



## A Comparative Study of the Calculation Method of the Monetary Damages in International Arbitration

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### Abstract

Different factors contribute to the assessment of monetary damage, whose ignoring results in an inaccurate evaluation of monetary damage. One such factor is the approach used to calculate monetary damages. Concrete and abstract methods of calculation, namely, have been adopted for this purpose. Applying one of the aforementioned methods may result in no monetary compensation for the aggrieved party, whereas the other method may result in substantial monetary damages. Articles 75 and 76 of the United Nations Convention on Contracts for the International Sale of Goods 1980 Vienna (CISG) have embraced both of these methods. Nonetheless, the Convention does not specify the priority or prerequisites for applying these methods, which has led the tribunal to employ them arbitrarily. A circumstance that not only renders the rights of the aggrieved party unpredictable, but also causes inconsistency in the application of the Convention. This article is descriptive and analytical, which analyzes these methods and their application conditions, and concludes that the concrete method for calculating monetary damages has precedence over the abstract method. When the abstract method's prerequisites are not met, it is utilized.

**Keywords:** Calculation of Monetary Damages, CISG, Mitigation of Monetary Damages, PECL, UPICC.

**JEL Classification:** K12, K33, K39.

### 1. Introduction

In legal systems, two approaches of calculation, the “*Concrete*” method and the “*Abstract*” method, may be used to calculate monetary damages. In the first approach, the amount of monetary damage is assessed concerning the actual circumstances of the aggrieved party, whereas in the latter approach, a fixed formula is always applied. For example, if the seller fails to deliver the agreed-upon goods, the quantity of monetary damages equals the difference between the

contract price and the current price. This approach disregards the behavior of the aggrieved party and assumes that all losses will be compensated through a replacement transaction at the current price. In contrast, the concrete method requires the injured party to take reasonable measures to mitigate monetary damages. For example, if the price of the products is on an ascending scale, the injured party must conduct a replacement transaction as soon as possible. In this instance, the amount of monetary damages equals the difference between the price of the replacement transaction and the current price. If the aggrieved party fails to do so, they are precluded from recovering the amount of loss that could have been avoided. And in the event that the buyer breaches the contract, the seller must sell the products at the best possible price under the circumstances, with the profit margin earned being factored into the calculation of monetary damages. This approach has been criticized by proponents of the *abstract method*, who contend that this profit is the result of the individual's risk-taking and not a breach of contract (Saidov, 2008).

The method of calculation may have a substantial impact on the amount of monetary damages and, consequently, the compensation of the aggrieved party. It is also possible that the tribunal in a given dispute awards no monetary damages using the concrete method of calculation, but a substantial amount using the abstract method, and vice versa. Therefore, the aggrieved party regarding the specifics of the case may base its claim on one of the aforementioned methods in order to assert its rights.

These two methods have been adopted by the United Nations Convention on Contracts for International Sale of Goods 1980 Vienna (CISG), the UNIDROIT Principles of International Commercial Contracts (UPICC), and the Principles of European Contract Law (PECL). However, none of these instruments specify the prerequisites or application of these methods, or the precedence of one over the other.

Article 75 of the CISG allows concrete calculation methodologies. As stated in this Article, if the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has purchased replacement goods or the seller has resold the goods, the party claiming monetary damages may recover the difference between the contract price and the price in the replacement transaction, in addition to any additional monetary damages recoverable under

Article 74<sup>1</sup>.” Consequently, Article 76 provides the abstract method as follows: “If the contract is avoided and there is a current price for the goods, the party claiming monetary damages may, if they have not made a purchase or resale pursuant to Article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance, as well as any additional monetary damages recoverable pursuant to Article 74. If, however, the party claiming monetary damages has rescinded the contract after taking possession of the products, the price in effect at the time of such rescinding shall be applied instead of the price in effect at the time of cancellation.” On the surface, it appears to be quite straightforward. If the aggrieved party has entered into a reasonable replacement agreement, then Article 75 applies; otherwise, Article 76 applies. It should be noted that this viewpoint represents a superficial comprehension of these Articles. Nonetheless, even in numerous awards based on these Articles, this incorrect interpretation has been adopted or they have been applied indiscriminately.

