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Research

# Law of Damages in India

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May 2022

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# 1. Introduction

Damages refer to a form of compensation due to a breach, loss or injury.<sup>1</sup> As explained by Fuller and Perdue, damages may seek protection of ‘expectation interest’, ‘reliance interest’ or ‘restitution interest’. Expectation interest (otherwise known as performance interest) refers to placing the plaintiff in a position that he would have occupied, had the defendant performed his promise by compensating for the injury, thus, aiming at fulfilling the expectation of the promisee;<sup>2</sup> reliance interest (otherwise known as status quo interest) refers to a restoring the plaintiff to a position which he was in before the promise was made in the course of which the promise altered his position by placing reliance on the promisor;<sup>3</sup> and restitution interest refers to prevention of gain by the defaulting promisor at the expense of the promisee or to compel the defendant to pay for the values received from the plaintiff thereby preventing unjust enrichment.<sup>4</sup>

‘Damages’ are often confused with ‘damage’. However, these two terms are significantly distinct. While ‘damages’ refer to the compensation awarded or sought for, ‘damage’ refers to the injury or loss which such compensation is claimed for or being awarded. ‘Damage’ could be monetary or non-monetary (loss of reputation, physical or mental pain or suffering) while ‘damages’ refer to pecuniary compensation.

Damages can also be distinguished from compensation, in general. Compensation is a broader concept which encompasses payments made to a person in respect of some kind of loss or damage suffered due to reasons like acquisition of property by another party, statutory violations, termination of employments, requiring the aggrieved party to be compensated; however, damages emanate from actionable wrongs.<sup>5</sup> In common parlance, compensation is often used to refer to damages as well. Moreover, the Indian Contract Act 1872 (“**Contract Act**”), refers to the term ‘compensation’ in the context of liquidated and unliquidated damages (*discussed below*).

Damages have gained much significance especially among commercial transactions, and as punitive measures for violation of rights of concerned persons. The nature of damages granted across various areas varies significantly, for example in cases relating to indemnity contracts.<sup>6</sup>

Indemnity is a kind of protection from third party losses, which is ensured by an indemnity agreement between the claimant (indemnified) and the indemnifier.<sup>7</sup> A claim for indemnity arises from the original contract of indemnity<sup>8</sup> while a claim for damages arises on breach of a contract. Unlike damages under ordinary contracts where the defendant has the primary liability to pay the damages, under indemnity contracts, the risk of future losses and liability to pay damages shifts to the indemnifier.

Damages are popularly granted in cases of tort or on breach of contract. This paper broadly covers damages in cases of contractual breaches in India, with a brief overview of claim and grant of damages in cases of torts, indemnity contracts, arbitral proceedings, sale of goods, consumer disputes, intellectual property rights (copyrights, trademarks and patents) and engineering, procurement and construction contracts (also known as EPC contracts).

1. *Common Cause v. Union of India* (1999) 6 SCC 667.

2. *AT Brij Paul Singh & Bros. v. State of Gujarat* AIR 1984 SC 1703; *MSK Projects (I) (JV) Ltd. v. State of Rajasthan* (2011) 10 SCC 573.

3. *Kanchan Udyog v. United Spirits Limited* (2017) 8 SCC 237.

4. L.L. Fuller and William R. Perdue Jr., ‘The Reliance Interest in Contract Damages’ (1936) 46 Yale Law Journal 52.

5. Halsbury’s Laws of England, Damages, vol 12 (4th edn) para 815 as cited in R.G Padia (ed.), *Pollock and Mulla Indian Contract and Specific Relief Acts*, vol 2 (13th edn, LexisNexis Butterworths Wadhwa 2006) 1498.

6. Refer to our hotline titled ‘Revisiting the Indemnity v/s Damages Debate’ <[http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/revisiting-the-indemnity-vs-damages-debate.html?no\\_cache=1&cHash=7a971fee52445663d1b3b87e707a6f5](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/revisiting-the-indemnity-vs-damages-debate.html?no_cache=1&cHash=7a971fee52445663d1b3b87e707a6f5)> accessed 19 July 2018.

7. Indian Contract Act 1872, s. 124.

8. *H.P. Financial Corporation v. Pawna* (2015) 5 SCC 617.

## 2. Types of Damages

The nature of damages used or sought for depends on the objective for which damages are being claimed for. Thus, damages can be categorized into one or more of the following kinds:

### I. General and special damages

Damages which arise in the normal course of events are known as general damages while special damages refer to those that arise under circumstances which were reasonably anticipated<sup>9</sup> by the parties when they entered into the contract. Once a damage is proven, general damages are presumed to follow such damage, while specific proof of such damage is necessary to be established in case of claim for special damages.

### II. Nominal damages

Nominal damages may be awarded even when there is no actual loss or injury caused to a party against whom a breach has been caused, or in cases where there has been a violation of a legal right, without any actual damage being proved.<sup>10</sup> Thus, in case a party fails to prove actual loss resulting from a breach of contract, nominal damages may be granted.<sup>11</sup> Nominal damages may also be granted where a party is proven to have suffered damages as a direct consequence of the breach of contract but it is difficult to calculate the same with mathematical accuracy.<sup>12</sup> Nominal damages may also be awarded where a technical breach of contract has been committed or when the losses have been incurred due to a reason which is not attributable to the defendant.<sup>13</sup>

### III. Substantial damages

Substantial damages are awarded when the extent of breach of the contract is proved but there are uncertainties regarding calculation of damages.

### IV. Speculative damages

Speculative damages are those, which are allowed when the probability that a circumstance will exist as an element for compensation becomes conjectural.<sup>14</sup> Broadly, there may be two kinds of circumstances in this regard:

- when the damages are uncertain or contingent, i.e., not the certain result of the breach
- those where the damages are uncertain in amount.

9. See, *Kanchan Udyog v. United Spirits Ltd* (2017) 8 SCC 237.

10. See, *Akhoy Kumar Chatterjee v. Akman Molla & Others* AIR 1915 Cal 154 (2).

11. *Chaudhary Construction Co. v. Delhi Development Authority* (1998) 1 Arb LR 334; *Bismi Abdullah & Sons v. Regional Manager of FCI* AIR 1987 Ker 56.

12. *Pravudayal Agarwala v. Ram Kumar Agarwala*, AIR 1956 Cal 41.

13. See, *Vikas Electrical Service Pann Bazar Hubli v. Karnataka Electricity Board*, AIR 2008 Kar 88..

14. Justice SS Subramani and VR Manohar (eds.), *P Ramanatha Aiyar The Major Law Lexicon*, vol 6, (4th edn, 2010) 6401.

## 2.Types of Damages

Uncertain damages, which are not the certain result of a breach or a wrong, are not recoverable.<sup>15</sup> However, damages which are definitely attributable to the wrong and only uncertain in respect of their amount, may be recovered.<sup>16</sup> In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.<sup>17</sup> However, courts in India are generally reserved while granting speculative damages.<sup>18</sup>

## V. Aggravated and exemplary damages

These damages are of such nature that they exceed the damages ascertained, mostly resulting from the *mala fide* conduct of the defendant.<sup>19</sup> Aggravated damages gain significance where the damage caused to the plaintiff are aggravated due to the motive, conduct or manner of inflicting injury, whereby the plaintiff's feelings and dignity are adversely affected resulting in mental distress.

Aggravated damages are mostly compensatory in nature since they aim at compensating the plaintiff for the aggravated loss suffered. On the other hand, exemplary damages are punitive in nature since they intend to punish the defendant and not merely compensate or deprive the defendants of the profits made.<sup>20</sup>

Since damages under contractual breaches do not consider the motive and conduct of defendants, aggravated and exemplary damages are more prominent in torts and not under contractual breaches.<sup>21</sup> This is primarily because the objective behind contractual remedies is to compensate the promisee for the breach rather than compelling performance on the promisor.<sup>22</sup> However, where elements of fraud, oppression, malice etc. are established, exemplary damages may be granted, which may not be confined to compensation proportionate to pecuniary losses actually suffered by the injured person.<sup>23</sup>

In any event, punitive damages may be granted in certain exceptional cases. The Canadian Supreme Court's finding in this respect is relevant, wherein it was observed that:

15. *Story Parchment Co. v Paterson Co.* (1930) 282 US 555.

16. *ibid.*

17. *ibid.*

18. See, *Rogers Pyatt Shellac v John King*, AIR 1926 Cal 564.

19. *Koninlijke Philips NV v. Amazestore* (2019) 260 DLT 135; *Inter Ikea Systems v. Sham Murari* 2018 SCC OnLine Del 11221.

20. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1173; see also, *Organo Chemical Industries and Another. v. Union of India and Others* (1979) 4 SCC 573.

21. The common law approach has been that aggravated damages cannot be awarded in an action for breach of contract. See, *Addis v. Gramophone Co. Ltd.* (1909) AC 488; *Bliss v. SE Thames Regional Health Authority* (1987) ICR 700; *Ghaziabad Development Authority v. Union of India & Another* (2000) 6 SCC 113.

22. E. Allan Farnsworth, 'Legal Remedies for Breach of Contract' (1970) 70 Columbia Law Review 1145, 1147 as cited in William S. Dodge, 'The Case for Punitive Damages in Contracts' (1999) 48(4) Duke Law Journal 629, 630.

23. *Sheikh Jaru Bepari v. AG Peters* AIR 1942 Cal 493; *Gayatri Balaswamy v. IGS Nocasoft Technologies Ltd. and Anr* (2015) 1 Mad LJ 5; *Alexander Brault v. Indrakrishna Kaul* AIR 1933 Cal 706.

## 2.Types of Damages

*“Punitive damages are very much the exception than the rule, imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant for the misconduct in question. Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. Their purpose is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community collective condemnation (denunciation) of what has happened. Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and they are given in an amount that is no greater than necessary to rationally accomplish their purpose.”<sup>24</sup>*

Nevertheless, courts in the U.K. and India have been strict regarding grant of punitive damages in case of contractual breaches. The House of Lords in *Rookes v. Barnard*<sup>25</sup> (“**Rookes v Barnard**”), which is considered the seminal authority on the issue of punitive or exemplary damages, had defined three categories of case in which such damages might be awarded. These are:

- a. Oppressive, arbitrary or unconstitutional action any the servants of the government;
- b. Wrongful conduct by the defendant which has been calculated by him for himself which may well exceed the compensation payable to the claimant; and
- c. Any case where exemplary damages are authorised by the statute.

While upholding the above in its subsequent decision in *Cassell & Co. Ltd. v. Broome*<sup>26</sup> (“**Cassell v Broome**”), the House of Lords had clarified as below:

*“A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury’s consideration. Even if it is not withdrawn from the jury, the judge’s task is not complete. He should remind the jury: (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories, (ii) That the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character. They can and should award nothing unless (iii) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff’s solatium in the sense I have explained and (iv) that, in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury’s idea of what the defendant ought to pay. (v) I would also deprecate, as did Lord Atkin in *Ley v. Hamilton*, 153 L.T 384 the use of the word “fine” in connection with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff’s pocket, and not contributing to the rates, or to the revenues of central government.”<sup>27</sup>*

24. *Whiten v. Pilot Insurance Company* [2002] 1 RCS 595.

25. [1964] 1 All ER 367.

26. 1972 AC 1027.

27. *ibid.*

## 2. Types of Damages

In a case before the England and Wales High Court (Chancery Division), the following observations were made in *obiter*:

“i) The first is that exemplary damages, otherwise known as punitive damages, are awarded against a defendant as a punishment, so that the assessment goes beyond mere compensation of the claimant. Whilst such damages are capable of being awarded in tort (albeit only in very limited circumstances), there is no right to recover exemplary damages for breach of contract. If any right to damages arises in the present case, it would be founded upon (or by analogy with) a cause of action in contract. Therefore, as a matter of principle, exemplary damages would not be recoverable in the present case. ii) The second answer is that, even if such an award is available in principle, it should be by reference to the principles developed in tort and subject to the restrictions laid down in *Rookes v. Barnard* [1964] AC 1129. The facts of the present case do not fall within those principles.”<sup>28</sup>

The principles laid down by the House of Lords in *Rookes v Barnard* and *Cassell v Broome* (as produced above) have been affirmed by the Supreme Court; however, the application in those cases has been in the context of abuse of authority leading to infringement of constitutional rights or by public authorities.<sup>29</sup> The Supreme Court is yet to indicate the standards which are to be applied while awarding punitive or exemplary damages in libel, tortious claims with economic overtones such as slander of goods, or in respect of intellectual property matters.<sup>30</sup> The peculiarities of such cases would be the courts, need to evolve proper standards to ensure proportionality in the award of such exemplary or punitive damages.<sup>31</sup> Indian courts have generally refrained from granting damages considered either punitive<sup>32</sup> or in the nature of a reward.<sup>33</sup> In this regard, the Delhi High Court had observed that:

“...the punitive element of the damages should follow the damages assessed otherwise (or general) damages; exemplary damages can be awarded only if the Court is “satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiffs solatium”. In other words, punitive damages should invariably follow the award of general damages (by that the Court meant that it could be an element in the determination of damages, or a separate head altogether, but never completely without determination of general damages).”<sup>34</sup>

For further details on grant of exemplary damages in cases related to infringement of intellectual property rights, see below (Section 4(VII))

## VI. Liquidated and unliquidated damages

Parties may agree to payment of a certain sum on breach of the contract. When such stipulations are made in the contract, they are known as liquidated damages. On the other hand, unliquidated damages are awarded by the

28. *IBM United Kingdom Holdings Ltd & Another v. Dalgleish & Ors (Rev 1)* [2015] EWHC 389(Ch).

29. *Ghaziabad Development Authority v. Balbir Singh*, (2004) 5 SCC 65; *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243.

30. *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*, (2014) 207 DLT 713.

31. *ibid.*

32. See, *BSNL v. Reliance Communication Ltd.* (2011) 1 SCC 394; also see, *Phulchand Exports Ltd. v. O.O.O. Patriot* (2011) 10 SCC 300.

