

# Law of Damages in India

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# 1. Introduction

Damages, in simple terms, refer to a form of compensation due to a breach, loss or injury. As explained by Fuller and Perdue,<sup>1</sup> 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; 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 promisee altered his position by placing reliance on the promisor; 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>2</sup>

“Damages” are often confused with “damage”.

However, it should be known that these two terms are significantly distinct, and different from each other. 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 (which could in cases where there is loss of reputation, physical or mental pain or suffering) while ‘damages’ refer to pecuniary compensation.

At this juncture, it is noteworthy that damages can 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, or statutory violations, termination of employments, requiring the aggrieved party to be compensated; however, damages emanate from actionable wrongs.<sup>3</sup> However,

in practical terms, there isn’t much difference and compensation is often used to refer to damages as well. Moreover, the Contract Act 1872, uses the term “compensation” in the sections referring to liquidated and unliquidated damages, which shall be discussed subsequently.

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, with respect to damages granted under indemnity contracts, it is pertinent to understand the significant differences between the two.<sup>4</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>5</sup> A claim for indemnity arises from the original contract of indemnity 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 law and intellectual property rights (copyrights, trademarks and patents).

1. L.L. Fuller and William R. Perdue Jr., “The Reliance Interest in Contract Damages” (1936) 46 Yale Law Journal 52

2. *ibid*

3. 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

4. Refer to our article titled “Revisiting the Indemnity v/s Damages Debate” available <[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=7a971fee-a52445663d1b3b87e707a6f5](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=7a971fee-a52445663d1b3b87e707a6f5)>

5. See, Indian Contract Act 1872, s 124

## 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 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 for which special damages are claimed.<sup>6</sup>

### II. Nominal damages

When a party approaches the court for claiming damages, the court has the discretion to award nominal damages. This 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. Thus, in cases where a party fails to prove actual loss resulting from a breach of contract, nominal damages may be granted. Additionally, nominal damages may be awarded where a technical breach of contract has been committed or when the breach has taken place due to an external reason which is not attributable to the defendant.<sup>7</sup>

6. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1171

7. *Weld & Co. v. Har Charn Das* AIR 1921 Lah 316; *Grant Smith and Co. and McDonnell Ltd v. Settle Construction and Dry Dock Co.* AIR 1919 PC 85 as cited in R.G Padia (ed.), *Pollock and Mulla Indian Contract and Specific Relief Acts*, vol 2 (13th edn, LexisNexis Butterworths Wadhwa 2006) 1519

### III. Substantial damages

Contrary to nominal damages, substantial damages are awarded when the extent of breach of contract is proved but there are uncertainties regarding calculation.

### IV. 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. Aggravated damages gain significance where the damage caused to the plaintiff are aggravated due to the motives, 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 compensating or depriving the defendants of the profits made.<sup>8</sup> Since damages under contractual breaches do not consider the motive and conduct of defendants, it is to be understood that aggravated and exemplary damages are more prominent in torts and not under contractual breaches.<sup>9</sup> This is primarily because of the fact that the objective behind contractual remedies is to compensate the promisee for the breach rather than compelling performance on the promisor.<sup>10</sup>

8. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1173

9. The Common law approach has been that aggravated damages cannot be awarded in an action for breach of contract (*Addis v. Gramophone Co. Ltd.* (1909) AC 488; *Bliss v. SE Thames Regional Health Authority* (1987) ICR 700); however, where fraud, oppression, malice etc. are established, exemplary damages may be granted (*Sheikh Jaru Bepari v. AG Peters* AIR 1942 Cal 493; *Alexander Brault v. Indrakrishna Kaul* AIR 1933 Cal 706)

10. William S. Dodge, 'The Case for Punitive Damages in Contracts' (1999) 48(4) *Duke Law Journal* 629, 630

However, punitive damages may be granted in certain exceptional cases. The Canadian Supreme Court's finding in this respect is of utmost relevance, wherein it was observed that:

*“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>11</sup>*

Nevertheless, courts in U.K. and India have been strict regarding grant of punitive damages in case of contractual breaches. For example, in a recent case, the England and Wales High Court (Chancery Division), in an obiter, agreed with the claimants that:

*“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>12</sup>*

Similarly, in India, courts have held that the nature of compensation should be such that the award of compensation for damages cannot be considered either punitive or in the nature of a reward.<sup>13</sup>

## V. Liquidated and unliquidated damages

In case of contracts, 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 courts on an assessment of the loss or injury caused to the party suffering such breach of contract.

Under the Indian Contract Act 1872, unliquidated and liquidated damages are given under sections 73 and 74 respectively, which shall be discussed in the subsequent chapter of this paper.

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

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

13. *Kerala State Road Transport Corporation Rep. by the Managing Director v. Feethambaran Rep. by his Next Friends Sukhmmari* 1994 (2) KLJ 646 (para 8)