This article seeks to investigate and analyze methods of calculating monetary damages in order to put forward a solution that establishes the manner and requirements for applying each of the aforementioned methods and eliminates ambiguities and disagreements in this field.

## 2. Concrete Method

According to Article 75 CISG, “if the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has purchased replacement goods or the seller has resold the goods, the party claiming monetary damages may recover the difference between the contract price and the price in the replacement transaction, in addition to any further monetary damages recoverable under Article 74.” The UNIDROIT Principles of International Contracts and the Principles of European Contract Law similarly express this rule. However, because the two sets of Principles may apply to transactions other than sales transactions, their provisions make a broad reference to “replacement” transactions. Consequently, the concept of replacement transaction is broader than what is outlined in the CISG. This approach is commonly referred to as the *Concrete method* because it focuses on the actual behavior and circumstances of the

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<sup>1</sup>. Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

aggrieved party. It is safe to say that the concrete method of calculation conveys the meaning of mitigation. This method has a close relationship with the *mitigation* rule, as making a replacement transaction is a common and reasonable way to mitigate monetary damages (Enderlien and Maskow, 1992). This provision establishes monetary damages through the actions of the injured vendor in reselling the goods and the actions of the injured buyer in obtaining coverage, i.e., purchasing the goods elsewhere (Sutton, 1989).

This method of calculating monetary damages will compensate for the profit margin the harmed party would have anticipated under the contract. If the claimant completes a replacement transaction at a reasonable price and in a reasonable amount of time, one can say that awarding the difference between the contract price and the current price will fully compensate the injured party (Honnold, 2009).

### **3. Conditions for Applying of Concrete Method**

The following are the prerequisites for employing the tangible method of calculation. First, all three instruments indicate that this method is utilized only when the contract has been avoided, as it is the avoidance of the contract that releases the party from their contractual obligations and enables them to procure a replacement transaction (Saidov, 2008). Second, an alternative transaction must have been arranged. This replacement transaction is required to replace the original contract. To accomplish this, the replacement transaction must be related to the original contract and capable of protecting the injured party's interest in the performance of the original contract (Schlechtriem, 2016; Borisova, 2007). Third, the replacement transaction must be completed in a reasonable amount of time and manner after a breach of contract (Bates, 1991). Despite the fact that a uniform practice has been developed in this regard, the determination of a reasonable period of time depends on the encompassing circumstances of the case at hand. In the majority of cases, judges and arbitrators have determined that a period of 2 or 3 months is reasonable for the completion of a replacement transaction. Depending on the specifics of the case, this timeframe can range from a few days to several months. Nature, descriptions of the goods, and the rationale for the conclusion of the contract all play a significant role in determining the reasonable time (Honnold, 2009). In the cases, eight years appears to be the greatest time period after a violation. In the 1980 case, *Dodd Properties (Kent) Ltd. v. Canterbury City Council*, 1 All E.R. 928 (C.A.), the 1968 pile driving operations of the defendant caused monetary damage to the plaintiff's commercial structure. 1970 was the earliest year in which the plaintiffs could have initiated restorations. At that time,

the price would have been £11,375. The chief financial officer of the plaintiff testified that they delayed making the repairs due to the plaintiff's cash flow situation and the defendant's denial of liability. The trial judge concluded that the evidence indicated commercially reasonable behavior (Bates, 1991).

