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### Liability of the Maritime Carrier towards Passengers

Belal A. Badawy

Faculty of Law Ain shams University, belalbadawy33@yahoo.com

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## Liability of the Maritime Carrier towards Passengers

### Cover Page Footnote

Dr. Belal A. Badawy Associate Professor Of Commercial & Maritime Law Faculty of Law Ain shams University belalbadawy33@yahoo.com

## **Liability of the Maritime Carrier of Passengers (Passengers Carrier)**

*Study in light of the provisions of the Egyptian Maritime Trade  
Law and Athens Convention relating to the Carriage of  
Passengers and their Luggage by Sea of 1974*

**Dr. Belal A. Badawy**

*Associate Professor Of Commercial &  
Maritime Law Faculty of Law  
Ain shams University*

**Transport is undoubtedly of great importance in passenger's lives. Not only because it is a legal phenomenon, but also a socio-economic phenomenon across all societies.**

**This search deals with this topic; it is divided into two sections, the first deals with Cases of the Passengers Carrier's Liability and its Basis, while the second deals with Area of Responsibility of the Maritime Carrier of Passengers under both of the Egyptian Law and Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.**

### Introduction

#### Research Importance:

Transport is undoubtedly of great importance in passengers's lives. Not only because it is a legal phenomenon, but also a socio-economic phenomenon across all societies. With this in mind, legal studies pertaining to contract of carriage have received considerable attention, irrespective of the mode of transport, i.e. land, air or water transport. However, and despite such importance, some topics were not given due attention in jurisprudence, and hence remained under wraps in spite of their importance. The subject of this study entitled "Liability of the Maritime Carrier of Passengers" is probably the most important of them all.

Maritime jurisprudence has played a tremendous role in examining the liability of the carrier of goods. It has, however, overlooked the liability of passengers carrier. Thus, we took it upon ourselves to embark on a thorough examination of the passengers carrier's liability, as such study is regarded as greatly important in Egypt for two reasons, namely:

Reason 1: maritime transport of passengers in Egypt gained a great deal of importance, especially to the GCC countries. A great number of Egyptian workers in GCC countries used to have recourse to mode type of transport from and to Egypt, due to low-cost water transport compared to air transport. The

large number of Hajj and Umrah sea travelers to the Saudi Arabia's Holy Land has further increased the importance of this mode of transport.

Reason 2: the increased number of vessel incidents during the carriage of passengers. In fact, Egypt had dealt with several maritime incidents, which had serious social and legal implications. And with each incident, talks would be initiated regarding the liability of maritime carrier of passengers.

Legislative Regulation of the Study Subject- Matter:

Maritime carriage of passengers may be internal or international. Therefore, the legislative regulation sources in this respect are divided into two categories: internal and international sources.

First: Internal Sources

Contrary to the French codification<sup>(1)</sup>, the cancelled maritime codification in Egypt- has regulated the contract of carriage in Articles 132- 148 under the title "Passengers". It goes without saying the new Maritime Trade Law No. 8 of 1990 would give more consideration to this matter. It had thus regulated the contract of carriage of passengers by sea in Articles 248 to 272 as well as the sea tourist trips in Articles 273-278.

It is noteworthy that the new Egyptian Commercial Law No. 17 of 1999 has established the regulation for the Contract of Carriage. Such regulation, however, applies to land, river, air and other modes of transport, save maritime transport. Article 209/1 read as follows: "With the exception of maritime transport, the provisions Prescribed in this chapter shall apply to all types of transport whatever the quality of the carrier, unless otherwise prescribed in the law<sup>(2)</sup>".

**Second: International Sources**

Maritime carriage of passengers is often performed internationally. The obvious question then arises as to the legal system governing this mode of transport.

In fact, there are international treaties that aim at eliminating the conflict of law issue. The main convention that governed maritime carriage of passengers was the Brussels Convention, whose provisions were drafted after the Athens Convention relating to the carriage of passengers and their luggage by sea entered into force, and which we handle in this research.

The Athens Convention was executed on 13/12/1974 and entered into force on 28/04/1987. The Convention was amended according to the provisions of a

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(1) The French Commercial codification had no special regulations concerning the maritime transport for passengers, and the French legislator did not mention this problem until 1966, when the Law No. 240 of 1966 was issued on June 18, 1966 and the decree No. 1078 was issued on December 31, 1966. This Law has regulated the contract of passengers maritime carriage and the touristic maritime trips.

(2) For explanation, see Dr. Ali Baroudy and Dr. Mohamed Fareed Al Areeni, Commercial Law, Commercial Contracts and Banking Transactions According to the Regulations of the New Commercial Law No. 17 of 1999, Dar El Gamaa Al Gadida, 2011, p. 199.

Protocol that was executed in London on 19/11/1976 and entered into force internationally on 10/4/1989. Also, a protocol to amend the said Convention was executed in London on 29/3/1990 but such protocol did not yet come into force internationally. In 2002, another protocol was also concluded and did not enter into force. On 22/8/1991, the Presidential Resolution No. 344 of 1991 approving the Athens Convention was issued.

While Egypt did not ratify the Protocol of 1976 on amending the Athens Convention until 1991, it is however deemed as a Party to the Athens Convention amended by the Protocol of 1976, pursuant to the provisions of Article (26/3) of the said Convention that reads as follows: “. Any State becoming a Party to this Convention after the entry into force of an amendment adopted by a conference convened in accordance with this Article shall be bound by the Convention as amended”.

The Athens Convention of 1974 addresses the liability of the maritime carrier for the death or injury of the passengers and the loss of and damage to luggage. The Convention, however, does not provide for the carrier’s liability for the delay of arrival of passengers or delivery of luggage.

The Athens Convention has established its scope of application and hence both the transport excluded from the Convention and the transport governed by the Convention. With respect to the excluded mode of transport, the Convention does not apply to free-of-charge carriage or with respect to the clandestine passenger where no contract of carriage exists. Clandestine passengers are subject to another provision regulated by the International Agreement on clandestine passengers.

With regard to the transport governed by the Convention, it was established under Article 2, Parg, 1, that the Convention shall apply to any international carriage if:

- (a) The ship is flying the flag of or is registered in a State Party to this Convention, or
- (b) The contract of carriage has been made in a State Party to this Convention, or
- (c) The place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

Paragraph 2 of the same Article reads as follows:

“Notwithstanding paragraph 1 of this Article, this Convention shall not apply when the carriage is subject, under any other international convention concerning the carriage of passengers or luggage by another mode of transport, to a civil liability regime under the provisions of such convention, in so far as those provisions have mandatory application to carriage by sea”.

*[Liability of the Maritime Carrier of Passengers]*

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With respect to the Convention and pursuant to its provisions, the Convention is not set to modify the rights and duties of the carrier, the actual carrier or their servants and agents provided for in international conventions relating to the limitation of liability of owners of seagoing ships, in accordance with Article (19) of the Convention.

.A performing carrier is defined as any person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage;

The convention relating to the limitation of liability of owners of sea-going ships is the London Convention of 1976 on Limitation of Liability for Maritime Claims.

Pursuant to the foregoing, the maritime carrier, where such carrier is the ship owner, may chose, with respect to limitation of liability, between two conventions: the Athens Convention of 1975 or the London Convention of 1976.

All this runs counter to the Maritime Trade Law that established under Articles 87-91 the provisions of the ship owner's liability for the physical and material damage and the limits of this liability. Also, in the chapter relating to the contract of carriage (carriage of goods or passengers) under the general provisions, Article 198 stipulated the following: "Only the provisions of this Chapter shall apply to the contract of carriage, whether the carrier is the owner, operator, or charterer of the ship". In other words, the maritime carrier where such carrier is the ship owner, shall not be subject to the provisions of the liability and its limits set forth in Articles 78 to 91 of the Maritime Trade Law.

Second: pursuant to the provisions of Article 20, no liability shall arise under the Convention for damage caused by a nuclear incident:

(a) If the operator of a nuclear installation is liable for such damage under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by its Additional Protocol of 28 January 1964, or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) If the operator of a nuclear installation is liable for such damage by virtue of a national law governing the liability for such damage, provided that such law is in all respects as favorable to persons who may suffer damage as either the Paris or the Vienna Conventions.

Third: Pursuant to Article (21) of the Convention, it shall apply to commercial carriage undertaken by States or Public Authorities under contracts of carriage within the meaning of Article 1.

Fourth: pursuant to the provisions of paragraph 1 of Article (22) of the Convention, any State Party may at the time of signing, ratifying, accepting, approving or acceding to this Convention, declare in writing that it will not give effect to this Convention when the passenger and the carrier are subjects or nationals of that Party. Also, subject to the provisions of paragraph 2 of the

same Article, any declaration made under paragraph 1 of this Article may be withdrawn at any time by a notification in writing to the Secretary-General of the Organization.

When it comes to a matter that was not covered by the Athens Convention of 1974, or where the said Convention does not apply, the provisions of the Article pertaining to carriage of passengers under the Maritime Trade Law shall apply.

### **Research Proposal**

The contract of carriage, however executed, binds the carrier to ensure the safety of the passengers. Views on this issue varied depending on whether the carriage is performed by land, sea or air. Views also varied depending on whether such carriage, in its different modes was internal or international<sup>(3)</sup>.

Therefore, we conducted our current study on the legal system of the passengers carrier's liability and the extent of protection provided to passengers.

In this research, our study is divided into Three chapters, as follows:

Chapter 1: Cases of the Passengers Carrier's Liability and its Basis

Chapter 2: The Scope of the Passengers Carrier's Liability

Chapter 3: Liability claim procedural System for the maritime carrier of passengers

These two chapters are preceded by a preface, where we address the conditions necessary for the implementation of the provisions of the maritime carrier's liability.

### **Preface**

For the provisions of the passengers carrier's liability to apply, material conditions must be available. Firstly, the matter must relate to a contract of passengers carriage and the carriage must be against consideration.

That is what we will be discussing in this preface.

### **First: Existence of a Contract of Carriage**

Article 196 of the Maritime Trade Law stipulates that "the contract of maritime carriage is a contract whereby the carrier undertakes to transport the goods or passengers by sea against remuneration"

It is obvious that this definition encompasses the transport of goods and passengers by sea. Hence, the contract of passengers carriage can be defined as "a contract whereby the carrier undertakes to transport the passenger against the payment of maritime transport costs from a port to another or in a round trip in the same port, provided, however, that the passenger must be a person other

(3) Dr. Ibrahim Dsouki Abu El Layl, *The Liability of the Passengers Carrier in the Internal Law and International Law, a Study for the compliance to the safety requirements during the land, aerial and maritime transport*, Dar Al Nahda Al Arabeya, p. 6.

than the captain, seamen, and carrier dependents, whether the carriage took place on a vessel designed specifically to transport passengers or goods<sup>(4)</sup>.

The contract of passengers carriage is a consensual contract that shall be deemed to have been concluded by mutual consent between the two parties thereto. The ticket granted to the passenger is only a means to confirm the contract and not a condition for its execution.

Carriage shall take place aboard a ship, whether such ship is designed for the carriage of passengers' or not (e.g. designed for carriage of goods).

Carriage of passengers by sea, for example from one port to another, may take place in the form of a round trip (round cruise) from one port and back to the same port.

The contract of passengers carriage has many characteristics that can be summed up as follows:

1- **“Consensual Contract”**: the contract of passengers carriage is deemed to be concluded once a mutual consent has been reached between the parties thereto. The ticket granted to the passenger is only a means to confirm the contract and not a condition for its execution. The person is not obliged to sit in the specific place onboard, as this is a condition for the compliance of the carrier with the safety policy and not a condition of the execution of the contract.

2- **“Commercial Contract”**: Article 6 of the New Trade Law No. 17 of 1999 established that the contract of maritime carriage is of a commercial nature. It is then obvious that the carrier shall acquire commercial capacity, provided that the carrier shall be expert at performing maritime carriage based on a material regulation<sup>(5)</sup>, and provided also that the carrier shall not be a volunteer otherwise carriage shall be deemed to be a civil activity<sup>(6)</sup>.

With respect to passengers, the contract may be of a civil nature if travel is a pleasure trip or for example for therapeutic, Hajj or Umrah purposes. The contract is, however, deemed as commercial if carriage is performed for the purpose of performing commercial transactions.

If the contract shall be deemed civil with respect to the passenger, the contract of carriage in this case shall be deemed a mixed contract governed by the legal system of mixed business.

3- **“Adhesion Contract”**: adhesion contracts are the contracts in which one of the parties is in superior position as a result of legal or actual monopoly of commodities or services, which enables such party to act independently by establishing typical contract conditions. The other party shall either accept or reject such conditions without discussion.

Upon carriage of passengers under adhesion contracts, the carrier shall be

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(4) Dr. Mahmood Sameer Al Sherkwawi, *Maritime Law*, Dar Al Nahda Al Arabeya, 1993, p. 473.

(5) Dr. Mohamed Fared Al Areeni, *Aerial Law* Dar Al Gamaa Al Gadida, p. 179.

(6) Dr. Mohamed Kamal Hamdy, *Maritime Law*, Monshat Al Maaref, 1995 p. 729.



solely entitled to establish the contract conditions, which shall be printed on the ticket. As long as the contract of passengers carriage is an adhesion contract, it will be subject to the protection decided in favor of the adherent whether such adherent was the debtor or creditor, in contradiction to the general rules that establish that doubt shall be interpreted in favor of the debtor. Instead, we will find that internal and international legislations interfered- as we will see later- to protect the adherent party in case of exemption from liability or reduction of maximum compensation<sup>(7)</sup>.

4- **“Binding Contract”**: the carrier shall undertake to perform the agreed upon carriage and ensure the safety of passengers, while the passenger shall be liable for paying the transportation costs and for abiding by the carrier’s instructions<sup>(8)</sup>.

5- **“Personal Contract”**: a passenger may not transfer the ticket to third parties, unless after having first obtained the carrier’s approval, because the passenger’s name is among the data included in the ticket. Subject to Article 248/2 of the maritime trade law, however, any error in the passenger’s person shall not result in the carrier acquiring the right to cancel the contract. Such right shall be only granted in case of a material error where the carrier shall be prohibited from executing the contract (Article 121/ civil). The passenger’s person is unquestionably never the main reason for contracting<sup>(9)</sup>.

6- **“Special Contract”**: a special contract is not a form of administrative contracts, even if the state itself performs the carriage. For a contract to be administrative one of the parties thereto shall be a moral person from the public law passengers and above all the contract shall contain conditions that are unconventional in private law contracts<sup>(10)</sup>.