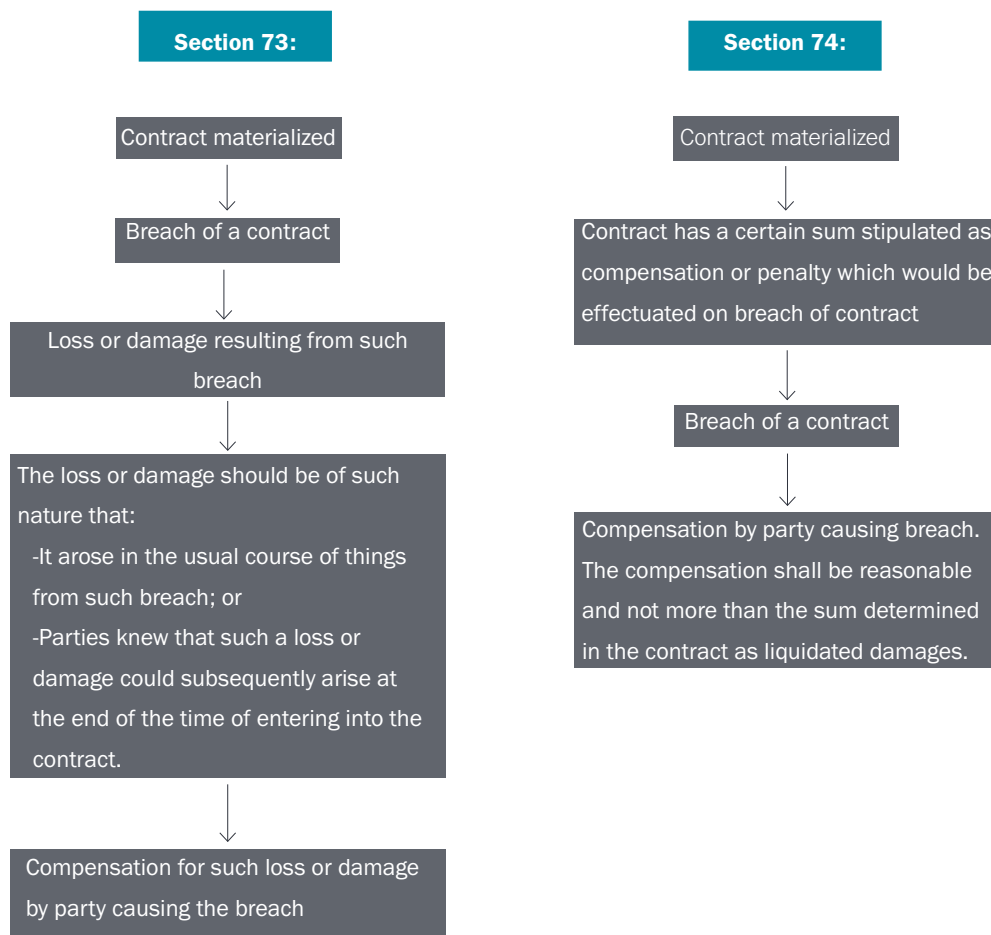


### 3. The Law of Damages under Indian Contract Act 1872

Section 73 deals with actual damages following breach of contract and the injury resulting from such breach which are in the nature of **unliquidated damages** since 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, while Section 74 deals with **liquidated damages**, referring to damages that are stipulated for. Thus, for a claim of damages, there has to be a breach of the contract.

In cases, where there is a valid termination of the contract, without any violation of the terms of the contract, the question of claim for damages should not arise since there is no breach per se. These provisions are subsequently discussed in detail.

Based on the requirements mandated for claim of damages, basic comparison between Section 73 and Section 74 has been done below:



Damages are generally claimed and granted to enable restoration of the position of the plaintiff in which he would have been, if the breach would not have taken place. Generally, these damages are to be claimed from the party causing such breach. In case of liquidated damages under Section 74, claims can be made by plaintiff as well as defendant.<sup>14</sup>

In case of liquidated damages, there is an assurance of compensation since a reasonable compensation is agreed upon. Thus, it would be expected that since the risks of a party causing a breach would be lesser since damages are already stipulated for.

## I. Breach of contract

“Breach of contract” constitutes the pre-condition for a claim of damages, be it liquidated, unliquidated or otherwise. Thus, irrespective of the extent to which the defendant profits from the contractual arrangement, there can be no claim for damages unless there is a breach of the contract. Further, the party committing the breach is liable to compensate by way of damages. To establish a breach, it has to be adjudicated upon and be proved, and not merely decided by the parties.<sup>15</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 manner which was decided, then the aggrieved party is entitled to damages to the extent of costs of making repairs in conformity with the contract.<sup>16</sup>

Damages may also be claimed in case of anticipatory breach of contract. An anticipatory breach is said to have been committed when a party refuses to perform, or has disabled himself from the performance of the promise in its entirety.<sup>17</sup> In such a scenario,

the other party may acquiesce to the continuation of the contract or rescind it.<sup>18</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>19</sup>

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

It is noteworthy that for a claim of liquidated damages, the clause “*whether or not actual damage or loss is proved to have been caused thereby*” would not be dispensing with the establishment of proof *in toto*.<sup>20</sup> This emanates from the understanding that the reasonable compensation agreed upon as liquidated damages in case of breach of contract is in respect of some loss or injury; thus, existence of loss or injury is indispensable for such claim of liquidated damages.<sup>21</sup> In such cases, the requirement to prove loss or injury or damage may be dispensed with, if it is difficult or impossible to prove that the genuinely pre-estimated can be awarded.<sup>22</sup> Thus, it is expected that the stipulation for liquidated damages should be *bona fide* and a fair estimate of the damages arising from the breach, and not done with a sole intent to penalize the other party.<sup>23</sup> Courts have repeatedly required parties to draft clauses within the contracts which aren’t ambiguous.

Irrespective of stipulations in the form of liquidated damages, a plaintiff 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; thereby, erasing the differences between liquidated damages and unliquidated damages.<sup>24</sup> Thus, provisions

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

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

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

17. *ibid* s 39

18. *ibid*

19. *Foran v. Wight* (1989) 168 CLR 385, 408 (Mason CJ)

20. *ONGC v. Saw Pipes* (2003) 5 SCC 705

21. *ibid*

22. *ibid*

23. B.V.R. Sharma, ‘Adjudication of claim for damages under Sections 73, 74 and 75 of Indian Contract Act, 1872’ <<http://www.manupatra.co.in/newsline/articles/Upload/30C28D5D-262B-4A4A-AE17-C4D-86F92BCE0.pdf>> accessed 10 September 2016

24. *Union of India v. Raman Iron Foundry* AIR 1974 SC 1265

relating to liquidated damages are required to be drafted with clarity and it has to be proven that the amount was a genuine pre-estimate of the loss or damage likely to be suffered. It is pertinent to note that amount stipulated as liquidated amount or penalty is the “upper limit beyond which the court cannot grant reasonable compensation”.<sup>25</sup> Meanwhile, other factors like extent of mitigation of losses, along with other facts and circumstances cannot be overlooked and warrant sufficient consideration.

Based on this reasoning, recently a Division Bench of the Delhi High Court had 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>26</sup>

Such mandates are required even in the presence of a pre-determined sum agreed by both the parties as liquidated damages, so that there is no windfall profit in case of a breach of a contract without resulting in kind of loss or damage.

