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The position of abusive clauses in Iranian Law

Saleh Yamrali[1]
[1]Assistant Professor, Department of Jurisprudence and law, Faculty of Humanities and Physical Education, Gonbad Kavous University, Gonbad Kavous, Iran.
salehyamrali@gonbad.ac.ir

Abstract

The contract terms that one party imposes by exploiting its economic, social and specialty status on the weaker party and the consumer, which has not been negotiated independently, are considered as abusive clauses. These terms are fundamentally void and ineffective. In Iran's law, annulment of these terms depends on the "Principle of No-Harm" and "Abuse of Rights Principle", which is explicitly emphasized in article 40 of the constitution of Iran. The unequal terms contained in the "automobile supplier-consumer contracts", "heavy liquidate damages between banks and customers" and "terms in electronic contracts" are among the instances.

Keyword: Abusive, right, consumer, law, clause.

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La posición de las cláusulas abusivas en la legislación iraní

Resumen

Los términos contractuales que una parte impone al explotar su estado económico, social y especialidad en la parte más débil y el consumidor, que no se han negociado de manera independiente, se consideran cláusulas abusivas. Estos términos son fundamentalmente nulos e ineficaces. En la ley de Irán, la anulación de estos términos depende del "Principio de No-Daño" y del "Principio de Abuso de Derechos", que se enfatiza explícitamente en el artículo 40 de la constitución de Irán. Los términos desiguales contenidos en los "contratos de proveedor-consumidor de automóviles", "daños por liquidación fuerte entre bancos y clientes" y "términos en contratos electrónicos" se encuentran entre las instancias.

Palabra clave: Abusivo, derecho, consumidor, ley, cláusula.

1. INTRODUCTION

The abusive clause is one of the new terms in Iranian law. None of the laws and regulations of Iran has mentioned the abusive clauses. While the abusive clauses are accepted in some countries such as France, in Iran's law only some legal experts have spoken of this issue and have tried to introduce this legal resolution into the legal system of Iran, as accepted in the Westerns' law. In this research, we seek to answer some of the questions about the abusive clauses, including what is its definition? What is the difference between "unfair clauses" and "imposed contracts"? What are the implications and consequences of the abusive clauses in Iranian law? For this purpose, first of all we explain the concept, characteristics and implications of abusive

clauses. Secondly, we explain the nature of the liquidate damages as an abusive clause and modifying of the liquidate damage in 3 different cases: 1- In the case that the subject of the condition is lack of liability for the losses incurred by the person. 2- In cases where a person deliberately injures or is aware of doing the acts that are considered deliberate in the customary. 3- In the case that there is a contract between the supplier and the sales intermediary dealer with the consumer. Then, we explain the concept of condition of lack or limited liability as an abusive clause. After all, we explain abusive clauses in electronic contracts.

Chapter one: The concept of abusive clause

Literally, the meaning of "condition" is to necessitate something or an action in contract of sale or in any other contract, to bind or be bound to something during a contract, bet, or agreement (Amid, 2009). The word “impose” means to burden something on someone else, by which someone has to do something forcibly (Ibid). In technical terms, the abusive clause or the imposed condition is a condition that one of the contractors imposes on the other by abusing their economic, social or specialty status (Ibid). These terms have been identified as "abusive clause" in the French legal system. In the legal jargon, a Persian equivalent, which includes both the correct translation of the terms and the basic ideas for identifying these terms, has not been suggested yet. However, the term "abusive clauses" (which literally means imposed conditions) is an equivalent that is largely capable of conveying the

concept of "abusive clauses", and offers simplicity and acceptability (Simler, 1998). Some authors, of course, have used other Persian terms for this. Some of them have been described as "cruel conditions"; in the sense that "in French law, the inclusion of a compensation clause as a "clause abusive" is prohibited in certain contracts such as employment and consumption contracts" (Adel, 2004).