Referring to the second requirement, this method is only applicable if the aggrieved party has complied with the CISG's obligation to mitigate monetary damages.<sup>1</sup> Mitigation of monetary damages implies that the non-breaching party must take reasonable steps to prevent or minimize loss (Saidov and Cunnington, 2008). However, this obligation is not a legal obligation in the strict sense; the non-breaching party is not required to perform any act for this purpose. If the non-breaching party fails to take any action to mitigate the harm, the monetary damages may be reduced to the extent that the injured party could have reduced or mitigated the loss (Saidov, 2002). According to the UPICC, the non-performing party is not liable for the aggrieved party's loss to the extent that the damage could have been mitigated by the aggrieved party's reasonable measures.<sup>2</sup>

The only effect of this duty is when the party in breach attempts to avoid liability for monetary damages in whole or in part by invoking this rule. Therefore, under the well-known concept of mitigation of monetary damages in common law, the non-breaching party is obligated to take reasonable measures to mitigate any potential harm or loss resulting from a breach of contract. If that party fails to take reasonable precautions, they cannot recover the amount of loss that could have been avoided. For the purpose of mitigating monetary damages, the non-breaching party should take only reasonable measures, and it is not necessary to resort to measures that involve excessive cost, a complex lawsuit, or monetary harm to the reputation of the innocent party; otherwise, they are not entitled to claim the costs incurred (Bates, 1991). However, these are general facts; the difficulty arises when determining the meaning of a replacement transaction in a particular circumstance. For example, a scenario in which the buyer has stock goods that were acquired before entering into a contract with the seller. Moreover, suppose that the buyer uses the inventory to secure the orders that were to be fulfilled under the second contract. Can we state, based on the specific method of calculation, that the buyer is entitled to the difference between the price of the goods in stock and the price of the breached contract's goods? It could be argued that such costs cannot be recovered, as the replacement transaction is the one that is entered into after a

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<sup>1</sup>. This obligation has been provided for under Article 77 of CISG and also Articles 7-4-8 and 9:505 of UPICC and PECEL respectively.

<sup>2</sup>. Article 7-4-8(1), *See also* Article 9:505 PECEL.

breach of the original contract. Hence, the products acquired before the breach of contract were not intended for replacement. Despite this, one could argue that international instruments do not state (at least expressly) that replacement transactions must be intended to supplant the original contract. For a transaction to be deemed a “replacement transaction,” the intent of the parties at the time the contract was executed is irrelevant (Schlechtriem, 2016). As international instruments permit a reasonable replacement transaction, it can also be argued that using products in stock is a reasonable alternative in this situation. Although the requirement that a replacement transaction occur after a breach is based on a sensible rationale, it may be reasonable for a party to use goods from its stock as a replacement before the breach.

In practice, judges and arbitrators frequently consider the market price when determining whether a replacement transaction was reasonable. If the price in a buyer’s replacement transaction is less than the market price, it is likely that this replacement will be deemed to be reasonable.<sup>1</sup> In instances where the price in a replacement transaction corresponds to the market pricing, the same logic most likely applies.<sup>2</sup> In some instances, the price in the seller’s replacement transaction, which is below the market price, may be deemed reasonable. In one case, where the seller was in a disadvantageous position due to the nature of the products, the tribunal determined that it was reasonable for the price in a replacement transaction to be slightly lower than the market price.<sup>3</sup> The existence or absence of more advantageous alternatives is also relevant to proving that a replacement transaction’s price was reasonable.

Despite the fact that a replacement transaction is the typical method of mitigating monetary damages, the aggrieved party may not have recourse to a replacement transaction in certain situations. In other words, there may be no solution in some instances. For instance, one can envision a scenario in which the buyer has already paid the purchase price in advance of receiving the goods and therefore lacks the monetary resources to enter into a new contract (Bates, 1991). Another circumstance in which the mitigation rule cannot be applied is the so-called lost volume situation, in which the supply of products exceeds their demand.

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<sup>1</sup>. See CIETAC Arbitration proceedings 10 June 2002  
<<http://cisgw3.law.pace.edu/cases/020610c1.html>>.