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>27</sup>*

In the absence of such a proof or honest estimation by the claimant, the court shall make an award for damages which is below the stipulated liquidated damages, by taking into consideration a reasonable assessment of the consequences of the breach of contract.<sup>28</sup>

It is also possible for the parties to agree to liquidated damages with respect to a specific type of breach only, and in such a case, if there is some other kind of breach, the damages in respect of such breach (which has not been stipulated) would be unliquidated damages.<sup>29</sup>

Often, prior to a claim of liquidated damages, courts have required time as the essence of the contract, or provide the other party with such notice so that reasonable time is given for performing the contractual obligations. On consideration of the facts of the case, in the case of *Kailash Nath v. Delhi Development Authority*,<sup>30</sup> it was observed that,

*“Based on the facts of this case, the single judge was correct in observing that the letter of cancellation dated 06.10.1993 and consequent forfeiture of earnest money was made without putting the appellant on notice that it has to deposit the balance 75% premium of plot within a certain stated time. In the absence of such notice, there is no breach of contract on the part of the appellant and consequently earnest money could not be forfeited.”*

Thus, an automatic pecuniary liability does not arise in the event of a breach of a contract which contains a clause for liquidated damages. 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>31</sup>

25. *ONGC v. Saw Pipes* (2003) 5 SCC 705

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

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

28. *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd* AIR 2003 SC 2629

29. *Aktieselskabet Reider v. Arcos* [1927] 1 KB 352

30. (2015) 4 SCC 136, para 21

31. *Iron & Hardware (India) Co. v. Firm Shamlal & Bros.* AIR 1954 Bom 423

## A. Differentiating liquidated damages from penalty

Considering the differences between liquidated damages and penalty, in general, 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 are 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. The need to differentiate between liquidated damages and penalty arises mainly because of the fact that a provision for penalty would not disentitle the plaintiff from claiming unliquidated damages as well; however, in the presence of a clause relating to liquidated damages, no additional remedy can be sought by way of unliquidated damages.<sup>32</sup>

With respect to the nature of liquidated damages under Section 74, 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>33</sup>*

Additionally, with respect to ‘stipulation by way of penalty’, it has been noted that Section 74 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 by a covenant in the contract it is liable to forfeiture.<sup>34</sup> Under Section 74, such stipulation by way of penalty would refer to an

amount to be paid and not an amount already paid prior to the entering into of the contract.<sup>35</sup>

Ideally, forfeiture of a reasonable amount paid as earnest money or advance deposit as part payment does not amount to imposition of penalty; however, in cases where the forfeiture is in the nature of penalty, Section 74 would apply.<sup>36</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>37</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 can be said to be in the nature of a penalty.<sup>38</sup>

## III. Causation

For a claim of damages and affixing liability, there has to be 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>39</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>40</sup> the defendant failed to install the

32. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1287

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

34. *Natesa Aiyar v. Appavu Padayachi* (1915) ILR 38 Mad 178

35. *Abdul Gani & Co. v. Trustees of the Port of Bombay* I.L.R. 1952 Bom. 747

36. *Kumwar Chiranjit Singh v. Har Swarup* A.I.R. 1926 P.C. 1; In *Kailash Nath Associates v. Delhi Development Authority & Anr* (2015) 4 SCC 136, it was observed that “Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

37. *ibid*

38. *ibid*

39. See *Yorshire Dale Steamship Co. Ltd. v. Minister of War Transport, The Coxwold* [1942] 2 All ER 6 at 9-10 per Viscount Simon LC (HL); *Gray v. Barr* [1971] 2 All ER 949 (CA)

40. (1968) 120 CLR 516

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 came to a conclusion 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>41</sup> Acknowledging the "but for" test, in *Alexander v. Cambridge Credit Corp Ltd.*,<sup>42</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>43</sup> The Supreme Court concluded that, "*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>44</sup>

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 would be disentitled from claiming damages. This would depend on the consideration of the facts and circumstances. This can 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 Indian Contract Act 1872, 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>45</sup> Thus, the defendant would not be liable for damages that are remote to the breach of contract.

In the landmark case of *Hadley v. Baxendale* ("**Hadley v. Baxendale**"),<sup>46</sup> the principle governing remoteness of damages was elaborated. The rules enunciated in this case were that 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>47</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>48</sup>

41. *Reg Glass Pty Ltd v. Rivers Locking Systems Ltd* (1968) 120 CLR 516

42. (1987) 9 NSWLR 310

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

44. *ibid*

45. Indian Contract Act 1872, s 73

46. (1854) 9 EX 341

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

48. *ibid*

If the plaintiffs can establish that the defendants were aware of the particular losses suffered by the plaintiffs due to the actions or inactions of the defendants, the latter shall be liable for such losses, if such losses do not occur in the normal course of events. 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>49</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*:

*“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>50</sup>*

This can be summed by referring to the observation made by the Kerala High Court that:

*“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>51</sup>*

Thus, a matter before the arbitrator, it was stated that in case of floods not due to the unprecedented rain, causing loss to the respondent, will not be attracted under force majeure clause which prevents performance of the contract and which could not have been foreseen or avoided by a prudent person.<sup>52</sup> Thereby, rendering such an incident as foreseeable.

## A. 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 is 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 is 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>53</sup> Consequential losses include those that 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>54</sup>

49. H. G. Beale (ed.). *Chitty on Contracts* (28th edn, Sweet & Maxwell Ltd 1999) 1296

50. *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*. [1949] 2 KB 528

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

52. *State of U.P. v. Allied Construction* 2003 (3) Arb LR 106 SC

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

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

Overhead costs, decreased profits come within the ambit of direct losses;<sup>55</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>56</sup> Similarly, expenses incurred prior to the contract may also be recovered as damages if they can be proved to reasonable foreseeable.<sup>57</sup>

## B. Damages for loss of profit

Generally, the defendant would be accountable for the loss of profits directly emerging from the contractual breach, for example, loss of normal profits due to delay in delivery of a relevant material by the defendant. However, loss of profits, which are not direct consequences 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 are contemplated by the parties.

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>58</sup>

Generally speaking, a party may claim for loss of opportunities or loss of chance of gaining something, which results from a contractual breach.