33. *Kerala State Road Transport Corporation Rep. by the Managing Director v. Feethambaran Rep. by his Next Friends Sukhmmari* 1994 (2) KLJ 646 (para 8); See, *Super Cassettes Industries Private Limited v. HRCN Cable Network* [CS(COMM) 48 of 2015; judgment of Delhi High Court dated 09 October 2017]; *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*, (2014) 207 DLT 713.

34. *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*, (2014) 207 DLT 713.

## 2.Types of Damages

courts on an assessment of the loss or injury caused to the party suffering such breach of contract.<sup>35</sup> Parties may provide for liquidated damages for certain kinds of breaches, while other kinds of breaches may be compensated by way of unliquidated damages.<sup>36</sup> For instance, a liquidated damages clause may stipulate a ceiling on account of delay in delivery; however, such a clause would not prevent a party from claiming damages on account of the goods supplied under the contract being defective.<sup>37</sup>

## VII. Differentiating liquidated damages from penalty

While liquidated damages are pre-determined estimates of losses and corresponding compensation, that is payable on breach of the contract, penalties are usually disproportionate to the losses and higher than the losses that could result from the breach of contract, which are stipulated with the intent to ensure performance of the contract and to avoid any breach.

The stipulation made within the contractual terms is often disputed as to whether such stipulation is in the nature of penalty or liquidated damages. Differentiating between ‘penalty’ and ‘liquidated damages’, the Supreme Court has been of the view that:

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*“whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss. (See Paras 26-126 of Chitty on Contracts, 30th edn.)”<sup>38</sup>*

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In this regard, the Madras High Court had observed as below:

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*“The primary test for identifying and distinguishing between liquidated damages and penalty clauses is whether, when tested as of contract formation, the stipulated sum bears a reasonable correlation to anticipated loss; if so, it would be construed as a liquidated damages clause and, if not, as a penalty clause. A stipulated sum that bears such reasonable correlation to anticipated loss is considered as a genuine pre-estimate of loss.”<sup>39</sup>*

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Regarding the enforceability and tests for liquidated damages claims and penalty clauses, the Madras High Court had further observed that:

35. *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63.

36. *ibid*

37. *Oil & Natural Gas Corporation Limited v. Soconord* 2014 SCC OnLine Bom 1277.

38. *BSNL v. Reliance Communication Ltd.*, (2011) 1 SCC 394.

39. *M/s 3I Infotech Limited v. Tamil Nadu E-Government Agency*, 2019 SCC Online Mad 33295.

## 2.Types of Damages

“Given the fact that a party claiming liquidated damages cannot claim more than the stipulated sum, once such party establishes that the stipulated compensation is a genuine pre-estimate, a high standard of proof would not be insisted upon to prove difficulty or impossibility of proving loss. In other words, the court would bear in mind that parties negotiated and concluded the contract on the basis of risk allocation, whereby the party claiming liquidated damages forecloses the possibility of claiming an amount higher than the sum stipulated, by way of proving higher actual loss, so as to enjoy the benefit of the relative ease and certainty of establishing a claim for liquidated damages as opposed to a claim for unliquidated damages.

On the contrary, if it is concluded that the stipulation is by way of penalty, the person claiming such penalty would be required to prove loss accurately, including the quantum of loss, and claim reasonable compensation on that basis.”

With respect to the nature of liquidated damages under the Contract Act, the apex court has observed that:

“Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74... In all cases...where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount specified in the contract as liable to forfeiture.”<sup>40</sup>

Section 74 of the Contract Act refers to a ‘stipulation by way of penalty’. Accordingly, it applies where a sum is named as penalty to be paid in future in case of breach, and not to cases where a sum is already paid and liable to forfeiture by a covenant in the contract.<sup>41</sup>

Forfeiture of a reasonable amount paid as earnest money or advance deposit as part payment may not amount to imposition of penalty; however, in cases where the forfeiture is in the nature of penalty, Section 74 applies.<sup>42</sup> Earnest money is part of the purchase price when the transaction goes forward, and would be required to be forfeited on occasions of failure of transactions which could be due to the fault or failure of the vendee.<sup>43</sup> However, in cases where a party has ‘undertaken’ to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking may be considered to be in the nature of a penalty.<sup>44</sup>

Further, in order to forfeit the sum deposited by the contracting party as “earnest money” or “security” for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture.<sup>45</sup> A right to forfeit being a contractual right and penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf, a fortiori, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum.<sup>46</sup>

Under the Contract Act, unliquidated and liquidated damages are given under sections 73 and 74 respectively, which is discussed in the subsequent chapter.

40. *Fateh Chand v. Balkishan Das* AIR 1963 SC 1405; also see, *Phulchand Exports Ltd. v. O.O.O. Patriot* (2011) 10 SCC 300.

41. *Natesa Aiyar v. Appavu Padayachi* (1915) ILR 38 Mad 178; *Abdul Gani & Co. v. Trustees of the Port of Bombay* I.L.R. 1952 Bom. 747,

42. *Maula Bux v. Union of India* (1969) 2 SCC 554.

43. *Kunwar Chiranjit Singh v. Har Swarup* AIR 1926 PC 1; see *Shree Hanuman Cotton Mills and Anr. v. Tata Aircraft Limited*, 1970 (3) SCR 127.

44. *Maula Bux v. Union of India* (1969) 2 SCC 554.

45. *Suresh Kumar Wadhwa v. State of M.P.*, 2017 (16) SC C 757.

46. *ibid.*

### 3. Damages under Indian Contract Act, 1872

Section 73 deals with actual damages following breach of a contract and the injury resulting from such breach which are in the nature of **unliquidated damages**. These damages are awarded by the courts on an assessment of the loss or injury caused to the party against whom breach has taken place. Section 74 deals with **liquidated damages**, i.e., damages that are stipulated for.

Thus, for claim of damages, there must be a breach of the contract,<sup>47</sup> thereby excluding cases, where there is a valid termination of the contract without any violation of the terms of the contract.

The differences between Section 73 and Section 74 may be summed up as below:

Section 73:	Section 74:
Contract materialized	Contract materialized
Breach of a contract	Contract has a certain sum stipulated as compensation or penalty which would be effectuated on breach of contract
Loss or damage resulting from such breach	Breach of a contract
The loss or damage should be of such nature that:	Compensation by party causing breach. The compensation shall be reasonable and not more than the sum determined in the contract as liquidated damages.
<ul style="list-style-type: none"> <li>▪ It arose in the usual course of things from such breach; or</li> <li>▪ Parties knew, when they made the contract, that such a loss or damage is likely to result from the breach of it.</li> </ul>	
Compensation for such loss or damage by party causing the breach	

#### I. Breach of contract

Liability to pay damages would arise only in the event a breach of contract.<sup>48</sup> To establish a breach, it has to be adjudicated upon, and not merely decided by the parties.<sup>49</sup>

A contract is said to be breached in case of contravention with the terms of the contract or when the promise made is broken. It may so happen that the terms are not complied in a manner which had been contemplated in the contract. For example, if a party contracts with another for repairing the other's house in a certain manner, and the repair was not done in the stipulated manner, then the aggrieved party is entitled to damages to the extent of costs of making repairs in conformity with the contract.<sup>50</sup>

Damages may also be claimed in case of anticipatory breach of contract.<sup>51</sup> An anticipatory breach is an assertion by a party to the contract that he will not perform henceforth an obligation arising under the contract.<sup>52</sup> In such a scenario, the other party may acquiesce to the continuation of the contract or rescind it.<sup>53</sup> In case of an anticipatory breach of contract, the plaintiff would be entitled to claim damages on establishing the intention to perform the contract prior to rescission of the contract.<sup>54</sup>

47. *P. Radhakrishna Murthy v. NBCC Ltd* (2013) 3 SCC 747.

48. *Managing Director, Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.* (2004) 9 SCC 619.

49. *P Radhakrishna Murthy v. NBCC Ltd.* (2013) 3 SCC 747; *J.G. Engineers (P) Ltd., v. Union of India* (2011) 5 SCC 758.

50. Indian Contract Act 1872, s. 73 (illustration (f)).

51. *Jawaharlal Wadhwa & Another v. Haripada Chakroberty* (1989) 1 SCC 76.

52. Indian Contract Act 1872, s. 39. See also, *Jayendra Construction v. Rajkot Jilla Panchayat* AIR 2014 Guj 137

53. *ibid.*

54. *Jawaharlal Wadhwa & Another v. Haripada Chakroberty* (1989) 1 SCC 76.

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## II. Proof of damage for a claim of liquidated damages

For a claim of liquidated damages, the clause “whether or not actual damage or loss is proved to have been caused thereby” merely dispenses with proof of “actual loss or damages”.<sup>55</sup> It does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.<sup>56</sup> Thus, existence of loss or injury is indispensable for such claim of liquidated damages.<sup>57</sup> The requirement to prove loss or injury or damage may be dispensed with if it is difficult or impossible to prove such loss or injury; in such cases, the genuine pre-estimate of damages can be awarded.<sup>58</sup>

An aggrieved party can recover damages to the extent of the claim being reasonable compensation for the injury sustained by him, and not the entire sum laid down as liquidated damages.<sup>59</sup> The amount stipulated as liquidated amount is the ‘upper limit beyond which the court cannot grant reasonable compensation’.<sup>60</sup>

In the absence of such a proof or honest estimation by the claimant, the court would consider a reasonable assessment of the consequences of the breach of contract and award damages which is below the stipulated liquidated damages.<sup>61</sup> If the entire amount stipulated is a genuine pre-estimate of loss, the need to prove actual loss may be dispensed with.<sup>62</sup> The burden to prove that no loss was likely to be suffered is on the party committing breach.<sup>63</sup> Accordingly, factors such as the extent of mitigation of losses, along with the relevant facts and circumstances warrant sufficient consideration.

In this respect, the Hon’ble Supreme Court has noted the following:

*“It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove loss or damage suffered by him before he can claim a decree, and the court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression ‘whether or not actual damage or loss is proved to have been caused there by’ is intended to cover different classes of contracts which come before the courts. In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established Rules. Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.”<sup>64</sup>*

55. *Fateh Chand v. Balkishan Das* AIR 1963 SC 1405.

56. *Fateh Chand v. Balkishan Das* AIR 1963 SC 1405.

57. *ibid*; *Raheja Universal Pvt. Ltd. v. B.E. Bilimoria & Co. Ltd.* (2016) 3 AIR Bom R 637.

58. *ibid*; *Kailash Nath v. Delhi Development Authority* (2015) 4 SCC 136; *Mahanagar Telephone Nigam Limited v. Haryana Telecom Limited* (2017), 163 DRJ 425; see, *Indian Oil Corporation v. Lloyds Steel Industries Limited* 2007 (4) Arb LR 84 (Delhi); *M/s 3I Infotech Limited v. Tamil Nadu E-Government Agency*, 2019 SCC Online Mad 33295.

59. *Kailash Nath v. Delhi Development Authority* (2015) 4 SCC 136.

60. *Kailash Nath v. Delhi Development Authority* (2015) 4 SCC 136; see, *Maya Devi v. Lalta Prasad* (2015) 5 SCC 588.

61. *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd* AIR 2003 SC 2629; *BSNL v. Reliance Communication Ltd.* (2011) 1 SCC 394.

62. *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd* AIR 2003 SC 2629; *Construction & Design Services v. DDA* (2015) 14 SCC 263.

63. *ibid*.

64. *Maula Bux v. Union of India* (1969) 2 SCC 554.

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Thus, an automatic pecuniary liability does not arise in the event of a breach of a contract which contains a clause for liquidated damages.<sup>65</sup> Till the time, it is determined by the court that the party complaining of the breach is entitled to damages, the plaintiff shall not be granted compensation by the mere presence of a liquidated damages clause.<sup>66</sup>

## III. Causation

For a claim of damages and affixing liability, there has to be a causal connection between the breach committed and the loss or injury suffered. This causal connection is said to have been established if the act of the defendant amounting to breach of the contract is the only 'real and effective' cause in relation to the injury or damage for which damages are claimed; in the presence of multiple causes, the 'dominant and effective' cause is to be taken into consideration.<sup>67</sup>

For establishing the causal link, courts follow various tests depending on what is warranted by the facts and circumstances, one of which is the 'but for' test, which is concerned with finding whether the damage would have accrued but for the acts of the defendant.

In *Reg Glass Pty Ltd v. Rivers Locking Systems Ltd*,<sup>68</sup> the defendant failed to install the door as per the terms of the contract which required a security door and locking system. When the plaintiff's property was subsequently burgled and a suit was filed for claiming damages, the court concluded that the burglary would not have taken place had the defendant installed the door and locking system; thus 'but for' the defendant's breach, the loss would not have been suffered.<sup>69</sup> Acknowledging the 'but for' test, in *Alexander v. Cambridge Credit Corp Ltd*,<sup>70</sup> McHugh JA stated that the applicable tests ought to be decided on the basis of the facts and circumstances and not limited to the 'but for' test, rather, a commonsensical approach is to be adopted to establish a causal connection between the breach of the contract and the loss or injury. This was pointed out, on consideration of the fact that there may be numerous factors causing the loss or injury and, in such cases, the 'but for' test may not be helpful.

In the Indian context, in one of the landmark cases relating to the application of the 'but for' test, the Hon'ble Supreme Court had stated that neglect of duty of the defendant to keep the goods insured resulted in a direct loss of claim from the government (there was an ordinance that the government would compensate for damage to property insured wholly or partially at the time of the explosion against fire under a policy covering fire risk).<sup>71</sup> The Supreme Court concluded as below:

*"But for the appellants' neglect of duty to keep the goods insured according to the agreement, they (the respondents) could have recovered the full value of the goods from govt. So, there was a direct causal connection between the appellants' default and the respondents' loss."*<sup>72</sup>

65. *Indiabulls Properties P. Ltd. v. Treasure World Developers P. Ltd.* (2014) 2 AIR Bom R 766; *Iron & Hardware (India) Co. v. Firm Shamlal & Bros.* AIR 1954 Bom 423.

66. *Indian Oil Corporation v. Lloyds Steel Industries Limited* (2007) 144 DLT 659.

67. *Kanchan Udyog v. United Spirits Limited* (2017) 8 SCC 237; see, *Gray v. Barr* [1971] 2 All ER 949 (CA).