### **Second: carriage must relate to passengers**

For the legal system governing the passengers carrier’s liability to apply, carriage must relate to passengers. This condition gives rise to two issues<sup>(11)</sup>: living animals and dead bodies.

With respect to living animals, they are regarded as similar to goods, as they can be handled and are subject to sale and purchase rules. This confirms that

(7) Dr. Abdul Monem Farag Alsada, Adhesion Contracts, Doctorate Thesis, 1948. Dr. Abdul Razzak Ahmed Al Sanhoori, Intermediate in the Civil Code explanation, Chapter I, Compliance sources, Dar Ehayaa Al Tourath Al Arabi, Beirut, p.234, Dr. Mustafa Al Gamal Adhesion Contracts in the French Jurisdiction, p. 100.

(8) Dr. Abdul Razzak Al Sanhoori, The Effects of the Contract, Intermediate in the Civil Code explanation, Volume I, Copy edited by Mustafa al Faqi, Abdul Baset Jumayei, Dal Al Nahda Al Arabeya, p. 278.

(9) Kamal Hamdy, Maritime Law, p. 279, Al Sanhoor, Intermediate, Volume I, p. 280.

(10) Dr. Suleiman Al Tamawi, General Principles of the Management Contracts, Dal El Fekr Al Arabi, p. 543, Dr. Maged Al Helou, Management Contracts, Dar Al Gamaa Al Gadida, p. 233.

(11) For the opposite point of view, Dr. Mohamed Fareed Al Areeni, Aerial Law, ibidem, p. 78.

*[Liability of the Maritime Carrier of Passengers]*

national and international legislations have established provisions pertaining to carriage of living animals similar to those of carriage of goods, while taking into account the particulars of this mode of transport.

With respect to dead bodies, controversy arose over whether dead bodies are considered goods or passengers. Jurisprudential and judicial views in this regard were spitted into two directions. Some believe dead bodies shall be regarded as similar to goods, based on the fact that the cost of transportation of dead bodies shall be estimated on the basis of weight and size, i.e. the same method whereby the cost of transportation of goods is estimated. Therefore, dead bodies shall be regarded as similar to goods. US judicial authorities head in this direction<sup>(12)</sup>.

While others believe the general system rules and moral values prevent dead bodies from being regarded as similar to goods, French judicial authorities move in this direction<sup>(13)</sup>.

For our part, we advocate the second opinion, even though we wish the law would establish a decisive and final provision in this regard, which prevents dead bodies from being regarded as goods.

Passengers often carry their luggage aboard the ship, a privilege that might attract the passenger to prefer sea transport over air transport, if the latter has lots of luggage or is transporting a car for instance or any other vehicle. It is obvious then that the maritime carrier shall undertake to carry the passenger's luggage. Some believed<sup>(14)</sup> that there is a contract ancillary to the carriage of luggage, along with the contract of passengers carriage. We believe<sup>(15)</sup>, however, that the carrier is bound by the contract of carriage of passengers to transport the passengers and their luggage without remuneration, within the limits set under the agreement. This was reflected in Article 266 of the Maritime Trade Law, which reads as follows: "the carrier is compelled to carry the passenger's luggage within the limit set forth in the contract".

**Third: carriage must be performed against consideration**

In order to implement the provisions of the passengers carrier's liability, carriage shall be performed against consideration. Free-of-charge carriage is not originally subject to the provisions of this liability<sup>(16)</sup>.

In fact, this condition has become less important practically, after jurisprudential and legislative authorities defined consideration as "each cash or

(12) U. S. Court of appeals. 9th circuit, 17Dec. 1987, 20Avi, 18, 298, Texas Court, Civ. App. 1961, 7Avi. 17, 559 Onyeanusu vs. pan American World Airways in. U. S. Ct. app. 3d. Cire, 1992, 952 f. 2d 788. Dr. Fareed Al Areeni, op cit, p. 80, margin 25.

(13) Trib. *De justice de paix de Paris* (19e. arr.) 31 mars, 1952, R. F. D. A. 1953. 499,

(14) Dr. Mustafa Kamal Taha, Principles of the Maritime Law, p. 677.

(15) Dr. Fayez Naim Radwan, Intermediate in the Maritime Trade Law Explanation, according to Law No. 8 of 1990, Volume III, 1998, p. 420, 421.

(16) Dr. Talba Wahiba Khattab, the Civil Liability of the Passengers Carrier free of Charge, Dar Al Fikr Al Arabi

in-kind benefit or commitment to performing an act the carrier obtains against carriage”.

Consideration shall not be necessarily in cash. For instance, the carrier’s dependents or servants specific number of trips shall be regarded as a paid carriage, as these benefits are deemed to constitute part of the dependent or servant’s remuneration<sup>(17)</sup>.

Among the examples of free-of-charge carriage not governed by the provisions of the contract of passengers carriage are pleasure trips, when one of the friends are invited to take a cruise tour. In this case, the leader’s liability for the damage incurred by the invited passenger shall not be a contractual liability but rather a tort liability<sup>(18)</sup>.

After we examined in this preliminary section the required conditions for the implementation of the provisions of the passengers carrier’s liability, we jump to the provisions of the passengers carrier’s liability, by dividing our study into two sections, the first being dedicated to the cases of such liability and its basis, and the second to the area of such liability.

### **Chapter I**

#### **Cases of the Passengers Carrier’s Liability and its Basis**

In this Chapter, we address the cases of passengers carrier’s liability in Section 1, while we address the basis of this liability in Section 2.

#### **Section One**

##### **Cases of the Passengers Carrier’s Liability**

In this Section, we address the cases of the passengers carrier’s liability under the Maritime Trade Law, and then under the Athens Convention, each in a separate subject.

#### **Subject One**

##### **Cases of the Passengers Carrier’s Liability under the Maritime Trade Law**

After perusing the texts of the Maritime Trade Law, we come to know that there are multiple cases of liability that we will examine in successive requirements, as follows:

First Requirement: Carrier’s liability for the physical damage to or death of the passenger

Second Requirement: Carrier’s liability for the non-performance of carriage

Third Requirement: Carrier’s liability for delay in performance of carriage

Fourth Requirement: Carrier’s liability for material change in travel conditions

(17) Mohamed Kamal Hamdi, op cit, p. 472.

(18) Dr. Mahmood Mukhtar Barairi, Maritime Trade Law, p. 436.

Fifth Requirement: Carrier's liability for damage to passenger luggage

**First Requirement**

**Carrier's liability for the physical damage to or death of the passenger**

This case is among the most significant cases of carrier's liability under the contract of carriage of passengers by sea. In such case, the carrier shall undertake to transport the passenger safe and sound to the port of arrival. This was reflected in Article 256/ 1 that stipulated the following: the carrier shall be held accountable for any damage caused by the passenger's death or any subsequent physical injuries, should the incident causing such damage occur during the performance of the contract of carriage".

The carrier shall be liable for breaching its commitment to ensuring the safety of the passenger, if the incident that caused such damage (death or injury of passenger) occurred during the performance of the contract of carriage.

Paragraph 2 of Article 256 sets out the period of performance of contract of carriage and reads as follows: "an incident shall be deemed to have occurred during the performance of the contract of carriage if such incident shall take place during travel or embarkation at the departure port or disembarkation at the arrival port or at an intermediate port, or otherwise during the period in which the passenger is in the custody of the carrier prior to embarkation or after disembarkation.

The carrier's obligation to ensure the passenger safety starts at the beginning of the carriage process and ends at the end of such process. While such obligation is set forth in the contract of carriage, but the obligation effective date is the date of beginning of carriage process. Therefore, the obligation to ensure the passenger safety shall not necessarily come into effect from the moment of execution of the contract, because the carriage process itself is often initiated after the execution of the contract of carriage<sup>(19)</sup>.

The carrier's commitment to ensuring the passenger's safety is limited to the period of carriage which includes the period when the passenger is aboard the ship and the embarkation and disembarkation processes, whether at the port of departure or arrival or at an intermediate port.

These processes are critical to the carriage process. Passengers will undoubtedly face real carriage-related risks while on board the ship and even during embarkation and disembarkation.

For the carrier to be able to perform the carriage, the passenger shall be present at the port facilities prior to embarkation and after disembarkation. This presence is critical and required for the performance of the contract of carriage. In such cases, the carrier's commitment to ensuring the passenger's safety shall extend to the period when the latter is in its custody prior to embarkation or after disembarkation, the ship shall be changed at an intermediate port and the carrier shall undertake to

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(19) Dr. Ibrahim Dsouki Abu El Layl, op cit, p. 162.

transport the passengers to another ship. At all events, the passenger shall be in the custody and under the protection of the carrier's dependents.

The carrier's area of responsibility consists in ensuring the passenger safety, as prescribed in the contract of carriage. Such responsibility shall be governed by the general rules of tort liability<sup>(20)</sup>.

Also, Article 257 of the Maritime Trade Law reads as follows: "the carrier shall be exonerated from the liability set out in the previous article, if it is proved that the passenger's death or injury is attributable to an external cause that the carrier has nothing to do with"<sup>(21)</sup>.

The foregoing means that by merely proving that the passenger's injury or death resulted from is the result of an incident that occurred during the performance of the contract of carriage, the passenger or his heirs or dependents prove that the carrier has breached its obligation to ensure the passenger's safety and the carrier is unable then to fulfill its obligations, unless the carrier shall prove the incident's cause and that the carrier and the representative and dependents thereof have nothing to do with such incident<sup>(22)</sup>.

### **Requirement 2**

#### **Carrier's Liability for Non-Performance of Carriage**

The Carrier's commitment to transporting the passenger is a commitment to achieving a result. The Carrier shall be deemed to have committed a breach of obligation, should the Carrier entirely or partly fail to perform the carriage. Where no carriage is performed, the first paragraph of Article 254 of the Maritime Trade Law read as follows: "In case the carriage is not performed for causes not attributable to the Carrier, the Contract of Carriage shall be terminated without compensation. If, however, it has been proved that carriage was not performed for causes attributable to the Carrier, the Carrier shall be liable to pay a compensation equaling half of the cost of carriage.

The text pertaining to compensation payment distinguishes between two assumptions: if the obstacle is attributable to the Carrier, the Carrier shall undertake to pay a compensation equaling half of the cost of carriage; otherwise the Carrier<sup>(23)</sup> shall not be liable for the settlement of any compensation.

The second paragraph of the same Article addresses the cases where carriage is initiated but suspended. It reads as follows: "If travel is suspended for a period exceeding 3 days, the passenger may terminate the Contract and shall be entitled to a suitable compensation when necessary. The Carrier shall be

(20) Dr. Mohamed Kamal Hamdy op cit, p. 656.

(21) Dr. Abdul Razzak Al Sanhoori, Intermediate, Volume I, p. 877, Dr. Ibrahim Dsouki Abu El Layl, op cit, p. 18.

(22) Dr. Mahmood Samir Al Sharkawi op cit, p. 480.

(23) Dr. Mahmood Samir Al Sharkawi, op cit, p. 477.

exempted from its obligation to compensate the passenger if it has been proven that the cause for suspension was not attributable to the Carrier. No Contract may be terminated if the Carrier performed the carriage of the passenger to the agreed upon destination within a reasonable period of time, and aboard a ship of the same level”.

Based on the previous text, it is clear that the passenger shall be entitled to termination of contract and compensation if carriage was initiated and then suspended for a period exceeding three days. However, the carrier shall not be liable for paying any compensation, if it is established that carriage was suspended for a reason not attributable to the carrier, e.g. an order from the local authority after leaving the port. Also, no termination of contract may take place if the carrier was able to transport the passenger to his destination within a reasonable amount of time aboard a ship of the same quality of that of the original ship.

### **Third Requirement Carrier’s Liability for Delay in Performance of Carriage**

The Maritime Trade Law counterbalanced the carrier’s obligation to perform the contract within the agreed upon times over the carrier’s obligation to ensure the passenger’s safety. Thus, the carrier shall be held accountable, in accordance with the provisions set out in Article 262 of the Maritime Trade Law, which stipulates the following: “the carrier shall be held accountable for any damage resulting from the delay in fulfillment of obligations under the contract, unless it is established this delay resulted from an external cause the carrier has nothing to do with”.

Respecting the times of departure and arrival constitutes an inevitable obligation, unless the carrier was able to prove the occurrence of a force majeure or third party’s fault or passenger’s fault. However, no compensation shall be paid unless such delay resulted in damage that the passenger shall prove its occurrence and extent, so that the amount of compensation can be specified. The carrier’s obligation is not reduced to the transportation of passenger safe and sound to the port of arrival but also the carrier shall ensure the passenger’s arrival within the agreed upon time<sup>(24)</sup>.

The ticket contains the details of the port and date of arrival. However, should the contract fail to specify the date of arrival, such date shall be deemed to be the reasonable date that the regular carrier shall respect in similar conditions. The carrier’s liability for the delay implies that carriage was actually performed.

Regular carrier means cautious intermediate carrier. Here, the criterion is a general, objective criterion rather than a personal, subjective criterion, meaning that there is a deviation from the regular carrier’s normal behavior should such

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(24) Dr. Mahmood Mukhtar Barairi, Maritime Trade Law, p. 447.k

carrier find similar conditions and enforce such criterion in order to determine the time at which such carrier was supposed to transport the passenger to his destination which shall not fall under the control of the court of cassation, so long as the ruling was well grounded<sup>(25)</sup>. The legislator did not establish the maximum limit of compensation, which implies that the judge may decide on the amount he may deem sufficient to cover all direct damage to passenger, as a result of the delay<sup>(26)</sup>.

#### **Fourth Requirement**

##### **Carrier's Liability for Material Change in Travel Conditions**

Article 255 of the Maritime Trade Law establishes that “the passenger may request termination of contract along with the required compensation where necessary, should the carrier make a material change. The carrier shall be exonerated from such compensation, if such carrier shall prove that the carrier exerted due diligence to avoid such change”.

Pursuant to this text, if the carrier shall apply any amendment to travel conditions before or during travel, the passenger shall be entitled to terminate the contract where necessary. It is noteworthy that there are several types of amendments to travel conditions, including amendments to times of departure, changes in ship itinerary or intermediate ports of call, etc.

The amendment must be material and must take into account the passenger's conditions, e.g. in case the amendment to ship itinerary requires passage across the enemy's port, such amendment shall be deemed to be material for the Egyptian passenger, but that might not be the case for other passengers.