<sup>2</sup>. ICC Arbitration Case No. 10329 of 2000 (Industrial product case) <<http://cisgw3.law.pace.edu/cases/000329i1.html>>

<sup>3</sup>. CIETAC Arbitration Proceeding, 4 June 1999 (Industrial raw material case) <<http://cisgw3.law.pace.edu/cases/990604c1.html>>

Even if the buyer had not breached the agreement, the seller would have been able to continue supplying products to other customers. Therefore, in this circumstance, we cannot speak of a replacement transaction. As an illustration, the seller has a thousand televisions in stock and sells 100 of them to the first buyer, who then breaches the contract by refusing to accept delivery of the products. Even though the original contract would have been honored, it cannot be argued that the seller could mitigate monetary losses through the resale of the televisions because they had sufficient quantities for potential purchasers (Saidov, 2008). Other circumstances exist in which the resale of the goods is impractical, such as when the goods are designed for a specific purpose. In one instance, the seller attached the buyer's trademark to the merchandise to prevent resale.<sup>1</sup>

Another instance is when the aggrieved party is logically unable to enter into a replacement contract. For instance, in a contract for the production of seasonal clothing with an order placed several months in advance, the seller failed to fulfill its obligations, preventing the buyer from entering into a new contract.<sup>2</sup>

#### **4. Implementation of the Concrete Method**

As stated, the amount payable as monetary damages under this method equals the difference between the original contract's price and the price of the replacement transaction. However, it should be noted that in some instances, one of the comparability prices must be adjusted because the provisions of the contracts may not be identical (Chengwei, 2003). In one instance, the original contract was governed by CFR (Cost & Freight) terms, while the replaced contract was governed by FOB (Free on Board) terms. Because freight was not included in the latter contract, the arbitral panel considered it when calculating monetary damages.<sup>3</sup> Another circumstance is when VAT<sup>4</sup> is charged on domestic sales but not on international sales (export). In one instance where the vendor breached the contract (VAT was not collected), they resold the products to a buyer in their home country (VAT included). For this reason, the tribunal deducted the amount of VAT from the price of the replaced contract.<sup>5</sup>

Yet, a situation involving a more complex pricing adjustment is when one contract requires payment in cash while the other requires credit payment.

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<sup>1</sup>. ICAC Case 107/2002, decision dated 16 February 2004.

<sup>2</sup>. <http://cisgw3.law.pace.edu/cases/940114g1.html>

<sup>3</sup>. CIETAC Arbitration, dated 15 November 1996. <http://cisgw3.law.pace.edu/cases/961115c1.html>

<sup>4</sup> Value added tax (VAT)

<sup>5</sup>. CIETAC Arbitration, dated 16 August 1996. <http://cisgw3.law.pace.edu/cases/960816c1.html>

Consider a contract with a thirty-thousand-dollar price payable within three years. After contract infringement, a replacement contract is negotiated for 21 thousand dollars to be paid in cash. It is illogical to state that the aggrieved party is entitled to nine thousand dollars in monetary damages, given that thirty thousand dollars payable in currency is not equivalent to 30 thousand dollars payable over three years. For calculation purposes, one must consider the effect of time on monetary value; otherwise, the aggrieved party will be overcompensated (Saidov and Cunningham, 2008).

### 5. Other Varieties of Loss

In accordance with international instruments<sup>1</sup>, in addition to the difference between the contract price and the price of the replaced contract, the aggrieved party may also seek compensation for any losses or damages incurred. These losses are of different types. The seller may, for instance, be entitled to warehouse costs from the time the contract was violated until the replacement transaction is executed. They may also intend to collect interest on loans they had to obtain. The buyer may also seek reimbursement for expenses such as hiring a broker or compensating the seller's customers. Since the calculation of monetary damages based on the concrete method does not include these categories of damages, the aggrieved party must claim them in addition to the direct loss resulting from the breach of contract (Honnold, 2009).

