Air carrier's obligation to ensure the safety of the passenger

التزام الناقل الجوي بضمان سلامة الراكب

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الملخص

يرتّب عقد النقل الجوي على عاتق الناقل التزاما بضمان سلامة الراكب مفاده إيصال هذا الأخير إلى مكان الوصول المتفق عليه سالما معافى، وتكمن أهمية هذا الالتزام في ارتباطه بحياة الراكب وسلامته الجسدية منعا لإصابته بأي ضرر. لم تعرف أغلب التشريعات الوطنية ولا الاتفاقيات الدولية هذا الالتزام واكتفت بالنص على شروطه، كما اختلفت بشأن طبيعته هل هو التزام ببذل عناية أو التزام بتحقيق غاية. كما جعلت مسؤولية الناقل الجوي عن اخلاله بهذا الالتزام مسؤولية محدّدة لا يجوز الاتفاق على استبعادها. حيث يكون الناقل الجوي مسؤولا عن الخسائر والأضرار التي تصيب الراكب والتي تؤدي إلى وفاته أو التي تسبب له جرحا أو ضررا، كما يلتزم أيضا بتعويض الأضرار التي تصيب مداركه العقلية أو ما يعرف بالأضرار المعنوية أو النفسية، بحيث لا يعفى من المسؤولية إلا بإثباته اتخاذ جميع التدابير اللازمة لمنع وقوع الضرر أو استحالة اتخاذها أو خطأ المضرور.

الكلمات المفتاحية: عقد النقل الجوي، الناقل الجوي، الراكب، ضمان السلامة، حادث جوي

Abstract

The air transport contract imposes on the carrier an obligation to ensure the safety of the passenger, namely to deliver the latter to the agreed destination safe and sound. The importance of this obligation lies in its connection to the life and physical safety of the passenger, avoiding him suffering any damage. Most national legislation and international conventions do not recognize this obligation and merely stipulate its conditions. They also differ as to its nature, whether it is a duty of care or one of performance. The air carrier's liability for breach of this obligation is a specific liability that cannot be excluded by agreement. The air carrier is liable for loss or damage suffered by the passenger which results in his death, injury or damage to his person. It is also obliged to compensate for damage to the passenger's mental faculties, known as moral or psychological damage, and is only exempt from liability if it can prove that it took all necessary measures to prevent the damage, that it was impossible to take such measures, or that the damaged party was at fault.

Keywords :. Air transport contract, air carrier, passenger, safety assurance, air accident.

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Introduction

The air carrier's obligation to ensure the safety of passengers is one of the most important obligations stipulated in the air transport contract. The air carrier is responsible for getting passengers to their destination safely and in good health. This is crucial because it is about people's lives and making sure that they are not damaged. The importance of this obligation arises from the fact that concerns the life of the passenger and the prevention of any damage, as the safety of the passenger is one of the necessities that international agreements and national legislations have endeavored to protect[1]. However, although these national legislation and international agreements do not define the obligation to ensure safety, they do oblige the air carrier to ensure the safety of passengers.

The obligation to ensure safety was first introduced by French case law at the beginning of the last century[2] and was subsequently enshrined by the French legislator in several legal texts. The Algerian legislator has explicitly enshrined it in the provisions of the contract of carriage in the Commercial Law[3]. This is clearly stated in Article 62, which stipulates that the carrier of persons is responsible for ensuring the safety of passengers during the term of the contract of carriage and is responsible for delivering them to their intended destination within the time limit or period specified in the contract.

Law No. 98-06[4], which sets out the rules applicable to civil aviation, does not expressly provide for the obligation to ensure safety, but it does address it implicitly[5] in its provisions on the liability of air carriers towards passengers, cargo and baggage. As evidenced by the provision of Article 145-1, the air carrier is liable for loss or damage suffered by a passenger or traveler which results in death, injury or damage, provided that the latter occur during the performance of the air transport contract, i.e. on board the aircraft or during boarding or disembarkation.