The condition whereby the carrier established its liability for the damage resulting from amendments to carriage conditions shall be deemed to be valid, so long as no condition exonerates the carrier from its liability.

The Carrier shall not be liable for any compensation, if it is established that the carrier exerted due diligence to avoid such amendment, even if the passenger shall remain entitled to request the termination of the contract of carriage<sup>(27)</sup>.

#### **Fifth Requirement**

##### **Carrier's Liability for Damage to Passengers' Luggage**

The contract of carriage provides for the carrier's obligation to carry the passenger's luggage. A relevant receipt shall be issued and recorded in the books prepared for this purpose. Pursuant to paragraph 2 of Article 268, “carriage of checked luggage shall be governed by the provisions of the contract of carriage of goods by sea”. This means the carrier shall insure the checked

(25) Dr. Mohamed Kamal Hamdy, op cit, p. 470.

(26) Dr. Mahmood Mukhtar Barairi, Maritime Trade Law, op cit, p. 450.

(27) Dr. Mahmood Samir Al Sharkawi, op cit, p. 479.

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luggage received against damage, so long as such damage occurred in the period between handover and delivery at the port of arrival. The carrier may not be exonerated from such liability, unless the carrier proves that such damage is attributable to an external cause.

The passenger, however, keeps his personal luggage in his allocated cabin. Such luggage are neither checked nor received by the carrier.

Paragraph 1 of Article 269 stipulated that” the carrier shall be held accountable for damage to unchecked luggage kept by the passenger, if such damage is the result of the fault of the carrier, its representative or servants”.

Here, liability is not presumed. It is rather based on fault, which is logical, for personal luggage is in the custody of the passenger. Thus, any damage to personal luggage results from the passenger’s negligence. Any claims to the contrary must be supported by evidence.

The carrier may discharge itself of liability, by proving the non existence of the fault, in accordance with the general rules<sup>(28)</sup>.

### **Subject Two**

#### **Cases of Passengers Carrier’s Liability under the Athens Convention**

It is noted that the Athens Convention has expanded its scope of application with respect to the actual carrier. We will address this matter in the first requirement and we will dedicate the second and third requirements for the examination of the cases of liability under the Athens Convention.

#### **First Requirement**

##### **Extension of the Athens Convention to Actual Carrier**

Article 1 of the Athens Conventions defined the carrier on whom the responsibility falls. It has established the definitions of both the carrier and the actual carrier (performing carrier). In the first paragraph (a), the carrier was defined as any person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier;

(b) the actual (performing) carrier means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage.

It is obvious here that the Convention places responsibility upon the carrier by or on behalf of whom a contract of carriage has been concluded, whether the carriage is wholly or partially performed. Paragraph (1) of Article 4 pertaining to performing carrier established that: “If the performance of the carriage or part thereof has been entrusted to a performing carrier, the carrier shall nevertheless remain liable for the entire carriage according to the provisions of this Convention. In addition, the performing carrier shall be subject and entitled to

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(28) Dr. Mahmood Mukhtar Barairi, op cit, p. 488.



the provisions of this Convention for the part of the carriage performed by him.

Also, Article 4/2 stipulated that the carrier shall, in relation to the carriage performed by the performing carrier, be liable for the acts and omissions of the performing carrier and of his servants and agents acting within the scope of their employment.

Article 4/3 explained that any special agreement under which the carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the performing carrier only if agreed by him expressly and in writing. This Articles shows that the performing carrier's explicit and written agreement on any obligation assumed by the carrier under any other agreement other than this Convention (Athens Convention) is critical for the carrier to assume obligations not imposed by this Convention or any waiver of rights conferred by this Convention.

Article 4/4 of the aforesaid Convention stipulated the following: "Where and to the extent that both the carrier and the performing carrier are liable, their liability shall be joint and several"<sup>(29)</sup>.

In addition, paragraph 5 of Article 4 established that "nothing in this Article shall prejudice any right of recourse as between the carrier and the performing carrier".

This implies that this Article does not prevent the right to request compensation whether from the carrier or the performing (actual) carrier. As it turns out, the Carrier that entrusts the carriage to another person for the whole or part of the trip shall be liable for the performance of the contract of carriage and for any breach of such carrier's obligations under the contract of carriage. The Convention also binds the carrier performing to assume responsibility for the entire or partial performance of the carriage, as agreed between him and the other contracting carrier, for any breach of its obligations under the contract of carriage.

The Convention also provided for the right of the affected party to have resource to each of the contracting carrier and the performing carrier to obtain the compensation whether their liability is joint or several.

**Second Requirement**  
**Carrier's Liability for Death or Injury of**  
**Passengers and for Loss of or Damage to Luggage**

With respect to the cases where the Carrier shall be held liable, Article 3 of the Convention reads as follows:

1- The carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the

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(29) Dr. Mohamed Kamal Hamdy, op cit, p. 787.

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incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.

2- The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, shall lie with the claimant.

3- Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment shall be presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship. In respect of loss of or damage to other luggage, such fault or neglect shall be presumed, unless the contrary is proved, irrespective of the nature of the incident which caused the loss or damage. In all other cases the burden of proving fault or neglect shall lie with the claimant.

Based on the foregoing, it can be concluded that the Convention defined the Contract of Carriage as a commitment to guaranteeing the passenger's arrival to the port of arrival safe and sound and that in the course of performance of the Contract of Carriage, passengers are transported under the care and at the responsibility of the Carrier for any damage that might cause the death or injury of the passenger or the loss or damage of luggage.

Nevertheless, pursuant to the said Convention, the burden of proving that the incident occurred in the course of performance of the Contract of Carriage and the extent of the loss or damage shall lie with the claimant. It has thus placed heavy burdens on the affected party. i.e. the claimant (passenger). But also, according to the same Convention, fault or neglect of the carrier or of his servants or agents shall be presumed, if the death or injury of the passenger or the loss of or damage to cabin luggage arose from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship.

It is clear that the Convention placed the burden of proof with respect to all incidents that take place in the course of performance of the Contract of Carriage on the shoulders of the claimant, meaning that fault must be proved. Also, pursuant to the Convention, the fault of the carrier shall be presumed in cases where the incident occurs as a result of collision, shipwreck, stranding, explosion or fire, or defect in the ship. In this case, the Carrier may not discharge itself, unless it has been proven that the Carrier took all the required measures to prevent the incident from occurring.

It is also clear that the Convention executors should have distinguished between incidents occurring in the course of performance of Contract of Carriage for specific reasons, but it is preferred that they mention the incident that takes place during the performance of the contract and presume the fault, which is hard to prove in such cases, given the lack of the passenger's technical experience in such matters.

**Presumed Fault of Passenger and Common Fault**

The Convention provided for exemption from liability, in case of any fault on the part of the passenger. Article (6) of the Convention read as follows: “If the carrier proves that the death of or personal injury to a passenger or the loss of or damage to his luggage was caused or contributed to by the fault or neglect of the passenger, the court seized of the case may exonerate the carrier wholly or partly from his liability in accordance with the provisions of the law of that court”. Subject to the provisions of this article, the Carrier can be discharged of its liability, if the carrier proves that the damage was caused directly or indirectly by the fault of the passenger himself.

This Article that addresses the impact of the passenger’s fault or negligence on the carrier’s liability suggested different proposals. Netherlands’ delegation introduced an amendment involving the normal behavior of the passenger as a criterion, without being able to establish a relevant definition. This has incited Finland’s delegation to establish that it is reasonable for passengers to drink aboard the ship. But is it possible to see this behavior as normal if such passenger got drunk. It has rejected the Dutch amendment and ratified the text contained in the IMCO legal committee project without amendment<sup>(30)</sup>.

- **Loss of monies and securities:**

Article (5) of the Convention established the following: “The carrier shall not be liable for the loss of or damage to monies, negotiable securities, gold, silverware, jewellery, ornaments, works of art, or other valuables, except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping in which case the carrier shall be liable up to the limit provided for in paragraph 3 of Article 8 unless a higher limit is agreed upon in accordance with paragraph 1 of Article 10.

It can be seen that the Convention held the Carrier liable for these monies and securities, which were deposited with the Carrier that agreed to maintain and protect them. This is normal provided that the latter’s ownership was transferred from the passenger to the carrier, prior to depositing them with the carrier.

This Article has such a similarity to the text of Article 269 of the Maritime Trade Law, with respect to the limitation of carrier’s liability for these stuffs.

**Third Requirement  
Carrier’s Liability for the Non-Performance  
and Delay in Performance of Carriage**

The Contract of Carriage establishes the obligation of the carrier to guarantee the safety and arrival of passengers to the port of arrival, meaning that the carrier shall secure safe transportation of passengers. In case of breach of this

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(30) Dr. Ahmed Husny, Highlights on the Athens Convention, 1978, p. 32.

obligation, the carrier executing the contract of carriage itself or by proxy shall be held liable, irrespective of whether carriage was performed by the carrier itself or by an actual carrier. This was made very clear in Article 4 of the Convention in parag. 1,2,3,4,5.

- **Delay in Performance of Carriage**

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 did not address the late arrival of the passenger and his luggage to the port of arrival, save the case set out in paragraph 7 of the first article, which stipulates the following: ““loss of or damage to luggage” includes pecuniary loss resulting from the luggage not having been re-delivered to the passenger within a reasonable time after the arrival of the ship on which the luggage has been or should have been carried, but does not include delays resulting from labor disputes”.

We believe this constitutes a major shortcoming of the Convention, which must have contained an Article that holds the carrier liable in case of delay in arrival to destination in due time. The carrier’s obligation under the Contract of Carriage is not only reduced to the mere transportation of passenger to the port of arrival safe and sound, but also to get the passenger to destination within the agreed time. This is also reflected on the ticket.

**Section II**

**The Basis of the Passengers Carrier’s Liability**

Establishing the basis of liability has a highly significant legal advantage in terms of establishing the conditions of liability on the one hand, and the identification of the methods of handling the same on the other. Therefore, we must examine the basis of the liability of the carrier of passengers and their luggage through two subjects. The first being dedicated to the examination of such basis with respect to carriage of passengers, and the second to the examination of the basis of carrier’s liability for carriage of luggage.

**Subject One**

**The Basis of the Carrier’s Liability  
for Damage to Passengers**

Here, we will address the basis of the passengers carrier’s liability for damage to passengers, in accordance with the Maritime Trade Law and the Athens Convention, each in a separate requirement.

**First Requirement**

**The Basis of the Passengers Carrier’s Liability  
for Damage to Passengers under the Maritime Trade Law**

The previous maritime codification did not include within its texts pertaining to the contract of carriage of passengers any texts relating to the maritime carrier’s liability for the death or injury of passengers. Therefore, it was necessary to have recourse to general rules.

In the past, judicial authorities used to take into account the principle of the carrier's Liability for incidents to passengers during carriage (tort). Today, however, the new maritime trade codification filled this gap by establishing the cases and provisions of carrier's liability. It has established that the carrier's liability is a contractual liability, given that a contract of carriage provides for the carrier's obligation to secure safe transportation of passengers to destination within the agreed time. The carrier shall be deemed to have committed a breach of such obligation by merely proving the occurrence of such incident. The carrier shall remain liable for this breach until proving the occurrence of a force majeure or the affected party's fault or third party's fault. In such case, it does not suffice that the carrier proves that the carrier deployed its best efforts and took all reasonable measures and precautions while fulfilling its obligation, but rather the carrier shall ensure the passengers' safety and perform carriage within the agreed upon time<sup>(31)</sup>.

The Maritime Trade Law observed the foregoing rules. In this context, Article 256 reads as follows: "the carrier shall be held accountable for the damage resulting from the passenger's death or injury, if the incident that caused such damage occurred in the course of performance of the contract of carriage".

An incident shall be deemed to have occurred during the performance of the contract of carriage, if such incident took place during travel or embarkation or disembarkation at the port of departure or the port of arrival or at an intermediate port, or during the period when the passenger is in the custody of the carrier prior to getting on board or after his disembarkation<sup>(32)</sup>.

Article 257 of the Maritime Trade Law stipulates the following;

"The carrier shall be exonerated from the liability set out in the previous article, if it is established that the passenger's death or injury is attributable to an external incident the carrier has nothing to do with,

Also, Article 262 of the Maritime Trade Law reads as follows:

"The carrier shall be held accountable for any damage resulting from the delay in fulfilling reasonable obligations , unless it is established the latter is attributable to an external cause the carrier has nothing to do with:

Based on the foregoing, the carrier shall ensure the passengers' safety and the performance of carriage within the agreed upon time. Otherwise the carrier shall be responsible, unless he proves that the damage (death or injury) and damage caused by delay is attributable to an external cause (force majeure, passenger's fault, or third party's fault) the carrier has nothing to do with.

In the Maritime Trade Law, the legislator, while establishing the carrier's

(31) Dr. Fareed Al Areeni, op cit, p. 186, Dr. Samiha Al Kalyoubi, Maritime Law, p. 192.

(32) Dr. Mustafa Kamal Taha, Maritime Law, ibidem, p. 280.

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obligation to ensure the safety of the passenger, adopts what the Egyptian court of cassation settled upon, i.e. “the contract of passengers carriage binds the carrier to ensure the safety of the passenger, meaning that the carrier shall be liable to transport the passenger to the agreed upon destination safe and sound. Hence, in case of injury of the passenger, it is sufficient that the passenger proves the injury occurred during the performance of the contract of carriage. This would prove that the carrier has failed to fulfill its obligation and shall thus be held liable for such damage without the need to show negligence or fault on the carrier’s part. The carrier shall remain liable unless it is established the incident was the result of a force majeure or the affected passenger’s fault or third party’s fault.

With respect to the carrier’s obligation pertaining to material change to travel conditions, the carrier shall undertake to exert due diligence with the presumption of fault, the carrier shall thus be discharged of its liability, only if the carrier proves that the carrier exerted due diligence to avoid such amendment or change<sup>(33)</sup>.

**Position of Egyptian Judicial Authorities**

Egyptian judicial authorities have gone, in the first place, so far as to claim that the passengers carrier’s obligation to transport the passengers is merely an obligation to exert due diligence and that the carrier shall not be held accountable unless the affected party proved the carrier’s fault. The Egyptian judicial authorities have been implementing the principle of carrier’s tort liability with respect to passenger incidents during carriage<sup>(34)</sup>.