In this section, it is appropriate to discuss the legal position of Iran in this regard. In contrast to civil liability, contractual liability issues have been almost ignored by the legislator; this is largely because the Iranian Civil Act was modeled after *fiqh* (Islamic law)<sup>2</sup> literature. Islamic jurists have primarily elaborated on the formation/termination of contracts and parties' obligations; sanctions for contract breach have not been emphasized. By analyzing legal foundations, we hope to cast some light on the issue of calculating monetary damages under Iranian law. As stated, the prerequisite for employing this method is the completion of a replacement transaction. Therefore, it should be made plain in the first instance whether replacement transactions have been permitted neither in the Iranian legal system nor in *fiqh*, the primary source of our law, nor in statutes. In addition, legal scholars have not addressed it in their writings. In actuality, this institution can be

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<sup>1</sup>. Article 75 CISG, 7.4.5 UPICC and 9:506 PECL

<sup>2</sup>. The word *fiqh* is an Arabic term meaning "deep understanding" or "full comprehension." Technically it refers to the body of Islamic law extracted from detailed Islamic sources.



traced back to the English legal system in the *British Westinghouse Electric* case (1912)<sup>1</sup> (Bates, 1991), and even in the French legal system, which has left its mark on the Iranian Civil Code, replacement transaction has no place (Le Pautremat & LQ, 2006). In contrast, the primary sanction for contract breach under Iranian law is specific performance as stated in Article 237 of the Iranian Civil Code (Shahidi, 2012), which conflicts with replacement transactions. In brief, it can be argued that replacement transactions are prohibited under Iranian law; there may be no concrete method for calculating monetary damages.

## 6. Abstract Calculation Method

The *Abstract Method* is the alternative method of calculation expressly specified in international instruments. Article 76 of the CISG states, “If the contract is avoided and there is a current price for the goods, the party claiming monetary damages may, if they have not made a purchase or resale under Article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance, as well as any additional monetary damages recoverable under Article 74.” If, however, the party claiming monetary damages has rescinded the contract after taking possession of the products, the price in effect at the time of such rescinding shall be applied instead of the price in effect at the time of cancellation.” UPICC<sup>2</sup> and PECL<sup>3</sup> also stipulate it in comparable language. As previously stated, these latter two instruments are not limited to sales contracts but rather apply to any contract, regardless of its nature. In domestic legal systems, the abstract calculation procedure is well-known. This method disregards the aggrieved party’s unique circumstances (Lando and Beale, 2000). Instead, this is a depersonalized formula based on the simple premise that by reimbursing the current price, the injured party is able to conduct a replacement transaction. Since the claimant is not obligated to make a replacement transaction, this method does not provide for the mitigation of monetary damages (Bridge, 2007).

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<sup>1</sup>. *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*

<sup>2</sup>. Article 7.4.6: “Where the aggrieved party has terminated the contract and has not entered into a replacement transaction, but there is a current price for the performance contracted for, the aggrieved party may recover the difference between the contract price and the current price at the time the contract was terminated, in addition to monetary damages for any further harm.”

<sup>3</sup>. Article 9:507: “Where the aggrieved party has terminated the contract and has not entered into a replacement transaction, but there is a current price for the performance contracted for, the aggrieved party may recover the difference between the contract price and the current price at the time the contract is terminated, as well as monetary damages for any further loss recoverable under this Section.”

This method of calculation may, in some instances, result in excessive or inadequate compensation. Suppose, for example, that the contract price and resale price are \$40,000 and \$50,000, respectively. If the current price is expected to be \$60,000, then the quantity of monetary damages payable is \$20,000, which is \$10,000 more than what the injured party has suffered. In contrast, if the current price declines to 35,000 dollars, the claimant will not be entitled to any compensation because the current price is below the contract price. Nonetheless, the following arguments have been presented in support of this method: 1) Overcompensation should not be considered; otherwise, the breaching party would benefit from market fluctuations; 2) Overcompensation can be justified by arguing that the injured party has been deprived of the opportunity to profit from market fluctuations; and 3) This method is simple and avoids the complexities or uncertainties associated with the concrete method of calculating monetary damages (Bates, 1991).