Some other lawyers in our country have followed "common law" and call this category to be "unfair and unconstitutional." In the sense that the contracts may contain unfair and costly conditions that if enforced is contrary to conscience (Shiravi, 2002). Of course, the difference between the unfair terms and the imposed terms, is that unfair terms are not necessarily between specialist and ordinary people. The imposed contract should be distinguished from adhesion contract. Some, in a general view, divide contracts based on the party autonomy into three groups: a) individual and collective contracts; b) adhesion and open-ended contracts; c) free, standard, imposed or implied contracts (Katouzian, 2009).

However, their distinction between the standard and imposed contracts can be criticized, as well as the difference between the adhesion and imposed contracts are not explicitly stated. In the definition of an adhesion contract, it is stated that in some agreements the negotiation of the terms of the contract is entirely taken from one side and the other party determines all the conditions and effects of it in advance. Therefore, anyone willing to conclude the contract must either abandon it or accept all the terms written by the other party, and

in fact, join a plan that is set up by the other party independently. Therefore, this group of contracts is called "adhesion" or "concretion" contracts. Such as contracts for the use of electricity and water and telephone, railways, mines, auctions' winner contract, and underwriting contract of securities in trade law (Ibid). In the definition of standard and imposed contracts it is stated that the rules made after the Civil Code make the rules of some of the contracts more imperative (Jafari Langaroudi,2009). As the government directly monitors the economy, it has also acquired the legal factor of distribution and exchange of wealth, as today, the insurance and lease of immovable property and the contract of employment and marriage are in a special legal situation in which the parties only have the right to accept the terms. This group of contracts is referred to "Ershadi contracts" in the reputation of being guided by the government, as well as "conditional legal act" since their conclusion is only a condition of law enforcement.

Some lawyers, after defining an adhesion contract, differentiate it from the standard contract. The features of adhesion contracts are as follows:

1. The supplier and the provider of adhesion contracts usually have monopolistic and pseudo-monopolistic commercial and economic power.
2. The submitter, usually includes some terms in the contract to secure his interests and limit his responsibilities and duties.
3. The party, to whom the contract is awarded, usually needs that product or service.

4. This type of contract is based on full acceptance of its terms by the consumer or the party that needs the goods or services supplied to access it.

In the domestic law of many countries, there are rules that allow courts to intervene in favor of the weaker party and modify the terms and conditions of the adhesion contracts. These supportive provisions do not in principle include standard contracts, which are set for commercial and trade purposes. Because standard contracts are fundamentally different from adhesion contracts in terms of basis, status, and type of writing (Shiravi, 1999).

However, the terms "imposed terms", also referred to as "unfair terms", are not clearly defined in our law, but the conditions for the implementation of such terms can be found in the text of Directive 13/93 of April 5, 1993, adopted by the Council of the European Union on the imposed conditions on banning consumption contracts. Article 3 of this directive, now circulated throughout the European Union, stipulates that "a condition of a contract that has not been negotiated separately is imposed when, in spite of the necessity of good faith, the consumer is faced to a significant inequality between rights and duties of the parties arising from the contract."

Chapter two: Characteristics and implications of abusive clauses

First topic: What is an abusive clause?

The "Directive of the Council of The European Communities" (Karimi, 2015), dated April 5, 1993, obliges all Member States to adopt measures and pass laws with the aim of establishment of this directive until December 31, 1994. This Directive consists of 11 articles and a long preamble that its contents can be considered in the interpretation of the content articles. In the United Kingdom, in accordance with the above-mentioned Directive "the Unfair Terms in Consumer Contracts Regulations 1994" was ratified and came into force on 1 January 1995. In order to comply more closely with the European Community Directive, it was revised in 1999 and was enacted as "Unfair Terms in Consumer Contracts 1999" and came into force on October 1999. Considering that, in accordance with Article 8 of the Directive, the Member States may impose more stringent provisions on unfair terms, the adoption of the "Unfair Terms in Consumer Contracts Regulations" does not denounce the "*Unfair Terms* in *Consumer Contracts Regulations1997*", which stipulates more stringent provisions on limited terms (Shiravi, 2002).

