



Analysis of definite condition for compensable loss in Iran and France

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ABSTRACT

Civil liability in law of obligations refers to a title to elaborate legal requirements for compensation of undue losses. Compensation of undue losses requires for the conditions such as definite condition for compensable loss which is contractual liability discussed in contractual liability. According to this condition, it must prove that a property has been destroyed and/or a benefit has lost, that is, a benefit that will bring into the owner if the harmer did not harm, because the decree for compensation of loss is not true. Under this condition in realization of liability, the theory for loss of opportunity is one of the issues discussed on definite condition for compensable loss, such that a person sometimes loses the opportunity to gain benefit or avoid loss in future due to another person's fault. It is asked whether a person affected by this issue can ask for compensation of loss with definite condition for compensable loss. In this regards, an attempt has been made in the present research to elaborate the theory for loss of opportunity with definite condition for compensable loss using descriptive and analytical method and the library method besides analysis of definite condition for compensable loss in positive laws of Iran and France. According to the investigations, the procedure in France has accepted the principle under compensation of loss considering definite condition for compensable loss. Iran's law regarding analogy of some of the articles in contractual liability law including article 6 of this law has stated that loss of an opportunity is a definite loss which must be compensated.

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Introduction

Pillars and conditions for realization of civil liability are the most fundamental issues helping to achieve civil liability, including the loss to the plaintiff, fault of harmer and causal relationship between action and loss. In this article, besides giving a definition for loss, we state that any loss cannot be compensated and compensable loss has its specific specifications, for which a condition lies on this fact that the loss must be definite. In other words, the injured must prove that he has been injured so as to ask compensation for the loss to him. Further, sentence to compensate loss ceases to prove loss which this includes loss of the opportunity to achieve something and loss of the opportunity to avoid another thing. In this regards, the loss due to the lost opportunity is one of the losses discussed largely. Legal articles associated to subject of research include articles 5 and 6 of civil liability law of Iran and the opinions issued by the French Supreme Court. In this regards, an attempt will be made to analyze the legal articles and opinions besides analytical overview of definite condition for compensable loss in Iran and France.

The conditions for compensation of losses

Under any loss to oblige due to lack of obligation or delay at obligation by the engaged, he can compensate the loss by observing the rules pertaining to loss. In this regards, it can refer to article 221, thus the loss should have been taken place to pave the way for compensation. This article states that if anyone obliges to take an action for an affair or

obliges to avoid it, under violation the one in charge of loss is the opposite party provided that the specified loss compensation is based on contract of guarantee. The most important way for compensation of loss in Iran and France courts implies paying an amount to the plaintiff of compensation for incurred losses (Novin, 2012, p. 14). Yet, there are conditions mentioned below to compensate losses.

The conditions to compensate loss

The conditions for compensation of loss in Iran's positive law include: 1-the casual relationship between avoidance from obligation and/or delay at it with loss, 2-definite loss, 3- direct or immediate loss.

Causal relationship: in this case, it can refer to legal articles of 226 and 520 of civil liability and article 1147 of civil liability of France (Shahidi, 2012, p. 76). Article 520 of Code of Civil Procedure has stated that plaintiff must prove this orientation concerning the compensation for the incurred loss that the incurred loss has been due to lack of obligation or delay at obligation and/or lack of submission of plaintiff, otherwise statement of court will reject plaintiff's loss. Article 1147 of civil law of France has stated that the debtor due to lack of adherence to his obligation or delay at obligation will be condemned to payment damages, that is, if the plaintiff does not prove that his lack of obligation is due to the cause that cannot be pertained to him. Despite engaged's fault which is assumed in violation to the obligation and no necessity for the engaged's approve, the casual relationship between violation and loss must be

proven by the obligee and the obligee feels unnecessary to prove lack of casual relationship. Concept of causality of violation to the obligation to the incurred loss comes to realize when it is revealed that if the obligation is enforced, no loss will be incurred.

Definite condition and prediction of loss: if loss due to violation is suspected, obligee cannot ask the compensation of loss, because the principle lies on lack of engaged's responsibility against the obligee unless the origin for the responsibility, that is, cause of loss to the obligee is proven. Law of France does not know the obligee in charge for compensation of unpredicted loss (Nouri, 2011, article 1150).