## **7. The Relationship between “Concrete” and “Abstract” Calculation Methodologies**

In various legal systems, one or both of these methods may be used in conjunction with the calculation of monetary damages. It appears that international instruments favor concrete methods by stipulating that the difference between the contract price and the current price may be claimed in the absence of a replacement transaction. In other words, the concrete method takes precedence over the abstract method, and if the aggrieved party has engaged in a replacement transaction, monetary damages must be determined using the concrete method. Despite the intention of the drafters to eradicate uncertainties, their accomplishments in this regard are highly questionable (Honnold, 2009). To address this difficulty, the relationship between these two methodologies must be investigated.

Sutton (1989) recommends that the abstract method be used when: 1) the aggrieved party has failed to make a replacement transaction; 2) the requirements of a concrete method of calculation have not been met; and 3) it has been impossible to make a replacement transaction. The relationship between the “abstract” method and the “mitigation” rule is questioned in the first two situations, but is self-evident in the third. To avoid making a reasonable replacement contract is a violation of the obligation to mitigate monetary losses. To calculate monetary damages in this instance, should an abstract method and the mitigation rule be disregarded, or should the amount of avoidable loss be deducted from the reimbursable amount? In other words, is it necessary to account for the loss that

the injured party failed to prevent or reduce reasonably? If the abstract method is used, the mitigation rule is disregarded because, under this method, the aggrieved party had no obligation to take measures to mitigate the damage or loss. Several cases decided under the CISG illustrate this difficulty by demonstrating that when the requirements of Article 75 are not met, judges and arbitrators frequently resort to Article 76 with little or no regard for the mitigation rule (Chengwei, 2003). In one instance, the recipient did not open the L/C. As the seller only resold a portion of the goods to a third party, they failed to satisfy their obligation to mitigate monetary losses. According to Article 76 of the CISG, the seller is entitled to the difference between the contract price and the market price as monetary damages.<sup>1</sup> The instruments are ambiguous as to whether the abstract method should be applied regardless of the mitigation rule or whether the amount of avoidable loss should be deducted from the amount payable. On the one hand, the instruments appear to permit the use of the “abstract” method when the replacement transaction has not been completed or has not been completed reasonably. In contrast, the obligation to mitigate monetary damages has been expressly indicated in the instruments. However, ignoring avoidable losses contradicts this obligation. With this premise in mind, it can be concluded that if the injured party refuses to reduce the loss, there is no other option but to use the abstract method, even though the quantity of avoidable loss must be considered. The presence of an express provision on mitigation cannot be disregarded because it may permit the aggrieved party to speculate and receive excessive compensation (Yovel, 2005).

The principles of full compensation and protection of the party’s performance interest should tip the balance in favor of the mitigation rule to prevent excessive compensation. In other words, if the application of the abstract method results in an unexpected windfall, the mitigation rule should serve as a recovery cap. However, arbitration practice is not entirely consistent with this view. Some cases reveal that arbitrators have not accorded mitigation rules a great deal of weight and have instead resorted to abstract methods to calculate monetary damages.<sup>2</sup> This attitude may derive from the fact that it is relatively easy and convenient to apply the “abstract” formula in practice, or, in part, from a desire not to place too much emphasis on the duty of mitigation.

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<sup>1</sup>. CIETAC Arbitration dated 29 September 1999.  
<http://cisgw3.law.pace.edu/cases/970929c1.html>. See also arbitral award dated 1<sup>st</sup> March 1999.

<sup>2</sup>. For example, see CIETAC Arbitration, award dated 29 September 1997.  
<http://cisgw3.law.pace.edu/cases/970929c1.html>

## 8. Solution

As described previously, there is no consistent application of these methods; they have been employed indiscriminately. In other words, arbitrators for the appraisal of monetary damages do not care which of the aforementioned methods should be prioritized or what the requirements are for each. As the mitigation rule is well-established in domestic legal systems and articulated in international instruments, it can be argued that referring to the abstract method in the first instance implies ignoring the mitigation rule. The concrete method of calculation has precedence over the abstract method, and it is fully compliant with the international instruments discussed in this article. Therefore, if the aggrieved party fails to take any measures to mitigate the loss, the concrete method cannot be applied; however, the quantity of avoidable loss must be accounted for when calculating monetary damages. However, since the burden of invoking and proving the mitigation rule (replacement transaction) rests with the defendant, if they fail to invoke mitigation or are unable to prove that the claimant took no steps to avoid or reduce the monetary damage or that the claimant's actions were unreasonable, then the tribunal should employ the abstract method. When making a replacement transaction is not possible -for example, when monetary resources are unavailable or when making a replacement transaction would be pointless- the tribunal should rely on the abstract method of calculation.