68. (1968) 120 CLR 516.

69. *ibid.*

70. (1987) 9 NSWLR 310.

71. *Pannalal Jankidas v. Mohanlal and Another* AIR 1951 SC 144.

72. *ibid.*

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However, establishment of causation would not conclusively, make the defendant liable where the injury caused is too 'remote' to the breach of contract or not foreseeable or where the contractual terms provide for exclusion of the liability of the defendant under the given circumstances.

Additionally, there may be cases, where the flow of causation is broken by external causes like those by third parties or acts of nature or by acts of the plaintiff himself or otherwise. In cases where there is contributory default or negligence of the plaintiff, he may be disentitled from claiming damages. This would depend on the consideration of the facts and circumstances. This may also be related with the principles of equity that "*He who comes into equity must come with clean hands.*"

## IV. Remoteness of Damages

As stated in the provisions relating to damages under the Contract Act, one of the vital requirements for an award of damages is that the loss or damage "arose in the usual course of things from such breach; or parties knew that such a loss or damage could subsequently arise at the end of the time of entering into the contract."<sup>73</sup> Thus, the defendant would not be liable for damages that are remote to the breach of contract<sup>74</sup> or an accidental mischief, for in such a case the maxim *causa proxima non remota, spectator* may be attracted.<sup>75</sup>

In the landmark case of *Hadley v. Baxendale* ("**Hadley v. Baxendale**"),<sup>76</sup> the principle governing remoteness of damages was laid down. A party injured by a breach of contract can recover only those damages that either should "reasonably be considered...as arising naturally, i.e., according to the usual course of things" from the breach, or might "reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."<sup>77</sup> This forms the basis of the understanding of 'special damages'. In this case, the Court recognized that the failure of the defendant to send the crankshaft for repairs was the only cause for the stoppage of the mill of the plaintiffs, which resulted in loss of profits. However, it added that:

*"...in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants."*<sup>78</sup>

In circumstances where it is evident that the defendant has not assumed such risk as contemplated under the special circumstances under the terms of the contract or that any reasonable man would not have assumed such risk, then mere knowledge of the special circumstances would not make the defendant liable for the corresponding loss or injury.<sup>79</sup>

Reiterating the finding in *Hadley v. Baxendale*, the following principles of remoteness and foreseeability were enunciated in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528:

73. Indian Contract Act 1872, s. 73.

74. See, *Thyssen Krupp Materials Ag v. Steel Authority of India Ltd.* 2017 SCC OnLine Del 7997.

75. *Pravudayal Agarwala v. Ramkumar Agarwala*, AIR 1956 Cal 41.

76. *Hadley v. Baxendale* (1854) 9 EX 341.

77. *ibid*; *The Andhra Pradesh Mineral Development Corporation Ltd. v. Pottem Brothers* (2016) 4 ALD 354.

78. *Hadley v. Baxendale* (1854) 9 EX 341.

79. H. G. Beale (ed.). *Chitty on Contracts* (28th edn, Sweet & Maxwell Ltd 1999) 1296; see also, *Tower Vision India P. Ltd. v. Procall P. Ltd.* (2013) 112 CLA 364 (Del).

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*“In cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. What was at that time reasonably so foreseeable, depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.*

*For this purpose, knowledge ‘possessed’ is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ‘ordinary course of things’ and consequently, what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the ‘first rule’ in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the ‘ordinary course of things,’ of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the ‘second rule’ so as to make additional loss also recoverable.”<sup>80</sup>*

This can be summed by referring to the following observation of the Kerala High Court:

*“The defendant is liable only for natural and proximate consequences of a breach or those consequences which were in the parties’ contemplation at the time of contract... the party guilty of breach of contract is liable only for reasonably foreseeable losses - those that a normally prudent person, standing in his place possessing his information when contracting, would have had reason to foresee as probable consequences of future breach.”<sup>81</sup>*

Courts in India refrain from granting compensation for any remote and indirect loss or damage sustained by reason of breach.<sup>82</sup>

## V. Damages for direct, consequential and incidental losses and damage

On breach of a contract, apart from the compensation payable ‘due to the loss or damage caused’, the defendant may also be liable to compensate for the losses and damage ‘consequent on such loss or damage’. For example, in a contract for construction of a building, where the builder has assured the building and erection to be complete on time so that it can be let out on rent, if the construction is so bad that it falls down and is immediately rebuilt, subsequent to which, it could not be let out for earning house rent, the defendant builder would be liable to compensate for the expenses incurred in rebuilding the house, for rent lost, and for the compensation paid to the potential lessee to whom the house would have been rented out.<sup>83</sup> Consequential losses may be covered under special damages, that is, such losses are reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.<sup>84</sup>

80. *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*, [1949] 2 KB 528; *Pravudayal Agarwala v. Ram Kumar Agarwala* AIR 1956 Cal 41.

81. *State of Kerala v. K. Bhaskaran* AIR 1985 Ker 49 (para 12).

82. *Karsandas H. Thacker v. The Saran Engineering Co. Ltd.*, AIR 1965 SC 1981; *Shwetadri Speciality Papers Pvt. Ltd. v. National Research Development Corp.*, 2019 SCC Online Del 9345.

83. Indian Contract Act 1872, s 73 (illustration 1).

84. *Hadley v. Baxendale* (1854) 9 EX 341.

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Overhead costs resulting in decreased profits come within the ambit of direct losses;<sup>85</sup> while incidental losses refer to the costs incurred after gaining knowledge of the breach of the contract which could be in the form of the transportation costs involved in shifting the goods on default of the purchaser to purchase the goods or costs incurred in looking for an alternative buyer. Damages may also be claimed for future losses which are not in existence at the time of the trial; and such damages shall be quantified separately wherever possible.<sup>86</sup> Similarly, expenses incurred prior to the contract and in contemplation thereof may also be recovered as damages if they were within the reasonable contemplation of the parties at the time of making the contract.<sup>87</sup> A claim for damages may also include expenses incurred in preparation towards performance of the contract by the innocent party, expenses incurred after the breach or even pre-contract expenditure but subject to remoteness.<sup>88</sup>

## VI. Damages for loss of profit

Generally, the defendant would be accountable for the loss of profits directly emerging from the contractual breach,<sup>89</sup> for example, loss of normal profits due to delay in delivery of a relevant material by the defendant. However, loss of profits, which is not a direct consequence of the breach of the contract would not attract damages except where the injured party has intimated the defendant of the same or if such loss of profits is contemplated by the parties.<sup>90</sup> Most importantly, there must be a reasonable expectation of profit.<sup>91</sup>

For example, in cases where unreasonable delays in delivery of machinery lead to loss of profitable contracts which were dependent on such machinery, and was known to the party expected to supply the machinery, damages can be claimed for such loss of profits that could have been made but not for the loss of the contract that could have been procured.<sup>92</sup> Further, a party may also claim for loss of opportunities or loss of chance of gaining something, which results from a contractual breach. This is to compensate the innocent party, who is deprived of the chance to receive a particular benefit or avoid a particular risk, due to a contractual breach. It must be noted that claims for loss of business opportunities and loss of profits are usually not granted simultaneously, since they are considered as principally the same.<sup>93</sup>

Courts have also begun to recognize claims of contractors for loss of profit arising out of reduction in turnover on account of delay in a matter of completion of work. In such cases, the contractor would have to establish that – “had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit.”<sup>94</sup>

Compensation for loss of enjoyment of money can also be claimed by a party who was entitled to the use of a certain sum of money under a contract or award.<sup>95</sup> Judicial precedents also show that damages for loss of enjoyment of money can be granted over and above the basic damages or relief granted upon breach of a contract.

85. *Mcdermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181.

86. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1169.

87. R. Yashod Vardhan and Chitra Narayan (eds.), *Pollock and Mulla The Indian Contract Act and Specific Reliefs Act* (15th edn, LexisNexis 2017) 1133 (citing *Anglia Television v. Reed*, [1972] 1 QB 60. [1971] All ER 690 (CA); criticized in *Ogus*, (1972) 35 MLR 423).

88. *Kanchan Udyog Ltd. v. United Spirits Ltd.* (2017) 8 SCC 237.

89. *National Highways Authority of India v. Hindustan Construction Company* (2016) 155 DRJ 646 (DB).

90. See, *Bharat Coking Coke Ltd. v. L.K. Ahuja* (2004) 5 SCC 109.

91. *A.T. Brij Paul Singh v. State of Gujarat*, (1984) 4 SCC 59; *Dwaraka Das v. State of Madhya Pradesh* AIR 1999 SC 1031.

92. *Indian Contract Act 1872*, s 73 (illustration i); see, *M/s A.T. Brij Paul Singh & Ors. v. State of Gujarat* (1984) 4 SCC 59.

93. *Mahanagar Gas Ltd. Mumbai v. Babulal Uttamchand & Co., Mumbai* (2012) 4 Mh.LJ 344.

94. *Bharat Coking Coke Ltd. v. L.K. Ahuja* (2004) 5 SCC 109.

95. *Sardar Mohar Singh v. Mangilal* (1997) 9 SCC 217.

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In *B.V. Gururaj and etc. v. M.R. Rathindran and Anr.*,<sup>96</sup> the Madras High Court while passing a decree for specific performance directed the defendants to refund the earnest money to the plaintiff. However, the defendants challenged the decree, depriving the plaintiff of the use of the earnest money during the pendency of the proceedings. On appeal, the court, while upholding the decree for specific performance and refund of earnest money on merits, also enhanced the quantum of damages to include damages for loss of enjoyment of the earnest money.<sup>97</sup>

Although damages seek to protect both the expectation and the reliance interests, recovery of both expectation loss, i.e., loss of profit, and reliance loss, i.e., expenses incurred in reliance on the promise, is ordinarily not granted lest it should result in 'double counting'.<sup>98</sup>

An aggrieved party cannot claim reliance losses to put himself in a better position than if the contract had been fully performed, considering such a claim would confer a windfall on the aggrieved party, and probably be in breach of normal principles of causation.<sup>99</sup>

## VII. Damages for non-pecuniary losses

Damages are generally awarded to compensate for pecuniary losses. However, there may be instances where a party claims damages for the non-pecuniary losses suffered. In this context, a reference made be drawn to Chitty on Contracts,<sup>100</sup> as produced below:

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*"Normally, no damages in contract will be awarded for injury to the plaintiffs feelings, or for his mental distress, anguish, annoyance, loss of reputation or social discredit caused by the breach of contract. The exception is limited to contract whose performance is to provide peace of mind or freedom from distress. Damages may also be awarded for nervous shock or an anxiety state (an actual breakdown in health) suffered by the plaintiff, if that was, at the time the contract was made, within the contemplation of the parties as a not unlikely consequence of the breach of contract. ...however... refused to award damages for injured feelings to a wrongfully dismissed employee, and confirmed that damages for anguish and vexation caused by breach of contract cannot be awarded in an ordinary commercial contract."*<sup>101</sup>

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Thus, damages for mental anguish, and suffering may be awarded in cases where the contract itself is for providing enjoyment or pleasure e.g. breach of contract of services to click photos during a wedding.<sup>102</sup> However, damages of such nature may not be awarded in case of breach of ordinary commercial contracts.<sup>103</sup>

96. AIR 2010 Mad 129.

97. *ibid.*

98. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1174; *Kanchan Udyog Ltd. v. United Spirits Ltd.* (2017) 8 SCC 237.

99. *ibid.*

100. A. G. Guest (ed.), *Chitty on Contracts* (27th edn, Sweet & Maxwell Ltd 1994) vol 1, para 26.041.

101. *Ghaziabad Development Authority v. Union of India & Anr.*, AIR 2000 SC 2003.

102. *Diesen v. Sampson* (1971) SLT (Sh Ct) 49.

103. *Ghaziabad Development Authority v. Union of India & Anr* AIR 2000 SC 2003.

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## VIII. Mitigation

It is notable that a party claiming damages for breach of a contract should have performed or was willing to perform the requisite part of the contract. Thus, prior to a claim of damages, the duty to mitigate losses is indispensable.<sup>104</sup> As noted by Lord Aldine, L.C.,

*“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.”<sup>105</sup>*

For example, if a seller defaults in delivering goods and, the purchaser purchases goods from another buyer at an exorbitant price, without trying to look for substitutes at a reasonably close price, such a purchaser would be entitled to damages that are calculated by considering the difference between the agreed price in the original contract and the normal market price.

The extent to which reasonable steps shall be taken by the plaintiff would be judged based on the facts and circumstances of a particular case. Nevertheless, it is advisable for the plaintiff to act reasonably not only in his own interest but also in the interest of the defendant and lower the damages by acting reasonably in the matter. On a failure to do so, he may not be entitled to damages for losses which could have been reasonably avoided.<sup>106</sup>

This duty to take reasonable steps to mitigate the loss is accompanied by the duty to refrain from resorting to unnecessary means that would aggravate the loss.<sup>107</sup> Generally, such duties to mitigate are generally held to be arising upon the breach of a contract.<sup>108</sup> Nevertheless, there may be terms imbibed within the contract to exempt the plaintiff from such a duty to mitigate losses.<sup>109</sup>

An aggrieved party would be entitled to the expenses incurred by him, besides any loss incurred while exercising reasonable steps towards mitigation of losses arising from the breach of the contract by the opposite party, irrespective of whether these steps are successful or not.<sup>110</sup>

## IX. Measure and calculation of damages

Following the ‘expectation interest’<sup>111</sup> approach for granting damages, it is ensured that the value expected by the plaintiff from the contract, is made good to him. Thus, ascertainment of the damages is of utmost importance.

104. *Murlidhar Chiranjilal v. Harishchandra Dwarkadas* AIR 1962 SC 366.

105. *British Westinghouse Electric and Manufacturing Company v. Underground Electric Railways* (1912) A.C. 673, 689; *Murlidhar v. Harish Chandars* AIR 1962 SC 366; *Ishwardas v. Union of India* AIR 1955 SC 468.

106. See *M. Lachia Setty & Sons Ltd v. Coffee Board Bangalore* AIR 1981 SC 162; *Union of India v. B Prahlad & Co.* AIR 1976 Del 236.