Nevertheless, it did not take long before the Egyptian judicial authorities held a different opinion that consists in regarding the passengers carrier’s liability as a contractual liability for the incidents suffered by passengers during travel, as a result of the carrier’s failure to fulfill its material obligation regulated by the contract of carriage, i.e. transportation of passenger to the port of arrival safe and sound<sup>(35)</sup>.

That is to say that the passengers’ carrier shall undertake to achieve a result, namely the transportation of the passenger to his destination safe and sound. It does not suffice that the carrier exerts due diligence to prevent passenger injuries. To that end, it would suffice for the passenger to prove that his injury occurred during travel, so that the carrier shall be held liable. The latter may not be discharged of its liability unless the carrier proves the incident resulted from an external cause.

The court of cassation established that the safety obligation under the

(33) Dr. Mohamed Kamel Hamdy, op cit, p. 658, Dr. Ibrahim Dsouki Abu El Layl, op cit, p. 196.

(34) Dr. Fayez Naim Radwan, op cit, p. 444.

(35) Dr. Ali Hassan Younes, Transport Contract, p. 355.

contract of passengers carriage shall be assumed by the carrier, which shall transport the passenger to his destination safe and sound and that the carrier shall not be discharged of its liability resulting from the death or injury of the passenger during travel, unless it is established that such death or damage was the result of an external cause in which neither the carrier, nor its representative or servants are involved.

The carriers have, however, insisted that passengers' contracts shall exempt them from any liability for passenger injury or death, as an essential condition. This condition is valid within the limits decided in Article 217/2 of the civil code, which stipulates that: "an agreement may be reached as to the exemption of the debtor from any liability for the non performance of its contractual obligation. The debtor may insist, as an essential condition, upon discharging him from any liability for fraud or material error on the part of the persons hired by such debtor to fulfill its obligations.

#### **Combining between contractual liability and tort liability**

As has been shown above, Egyptian judicial authorities have established in the first place the passengers carrier's liability as a tort liability. However, jurisprudential and judicial opinion came to the conclusion that the passengers carrier's liability is only a contractual liability that the carrier shall assume while fulfilling its main obligation under the contract of carriage, whether by transporting the passenger safe and sound, according to Egyptian judicial authorities, or by exerting due diligence to prevent passenger injuries, according to recent French jurisdiction. In both cases, such liability is a contractual and not a tort liability. The established opinion is that contractual liability provides the required protection to the passenger to request the suitable compensation for the damage incurred and there is no need to have recourse to tort liability, so long as contractual liability exists<sup>(36)</sup>.

If we had recourse to the general rules when it came to choosing between contractual and tort liabilities, we would have found that most of the French jurisdiction save some few provisions that tend to reject the choice between the two liabilities<sup>(37)</sup>.

In this context, the French court of cassation clearly established that when both the contractual and tort liabilities are combined, the affected party may not rely on tort liability rules, even if such party may have interest in such rules.

The majority of jurisprudential authorities opt for the non selection, grounding their decision on the fact that tort liability was established to be applied to passengers who fail to find a contractual link. As for those who enter

(36) Dr. Fayez Naim Radwan, op cit, p. 446.

(37) Dr. Ali Hassan Younes op cit, p. 356.

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into a contract or agreement, the contract provisions are those that shall apply.

Nevertheless, some believed that the debtor may select tort liability rules over contractual liability rules in some cases, including the cases where non-performance of contract is attributable to a crime, fraud, or gross error on the debtor's part<sup>(38)</sup> this does not imply that the affected passenger may combine between the two liabilities, but such passenger may only chose between them in his best interests.

Others believed that it is possible to choose between the two liabilities generally, based on the tort liability rules, as such rules relate to the public order and may not be excluded. This opinion is grounded on the impact of agreements of exemption from contractual liability which is reduced to placing the burden of proof on the creditor rather than the debtor. This trend shows that the exclusion of contractual liability does not prevent the implementation of tort liability rules.

It appears that the Egyptian judicial authorities were tending to opt for the possibility of choosing between the two types of liability- contrary to the jurisprudential view that rejects such possibility. Then the court of cassation altered its opinion in the matter and opted, in its latest provisions, for the non-possibility of selection between contractual and tort liabilities. It has only excluded the case of fraud and gross error, and the debtor's commitment of a crime.

In such a context, the Egyptian court of cassation<sup>(39)</sup> states that:

“Should a contractual relationship involving specific parties and scope be established, and the damage incurred by one of the contracting parties resulted from the other party's failure to perform the contract, the contract and law provisions shall be observed in this matter, given that these provisions alone regulate each relationship between the two parties. Tort liability provisions under which the affected party is not engaged in a previous contractual relationship may not be observed, unless it is established that the act committed by one of contracting parties and that caused damage to the other party is a crime, fraud, or gross error, and shall thus be subject to tort liability, as such party has violated a legal obligation that prohibits him from committing such act in all cases, whether engaged in a contract or otherwise.

While contractual liability rules emerge from an agreement between the concerned parties, (parties to the contract), as to the rules and provisions, these parties may undoubtedly agree upon the tort liability. They may, at their sole discretion, agree to resort to all or part of the tort liability provisions and rules and they may as well agree expressly to exclude these rules and limit

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(38) Dr. Ibrahim Dsouki Abu El Layl, op cit, p. 274.

(39) Ruling of the Court of Cassation issued on 16/04/1968 referred to in Dr. Ibrahim Dsouki Abu El Layl, ibidem, p. 276.



themselves to contractual liability rules. On the other hand, prohibiting the selection of tort liability rules over contractual liability rules is reduced to contracting parties only<sup>(40)</sup>.

With this in mind, the injured passenger's relatives who are entitled to claim compensation for damage incurred personally due to failure to assume contractual liability, shall not abide by these rules, as they do not constitute a party to the contract. They may take legal actions based on tort liability. The relatives of a passenger who dies in an accident may, in accordance with the general rules, waive the condition in favor of a third party contained in the contract to their advantage and hence waive the contractual liability rules and take legal actions in accordance with the tort liability rules.

Nevertheless, if the claim for compensation for the passenger's death is filed by such passenger's heirs, it shall be grounded on contractual liability, for, assuming the passenger's injury caused his death, he would then be entitled to several rights, including the right to compensation for damage incurred, and depending on the increase in such damage severity and seriousness. Once such right is asserted prior to his death, his heirs shall be entitled to such right and they shall thus be entitled to claim such right.

Also, the passenger's heirs may claim compensation from the carrier for material and moral damage incurred by them because of the death of their devisor, based on tort liability rules and not contractual liability rules. And that is because the obligations emerging from the contract of carriage shall be assumed by the contracting parties to such contract. The passenger himself shall be entitled to claim compensation from the carrier for having failed to fulfill its obligation to ensure the safety of the passenger alone, without his heirs who were not parties to this contract<sup>(41)</sup>.

Here, it can be noted that the heirs' claim for compensation from the carrier along with their claim for compensation for the damage they incurred because of the death of their devisor shall not be deemed as a combination between the two contractual and tort liabilities<sup>(42)</sup>.

If the claim for compensation for the passenger's death is filed by the dependents of such passenger, the basis of such claim shall always be the tort liability, given that the passenger's dependents were not parties to the contract of carrier and are not the heirs of the dead passenger<sup>(43)</sup>.

(40) Ibidem, p. 277.

(41) Dr. Ahmed Zaki Oweiss, *the Maritime Transport of Passengers and their Luggage in the Islamic Fiqh and Maritime Law*, Tanta University, p. 232.

(42) Dr. Ali Gamal El Deen Awad, *Maritime Law*, Dar Al Nahda Al Arabeya 1969, p. 633.

(43) Dr. Mohamed Kamal Hamdy, *op cit*, p. 661.

**Second Requirement**  
**The Basis of the Passengers Carrier's Liability**  
**For Damage to Passengers under the Athens Convention**

For the carrier to be held responsible, there shall be a contract of carriage that establishes a contractual relationship between the carrier and the passenger, in accordance with the provisions of the Convention and upon breach of the obligations set out in the contract, the contractual liability arises. The carrier's main obligation consists in transporting the passenger to the port of arrival safe and sound. This means that the basis of liability is the contract concluded between the passenger and the carrier.

The Convention made it clear that, in case of injury or death of the passenger during the performance of carriage, and due to fault or negligence on the part of the carrier, its servants or agents during and due to the performance of acts within the scope of their employments, the carrier shall be held liable but the claimant shall assume the burden of proving such fault or negligence.

Nevertheless, the aforementioned Article of the Convention was in favor of the passenger where the fault or negligence of the carrier, its servants or agents shall be presumed, unless otherwise established, if the passenger's death or injury was caused by a storm or collision or explosion, fire or defect in the ship.

Save these cases, the burden of proving the carrier's fault or negligence shall lie with the claimant.

**Subject Two**  
**The Basis of Carrier's Liability**  
**For the Loss of or Damage to Luggage**

In this subject, we will address the basis of the passengers carrier's liability for the loss of, or damage to, luggage under the Maritime Trade Law and the under the Athens Convention, each in a separate requirement.

**First Requirement**  
**The Basis of the Passengers Carrier's Liability for the Loss**  
**Of, or Damage to Luggage under the Maritime Trade Law**

Carriage of passengers' luggage is a sub-process of carriage of passengers. No special contract exists concerning carriage of luggage, but the passenger's contract of carriage is the basis of the relationship between the passenger and the carrier. The carrier is bound under such contract to carry the passenger's luggage.

Article 266 of the Maritime Trade Law reads as follows:

“The carrier shall be liable for carrying the passenger's luggage within the limits set out in the contract or common law”.

The passenger's luggage is divided into:

Checked-in Luggage: shall mean luggage that are similar to goods, which are usually placed in the cargo deck. Hence, such luggage will be no more in the

custody of the passenger. Carriage of checked in luggage shall be governed by the provisions of the contract of carriage of goods, save the provision pertaining to limitation of liability and the provisions set out in Article 271 relating to the limitation of actions arising from carriage of luggage.

Pursuant to the provisions of the contract of carriage of goods governing checked-in luggage, the carrier's obligation in respect of carriage of luggage is an obligation to achieve a result, i.e. ensuring luggage arrives safe and sound at the proper destination. The carrier can only be exonerated from its liability by proving an external cause, meaning that the carriage liability shall be presumed.

Unchecked Luggage: shall mean the luggage in passenger custody throughout the trip, which hence remain under the control of the passenger.

Article 269/1 of the Maritime Trade Law stipulated the following: "the carrier shall only be held accountable for damage to unchecked luggage in the custody of the passenger proves that such damage occurred as a result of the fault of the carrier, its representative or servants".

Subject to the provisions of this text, the carrier shall be only liable for the loss of or damage to unchecked luggage if the claimant proves the carrier's fault. The carrier's obligation in this respect is to exert due diligence only. In other words, the affected "passenger" shall be bound to prove the carrier's fault, damage and causal relationship when the fault of the carrier or its dependents is proved, e.g. stealing the contents or attempting to open the luggage, which would result in causing damage thereto<sup>(44)</sup>.

Deposited Luggage: shall mean the luggage deposited with the ship captain or with the person entrusted to keep deposits in the ship, which are usually valuable things

In this case, the passenger shall notify the carrier of their significance. Then, the carrier shall be liable to compensate the passenger for the entire damage to such deposited luggage. If it is established such damage resulted from the act or omission of the carrier or its representative, with the intention of causing damage while knowing that damage may be incurred. In such a context, Article 259 of the Maritime Trade Law stipulates that "the carrier may not adhere to the limitation of liability, if it is established the damage resulted from the act or omission of the carrier or its representative, with the intention of causing damage or while knowing that damage might occur".

Also, Article 269/2 of the Maritime Trade Law reads as follows:

"This limitation shall not apply to things deposited by the passenger with the ship captain or with the person entrusted to keep deposits in the ship, if the passenger shall notify the carrier of how valuable the deposited things are.

(44) Dr. Abdel Fadeel Mohamed Ahmed, *Special Maritime Law*, Dar Alfikr Wa Alkanon, 2011., p. 470.

The basis of the carrier's liability for loss or damage to luggage is always a contractual liability emerging from the contract of carriage executed between the passenger and the carrier, which constitutes the basis of the relationship, whereby the carrier shall undertake to carry the passenger's luggage.

The basis of the passenger's carrier's liability is a contractual liability. The contract of carriage binds the carrier to carrier to make sure the luggage reaches the proper destination safe and sound. The carrier's obligation is thus to achieve a result. The passenger shall only be bound to prove the damage occurred during the performance of the contract of carriage. The carrier shall not be discharged of its liability, for having failed to fulfill its obligations. The carrier shall thus be held liable for such damage without the need to prove the carrier's fault. The carrier shall remain liable unless the carrier proves such loss or damage resulted from an external cause, e.g. force majeure or the passenger's act<sup>(45)</sup>.

### **Second Requirement**

#### **The Basis of the Passengers Carrier's Liability for the Loss of, or Damage to Luggage under the Athens Convention**

The Convention did not distinguish between the injury and death of the passenger during the performance of the contract of carriage, and between the loss of and damage to luggage. Here, it is a question of contractual liability emerging from the carrier's failure to fulfill its main obligation under the contract of carriage, i.e. getting the passenger and his luggage safe and sound to the port of arrival.

If luggage suffers damage or gets lost during carriage, the carrier shall be liable,, along with its servants and agents, for such damage or loss, if such damage or loss occurs during and due to the performance of their job. The burden of proof, however, shall lie with the claimant.

Nevertheless, the Convention set out some cases that we already mentioned, with respect to passenger injury or death and established that the carrier's fault shall be presumed without the passenger being obliged to assume the burden of proof of the carrier's fault. The carrier shall only be discharged of this liability by proving that the carrier took all required measures.

Article (3) of the Convention stipulated that the carrier shall be liable for the damage resulting in the death of or personal injury to a passenger and the loss of or damage to luggage and that the carrier's fault shall be presumed. This means s that the carrier's obligation is to exert due diligence with the presumption of fault. That is to say that the carrier's fault is presumed and shall, in order to discharge itself of such liability, prove that the carrier, its servants and agents took all required measures to avoid such incident that caused the damage.

So, it is fair to say that the burden of proof falls on the claimant under the Convention. The Convention compelled the claimant to prove the carrier's fault that caused the damage. The carrier, however, may discharge itself by proving

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(45) Dr. Ahmed Husny, op cit, p. 258.

that the carrier, its servants and agents exerted tremendous efforts to prevent such incident. That is to say that the carrier's obligation in this case is to exert due diligence. The Convention, however, distinguished between the damage that occurs as a result of storm, collision, stranding, explosion, fire or defect in the ship. Here, the carrier's fault shall be presumed and the claimant (passenger) shall only undertake to prove that such damage occurred during the performance of the contract of carriage.