Regarding this, it is necessary to examine the position of the Iranian legal system. According to this approach, as previously explained, the difference between the contract price and the current price is regarded as monetary damages. In order to protect the aggrieved party in the event of a breach of contract, it is necessary in the first stage to propose a solution to this question. Simply stated, is the aggrieved party entitled to the profits they would have anticipated had the contract been performed, or should they be returned to the position they held before the conclusion of the contract? Due to the vast gap in Iranian law in this field, it is impossible to provide a definitive response to this question. For this reason, we must provide a response based on legal principles.

"Certainty" is one of the requirements officially recognized by Iranian law for monetary damages. Article 520 of the Civil Procedure Act stipulates in this regard that "the claimant shall prove the loss sustained was directly caused by non-performance or delay in performance... ." This principle conveys the notion of "certainty" of loss based on its adoption of limited interpretations. According to these interpretations, the promise's anticipated profits from the performance of the contract are not deemed to be certain. It means that it is sufficient compensation to

restore the innocent party to the position they held before the contract's execution and to cover the costs that have been incurred for this purpose. In a decision issued by the Iran Chamber of Commerce's Arbitration Center, a similar position was adopted.<sup>1</sup> In such a scenario, the seller failed to deliver the products, and the buyer filed a claim for performance interest, which is the difference between the contract price and the market price. According to Article 522 (Note 2) of the Civil Procedure Act, lost profits are inadmissible, so the arbitrator denied the claim.

However, the aforementioned arguments are not persuasive. Although the sanctions for contract breach may vary from country to country where a contract is signed, a new situation is created that is recognized and protected by the law. It can be argued that property rights are created by a contract. These property rights are part of the contracting party's possessions. A breach of contract is a negative action that impairs the legal situation. Therefore, to receive complete compensation, the aggrieved party must be placed in the position they would have occupied if the contract had been performed and its rights realized (Katouziyan, 2008). In a case heard by the Iran Chamber of Commerce's Arbitration Center, the tribunal reached this conclusion<sup>2</sup>. Arbitrators reasoned that the aggrieved party must be placed in the position they would have occupied had the contract been honored.

In brief, the prevailing view is that lost profits that are reasonably certain and would have been earned had the contract been executed can be claimed as monetary damages. In contrast, likely profits will not be classified as losses and will bear no liability.

Thus, according to what was stated, the Iranian legal system permits only the abstract method for calculating monetary damages. To calculate damages, the question arises as to whether the current price at the time of breach or the price at the time of award or judgment must be used. Some law commentators have argued that determining the time for calculation as opposed to the case in civil liability is unimportant; it should be made clear, however, that contrary to the prevalent view that introduces the time of harm occurrence for calculation, the time of issuing the award or judgment must be relied upon for two reasons. 1) Before a judgment is rendered, the party in breach is liable for monetary damages. This legal obligation is materialized in the form of monetary damages by the judgment. Therefore, it is prudent to consider monetary damages when rendering a verdict. 2) Only in this

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<sup>1</sup>. Award No. 36/85/47/146

<sup>2</sup>. Award No. 36/85/36/192; see also Award No. 36/82/5/171.

