I R A N

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PART ONE

FORMATION OF CONTRACT

Contracts, agreements and non-contractual obligations constitute the title of the second part of the first volume of the Iranian Civil Code (I.C.C.).[1] This part is divided into three sections as follows :

I. Contracts and contractual obligations in general (articles 183-300 inclusive).

II. Obligations which come into existence without an agreement (articles 301-377 inclusive).

III. Various nominate contracts (articles 338-824 inclusive).

According to article 183, "Contract consists in the undertaking of something by one or several persons towards another or several others, which is accepted by them".

In articles 184-189 inclusive, the Iranian law-giver divides contracts into 5 categories as follows :

Irrevocable (*lazim*), revocable (*jaiz*), cancellable (*khiyari*), definitive (*munajjaz*) and conditional (*muallaq*).

One of the points peculiar to Iranian law, vis-a-vis western laws is constituted by the first two divisions. An irrevocable contract is that which neither of the contracting parties has the right to annul, except in specified cases, as, for example, sale and lease. A revocable contract can be cancelled by each of the parties at his discretion (article 186), such as deposit, mandate, etc. According to article 187 : "A contract may be binding on one party but revocable by the other".

Article 188 defines a cancellable contract in the following terms : "A cancellable contract is a contract in which either or one of the parties or a third party has the option to cancel the contract".

1. The Iranian Civil Code consists of 3 volumes and contains 1335 articles. The first volume is dated 1928 and deals with goods and obligations. The second volume governs persons and is dated 1934. The third volume related to the methods of proof and was promulgated in 1935.

The last two categories are defined by article 189 of the I.C.C.: "An unconditional contract is a one which is not, in the intention of the makers, contingent upon any outside matter. Otherwise it is a conditional contract".

All the same, it must be noted that the binding effect of the contract is a principle recognised in Iranian law. Every agreement is deemed binding except an arrangement contrary to the law. Moreover, the concurrence of the will (*concensus ad idem*) of the contracting parties may make binding that which is considered not binding by the law-giver.

Most of the legal arrangements concerning contracts are interpretative or supplementary: they are applied only if the contracting parties have not otherwise agreed.

There are four prerequisites for the validity of a contract: namely

(1) The will of the parties and their consent,

(2) The capacity of the contracting parties,

(3) A specified object,

(4) The lawfulness of the cause.

According to article 10 of the I.C.C., "Private contracts, not expressly contrary to the law, will be binding on the parties who have concluded them".

Furthermore, article 219, following the same idea, provides that: "Contracts made according to law are binding on the parties or their substitutes, unless they have been cancelled by mutual agreement or for some legal reason".

In the field of contractual obligations, the Iranian Law-giver has fused together the rules of Islamic law and the Western law. This is a field where one finds many similarities between Iranian law and continental, particularly French law.

One particularity of the Iranian law which has its origin in Islamic sources consists in recognising, in theory, according to arts. 247 to 263 inclusive, the possibility of contracting out the property of another person. Of course, such a contract cannot produce any effect before it is ratified by the owner or his successor or assign.[2] Ratification, however, is retrospec-

2. Article 247.

tive to the date of the contract and, thus, the contract will be considered valid since its conclusion.

Usage and custom have a very important role in contracts and fill up the lacunae which the parties have not specifically provided for.[3]

Contracts concluded by the Government are subject to certain special rules, which fall outside the purview of the present article. (In principle, they are controllable by the Court of Accounts).

Under the Commercial Code, certain contracts, such as brokerage, commissioning, transport and insurance, are governed by special provisions. Further, usages and customs play a considerable role in them.

Contracts concerning the constitution of certain companies, composition and settlement, donation and real estate shall have to be notarized, otherwise they will not be recognized either by the Courts or by governmental agencies.[4] All the same, a contract of lease of immovable property, if it falls within the jurisdiction of the Law of Landlord and Tenant, does not have to be notarized.

Volume III of the I.C.C., containing 79 articles, is devoted to the means of proof (article 1254 to 1335 inclusive).