The 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by the 1955 Hague Protocol[6], does not address the definition of the obligation to ensure passenger safety. However, this obligation is inferred from the provisions of Article 17, which stipulates that the air carrier is liable for damage or loss suffered by a passenger, such as death, injury or any damage caused to him (her)[7].

It should be noted that with the technological developments in air transport, the obligation to ensure passenger safety has changed significantly from what it was before, given the large number of flights taking place across different countries around the world. It was therefore necessary to provide greater protection for travelers or passengers. This is what the legislator has done through Law No. 15-14[8] amending Law No. 98-06, which includes a section entitled ‘Security and Safety Objectives and Measures. It is clear from the provisions of Article 16 bis of this section that the legislator has strengthened passengers safety by stipulating the need to provide safety and security for them, in order to keep pace with developments and the requirements of international civil aviation.

However, since its approval, this obligation has always been the subject of discrepancies and differences between national legislation and international conventions,

whether in terms of its content, nature or basis[9]. Therefore, we have addressed this issue by raising the following question, which focuses on the content of the air carrier's obligation to ensure air transport safety within the framework of civil aviation law and the Warsaw Convention, and the penalties for breaching it.

We will answer this question through two main axes. The first axis addresses the concept of the air carrier's obligation to ensure passenger safety, and the second axis addresses the penalties for breaching this obligation.

I- Content of the air carrier's obligation to ensure passenger safety

The obligation to ensure passenger safety by delivering the passenger to the agreed destination is one of the most important obligations imposed on the carrier by the air transport contract. To determine the content of this obligation, we will address its definition (1), its conditions (2), and then its nature (3).

1- Definition of the air carrier's obligation to ensure passenger safety

Neither Law No. 98-06 nor the 1929 Warsaw Convention nor its amended protocols define the obligation to ensure safety. Moreover, it is not defined in the general rules. However, this obligation was enshrined in the general rules by the French judiciary in its ruling of 21 November 1911[10], which imposed a contractual obligation of safety on the land carrier during the performance of the contract of carriage, namely to deliver the passenger to his destination safe and sound. This obligation was then transferred to other contracts, including the contract of carriage by air, after the legislator enshrined this obligation[11], and it became a legal obligation of its own[12].

The definitions by jurisprudence have varied depending on the angle from which this obligation is viewed. Some scholars have defined this obligation by listing the conditions that must be met for it to be fulfilled, which generally consist of an obligation on one of the contracting parties to preserve the physical safety of the other contracting party, and that there is a danger threatening the safety of the contracting party benefiting from this service, in addition to the requirement that the debtor who is obliged to ensure safety must be a professional[13]. Some have added that this obligation is fulfilled when one party to the contract approaches the other requesting a specific product or service and there is a threat to the party requesting this service or product, and the party obliged to provide the latter is a professional or craftsman[14].

It should be noted that these definitions do not address the subjectivity of the obligation to ensure safety and merely specify the conditions on which it is based. Others have therefore proposed defining this obligation by examining its subjectivity, specifying the meaning of the concept of safety itself as the subject of this obligation. They considered that this obligation is only fulfilled in contracts where the creditor is under the control of the debtor, or where the means by which the debtor's principal obligation is performed are under the latter's control, where the debtor has actual control over all the elements, both persons and things, used in the performance of the contract that could cause damage to the creditor[15].

The content of the air carrier's obligation to ensure the safety of passengers or travellers is not different from the above, as it is based on the air carrier's control over the elements that cause damage, namely the aircraft and the crew. Therefore, in order to achieve this obligation and its intended purpose, and in line with international agreements in this field, the legislator stipulated that the aircraft must be airworthy, imposing international safety standards that must be respected in the manufacture and maintenance of aircraft, with the need to subject them to periodic inspections and maintenance, and that the air carrier must comply with all instructions relating to air navigation, such as rules for take-off, landing and flight levels, in addition to equipping the aircraft with the necessary protection and safety measures, as well as requiring the competence of the crew carrying out the air transport operation by providing licenses and certificates proving this competence[16].

