

## Comparative Study on concept and scope of Non-Pecuniary Loss And its remedy in contract claim matrix

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**Abstract:** courts use extra caution for sentencing non-pecuniary loss in the field of contract law because of extra compensation, since the purpose of contract law is to facilitate market transactions. The practice and arguments against and benefit of compensating for such losses have been studied in different countries. Nowadays it seems in cases where the primary purpose of the contract are to provide comfort, joy or freedom from harassment or create a security, Courts tend sentence to compensation non-financial losses in contractual liability claim. I think there is no logical reason to justify the impossibility of compensating for these kinds of losses in Contractual liability lawsuits and monopoly it to tort claim. Opposition to give remedy for this type of losses contract scope is not based on legitimate and reasonable justification rather is Philosophical doubt.

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### Introduction

This area of law that we named non-financial has not universal common terminology. Terms are different<sup>1</sup>. Sometimes is used the term shock the nervous which is higher than simple sad, sad or happy and includes well-known mental illnesses. Courts use extra caution for sentencing non-pecuniary loss in the field of contract law because of extra compensation, since the purpose of contract law is to facilitate market transactions. Therefore for effective breach in promotion of market limit the amount of indemnities and penalties<sup>2</sup>. View to The historical record of this subject shows that, in Roman law there was many cases that Intellectual harm are award in tort and contractual liability.<sup>3</sup>

### 2- Review of Iran's law and Islamic Feqh

Regardless the permission of principles for compensate of Intellectual damages in breach of contracts and there is not any Discrimination between the compensation in contract and tort Claim, in

practice damages for infringement of Non-Pecuniary Loss in contract area has been abandoned and obsolete. Position of judicial procedures in Iran in this regard is not clear<sup>4</sup>. In Iranian civil law, except the general text of constitution Act (Principle 171), there is no legal award about this subject. In tort law binding compensate for Non-Pecuniary losses explicitly foreseen in Article 10. But the legislative definition of Intellectual capital are not include such losses ie. emotionally and mentally losses. In other hand, under paragraph 2 of Article 9 of the Code of Criminal Procedure Act of Iran, emotional damages considered includes of Intellectual harm.<sup>5</sup> Content of articles 1117, 1115, 1130 and 1035 civil code of Iran in believe of some ones<sup>6</sup>, regarded permission for non-cash compensate for emotional harm.

Although Article 1 and 2 of the Civil Act of Iran 1339, is directly related to the tort liability, but the binding to compensate emotional losses resulting from the failure to enforce the contrac

<sup>1</sup> - Non-Pecuniary Loss, Non-patrimonial Loss, Dommage Moral, Danno Alla Salute, Schmerzensgeld, Pain and Suffering and Loss of Amenity.

<sup>2</sup>- Fransworth, dr.Allan, **Contracts**, 1982, Pp894-895.

<sup>3</sup> - Sanhoorie, Dr.Abdolrazagh Ahmad, law of obligation, general principles of contracts, Vol.2, translated by: s.m.dadmarzi, and m.h.daneshkia, published by: qum university press, first edition, 2002, p103 .

<sup>4</sup>- Guardian Council of Iran in relation to Article 30 of the Press Act 1364 say Illegitimacy of financial compensate (cash) for Intellectual damages. Of course is necessary Issues to compensate in other proper ways for violate and defamation, if the victim ask it. The issues are refer by Guardian Council is in the scope of the tort law. Quoted by: Nagibie, Dr. Seyed Abolghasem, moral damages in Iran and another systems law, amirkabir press, first edition, 2006, p433.

<sup>5</sup>- Katouzian. Dr. Nasser, Civil liability, Volume 1, Tehran University press, 2009, nom.106, p258.

<sup>6</sup>-. Nagibie, Dr. Seyed Abolghasem, op.cit, Pp 226-280.

can be achieved from it, because when the lawmakers say Intellectual harm is compensable, it is not important this harm raised from breach of contract or tort.<sup>7</sup>

The Islamic jurists like Sheikh Shaltout are of those who were accepted Compensate for Intellectual harm in Islam law through financial punishment<sup>8</sup>. There are Rvayat and documentaries that are they imply that the content of them is implied accept compensation for emotional damages in Islam<sup>9</sup>. Article 263 of the Lebanese civil with clear terms declares that responsibility for Intellectual damages in contractual liability can ask subject that its assessment be reasonable<sup>10</sup>. Additional, Article 122 of the Egypt civil code also is knowing certainty give remedy for emotional harm.<sup>11</sup>