"The Unfair terms in consumer contracts regulations" refers solely to contracts that the natural persons who are consumer conclude with the natural or legal persons who are seller or supplier and will not be subject to commercial contracts, even if the parties to the contracts are retailer businesses or small companies. These "regulations" merely apply to the terms and conditions that are in standard contracts and not negotiated by the parties. Of course, the burden of proving that such terms have been negotiated lies with the seller and supplier. Therefore, if the contract or some of its terms are already set and the consumer

does not play a role in modifying it, it is considered that this condition is not specifically negotiated and subject to the "regulations" (Ibid).

Although the "regulations" appear to apply to all contractual conditions, the essential terms of the contract, which include those expressing the scope of the contract or seeking to determine the price in proportion to the amount, type and quality of the goods and services provided, are not subject to evaluation and the examination of fairness, provided that such terms are unambiguous and clearly defined. However, these basic conditions are also taken into account to determine whether other contractual terms are fair.

In short, those terms are considered unfair which do not respect the good faith in transactions and create a sharp inequality between the parties' obligations and rights that would be harmful to the consumer. In determining whether good faith is being observed, it is necessary to consider three things: the bargaining power of the parties at the time of the conclusion of the contract, whether the consumer had a particular motive in concluding the contract with such unfair terms; and whether goods and services subject to the contract are provided as a specific consumer order (Ibid).

In France, for the first time, the law of 10 January 1978, which was passed to protect consumers, defined the abusive clauses. Article 35 of this law stipulated: "In the contracts concluded between specialists and non-specialists or consumers, the following clauses are imposed on the non-professionals or consumers by exploiting the

economic power of the opposing party and, as a result, granting excessive interest to the abusive user; it may be prohibited, restricted or under special order by the Council Directive (based on the opinion of the commission established in accordance with Article 36). Such terms and conditions are as follows: the terms of the contract with respect to its duration, characteristics or the price of the goods or services to be supplied, the terms of subject of contract and its delivery, the responsibility for the risks, the scope of liability and guarantee, the terms of the contract enforcement, termination, or extension". The above text, now referred to as Article L.132-1 in the Consumers Act, was amended to harmonize the French law with the EU Directive of April 5, 1993 without changing its main lines by the law of 1 February 1995, and the criterion of abuse are raised in another way (Simler, 1998).

"In the contracts concluded between experts and non-experts or consumers, the following conditions are considered imposed (and abusive): conditions that are set to create a significant imbalance between the rights and obligations of the parties to the contract and to the detriment of the non-expert or the consumer. The State Council directives (which are based on the opinion of the Commission established in accordance with Article L.132-2) may list a variety of conditions that are considered to be imposed clauses (in the meaning of clause 1)."

The third clause of article L.132-1 of the Consumers Act provides that: "The appendix attached to the present Act includes a list

of allegorical and not ancillary of the terms that may be taken as abusive terms, provided that the terms and conditions are in accordance with the terms listed in clause 1. In the assumption of a dispute about a contract containing such terms, the claimant will not be exempted from providing the reason for imposing this condition." The attached Appendix contains 17 types of terms that can be voided by the legislator, provided that the terms result in a "material imbalance" referred to in paragraph 1 of this article. Of course, these 17 terms are not imposed, and they, as the case determines, only can be considered to be among the requirements imposed, so the legislator has simply called into question these terms. It cannot even be said that these conditions are considered among the imposed clauses, since the legal text explicitly places the consumer in the position of proving the abusiveness of the terms (Ibid).

But the main question is whether the parties to the contract must be an expert side and a non-expert /consumer side, in order to be considered an abusive condition?

In Iran's law, there is no definition of abusive clauses in the constitutional laws and judicial procedures and even in the books of the law scholars of the country. However, it can be inferred from the foundations of European law that the conditions imposed may be fulfilled in consumer-expert contracts, and in contracts that exploit the economic and social status of the other party. The basis for the abandonment of such conditions can be deduced from the "The No-

Harm Principle" and "the theory of abuse of the right" reflected in Article 40 of the Iranian Constitution.

It should be noted that considering the legal and jurisprudential principles, some of the conditions can be considered as examples, including the lack of liability and the limitation of the responsibility between the expert and the consumer, the condition of a heavy or negligible obligation, etc., which we shall examine. In Civil Law in Articles 232 and 233, the null and void provisions are listed, but in none of these articles, the imposed clauses or its indications are not stated.