## C. Damages for non-pecuniary losses

Damages are generally awarded to compensate for pecuniary losses. However, there may be instances where a party claims for damages for the non-pecuniary losses suffered. In this context, the observation made by Lahoti J. on the basis of a reference made to Chitty on Contracts<sup>59</sup> is noteworthy, wherein it was stated that,

*“Normally, no damages in contract will be awarded for injury to the plaintiff’s 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>60</sup>*

Thus, damages for mental anguish, and suffering may be awarded in cases where the contract itself is for providing enjoyment, pleasure e.g. breach of contract of services to click photos during a wedding.<sup>61</sup> Damages of such nature shall not be awarded where “the normal nature of damages is the value of the use of the land for the period of delay” and the contract was not entered into for attaining pleasure or peace of mind.<sup>62</sup>

## V. Mitigation

It is notable that a party claiming damages on breach of a contract should have performed or was willing to perform the requisite part of the contract. Thus, prior

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

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

57. *ibid* 1196

58. Indian Contract Act 1872, s 73 (illustration i)

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

60. *Ghaziabad Development Authority v. Union of India & Anr* AIR 2000 SC 2003, para 5

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

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

to a claim of damages, the duty to mitigate losses is indispensable. 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 daage which is due to his neglect to take such steps.”*<sup>63</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 shall be judged based on the facts and circumstances of the given case. Nevertheless, it must be ensured that the plaintiff acts 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, failing which he shall not be entitled to damages for losses which could have been reasonably avoided.<sup>64</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. Courts have often stated that such duties to mitigation would arise on breach of a contract.<sup>65</sup> Additionally, parties should ensure that they perform their obligations in a bona fide manner to avoid any breach or subsequent losses, since the day contract is entered into.

The plaintiff shall 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 defendant, irrespective of whether these steps are successful or not.<sup>66</sup> The purpose of the duty to mitigate losses is relevant mostly in the context of assessment of damages wherein the plaintiff shall not be entitled to damages for losses which have been mitigated. Nevertheless, there may be terms imbibed within the contract to exempt the plaintiff from such a duty to mitigate losses.<sup>67</sup>

## VI. Measure and calculation of damages

Following the “expectation interest”<sup>68</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.

The quantum of damages to be awarded is being distinguished from the measure of damages. The former deals with the amount of damages while the later involves considerations of law as well.<sup>69</sup> 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. Thus, the damages awarded should not exceed the loss suffered or likely to be suffered.<sup>70</sup> For understanding the relation between “damages” and “loss”, the Supreme Court has observed that:

63. *British Westinghouse Electric and Manufacturing Company v. Underground Electric Railways* (1912) A.C. 673, 689

64. *M. Lachia Setty & Sons Ltd v. Coffee Board Bangalore* AIR 1981 SC 162

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

66. *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

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

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

69. R.G Padia (ed.), *Pollock and Mulla Indian Contract and Specific Relief Acts*, vol 2 (13th edn, LexisNexis Butterworths Wadhwa 2006) 1524

70. *Ghansiram v. Municipal Board* AIR 1956 Bhop 65



*“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>71</sup>*

This follows illustration (a) to Section 73 of the Contract Act, which lays down says 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 (promise) 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>72</sup> Similarly, if a contractor abandons the ongoing construction work, the measure of damages is the cost incurred in completing the work.<sup>73</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.

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

- 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>74</sup>

Thus, the explanation to Section 73 of the Indian Contract Act 1872 provides that “the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.” 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 and such a term is enforceable.<sup>75</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.<sup>76</sup>

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, apart from consideration of the aspects of mitigation by the plaintiff.<sup>77</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. Neither Sections 55 and

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

72. Indian Contract Act 1872, s 73 (illustration (h))

73. *Dhulipudi Namayya v. Union of India* AIR 1958 AP 533

74. *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

75. *Syed Israr Masood v. State of Madhya Pradesh* AIR 1981 SC 2010

76. Nilima Bhadbhade (ed.), *Pollock & Mulla, The Indian Contract Act and Specific Relief Acts*, vol 2 (updated 14th edn, LexisNexis Butterworths Wadhwa) 1142

77. *British Westinghouse Electric and Mfg. Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* (1912) AC 673, 691; *ibid* 1160

73 nor any other relevant laws in India prohibit the applicability of widely accepted formulae or deem them as contraventions to the existing legal regime.<sup>78</sup> Thus, courts have preferred not to interfere with the methods/formulae adopted by arbitrators or valuers for computation of quantum of damages.<sup>79</sup>

Regarding the **time and place** for assessment of damages, generally, the ‘the value of the goods at the time and place at which they ought to have been delivered, that is, the value of the goods to the purchaser of such goods at the time and place they ought to have been delivered’ is considered.<sup>80</sup> If the goods were being purchased for self-use and not re-sale, then additional factors like the nature of the intended use may be considered. 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>81</sup> In the absence of an appropriate market for determining the market price, assessment can be made by referring to the closest market<sup>82</sup> or the market to which the aggrieved promisee would resort to, on the breach of the contract.<sup>83</sup>

As mentioned earlier, courts attach significance to 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.”<sup>84</sup> Thus, the fair market value is usually referred to for ascertaining the quantum of damages.

## VII. Interests on damages

Generally speaking, interest, whether it is statutory or contractual, “represents the profit the creditor might have made if he had the use of the money or the loss he suffered, because he had not that use.”<sup>85</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. Thus, a court may grant interests from the date of filing of the suit till the realization of the amount of damages.<sup>86</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>87</sup> Under Section 34 of the Civil Procedure Code, courts are required to exercise discretion for granting interests on damages, for which the following observation is relevant:

*“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>88</sup>*

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

79. *ibid*

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

81. *ibid*

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

83. *ibid*

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

85. *Dr. Shamlal Narula v. Commissioner Of Income-Tax* AIR 1964 SC 1878

86. *Kishan Lal Kalra v. NDMC* AIR 2001 Del 402

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

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

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.

## 4. Applicability of the law of damages

Apart from the Indian 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

Sections 55-61 of the Sale of Goods Act govern breach of contracts for sale of goods. 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>89</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>90</sup> or for specific performance.<sup>91</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>92</sup> Under Section 61 of the Act, the seller is entitled to the right to recover interests or special damages or to recover the money paid where the consideration for such payment has failed.