The five forms of proof recognised by the I.C.C. are enumerated in article 1257:

> "(1) Admission; (2) Written documents; (3) Testimony; (4) Presumptions and (5) Oath".

Three of these five forms, namely, testimony, presumptions and oath. have not, in principle, a great part in proving the existence of a contract.[5]

According to article 1306: "Except in cases where the Law has made exceptions, no contracts, obligations or transactions made for an object worth more than 500 rials in capital or in value, can be proved by verbal or written testimony only; but this rule does not prevent the Courts from examining the statement made by witnesses, for further information and discovery of the truth".

3. Articles 220, 224 and 225.

4. Articles 46 and 47 of the Registration Law.

5. Articles 1306, 1324 and 1325 of the I.C.C.

According to article 1324 "The circumstantial evidence left to the appreciation of the judge is the conditions and circumstances regarding the issue, and can be accepted only in cases where the claim is provable by the evidence of witnesses, or where it completes other evidence".

In the terms of article 1325 "In respect of claims which can be proved by the evidence of witnesses, the claimant may subject the decision to be issued respecting his claim denied by the defendant, to the latter's taking an oath".

PART TWO

PERFORMANCE OF THE CONTRACT

Contract is made to be performed: performance is the most normal and the simplest form of its discharge. There are six ways for discharging a contract as provided for in articles 264 to 300 inclusive of the I.C.C.

Article 264 enumerates the six ways as follows:

"Obligations shall be discharged by:

(1) Performance:

(2) Revocation by mutual consent;

(3) Release:

(4) Novation:

(5) Set off;

(6) One's becoming owner of what is owed.

Contracting parties determine their obligations through the agreement they make, as well as the date, and the manner and the place of performance. But, normally, parties cannot provide for everything in their agreement; law and usage come to their aid and supply their shortcomings.[6]

A contract is discharged when the promisor performs not only what he has formally promised according to the terms of the contract, but also all that which normally, according to usage or the law, pertains to this promise.[7]

According to article 220: "Contracts will bind the parties not only to perform what is explicitly stated in them; but also the parties are bound by whatever consequences which may ensue from the contract according to usage and custom or by law".

According to article 225: "If certain points that are customarily understood in a contract by customary law or practice are not specified therein they are nevertheless to be considered as mentioned in the contract".

6. Articles 265 to 282.
7. Articles 220 and 225.

PART THREE

NON-PERFORMANCE OF THE CONTRACT

If one of the contracting parties abstains from fulfilling the promise he has made, the other party will have the right to refer the case to the public authorities for obtaining a performance-order. This order will be delivered by the Bureau of Execution of Registration for notarized documents, or through a judgement rendered by the tribunal for other contracts.

In fact, as aforesaid, execution is very simple if the contract has for its object a sum of money or generic goods provided, of course, that the promisor is solvent.

When the object of the contract is a specific and existing property, the competent authority (Tribunal or the Bureau of Execution of Registration) shall order that it will be delivered to the promisee.[8]

If the object of the obligation is not a specific property or if it is a sum of money, the property of the promisor may be attached.

In all cases where the promisee could not show a property of the promisor to be attached and the promisor himself did not show any, then, according to the laws which were in force up to 13 Nov. 1973, he could be imprisoned unless he proved in Court his insolvency. On that date, a law was passed which prevents imprisonment of debtors and promisors who have defaulted in payment or discharged of their obligation.

As regards the performance of an act, there are two different hypotheses :

(a) The act which the promisor must perform is capable of being performed by another person (this is the case of generic goods which can be evaluated in money); or by the judicial authorities (e.g., for the signature of notarized documents). In either case, there is no problem; in the first case the act will be performed at the expense of the promisor by another person, and, in the other, the competent authority will sign the necessary documents.