Second topic: Imposed Conditions Indications

First speech: Liquidate damages

First Paragraph: The nature of the liquidate damages as an abusive clause

Article 230 of the Civil Code stipulates that: "If in a contract the amount of compensation to be in the event of its non-fulfillment is laid down, the judge cannot condemn the offender to pay more or less than the sum fixed".

Some lawyers define the **liquidate damages** as the compensation of the contract in case of damage caused by the failure to implement the contract or the delay in its implementation, which is

determined before the damage by agreement (whether under the same contract, or under an independent agreement, but it must precede the breach of obligation). The nature of the **liquidate damages** is compensation, that is previously agreed upon by the parties in the contract. Therefore, the sum of the compensation and performing the obligation is prohibited and a well-known distortion. However, if the damage is for delaying the obligation, it must be done in addition to paying the compensation for the damage. The **liquidate damages** are also called the penal clause, but this clause is not always during the contract. Contemporary jurists call it a "random change", which is an inadequate interpretation (Jafari Langaroudi, 2009).

Others call these clauses as penalty clauses, according to which the two sides predetermine the amount of damage that must be paid in the event that the contract is not executed on time. The most important benefit of these clauses is the exemption of the damaged party from the proof of damage entry and its cost; since it is sufficient to prove that the obligation has not been fulfilled to be compensated, while, in accordance with the general rules of civil liability (tort), the claimant of damage must prove the damage and the causal relation between the non-fulfillment of the obligation and the damage. In order to achieve this benefit, Article 230 of the Civil Code prohibits the Chief Justice from modifying the penal clause to prevent rising the preliminary terms of the claim for compensation (Katouzian, 2007).

The term *penalty* for these clauses in European law is a Roman emblem. In the early Roman times, this condition was in fact a penalty,

and without any relation to the amount of damage, it was added to, and there was no need to establish a proportion and balance between the damages and the amount of compensation. Whoever that did not pay off their debt was looked at as a perpetrator by the Romans, and they were punished by severe penalties. While, in current law, it is more or less a tool for compensation of contract, and even in some countries, such as Switzerland, Germany and France, the judge can modify it if it does not suit the amount of damages. In the Iranian law, the term "penalty clause" is not used and the amount which is designated as a guarantee of performance of the contract is called "liquidate damages". Determining the liquidate damages is specific to the contracts and refers to the amount that should be paid in the event of non-execution or delay in the execution of the contract by the guilty party (Ibid).

In French civil law, the penal clause is predicted in Articles 1226 to 1233, entitled "penalty clauses" is foreseen, and the fulfillment, its validity, and its effects are expressed in these articles. Article 1152 of this law comes under the chapter on damages caused by the non-fulfillment of obligations and states: "Where an agreement provides that he who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser sum." The second part of the article 1152 added on 9 July 1975 states: "Nevertheless, the judge may even of his own motion moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low. Any stipulation to the contrary shall be deemed unwritten."

This means that if a sum in a contract is defined as a penalty condition and is in excess of the original contract, it will be reduced in the interest of the committed and if it is low and worthless, it will be increased in favor of the obligee. However, in French law, the judge is prohibited from modifying the original contract and the law and judicial procedure also did not allow the judge to interfere in the contract, except in exceptional cases. It is noteworthy that, in French law, in the case of contracts that one party is the government or a municipal organization, the judge has been given permission to modify the contract (Hossein, 1994).

The difference between materials 1152 and 1226 is that in Article 1152, the subject matter is a certain amount of cash, while the subject matter of Article 1226 is anything "n'importe quoi", whether it be a property or an act. The French judicial procedure has considered all these conditions (Article 1152 and 1226 onwards) to be penal clauses, but some legal authors distinguish between the clause at the Article 1226 of Civil Code and the Article 1152 of this law (Hossein, 1999).