Direct and immediate loss: with regard to article 520 civil law, direct and immediate loss refers to a loss with the closest result of violation to obligation and another affair does not appear as appointment of loss to the violation (Shahidi, 2012, p. 83). Legal authors have put emphasis on the necessity of this condition that the loss must be direct. Anyhow, direct loss implies that the illegitimate action is accounted the cause for loss in practice (Ismaeili, 1998, p. 23). In contractual losses, article 1551 of civil law of France states that even if lack of enforcement of contract is due to engaged's fraud, the incurred loss must not include the loss for obligee's waste of property and the profit which has been deprived from him, unless the loss which is the immediate and direct result of enforcement of contract (Shahidi, 2004, p. 267).

Definite condition for compensable loss

The loss must be definite rather than probable, that is, the loss which has been incurred objectively or materialy rather than the loss which might emerge, because it is sought to assess compensation of loss in occurrence of event. Loss of opportunity and facilities is not accounted as a probable loss, that it is obvious that the court examines to which extent or to which percent the possibility for success and opportunity has come to realize (Novin, 2012, p. 16). Further, in this context, it has been stated that existence of loss is of great importance in traditional liability in which compensation of loss is take into account. Nevertheless, in economic analysis of law, although civil liability is targeted in preventing from loss, loss is required to exercise rules of civil liability. Traditionally, it is stated that probable loss does not cause liability, not required for compensation (Katouzian, 1998, p. 278). Hence, compensable loss is definite rather than probable. In other words, it can say that definite loss refers to a loss which comes to realize in terms of ordinary process of affairs. Aim of this definite condition which is avoidance from compensation of the loss that just it might occur, thus the risk under compensable loss, e.g. risk of electric shock due to installation of high-voltage line is not a definite loss, yet the disturbance due to staffs' commutation for taking care of line is a definite loss, under which if a person claims for indirect loss due to loss of the aim with poor probability, the court will reject the lawsuit (Novin, 2012, p. 201).

Compensable loss in France

Some jurists in France have said that future loss is definite in case the evaluation and determination of amount of loss are possible by the judge. Hence, actuality of loss is not provided, that the judge can compensate the loss which

occurs in future definitely, e.g. the judge can determine the extent of loss and release compensation for it considering the outcomes of the incurred loss and the reduction which will emerge in the injured work force. Hence, it should take into consideration that the state of being definite is relative, because the future loss is always subjected to transformation of status, thus it is sufficed to the reasonable probability and degree of this probability might differ based on type of loss (Novin, 2012, p. 201). With regard to judicial procedure of France, the loss is not required to occur but the loss's state of being definite must be actual. Hence, the state under definite loss in future is compensable, such as deprivation from the exploitation from firing in factory, deprivation from profit from property due to deterioration of property or physical injury (Novin, 2012, p. 201). Judicial procedure of France knows lack of opportunity restorable (Hosseini nejad, 2010, p. 79). From point of view of the French Supreme Court, compensable loss refers to a loss with the high probability to incur it. As the loss seemed definite, there is no need to actuality of loss (Ismaeili, 1998, p. 27).

Definite loss in Iran's positive law

Definite condition for compensable loss has not been mentioned in Iran's law, yet article 5 of Iran's civil liability law says about this: if determination of outcomes of physical injuries is not possible during issuance of decree, the court will have the right for revising the decree since the issuance of decree till two years. According to this term, it can perceive that the court might issue the decree for compensation of the loss which lacks actuality, yet it definitely occurs in future. Yet, since the state of being definite does not mean thorough definite, the court is allowed to revise its decree under diminishing or increasing the loss till two years.