### 3- Comparative analysis about compensate the Non-Pecuniary Loss based on contractual liability

In England during the case *Addis V. Gramophone* (1909) court by relying on the Compensatory goal (not punitive) of contractual liability, say the damages rose from Sadness and emotional distress can not be claim<sup>12</sup>. While such rule opposite by principle was imposed in 1848 in the case *Robinson V. Harman*<sup>13</sup> that was regulate in it, plaintiff should be placed in a situation which stand there if the contract is executed, of course in some extent is possible with the money. The arguments in opposition to compensate non-financial losses in contracts, is indefinite and difficulties of it's calculate, but we can seen in other areas of law courts despite of difficulties of calculate,

are calculate and sentencing such kind of damage<sup>14</sup>. Something that can be done in another area despite of difficulties why do not in contract area?

Today, in cases where the primary purpose of contract is to provide comfort, joy or freedom from harassment, Courts tend to award compensation for non-financial losses on contract base. An obvious example is contract for a holiday.<sup>15</sup> Also in cases where the main purpose of contract is assured security against the Sadness and confusion of mind claim to compensate non-financial losses will be possible<sup>16</sup>. The latter is connecting to the case of Sadness raised from objective results of breach of contract.<sup>17</sup> Principles of European contract law 1998 in Article 9: 501 named non-financial losses as regarded to compensate able losses<sup>18</sup>. Article 2-4-7 of principles of international commercial contracts With provision for recognize the victim's right to Entitled full compensation for injuries were due to not perform of contract, said that harm may be was Non-financial damage, for instance include damage to physical or emotional stress.<sup>19</sup> In the Vienna Convention Article 74 is based on full compensation. However, most scholars<sup>20</sup> believe, on base of provision of convention cannot be award remedy for Non-financial damage in

<sup>7</sup> - Safaee, Dr.seyed Hussein, general rules, published by mizan press, fifth edition, 2010, p212.

<sup>8</sup> - Nagibie, Dr. Seyed Abolghasem, op.cit, p193.

<sup>9</sup> - Including Zamakhshry writes: after Khalid bin Walid attacked to the ethnic tribe and killed a number of its people, Prophet (hazrat mohammad) sent emam Ali to pay remedy. Then emam Ali paying instead of dreads and fear because of their horses. He said i had been paid also for your women and children are frightened by horses: Quoted by: Nagibie, Dr. Seyed Abolghasem, op.cit, p 223.

<sup>10</sup> - Katouzian. Dr. Nasser, Civil liability, Volume 1, op.cit, p260.

<sup>11</sup>-Sanhoorie, Dr.Abdolrazagh Ahmad, law of obligation, general principles of contracts, Vol.2, op.cit., p105.

<sup>12</sup>-raf, ane, rules of England contract law in light of procedure, translated by: mosavi, seyed mehdi, published by mizan press, first edition, 2008, Pp249 - 248.

<sup>13</sup>- lexch 850 park b.

<sup>14</sup> - Holmes, Renee, Mental Distress Damages for Breach of Contract, Victoria University of Wellington Law Review, Vol.35, 2004, p688.

<sup>15</sup> - in the case *Jarvis V. Swan Tours Ltd* (1972) British appellate courts awards general compensation due to distress caused by lack of establish holiday in standard way. in case *Jackson V. Horizon Holidays Ltd* The court went even further and not only award compensation for the lack of comfort and anxiety But also was granted right of demand damages for his wife and children due to deterioration of the holiday. Quoted by: Farran -Sue, Care-Jenifer Corrin, Towards A Pragmatic Approach To The Contract Or Tort Debate In The South Pacific, Journal of South Pacific Law, Volume 4, 2000, p 7.

<sup>16</sup> - raf, ane, rules of England contract law in light of procedure, translated by: mosavi, seyed mehdi, op.cit, p250.

<sup>17</sup> - raf, ane, rules of England contract law in light of procedure, translated by: mosavi, seyed mehdi, op.cit, p252.

<sup>18</sup> - European Principles of Contract Law (1998): Available at: Website of Pace Law School Institute of International Commercial Law.

<sup>19</sup> -UNIDOIR.