Regarding whether the injured party can ask for the implementation of obligation instead of the penalty? According to Article 1228 of the French Civil Code, the answer to this question is positive. The French legislator has authorized the creditor in this article to request the enforcement of the principle in place of the request for a penalty contained in the contract. Article 230 of the Civil Code of Iran also does not provide that the obligated party cannot ask for the

fulfillment of the main obligation or necessarily demand the damage caused by non-performance of the agreement. This article implies that if the creditor demands compensation instead of performing the agreement, the court cannot condemn the offender to pay less than or more than what is specified in the contract (Ibid).

Some also believe that what is important in recognizing the legal effect of the liquidate damage is the common intention of the parties. The court should discover this intention and decide on it. If the parties each were intended to be exempted from the obligation by paying the penalty, the court should condemn the offender only to the payment of the penalty; and if the intention is to determine the penalty to consolidate the agreement, the penalty clause is considered as a kind of threat. Because the claimant has the option between the claim for compensation and the performing the commitment, whichever is requested by him, the court must condemn the offender.

As the General Board of the Legal Divisions of the Supreme Court, in the insistence of No. 11 at 3/3/52 row 26, following the joint intention of the parties, in spite of the determination of the liquidate damages in the contract, authorized the obligation of performing the agreement, and annulled the order of provincial court on the obligation of paying the liquidate damage as the guarantee of non-performance of the agreement (Katouzian, 2015).

But the question is how can liquidate damage be considered as an abusive clause?

If the liquidate damage enter into a contract as a too heavy liability on the obliged, or in a very minor and the interest of the obliged and at the expense of the obligee, it can be considered an abusive clause. For example, if a dairy company makes a contract with a livestock producer holding a few livestock breeding, by which the contractor must pay 20 million dollars as a penalty if it delays in the delivery of the contract. Under Article 230 of the Civil Code, this clause is binding and correct, but is this condition a fair term and in accordance with the reality and equality of the parties to the contract? Obviously, the answer to this question is negative, and this is a very heavy and unfair condition that the expert person has used his superior status and has included such a condition in the contract. But is there a possibility to modify the liquidate damage?

Liquidate damages are often observed in most contracts between banks and customers, especially in loan and facility contracts, because the terms of delay and damage are not negotiated independently with the customer and the customer has not a bargaining power over it; because these terms are sent in print from central bank management to the branches and the customer has no choice but to accept the terms and conditions for receiving a loan.

Paragraph 2: Modifying the liquidate damage

The last part of Article 230 of the Civil Code, which provides: "... the judge cannot condemn him to more or less than what is required" explicitly prohibits the judge from modifying the liquidate

damage. However, the justification can be that Article 230 stipulates that "... in the case of violation, the violator shall pay a sum as damages...", which states that the violation of the agreement, delay or non-performance must have had a damage, and by default, non-performance of the agreement does not obligate giving liquidate damage to the other party. Also, although in liability for the contract, there is not a condition for the failure to fulfill the agreement to claim damages, but according to the provisions of Articles 227 and 229 of the Civil Code, if the obligee can prove the failure to perform the agreement was due to an accident that was outside of his control, he will not be forced to pay the damages. This is confirmed by the following points.

Some lawyers, believe that perhaps this part of Article 230 of the Civil Code has a spelling mistake, and the word "*cannot*" must be "can", but examining the civil law shows that it was "cannot" from the very beginning. Moreover, this article is likely to be adapted from Article 1152 of the French Civil Code, which, in accordance with the condition of the time and the failure to approve the subsequent amendment at the time of adaptation, in this article of French civil law, the judge was prohibited from interfering with the amount of the determined penalty (Hossein, 2011).