The principles governing such claim for damages under the Sale of Goods Act are primarily based on Section 73 of the Contract Act. The significant difference is that Section 73 of the Contract Act is more general, as compared with the Sale of Goods Act, which is specifically applicable to sale of moveable property. The Sale of Goods Act makes specific reference to special damages which can be claimed by either parties under Section 61. This is in accordance with the principle under Section 73 of the Indian 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.

### A. 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, 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>93</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>94</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>95</sup> Thus, parties may use the discretion of deciding upon pre-determined measure of damages while entering into a contract.

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 shall be taken into consideration.<sup>96</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

89. Sale of Goods Act 1930, s 55

90. *ibid* ss 56, 57

91. *ibid* s 58

92. *ibid* s 60

93. *Bismi Abdullah & Sons, Merchants and Commission Agents v. Regional Manager, Food Corporation of India, Trivandrum* AIR 1987 Ker 56

94. *ibid*

95. Sale of Goods Act 1930, s 62

96. *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

acceptance as per the contractual terms, or at the time of refusal to perform such a contract, would be the relevant date.<sup>97</sup>

## II. Grant of damages under indemnity contracts

Unlike in cases of damages under Section 73 and 74, there is no specific bar for the quantum of damages under indemnity contracts. For example, claims for unliquidated damages are restricted to only reasonable amounts and foreseeable losses.<sup>98</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 do they resort to the liquidated damage amount.<sup>99</sup> However, in cases of damages under indemnity contracts, the indemnified may recover all damages in respect of the indemnity contract from the indemnifier.<sup>100</sup> In the context of damages, it is to be noted that an indemnity contract and its scope ought to be limited by appropriate drafting since many of the statutory protections and limitations present in claim for damages are not present for contracts of indemnity.<sup>101</sup>

Additionally, an indemnified in India is entitled to sue the indemnifier even before incurring any actual damage or loss and that an indemnity is not necessarily given by repayment after payment but to ensure that the indemnified is not called upon to pay.<sup>102</sup>

These are some of the reasons why such provisions are heavily negotiated to limit the scope of claims in indemnity contracts. As is understandable, 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. Some of the drafting techniques used to limit the scope are:-

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

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 1942, the Indian courts realized that not all indemnity contracts are governed by the Contract Act and there might be scope to indulge into principles of common law and contract to give full meaning and effect to the intention of the parties. Such indemnity contracts also known as “to hold harmless” were recognized.<sup>103</sup> Hence, the indemnifier might be called upon to protect from the loss rather than compensate for the loss. Going one step further, if the drafting has been done correctly, the indemnifier might also be liable to pay compensation before the actual loss has happened but only if a clear enforceable claim exists against him.<sup>104</sup>

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

98. See, Indian Contract Act 1872, s 73

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

100. Indian Contract Act 1872, s 125

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

102. See *Jet Airways (India) Limited v. Sahara Airlines Limited and Ors* 2011 (113) Bom LR 1725, *Khetarpal v. Madhukar Pictures* AIR 1956 Bom 106. See also *Osman Jamal and Sons Limited v. Gopal Purshattam* (1928) ILR Cal 262: “Equity has always recognized the existence of a larger and wider right in the person entitled to indemnity. He was entitled, in a Court of Equity, if he was a surety whose liability to pay had become absolute to maintain an action against the principal debtor and to obtain an order that he should pay off the creditor and relieve the surety (...) Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay”

103. *Gajanan Moreswar Parelkar v. Moreswar Madan Mantri*, AIR 1942 Bom 302

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

### 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. As observed by the Canadian Supreme Court, under contract law, punitive damages are “very much the exception that the rule.”<sup>105</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 was within the reasonable contemplation of the parties at the time of making of the contract;<sup>106</sup> whereas the plaintiff in tort must show only that the loss was reasonably foreseeable by the party in breach.<sup>107</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 liquidated damages in arbitral proceedings

Damages constitute a significant remedy even in arbitral awards. In this context, it is noteworthy that the principles governing award of damages in case of civil suits shall extend 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 shall be awarded only to the extent of “reasonable compensation” which cannot exceed that the amount so stated. The onus to prove such loss or damage shall not cease except where actual damage from the breach of contract cannot be proved or calculated. Based on this reasoning, recently a Division Bench of the Delhi High Court had 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>108</sup> Thus, mere breach of contract does not warrant an automatic grant of liquidated damages unless actual loss or injury is proven.

### V. Damages under consumer laws

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 provides that the defaulting seller may be directed to pay such amount as may be awarded by it as compensation to the consumer for

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

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

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

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

any loss or injury suffered by the consumer due to the negligence of the opposite party; additionally, punitive damages may also be granted.<sup>109</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>110</sup> It is not mandatory to lay down the exact loss or damage, in light of the fact 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>111</sup> This is mainly because the difficulty with exact assessment of damage under consumer law has been recognized, for example, it would not be feasible to arrive at a conclusive finding regarding deficiency of services rendered by a medical professional or an architect.

## VI. Damages under contracts of employment

Damages can be claimed by employees for wrongful dismissals resulting in breach of employment contracts. Such damages would extend to loss of earnings along with additional entitlements for the remaining term of the contract. 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>112</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>113</sup>

## VII. Damages under cases relating to intellectual property

Among the various reliefs entitled to the plaintiff in case of infringement of an intellectual property 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 (“IP”) 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 intellectual property. 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.

Under **the Indian Copyright Act**, 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>114</sup>

Additionally, the owner of the copyright is entitled to remedies in respect of the conversion of any infringing copies.<sup>115</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>116</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,

109. Consumer Protection Act 1986, s 14(1)(d)

110. See *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

111. *Jaidev Prasad Singh v. Auto Tractor Ltd.* 1 (1991) CPJ 34 (36) NC

112. *Malik v. Bank of Credit and Commerce Intl SA* [1997] 3 All ER 1 (HL)

113. *Mahommad v. Official Receiver* AIR 1931 Lah 133

114. Copyright Act, section 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.”*

115. Section 58 (proviso)

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

the plaintiff would be entitled to damages under both these heads.<sup>117</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>118</sup> Ideally, the damage, to be recoverable at law, must be one which can be measured in terms of money.