(b) The act can be performed only by the promisor, this hypothesis comprises both actions and omissions, i.e., an obligation to do or not to do. Briefly, if the performance of the contract depends on the personal will of

8. Articles 621 and 622 of the Code of Civil Procedure.

the promisor it is by financial pressure that the law tries to overcome the resistance of such a recalcitrant person.[9] This is the theory of compulsion.

Article 729 provides : "In cases where the object of the obligation is an act which cannot be performed except by the promisor himself, the Court may, at the request of the promisee, provide in the judgement relating to the principal claim or after awarding the judgement a period and an amount so that, if the promisor fails within the period mentioned to comply with judgement as finally rendered, he should pay to the promisee, the mentioned amount for every day of delay".

According to article 730 of the C.C.P., "The court may, either before or after the execution of a judgement, revise the amount which it had already determined and instead determine another amount for the delay in the execution of the judgement for the time elapsed or to come".

The I.C.C. has provided, under article 239, for the case where, by the resistance of a recalcitrant promisor, the performance is in effect made impossible and gives, to the other party, the right to annul the contract. According to article 239 of the I.C.C., "Should it not be possible to compel the promisor to perform the act undertaken and if the act undertaken is not of the kind to be performed on his behalf by another person, the promisee is entitled to rescind the contract" ?

If the delayed performance of a promise is devoid of all use to the promisee, the contract terminates by the simple fact of delay in performance. In other cases, the contract continues to be valid, and the promisee would be entitled, as the case may be, to damages arising out of the delay.

It should be noted that the sanction against non-performance must primarily be sought in the contract itself. The contracting parties are well entitled, according to the theory of supremacy of will, which reigns in principle in the field of contracts,[10] to determine the consequences of their agreement. Thus, they can provide precisely the sanction against non-performance in a penalty clause which must be respected by the judge[11] if the object of the obligation is not a sum of money; otherwise, i.e., when money is involved, the ceiling of damages is fixed by the law at 12% per annum. The only restriction on the penalty clause, it appears, is that it must be reasonable.[12]

Does compulsory execution exist along with a penalty clause? Yes, if the clause concerns only the damage resulting from the delay in performance;

9. Article 729.
10. Article 10.
11. Article 230.
12. Article 215.

no, if the clause envisages non-performance and takes the place of performance.

In the first case, the penalty clause, as damages, does not assure in principle the liberty to a contracting party to free himself from the contract by the payment of a penalty or damages.

On the other hand, an exonerating clause does not close to the injured party all the avenues of recourse. In fact, the exonerating clause does not cover either gross negligence or intentional harmful act, which not being within the field of contract to be covered by the clause, falls, on general principles. in the field of penal law or tort.[13]

In what conditions can damages be claimed ?

Four conditions are requisite for claiming damages, namely :

(1) That there was damage. Damage is the essential element, *sine qua non*, for giving a right of reparation.[14]

Damage may consist of a loss as well as a gain missed.[15] It can be material or moral.[16]

Damage must really exist; therefore, possible damages cannot be claimed.

(2) That there is a bond of causality between the non-performance and the damage.

The damage (or gain missed) will be taken into consideration only if it is the direct and definite effect of the non-performance, and this eliminates possible gains and indirect losses.

According to article 728 C.P.C., "The tribunal orders reparation of damage only if the plaintiff proves to have suffered damage resulting directly from the non-performance or the delayed performance of the obligation, or the non-delivery of the thing adjudged. Damage can result from the loss of property, or the loss of a profit which would have resulted from the performance of the obligation.

(3) That the reparation of the damage should have been provided for by the contracting parties according to custom or law. This is almost always the case.

13. Articles 328 to 333 of the I.C.C. and article 1 of the Law on Civil Responsibility.
14. Article 728 of the C.P.C.
15. *Ibid.*
16. Article 1 of the Law on Civil Responsibility.

According to Article 221 of Civil Code, "If a person undertakes to perform an act or undertakes to refrain from doing an act, he will be liable in case of default for the losses of the other party, provided the compensation for such losses has been explicitly stated (in the contract) or is, according to custom, as (clearly pertaining to the contract as if it had been) explicitly stated or (such liability) is imposed by the law".