Definite condition for loss and loss of opportunity

Under the assumption that the opportunity to gain benefit is lost, as gaining benefit is probable in future, there is mistake at definite loss, because it cannot definitely say that when the fault is not mentioned, the plaintiff gains the benefit. In this regards, a discussing issue includes: whether loss of opportunity is considered as compensable loss or not. Loss of opportunity implies that a person sometimes is in a situation that has the possibility to gain benefit in future or has the opportunity to avoid loss, e.g. the person has the possibility for attendance in a competition and his attendance in competition is an opportunity that can be exploited by him to gain the reward of the competition; in addition a person that has been sometimes subjected to a loss has the opportunity to take a step to avoid the loss or extension of loss, e.g. the opportunity for avoidance from definitive sentence due to the fault of lawyer who does not ask appealing from the court's issuance. "Non-profit" refers to a concept that might seem similar by loss of opportunity, that is, avoidance from the benefit (Jaffari Langeroodi, 1994, p. 1143). The lost opportunity refers to what considered as loss in losing opportunity and discussed in the compensation of loss, rather than the final loss which has taken place or that benefit with the probability to gain it. Hence, the lost opportunity must not be taken by mistake with removal of the expected benefit which is called as non-profit and must not be known as the final loss which is taken place due to loss of the opportunity for avoiding

it (Jordian, 1992, p. 9). In this regard, there is a difference between these two concepts:

1-as mentioned previously, two assumptions have been proposed about the lost opportunity, proposed as the opportunity to gain benefit and avoidance from loss. In this regard, it can be said that the inclusion goes beyond the concept of non-profit.

2-concerning non-profit, gaining benefit in future is definite and the injured avoids non-profit, under which non-profit is compensable, thereby it is said that definite non-profit is compensable. If gaining benefit is probable in future, loss of the possibility to gain it is not compensable (Mazeaud, 1974), because one of the conditions for compensable loss lies on this fact that the loss is definite, however this loss pertains to future (Mazeaud, 1997, p. 66). Yet, concerning the lost opportunity, probable opportunity is considered in both assumptions, whereby the probability is the major pillar (Mazeaud, 1997, 73).

3-the major difference between these two concepts lies on this fact that the loss is potential in the lost opportunity, yet the loss pertains to future in the non-profit.

This is due to the fact that the loss of opportunity is considered as the loss, otherwise non-profit has been expected lacking acquisition of profit in future (Kazemi, 2004; quoted from Jordin, 1992). Hence, what develops major nature of "loss of opportunity" is just the probability in realization of opportunity, i.e. taking place the opportunity in probable future, because an opportunity does not always come to realize, otherwise it will not be called chance appearing as definite non-profit (ibid, p. 73). The countries such as France, Belgium and the Netherlands are pioneer in exercise of the theory under loss of opportunity in lawyer's mistakes and medical errors (Amini, Nategh nouri, 2011). In France's law, loss of opportunity and chance has been recognized as the consequential loss. In law of this country, petition branch in 1889 and Civil Chamber of the Court of France in 1911 have accepted this theory in case the opportunity to appeal is annihilated. By the passage of time, this theory has been widely drawn into attention by doctrine in a wide range. Later, the judicial procedure has extended this theory and numerous votes have been issued by the French Court in this context. Concerning the loss of opportunity, in the First Branch of the Civil Supreme Court in 18 March 1969, it can witness that the loss might be the loss of opportunity. Further, in the vote issued by the first branch of the Civil Supreme Court in 18 March 1969, it has been announced that if the lawyer of plaintiff does not engage in his task properly, the plaintiff can ask compensation due to loss of opportunity. There is no text in this context in Iran's law and also there is no judicial procedure in this context, so that long time has not passed since representation of this issue in legal works of one of the professors of law, yet it can be said that today's custom has mentioned loss of opportunity as a compensable loss (Katoozian, 1996, p. 472).

Law of Iran has several articles and code about civil liability, in this section we show more important articles that related to our discussion. Article 339 states that while one person would obstacle or thing on the way of people that made damage or loss for pedestrians then subject has liability to compensation this article and article 340 implies

to civil liability. Article 339 states while a person works in a factory then he has liability to compensation if he put losses.

Also, this article states that while a person do action and invite other to his home, that guest damaged due to blindness or dark ness then host has liability to compensation of loss but if host do not allow or don't know that guest was into house then he has not any liability guest over. Article 4 is about civil liability in roads and rail safety. It states that if driving caused to damage or loss the driver has no liability in situation of movement on the main road although he is bound to park car in right hand, if an accident occurred and carry damaged to hospital or agency center. In this case lack of liability of driver don't barrier to applying insurance regulation. Article 9 states that railroad crossing and entering to station, factory and technical installations in railway is prohibited and Iranian state railway has not any civil liability if occurred every accident.