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 some pages of a book would not amount to conversion of the book till the binding was complete and ready for sale.<sup>119</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>120</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>121</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>122</sup> It is pertinent to note that difficulty in assessment or measure of damages is not considered as a ground sufficient for denying grant of damages.<sup>123</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>124</sup> Where the party claiming damages, fails

to establish substantial damage, courts tend to grant damages only to the extent of nominal damages.<sup>125</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 for account of profits made by the infringer irrespective of the loss suffered by him.<sup>126</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 the infringement occurs after a failure to pay any renewal fee with the prescribed period and before any extension of that period or there has been a usage of the invention before the date of the decision allowing an amendment of a specification.<sup>127</sup>

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ery-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."

125. *Gujarat Ginning v. Swadeshi Mills* AIR 1939 Bom 118; *General Electric v. Pyara Singh* AIR 1974 P&H 14

126. *Draper v. Trist* (1939) 56 RPC 429, 436

127. Patents Act 1970, s 111

117. *ibid*

118. *Dam v. Kirk La Shelle*, 175 Fed 902 (908).

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

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

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

122. *Mishra Bandhu v. Shivaratn Lal* AIR 1970 MP 26

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

124. 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 deliv-



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>128</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>129</sup> And, where the patentee tends to license out the products, the loss of royalties is considered for assessment of damages.<sup>130</sup>

## A. Judicial approach in granting damages in IP cases

Indian courts have started to display a more liberal approach towards grant of damages in case of infringement of rights relating to intellectual property by allowing grant of punitive damages along with compensatory damages. This was identified in the case of *Time Incorporated v. Lokesh Srivastava* (“*Time Incorporated*”),<sup>131</sup> where 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.”*

This observation was followed in a series of judgments like *Adobe Systems, Inc and Anr. v Mr. P. Bhoominathan and Anr.*,<sup>132</sup> *Microsoft Corporation v. Raval*,<sup>133</sup> *Microsoft Corporation v. Rajendra Pawar & Anr.*<sup>134</sup> and *Hero Honda Motors Limited v. Shree*

*Assuramji Scooters*.<sup>135</sup> In a recent ruling of 2016, the Delhi High Court, on following *Time Incorporated*, awarded punitive damages as high as one crore rupees.<sup>136</sup> In *Microsoft Corporation v. Deepak Raval*,<sup>137</sup> which involved a copyright infringement action, the court awarded similar damages by referring to decisions on punitive damages by courts in other countries, and holding that Indian courts have recognized that both compensatory and punitive damages are to be awarded. The court 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>138</sup>, damages to goodwill and reputation<sup>139</sup> and exemplary damages<sup>140</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>141</sup>*

This judgment includes a detailed comparative study on the position relating to damages in IP cases, across jurisdictions, which is as follows:<sup>142</sup>

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

129. *Meters v. Metropolitan Gas Meters* (1911) 28 RPC 157, 165 (CA)

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

131. (2005) 30 PTC 3 (Del)

132. (2009) 39 PTC 658 (Del)

133. MIPR 2007 (1) 72

134. (2008) 36 PTC 697 (Del)

135. (2006) 32 PTC 117 (Del)

136. *Cartier International Ag & Others v. Gaurav Bhatia & Ors* (2016) 65 PTC 168 (Del)

137. MIPR 2007 (1) 72

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

139. 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.

140. 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.

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

142. *ibid*

<b>Case Title</b>	<b>Damages Awarded (In US Dollar)</b>	<b>Damages in Rupees</b>
<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 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 Rs. 1 Crore 31 lakhs for infringement of copyright plus Rs. 17 crore 3 lakhs 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 Rs. 1 crore 32 lakhs plus additional damages of Rs. 1 crore 3 lakhs
<i>Microsoft Corporation v. Golstar Pty Limited</i> , [2003] FSR 210	Damages of \$ 295,750	Damages of Rs. 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 Rs. 2 crore 25 lakhs plus additional damages of Rs. 1 crore 72 lakhs
<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 Rs. 8 lakhs 61 thousand plus additional damages of Rs. 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 Rs. 4 lakhs
<b>Hong Kong</b>		
<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 Rs. 18 crore 29 lakhs and additional damages of Rs. 1 crore 82 lakhs
<b>China</b>		
<i>Autodesk Inc. Beijing Longfa Construction &amp; Decoration Ltd.</i>	Compensation of RMB 1.49 million	Compensation of Rs. 78 lakhs

Subsequently in another case of *Microsoft Corporation v. Rajendra Pawar & Anr.*, the Delhi High Court came up with the following observation, on similar lines:

*“Perhaps it has now become a trend of sorts, especially in matters pertaining to passing off, for the defending party to evade court proceedings in a systematic attempt to jettison the relief sought by the plaintiff. Such flagrancy of the Defendant’s conduct is strictly deprecatory, and those who recklessly indulge in such shenanigans must do so at their peril, for it is now an inherited wisdom that evasion of court proceedings does not de facto tantamount to escape from liability. Judicial process has its own way of bringing to tasks such erring parties whilst at the same time ensuring that the aggrieved party who has knocked the doors of the court in anticipation of justice is afforded with adequate relief, both in law and in equity. It is here that the concept of awarding punitive damages comes into perspective.”<sup>143</sup>*

However, 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. The trend adopted by the Delhi High Court has been often criticized as lacking any uniformity or continuity.<sup>144</sup> Further, if the distinction in the statutes between U.K. and India are considered, it is seen that the U.K. Act specifically provides for additional damages, apart from the general damages<sup>145</sup> while the Indian statute does not. Thus, the award of punitive damages has also been criticized. Nevertheless, if a party has specifically pleaded for such additional damages, nothing prevents the courts from granting such damages.

<sup>143</sup>. *Microsoft Corporation v. Rajendra Pawar & Anr.* 2008 (36) PTC 697 (Del.)

<sup>144</sup>. 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

<sup>145</sup>. Copyright Act 1956, s17(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.”

## 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>146</sup>

However, there are some variations that can be gathered from these regimes. For a better and more comprehensive understanding of the same, an analysis has been made under the following heads:

### I. Liquidated damages and penalty clauses

Singapore follows the common law approach when it comes to enforcement of liquidated damages clauses as set out in the landmark English case,<sup>147</sup> *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd*.<sup>148</sup> wherein it was held that provision for liquidated damages will be enforceable only 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.