<sup>20</sup> - Schlechtriem, Prof.Peter, Non-Material Damages-Recovery under the CISG? Vol.19:89, pace International Law Review, 2007, p90: Available at: [http:// www.digitalcommons. Pace edu/intlaw/](http://www.digitalcommons.pace.edu/intlaw/) 262.

sale contracts because of additional of scope of the Convention that governs trade relations ordinary The parties to the sale of commercial have legal entities therefore are not able to sustain such losses<sup>21</sup>. Among the most famous of them, Professor Schlechtriem argues that by regard to the difference of beliefs, ideologies and cultures in every region and country, mental harm can not be considered under Article 74 Convention. This interpretation exist Convention of universal and general acceptance<sup>22</sup>. Against the minority believes that non-financial injury can not be claimed to compensate unless there is an exception insert in the contract. Subject to this term that non-financial goal of contract expressly is agreed and other party aware about it or Essenional or general purpose of transaction is non-financial. CISG Advisory Council Opinion No. 6<sup>23</sup> endorsed the majority view.<sup>24</sup> Of course third group of researchers believe that with regard to paragraphs (1) (2) Article 7 of Convention and discussed the possibility of filling gaps of international sale Convention 1980 (Vienna) by the rules of European contract act and principles of international commercial contracts, the Non-Pecuniary Loss can be compensate under the Convention.<sup>25</sup> Since the purpose of the principles of international commercial contracts and documents have been inserted to help interpretation or supplement international rules So it seems in the light of Article 7 of the Vienna Convention and the principle accepted

<sup>21</sup> - For example, the Court of Arbitration of Milan, in case No A-1795/51 (01 December 1996) in implementing the principles of international trade agreements to compensate for the loss and mental stress refused Because the victim was a legal entity, quoted by: Djakhongir, dr.Saidov, Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods, 2001, p10, Available online at: <http://cisg.law.pace.edu>.

<sup>22</sup>- Schlechtriem, Prof.Peter, Non-Material Damages-Recovery Under the CISG?, *Op.cit*, p101-102.

<sup>23</sup> - CISG Advisory Council Opinion No. 6, Adopted by the CISG-AC on its spring 2006 meeting in Stockholm, Sweden. Reproduction of this opinion is authorized. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA.

<sup>24</sup> - CISG-AC.

<sup>25</sup> - Djakhongir, dr.Saidov, *Op.Cit.*, p9, Liu, dr.Chengwei, Remedies for Non-Performance: Perspectives from CISG, UNIDROIT Principles & PECL, September 2003, p4. Höttler – dr.Philipp, Friedrich-Blase, Remarks on the Damages Provisions in the CISG, Principles European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC), p5.

by Convention i.e. The full compensate for losses and provisions of international commercial contracts, is allowed approved the convention. Additional, three procedures confirmed this permission: consent of the victim of breach of contract, discounts and adjustments and provide proof of loss and ultimately moral obligations.<sup>26</sup> Although Article 5 of international sale of goods exempt death and physical injuries, from governing of the Vienna Convention1980 But it must be admitted that in commercial contracts, like sale contracts, impose the non-financial loss and disappointment for non-performance is conceivable. For example, signed contracts with athletes, artists, organizations and consultants.<sup>27</sup>

It seems some of the strengths back to difficult prove of these kinds of harms and their scope. But being predictable criteria set forth in Article 74 of Vienna Convention as far as is related to prove and scope of losses can offering a standard of the reliable degree of reasonableness with help of article 7-4-3 unidroit.<sup>28</sup> Applying the principles of international commercial contracts in interpreting and applying the Vienna Convention help a lot to initial and final object of recent Convention i.e. promoting uniformity.

Should be noted that breach of contract does not always lead to money losses could be presented and proved. Perhaps may be this breach in some circumstances lead to benefit for victim<sup>29</sup>. But despite better financial situation in the breach, severe stress may be obtained by breaking<sup>30</sup>. Member states of EU have directive 90/314 / Union Europe about tourism services as the general rules on contractual liability. In fact, contractual liability law and tort law broadly mixed with each other<sup>31</sup>. In this directive scope of support not only include the contract party rather all beneficiary regarded as a contract party<sup>32</sup>. Passenger could receive remedy for their non-Pecuniary Loss

<sup>26</sup> - Schlechtriem, Prof.Peter, Non-Material Damages-Recovery Under the CISG?, *Op.cit*, Pp92-93.

<sup>27</sup> - Liu, dr.Chengwei, *Op.cit*, p5.

<sup>28</sup> - Höttler – dr.Philipp, Friedrich-Blasé, *Op.cit.*, p6.

<sup>29</sup> -in war between Spain and united state at 1898 delay in supply the 4 ship to Spain saving them from destroy. A.C.6 (H.L)[1905] .

<sup>30</sup> - Peter, Prof.Slechtriem, Non-Material Damages-Recovery Under the CISG?, *Op.cit* , p 93.