## **Chapter II**

### **Area of Responsibility of the Maritime Carrier of Passengers**

Examining the liability of the maritime carrier of passengers requires a discussion about the area of such liability. On the one hand, this examination points the need for the limitation of liability of the carrier; on the other hand, it demonstrates the cases where such liability shall be emphasized. Finally, it addresses the procedural system of liability claims.

This Chapter is divided into three sections, as follows:

Section I: Limitation of liability of the maritime carrier of passengers

Section II: Limitation of liability of the maritime carrier of passengers

Section III: The procedural system of the liability of maritime carrier of passengers

### **Section I**

#### **Limitation of liability of the maritime carrier of passengers**

In this Section, our study is divided into two subjects as follows:

Subject One: limitation of liability under the Maritime Trade Law.

Subject Two: Limitation of liability under the Athens Convention

#### **Subject One:**

#### **Limitation of Liability of the Maritime Carrier of Passengers under the Maritime Trade Law Principle of Limitation of Liability of the Maritime Carrier of Passengers**

The principle of limitation of liability of the maritime carrier stands among the top of Maritime Trade Law principles. It is embraced by most maritime legislations, with variations in terms of regulation of passengers or luggage, in order to achieve a balance between the carrier's interest on the one hand, and the interest of passenger or shipper on the other hand, but also in order to ensure the ongoing success of such mode of transport.

According to rules, the demand for compensation shall be proportional to actual size of damage caused to the affected person (Article 221/ civil). It is an acknowledged fact that, with respect to contractual liability, compensation shall cover expected damage only. If such damage, however, shall be incurred as a result of the debtor's fraud or gross error, compensation shall cover both expected and unexpected damage.

With respect to maritime carriage of passengers or luggage, the ship is subject to serious hazards which often lead to the death of passengers, in

addition to loss of monies on board the destruction of the ship itself.

The carrier's commitment to paying full compensation for all the damages occurring during the sea journey may result in the flight of capitals invested in the field of seat transport industry.

The limitation of liability of the maritime carrier is set to promote capital investment in marine operations. In so doing, the state would build a strong fleet that meets its economic obligations, and even contributed in decreasing transportation fees and to the growth of international commerce.

The concept of balance between the carrier's interest and the passenger's interest constitutes the basis for the limitation of liability of the maritime carrier, with the presumption of the carrier's good faith while performing its obligations.

With this in mind, the principle of limitation of the maritime carrier's liability ensures the protection and overall stability of seat transport industry and the persistence of such activity<sup>(46)</sup>.

#### **Justifications of the principle of limitation of liability (Compensation)**

The principle of limitation of liability is justified as follows:

Ship incidents often result in the destruction of such ships and in damage to passengers and luggage. If we assume that the carrier shall be liable for compensating the passengers for the entire amount of damage caused by the incident, this would be prejudicial to the carrier, and would culminate in the bankruptcy of sea transportation companies and in the navigation coming to a standstill. Such damage is not reduced to the maritime carrier only, but it also affects the interests of passengers benefiting from the carrier's services. To ensure the validity and correctness of the foregoing, it is sufficient to figure the amount of compensation required from the carrier. In the event of an incident, the carrier shall be responsible for providing compensation due to the death of passengers or crew members, whose number has considerably increased, especially after the expansion of ship capacities nowadays, where giant ships can accommodate more than one thousand passengers. The carrier shall be also responsible for compensating the owners of lost or damaged goods, as well as the destruction of a part of the fixed assets of the carrier's company, namely, the ship which was destroyed.

Hence, it was highly important to preserve this vital utility, i.e. sea transportation utilities, and to support it and guarantee its continuity by determining the amount of compensation the carrier shall undertake to pay to the affected persons.

Ensuring the continuity and prosperity of such economic exploitation depends on the extent of insurance against the risks associated with such exploitation. The carrier will not be able to fully compensate the damage, due to the impossibility to calculate in advance the risks the carrier's business may be subject to. As a matter of fact, the carrier would not be able to predict the

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(46) Mohamed Abdul Fattah Turk, op cit, p. 520.

amounts the carrier shall be bound to pay as compensation to the affected passengers. The compensation value depends on several factors, such as the social position of the passenger and the circumstances resulting from his injury or death. This situation would definitely change if the compensation payable by the carrier is fixed, as could the carrier would know in advance the maximum compensation to be paid. Therefore, it would be easy for the carrier to calculate the risks such carrier might face and provide the necessary insurance against such risks<sup>(47)</sup>.

Here, we will address the scope of limitation of liability, then we will demonstrate the extent of limitation.

### **First Requirement Liability governed by legal limitation**

Legal limitation applies to the liability of the maritime carrier for the damages resulting in the death or injury of the passenger, as well as the loss of or damage to his luggage, if the incident that caused such damage occurred during the performance of the contract of carriage. This constitute the basis of such liability, whether contractual, tort or otherwise.

In the Article related to the carriage of passengers under the Maritime Trade Law, the legislator does not include such provision. This, according to the case, concerns the limitation of the maritime carrier in the Article related to the carriage of goods by sea, as stipulated in Article 233 of the Maritime Trade Law. Yet, the applicability of legal limitation in the passengers carriage Article to liability, irrespective of its type, is reflected in Article 258/2 of the Maritime Trade Law, where the compensation fixed in the first paragraph of the Article is the maximum limit of the carrier's liability, encompassing a series of compensation claims filed by the passenger, his heirs or dependents.

The text of Article 258 demonstrates that the compensation claim submitted by the passenger for his injury is definitely based upon the contract of carriage, which hence constituted the basis of contractual liability.

#### **- Beneficiaries from the limitation of liability**

In order to maintain the balance between the interests of the carrier and those of the passenger, which is the aim of the principle of limitation of liability, the legislator extended the validity of benefiting from such limitation so that it covers the agents and servants of the carrier, so they are not subject to the affected person obtaining the full compensation.

Then, the carrier shall be responsible for the works of its servants. This does not imply that the carrier's right in the limitation of his liability is proscribed upon his perpetration of a fault or a tort in his work.

Hence, the beneficiary from the legal limitation of liability is reflected in Article 264 of the Maritime Trade Law, If the compensation action is brought against a servant or agent of the carrier or of the performing carrier arising out

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(47) Dr. Mohamed Fareed Al Areeni, op cit, p. 237.

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of damage covered by this Convention, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defenses and limits of liability which the carrier or the performing carrier is entitled to invoke under this Convention. According to the aforementioned text, the beneficiaries are:

**1. Maritime carrier**

Pursuant to Article 246, the beneficiary from the limitation of liability is the maritime carrier whether the owner, operator or charterer of the ship.

However, the ship owner may only benefit from the limitation of liability if he was a carrier. Subject to the provisions of Article 198 of the Maritime Trade Law included within the general provisions in the section related to maritime carriage, only these provisions shall apply to the maritime contract of carriage, irrespective of whether the carrier was the ship owner, charterer, or operator.

The provision set out in Article 246 shall apply to the legal limitation of liability of the ship owner, when the latter is the carrier. However, if the ship owner is not the carrier, Article 246 shall not be observed, but rather the text of Article 83 related to the limitation of liability of the ship owner shall be adhered to.

**2. Carrier's agents and dependents**

Pursuant to the provisions of Article 164 referred to above, the carrier's agents or dependents shall be entitled to adhere to the legal limitation of liability, provided, however, that such agent or dependent proves that the act attributed to any of them occurred during or due to the performance of their job, otherwise he shall be deprived of such limitation. Furthermore, the passengers the carrier accepts to carry as companions of a living animal or any other item carried pursuant to the contract of carriage of goods in Article 265/2 of the Maritime Trade Law, the carrier and the dependents thereof may face them<sup>(48)</sup>.

**Extent of the Connection between Legal Limitation of Liability and the Public order**

The provisions of the liability of the maritime carrier are linked to the public order. Thus, the court shall limit the liability without depending on the adherence of the carrier thereto<sup>(49)</sup>.

The legal limitation of liability constitutes part of the public order, and therefore no agreement to the contrary may be made unless about the matter relates to agreeing upon a compensation exceeding the maximum limit of liability.

If the affected person claims compensation without justifying the claimed amount of compensation, the judge shall observe the maximum extent of liability.

If the contract of carriage includes a condition whereby the highest limit of the liability of the carrier is less than the legal limit of liability, such agreement

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(48) Dr. Mohamed Kamal Hamdy, op cit, p. 662, Mohamed Turk, op cit, p. 530.

(49) Dr. Mohamed Kamal Hamdy, op cit, p. 662.



which was entered into before the occurrence of the incident that caused the damage shall be void and null, with the presumption that the liability of the maritime carrier is a part of the public order, and the protection of the passenger was observed in the legal limitation of liability. Article 260 of the Maritime Trade Law stipulates that any agreement made prior to the occurrence of the incident causing the damage and relating to any of the following matters shall become invalid:

1. Exonerating the carrier from liability towards the passenger, his heirs or dependents.
2. Amending the burden of proof that lies with the carrier according to law.
3. Prescribing a lower limit of liability than that fixed in Article 258 of this Law.
4. Assigning to the carrier the rights arising out of the passenger's insurance.

If the condition of the contract of carriage prescribes for the carrier a higher limit of liability than that stipulated by law, such condition is valid and enforceable, as Article 258/1 of the Maritime Trade Law states that the compensation due by the carrier in the event of death or injury of the passenger shall not exceed 150.000 pounds and it may be agreed upon a limit of liability above such amount. The carrier may assign a part or the totality of the rights and exemptions granted to him, and he may increase his liability and obligations by agreeing with the passenger upon a higher compensation. The sponsoring of the carrier aimed by the limitation of liability is an advantage and not a protection; he may make use of it or leave it. Then, this agreement is valid even if the compensation does not cover the damage in full.

Such agreement is obviously valid if it is concluded before and after the occurrence of the incident resulting in the damage. The court may decrease the compensation proportionally to the amount of damage.

Accordingly, the legal limitation of liability of the maritime carrier, while considering at the same time the protection of the passenger, is the minimum that may be agreed upon<sup>(50)</sup>. The adherence to the limitation of liability is only effective when the requesting party places the maximum amounts of his liability at the disposal of creditors or provides a guarantee deemed acceptable and sufficient by the court. For instance, he shall submit a bank guarantee, so the creditor shall not become entitled to seize any other money than the amount submitted by the requester of the limitation of liability; he shall not seize the ship or any other element of the marine wealth<sup>(51)</sup>.

### **Second requirement**

#### **Extent of legal limitation of liability**

##### **First: in case of death or injury**

In this context, limitation refers to setting the maximum amount of compensation payable by the carrier and its servants. Such limitation relates to

(50) Dr. Mohamed Kamal Hamdy, op cit, p. 515

(51) Dr. Mahmood Sameer Al Sharkawi, op cit, p. 223

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the liability for the death or injury of the passenger. This limitation shall be in return for the deprivation of the maritime carrier in the Article related to the carriage of passengers from including the conditions of exemption from liability in the contract of carriage.

The Egyptian legislator uses these two interchangeable “highest limit of liability” and “maximum compensation

As a matter of fact, liability itself is not subject to limitation. The same goes for compensation whose controls are established under the civil law. Then, the maximum or highest limit of liability is deemed as a specific type or form of compensation. This means that of the bases and considerations of such compensation are independent of those pertaining to the compensation decided upon in Article 221 civil. Such considerations emanate from the legislator’s wish to establish a balance between the interests of the passenger and those of the carrier.

In this regard, Article 258 of the Maritime Trade Law reads as follows:

1. Compensation payable by the carrier in case of death or injury of the passenger shall not exceed 150.000 Egyptian pounds, and it may be agreed upon compensation above such amount.
2. The compensation prescribed in paragraph 1 of this Article encompasses all compensation claims filed by the passenger, his heirs or dependents, for each accident separately.

**Below are some observations about the foregoing text:**

1. The legal limitation of liability to maximum 150.000 Pounds is not an arbitrary compensation in cases of death or injury, but rather a maximum or highest limit of liability. If the amount of damage was less than the highest limit of liability of the carrier, the affected person is only entitled to a compensation that is proportional to the amount of damage. The same foregoing provision shall be applicable when the amount of damage is equal to the highest limit of liability.
2. If the amount of damage exceeds the said limit, the carrier shall abide only by the maximum liability prescribed by law.
3. The legal limitation of liability is the minimum that may be agreed upon and the maximum that might be imposed. Article 258/1 authorized agreeing on a maximum compensation beyond 150.000 pounds, even if the probability of occurrence of such case is practically extremely low.
4. The legal limitation of liability of the carrier is limited to the damage caused by the death or injury of the passenger, while excluding the damage resulting from late arrival<sup>(52)</sup>.
5. Some believe that the amount of compensation decided upon in case of death or injury (150.000 Pounds) is somehow unfair, because the purchasing power of money is now less than that upon promulgation of this law. And also over time, such value will further decrease. It, therefore, was preferred that this

(52) Dr. Mohamed Kamal Hamdy, op cit, p. 659

amount be attributed to one of difficult currencies such as the Dollar or Euro given the low purchase value of Egyptian pound<sup>(53)</sup>.

We believe that compensation in the national law shall not be attributed to a foreign currency, and it would be better to link compensation to inflation.

## **II. In case of loss or damage of luggage**

The Maritime Trade Law established the limits the carrier's liability for the luggage carried by sea and distinguished in this regard between:

- a. Checked-in luggage
- b. Unchecked luggage

### **a. Checked-In Luggage**

This type of luggage is similar to goods as it is usually placed in the cargo deck and is therefore not in the custody of its owner.

Paragraph 1 of Article 268 of the Maritime Trade Law established the highest limit of carrier liability for the checked in luggage of the passenger. it reads as follows: "the value of compensation payable by the carrier in case of destruction or damage of the registered luggage shall not exceed 5000 pounds per passenger, unless the damage concerns a car or any other vehicle, in which case the compensation value may exceed such limit provided that it does not exceed 50.000 pounds per car or vehicle or for what may be contained therein on board.

Given this luggage, just like goods delivered by the shipper to the carrier, is in the custody of the carrier, s, the provisions of Article 268/2 of the Maritime Trade Law stipulates that the provisions of the maritime carriage of goods shall be applicable to checked-in luggage, save the foregoing text regarding the highest limit of the carrier's liability for the luggage.