case is the loss resulting from non-performance entirely compensated, and the aggrieved party placed in the position they would have occupied if the contract had been performed (Katouziyan, 2008). It is important to note, however, that the assessment of monetary damages at the time of judgment may in some instances best compensate the injured party, whereas in other cases the opposite is true. Take the price of luxury goods, for example which will fall as the supply of newer products increases. Using the price at the time of judgment would not serve the interests of the injured party in this situation. Nevertheless, in accordance with the general principles of the Iranian legal system, the more favorable view is the price at the time of performance, as it is presumed that if the promisor had performed the contract, the promise would have realized the profits they had anticipated under the contract. Though this viewpoint may serve the interests of the aggrieved party in some instances, as devaluation is not recognized and protected under Iranian law, the aggrieved party will likely remain uncompensated for a portion of the loss they have suffered in the majority of cases. Nonetheless, this lacuna in the Iranian legal system appears advantageous, as the adjudicator has greater latitude to adopt a position regarding the particulars of each case that best compensates the aggrieved party. Consequently, this strategy appears to be more consistent with the essence of justice and more acceptable to common sense.

## **9. Conclusion**

If the party in breach is held liable for non-performance, the tribunal must determine the amount of loss. Nonetheless, the method of calculation may have a substantial effect on the amount of monetary damages. Not all legal systems employ a singular strategy for this purpose. Under the CISG, UPICC, and PECL, both “concrete” and “abstract” methods are defined. Article 75 of the CISG defines the concrete method as the difference between the price of the contract and the price of the replacement transaction. Monetary damages can be claimed only if the price of the replacement contract was higher.

The alternative technique of calculation is the so-called abstract method outlined in Article 76 of the CISG. According to this method, if no replacement transaction has been executed, the amount of monetary damages equals the difference between the contract price and the price at the time of the transgression. Numerous discrepancies have surfaced as a result of the convention’s adoption of these two methods without elucidation of their respective application requirements.

When calculating monetary damages, the arbitrator considers whether a replacement transaction has been executed. If so, the concrete method (Article 75) is utilized; otherwise, the abstract method (Article 76) is utilized. Nonetheless, this comprehension is a superficial and incorrect interpretation of these Articles, which can even be found in case law, as it disregards the obligation to mitigate monetary damages that has been expressly stipulated by the convention. The CISG requires the aggrieved party to engage in a replacement transaction for the purpose of avoiding or minimizing the loss; otherwise, their inaction will be to their detriment, as they cannot claim avoidable losses.

In the absence of an alternative transaction, a direct reference to the abstract method is equivalent to disregarding the mitigation obligation. This is why, at first glimpse, the language of the CISG appears contradictory, since on the one hand it requires the injured party to mitigate monetary damages or else bear the consequences (Article 77). Alternatively, if a replacement transaction has not been executed, Article 76 states that the difference between the contract price and the current price will be the amount of monetary damages; an approach that disregards the sanction of mitigation duty. To resolve this conflict, it is possible to argue that if reasonable measures have not been taken to reduce the loss, the judge or arbitrator will rely on the abstract method, but the quantity of avoidable loss must be considered.

As the focus of this article, even though the CISG, UPICC, and PECL make no explicit reference in this regard, it can be inferred that the concrete method of calculation has precedence over the abstract method because it is in line with and in harmony with the mitigation duty expressly provided for under the instruments. In situations where a replacement transaction is not possible, the defendant does not invoke it, or cannot demonstrate that the measures taken were not reasonable, the tribunal should rely on the abstract method directly.

Methods of calculating monetary damages have not been spelled out in Iranian statutes; consequently, there is a lacuna in this area. Nonetheless, a solution can be proposed by utilizing legal principles and logic. It must be acknowledged that recourse to the concrete method is not permitted, as a replacement transaction is required for its application, whereas this concept is rooted in common law and has no position in the Iranian legal system. In contrast, a replacement transaction conflicts with specific performance as the primary remedy for breach of contract. Therefore, the only method that can be applied is the abstract method because the price to be relied on (price at the time of breach or price at the time of judgment) is questionable. Some commentators have argued that the price at the time of

judgment must be considered because it best compensates the aggrieved party. However, one should not be oblivious to the fact that reliance on the price at the time of breach does not always fulfill the purpose of contractual liability. Therefore, it is the responsibility of the judge or arbitrator in each instance to consider the specifics of the dispute and to award the party who has been wronged the amount that is most equitable and adequate compensation.

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