107. *Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited & Ors.* (2018) 3 SCC 133.

108. *Burn & Co. Ltd v. Thakur Sahib Shree Lakhdirjee* AIR 1924 Cal 427.

109. *Ralli Bros Ltd. Firm Bhagwan Das Parmeshwari Dass* AIR 1945 Lah 35.

110. *Banco de Portugal v. Walerlow & Sons Ltd.* (1932) AC 452, 506 as cited in Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1260.

111. L.L. Fuller and Willian R. Perdue Jr., ‘The Reliance Interest in Contract Damages’ (1936) 46 Yale Law Journal 52, 53.

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The quantum of damages to be awarded is distinguished from the measure of damages. The former deals with the amount of damages while the latter involves considerations of law as well. With respect to assessment and calculation of damages, the determination of loss or damage resulting from such damage, especially in the context of unliquidated damages, gains immense significance.

The damages awarded in case of breach of contract aim at restoration of the party against whom a breach has been committed to the position which would have existed if the breach would not have taken place.<sup>112</sup> Thus, the damages, so awarded should not exceed the loss suffered or likely to be suffered.<sup>113</sup> Referring to the relation between 'damages' and 'loss', the Supreme Court has observed that:

*"In the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the injured party. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then.... In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation, i.e., how much worse off was his estate owing to the bargain in which he entered into."*<sup>114</sup>

This follows illustration (a) to Section 73 of the Contract Act, which provides that the measure of damages in this case is the sum by which the contract price falls short of the price for which the purchaser (promisee) might have obtained goods of like quality at the time when they ought to be delivered.

Thus, in a case where a party contracts with another for supplying certain goods at price higher than the cost of procurement, and later the receiver refrains from accepting such goods, the supplier is entitled to damages to the extent of the difference between the supply price and the cost of procurement.<sup>115</sup> Similarly, if a contractor abandons the ongoing construction work, the measure of damages is the cost incurred in completing the work.<sup>116</sup>

On a similar note, in case of a failure to deliver goods, the receiver/buyer may procure substitutes if considered reasonable to do so, and can later recover from the seller, any difference in the price at which the buyer has subsequently procured and the original contract price. The attempts made by the buyer to diminish losses shall also be taken into consideration.

In case of delayed delivery, damages can be calculated, proportionately, by considering the losses suffered and the attempts of mitigation by the plaintiff, i.e., the means which existed of remedying the inconvenience caused by non-performance of the contract.<sup>117</sup> The parties can also provide in a contract that in the event of breach, no compensation will be payable except for refund of amounts paid.<sup>118</sup>

With respect to calculation of damages subsequent to breach of contract, there are two important principles laid down by the Supreme Court, as below:

<sup>112</sup>. *R.K. Malik v. Kiran Pal*, (2009) 14 SCC 1.

<sup>113</sup>. *Ghansiram v. Municipal Board* AIR 1956 Bhopal 65.

<sup>114</sup>. *Trojan & Co. v. RMNN Nagappa Chettiar* [1953] SCR 789.

<sup>115</sup>. Indian Contract Act 1872, s 73 (illustration (h)).

<sup>116</sup>. *Dhulipudi Namayya v. Union of India* AIR 1958 AP 533.

<sup>117</sup>. The Indian Contract Act, 1872, s 73, explanation.

<sup>118</sup>. *Syed Israr Masood v. State of Madhya Pradesh* (1981) 4 SCC 289.

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- After proving the breach of contract, the party claiming for damages is to be placed so far as money can do it in as good a situation as if the contract had been performed, and
- The plaintiff is duty-bound to take all reasonable steps to mitigate the loss resulting from the breach, and he would be prevented from claiming any part of the damage which is a consequence of his failure to mitigate such damage or loss.<sup>119</sup>

With respect to measure of damages, there may be corresponding stipulations made within the contractual terms, wherein parties agree to a specific measure of damages for breach.

The ‘net loss’ approach takes into account the gains accrued by the plaintiff seeking damages from the defendant; thus, the gains made by the plaintiff are set off against the losses suffered as a result of the breach of the contract, on due consideration of the mitigation by the plaintiff.<sup>120</sup> Such gains could be savings made by the plaintiff on being discharged from subsequent performance of the contract.

With respect to the formulae to be used to ascertain the quantum of damages - there is nothing specifically mentioned in the Contract Act nor any other relevant law in India, prohibiting the applicability of widely accepted formulae or deem them as contraventions to the existing legal regime.<sup>121</sup> Thus, courts have generally refrained from interfering with the methods/formulae adopted by arbitrators or valuers for computation of quantum of damages.<sup>122</sup>

Regarding the ‘time and place’ for assessment of damages: Generally, the value of the goods at the time and place at which they ought to have been delivered, is considered.<sup>123</sup> And, for determining the market price or value, courts refer to the buying price at which the purchaser can obtain equivalent goods of like quantity at the time and place where the delivery should have been made.<sup>124</sup> In the absence of an appropriate market for determining the market price, assessment can be made by referring to the closest market<sup>125</sup> or the market to which the aggrieved promisee would resort to, on the breach of the contract.<sup>126</sup>

As discussed earlier, courts would refer to the difference between the price paid by a party and the price which it would have received if it had resold them in the market forthwith after the purchase, provided there was a fair market.<sup>127</sup> Thus, the fair market value is usually referred to for ascertaining the quantum of damages.

While awarding damages in arbitrations especially for loss of profits, tribunals may exercise an element of “honest guess work” based on the evidence on record as to the loss of profits suffered.<sup>128</sup> For example, the arbitral tribunal may undertake an “honest guess work” and reduce the quantum claimed as damages by a certain percentage depending on the materials on record.<sup>129</sup>

119. *Murlidhar Chiranjilal v. Harishchandra Dwarkadas*, AIR 1962 SC 366 following *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London* [1912] A.C. 673, 689; *Manju Bagai v. Magpie Retail Ltd.*, (2010) 175 DLT 212.

120. *British Westinghouse Electric and Mfg. Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* (1912) AC 673, 691.

121. *Mcdermott International Inc v Burn Standard Co. Ltd. & Ors* (2006) 11 SCC 181.

122. *ibid.*

123. *Hajee Ismail Sait and Sons v. Wilson And Co.* AIR 1919 Mad 1053 (DB).

124. *ibid.*

125. *Saraya Distillery v. Union of India* AIR 1984 Del 360; *Buago Steel Furniture Pvt. Ltd. v. Union of India* AIR 1967 SC 378.

126. *ibid.*

127. *Trojan & Co. v. RMNN Nagappa Chettiar* [1953] SCR 789.

128. *Mohd Salamatullah v. Government of Andhra Pradesh* AIR 1977 SC 1481; *A.T. Brij Paul Singh v. State of Gujarat* AIR 1984 SC 1703; *Ayub Ali v. Union of India* 86 (2000) DLT 869; *A.K. Sinha v. Mahanagar Telephone Nigam Ltd. and Ors* [OMP No.457/2008; judgment of the Delhi High Court dated 30 October 2009].

129. See, *Bata India Limited v. Sagar Roy* [A.P. No. 5 of 2013; judgment of the Calcutta High Court dated 29 October 2014].

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## X. Interests on damages

Interest, whether it is statutory or contractual, represents the profit the creditor might have made if he had used the money or the loss he suffered because he had not used that money.<sup>130</sup> With respect to interests on damages, it is noteworthy that these damages denote compensation to the plaintiff for being deprived of the damages till the judgment is made in his favour, and not merely an increase in value of damages done to keep up with the inflation.<sup>131</sup>

In the context of contractual breaches, grant of interests on damages greatly depends on the terms of the agreement, customs governing the payments and the relevant statutory provisions.<sup>132</sup> A court may grant interests from the date of filing of the suit till the realization of the amount of damages.<sup>133</sup> Under Section 34 of the Civil Procedure Code, 1908 (“**Civil Procedure Code**”), courts are required to exercise discretion for granting interests on damages.<sup>134</sup> In this regard, the Bombay High Court’s observation is relevant, as produced below:

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*“No distinction is made in the Section [34] between an ascertained sum of money and unliquidated damages... The expression ‘decree for the payment of money’ is very general and to give it due effect, it must be construed as including a claim to unliquidated damages. The Court is not bound to give interest, for, it must be noted, that the Section gives a discretion to give or refuse interest; and whatever the nature of the claim is, whether it is a claim to a fixed sum of money or to unliquidated damages, the Court is bound in every case to exercise a sound discretion.”<sup>135</sup>*

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Interests that are granted as damages would be calculated at the rate of interest that the person to whom it ought to have been paid would have got on it, if it had been paid per the terms of the contract. Section 34 of the Civil Procedure Code provides that rates for such interests shall not exceed 6%; however, where the liability has arisen out of a commercial transaction, the rate of such interest may exceed 6% per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.<sup>136</sup>

## XI. Limitation of liability

Under Indian law, parties to a contract may restrict liability for damages through the inclusion of express provisions in the contract stating that no compensation will be payable in specific cases or that the liability will be limited only to certain kinds of damages. Liability for damages may also be contingent upon certain events. It is a common practice for contracting parties to categorically exclude indirect and consequential damages.<sup>137</sup> Even though such damages are generally not granted in law, parties choose to make an express exclusion to avoid ambiguity. Further, such clauses ought not to be in contravention of the public policy or procured through

130. *Dr. Sham Lal Narula v. Commissioner of Income Tax* AIR 1964 SC 1878; *Secretary, Irrigation Department, Government of Orissa v. G.C. Roy* 1992 (1) SCC 508.

131. *C.I.T. v. Dr. Shyam Lal Narula* AIR 1963 (Punjab) 411.

132. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1251.

133. *Kishan Lal Kalra v. NDMC* AIR 2001 Del 402; *Mahabir Prasad Rungta v. Durga Datta* AIR 1965 SC 1231; *Mahant Tirupathi Devasthanam* AIR 1965 SC 1231.

134. See Interest Act 1978, s 3.

135. *Bhagwant Genuji Girme v. Gangabisan Ramgopal* AIR 1940 Bom 369.

136. See Interest Act 1978, s 3.

137. See, *Mcdermott International Inc v. Burn Standard Co. Ltd. & Ors* (2006) 11 SCC 181.

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coercion, undue influence, misrepresentation or fraud.<sup>138</sup> For instance, clauses which wholly disentitle an aggrieved party to the benefits of Section 55<sup>139</sup> and Section 73 of the Contract Act, i.e., a claim for damages, have been held as against public policy, therefore void.<sup>140</sup> However, mere inclusion of other remedies for breach in the contract does not *ipso facto* exclude the remedy of damages in case of breach.<sup>141</sup>

Further, when limitation of liability or exclusion of liability clauses are included in the contract, courts cannot award damages greater than the liability undertaken therein.<sup>142</sup> However, if the limitation of liability clause is limited in scope, damages for situations beyond the scope of such clauses can be awarded.<sup>143</sup>

Parties are also free to expressly agree to follow a certain methodology or formula of computation of damages, thereby excluding the mode of computation as stated in Section 73 of the Contract Act.<sup>144</sup>

## XII. Quantification of damages by experts and valuers

The question of ascertaining loss and the quantum of damages is often a technical undertaking. In view of the rising complexity of commercial disputes the practice of hiring experts to quantify loss and damages has increased. Courts and tribunals award damages based on claims made and proven by the parties. Therefore, the onus of quantifying loss and damages is upon the party claiming it. As discussed, parties may choose to stipulate liquidated damages in their contract or quantify damages post an event or breach warranting a claim. Further, an assessment of damages is also undertaken by courts and tribunals while awarding damages. This requires knowledge of various industry-related aspects, causes and effects of loss and skills of assessment and valuation. Experts hired by parties to quantify delay, disruption, underperformance, wasted time, profits margins etc. in event of a breach or anticipated breach, are called on record during trial if such evidence is relied upon to establish the claim. In arbitrations, either the party or the arbitrator appoints an expert to prove certain technical issues.<sup>145</sup>

Entitlement to damages is derived on legal grounds but determination of quantum of loss and damages is based on technical grounds. An expert brings forth two crucial characteristics i.e. independence and technical expertise.<sup>146</sup> Various kinds of damages, *inter alia*, loss of profits, future profits, wasted costs, loss of goodwill, defects, delay need to be computed to arrive at a correct estimate of loss and damages. Further, there are other indispensable aspects such as valuation which involves the application of niche methods, admittedly best understood by industry experts. Hence, it is encouraged that parties hire experts to evaluate loss and quantify damages. To enable this,

138. Indian Contract Act 1872, ss 15-18, 23.

139. Indian Contract Act 1872, s 55:

“Effect of failure to perform at fixed time, in contract in which time is essential—

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential—

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon—

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.”

140. *Simplex Concrete Piles (India) Ltd. v. Union of India*, 2010 SCC OnLine Del 821.

141. *Rajeshwar Prasad Sinha v. Chumilal Daruka* AIR 1942 Pat 269.

142. *Bharathi Knitting Co. v. DHL Worldwide Express Courier* (1996) 4 SCC 704.

143. *Simplex Infrastructure Ltd. v. Siemens Ltd.* (2015) 5 Mah LJ 135.

144. *Maharashtra State Electricity Board v. Sterlite Industries (India) Ltd.* AIR 2001 SC 2933.

145. Arbitration and Conciliation Act 1996, s 26.

146. Vidya Rajarao, ‘Perspectives and Best Practices in Quantifying Damages, Business Valuations and Expert Witnesses’ (2016) 5(1) Indian Journal of Arbitration Law 147.

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various institutional and domestic arbitration systems provide for procedures to bring on record testimony of party-appointed or tribunal-appointed expert witnesses, expert reports and even expert evidence.<sup>147</sup>

In *Canada (Director of Investigation and Research) v. Southam Inc.*,<sup>148</sup> the following was enunciated in relation to experts:

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“Experts, in our society are called that precisely because they can arrive at well-formed and rational conclusions. If that is so, they should be able to explain, to a fair minded but less well-informed observer the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses the right to deference when it is not defensible. That said, it seems obvious that [Appellate Courts] manifestly must give great weight to cogent views thus articulated [emphasis added].”