On establishing the above, the party claiming damages, would be dispensed with the need to prove actual damage. Meanwhile, a penalty clause is legally invalid owing to the fact that a penalty clause would be inserted with the intention to punish the party causing breach rather than granting compensation

to the aggrieved party for the loss suffered. Thus, in such a scenario, the only remedy for the injured party would be to claim for actual damages upon proof of loss or injury.

Under the common law, it is pertinent to ascertain the question whether the sum stipulated in a contract is in the nature of a penalty or liquidated damages is a question of law, since a stipulation in the nature of penalty would be legally invalid vide law of damages under contract law.

In the absence of any such distinction in the Indian regime as far as the statutory language is concerned, a liquidated damages clause need not specifically state that liquidated damages are not in the nature of a penalty. However, an important mandate which is applicable across these regimes, is that the compensation paid by the party causing breach has to be “reasonable”. Moreover, the practice enunciated by courts has been that the statutory duty imposed on courts under Section 74, remains “...*not to enforce the penalty clause but only to award reasonable compensation...*”<sup>149</sup> Further, as has been already discussed, Section 74 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 by a covenant in the contract it is liable to forfeiture.<sup>150</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. The same has been statutorily recognized in India under Section 74 of the Indian Contract Act 1872.

<sup>146</sup>. Application of English Law Act, s 4

<sup>147</sup>. *Max Media FZ LLC v. Nimbus Media Pte Ltd*. [2010] SGHC 30; *Hong Leong Finance Ltd v. Tan Gin Huay* [1999] 2 SLR 153

<sup>148</sup>. [1914] UKHL 1

<sup>149</sup>. *Fateh Chand v. Balkishan Das* AIR 1963 SC 1405

<sup>150</sup>. *Natesa Aiyar v. Appavu Padayachi* (1915) ILR 38 Mad 178

On similar lines, the courts in Singapore have been consistently faithful towards the *Hadley v. Baxendale* rule.<sup>151</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>152</sup> to determine whether damages are too remote in a contractual claim.<sup>153</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>154</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. This has been already discussed under section 2(IV) of this paper.

However, recently, a Singaporean court confirmed applicability of punitive damages under contract law by holding that:

*“...the court has the power in an exceptional case to award punitive damages in the context of a breach of contract, when the defendant’s conduct in breaching the contract has been so highly reprehensible, shocking or outrageous that the court finds it necessary to condemn and deter such conduct by imposing punitive damages.”<sup>155</sup>*

151. *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

152. In *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilleas)* [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.

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

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

155. *Airtrust (Hong Kong) Ltd v. PH Hydraulics & Engineering Pte Ltd*. [2015] SGHC 307 (para 264)

## 6. Conclusion

Damages on breach of contracts have been considered to be advantageous than other remedies that may be available to parties suffering losses from breach of contracts. One of such advantages could be that a claim for damages could be made as a matter of right, contrasted with other reliefs like specific performance which are subject to and greatly influenced by judicial discretion and findings.<sup>156</sup> For example the Specific Relief Act lays down that the court may exercise its discretion not to grant specific performance “where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.”<sup>157</sup>

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. Liquidated damages are preferred when the parties wish to affix some kind of assurance or security in the event of breach of contracts.

Just like quantum of damages can be pre-decided in a contract, there can also be exclusion of the right to claim damages by express terms,<sup>158</sup> or that in case of breach of contract, there would not be payment of compensation but refund of payments already made.<sup>159</sup> Similarly, there may be specific amounts laid down as compensation for specific breaches, accordingly damages shall be granted for a corresponding breach.<sup>160</sup>

However, in case of liquidated damages, parties shall not be entitled to damages that exceed the amount that has been already ascertained and fixed as liquidated damages. Other drawbacks that are associated with damages include cases where damages do not suffice in respect of the losses or damage suffered by the party. This may lead to a situation which warrants a specific performance by the other party instead of damages so as 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>161</sup> Moreover, stipulation for liquidated damages would not prevent a party from claiming specific performance.<sup>162</sup> Similarly, plaintiffs may claim for damages in addition to or in substitution of injunctions sought from a court.<sup>163</sup>

Another remarkable progress is the approach of the judiciary, which is gradually becoming liberal while granting damages. Courts have allowed enforcement of arbitral awards granting damages amounting to sums ranging in crores of rupees.<sup>164</sup> Additionally, in IP cases, courts have considered actual damages along with damages to goodwill and reputation and exemplary damages, and valued damages to be Rs. 12,823,200.<sup>165</sup>

Similarly, on taking into account the distinction between penalty and damages in the Indian context, it is seen that a party can claim penalty, as stipulated, along with unliquidated damages on breach of a contract. However, it is suggested that courts may consider being less stringent as far as punitive damages are concerned. The approach adopted in Singapore and Canada, to grant punitive damages in cases of contractual breaches in certain exceptional cases,

156. R.G Padia (ed.), *Pollock and Mulla Indian Contract and Specific Relief Acts*, vol 2 (13th edn, LexisNexis Butterworths Wadhwa 2006) 1476

157. Specific Relief Act 1963, s 20(2)(e)

158. *State of Jammu & Kashmir v. Dev Dutt Pandit* AIR 1999 SC 3196

159. *Syed Israr Masood v. State of Madhya Pradesh* (1981) 4 SCC 289

160. *Indian Drugs and Pharmaceuticals Ltd. v. Industrial Oxygen Co. Ltd.* AIR 1985 Bom 186

161. Specific Relief Act 1963, s 21

162. *P. D'Souza v. Shondrilo Naidu* AIR 2004 SC 4472

163. Specific Relief Act 1963, s 40

164. (2016) 155 DRJ 646 (DB)

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

may be adopted as well, on an incisive analysis and consideration of the facts and circumstances.

Conceptually and practically, damages have been effective in enforcement of contractual obligations. This can be supported with the progressive interpretations by the courts with respect to liquidated damages, for example. Courts have ensured that there is no windfall for the parties in the presence of a clause for liquidated damages by asserting that the quantum of damages shall be reasonable and shall not exceed the amount stipulated as liquidated damages. Moreover, even in a claim for damages under such

a clause on liquidated damages, the concerned party would not be exempted from proving the loss or injury suffered subsequent to the breach of the contractual terms.