### **b. Unchecked luggage**

Unchecked luggage is carried in the custody of the passenger. Therefore, loss of or damage to unchecked luggage does not imply that the carrier shall be held accountable, unless the passenger proves that the damage is the result of the fault of the carrier or his servants.

Article 269/2 of the Maritime Trade Law shows the maximum liability of the carrier for the unchecked luggage, and stipulates the following: "without prejudice to the provisions stipulated in Article 259 of this Law, the compensation imposed on the carrier in case of loss of or damage to unchecked luggage shall not exceed 2000 pounds per passenger. Such limit shall not apply to the items deposited by the passenger with the captain or with the person in charge of storing deposits in the ship once he notified him of the particular attention he gives to the preservation of such deposits".

Pursuant to this text, the maximum liability of the carrier for the loss or damage of unchecked luggage is 2000 pounds per passenger, and this limit shall

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(53) Mohamed Turk, op cit, p. 522.

not apply, in case of deposited luggage, but the carrier shall undertake to fully compensate the passenger for the damage in case of loss or damage of luggage, when the passenger notifies the person in charge of keeping these deposits of the significance of such luggage Pursuant to the provisions of Article 270 of the Maritime Trade Law, “the ship captain shall not retain the unchecked luggage of a passenger to settle transportation fees”.

**Subject Two**  
**Limitation of Liability of the Maritime**  
**Carrier of Passengers under Athens Convention**

Similarly to the previous subject, we will address here the scope of limitation of liability, then the extent of limitation.

**First Requirement**  
**The Liability subject to limitation**

The limits of liability, as set out in Athens Convention, apply to liability regardless of the basis upon which it is built, in accordance with the text of Article 14 of the Convention stipulating that “No action for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention<sup>(54)</sup>”.

The foregoing shows that the limits of liability apply to the passenger, in the event that the carrier shall be held liable, whether such liability is contractual and/or a tort.

The carrier may, according to Article 14, face the passenger within the limits of the liability stipulated in the Convention unless the contract entered into between them stipulates otherwise in the event of physical injury or loss of luggage because the contract imposes a contractual relation between the passenger and the carrier, which is the commitment to ensure safety, and upon breach of such commitment, the passenger may claim compensation.

This is also reflected in the case of death of passenger. in such case, his heirs may claim compensation from the carrier for the death of their devisor by virtue of the contractual liability, in the event of injury of the passenger and such injury leads to death, so that heirs acquire the right of their devisor to compensation upon the occurrence of injury and according to the amplification of such damage. When such right is confirmed before his death, his heirs shall obtain it in his legacy. They have also the right to claim compensation from the carrier on the basis of contractual liability.

The heirs of the passenger are also allowed to claim from the carrier compensation for material and vindictive damages arising out of the death of their devisor, on the basis of tort liability.

Accordingly, if the persons who were supported by the carrier claimed compensation for the damages, it shall be always based on tort liability; given that the passenger was supporting them and that they are not parties to the

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(54) Dr. Mohamed Kamal Hamdy, op cit, p. 680.

contract of carriage or heirs of the passenger.

In this context too, the carrier may face them within the limits of liability set out in Articles 7 and 8.

We notice here that the Athens Convention did not expressly stipulate the type of liability that is applicable to the limitation, but it was extracted from the text of Article 14 of the Convention, stipulating at its end: "... otherwise than in accordance with this Convention".

Any liability the passenger, his heirs or passengers supported by him, benefit from, whether it was a contractual and/or tort liability, grants them the right to face them within the limits of liability set out in the Convention.

It is also noted that this text is similar to that of the Egyptian Maritime Trade Law, where it did not specify the type of liability subject to limitation in the Article related to the carriage of passengers. Yet it was concluded from the text of Article 258 of the aforementioned Law, unlike the content of the same law in the Article related to the carriage of passengers in Article 233.

- **Beneficiaries from the limitation of liability:**

The Convention extended the legal limitation of liability to encompass the users of the carrier his agents and the performing carrier, in order to fulfill the objective of the limitation, and to prevent the passenger from resorting to trickery and to the user of the carrier and his agents in order to obtain a compensation covering the full damage. The carrier is responsible for the works of his users and agents in the event of performance of their tasks or due to it. He may also limit his liability upon their perpetration of nay fault leading to damage during the performance of their work.

Article 11 of the Convention stipulated:

"If an action is brought against a servant or agent of the carrier or of the performing carrier arising out of damage covered by this Convention, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defenses and limits of liability which the carrier or the performing carrier is entitled to invoke under this Convention."

The foregoing Article shows that the beneficiaries from the limitation of liability are:

1. **Actual (or performing) carrier**

The first beneficiary from the limitation mentioned in the convention is the maritime carrier, whether he was a contracting carrier or the performing carrier, and whether he was the owner, operator, or charterer of the ship

Yet, if the carrier is a ship owner, he may choose to be either subject to the convention which limits the liability of the carrier, or to the limited liability of the seagoing ship owner. In this case, the Athens Convention shall not have any effect within the limits imposed by other convention regarding the limits. This is

what we have previously clarified, as mentioned in Article 19<sup>(55)</sup>.

## **2. The user and agent of the carrier or the performing carrier**

Provided that the carrier is responsible for his servants during the performance of their tasks, it was critical that the convention grants them the right to benefit from the limitation of liability. The text of Article 11 of the Convention stipulated that If an action is brought against a servant or agent of the carrier or of the performing carrier arising out of damage covered by this Convention, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defenses and limits of liability which the carrier or the performing carrier is entitled to invoke under this Convention.

Thus, the carrier may benefit from the legal limitation of liability in facing the person who is accompanying living animals or vehicles which are covered by a contract for the carriage of goods not governed by this Convention, with the consent the carrier as stipulated in Article 1 (b4).

### **- Extent of Connection between limitation of liability and public order**

When the conflict arises before the court and the court notices that the conditions for the application of the convention to the conflict were available in the contract of carriage so that it enters into force, the court shall abide by the provisions of the Convention. This means that its provisions are considered as part of the public order. Therefore, the legal limitation of liability is considered as part of the public order. Accordingly, no agreement may be made on the contradiction of its provisions unless it is an agreement exceeding the maximum of liability.

If the contract that is entered into between the passenger and the carrier included a condition which reduces the minimum of the liability of the carrier, such agreement which was entered into before the occurrence of the accident leading to the damage shall be void and null.

The liability of the carrier in the public order, the legal limitation of liability considered the interest of the carrier and the protection of the carrier, as he is the weak party whereas the carrier is considered the strong party in this contract.

The convention stipulated in Article 18:

Any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger or the loss of or damage to his luggage, purporting to relieve the carrier of his liability towards the passenger or to prescribe a lower limit of liability than that fixed in this Convention except as provided in paragraph 4 of Article 8, and any such provision purporting to shift the burden of proof which rests on the carrier, or having the effect of restricting the option specified in paragraph 1 of Article 17, shall be null and void, but the nullity of that provision shall not render void the contract of carriage which shall remain subject to the provisions of this Convention.

The Convention included also another text regarding the limitation of

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(55) Dr. Mohamed Kamal Hamdy, op cit, p. 695.

liability stipulated in Article 19 as follows: This Convention shall not modify the rights or duties of the carrier, the performing carrier, and their servants or agents provided for in international conventions relating to the limitation of liability of owners of seagoing ships.

This text shows that the provisions of limitation of liability, mentioned in Article 7, 8 shall be applicable to the maritime carrier. However when another agreement sets out other provisions that limit the liability of the ship owner when he is a carrier, such agreement shall not amend the limits indicated in the other convention. When the maritime carrier is the ship owner, he may choose either to benefit from the provisions of Athens Convention, accordingly, the provisions of limitation of the liability stipulated therein, or to resort to another convention for the limitation of his liability. Athens Convention has nothing to do in this regard.

## **Second requirement Scope of limitation**

### **First: in case of death or physical injuries**

Article 7 of Athens Convention stipulated the ceiling of the liability of the carrier as to the death or physical injuries, paragraph 1 stipulated that “The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 700,000 francs per carriage. Where in accordance with the law of the court seized of the case damages are awarded in the form of periodical income payments, the equivalent capital value of those payments shall not exceed the said limit”.

Furthermore, paragraph 2 stipulated that “Notwithstanding paragraph 1 of this Article, the national law of any State Party to this Convention may fix, as far as carriers who are nationals of such State are concerned, a higher *per capita* limit of liability”.

Paragraph 2 of Article 7 showed that the convention gave the right to any state that is not a party therein not to abide by the amount fixed by it as compensation to the passenger in the event of death or physical injuries. It also allowed it to fix a higher ceiling for the liability per individual as to carriers among its nationals. In its inverse concept, no amount may be less than this limit of liability as to the states that are parties in the convention. Amounts may also exceed such limit.

### **3. In case of loss or damage of luggage**

As stated in Article 8 regarding the limit of liability of the carrier in the event of loss or damage of luggage as follows:

1. The liability of the carrier for the loss of or damage to cabin luggage shall in no case exceed 12,500 francs per passenger, per carriage.
2. The liability of the carrier for the loss of or damage to vehicles including all luggages carried in or on the vehicle shall in no case exceed 50,000 francs per vehicle, per carriage.

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3. The liability of the carrier for the loss of or damage to luggage other than that mentioned in paragraphs 1 and 2 of this Article shall in no case exceed 18,000 francs per passenger, per carriage.
4. The carrier and the passenger may agree that the liability of the carrier shall be subject to a deductible not exceeding 1,750 francs in the case of damage to a vehicle and not exceeding 200 francs per passenger in the case of loss of or damage to other luggage, such sum to be deducted from the loss or damage.

Article 10 of the convention also set out supplementary provisions regarding the limits of liability whether in terms of physical injuries or loss or damage of luggage, whereby:

1. The carrier and the passenger may agree, expressly and in writing, to higher limits of liability than those prescribed in Articles 7 and 8.

This shows that this paragraph is different from the content of paragraph 2 as it stipulates that any state that is a party in this Convention may fix, as to carriers, a limit on the liability in its national legislation as to the individual.

2. Interest on damages and legal costs shall not be included in the limits of liability prescribed in Articles 7 and 8.

Article 9 of the Convention, in its paragraphs 1 and 2 showed that the monetary unit used for the calculation of the limits of liability and the method of its conversion into the currency of the state where the court is located is as follows:

1. The franc mentioned in this Convention shall be deemed to refer to a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.
2. The amounts referred to in Articles 7 and 8 shall be converted into the national currency of the State of the court seized of the case on the basis of the official value of that currency, by reference to the unit defined in paragraph 1 of this Article, on the date of the judgment or the date agreed upon by the parties. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purpose of this Convention.

Whereas Egypt joined Athens Convention after issuance of the amendment of the Convention by virtue of the Protocol of 1976, it is considered that it joined the convention with the amendment brought to it. And as the amending protocol of the convention entered into effect on international levels, its provisions shall be implemented as stipulated by Article 26.3 of the convention:

“Any State becoming a Party to this Convention after the entry into force of an amendment adopted by a conference convened in accordance with this Article shall be bound by the Convention as amended”.

Accordingly, we will expose the Protocol of 1976 amending Athens Convention, as it included a new unit, which is the Special Drawing Right (SDR) as defined by the International Monetary Fund, instead of the Franc Poincaré as basis for the calculation of the maximum amount of compensation.



The Article 2 of the Protocol of 1976 amended the Articles 7 and 8 of Athens Convention, by making the maximum limits of liability as follows:

1. As to Article 7, an amount of 46666 accounting units.
2. As to Article 8, paragraph 1, an amount of 833 accounting units, and paragraph 4, both amounts of 13, 117 consecutively.

Furthermore, the Protocol of 1976 amending the Convention included in its Article 2 a new text titled “accounting or monetary units and conversion, instead of the text of Article 9 of the Convention. Its new provisions stipulated the following:

1. The accounting unit referred to in this Convention is the Special Drawing Right as defined by the International Monetary Fund, and the amounts referred in Articles 7 and 8 are converted to the national currency of the state where the court in charge of the case is located, according to the value of such currency on the date of judgment or on the date agreed by the parties. As to each contracting state that is a member in the International Monetary Fund, the value of its national currency shall be calculated according to the SDR as per the evaluation method applied by the International Monetary Fund, which is applicable on that date to its operations and formalities. As to each contracting state that is not an element of the International Monetary Fund, the value of its national currency shall be calculated according to the SDR using the method specified by this state.

2. Yet, the state that is not a member of the International Monetary Fund whose law does not allow the implementation of the provisions of Article 1 of this Article may declare on the validation or acceptance date, or at any time later that the limits of liability stipulated by this convention and which are applied on its territory shall be as follows:

- a. Regarding Article 7.1, an amount of 700000 monetary units.
- b. Regarding Article 8.1, an amount of 120500 monetary units.
- c. Regarding Article 8.3., an amount of 18000 monetary units.
- d. Regarding Article 8.4, deduction shall not exceed 1750 monetary units in the event of damage caused to his boat and it shall exceed 200 monetary units for each cash unit per passenger in the event of loss or damage of other luggage.

The monetary unit referred in this paragraph is equal to 56.5 mg of gold, gold bullion, fineness 900, the conversion of the referred to amounts into the national currency shall be made according to the concerned state law.

3. The account mentioned in the last expression of paragraph 1 and the conversion referred to in paragraph 2 shall be calculated by maximum in the national currency of the state for the same real value of the parameters in Articles 7 and 8, expressing them in the accounting units. The state shall meet the deposit through calculation according to paragraph 1 or as result of the content of paragraph 2, according to the case on the time of deposit of the deed referred to in Article 8 and whenever a change occurs in any of them.

The convention was not subject to delay in the delivery of luggage. However

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Article 7 of the convention showed only the limits of liability regarding the death of the passenger or a physical injury without showing the limits of liability in the event of late arrival of the passenger. Then, it is necessary to go back to the national legislation in this regard<sup>(56)</sup>.

The provisions of Article 12 of the Convention read as follows:

1. Where the limits of liability prescribed in Articles 7 and 8 take effect, they shall apply to the aggregate of the amounts recoverable in all claims arising out of the death of or personal injury to any one passenger or the loss of or damage to his luggage.

2. In relation to the carriage performed by a performing carrier, the aggregate of the amounts recoverable from the carrier and the performing carrier and from their servants and agents acting within the scope of their employment shall not exceed the highest amount which could be awarded against either the carrier or the performing carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him.