<sup>31</sup> - Magnus-Ulrich, Micklitz -Hans-w., Comparative Analysis Of National Liability Systems For Remedying Damage Caused By Defective consumer Services, April 2004, p39.

<sup>32</sup> - Magnus-Dr.Ulrich, Micklitz-Hans-w., *Op.Cit.*, p40.

and ruin their vacation.<sup>33</sup> Article 5 of directive expressly accepts the right of demand for compensates non-Pecuniary Loss<sup>34</sup>. In United States these services are among the public service and duty of care is defined widely distinct (independent) of the contracts law.<sup>35</sup> The doctrine of Belgium explicitly noted that contractual obliged entitled to claim for all injuries caused by the committed due to non-performance, including the psychological harm. In France today, the possibility to compensate for psychological injury for contractual promised is not questioned. The precedent has followed this procedure since 1833. Of course compared to other countries, amount of sentence in judgment is less than and person who permit to available to this kind of losses are limited<sup>36</sup>. Article 1106 Spanish Civil<sup>37</sup> Code also contains similar provisions. It is worth noting that the French law achieves differences between a mental or physical losses, damage and loss of aesthetic and loss the opportunities, for each of these losses, the separation amount is award.<sup>38</sup> Tort law puts the sentence for losses due to coma position. In 1995, the French Supreme Court declared that a person in a vegetative state, not make Change in titles of losses and to compensate, respectively to what person has in normal state<sup>39</sup>.

Article 47 of Swiss obligations act refers that the judge may consider fair compensation for specific requirements, to benefit of victim or in death benefit his family as intellectual losses. Content of article 49 Swiss obligations act offered a confirmation on article 47 and also offers a wide discretion in this area to the judge.

In Germany from reform in 2002, the legal status of the victim to claim for demand immaterial losses than the old law was improved. In the former Article 847 German Civil Code – concern to tort law - the ability to compensate the pain arose from the physical damage is inserting. But this regulation imposed

burden of proof the fault by the victim, and not apply in most strict systems. In contract cases only in two cases the victim could claim Intellectual loss: loss of pleasure vacation travel And gender discrimination in employment contracts. Now mental damage in cases award that occurred in framework of violation of legal protection set forth in Article 253 (2) civil law to Germany. This article requires that immaterial losses suffered on the body, health, freedom and independence, regardless of gender as a based on contractual fault or tort law or strict regime is compensated in any appropriate manner.<sup>40</sup> In The above mentioned amendments prohibiting compensating non-financial losses in claims based upon strict regime and motor vehicles were also removed. Article 1300 Civil Code in Germany on the candidate's nomination for marriage entitled to women demand the Intellectual damages caused to damage her credit or loss of opportunity for marriage, or loss of opportunity for good marriage. Compensate for pain and suffering damages in medical affairs in accordance with Article 847 German Civil Code is presented.<sup>41</sup> But plaintiff could not received money more than 17500\$. In France, unlike Germany, do not differentiate between titles of non-financial losses and were not Separate sums of money for various aspects of non-financial losses. The German courts have accepted Non-financial losses related to anesthesia during.<sup>42</sup> In Sweden in accordance with Article 1 Chapter 1 of civil code in contractual cases like tort cases practice.<sup>43</sup> Except of cases about discrimination, vacation and employment contracts<sup>44</sup> that are subject to special regulations another one is under governing of Article 1 Chapter 1 of civil code.

In Italy, Article 2059 Civil Code is problematic. Immaterial damages for non-contractual allows for tort claim and provided that Non-Pecuniary Loss should be judge only when which is expressly prescribed by law. Of course in accordance of article 1174 if possibility for compensate of such losses explicitly insert in contract. In other hand, compulsory insurance act for accident and illness caused in work, article 3 no.2000/38 of Italy, permit compensate for Non-Pecuniary Loss. Also article 2087 civil code is

<sup>33</sup> - Magnus-Dr.Ulrich, Micklitz-Hans-w., *Op.Cit.*, p41.

<sup>34</sup> - Von bar- Dr.Christian ,Drobing –Ulrich, Study On Property Law and None-contractual Liability Law as they relate to Contract Law, 2003, nom.132 ,p117.

<sup>35</sup> - Magnus-Dr.Ulrich, Micklitz -Hans-W., *Op.cit.*, p40.

<sup>36</sup> - Von bar- dr.Christian, Drobing-dr.Ulrich, *Op.Cit.*, nom.139, Pp121-122.

<sup>37</sup> - the Spanish Supreme Court in 2000 was issued Order to compensate Intellectual damages against the airline transportation in as to compensate flight delays with no excuses for 8 hours in favor of passengers, passenger in this term (8 hours ) stay in plane.