- Vyapak Desai, Shweta Sahu & Moazzam Khan

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## 7. Table of Cases

Sl. No.	Cases	Relevant Extracts	Para No. s
1.	<i>Union of India v. Raman Iron Foundry</i> AIR 1974 SC 1265	<i>"...even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages"</i>	11
2.	<i>Seth Thawardas Pherumal v. Union of India</i> [1955] 2 S.C.R. 48	<i>"Government expressly stipulated, and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair."</i>	8
3.	<i>Airtrust (Hong Kong) Ltd v. PH Hydraulics &amp; Engineering Pte Ltd</i> [2015] SGHC 307	<i>"...the court has the power in an exceptional case to award <b>punitive damages</b> in the context of a breach of contract, when the defendant's conduct in breaching the contract has been so highly reprehensible, shocking or outrageous that the court finds it necessary to condemn and deter such conduct by imposing punitive damages."</i>	264
<b>Penalty and Liquidated Damages</b>			
4.	<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
5.	<i>Iron &amp; Hardware (India) Co. v. Firm Shamlal &amp; Bros.</i> AIR 1954 Bom 423	<i>"... 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."  "...the only right which he has is the right to go to a Court of law and recover damages."  "...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."</i>	Page 745



6.	<i>Kailash Nath Associates v. Delhi Development Authority &amp; Anr (2015) 4 SCC 136</i>	<p>“...the law on compensation for breach of contract under Section 74 can be stated to be as follows:</p> <p>...In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found <i>inter alia</i> in Section 73 of the Contract Act. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a <i>sine qua non</i> for the applicability of the section. 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
7.	<i>Raheja Universal Pvt. Ltd. v. B.E. Bilimoria &amp; Co. Ltd (2016) 3 AIR Bom R 637</i>	<p>The Division Bench reiterated the findings of the Single Judge on the observations made with respect to the arbitrator’s award on liquidated damages:</p> <p>“This court cannot permit a party to supplement the reasons rendered by the learned arbitrator by relying upon the pleadings and documents which are not considered by the arbitrator and cannot probe into the mind of an arbitrator and assume that the learned arbitrator must have considered such pleadings, documents and submissions of parties which are not reflected in the award.”</p>	4
8.	<i>Bharat Sanchar Nigam Ltd. v. Motorola India Ltd. 2009 (2) SCC 337</i>	<p>“...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.”</p>	24
9.	<i>Sir Chuni Lal Mehta &amp; Sons v. Century Spinning and Manufacturing Co. AIR 1962 SC 1314</i>	<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>			
10.	<i>Hadley v. Baxendale (1854) 9 EX 341</i>	<p>Subsequent to a contractual breach, an injured party can claim which 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.”</p>	Pages 151-152
11.	<i>Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd [1949] 2 KB 528</i>	<p>“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.</p> <p>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.”</p>	32-34

12.	<i>State of Kerala v. K. Bhaskaran</i> AIR 1985 Ker 49	<i>"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."</i>	12
13.	<i>Pannalal Jankidas v. Mohanlal and Another</i> AIR 1951 SC 144	<i>"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."</i>  ("But for" test)	30
14.	<i>Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd</i> AIR 2003 SC 2629	<i>"If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act."</i>  <i>"In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation"</i>	68
15.	<i>Titanium Tantalum Products Ltd. v Shriram Alkali and Chemicals</i> 2006 (2) ARBLR 366 Delhi	<i>"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."</i>	12
<b>Measure and Calculation of Damages</b>			
16.	<i>Hajee Ismail Sait and Sons v. Wilson and Co.</i> AIR 1919 Mad 1053 (DB)	<i>"...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."</i>  <i>"...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."</i>	Pages- 713, 718, 719
17.	<i>Mcdermott International Inc v. Burn Standard Co. Ltd. &amp; Ors</i> (2006) 11 SCC 181	<i>"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."</i>  <i>"...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."</i>	106, 110

18.	<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	<i>"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."</i>	9
19.	<i>M. Lachia Setty &amp; Sons Ltd v. Coffee Board Bangalore</i> AIR 1981 SC 162	<i>"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"</i>	14
<b>Damages in IP</b>			
20.	<i>Time Incorporated v. Lokesh Srivastava</i> (2005) 30 PTC 3 (Del)	<i>"...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."</i>	

## About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

As a firm of specialists, we work with select clients in select verticals. We focus on niche areas in which we provide high expertise, strategic value and are invariably involved in select, very complex, innovative transactions.

We specialize in Globalization, International Tax, Fund Formation, Corporate & M&A, Private Equity & Venture Capital, Intellectual Property, International Litigation and Dispute Resolution; Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our industry expertise spans Automotive, Funds, Financial Services, IT and Telecom, Pharma and Healthcare, Media and Entertainment, Real Estate, Infrastructure and Education. Our key clientele comprise marquee Fortune 500 corporations.

Equally passionate about philanthropy, social sector and start ups, our role includes innovation and strategic advice in futuristic areas of law such as those relating to Bitcoins (block chain), Internet of Things (IOT), Privatization of Outer Space, Drones, Robotics, Virtual Reality, Med-Tech and Medical Devices and Nanotechnology.

Nishith Desai Associates is ranked the 'Most Innovative Asia Pacific Law Firm in 2016' by the *Financial Times - RSG Consulting Group* in its prestigious **FT Innovative Lawyers Asia-Pacific 2016** Awards. With a highest-ever total score in these awards, the firm also won Asia Pacific's best 'Innovation in Finance Law', and topped the rankings for the 'Business of Law'. While this recognition marks NDA's ingress as an innovator among the globe's best law firms, NDA has previously won the award for 'Most Innovative Indian Law Firm' for two consecutive years in 2014 and 2015, in these elite *Financial Times* Innovation rankings.

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**Legal 500** has ranked us in tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011, 2012, 2013, 2014).

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**Chambers and Partners** has ranked us # 1 for Tax and Technology-Media-Telecom (2015 & 2014); #1 in Employment Law (2015); # 1 in Tax, TMT and Private Equity (2013); and # 1 for Tax, TMT and Real Estate – FDI (2011).

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## Research @ NDA

**Research is the DNA of NDA.** In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our "Hotlines". These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction.

We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

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As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports.

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