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In India, parties have begun engaging expert valuers and assessors for certain contractual disputes and arrangements. In *G. L. Sultania v. Securities and Exchange Board of India*,<sup>149</sup> the court refused to value the shares by itself, instead sought to rely upon expert testimony for valuation of shares. Further, courts have also been of the view that valuation of shares is a complex problem which can be appropriately left to the consideration of experts in the field of accountancy as many imponderables enter the exercise of valuation of shares.<sup>150</sup> The same is true for quantification of damages due to delays and disruptions in construction contracts, damages due to loss of time, damages due to loss of business opportunities etc. which require assessment of various commercial and contractual aspects best analyzed by industry experts.

In order to bring the evidence of a witness as that of an expert on record, it has to be shown that he has made a special study of the subject or acquired special experience therein.<sup>151</sup> This suggests that the expert must be skilled and have adequate knowledge in the subject.

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147. IBA Rules on the Taking of Evidence in International Arbitration 2010, arts. 2, 5, 6.

148. [1997] 1 S.C.R. 748.

149. AIR 2007 SC 2172.

150. *Miheer H. Mafatlal v. Mafatlal Industries Limited* AIR 1997 SC 506.

151. *State of HP v. Jailal* (1999) 7 SCC 280.

## 4. Applicability of the law of damages

Apart from the Contract Act, damages have also found a special place in various other areas, some of which are discussed below.

### I. Damages under Sale of Goods Act, 1930

The Sale of Goods Act is specifically applicable to sale of moveable property. Sections 55-61 of the Sale of Goods Act, 1930 (“**Sale of Goods Act**”) govern breach of contracts for sale of goods. The principles governing claim for damages under the Sale of Goods Act are primarily based on Section 73 of the Contract Act.<sup>152</sup>

In a contract for sale of goods, a breach is said to have occurred if the buyer wrongfully neglects or refuses to pay for the goods in question.<sup>153</sup> For such non-acceptance and non-payment for the goods, the seller may sue the buyer for damages; similarly, if the seller defaults in delivery of the goods to the buyer, the buyer may sue the seller for damages,<sup>154</sup> or for specific performance.<sup>155</sup> Additionally, there may be a suit for damages in case of a breach of warranty by the seller as laid down under Section 59 of the Sale of Goods Act; and in cases of anticipatory breach where one of the parties to the contract of sale retracts from the contractual obligations before the date of delivery and the other party may choose to continue with the contract till the delivery date or treat it as rescinded following a claim for damages.<sup>156</sup> Under Section 61 of the Act, the buyer or seller may recover interests or special damages or to recover the money paid where the consideration for such payment has failed. This is in accordance with the principle under Section 73 of the Contract Act that the parties were aware of their obligations and that special damages could be claimed ‘which the parties knew when they made the contract to be likely to result from the breach of it’ referring to a special loss which is beyond the normal course of events.

### Measure of damages

The principles governing the measure of damages under the Sale of Goods Act is similar to that of the Contract Act. If the seller/supplier is entitled to re-sell the goods in case of any default by the first purchaser<sup>157</sup>, and there is a subsequent resale of goods by the seller/supplier to another purchaser, the measure of damages would be the difference between the initial contract price and the resale price.<sup>158</sup> Similarly, if resale couldn’t take place, then the measure of damages would be based on the difference between the contract price and the market price on the date of breach.<sup>159</sup>

The Sale of Goods Act recognizes the right of determination of valuation of rights under the terms of the contract wherein the parties may choose to agree upon on the measure of damages in case of breach of contract.<sup>160</sup> Thus, parties may include a pre-determined measure of damages in their contract.

152. *A.K.A.S. Jamal v. Moola Dawood Sons and Co.* AIR 1915 PC 48; *Rakesh Kumar Vats v. Vinod Kumar Chahel* 2018 SCC Online Del 9775.

153. Sale of Goods Act 1930, s 55.

154. *ibid* ss 56, 57.

155. *ibid* s 58.

156. *ibid* s 60.

157. Sale of Goods Act, 1930, s 54.

158. *Bismi Abdullah & Sons, Merchants and Commission Agents v. Regional Manager, Food Corporation of India, Trivandrum* AIR 1987 Ker 56; *V/O ‘Tvazhpromexport’ v. Mukand Limited*, 2005 (3) Arb LR 406 Bom.

159. *ibid*; See also, *P.S.N.S. Ambalavana Chettiar and Co. Ltd. v. Express Newspapers Ltd.* AIR 1968 SC 741; *M/s European Metal Recycling Ltd. v. M/s Blue Engineering Private Ltd.* 2009 SCC Online Del 4174.

160. Sale of Goods Act 1930, s 62.

#### 4. Applicability of the law of damages

For ascertaining the price relevant to fix the value for which damages shall be granted, the price existing in the market at the place of delivery, and alternatively, the market price at the nearest place, or the price prevailing in the controlling market, or the price at the final destination of the goods may be taken into consideration.<sup>161</sup> With respect to the time to be considered for considering the market price required for determining the damages, the date on which the contract was to be performed by delivery and acceptance as per the contractual terms, or at the time of refusal to perform such a contract, would be the relevant date.<sup>162</sup>

## II. Grant of damages under indemnity contracts

Unlike in cases of damages under Section 73 and 74 of the Contract Act, there is no specific bar on quantum of damages under indemnity contracts. For example, claims for unliquidated damages are restricted to only reasonable amounts and foreseeable losses.<sup>163</sup> For liquidated damages, Indian courts have also limited the scope of liquidated damages to losses claimed to a reasonable amount, commensurate with the actual loss caused and only when the damage is unquantifiable.<sup>164</sup> However, in case of damages under indemnity contracts, the indemnified may recover all damages in respect of the indemnity contract from the indemnifier.<sup>165</sup> In the context of damages - an indemnity contract and its scope may be limited (by appropriate drafting), since many of the statutory protections and limitations present in claim for damages are not available in contracts of indemnity.<sup>166</sup>

Section 125 of the Contract Act provides for compensation of the indemnified with the loss caused to him. Contracts can, however, be drafted for the indemnified to not be liable to pay in the first place rather the indemnifier would have to protect the indemnified and pay for the liability that has arisen. In certain cases, Indian courts realized that not all indemnity contracts are governed by the Contract Act and there might be some scope to indulge into principles of common law to give full meaning and effect to the intention of the parties. Such indemnity contracts, also known as 'to hold harmless', were recognized.<sup>167</sup> Hence, the indemnifier might be called upon to protect from the loss rather than compensate for the loss. Going one step further, subject to the terms of the contract, the indemnifier might also be liable to pay compensation before the actual loss has happened but only if a clear and enforceable claim exists against him.<sup>168</sup>

Even before damage is incurred by the indemnity-holder, he may sue for the specific performance of the contract of indemnity, if it is shown that an absolute liability has been incurred by him and that the contract of indemnity

161. *Wertheim v. Chicoutini Pulp Co.* [1911] AC 301 (PC) as cited in Satish J Shah, *Pollock & Mulla The Sale of Goods Act* (8th edn, LexisNexis Butterworths Wadhwa 2011) 395. See also, *Saraya Distillery v. Union of India and Anr.* AIR 1984 Delhi 360.

162. Satish J Shah, *Pollock & Mulla The Sale of Goods Act* (8th edn, LexisNexis Butterworths Wadhwa 2011) 396

163. See, Indian Contract Act 1872, s. 73.

164. *Kailash Nath Associates v. Delhi Development Authority & Anr* (2015) 4 SCC 136.

165. Indian Contract Act 1872, s. 125.

166. *Total Transport Corporation v. Arcadia Petroleum Limited* [1998] 1 Lloyd's Rep. 351.

167. *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, AIR 1942 Bom 302; *Haji Sattar & Sons v. State Trading Corporation Of India Ltd.* 2011 (271) E.L.T. 340 (Mad.).

168. *Khetarpal Amarnath v. Madhukar Pictures* AIR 1956 Bom 106.

#### 4. Applicability of the law of damages

covers the said liability.<sup>169</sup> Indemnity is not necessarily given by repayment after payment but to ensure that the indemnified is not called upon to pay.<sup>170</sup>

These are some of the reasons why such provisions are heavily negotiated to limit the scope of claims in indemnity contracts - the indemnifier tries to limit the scope to the maximum extent possible whereas the indemnified would try to keep the scope as broad as possible. In this regard, the following may be of relevance:

- Nature of acts and extent to which protection is provided
- Cap on value and nature of losses covered
- Defining the third party or contracts for which protection is provided against losses as opposed to all third parties and all acts
- Duty of the indemnified to mitigate, which is otherwise not a pre-requisite under indemnity contracts.

### III. Damages under tort and contract law

Generally speaking, damages are compensatory in nature, under law of contracts as well as tort. However, under law of contracts, damages seek to compensate for the loss (resulting from being deprived of the expected profits from the contractual arrangement) suffered by a party due to breach of contract, while in case of a tort, damages provide for remedies to restore the original position of the party against whom tort was committed to what it was prior to the occurrence of such tort. Thus, unlike in case of contractual breaches, damages are mostly punitive in case of torts. Under contract law, the damages are compensatory in nature and not punitive.<sup>171</sup>

This is in furtherance of the discussion of exemplary and aggravated damages, wherein it can be concluded that in case of a tort, there may be damages for distress, mental agony and such other abstract losses; however, damages are rarely awarded for such losses in case of breach of contract.

With respect to the remoteness of damages, it can be inferred that the interpretation of remoteness is broader under liabilities arising from contractual breaches as compared with tortious liability. This results in limiting the scope of damages under contracts than under tort. As a result of this understanding, under contract law, the plaintiff would have to show that the loss flowed naturally and in the usual course of things from the breach, or

169. *Jet Airways (India) Limited v. Sahara Airlines Limited and Ors* 2011 (113) Bom LR 1725:

“Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri (44 BLR 704 (1942) ... Justice Chagla held that the Indian Contract Act is an amending and consolidating legislation and is not exhaustive of the law of contract to be applied by Courts in India. The Learned Judge held that if the indemnified has incurred a liability which is absolute, he is entitled to invoke the indemnity by calling upon the indemnifier to pay the demand. In a subsequent judgment, Justice P.B. Gajendragadkar (as the Learned Chief Justice of India then was) spoke for a Division Bench of this Court in *Khetarpal vs. Madhukar Pictures*, (AIR 1956 Bom. 106) and while affirming the principle enunciated by Justice Chagla in *Gajanan Moreshwar* that Sections 124 and 125 are not exhaustive of the rights of an indemnity holder held as follows:

On this view, an indemnity-holder is entitled to sue the indemnifier even before he has incurred any damage, provided of course the indemnity-holder is able to satisfy the Court about the existence of a clear enforceable claim against him and is able to show that it is in respect of such a clear enforceable claim that a contract of indemnity has been executed. ... We are, therefore, disposed to take the view that the rights of the indemnity-holder should not and need not be confined to those mentioned in S.125, Contract Act. Even before damage is incurred by the indemnity-holder, it would be open to him to sue for the specific performance of the contract of indemnity, provided of course it is shown that an absolute liability has been incurred by him and that the contract of indemnity covers the said liability.

The law on the subject has similarly been considered in a judgment of the Calcutta High Court in *Osman Jamal & Sons Ltd. vs. Gopal Purshattam*. (1928) ILR 56 Calcutta 262). The Court cited the judgment of Buckley L.J. in re: *Reardon Ex parte The Governors of St. Thomas's Hospital*, (1911) 2 K.B. 705) to the following effect:

Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called to pay.”

170. *ibid.*

171. *Whiten v. Pilot Insurance Company* [2002] 1 RCS 595, 645.

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was within the reasonable contemplation of the parties at the time of making of the contract;<sup>172</sup> whereas the plaintiff in tort must show only that the loss was reasonably foreseeable by the party in breach.<sup>173</sup>

Consequently, parties tend to lay down all possible circumstances that are foreseeable, which has the additional advantage of ensuring that the parties are more responsible towards compliance with contractual terms, with minimization of breach of the contract.

## IV. Grant of damages in arbitral proceedings

The principles governing award of damages in case of civil suits may be extended to arbitral proceedings as well. To claim damages, the party making such claim has to lead evidence and establish loss as per the principles governing damages. Even in case of the liquidated damages, the arbitrator has to be convinced that the claimant has proven the losses or injury against which it is claiming the liquidated damages and such damages would be awarded only to the extent of 'reasonable compensation', which cannot exceed the amount so stated. The onus to prove such loss or damage would not be dispensed with, except where actual damage from the breach of contract cannot be proved or calculated. For instance, a Division Bench of the Bombay High Court upheld the finding of a Single Judge who had set aside the arbitral award on the ground that the award for grant of liquidated damages had been made even though no evidence had been led to prove any loss or damage.<sup>174</sup> Thus, mere breach of contract does not warrant an automatic grant of liquidated damages unless actual loss or injury is proven.

Further, arbitrators may also award interests on damages. In certain cases, Indian courts have also recognised the powers of arbitral tribunals to grant punitive damages towards mental tension, agony, harassment etc.<sup>175</sup>

## V. Damages under consumer law

Amidst the volcanic growth of consumer law in India, damages have found a special place in the numerous decrees that are passed by the relevant fora. The Consumer Protection Act, 2019 provides that the defaulting party may be directed to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party; additionally, punitive damages may also be granted.<sup>176</sup>

Broadly speaking, damages under the Consumer Protection Act are awarded if the negligence of the opposite party and subsequent loss or injury to the consumer are proved.<sup>177</sup> It is not mandatory to lay down the exact loss or damage, considering that the consumer disputes redressal fora should use their 'best judgment' to determine the loss that can reasonably be used for grant of compensation.<sup>178</sup> This duly recognized the difficulty associated with exact assessment of damage under consumer law. For instance, it would not be feasible to arrive at a conclusive finding regarding deficiency of services rendered by a medical professional or an architect.

172. *Hadley v. Baxendale* (1854) 9 EX 341.

173. *Cambridge Water Co. Ltd. v. Eastern Countries Leather plc* [1994] 2 AC 264.

174. *Raheja Universal Pvt. Ltd. v. B.E. Bilimoria & Co. Ltd.* (2016) 3 AIR Bom R 637.