Certain authors consider this article superfluous, since custom considers, almost always, the defaulting party responsible for the damage.

(4) That the time of performance should have passed.

If the time is indicated in the contract, and the promisor does not fulfil his obligation, the promisee would have the right to damages without prior notification.[17]

If no time is indicated in the contract the performance must be effected without delay, except in cases where reasonable delay is admitted by custom and noting the nature of the obligation, for example, the obligation to construct a building.

If the choice of the date of performance is put at the disposal of the promisee by the contract, he would have the right to damages if he proves that he had claimed the performance of the contract. In this case, it is necessary to distinguish between two different situations:

(a) If the performance of the contract after the time specified loses its utility to the promisee then the delay extinguishes the contract and the promisor is obliged to compensate the damage.

(b) If the discharge of the obligation, even the time specified, is useful to the promisee, the promisor in such a case would be held to have the contract performed and, in addition, would have to compensate the loss caused by the delay.

Even when these four conditions obtain, the debtor has yet a chance to escape from making reparation for damages. According to article 227 of the Civil Code, "The party who defaults in performing his obligation, will be adjudicated to make compensation only when he cannot prove that the non-performance was due to some extraneous cause which cannot be attributed to him". Therefore, the promisee who, by his fault, has prevented the promisor from performing his obligation may not claim damages.

The case of *force majeur* is specifically provided for by article 229 of the Civil Code in the following terms: "If a promisor is unable to perform

17. Article 226 of the I.C.C.

his obligation because of (the occurrence of) some event which is beyond his power to overcome, he will not be adjudicated to pay compensation".

The Amount of Damages

Damages are properly determined by the parties in their contract, by law or by the court.

A. — The contracting parties can in their contract provide for a special method or designate a person, natural or corporate, for determining the amount of damages resulting from non-performance, mal-performance, as the case may be, of the obligation.

They can also determine, *a fortiori*, by a penalty clause, the amount of different damages resulting from the non-performance of the contract. In these cases, their agreement, in principle, must be respected.[18]

B. — The law determines, in certain cases, the amount of damages. The example most usually given is the legally enforceable rate of interest for debts in money, which in the text of most relevant provisions of the law is, for historical reasons, described as "damage for delay in payment".

To compensate the actual loss suffered and the loss of profit, by the non-performance or late performance of an obligation of which the object is the payment of a sum of money, the law has fixed a rate of 12% per annum.[19] It is a rate which the contracting parties who have not provided for the amount of damages are obliged to accept. It is, at the same time, a ceiling over and above which any agreement between the parties, including a penalty clause, will not be enforceable. Of course, nothing prevents the parties from agreeing on a lesser rate.

The creditor of a sum of money has no need to prove any damage, caused by the delay in payment, in order to be able to claim damages.[20] The damages for such delay will be counted from the date provided for in the contract. If the contract has not provided for such a date, the debtor owes the damages from the moment he is called upon by the creditor to pay. If not so called upon, the damages will be calculated from the day the action is brought before the court.[21]

18. Articles 10 and 219 of the I.C.C.
19. Article 719 of the Code of Civil Procedure.
20. Article 725.
21. Article 721.

In non-commercial affairs where the debtor dies, and in cases where the judgement is based on evidence or presumptions, damages will be counted only from the date of the first judgement recorded in favour of the plaintiff.[22]

For documents legally capable of direct execution, the damages for delay in payment will be counted from the date of notification of the writ of execution on the debtor; for promisory notes and bills of exchange, from the date of protest.[23]

It must be noted that compound interest is categorically prohibited by article 713 of the C.C.P. in the following terms: "damages on damages are not recoverable".

C. — The judge, when it is not a question of a debt in money and when the parties have not provided anything in their contract, intervenes, as in extra-contractual cases for determining the amount of damages.