Article 10 states about ban transit vehicles and offending has liability of every loss and accident in this case damaged has not any right and they must compensation of railway organization. Article 333 states that in situation that pedestrian crossing is prohibited if pedestrian cross from road in situations that their crossing is prohibited and happen an accident then driver has no any liability to compensation. Of course car must have legal speed, lack of mal function, and inability to control the car in this situation. Some articles of civil liability related to labour inspection so, article 3 states that labor inspectors have duty to supervising law enforcement. Article 5 states that if inspectors recognized that continue of devices in dangerous then he is bound to report. Article 5 states that inspectors should be asks of stop work to eliminate the danger in conditions dangerous of work. Article 6 stresses that employer and worker must learn safety at work. Article 27 of bill of technical protection states that all workshops would have enough alarm devices this article shows that waning directors will cure liability of losses and damages due to ignoring warnings. Article 12 states that if employers do precautions then they are not responsible of lossor damages of workers.

Loss of opportunity can be assumed in two ways:

a-the opportunity to gain benefit: the person loses the opportunity to gain an expected benefit. In other words, sometimes a person has the opportunity to gain a benefit in future but a fault causes loss of this opportunity such as opportunity to achieve victory or finish first in a competition, being accepted in university or the opportunity for appealing which are lost due to the lawyer's fault and delay at granting a petition for appealing (Kazemi, 2004, quoted from Jordin, 1992).

b-the opportunity to avoid loss: another assumption lies on this fact that the opportunity to avoid loss is lost, such as the case that the lawyer does not grant appealing for the issued decree and condemns his client in a definite way.

There is a little difference between these two assumptions which lies on opportunity, that is, gaining assumption in one assumption and avoiding loss in another assumption might raise difference in two assumptions, because the opportunity to gain benefit is lost by negating opportunity in the first assumption and non-profit is resulted from lack of gaining profit, and the opportunity to avoid loss is lost by negating the opportunity in the second assumption and loss is

resulted from lack of avoiding loss. As mentioned above, there must be a definitive loss so as to be compensable, thus there is doubt on definitive loss in compensation of loss (katozian, 1996, p. 245); in the assumption that the person loses the opportunity to gain benefit, definitive loss is a form which is proposed in compensation of loss because gaining benefit is not definitive in future so far as the negation of benefit is accounted as a definitive loss. For this, the legal authors have proposed this assumption 'the lost opportunity' proposed as the compensable conditions for loss (Kazemi, 2007, quoted from vieny, 1997). In this assumption, the loss implies non-profit, under which the loss pertains to future making no mistake because the loss in future is compensable (Katozian, 1956, p. 269). In other words, there is no conflict of interest between definite loss and future loss, thus one of the French writers says in doubting on compensation of loss due to the lost opportunity says that in case the loss incurred on the person can be extended, compensation of loss has been accepted (vieny, 1997, p.73). To sum up, gaining opportunity is probable that it cannot prove that when the injured is not deprived from opportunity, he gains the expected benefit, thus it seems that acceptance of this theory in law is without any problem (Katozian, 1996, pp. 247-248).

Conclusion

Civil liability is the obligation of a person to compensation which the civil liability of another person without authorization from the legal right to occur when one of the loss to bring hurt, damage that may does not care about act of It is a crime or a tort. In France's law, with regard to judicial procedure of this country, loss is not required to occur, but the state of being definite must be real for the loss, thus definite loss is compensable. In Iran's law, loss has been considered in law of civil liability that it can refer to article 5 of this law. Article 6 of this law knows the loss in future compensable. With regard to these cases, the court might issue a decree to compensate the loss which lacks actuality, yet its occurrence is definite in future. There is no text in this context in Iran's law and also there is no judicial procedure in this context, yet France's law as one of advocates of the theory "loss of opportunity" has identified loss of chance as the loss, thus with regard to the investigations, loss of opportunity is assumed as a definite loss that must be compensated which acceptance of this theory does not raise problem in Iran's law.

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