3. In any case where a servant or agent of the carrier or of the performing carrier is entitled under Article 11 of this Convention to avail himself of the limits of liability prescribed in Articles 7 and 8, the aggregate of the amounts recoverable from the carrier, or the performing carrier as the case may be, and from that servant or agent, shall not exceed those limits.

## **Section II**

### **Intensification of the liability of the maritime carrier of passengers**

We will study the intensification of the maritime carrier of passengers or the digression from the limited liability, in two successive studies, the first of which focuses on the Maritime Trade Law while the second focuses on Athens Convention.

#### **Subject One**

### **Intensification of the liability of the Maritime carrier of passengers in the Maritime Trade Law**

The carrier may be entitled to the provisions of the limitation of liability and the servant of the carrier enjoys the same right, provided that he proves the fault perpetrated by him (i.e. the servant) during his duty performance or as a result from the latter.

However, two cases indicate a disgraceful conduct on the part of the carrier, his representative or any of his servants: when the damage results from act or omission with the intent to cause damage, or recklessly with knowledge that damage would probably result. In none of these cases, the carrier is worthy of care. Therefore, he shall be deprived from the benefits of the legal limitation of liability and he shall be obliged to compensate the damage in full.

This is shown in the text of Article 259 of the Maritime Trade Law, as it stipulates the following: "The carrier shall not be entitled to the benefit of the limits of liability, if it is proved that the damage resulted from an act or

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(56) Dr. Mohamed Kamal Hamdy, op cit, p. 679.

omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”.

Furthermore, Article 258/1 of the Maritime Trade Law stipulates that: “The compensation imposed on the carrier in the event of death or injury of the passenger shall not exceed one hundred and fifty thousand Pounds and a compensation limit above such amount may be agreed upon”.

The aforementioned two texts show that the carrier shall be deprived from the legal limitation of liability in the following cases:

a. Administrative misconduct, especially as the limitation of liability is a benefit to the carrier. He does not benefit from and he does not make use thereof and he shall be bound to compensate the damage in full, if the plaintiff “the passenger, his heirs or the passengers supported by him” proves that the damage emanated from a full compensation for the damage; if the plaintiff “the passenger, his heirs or the passengers supported by him” proves that the damage resulted from an administrative misconduct on the part of the carrier or his representative.

The administrative misconduct consists in an intentional act (fraud), where the damage results from an act or omission done by the carrier or his representative with the intent to cause damages. In the event of intolerable or aware fault, where the damage results from an act or omission on the part of the carrier or his representative with the intent to cause damages or recklessly with knowledge that damage would probably result, as stipulated by the legislative in Article 259 of the Maritime Trade Law is unfamiliar to the Egyptian legal formulation, but according to the content of the explanatory memorandum Clause No. 196, it is the prevailing expression in the field of transport of all types, and it is the preferred one to international conventions, as it tightens the gap between the discrepancy of national legislations in terms of serious fault.

And the administrative misconduct, as shown, may be the result of an intentional act with the intent to cause damage or indifference with the awareness that damage may occur.

#### **First: Fraud**

If the carrier, his representative or any of his servants intended, through any act or omission that led to the damage, to cause such damage, then we are surely facing an intentional act and fraud, and according to rules fraud impairs all rules of law.

Hence the question that arises: what does fraud mean?

In its modern concept, fraud is synonymous to intentional fault. In this context, it means the perpetration by the carrier of any act or his omission despite his full awareness that damage may occur as a result thereof; yet, he perpetrates such act. However, there shall be intent to harm the concerned party (passenger, his heirs or the passengers supported by him).

Unlike the traditional concept which was required in the definition of the fraud idea, the presence of an intent to harm.

If the carrier’s fraud is not presumed, then the affected party shall prove such

fraud by submitting evidence on the willful act or omission on the part of the carrier, his representative or any of his servants, and the consequences of such act or omission<sup>(57)</sup>.

## **II. Indifference (intolerable fault or aware fault)**

Indifference exists when the carrier is aware that his willful act or abstention may lead to damage or destruction of items, subject of the carriage contract, or might delay the arrival of the same. Yet, he perpetrates the act or abstention, with indifference to the damage that might occur<sup>(58)</sup>.

Therefore, indifference consists of two elements:

First element: willful act or omission by the carrier. If the act is not willful, then it shall be deemed as indifference, and the carrier has the right to adhere to the limitation of liability.

Second element: The carrier, at the moment of perpetrating the act or abstaining, is fully aware that damage may occur. Moreover, indifference exists in the situation where the carrier shall be aware of this, then we notice the separation between intentional act and indifference; in case of indifference, the carrier knows that his act or omission may lead to damage, destruction and delay (damage). However, in case of indifference, the carrier knows or is supposed to know that damage may occur according to the events.

The affected party may claim from the carrier a full compensation for the damage, provided he proves that the carrier, his representative or any of his servants was aware that damage may occur as a result of his act or omission, and he shall confirm that it is admissible by all ways, and the standard in this regard is objective to the regular carrier (with average diligence), if he finds the same conditions. And the agent of the carrier or his carrier shall be also deprived from the benefits of the limitation of liability if damage results from his administrative misconduct.

b. Case of the agreement on compensation beyond the limit of the legal limitation of the liability of the carrier (Article 258/1).

c. The third case: the case of damage resulting from the delay of arrival, such damage requires full compensation according to the general rules.

Therefore, the unlimited liability of the carrier may arise if the reason of the accident causing the damage is unknown<sup>(59)</sup>.

### **Subject Two Intensification of the liability of the maritime Carrier of passengers under the Athens Convention**

The convention granted the carrier and his servants the right to benefit from the limitation of their liability in the event of death or injury, or loss of or damage to luggage, provided that he proves that fault occurred on the part of the carrier or his servants while performing their tasks, and in counterpart, the

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(57) Dr. Mohamed Kamal Hamdy, op cit, p. 521.

(58) Dr. Mustafa Kamal Taha, op cit, p. 146 - Dr. Mohamed Kamal Hamdy, op cit, p. 526.

(59) Dr. Hani Doueidar, Maritime Law, p. 163.

carrier and his servants shall be deprived from sticking to this right. Furthermore, Article 13 of the convention stipulated the following:

1. The carrier shall not be entitled to the benefit of the limits of liability prescribed in Articles 7 and 8 and paragraph 1 of Article 10, if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

2. The servant or agent of the carrier or of the performing carrier shall not be entitled to the benefit of those limits if it is proved that the damage resulted from an act or omission of that servant or agent done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The foregoing text shows that in the event that the maritime carrier, as well as its servants and agents perpetrated an act or caused damage, and such act or abstention from performing the obligations imposed on them during their performance of works, with the intent to harm, or they caused damages or perpetrated acts with indifference knowing that damage would probably result.

In such case, the carrier may not request the limitation of his liability because he is not worthy of it. However, he shall fully compensate for the damage caused by him whether intentionally or not, with knowledge that such damage would probably result.

Hence, the administrative misconduct may result from an intentional fraud with the intent to cause damage, or with indifference with the knowledge that such damage would probably result.

Finally, the carrier may not be entitled to the benefits of the limitation of liability, if there was an agreement between him and the passenger on a limit of compensation beyond the stipulated limit in the convention.

Furthermore, the convention shall not fix any maximum limit of compensation resulting from delay, the carrier shall compensate for the damage according to the general rules in legislation.

### **Section III** **Conventions related to the liability** **of the maritime carrier of passengers**

The conventions related to the liability consist in the conditions set by the carrier for exonerating him from liability or diminishing such liability. Hence we will study the annulment of the conditions in the Maritime Trade Law and Athens Convention in two successive studies.

#### **Subject I** **Annulment of the conditions of exoneration** **or diminution of liability in the Maritime Trade Law**

The exoneration of the carrier from the liability for death, injury or delay shall be made by confirming that the source of the damage is external, and that

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none of the carrier, or his representative or servants is involved therein. The exoneration of the carrier from the liability for substantial shift in the circumstances of transport shall be made by confirming that he and his servants had deployed the due diligence in such circumstances so as to avoid such shift. The beneficiary from the exoneration from liability is the carrier, his agents and his servants, if the agent or servant proved that the act attributed to him arises from his duty performance, and this provision was stipulated in Article 264 of the Maritime Trade Law: “if a compensation claim was filed against one of the carrier agents or servants, the defendant may stick to the defenses the carrier may object to through the liability provisions and the prescription of the lawsuit with time, if the agent or servant proves that the act attributed to him arises from his duty performance”.

Hence, Article 264 assumes that the liability claim was addressed to the carrier agent or any of his servants; therefore it was subject to the provisions of the carrier’s liability, provided that the agent or servant proves that the act attributed to him arises out of his duty performance.

The agent and servant may stick to the limitation of liability and the short-term aging; and in counterpart, he shall abstain from making use of the conditions of exoneration from liability if any, and then, the Maritime Trade Law shall annul any condition including exoneration or diminution of liability imposed by it on the carrier.

Article 260 of the Maritime Trade Law provided for the annulment of the conditions of exoneration from liability, which may be included in the contract of maritime carriage of passengers, as it says: “Any agreement shall be invalid if an incident that caused the damage and whose subject-matter relates to one of the following matters:

- a. Exonerating the carrier from liability towards the passenger, his heirs or dependents
- b. Amending the burden of proof
- c. Fixing the compensation at less than the limit decided in Article 258 of this Law.
- d. Assigning to the carrier the rights arising out of the insurance of the passenger.

Here is the new Egyptian Maritime Trade Law which used to allow the carrier to insist upon exoneration from liability, as a main condition, for small faults perpetrated by him personally and for consequent faults if they were serious, but also for their fraud in executing the carriage as per the requirements of Article 218 of the civil law, and the only defense that the passenger, his heirs or the persons supported by him had against such conditions was the possibility to implement Article 149 civil which allows the exoneration of the passenger from such conditions, if he proves that the contract was made by obedience or that conditions are arbitrary<sup>(60)</sup>.

The new text protects the passenger, then his heirs and the persons supported

(60) Dr. Mahmood Sameer Al Sharkawi, op cit, p. 482.

by him, not only from the conditions of exoneration from liability, but also from each condition that diminishes the burden of proof imposed by the law on the carrier or fixes the minimum limit for compensation at less than 150.000 pounds or decides to assign to the rights arising out of the insurance of the passenger.

All these conditions shall be null if they were agreed before the occurrence of the event leading to the bodily injury or death, and this means that such conditions are valid if they were included after the occurrence of the incident, preventing the carrier from imposing such conditions making use of his economic power, because after the event, the passenger, his heirs or the persons supported by him are in a situation where they only accept the conditions which fulfill their interests.

However, conditions may be put before the event as the liability for delay for which the legislator did not put a maximum. Therefore, he may stipulate the limitation of his responsibility, but he shall not stipulate his exoneration because the annulment of the conditions of exoneration encompasses all the cases of liability, then the carrier's stipulation of his exoneration from the liability for delay shall not be acceptable<sup>(61)</sup>.

This means that the carrier may include any conditions where his liability is defined, provided that such conditions is not insignificant in a way that it comes along with a mask that veils the exoneration from liability or hidden exoneration from liability<sup>(62)</sup>.

## **Subject II** **Invalidity of the conditions of the exoneration from** **Liability or diminution of liability in Athens Convention**

The carriage contract stipulates obligations that fall upon the carrier. In the event of breach of such obligations, the carrier shall be subject to the liability stipulated in the Convention. Therefore, the Convention stipulated in Article 18 the annulment of every agreement before the occurrence of accident, with the intent of exonerating the carrier from his liability or diminishing such liability. The Article stipulated the following:

“Any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger or the loss of or damage to his luggage, purporting to relieve the carrier of his liability towards the passenger or to prescribe a lower limit of liability than that fixed in this Convention except as provided in paragraph 4 of Article 8, and any such provision purporting to shift the burden of proof which rests on the carrier, or having the effect of restricting the option specified in paragraph 1 of Article 17, shall be null and void, but the nullity of that provision shall not render void the contract of carriage which shall remain subject to the provisions of this Convention”.

Yet, in accordance with Article 10/1, the carrier or passenger may agree

(61) Dr. Mahmood Mukhtar Barairi, op cit, p. 451.

(62) Dr. Mohamed Kamal Hamdy, op cit, p. 256, Dr. Ibrahim Dsouki Abu El Layl, op cit p. 286.

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expressly or in writing on higher limits of liability other than those indicated in Articles 7 and 8. Furthermore, the interests on compensations and legal costs shall not enter within the limits of liability stipulated in Articles 7 and 8, as stipulated by Article 10/2<sup>(63)</sup>.

The foregoing shows that the convention invalidated the conditions concluded between the passenger and the carrier before the accident, stipulating the exoneration from liability or the diminution of liability, which may be detailed as follows:

1. Exoneration of the carrier from liability in the event of death or bodily injury, or loss or damage of luggage.
2. Shift of the burden of proof which rests on the carrier.
3. Determination of the compensation below the limit decided in Articles 7 and 8.
4. Deprivation of the defendant from choosing the court that will examine the lawsuit indicated in Article 17, paragraph 1.

Yet, Article 18 of the Convention sets out the contractual conditions which defined the contractual conditions which are deemed null, stipulating that they exonerate the carrier from his liability or diminish his liability in the contract of maritime carriage of passengers concluded before the occurrence of the accident that caused the death or injury, or damage or loss of luggage. But as mentioned in the convention, such conditions shall be deemed null when they were agreed upon before the accident. Yet, such contractual conditions becomes valid in the inverse concept, if they were agreed upon before the occurrence of the accident and the reason leading to it is attributed to the carrier's loss of the power he exploited before the accident, as after the accident, the passenger and his heirs are in a strong position that make them accept only the conditions that fulfill their interests.

Hence, we notice a strong similarity between the provisions set out in the convention regarding the exoneration and the Maritime Trade Law in Article 260.

### **Chapter III** **Liability claim procedural System** **for the maritime carrier of passengers**

The procedural system of the liability claim implies a direct liability claim against the carrier of passengers by sea. We will not study it in details but we will only expose the characteristics of the liability claim in the Maritime Trade Law in the general rules of the code of procedure.

Such characteristics consist in three topics, each of them will be discussed in a separate study in this Section, i.e.:

- Notification of the carrier in the event of bodily injury.
- The competent court for the examination of lawsuits arising out of the contract or carriage of passengers and their luggage.
- Time-bar of the liability claim.

