-wosoul*") benefits, since customarily, the blossoms are to produce fruits, although it is possible that they are lost by storms or the cold.

2. However, there are also benefits, which hypothetically ("*be ehtemal*") occur in the future such as the loss of [no] profits (adam o-naf'a), which would have been gained if an obligation was performed in a timely manner. For example, a purchaser of flour did not receive delivery on time in order to bake the pastry and sell it on the market and therefore he would gain less profit, it is the hypothetical ("*ehtemali"*) profits which are lost and are named loss of non-profits (adam o-naf'a). That is to say that the cause for such profit does not exist.

3. The difficulty of a claim for loss of [no] profits (adam o-naf'a) is proving the certainty ("*mosallam*") of the profits, had the obligation been carried out, and it cannot be found on the basis of the ordinary course of events. The law does not recognize loss of profits either, because it is not deemed certain by custom. Thus, possibly realizable ("*momken ol-hosoul*") profits and damages arising from loss of non-profits (adam o-naf'a) are not the same. The possibly realizable ("*momken ol-hosoul*") profits, according to Article 9-2 of the Criminal Procedure Code of 1999, can be claimed. (Paragraph numbers added.)

Paragraph 3 makes it clear that the issue of the possibly realizable loss of profit and loss of no profit, which is not certainly realizable in custom, is a matter of proof in each case. The law does not recognize it when it is not certain in custom. However, the phrase "and it cannot be found on the ordinary course of events," in paragraph 3 should be read in context as subject to custom and other provisions of paragraphs 1 and 2. At most, it may suggest that the ordinary course of events alone is not sufficient. Further, this has not been a factor in other advisory opinions[50] on the subject.

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[50] The Judiciary Legal Department, Advisory Opinion No.7/8047, dated 21 December 2003 (30.9.1382), Presidential Legal and Parliamentary Deputy Directorate of Statutory Drafting, *Civil Procedure Code Annotated*, 7th Ed., Article 515, Note 2, n. 1, p. 439, Tehran (1387/2008) states:
According to the 2000 Civil Procedure Code, Article 515, Note 2, damages arising from loss of non-profits are not recoverable. Loss of non-profits means that persons and equipment which are not continuously in business activity and income, such as unemployed persons, although job seekers, if they are prevented from work for a period of time by another, they cannot claim damages from the person who prevented them from employment, because without said cause they were also without job and business. Whereas, *in case of the employed who become unemployed for a period due action of another, they are entitled to damages for the period of their unemployment.* So is the case for materials such that if their owner does not continuously use them and derive no income from them, he cannot claim damages for the possibly realizable profits for the period that a person or persons prevented him from their enjoyment. However, if the said materials are constantly enjoyed and used by the owner and the action of these persons actually prevents the owner from their possibly realizable profits, for this reason the property owner is entitled to claim damages for the period he could not use them. *Therefore, regarding the question made, the owner of game equipment in the amusement park is entitled to claim damages against the person at whose request the park was sealed (by the authorities) for the period that he was prevented from the enjoyment of his property.* (Emphasis added.)

The above 2003 Advisory Opinion shows that damages for loss of realizable profits for the period of unemployment are allowed when the claimant has been employed but for the impediment.

A second 2005 Advisory Opinion, No. 7/3164, dated 30 July 2005 (5.8.1384), *Civil Procedure Code Annotated, op. cit.*, Article 515, Note 2, n. 1, p. 440, states that:
Regarding unemployment damages a distinction should be made: For some persons, it is not ordinarily possible to remain unemployed such as tailors, who in the absence of impediment are at no time without work and are able to use all their time to work and make income, or a famous physician or surgeon who at no time is possible to imagine that he would be unemployed. Regarding such persons, who due to crime or personal injury are unable to continue their work as when they were healthy, they should be allowed loss of possibly realizable profits and their claim for damages for the period of unemployment due to crime admitted. However, for unemployed persons, although job seeker, it is possible that in the absence of crime still they would not find employment and income, in which case they are not entitled to damages for unemployment.