175. *Krishan Gopal v. Parveen Rajput* 2019 (175) DRJ 82; *Tejpal Singh v. Surinder Kumar Dewan OMP* (Comm.) 178/2018 dated 9 August 2018 (Del HC).

176. Consumer Protection Act 2019, s 39(1)(d). See also, *Kishan Rao v. Nikhil Super Specialty Hospital & Another* (2010) 5 S.C.R. 1.

177. *Air India v. Suganda Ravi Mashelkar*, 1 (1993) CPJ 63 (64) (NC); Dr. J.N. Barowalia, *Commentary on the Consumer Protection Act* (5th edn, Universal Publishing Co. 2012) 673; see also, *Economic Transport Organization v. Charan Spinning Mills Ltd* (2010) 4 SCC 114.

178. *Jaidev Prasad Singh v. Auto Tractor Ltd.* 1 (1991) CPJ 34 (36) NC; *Nizam Institute of Medical Sciences vs. Prasanth S. Dhananka and Ors* (2009) 9 SCR 313.

## 4. Applicability of the law of damages

## VI. Damages under contracts of employment

Damages can be claimed by employees for wrongful dismissals resulting in breach of employment contracts.<sup>179</sup> Such damages would extend to loss of earnings along with additional entitlements for the remaining term of the contract.<sup>180</sup> Except for cases where there is a breach of implied terms of trust and confidence, generally, damages are not granted for injured feelings and similar non-pecuniary losses.<sup>181</sup>

Similarly, an employer is also entitled to damages from the employee for the breach of his duties as required under the contractual terms. For example, an employer may recover losses caused by the employee by forfeiting the salary for the notice period.<sup>182</sup>

## VII. Damages under cases relating to intellectual property rights

Among the various reliefs entitled to the plaintiff in case of infringement of an intellectual property (“IP”) right, for the purpose of this section, damages and account of profits shall be discussed. On damages being granted, the party causing the infringement has to compensate the owner of the intellectual property for the damage caused by him, while account for profits aims at giving up on the wrongful profits made by infringing the rights of the owner of the IP. The plaintiff can recover damages for the loss sustained by reason of the infringement, or if, he prefers, payment of the profits resulting from the infringement, but not both.<sup>183</sup>

Under **the Indian Copyright Act, 1957**, damages can be awarded in case of infringement of a copyright; however, the party causing such infringement shall not be liable to pay damages if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work.<sup>184</sup> Additionally, the owner of the copyright is entitled to remedies in respect of the conversion of any infringing copies.<sup>185</sup> In the former case, the measure of damages is the depreciation caused by the infringement to the value of the copyright. In the latter, the normal measure of damages is the market value of the goods converted at the date of conversion;<sup>186</sup> and the copyright owner is entitled to treat all infringing copies of his work as his own.

Damages for infringement and conversion are not mutually exclusive, but cumulative, and in most cases, the plaintiff would be entitled to damages under both these heads.<sup>187</sup> The plaintiff is entitled to all the profits made by the defendant, even though the plaintiff would not have made that much himself from exploiting the copyright.<sup>188</sup> Ideally, the damage, to be recoverable at law, must be one which can be measured in terms of money.

179. *Nishikant Narayan Kale vs. Bajaj Tempo Limited* (2017) 4 ALL MR 335.

180. See, *K.G. Hiranandani v. Bharat Barrell* AIR 1969 Bom 373.

181. *Malik v. Bank of Credit and Commerce Intl SA* [1997] 3 All ER 1 (HL); see, *Gayatri Balaswamy v. IGS Nocasoft Technologies Ltd. and Anr* (2015) 1 Mad LJ 5.

182. *U.P. State Sugar Corporation Ltd. v. Kamal Swaroop Tondon* (2008) 2 SCC 41.

183. *Ferrero Spa v. M/s Ruchi International* (CS(COMM) 76/2018), judgment dated 02 April 2018 (Delhi High Court).

184. Copyright Act 1957, s 55:

“(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right: Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable.”

185. Copyright Act 1957, s 58 (proviso).

186. *Caxton Publishing Co. v. Sutherland Publishing Co.*, (1938) 4 All ER 389 (HL).

187. *ibid.*

188. *Dam v. Kirk La Shelle*, 175 Fed 902 (908); *The Indian Performing Right Society v. Adventure Communication India Private Limited* (2012) ILR 6 Delhi 426.

#### 4. Applicability of the law of damages

Measurement of damages in case of copyright is primarily based on the facts and circumstances, e.g. grant of damages would vary for unpublished copies as compared with published ones. Similarly, in cases of conversion, the point of conversion would be relevant for calculation of damages, for example, mere printing of a few pages of a book would not amount to conversion of the book till the binding was complete and ready for sale.<sup>189</sup>

In case of a claim for accounts for profits made by the defendant, the basic question relates to the quantum copied. However, the plaintiff is not entitled to calculate damages to include his loss as well as profits of the defendant, he can use only one of these for the purpose of calculation of damages.<sup>190</sup> Since account of profits involves a lengthy process of verification of records and books of accounts of the defendant, it is often advised that the plaintiff may choose damages for loss suffered.<sup>191</sup> In any event, if the plaintiff opts for an account for profits, he is entitled to an inspection of the books of accounts of the infringer.<sup>192</sup> Notably, difficulty in assessment or measure of damages is not considered as a ground sufficient for denying grant of damages.<sup>193</sup>

Similarly, Section 135 of the **Trademarks Act, 1990** refers to damages as a relief in any suit for infringement or for passing off of a trademark, wherein under some circumstances, the court can only grant nominal damages e.g. in case of certification or collective marks.<sup>194</sup> Where the party claiming damages, fails to establish substantial damage, courts tend to grant damages only to the extent of nominal damages.<sup>195</sup> The principles governing grant of damages or accounts of profits is the same for cases of infringement of trademark as well as passing off. For measurement of damages, some of the factors to be considered are:

- loss sustained by the plaintiff, resulting from the natural and direct consequences of the infringement,
- drop in trade of the plaintiff pursuant to the infringing activities of the defendant (and not market forces),
- impact on the goodwill, reputation resulting from the infringing activities.

Alternatively, the plaintiff may also seek account of profits made by the infringer irrespective of the loss suffered by him.<sup>196</sup>

Under the **Patents Act 1970**, in a case of infringement, damages or account of profits may be granted except where:

- it is proven that on the date of the infringement, the defendant was unaware and had no reasonable grounds for believing that the patent existed; or

189. *Caxton Publishing Co. v. Sutherland Publishing Co.*, [1939] AC 178.

190. *Srimagal v. Books (India)* AIR 1973 Mad 49; *Pillalamarri Lakshikantam v. Ramakrishna Pictures* AIR 1981 AP 224.

191. P. Narayanan, *Law of Copyright and Industrial Designs* (4th edn (rep), Eastern Law House 2010) 331.

192. *Mishra Bandhu v. Shivaratanlal* AIR 1970 MP 26; *Samsung Electronics Company Limited and Another v. G. Choudhury and Anr.* 2007 (136) DLT 605.

193. *Chaplin v. Hicks* (1911) 2 KB 786.

194. Trademarks Act 1990, s 135:

“(1) The relief which a court may grant in any suit for infringement or for passing off referred to in section 134 includes injunction (subject to such terms, if any, as the court thinks fit) and at the option of the plaintiff, either damages or an account of profits, together with or without any order for the delivery-up of the infringing labels and marks for destruction or erasure...

(3) Notwithstanding anything contained in sub-section (1), the court shall not grant relief by way of damages (other than nominal damages) or on account of profits in any case-

(a) where in a suit for infringement of a trade mark, the infringement complained of is in relation to a certification trade mark or collective mark; or

(b) where in a suit for infringement the defendant satisfies the court-

(i) that at the time he commenced to use the trade mark complained of in the suit he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was a registered user using by way of permitted use; and

(ii) that when he became aware of the existence and nature of the plaintiff's right in the trade mark, he forthwith ceased to use the trade mark in relation to goods or services in respect of which it was registered; or

(c) where in a suit for passing off, the defendant satisfies the court-

(i) that at the time he commenced to use the trade mark complained of in the suit, he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was in use; and

(ii) that when he became aware of the existence and nature of the plaintiff's trade mark he forthwith ceased to use the trade mark complained of.”

195. *Gujarat Ginning v. Swadeshi Mills* AIR 1939 Bom 118; *General Electric v. Pyara Singh* AIR 1974 P&H 14; *Indian Performing Right Society Ltd. vs. Debashis Patnaik and Ors.* 2007 (34) PTC 201 (Del).

196. *Syed Zakirali vs. Syed Zahidali and Ors.* 2018 SCC Online Bom 1465.

#### 4. Applicability of the law of damages

- court may, if it thinks fit, refuse to grant any damages or an account of profits in respect of any infringement that occurs after a failure to pay any renewal fee with the prescribed period and before any extension of that period; or
- an amendment of a specification by way of disclaimer, correction or explanation has been allowed after the publication of the specification, no damages or account of profits shall be granted in any proceeding in respect of the use of the invention before the date of the decision allowing the amendment, unless the court is satisfied that the specification as originally published was framed in good faith and with reasonable skill and knowledge.<sup>197</sup>

On infringement of a patent, generally, damages are calculated on the basis of the pecuniary equivalent of the injury resultant as natural or direct consequences of the infringement.<sup>198</sup> In a certain case, where the patentee manufactured and sold a patented article, the court ascertained the number of articles sold less by the patentee and the profit that he would have made on each article, and determined the product of the two as the 'damages'.<sup>199</sup> And, where the patentee tends to license out the products, the loss of royalties is considered for assessment of damages.<sup>200</sup>

### Judicial approach in granting damages in IP cases

In certain cases relating to intellectual property disputes, Indian courts have allowed grant of punitive damages along with compensatory damages.<sup>201</sup> This was identified in the case of *Time Incorporated v. Lokesh Srivastava* ("Time Incorporated v. Lokesh Srivastava"),<sup>202</sup> where a Single Judge of the Delhi High Court observed that:

“...the time has come when the Courts dealing actions for infringement of trademarks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In *Mathias v. Accor Economy Lodging, Inc.* reported in 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away. This Court feels that this approach is necessitated further for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions since they know that the same are objectionable and unlawful.”

This observation was followed in a series of judgments like *Adobe Systems, Inc and Anr. v. Mr. P. Bhoominathan and Anr.*,<sup>203</sup> *Microsoft Corporation v. Raval*,<sup>204</sup> *Microsoft Corporation v. Rajendra Pawar & Anr.*<sup>205</sup> and *Hero Honda Motors Limited v. Shree Assuramji Scooters*.<sup>206</sup>

197. Patents Act 1970, s. 111.

198. P. Narayanan, *Patent Law* (4th edn (rep), Eastern Law House 2010) 624.

199. *Meters v. Matropolitan Gas Meters* (1911) 28 RPC 157, 165 (CA).

200. P. Narayanan, *Patent Law* (4th edn (rep), Eastern Law House 2010) 625.

201. *Toyota v. Deepak Mangal* 2016 SCC OnLine Del 3809 (affirmed in *Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd.*, (2018) 2 SCC 1.

202. (2005) 30 PTC 3 (Del).

203. (2009) 39 PTC 658 (Del).

204. MIPR 2007 (1) 72.

205. (2008) 36 PTC 697 (Del).

206. (2006) 32 PTC 117 (Del).

#### 4. Applicability of the law of damages

In *Microsoft Corporation v. Deepak Raval*,<sup>207</sup> which involved a copyright infringement action, the court awarded similar damages by referring to referred to *Time Incorporated v. Lokesh Srivastava* and decisions on punitive damages by courts in other countries. While observing that Indian courts have recognized that both compensatory and punitive damages are to be awarded, it also observed that:

“...while awarding punitive damages Courts have taken into consideration the conduct of the defendants which has “willfully calculated to exploit the advantage of an established mark” (expression used by US Courts), which may also be termed as “flagrancy of the defendant’s conduct” (test adopted by Australian Courts). The English Courts have, adopting the same nature of test, have used the test of “dishonest trader”, who deals in products knowing that they are counterfeit or “recklessly indifferent” as to whether or not they are. ... Damages are quantified in three categories viz., actual damages<sup>208</sup>, damages to goodwill and reputation<sup>209</sup> and exemplary damages<sup>210</sup>.... [O]n this basis total damages are worked out to be Rs. 12,823,200. However, in the suit damages claimed are Rs. 500,000. Therefore, I have no option but to limit the claim of the plaintiff to Rs 500,000.”<sup>211</sup>

This judgment includes a detailed comparative study on the position relating to damages in IP cases, across jurisdictions, which is as follows:<sup>212</sup>

Case Title	Damages Awarded (In US Dollar)	Damages in Rupees
<b>United States</b>		
<i>Microsoft Corp. v. G.D. Systems America Inc.</i> , 872 F. Supp.1329	Treble profits plus \$88,780 in Attorney fees and costs.	Treble profits plus INR 39 lakhs in attorney fees and costs
<i>Microsoft corporation v. Grey Computer, et al</i> , Civ. A. No. AW 94-221	Damages of \$300,000 for infringement of copyright plus \$3,889,565.16 as treble profits	Damages of INR 1.31 crore for infringement of copyright plus INR 17.03 crore as treble profits
<b>Australia</b>		
<i>Microsoft Corp. v. TYN Electronics Pty. Ltd.</i> , [2004] FCA 1307	Compensatory damages of \$386,000 plus additional damages of \$300,000	Compensatory damages of INR 1.32 crore plus additional damages of INR 1.03 crore
<i>Microsoft Corporation v. Golstar Pty Limited</i> , [2003] FSR 210	Damages of \$ 295,750	Damages of INR 1 crore
<i>Microsoft Corp. v. Goodview Electronics Pty. Ltd.</i> , [2000] FCA 1852	Damages of \$ 653,818.55 plus additional damages of \$ 500,000	Damages of INR 2.25 crore plus additional damages of INR 1.72 crore
<i>Autodesk Australia Pty Limited v. Cheung</i> , (1990) 17 IPR 69	Compensatory damage of \$ 25,000 plus additional damages of \$ 35,000	Compensatory damage of INR 8.61 lakhs plus additional damages of INR 12 lakhs
<b>United Kingdom</b>		
<i>Microsoft Corp. v. Electro-Wide Limited</i> , [1997] FSR 580	Court suggested an award of additional damages	Court suggested an award of additional damages
<i>Microsoft Corporation v. Plato Technology Limited</i> , [1999] FSR 834	Microsoft entitled to an account of profits to the extent of 5000 Pounds	Microsoft entitled to an account of profits to the extent of INR 4 lakhs
<b>Hong Kong</b>		

207. MIPR 2007 (1) 72.

208. Actual damages aim to place the plaintiff in the same position as if the defendants caused no loss to the plaintiff.