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(63) Dr. Ahmed Husny, op cit, p. 35



## Section I

### Notification of the carrier by the passenger in case of bodily injury

The legislator regulated the provisions of the liability claim, as Article 261 of the Maritime Trade Law stipulated that: “in case of bodily injury, the carrier shall be notified in writing of the injury within fifteen days of the date of the passenger’s departure from the ship, otherwise, he shall be supposed to have left it without injury unless he proved otherwise”.

The notification in the aforementioned Article is imposed only on the passenger in case of bodily injury, and during the performance of the carriage contract.

Hence, the question arises in the case the passenger leaves the ship and death occurred afterwards due to an accident during the execution of the carriage contract. The passenger had not notified of the bodily injury resulting from the accident, whether it occurred before the elapse of fifteen days from the departure from the ship or it occurred after the elapse of such period.

The Maritime Trade Law did not provide the solution to be adopted in the event of the death of the passenger after his departure from the ship due to an accident that occurred during the execution of the carriage contract came only to prove the commencement of validity of the prescription of the liability claim.

In the previous case for which no stipulation was set out, the legislator did not want to breach the general rules, this means that the non-notification in writing shall not entitle the heirs of the passenger or the persons supported by him, to claim of liability for the bodily injury filed by the passenger. Furthermore, there is no notification in the event of death<sup>(64)</sup>.

The period of notification of the bodily injury is fifteen day from the date of the passenger’s departure from the ship. And law did not specify a specific form of notification, but it only stipulated that it should be written, and it shall reach the carrier. This is fulfilled if the notification of warning came through minutes or registered letter with acknowledgment of receipt<sup>(65)</sup>.

In order to take its legal effect, the notification shall expressly stipulate that the passenger was subject to bodily injury while executing the carriage contract, along with the specification of the injury as much as possible.

Article 261 shall result in the failure to notify or the non-fulfillment of its legal conditions such as delay as to the legal deadline, or being oral, or that it ignores the pretext that the passenger left the ship without injury. Hence, the defendant may refute in all the ways of proof. Furthermore, the occurrence of notification as stipulated by law proves that the passenger was subject to injury due to an accident while executing the carriage, which is also a pretext that may prove the contrary<sup>(66)</sup>.

(64) Dr. Mohamed Kamal Hamdy, op cit, p. 663.

(65) Mohamed Turk, op cit, p. 532.

(66) Dr. Mohamed Kamal Hamdy, op cit, p. 664.

## Section II Competent Court

The competent Maritime Trade Law specified the competent court in the event of disputes arising out of the contract of carriage of passengers, where the Article 272 of the Law stipulated that “lawsuits arising out of the contract of carriage of passengers by sea to competent court according to the provisions stipulated in the civil and commercial procedure code. The said lawsuits may be, according to the choice of the plaintiff, be filed before the court, where the port of seizure of the ship is located and each agreement prior to the conflict shall be rendered null. The aforementioned text show that the competent court for the examination of claims arising out of the contract of carriage of persons as they are based on the contract and the text sets several choices as stated in the previous article<sup>(67)</sup>.

The provisions of the text are conform to the text of Article 245 of the Maritime Trade Law concerning the competent courts for the examination of claims arising out of the contract of carriage of goods, except for the text of Article 272 which mentions the port of call or port of arrival instead of the port of discharge.

The competent court is, according to the provisions of the civil and commercial procedure code is the court in the area of which the defendant resides (Article 49). When a commercial matter is in question, the local jurisdiction is concluded for the court of the plaintiff or the court in the area of jurisdiction where the agreement was made, or the court in the area of which the agreement shall be executed.

The text (Article 272) of the Maritime Trade Law authorized the plaintiff, whether he was the passenger or his heirs, instead of filing his claim before the courts determined by the provisions of the code of procedure, to file the same at his discretion before the court in the area of which the port of arrival or the port of call where the ship is booked is located.

Hence, the legislator allowed the plaintiff, instead of filing his claim before the nearest court, in the country he is aware of its judicial and legal system, as any claim against the carrier if the domicile of the latter was outside his state, he shall make him bear hardship and charges, as he will be facing with an unfamiliar judicial, with unfamiliar procedures, as well the fees of transport and appointment of lawyers, the translation of documents, the right of choice decided by the legislator to the plaintiff in the public order. Hence, the text stipulated that every agreement depriving the plaintiff from such right or restricting him shall be deemed null and void, i.e. every agreement concluded before the dispute. However, after the dispute, the agreement is valid for the lack of pressure by one of the parties over the other.

There is no doubt that the order of appointment of the competent court to examine the claim for contractors shall grant the party enjoying the stronger position to weaken the other, within conditions that give the jurisdiction to a unfamiliar court, the order which make him incur hardship and fees and worries.

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(67) Dr. Mohamed Kamal Hamdy, op cit, p. 666.

Hence the legislator gave the right to determine the competent court, whether the claim was filed by the carrier or passenger, as to the claims arising out of the contract of carriage of passengers<sup>(68)</sup>.

### **Section III Prescription of liability claim**

Article 263 of the Maritime Trade Law regulated the prescription of the claim of liability for the death or injury of the passenger or late arrival. Therefore, it stipulated the following:

1. The claim of compensation for the damage arising out of the death or injury of the passenger shall be valid for two years starting from:
  - a. The day following the departure from the ship in case of bodily injury.
  - b. The day on which the passenger was supposed to leave the ship in case of death during the carriage contract.
  - c. The day of death if it occurred after the departure from the ship and due to an accident that occurred during the execution of the carriage contract; in which case, the lawsuit shall be time-barred after a period of three years from the date of the passenger's departure from the ship.
2. The claim of liability for the damage arising out of the date arrival shall prescribe with the elapse of six months as from the day following the passenger's departure from the ship.

#### **The claims on which prescription applies:**

1. The claims of compensation for the death or injury. Article 263/1 set out the provisions of prescription, limiting it to the compensation claim filed against the carrier, in his capacity as such, for the damage arising out of the death or injury of the passenger. The other claims arising out of the contract of the carriage of passengers are not subject to such prescription, same as the liability claim due to the misperformance of the carriage contract, provided that this does not result in the death or injury of the passenger. Furthermore, if the carrier seated the passenger in the ship at a lower class than the one agreed upon in the travel ticket or made default in some services by which he abided by virtue of the contract. As for the claim for charges and the claim for the termination of contract and compensation filed by the passenger in the cases stipulated by Articles 254 and 255 of the Maritime Trade Law, it is applicable to such ordinary prescription claims or the prescription decided for the tort of the carrier towards a passenger for a transport free of charge.

Therefore, we notice that the legislator was supposed, in order to speed up the disputes related to the contract of carriage of passengers, to decide a short-term time-bar for two years for the rest of the claims arising out of this contract which were not stated in Article 263, with respect to the claims arising out of the contract of carriage of goods as Article 244 of the Maritime Trade Law stipulates that the claims arising out of the contract of the carriage of goods shall be time-barred after a period of two years from the date of delivery of

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(68) Dr. Abdul Fadeel Mohamed Ahmed, op cit, p. 297.

goods, or the date on which the delivery was supposed to be made<sup>(69)</sup>.

**Second: Prescription of the claims arising out of the damage or destruction of luggage**

As to the luggage of the passenger, whether they were registered or not, it shall be subject to the same provisions regarding the prescription of claims arising out thereof and the competent court for the examination of claims, Article 271 of the Maritime Trade Law stipulates: “the claims arising out the carriage of luggage shall be time barred after a period of two years from the date of delivery of goods, or the date on which the delivery was supposed to be made”.

The calculation of the period of prescription from the day following the day on which the passenger was supposed to leave the ship shall be made in case of death of the passenger during the execution of the contract, and the claims related to the carriage of the passenger shall be considered as claims arising out of the carriage contract. The passenger has a privilege in the ship and the carriage charge in order to guarantee the due compensation for the destruction or damage of the registered luggage.

**Third: Time-bar of the claims of compensation for delay**

Article 263/2 stipulates the time-bar of the claim of compensation for the damage resulting from the late arrival by the elapse of six months as from the day following the ship departure. Hence, we notice that the legislator did not require the notification of the carrier in case of delay because the notification mission means the creation of a presumption to the benefit of the carrier in the event of injury or damage to luggage. However, in case of delay, the official papers related to the ship and the ports registers confirm that there is no need for notification and no need to prove the timely arrival<sup>(70)</sup>.

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(69) Dr. Mohamed Kamal Hamdy, op cit, p. 664.

(70) Dr. Mahmood Mukhtar Barairi, op cit, p. 453.

## Conclusion

In this study, we raised one of the major issues in the field of maritime law, mainly the liability of the maritime carrier of passengers, which was not tackled by legal studies. Therefore, in this study we explored some provisions related to it. Hence, we discussed the topic from two perspectives: the Egyptian sea trade law and Athens Convention of 1974 on the carriage of passengers and luggage by sea. In this context, we noticed a great similarity between several provisions included therein.

We started this study with a preliminary section limiting the scope of liability in an accurate way. We showed the necessary substantial conditions for the implementation of the provisions of the maritime carrier. Hence, a contract on maritime must exist. We also mentioned the characteristics of this contract as being a consensual contract, a commercial contract and a contract of adhesion. This contract is binding to both parties. It is also a personal contract and a private one. Such provisions are applicable only when the subject of carriage is passengers and in return for fees.

Then we divided the study into two parts: one focusing the cases and bases of the liability of the maritime carrier of passengers, and another one centered on the scope of liability of the maritime carrier of passengers.

In the first part, we studied the cases and bases of liability of the maritime carrier of passengers. We exposed five cases of liability in the Egyptian Law: the carrier's liability for the physical damage or death of the passenger; the carrier's liability for the non-performance of the carriage; the carrier's liability for the substantial shift in the travel conditions; the carrier's liability for the damages caused to the traveler's luggage.

We also showed that Athens Convention gave a definition of the carrier on whom the liability rests. Furthermore, it gave another definition of the actual carrier (performer), and limited the liability of each of them, where they are jointly liability in terms of joint and separate liability. It also allows claiming compensation whether from the carrier or the performing carrier (the actual carrier). We indicated that the convention rendered the contract of carriage a commitment to guarantee the arrival of the passenger to the port of arrival safely and that he is under the responsibility of the carrier during the performance of the contract, for any damage resulting in the death or injury of the passenger or loss or damage to luggage. Moreover, it stipulated that the carrier may discharge his responsibility if it was proved that the act that resulted in the damage is due to a direct or indirect fault on the part of the passenger.

Then, we raised the issue of the basis of the liability of the maritime transporter of passengers, as to the damages caused to passengers and whether there was a commitment by the carrier to give due diligence or to achieve a result in this regard. We also mentioned that the Egyptian legislator and the Egyptian jurisdiction acknowledged that the carrier's commitment to guarantee the safety of the traveler is a commitment to achieve a result: the safe arrival of the passenger. It is not enough for the carrier to give the necessary due diligence to prevent the injury of the passenger, but it is enough for the passenger to prove that his injury occurred during the journey so that the carrier is deemed responsible. And the latter may not be released from the liability, unless he proved the external cause.

Then, we moved to the basis of liability in cases of loss or damage to luggage. In this context, we identified between the registered, non registered and deposited luggage. The carriage of registered luggage is subject to the provisions of the contract

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of goods carriage, except for the provision related to the limitation of liability. As for the carrier, he shall be answerable for the damage or deterioration of unregistered luggage kept by the traveler if it was proved that the damage is attributable to the fault of the carrier, his representative or his servants. As for deposited luggage, the carrier is not entitled to benefit from the limitation of liability if it was proved that damage resulted from an act or omission from him or from his representative, with intent to cause damage or neglect with knowledge that damage would probably result. In any event, the basis of liability of the maritime carrier for the destruction and damage of luggage is always a contractual liability resulting from the contract of carriage concluded between the passenger and the carrier, being the support of the relation by virtue of which the passenger is bound to carry the passenger's luggage.

The Second part of the study is about the scope of liability of the maritime carrier of passengers. We divided its axes into three sections. First, we talked about the principle and justifications of the limitation of the carrier's liability and we noted that the idea of balance between the carrier's interest and the passenger's interest is the basis for the limitation of liability of the maritime carrier, with the assumption of the carrier's good faith principle in the performance of his obligations. Then, we showed the liability to which the limitation applies, as the damages leading to the death or injury of the passenger, as well as loss or damage to luggage, if the accident leading to the damage occurred during the performance of the contract of carriage, and this was the basis of this liability, whether it was a contractual one, a tort or otherwise. The carrier, his agents or his servants benefit from such limitation. Finally, we showed the extent of this limitation, whether in case of death, physical injury or in case of loss or damage to luggage.

We showed this according to the Egyptian Law and Athens Convention.

As for the second section, it is about the intensification of the carrier's liability, the extent of validity or invalidity of the conditions of exoneration and diminution of liability. We noted that the carrier is entitled to benefit from the provisions of limitation of liability, and the servant enjoys the same right provided that he proves the fault perpetrated by him (i.e. the servant) during or due to performance of his task, apart from the cases of fraud and neglect (intolerable fault or aware fault). We also raised the issue of invalidity of the conditions of exoneration or diminution of liability in both Egyptian Law and Athens Convention.

Then, we studied in the third and last section the procedural system for the claim of liability in the sea trade law, which mainly encompasses the notification of the carrier in case of physical injury, and the competent court for the examination of claims arising out of the contract of carriage of passengers and their luggage, and finally the time-bar of the liability claim.

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مسؤولية الناقل البحري للركاب  
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بنقل الركاب وأمتعتهم بحراً لعام ١٩٧٤

د. بلال عبد المطلب بدوي  
أستاذ القانون التجاري والبحري المشارك  
كلية الحقوق - جامعة عين شمس

### ملخص البحث باللغة العربية

لا شك أن للنقل البحري للأشخاص أهمية كبيرة في حياة الشعوب، حيث يعد ظاهرة من الظواهر الاجتماعية والاقتصادية في كل المجتمعات على اختلافها، وتمثل مسؤولية الناقل البحري محوراً أساسياً في هذه الموضوع.

ويدور هذا البحث حول هذا الموضوع حيث ينقسم إلى فصلين، يتناول الأول منها حالات تلك المسؤولية وأساسها، بينما يتناول الثاني نطاق تلك المسؤولية، وذلك في ظل كل من القانون المصري معاهدة أثينا الخاصة بنقل الركاب وأمتعتهم بحراً.