A more recent Advisory Opinion No. 7/6332, dated 15 December 2007 (24.9.1386), *Criminal Procedure Code Annotated, op. cit.*, Article 9 (2), n. 27, p. 72, states:
Recoverable losses arising from crime are those provided for under the Criminal Procedure Code Article 9 of 1999. One of such losses if loss of possibly realizable profits that the private claimant is deprived of due to crime. For unemployment damages due to crime a distinction should be made: For some persons, it is not ordinarily possible to be unemployed and they can work all the time to make income. For such persons, who due to crime or personal injury are unable to work as when they were healthy, it perhaps can be said that their case is that of loss of possibly realizable profits and that damages for the unemployment period are admissible. However, if the person is unemployed, even though job seeker, it is possible that in the absence of crime still he would not succeed to obtain employment and income, in which case he would be in the situation of a loss of non-profit that does not allow damages for unemployment. If the causation relationship between the crime and the losses claimed by the injured is established and in the view of the court it is a case of possible realizable profit it can legally be claimed.

It is clear from the above advisory opinions and those cited concerning lost profits that they deal with private claims for damages arising from civil liability, whether referring to the Criminal Procedure Code, Civil Procedure Code or Civil responsibility Act and in fact a good number of them are published in the Civil Procedure Code Annotated.

Regarding arbitral practice, an international arbitral award, *"K" Company v. "M" Company*,[51] made in Tehran and rendered by a prominent tribunal under the Iranian Law on International Commercial Arbitration and governed by Iranian law on the merits has awarded the foreign claimant loss of certainly realizable profits in the amount of IR72 billion, including 20% interest as customary profit, for a five year contract term, although it discounted the amount under its discretion to IR9.6 billion. *K v. M*, also referred to as Award 45, involved the claim of a Canadian company's Iranian branch against an Iranian company and its two subsidiaries, Companies "B" and "Kh" for the breach of a five-year lease agreement by M after eight months of it operation. The claimant sought US$25 million, which was later converted to rials. The respondent also made a major counterclaim, the total amount of which is not noted. The lease agreement concerned two factories and their distribution fleet for the production and distribution of soft drinks in Iran. The lease agreement was terminated by the parties due to their disputes. *K v. M* was heavily relied upon in a recent ICC case, which will be briefly referred to below.

K v. M applied Iranian law on the merits according to the choice of law clause of the agreement together with trade usage and custom by reference to Article 27(3) of the Law on International Commercial Arbitration, which provides that "In all cases, the 'arbitrator' shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."[52] The Arbitration Law applied to the case by virtue of Article 1(b) thereof, requiring that at least one of the parties to be non-Iranian, as the claimant was a Canadian company.[53]

Concerning liability and compensation, *K v. M* held that termination of the lease agreement, although by agreement of the parties, was due to the breaches of the lease agreement and other illegal conduct of the respondent lessor, in violation of the rule requiring fulfillment of obligations and the consequent obligation for payment of certain and established direct damages for the breach to the claimant under Islamic law and the Civil Code, Articles 226 et seq.[54] It also held that the conduct of the respondent, which led to the termination of the lease agreement before expiration of its term frustrated the

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The Civil Responsibility Act may be relied upon to render judgment for losses arising from intentional or unintentional crimes.

[51] Award No. 36.85.36.192, (Bagher Shamloo, Goudarz Eftekhar Jahromi and Gholamreza Mahdavi), undated though rendered after the parties' agreement on jurisdiction of 5 July 2008, published as Award 45, *Selected Arbitral Awards of Arbitration Center of Iran Chamber*, pp. 439-65, Mohammad Kakavand, ed., Shahr Nashr Pub., Tehran (1390/2011). It may be noted that this publication is the first of its kind in Iranian legal history.

[52] *Id.*, pp. 444-45.

[53] *Id.*, p. 444.

[54] *Id.*, pp. 461-62.

long-term expenditure and investment planning of the claimant.[55] The award however made no reference to the Civil Procedure Code, Article 515, Note 2, on lost profits, which must be due the Arbitration Law, Article 27(3) requirement for taking into account trade usage, noted in several places. Article 36.1, also provides that "Arbitration of international commercial disputes specified in this Law shall be exempt from the arbitration provisions stipulated in the Code of Civil Procedure and other rules and regulations." The award's reliance on the Code, Article 520, for the requirement of direct damages, therefore, could be for ease of reference, as the rule is embedded in the Civil Code provisions it referred to.