Despite the prohibition of Article 230 of the Civil Code in many cases, judicial procedures have provided other ways for balancing the liquidate damage. For example, in the following case the lower court ruled that: "In the case of the dispute of Mr (M) and Mr. (A) on behalf

of Ms. (Sh-A) vs. Mr. (M), which subsequently Mr. (M) entered a lawsuit on her behalf, regarding the obligation of drawing up and official instrument of the property No ... located in…… with the price of 22,590,000 Rials and the claim for damages due to non-presence in the notary's office for the transfer of 200,000,000 Rials and the damage occurred as hearing the sale contract in 2006-07-11, citation according to the contents of the plaintiff case of instrument documents is accepted, and the acceptance of defendant's attorney on conclusion of the sale contract and their defenses to justify the failure of their client to appear in the notary office, and the non-eligibility of the claimant to receive compensation based on the articles (230), (228), (227), (19) and (10) of the Civil Code, and (519) and (158) of the Civil Procedure Code, the court orders the defendant to draw up the official instrument for transferring the mentioned building and payment of 200 million Rials for damages to the contractor and payment of 4356820 Rials, as well as the lawyer's fee in accordance with the official tariffs as compensation. This is a contradictory verdict and can be appealed. The Appeals Court rejected the obligation of drawing up an official instrument, since it does not comply with any of the provisions of Article 348 of the Civil Procedure Code. However, in the case of the obligation to pay liquidate damages or the determined penalty, it accepts the appeal and argues: (1) the negotiated property has been delivered to the buyer in accordance with the terms clearly stated in the sale contract even before the due date; (2) in this type of liquidate damages, the sale contract has not been based on this condition and it is not of the pillars that will interfere with the realization of the sale. And (3), with the exception of the testimony of the appealing lawyer

on the written testimony of two persons to the agreement between the parties to draw up the official instrument until the end of the work, obtaining the instrument before the end of the work is not possible, and in the process of proof of the end of the work in building No… this certificate had been issued in …….. By the Municipality District-5, the issuance of which is in the duties and authority of the municipality that the seller has not provided for obtaining it. (4) The appellant had announced his goodwill to draw up the official instrument after the final-construction certificate in the statement no. ... And this is indicative of his commitment to perform the agreement. (5) Drawing up an official instrument is not essential in the implementation of the sale contract, but it is considered a legal procedure that if delayed, no loss essentially occurs to the buyer and, on the other hand, the basic condition of compensation is that there must be a damage in the contract. However, in the content no reason is stated for the damage due to delay; which is basically unlikely. Therefore, in this part of the case the order is null and the appeal court orders to the rejection of the claim on the compensation of the contractual damages (Saberi, 2009).

In the United Kingdom, from a traditional point of view, where a judge sees a clause in a contract stipulates that if one of the parties is bound to pay a certain amount to the opposite party in the event of not performing his obligations, first asks whether the intention of the parties to include the condition had been to determine a penalty for the violator, or the interlocutors have placed the condition as a means of

determining the probable damage of the injured party? The order of the judge to enforce the condition will depend on his judgment.

The courts of Common Law, following the procedure of appeal courts, were required by laws 1696 and 1705 to first consider whether the amount claimed due to damages as a result of non-performance of the agreement has a punitive aspect? In the first case, the court should condemn the pledged party merely to pay the actual damages, in case the damage occurred is proved by the other party. On the contrary, if the court did not see the amount claimed to be punished, it was required to enforce it without having the right to change within the specified amount, or to ask the claimant to prove the actual damage to it. This procedure is currently administered in the Common Law courts.

In France, *Pothier*, the *French* jurist and *writer* on contract law, defined the subject matter of the liquidate damages as compensation for the failure to perform the obligation, so the amount could be changed. The authors of the Civil Code incorporated *Pothier*'s belief in the fact that liquidate damages is a predetermination of damage compensation in Article 1229 of the Act. According to this article: "The liquidate damage is to compensate for the loss and damage that is caused by the non-fulfillment of the main obligation." The concept of this article should, in effect, be that since the parties include a liquidate damage clause in the contract with the intention of being compensated for any likely damage of both. If the amount determined is more than the actual loss, the judge will be able to reduce the amount, because

with the verdict to pay the damages, the defendant's opinion will be provided to compensate for the loss. Although Article 1152 of the French Civil Code accepted the first part of *Pothier*'s view that liquidate damage is compensation, but did not accept the second part of the provision that it is possible to modify the liquidate damage until the adoption of the second part of Article 1152 in 1975 by which balancing the liquidate damage was also accepted by the legislator (Skini, 1994).