209. These damages are in respect of the injury caused to the goodwill and reputation of the plaintiff due to the infringing activities of the defendant.

210. These damages are awarded if there is a flagrant violation by the defendants of the plaintiff's rights, to set a deterrent example for others.

211. *Microsoft Corporation v. Deepak Raval* MIPR 2007 (1) 72.

212. *ibid.*

## 4. Applicability of the law of damages

<i>Microsoft Corp. Able System Development Ltd.</i> , HCA17892/1998	Compensatory Damages of \$ 32,575,064 and additional damages of \$ 3,257,506	Compensatory Damages of INR 18.29 crore and additional damages of INR 1.82 crore
<b>China</b>		
<i>Autodesk Inc. Beijing Longfa Construction &amp; Decoration Ltd.</i>	Compensation of RMB 1.49 million	Compensation of INR 78 lakhs

However, the judgment of the Single Judge in *Time Incorporated v. Lokesh Srivastava* was overruled in a subsequent judgment of the Division Bench of the Delhi High Court.<sup>213</sup> Referring to the principles laid down in *Rookes v Barnard and Cassell v Broome*, the Division Bench observed as below:

“Both those judgments have received approval by the Supreme Court and are the law of the land. The reasoning of the House of Lords in those decisions is categorical about the circumstances under which punitive damages can be awarded. An added difficulty in holding that every violation of statute can result in punitive damages and proceeding to apply it in cases involving economic or commercial causes, such as intellectual property and not in other such matters, would be that even though statutes might provide penalties, prison sentences and fines (like under the Trademarks Act, the Copyrights Act, Designs Act, etc.) and such provisions invariably cap the amount of fine, sentence or statutory compensation, civil courts can nevertheless proceed unhindered, on the assumption that such causes involve criminal propensity, and award “punitive” damages despite the plaintiffs inability to prove any general damage. Further, the reasoning that “one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes” is plainly wrong, because where the law provides that a crime is committed, it indicates the punishment. No statute authorizes the punishment of anyone for a libel - or infringement of trademark with a huge monetary fine-which goes not to the public exchequer, but to private coffers. Moreover, penalties and offences wherever prescribed require the prosecution to prove them without reasonable doubt. Therefore, to say that civil alternative to an overloaded criminal justice system is in public interest would be in fact to sanction violation of the law. This can also lead to undesirable results such as casual and unprincipled and eventually disproportionate awards. Consequently, this court declares that the reasoning and formulation of law enabling courts to determine punitive damages, based on the ruling in *Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat*, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled. To award punitive damages, the courts should follow the categorization indicated in *Rookes (supra)* and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in *Rookes* and also following the five principles in *Cassel*. The danger of not following this step by step reasoning would be ad hoc judge centric award of damages, without discussion of the extent of harm or injury suffered by the plaintiff, on a mere whim that the defendant’s action is so wrong that it has a “criminal” propensity or the case merely falls in one of the three categories mentioned in *Rookes* (to quote *Cassel* again - such event “does not of itself entitle the jury to award damages purely exemplary in character”).”<sup>214</sup>

However, the Delhi High Court had awarded punitive damages as high as one crore rupees in *Cartier International Ag & Others v. Gaurav Bhatia & Ors.*<sup>215</sup>

<sup>213</sup>. *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*, (2014) 207 DLT 713.

<sup>214</sup>. *ibid.*

<sup>215</sup>. (2016) 65 PTC 168 (Del).

#### 4. Applicability of the law of damages

In a recent case, the Hon'ble Delhi High Court passed a judgment, awarding the highest ever quantum of damages in a copyright and design infringement case. The total cumulative relief awarded to the Plaintiff was about INR 3,15,71,000 (i.e. INR 1,19,96,000 against the importer & INR 1,45,75,000 against the manufacturers of the infringing product).<sup>216</sup> The Court considered the wilful and repeated infringement of the Plaintiffs' rights as vested in their copyright, trade dress and design and profits earned by the defendants while granting compensatory damages.<sup>217</sup> While granting exemplary/aggravated damages, the Court observed that the law is well-settled that the degree of *mala fide* conduct has a direct impact on the quantum and nature of damages that could be awarded in addition to a claim for actual/compensatory damages.<sup>218</sup> In the said case, the Court had arrived at a conclusion that the injury caused to the plaintiffs has been aggravated by malice on part of the defendants.<sup>219</sup> The award of aggravated damages is justified when the court finds the conduct of the defendant to be extremely *mala fide* and wanton.<sup>220</sup>

The Delhi High Court referred to the following three conditions propounded by the House of Lords in *Rookes v. Barnard* which need to be satisfied before an award for aggravated or exemplary damages is granted:

“First, the Plaintiff cannot recover exemplary damages unless he is the victim of the punishable behavior. The anomaly inherent in exemplary damages would become an absurdity if a Plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.

Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defense of liberty, as in the *Wilkes* cases, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling*, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough.

Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the Defendant's conduct is relevant.”<sup>221</sup>

Following, *Rookes v. Barnard* and *Cassell v Broome*, the Delhi High Court also observed that - in assessing the aggravated damages which the defendants should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure; thereafter, the rounded total sum shall have to be calculated by adding an additional amount to the compensatory damages.<sup>222</sup>

216. Koninlijke Philips N.V. & Anr v. Amazestore & Ors., CS(COMM) 737/2016 (Judgment of the Delhi High Court dated 22 April 2019).

217. *ibid.*

218. *ibid.*

219. *ibid.*

220. *Rookes v. Barnard* [1964] AC 1129.

221. Koninlijke Philips N.V. & Anr v. Amazestore & Ors., CS(COMM) 737/2016 (Judgment of the Delhi High Court dated 22 April 2019).

222. *ibid.*

#### 4. Applicability of the law of damages

The Delhi High Court had also laid down an illustrative guidance for grant of damages in cases of infringement.<sup>223</sup>

	Degree of mala fide conduct	Proportionate award
i.	First-time innocent infringer	Injunction
ii.	First-time knowing infringer	Injunction + Partial Costs
iii.	Repeated knowing infringer which causes minor impact to the Plaintiff	Injunction + Costs + Partial damages
iv.	Repeated knowing infringer which causes major impact to the Plaintiff	Injunction + Costs + Compensatory damages.

When it comes to calculating quantum of damages, there are no set parameters or guidelines and courts tend to rely on existing broad principles and precedents. Therefore, the judicial trend may be criticized as lacking any uniformity or continuity.<sup>224</sup> Further, if the distinction in the statutes between U.K. and India are considered, it is seen that the relevant statute in U.K. specifically provides for additional damages, apart from the general damages,<sup>225</sup> while the Indian statute does not. Thus, the award of punitive damages may also been criticized. Nevertheless, nothing prevents the courts from exercising their discretion while granting such damages. Therefore, courts may also refrain from granting such punitive damages, if they are of the view that adequate compensation has been awarded in favour of the plaintiff.<sup>226</sup>

## VIII. Damages under cases relating to Engineering, Procurement and Construction contracts

In India, construction contracts are usually being based on the Engineering, Procurement and Construction model (“EPC”). These are turnkey contracts in which the responsibility of designing, procurement of material and construction gets transferred from the owner to the contractor. The time and cost risks thereby shift to the contractor.

Generally speaking, construction contracts involve high costs and stakes, therefore, delay or breach can have substantial repercussions for the parties. Calculation of damages for underperformance, delay or non-performance are of critical importance in construction disputes. Usually, claims made in construction disputes are with respect to damages due to loss of profits, delay, disruption, loss of opportunity, underperformance or non-performance.<sup>227</sup>

In *McDermott International Inc. v. Burn Standard Co. Ltd.*,<sup>228</sup> the Hon’ble Supreme Court has analyzed various issues regarding computation of damages, and considered certain formulae which are followed to compute damages in construction disputes globally, as produced below:

i. Hudson Formula is stated in the following terms:

“Contract head office overhead and profit percentage × (Contract sum ± Contract period) × Period of delay”

223. *ibid.*

224. Eashan Ghosh, ‘Surveying the Damage: A Study of Damages Payouts by the Delhi High Court in Trademark Infringement’ (2015) 11 *The Indian Journal of Law and Technology* 52.

225. Copyright Act 1956, s 17(3):  
 “Where in an action under this section an infringement of copyright is proved or admitted, and the court, having regard (in addition to all other material considerations) to –  
 (a) the flagrancy of the infringement, and  
 (b) any benefit shown to have accrued to the defendant by reason of the infringement, is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.”

226. *Super Cassettes v. HRCN Cable* 2017 SCC OnLine Del 10943.

227. John A Trenor, *The Guide to damages in International Arbitration*, (2nd ed., Law Business Research Ltd, 2017).

228. (2006) 11 SCC 181.

#### 4. Applicability of the law of damages

In the Hudson Formula, the head office overhead percentage is taken from the contract.<sup>229</sup>

Although the Hudson Formula has received judicial support in many cases,<sup>230</sup> it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

ii. The Emden Formula is stated in the following terms:

“Head office overhead and profit percentage × (Contract sum ÷ Contract period) × Period of delay”

This formula has the advantage of using the contractor’s actual head office overhead and profit percentage rather than those contained in the contract.<sup>231</sup> This formula has been widely applied and has received judicial support.<sup>232</sup>

iii. The Eichleay Formula is stated in the following terms:

*Step 1*

(Contract billings ÷ Total billings for contract period) × Total overhead for contract period = Overhead allocable to the contract

*Step 2*

Allocable overhead ÷ Total days of contract = Daily overhead rate

*Step 3*

Daily contract overhead rate × Number of days of delay = Amount of unabsorbed overhead”

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost.<sup>233</sup> The total head office overhead during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.<sup>234</sup>

Since the computation of damage would depend on circumstances and the method of computation, arbitral tribunals may exercise their discretion in adopting the formula for computation unless provided for in the underlying contract.<sup>235</sup>

229. See, Alfred Arthur Hudson, *Hudson’s Building and Engineering Contracts* (Sweet & Maxwell) as referred to in *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

230. *A.T Brij Paul Singh v. State of Gujarat* AIR 1984 SC 1703.

231. See, Alfred E Emden, S Bickford-Smith, Evelyn Freeth, *Emden’s Building contracts and practice* (8th edn, London: Butterworths, 1980) as referred to in *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

232. *Norwest Holst Construction Ltd. v. Coop. Wholesale Society Ltd.* [1998] EWHC Technology 339; *Beechwood Development Co. (Scotland) Ltd. v. Mitchell* (2001) CILL 1727; *Harvey Shopfitters Ltd. v. Adi Ltd.* (2004) 2 All ER 982.

233. *Appeal of Eichleay Corp.*, ASBCA No. 5183, 60 – 2 BCA ¶ 2688, 1960 WL 538, aff’d on reconsideration, 61 – 1 BCA ¶ 2894, as referred to in *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

234. *ibid.*

235. *McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181.

#### 4. Applicability of the law of damages

Further, in arbitrations relating to construction disputes, it is common practice for parties and arbitrators to rely upon expert valuations, expert reports and expert witnesses.<sup>236</sup> This emanates from the complex nature of such disputes and the granular details that can be best analyzed by industry experts.

It is pertinent to note that liability for breach in construction contracts is determined on a case by case approach. It is attributed to the party who is responsible for the delay or underperformance resulting in breach of the contract.<sup>237</sup> Delay in completion of construction cannot always be attributed to the contractor. It is settled law that when delay is due to acts of the employer, he cannot be exonerated of his responsibility to pay damages by granting an extension of time unless the employer establishes that the contractor has consented to accept the extension of time alone, in satisfaction of his claims for the delay.<sup>238</sup> Further, if the contract specifically limits liability to certain events or excludes claim for some kind of damages, the court or tribunal would not transcend beyond the terms of the contract to award damages beyond the scope of what the parties have agreed to.<sup>239</sup>

To succeed in a claim for damages due to delay in construction, party claiming it needs to establish that 'time was of the essence' in the contract. Time is not always of the essence in a construction contract, unless specifically mentioned or specific features exist thereof.<sup>240</sup>

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236. The Arbitration and Conciliation Act, 1996, s. 26.

237. *Ramnath International Pvt. Ltd. v. Union of India & Ors.* AIR 2007 SC 509.

238. *ibid.*

239. *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises & Anr.* 1999 (9) SCC 283.

240. *Saradamani Kandappan v. S. Rajalakshmi* (2011) 12 SCC 18.

## 5. Law of damages in India, U.K. and Singapore: An Overview

The Indian law of contracts is primarily based on the common law. Thus, a noticeable similarity can be tapped between the two. Similar is the case with Singapore. In the case of Singaporean law of contracts, the extent of similarity is such that the Application of English Law Act of Singapore incorporates 13 English commercial statutes as part of the Statutes of the Republic of Singapore.<sup>241</sup>

However, there are some variations that can be gathered from these regimes.

### I. Liquidated damages and penalty clauses

As per the English law, a liquidated damages provision would amount to a penalty if it is unconscionable, exorbitant or extravagant.<sup>242</sup> If the liquidated damages clause is in the nature of a secondary obligation which imposes a detriment on the party which has committed a breach which is proportionate to the legitimate interest of the aggrieved party in the enforcement of the primary obligation of performance of the contractual obligations – such a clause would be valid and enforceable.<sup>243</sup> If the liquidated damages clause is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to “any legitimate interest of the innocent party” in the enforcement of the primary obligation – such a clause would not be enforceable.<sup>244</sup> While making such a determination, English courts also consider factors such as freedom of parties to agree on contractual terms based on legal advice.<sup>245</sup>

Singapore follows the common law approach when it comes to enforcement of liquidated damages clauses as set out in the landmark English case,<sup>246</sup> *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd*. (“**Dunlop v. New Garage**”)<sup>247</sup> wherein it was held that provision for liquidated damages will be enforceable if, at the time of drafting:

- it was difficult to determine the damages that would accrue if a contemplated breach occurred; and
- the amount of the liquidated damages provision was a reasonable estimate of the actual suffered damage.