On the standard of compensation, the award holds that "the compensation for damages must be in such a way to put the aggrieved party in the same position had the contract been fully performed without any diminution under principles of Iranian law and international commerce in particular in the field of investment."[56] Thus the award took into account the respondent's "report on the future of the two soft drink factories and the expected profits of the cooperation with the claimant during five years of correctly implementing the contract" as well as the fact that by concluding the contract with the respondent, the claimant in fact lost the opportunity to make similar investments at the time elsewhere as compared with the market conditions at the time of the award.[57]

The award took two approaches to arrive at the damage amount. It first examined the minimum rent revenue of the respondent for the five-year term of the lease agreement, an amount which the claimant would also be expected to make plus at least 20% interest according to custom and trade usage, as its certain and foreseen profit. In this way the award arrived at IR9.5 billion plus 20% interest, resulting in IR11 billion. Second, the award assessed the claimant's damage on the basis of the respondent's profitability of its three factories leased to the claimant for five years under the contract and their expected profits according to their expert valuation, and arrived at IR60 billion plus 20% interest, resulting in IR72 billion as incurred loss of certain profits of the claimant arising from the termination of the lease agreement. However, using its discretion the arbitral tribunal reduced the IR72 billion for five years to IR9.6 billion for eight months operation of the contract as a discount appropriate in the circumstances of the case. The arbitral tribunal also emphasized that the awarded sum of IR9.6 billion was for lack of realization of the contractual expectation of the claimant and the termination of the contract due to the conduct of the respondent.[58]

There are also a few Iranian arbitral awards,[59] which have denied loss of profit claims based on the Civil Procedure Code, Article 515, Note 2, without any discussion. However, they are domestic rather than international arbitral awards with limited amounts in dispute and it is unclear if the issue was adequately raised and argued, much

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55 *Id.*, p. 462.

56 *Id*., p. 463.

57 *Id.*, p. 464.

58 *Id.*, pp. 464-65.

59 Award 9, Award 12, Award 24, and Award 44, *Selected Arbitral Awards of Arbitration Center of Iran Chamber*, pp. 87, 102, 190, and 409, Mohammad Kakavand, ed., Shahr Nashr Pub., Tehran (1390/2011).

less any reference to and explanation for the Civil Procedure Code, Article 477, which excludes application of the Code's provisions other than the part on arbitration.

A recent ICC award (2014),[60] made in London, by eminent international arbitrators and a former Iranian judge, dealt with a breach of contract dispute between a European claimant and an Iranian owned foreign company for US$80 million or alternatively $60 million damage claim, and awarded the claimant about $10 million as lost profit under the applicable Iranian law. The contract had a fixed fee five-year term, renewable to another five-year term for the swap and marketing of certain commodity, which was terminated by the respondent seeking several times higher fees after one year of operation. The tribunal found that Iranian law would apply as the law chosen by the parties, but also that "the UNIDROIT Principles may be taken into consideration to interpret and supplement Iranian law," citing the UNIDROIRT Principles, Preamble, Official Comment 6.[61] The award held that the respondent had wrongfully terminated the contract and had to pay compensation. It examined the parties' positions and the evidence of their experts on Iranian law, the advisory opinions of the Iranian Judiciary Legal Department and in particular the *K v. M* award, discussed above, on loss of profit.

The ICC award agreed that the advisory opinions are not binding but that they "ha[ve] persuasive authority and may be used as a guideline by the courts." It also found that not all the advisory opinions deal with criminal claims, that "while the 2005 Advisory Opinion refers to Article 9 (2) of the Code Criminal Procedure in the last sentence, it cannot be inferred from the extract that it only applies to criminal claims and not civil claims," and that [t]his is even clearer with respect to the 2009 Advisory Opinion: while the first part of the extract refers to Article 9 (2) of the Code Criminal Procedure, the second half refers to Article 515, Note 2 of the Code of Civil Procedure."

The ICC award observed that "[t]he fact that Award 45 does not refer to Article 515, Note 2 is not itself conclusive, but may simply confirm that the tribunal did not find that it was prevented by Article 515, Note 2 to assess damages for future lost profits in an international commercial arbitration," rather "[b]y contrast, the tribunal considered that the applicable rules and principles covered future lost profits." It found that although "Award 45 being an isolated case, it cannot provide evidence of an established practice," "it shows that at least some international arbitral tribunals applying Iranian law are ready and willing to include future lost profits in their damage calculations [and] thereby join the opinion of several eminent Iranian scholars, according to whom certain future lost

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60 ICC Award (2014) remains confidential; suffices to note the present writer appeared as legal expert on Iranian and international business law for the claimant.