According to article 727 of the C.C.P , "In Law suits of which the object is not a sum of money ... and also in cases where the claim is for ... damages caused by non-performance or late performance, the court shall, after investigation, determine the amount of damages in its judgement".

The same concept is employed in article 3 of the Law on Civil Responsibility of 1960 which provides: "The court will determine the amount of damages and the manner of compensation, taking into account all circumstances...".

Thus, by judicial investigation (enquiries, local inspections, estimation, the reports of experts, etc.) the court will fix the amount of damages, always taking into account the circumstances.

Article 4 of the law on Civil Responsibility enumerates the cases where the court can mitigate the amount of damages. They are as follows:

(1) If the author of the damage, after having caused it, has effectively helped the injured person.

(2) If the damage is caused by negligence, usually excusable, and if its reparation entails the poverty of the author of damage.

(3) If the injured person has contributed on one way or another, the happening of the injury or if he has aggravated the damage or the situation of the author of the damage.

22. Article 723.
23. Article 304 of the Commercial Code.

Certain authorities consider article 4 of the Law on Civil Responsibility an exception to the general rule, which is applied only in the cases specifically provided for, that is to say, in the cases concerning the extra-contractual obligations with which the law on Civil Responsibility deals.

For others, it is a matter of principle inspired by equitable considerations of a general nature. For these this element of equity, in the performance of obligation, is already manifested in article 227 of the Civil Code. According to the article: "The promisor cannot force the promisee to accept part-performance of the obligation. But the judge can, taking into consideration the position of the promisor, provide an equitable delay for the date of performance or for payment on instalments". Providing a delay for performance or permitting payment in instalments, thereby lengthening the contractual period, is to reduce, economically speaking, the quantum of obligation.

In the Civil Code, as in the Code of Civil Procedure (C.C.P.), the Iranian law-giver has spoken only of material damage resulting from the non-performance or the delayed performance of an obligation. But the Law on Civil Responsibility expressly provides in article 1 for moral damage. Article 10 of this law provides, for moral damages, a kind of moral compensation, in addition to material reparation, consisting of an obligation to ask pardon, publication of the judgement in newspapers, etc.

Unfortunately, we are not throwing much legal light on the following problems which must be resolved on general principles of contracts in Iranian law, which attaches great importance to the will of the contracting parties.

(1) The promisor is fully responsible for damages resulting from the non-performance without any intervention being required by the promisee. Nevertheless, his inaction is liable to be considered, under the heading of delict or quasi-delict, as causing an injury against the interest of the other, which as such will entail his responsibility.[24]

(2) The connection between a sub-contractor with the principal contractor, being a contractual relation, is governed by the rules of contract.

All the same, if there is, in the principal contract, a stipulation for the benefit of the sub-contractor or of the purchaser of a thing resold, they could pursue, the one or the other of the principal contracting parties, or both of them, for reparation of any damage suffered.

According to article 196 of the Civil Code, "Anyone who makes a contract is personally bound thereby, unless in making the contract the

24. Article 331 of the I.C.C. and article 1 of the Law on Civil Responsibility.

contrary is laid down, or unless subsequent evidence to the contrary is produced".

However, anyone, when making a contract, can make provision for the benefit of a third person.

(3) Nevertheless, if the promisor gives prior notice to his promisee before the time, that he will not perform his obligation, he will not be held liable for damage specially resulting from subcontracts or re-sales effected after notice. Nevertheless, in principle, loss of profit can be claimed by the promisee.

(4) Rial is the unit of Iranian currency (67½ Rials = $1) which is the legal tender. All the same, the contracting parties may choose another currency for regulating their payments. In this case, it is necessary to distinguish between payments concerning internal transaction and those concerning international transaction.

In internal transaction, if there is a stipulation of payment in foreign currency, that currency is considered a merchandise convertible into rials according to the rate in operation at the Central Bank of Iran.

But in international transaction, an Iranian can validly agree to pay in foreign currency on condition that payment in such currency conforms to the applicable rules and regulations and has the prior confirmation of the Central Bank of Iran.