<sup>38</sup> -Van Dam, dr.Cees, *Op.cit.*, p322.

<sup>39</sup> - Van Dam, dr.Cees, *Op.cit.*, p324.

<sup>40</sup> - Magnus, Dr.Ulrich, The Reform Of German Tort Law, Working Paper No:127, April 2003, Available at: [www.indret.com](http://www.indret.com), p4-5.

<sup>41</sup> - Baumgartner, Samuel P., How Well Do U.S. Judgment Fare in Europe?, George Washington International Law Review, Vol.40, 2008, p205.

<sup>42</sup> - Van Dam, dr.Cees, *Op.cit.*, p322.

<sup>43</sup> - Von bar- dr.Christian, Drobing –dr.Ulrich, *Op.cit.*, nom.142-143, Pp123-124.

<sup>44</sup> -§38(2) Law On The Protection Of Position Of Employment (Lag (1982:80) Om Anställningsskydd).



among the responsibilities of employers, take account moral welfare of employee which compensate for its breach is required to compensate non- Pecuniary Loss<sup>45</sup>.

In the civil law of Portugal in Article 496 refer to Non-Pecuniary Loss just in tort area. In general section related to compensation duty in civil code has not named of it. However, precedents and case law in contractual claims as well as tort law area, awarded to remedy for Non-Pecuniary Loss. This action is approval and acceptance of academic scholars in the country<sup>46</sup>.

Argentine Civil Code Article 522 specifically and in limited form refers to the Intellectual damage. Civil laws of Ecuador, Mexico, Peru, Bolivia and Venezuela' are also specific rules in this area.

Other Latin American countries like Panama, Colombia, Chile and Uruguay will follow the Spanish tradition of civil law, therefore, no provision regarding Intellectual damage.<sup>47</sup>

In a medical case in Canada, A person need special treatment but for religious reasons do not satisfy. Therefore were treated during anesthesia because treatment was necessary to maintain his life. He did not be live without it. After treatment, the patient's complaint, the court was to compensate 20,000 / \$ for emotional losses.<sup>48</sup>

Non-financial losses can include pain or frustration and irritation caused by physical damage and injuries caused to an individual's personality, dignity or death of her husband and other relatives or harm to be immaterial values that have no Concept and economic content and separate from body of person<sup>49</sup>.

Sometimes an injury to goodwill is presented as non-financial losses. But according to the expert advisory council of Vienna Convention nom. 6 in their recent view harm to goodwill can be considered as material losses.<sup>50</sup>

The court may not order compensation to cash to compensate, but other forms of to compensate such as advertising in newspapers, can be use.

Scope of the ability to compensate of Non-financial losses in contract claim is different in vary court.

For example, some courts oppose with the sentencing of stress in America in trade agreements, and some of them who know it only deal with contract by personal factor. In definition of contract with personal factor California courts act widely and recognized every contract relate to welfare, enjoy, convenience, comfort or happiness with personal factor. Others like Michigan courts are recognized personal factors only in cases involving life and death.<sup>51</sup>

### Conclusion

The writer believed, regardless of academic debate, decide on possible compensation of non-financial in contracts area should be viewed as a whole and as a rule. There is no logical reason to justify the impossibility of to compensate this type of damages in contractual claim and monopoly of it's to tort.

Rule in liabilities claim in both action – tort and contract– are as the same. Opposition to compensate this type of losses is a philosophical question and not based on legal and rational justification.

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<sup>45</sup> - Von bar-dr.Christian, Drobing-dr.Ulrich, **Op.cit.**, nom.145, p125.

<sup>46</sup> - Von bar- dr.Christian, Drobing-dr.Ulrich, **Op.cit.**, nom.147, Pp125-126.

<sup>47</sup> - Zuppi, Alberto, A Comparison of Buyer's Remedies under the CISG with the Latin American Legal Tradition, 1999, p14.

<sup>48</sup> - Maletta V. Shulman (1990) 67 DLR 4TH 321.

<sup>49</sup> -Official Comment on PECL Article 9:501, Available online at: [Http://cisg.law.pace.edu/cisg/text/peclcomp74](http://cisg.law.pace.edu/cisg/text/peclcomp74).

<sup>50</sup> -Goldberg, dr.Charlotte K., Emotional Distress Damages and Breach of Contract: A New Approach, University Of California Davis Law Review, Vol.20:57, 1986, Pp57-59.

<sup>51</sup> - Goldberg, Charlotte K., **Op.cit.**, p60-61.

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