61 UNIDROIT Principles of International Commercial Contracts, Preamble, Official Comment 6: The Principles as a means of interpreting and supplementing domestic law:
The Principles may also be used to interpret and supplement domestic law. In applying a particular domestic law, courts and arbitral tribunals may be faced with doubts as to the proper solution to be adopted under that law, either because different alternatives are available or because there seem to be no specific solutions at all. Especially where the dispute relates to an international commercial contract, it may be advisable to resort to the Principles as a source of inspiration. By so doing the domestic law in question would be interpreted and supplemented in accordance with internationally accepted standards and/or the special needs of cross-border trade relationships.

profits are recoverable under Iranian law.

Therefore, the ICC award concluded that "Iranian law does not exclude lost profit as a matter of principle," that "despite its wording, Article 515, Note 2, is not interpreted as a blanket exclusion of lost profit in general or for all future lost profits in particular," and that "Iranian courts may decide to award lost profits for which the cause of existence has been provided and which would certainly have been realized had the contract not been breached." It also found that regarding the degree of certainty, "Iranian law requires that the profits would have been realized 'in the ordinary course of events' had the contract not been breached" and that "in light of the controversies among legal scholars and the reluctance of Iranian law to award future lost profit, the tribunal would apply a high standard of certainty."

However, guided by the UNIDROIT Principles, the tribunal also held "that a party must prove both the principle of the loss and its extent," although "once the existence of the loss is established with sufficient certainty, the Tribunal enjoys some discretion in determining the quantum, which must be established with some lesser degree of certainty," citing the UNIDROIT Principles, Article 7.4.3 (3) and *Aucoven*[62] and *Karaha Bodas*[63] cases.

The award has cited the *ICC Case 5418* (1987),[64] for the high standard of proof, however, the issue in the case concerned the proof "that the lost profit would be more substantial than had been earned in the period immediately preceding termination of the contract," "that marketing circumstances would have significantly improved had the contract continued" and that future sales would have increased,[65] a standard which in any event is overtaken by the 2010 UNIDROIT Principles, Article 7.4.3, sufficing with a reasonable degree of certainty, discussed above. Further, on the basis of its high standard of proof, the award in that case only denied UKP 105,000 of the UKP 797,000 lost profit claim, by allowing UKP 692,000.[66]

Such a high standard of certainty for future loss of profits due to the controversy over lost profit in Iranian law however remains questionable in particular where liability for breach of contract is established. A wrongdoer may not be rewarded simply because the aggrieved party cannot prove the extent of the loss. Nor the aggrieved party's inability to prove the quantum may be used as a means of extraction of undue benefits by the wrongdoer. It is a truism that for a benefit the wrongdoer knowingly breaches the contract, whether or not the benefit materializes subsequently. Breach of contract does not happen accidently. The aggrieved party must have the benefit of the doubt for the proof of the extent of the loss without necessarily resulting in speculative damages and this is where the ICC award agrees that exercise of its discretion may be necessary.

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62 *Autopista (Aucoven) v. Venezuela*, 23 Sept. 2003, ICSID Case ARB/00/5.

63 *Karaha Bodas v. Pertamina and PLN*, XXV *Yearbook Com. Arb*. 13 (2000).

64 XIII *Yearbook Com. Arb*. 91, 99-100 (1988).

65 *Id.*

66 *Id.*

However, the high standard of certainty even if applicable it may require monetary compensation for the period that evidence can establish and specific performance of the contract for the remaining period and suspended for certain time until it can be implemented, as with personal injury cases where the court may revisit its judgment until two years later concerning damages, depending on the health of the injured rather than dismissal of a good portion of the damages. Indeed, it seems that specific performance was the solution or partial solution reached in the PCA award (2014), *Crescent Petroleum v. National Iranian Oil Company*, concerning a 25-year gas supply contract dispute, as reported,[67] although not indicating if Iranian law applied.