In Singapore, liquidated damages clauses which are not “genuine pre-estimates of the likely loss at the time of contracting” would be considered unenforceable penalty clauses.<sup>248</sup> While following the principles in *Dunlop v. New Garage* and distinguishing from *Cavendish Square Holding BV v. Talal El Makdessi and ParkingEye Limited v. Beavis*,<sup>249</sup> the Singapore Court of Appeal was of the view that:

241. Application of English Law Act, 1993 s. 4.

242. *Cavendish Square Holding BV v. Talal El Makdessi and ParkingEye Limited v. Beavis*, [2015] UKSC 67.

243. *Eco World – Ballymore Embassy Gardens Company Limited v. Dobler UK Limited*, [2021] EWHC 2207 (TCC).

244. *Cavendish Square Holding BV v. Talal El Makdessi and ParkingEye Limited v. Beavis*, [2015] UKSC 67.

245. *Eco World – Ballymore Embassy Gardens Company Limited v. Dobler UK Limited*, [2021] EWHC 2207 (TCC).

246. *Max Media FZ LLC v. Nimbus Media Pte Ltd*, [2010] SGHC 30; *Hong Leong Finance Ltd v. Tan Gin Huay* [1999] 2 SLR 153.

247. [1914] UKHL 1.

248. *Denka Advantech Private Limited v. Seraya Energy Pte Ltd*, [2020] SGCA 119.

249. [2015] UKSC 67.

## 5. Law of damages in India, U.K. and Singapore: An Overview

“...a contractual provision which stipulates for an amount of damages to be paid in the event of breach that is more than the pre-estimate of the likely loss must necessarily be (on a normative level) penal, as opposed to compensatory, in nature – notwithstanding that it might have been in the commercial interests of the plaintiff to have included such a provision or clause on a factual level. Looked at another way, the “legitimate interest” (or commercial interest) of the plaintiff, whilst grounded in practical factual circumstances, has no role to play at the level of legal principle – except to the extent that the “legitimate interest” concerned is coterminous with that of compensation.”<sup>250</sup>

An important mandate which is applicable across these regimes, is that the compensation paid by the party causing breach has to be ‘reasonable’. Further, both in Singapore and UK, the penalty rule applies only in the context of a breach of contract.<sup>251</sup>

One of the differences between English law and Indian law, in this regard, is that a stipulation by way of penalty is unenforceable under English law whereas it may be enforceable under Indian law (see section 2.7 above).<sup>252</sup>

## II. The principle of remoteness of damages

As discussed earlier, the *Hadley v. Baxendale* rule governs the principle of remoteness of damages under the common law along with *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*<sup>253</sup>. The same has been statutorily recognized in India under Section 74 of the Contract Act.

On similar lines, the courts in Singapore have been consistently faithful towards the *Hadley v. Baxendale* rule.<sup>254</sup> In a landmark judgment, the Singapore Court of Appeal reaffirmed the applicability of the test for remoteness as embodied in *Hadley v Baxendale* by rejecting the assumption of responsibility test<sup>255</sup> to determine whether damages are too remote in a contractual claim.<sup>256</sup>

## III. Grant of punitive damages

Distinguishing punitive damages from vindicatory damages, the English law approach is that since punishment is not the object of vindicatory damages, they may be granted for loss of chance, non-pecuniary losses etc.<sup>257</sup> Courts in U.K. and India have been adverse in granting punitive damages in case of breach of contract, as compared with tort claims, as has already been discussed above. The general rule in Singapore is that punitive damages cannot be awarded for breach of contract.<sup>258</sup>

250. *Denka Advantech Private Limited v. Seraya Energy Pte Ltd*, [2020] SGCA 119.

251. *Denka Advantech Private Limited v. Seraya Energy Pte Ltd*, [2020] SGCA 119.

252. *M/s 3I Infotech Limited v. Tamil Nadu E-Government Agency*, 2019 SCC Online Mad 33295.

253. [1949] 2 KB 528.

254. *Robertson Quay Investment Pte Ltd v. Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623; *MFM Restaurants Pte Ltd v. Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150; *Judah Value Activist Fund v. Open Faith Investment Limited*, [2021] SGHC (I) 7

255. In *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilles)* [2009] 1 AC 61, remoteness was regarded as an issue of construction of contract to determine whether a given type of loss is one which a party has assumed contractual responsibility for.

256. *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] SGCA 15.

257. *The Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15; [2006] 1 A.C. 328 (para 19)

258. *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26.

## 6. Conclusion

Damages on breach of contracts are considered to be advantageous than other remedies that may be available to parties suffering losses from breach of contracts. Liquidated damages play a significant role in cases where it is difficult to ascertain the quantum of damages since that is pre-determined by inserting a clause on 'liquidated damages' in the contract itself. Such clauses for liquidated damages aim at prevention of litigation to the extent possible. This would also help in reducing the burden to prove actual damage suffered pursuant to a breach, in order to claim damages.

However, in certain cases, damages may not suffice in respect of the losses or damage suffered by a party. This may lead to a situation which warrants a specific performance by the other party instead of damages to enable restoration of the position of the party prior to such contractual breach. Such situations may arise if the subject matter of the contract is of rare quality or indispensable for the aggrieved party. Thus, courts may opt to award damages in addition to or in substitution of specific performance, depending on what is warranted by a given situation.<sup>259</sup> Moreover, stipulation for liquidated damages would not be a bar to specific performance.<sup>260</sup> Similarly, plaintiffs may claim for damages in addition to or in substitution of injunctions sought from a court.<sup>261</sup>

Conceptually and practically, damages have been effective in enforcement of contractual obligations. This may be supported with the progressive interpretations by the courts with respect to liquidated damages. Courts have also tried to ensure that there is no windfall for the parties in the presence of a clause for liquidated damages by arriving at a reasonable quantum of damages

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259. Specific Relief Act 1963, s. 21.

260. Specific Relief Act 1963, s 23; P. D'Souza v. Shondriilo Naidu AIR 2004 SC 4472

261. Specific Relief Act 1963, s. 40

## 7. Table of Cases

Sl. No.	Cases	Relevant Extracts	Para No. s
<b>Proof of loss while claiming damages</b>			
1.	<i>Maula Bux v. Union of India</i> (1969) 2 SCC 554	<p>“...It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove loss or damage suffered by him before he can claim a decree, and the court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression ‘whether or not actual damage or loss is proved to have been caused there by’ is intended to cover different classes of contracts which come before the courts. In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established Rules. Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.”</p>	6
2.	<i>Kailash Nath v. Delhi Development Authority</i> (2015) 4 SCC 136	<p>“Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.”</p> <p>“Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.”</p> <p>“Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.”</p> <p>“The expression ‘whether or not actual damage or loss is proved to have been caused thereby’ means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.”</p>	43
3.	<i>Fateh Chand v. Balkishan Dass</i> , AIR 1963 SC 1405	<p>“Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of ‘actual loss or damage’; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.”</p>	10

## 7. Table of Cases

4.	<i>Construction &amp; Design Services v. DDA</i> (2015) 14 SCC 263	<i>"Once it is held that even in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when the highest limit is stipulated instead of a fixed sum, in the absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on the party committing breach, as already observed."</i>	15
<b>Liquidated Damages and penalty clauses</b>			
5.	<i>Cavendish Square Holding BV v. Talal El Makdessi and ParkingEye Limited v. Beavis</i> , [2015] UKSC 67	<i>"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations."</i>	32
6.	<i>Dunlop Pneumatic Tyre Co Ltd v. New Garage &amp; Motor Co Ltd</i> [1914] UKHL 1	For an understanding of what amounts to 'penalty', the court held that: <i>"It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach... It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid... There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'. On the other hand: It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility ..."</i>	4
7.	<i>Denka Advantech Private Limited v. Seraya Energy Pte Ltd</i> , [2020] SGCA 119.	<i>"...a contractual provision which stipulates for an amount of damages to be paid in the event of breach that is more than the pre-estimate of the likely loss must necessarily be (on a normative level) penal, as opposed to compensatory, in nature – notwithstanding that it might have been in the commercial interests of the plaintiff to have included such a provision or clause on a factual level. Looked at another way, the "legitimate interest" (or commercial interest) of the plaintiff, whilst grounded in practical factual circumstances, has no role to play at the level of legal principle – except to the extent that the "legitimate interest" concerned is coterminous with that of compensation."</i>	154, 185
8.	<i>M/s 3I Infotech Limited v. Tamil Nadu E-Government Agency</i> , 2019 SCC Online Mad 33295.	<i>"The primary test for identifying and distinguishing between liquidated damages and penalty clauses is whether, when tested as of contract formation, the stipulated sum bears a reasonable correlation to anticipated loss; if so, it would be construed as a liquidated damages clause and, if not, as a penalty clause. A stipulated sum that bears such reasonable correlation to anticipated loss is considered as a genuine pre-estimate of loss."</i>  <i>"Given the fact that a party claiming liquidated damages cannot claim more than the stipulated sum, once such party establishes that the stipulated compensation is a genuine pre-estimate, a high standard of proof would not be insisted upon to prove difficulty or impossibility of proving loss. In other words, the court would bear in mind that parties negotiated and concluded the contract on the basis of risk allocation, whereby the party claiming liquidated damages forecloses the possibility of claiming an amount higher than the sum stipulated, by way of proving higher actual loss, so as to enjoy the benefit of the relative ease and certainty of establishing a claim for liquidated damages as opposed to a claim for unliquidated damages.</i>  <i>On the contrary, if it is concluded that the stipulation is by way of penalty, the person claiming such penalty would be required to prove loss accurately, including the quantum of loss, and claim reasonable compensation on that basis."</i>	23

## 7. Table of Cases

9.	<i>Iron &amp; Hardware (India) Co. v. Firm Shamlal &amp; Bros.</i> AIR 1954 Bom 423	<p>“... it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breaches has any amount due to him from the other party.”</p> <p>“...the only right which he has is the right to go to a Court of law and recover damages.”</p> <p>“...no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.”</p>	Page 745
10.	<i>Bharat Sanchar Nigam Ltd. v. Motorola India Ltd.</i> 2009 (2) SCC 337	“...the question of holding a person liable for Liquidated Damages and the question of quantifying the amount to be paid by way of Liquidated Damages are entirely different. Fixing of liability is primary, while the quantification, which is provided for ... is secondary to it.”	24
11.	<i>Sir Chuni Lal Mehta &amp; Sons v. Century Spinning and Manufacturing Co.</i> AIR 1962 SC 1314	<p>“Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.”</p> <p>“By providing for compensation in express terms the right to claim damages under the general law is necessarily excluded...”</p>	11
<b>Remoteness of damages</b>			
12.	<i>Hadley v. Baxendale</i> (1854) 9 EX 341	“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”	
13.	<i>Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd</i> [1949] 2 KB 528	“In cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. What was at that time reasonably so foreseeable, depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. For this purpose, knowledge ‘possessed’ is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ‘ordinary course of things’ and consequently, what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the ‘first rule’ in <i>Hadley v. Baxendale</i> . But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the ‘ordinary course of things,’ of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the ‘second rule’ so as to make additional loss also recoverable.”	32-34
14.	<i>State of Kerala v. K. Bhaskaran</i> AIR 1985 Ker 49	“The defendant is liable only for natural and proximate consequences of a breach or those consequences which were in the parties’ contemplation at the time of contract... the party guilty of breach of contract is liable only for reasonably foreseeable losses - those that a normally prudent person, standing in his place possessing his information when contracting, would have had reason to foresee as probable consequences of future breach.”	12
15.	<i>Pannalal Jankidas v. Mohanlal and Another</i> AIR 1951 SC 144	<p>“But for the appellants’ neglect of duty to keep the goods insured according to the agreement, they (the respondents) could have recovered the full value of the goods from govt. So there was a direct causal connection between the appellants’ default and the respondents’ loss.”</p> <p>(‘But for’ test)</p>	30
16.	<i>Titanium Tantalum Products Ltd. v Shriram Alkali and Chemicals</i> 2006 (2) ArBLR 366 Delhi	“Proximate and natural consequences are those that flow directly or closely from the breach in the usual and normal course of events - those which a ‘reasonable man’ or a person of ordinary prudence would when the bargain is made foresee, as expectable results of later breach. The phrase ‘in the parties’ contemplation’ normally means in the reasonable contemplation of the defendant.”	12

## 7. Table of Cases

Measure and Calculation of Damages			
17.	<i>Hajee Ismail Sait and Sons v. Wilson and Co.</i> AIR 1919 Mad 1053 (DB)	<p>“...natural and fair measure of damages is the value of the goods at the time and place at which they ought to have been delivered to the owner, which I read as meaning the value of the goods to the owner of such goods at the time and place they ought to have been delivered.”</p> <p>“...it is not the nearest market that always governs but the place where, having regard to all the facts of a particular case, the plaintiff would without any material inconvenience to himself procure the goods in a manner that would throw the least amount of hardship on the other party.”</p>	Pages- 713, 718, 719
18.	<i>Mcdermott International Inc v. Burn Standard Co. Ltd. &amp; Ors</i> (2006) 11 SCC 181	<p>“We do not intend to delve deep into the matter as it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Arbitrator.”</p> <p>“...the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.”</p>	106, 110
19.	<i>Murlidhar Chiranjilal v. Harish Chandra Dwarkadas</i> (1962) 1 SCR 653 following <i>British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London</i> [1912] A.C. 673. 689	<p>“The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable step” to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.”</p>	9
20.	<i>M. Lachia Setty &amp; Sons Ltd v. Coffee Board Bangalore</i> AIR 1981 SC 162	<p>“At the outset it must be observed that the principle of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the Court while awarding damages”</p>	14

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