Second Speech: The condition of lack or limited liability

First Paragraph: The concept of condition of lack or limited liability as an abusive clause

A contract between the liable party and potentially injured party of the future, by which the liable party is exempted from payment of all or part of the damages, is called "lack or limited liability condition". The lack of liability condition may apply to all damages that are normally incurred on the liable person, or eliminate only a part of the liability and limits it to a specific maximum amount. In some systems, there are differences between the two groups: they allow limited liabilities and prohibit deleterious ones. But both groups must be considered of the same category. The difference is only in intensity and weakness, not in nature (Katouzian, 2007).

The lack or limited liability condition can be considered as an imposed condition where a stronger party by abusing its superior position imposes the condition on the weaker side. The following are

examples that are not imposed terms in themselves, but if the stronger and more expert party imposes it on the other party, they are considered to be abusive clauses.

Second paragraph: Examination of the Examples of lack or limited liability condition

A. Damage to the body and personality

In the case that the subject of the condition is lack of liability for the losses incurred by the person, whether his physical health damage or the freedom and rights of the personality, there is disagreement over the influence of that, but it seems to be contrary to public order in such a condition (Ibid). There is no doubt that nobody can freely go under such a condition. Such clauses are usually concluded in medical or sports contracts, in which one of the parties is definitely on the superior and expert side. For example, in the contract of a surgeon with a patient, it is stipulated that the surgeon is not responsible, even in the absence of medical regulations, or in the contract of a football club with a football player the club is not responsible if the player is hurt during the training.

B. Intentional fault, and considered as deliberate

In cases where a person deliberately injures or is aware of doing the acts that are considered deliberate in the customary, the

condition of lack of limited liability cannot waiver the obligation to pay compensation (Ibid).

C. The contract between the supplier and the sales intermediary dealer with the consumer:

Article 7 of the Law on the Protection of the Rights of Automobile Consumers, adopted in 1966, provides: "Any direct or indirect agreement between the supplier and the intermediary of the sale with the consumer, in accordance with which all or part of the obligations offered by the supplier or the warranty is void or be conferred to the sales agent or any other title, is void and unwritten for the consumer." It notes "the conclusion of any contract which does not observe the rights and obligations of the parties to the contract and the persons covered by this law shall be unlawful and void according to Article 10 of the Civil Code and the like." Since Article 10 of the Civil Code considers those private contracts enforceable which are not explicitly prohibited by law; and in the Law on the Protection of the Rights of Consumers of Automobiles, a contract that provides for the lack or limited liability between the sales agent and the supplier of the vehicle with the consumer, is against the Law of Protection of Automobile Consumers and void.

It is worth noting that the Consumer Protection Act of 2009, which is a general law on consumer rights, has not made any

mention of the annulment of the condition of lack or limited liability toward consumers.

Third Speech: Abusive clauses in electronic contracts

Article 46 of the Electronic Commerce Law stipulates that "the use of contractual conditions that are in contradiction with the regulations of this section and also the application of unfair conditions that the disadvantage consumer shall not be effective." In the definition of unfair terms, it refers to a condition that is inconsistent with good faith in the transactions and causes inequality between the rights and obligations of the parties to the disadvantage of the consumer and had not been directly in the negotiation of the parties (Taghizadeh and Ahmadi, 2015).

Considering the meaning of the term "is not effective" in the article, it should be stated that "lack of effectiveness" means "relative void". The effect of this relative void is to protect the electronic consumer and can be resorted to solely by him. The provider has no right to terminate the original agreement due to a void condition. Because Article 240 of the Iranian Civil Code provides: " when a contract has been made it is found that the carrying out of its condition is impossible or if it becomes known that the carrying out was impossible when the contract was made, the person in whose favor the contract was drawn up will have the option of canceling the contract, unless the condition becomes impossible of fulfillment owing to some act of the person in whose favor the contract was drawn up" (Ibid).