Regarding the point in time for assessment of certainty that under Iranian law lost profits must be foreseeable in the ordinary course of events, the tribunal found that based on "Articles 515 and 520 of the Code of Civil Procedure of 2000, [which] require a direct causal link between the breach of the contract and the harm," "in order for the loss to be recoverable under Iranian law, it should either flow from the breach 'in the ordinary course of events' or be foreseeable at the time of conclusion of the contract." The tribunal also confirmed this by reference of the UNIDROIT Principles, Article 7.4.4 under which the party in breach "is liable only for the harm it foresaw or could reasonably have foreseen 'at the time of conclusion of the contract as being likely to result from its non-performance.'"

The tribunal accepted the claimant's loss model, which had assessed the lost profits on the accruals/profit and loss (P&L) basis for lost profits valuation as correct rather than the discounted cash flow on which the respondent insisted. Importantly the tribunal also upheld the inclusion of the post-breach events in the loss model, which the respondent disputed. The award reasoned that post-breach data and events may be taken into consideration, because "under Iranian law (as well as under the UNIDROIT Principles), damages are designed to put the aggrieved party in the position in which it would be but for the breach." It added that in this connection it is also guided by the Commentary to Article 7.4.2 of the UNIDROIT Principles, according to which "regard is to be had to any changes in the harm, including its expression in monetary terms, which may occur between the time of the non-performance and that of the judgment." The tribunal did not find the respondent's reference to expropriation cases of the Iran-US Claims Tribunal concerning the breach date rule relevant, as they pertain to determination of fair market value of the expropriated asset at the time of expropriation for the value which a willing buyer would have paid for that asset at that date, and "which is a different assessment from the one here."

However, the ICC award reduced a number of income items of the lost profits by the application of the high standard of proof and certain negative events, which arguably had nothing to do with the harm, and arrived at a net lost profit of $9.77 million, which was

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67 "Dana Gas has been notified by Crescent Petroleum that the Arbitration Tribunal has issued a Final Award for the merits phase of the proceedings, determining that the 25-year Contract between it and NIOC is valid and binding upon the parties, and that NIOC has been obligated to deliver gas under the Contract since December 2005." http://www.danagas.com/en/pressrelease/media-center/press-releases/disclosure-3.html

further reduced by a 20% discount rate, including 5% country risk, resulting in $9.36 million discounted net profit for the claimant. The final awarded sum was also subject to another item not relevant to the assessment of lost profits.

Conclusion

Availability of loss of profit in breach of contracts is crucial to the principle of *pacta sunt servanda*, that contracts are binding under Iranian law, Islamic law, general principle of law, UNIDROIT Principles of International Commercial Contracts and the UN Convention on the International Sale of Goods. Otherwise, binding contracts, which may not be revoked unless by mutual agreement, become revocable for convenience by either of the parties without any condition to that effect in the contract. Such a result also would seriously disrupt the distinction between revocable and irrevocable nominated contracts under the Civil Code and will not be conducive to international commerce in particular.

There is no sensible reason to limit the recoverability of loss of realizable profits to criminal cases even when the public cause of action has failed or the accused is acquitted and exclude it in civil and particularly contract cases, whereas the sanctity of contracts requires at least an equal treatment if not more. The Civil Procedure Code also recognizes liquidated damage clauses, which may include lost profit, because there is nothing prohibitive or prohibited about lost profit in Islamic law and the old Imamiah nonbinding majority view about it was limited to lost profit claim for the period of illegal detention of an unemployed free persons, which the Iranian criminal law and procedure law do not accept today.

For instance, it would make no sense for an oil sales contract with future delivery of three months under Iranian law, if the producer/seller could terminate the contract on delivery date and sell the cargo to another for higher price without accounting for the lost profit and other damages of the original buyer under the Civil Procedure Code. This is also true for long term supply contracts and any other term contracts, including buyback, production sharing, BOOT and swap contracts.

Consequently, the provision of the Civil Procedure Code on disallowing lost profits should in principle be interpreted as limited to speculative rather than realizable profits in accordance with the principle that compensation for damages in place of specific performance should put the aggrieved party in the same position it would had the contract been fully performed, consistent with the recoverability of loss of realizable profit in criminal law cases, as prominent Iranian jurists have opined and recent international arbitral awards applying Iranian law have shown.