CONCLUSION

The abusive clause refers to a condition that has not been independently negotiated and one of the parties imposes the other party by abusing his economic, social or specialty status. But the fact is that in Iranian law the abuse of an economic situation which is carried out in the form of an "extremely high" or "insignificant" liquidate damage is not recognized as an abusive clause and is considered to be in accordance with article 230 of the Civil Code, unless the condition has not been independently negotiated, which is common in banking contracts in Iran. Obviously, the benefit and loss, and bargaining are customary in the contract, and considering that a condition can be to the advantage or disadvantage of any party does not make it abusive and imposed; therefore, imposed condition is a condition that does not have such a characteristic. Although Article 230 of the Civil Code of Iran was adapted from Article 1152 of the Civil Code of France and this article was amended in 1975 and allowed the judge to modify the imposed condition, the law of the Civil Code of Iran remained unchanged.

Basically, in Iranian law, the lack or limited liability condition is considered a correct condition, but if this condition is considered intentional or aimed at the inferior character, and also in the contracts of automobile supplier and consumer, it is considered void. Also, the imposed clauses by the Electronic Commerce Law of I.R.I are ineffective and the buyer can apply for it to be void. It seems that wherever a stronger party abuse his status to impose such a condition

to a weaker party, it is possible to regard such conditions as void and ineffective through "the Principle of No-Harm" and "the principle of Abuse of Right".

REFERENCES

AMID, H. 2009. **Amid Persian Dictionary.** Farhang-Nama Publishing House. First Edition. Tehran. Iran.

ADEL, M. 2004. **Agreement on Compensation in Contracts.** The Journal of Law and Political Sciences Faculty. Vol. 53: 112. Iran.

JAFARILANGAROUDI, M. 2009. **Terminology of Law.** Ganj Danesh Library. Twenty-Second Edition. Tehran. Iran.

HOSSEINABDI, A. 2011. **Comparative Civil Liability.** Ph.D. at Private Law. University of Mofid. First semester. Iran.

HOSSEINABDI, A. 1994. **Equilibrium in Contract.** Journal of Legal Research. pp. 19-20. Iran.

HOSSEINABDI, A. 1999. **Investigating the Contract liquidate damage.** Research Journal of Razavi University of Islamic Sciences. Iran.

KARIMI, A. & MORADI, Y. 2015. **Abuse of Clauses of Civil Compensation Contract in Islamic Banking: A Comparative Study with the Directives of the European Union.** Journal of Financial Studies and Islamic Banking. Vol. 1. N^{o} 1. Iran.

KATOUZIAN, N. 2009. **General Rules of Contracts.** Sahmai-Enteshar Publishing Co. Vol. 1. Eighth Edition. Tehran. Iran.

KATOUZIAN, N. 2015**. Nominate Contracts.** Sahmai-Enteshar Publishing Co. Vol 1.Thirteenth Edition. Iran.

KATOUZIAN, N. 2007. **Out of Contract Obligations: Safeguards.** Tehran University Press. Vol. 1. Eighth Edition. Tehran. Iran.

SABERI, A. 2009. **Equality, Justice and Fairness (Liquidate damage in Judicial Procedure).** Monthly Hearings. Vol. 13. N^{o} 74. Iran.

SHIRAVI, A. 1999. **The Role of Standard Contracts in International Trade and Comparison with Adhesion Contracts in Internal Law.** Journal of Qom Higher Education Institute. Vol.1. N° 2. Iran.

SHIRAVI, A. 2002. **The theory of Unfair and anti-Conscience of Terms of Contracts in Common Law with Emphasis on the Law of England.** Journal of Qom Higher Education Institute. Vol. 4. N° 14. Iran.

SIMLER, P. 1998. **French law remedies against Imposed clauses in contracts.** Journal of Legal Research and Analysis. Translation of Abbas Ghasemi Hamed. Vol. 23. UK.

SKINI, R. 1994. **Liquidate damage in International Business Contracts.** Journal of law and society. Vol. 9. UK.

TAGHIZADEH, E., & AHMADI, A. 2015. **The Situation of Unfair Terms in Iran's Law by Looking at Article 46 of the Electronic Commerce Law of I.R.I.** Journal of Private Law Research. Vol. 3. N° 10. Iran.

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