It should be noted that, in order to strengthen the commitment to ensuring passenger safety, the legislator has also stipulated in the Civil Aviation Law that the air carrier is obliged to ensure passenger security, linking the two obligations together, as is clear from the title of the section added by the 2014 amendment to this law, entitled 'Security and Safety Objectives and Measures'. It should be noted that the air carrier's obligation to ensure passenger safety differs from its obligation to ensure passenger security. The former obligation consists of all the means and measures that the carrier must take during the performance of the air transport contract to preserve passenger safety and compensate passengers for all damages they may suffer because of technical incidents.

The air carrier's obligation to ensure the security of passengers consists of protecting them from unlawful acts that may occur during the flight, such as hijacking and piracy[17].

Therefore, regardless of the definition given to the obligation to ensure safety, according to Article 145 of Law No. 98-06 or the Warsaw Convention, certain conditions must be met for the air carrier to fulfil its obligation to ensure safety.

2- Conditions for the air carrier's obligation to ensure safety

In addition to the conditions relating to the contract of carriage itself (2.1), other conditions relating to the accident that occurs to the passenger and causes him damage (2.2) are required for the air carrier's obligation to ensure passenger safety.

1.2 Conditions relating to the air transport contract

The air carrier's obligation to guarantee the safety of the passenger requires a valid air transport contract between the air carrier and the passenger, because the damage that occurs as a result of the breach of the obligation to guarantee safety, for which the carrier is liable, is that which occurs during the execution of this contract, so the validity of the latter is conditioned on the availability of the general elements necessary for its existence, which is confirmed by Article 131 of the Civil Aviation Law.

The passenger is obliged to prove the existence of this contract by presenting the travel ticket, which proves the obligations and rights of the parties as evidence of the conclusion of the contract and the payment of the consideration by the carrier[18], provided that the main

subject of the contract of carriage is transport as the main obligation of the air carrier, as evidenced by the provisions of the aforementioned article, which means that it excludes from the scope of the air transport contract recreational trips by plane, for example[19].

In addition, in order to qualify the contract as a contract of carriage by air, it must have been concluded for consideration, as stipulated in article 131 above, and the passenger who is a party to the contract of carriage by air must be alive at the time the contract is executed. If he is not, the contract of carriage by air for persons is not applicable to him, nor are the provisions of the obligation to ensure safety, since the essence of this obligation is the physical or psychological integrity of the passenger, which is only available if the passenger is alive. If not, the contract is classified as a contract of carriage for goods, not persons, as the body is considered as an object[20].

2.2- Conditions related to the accident

The conditions relating to the accident are the occurrence of an air accident that causes damage to the passenger (2.2.1), the occurrence of the air accident during the performance of the contract of carriage by air (2.2.2), and finally the damage to the passenger (2.2.3).

2.2.1- Occurrence of an air accident

Article 17 of the Warsaw Convention and Article 145 of Law No. 98-06 clearly stipulate that in order to fulfil the obligation to ensure safety, an air accident must occur leading to the compromise of the passenger's safety[21], but it is notable that neither the Warsaw Convention nor the legislator defines what is meant by an accident that causes damage to the passenger or traveller.

However, it should be noted that the legislator addressed in the provisions of Article 93 of the aforementioned law that the meaning of an accident is facts that result in either the disappearance or crash of the aircraft or the injury or death of persons, whether on board or outside the aircraft, or the aircraft suffers losses that require major repairs, even though this definition is not directly related to accidents affecting only passengers. Being general, it is understood that the accident relates to those facts that relate to the use of the aircraft.

The doctrine on the concept of accident is divided into two trends. The first trend holds that the concept of accident is limited to a sudden external incident that is not related to the passenger traveller or the air carrier, such as technical or mechanical failures that lead to the explosion of the aircraft, hitting the ground or colliding with another aircraft, which is related to the exploitation of the aircraft, that is, during the execution of the air transport contract, thus limiting the meaning of the accident to cases where the passenger is only on board the aircraft without the accidents that affect him during his preparation for travel or his presence inside the airport[22].

Therefore, any accident that is not related to the transport process and is not related to the process of air exploitation, such as the case of a passenger assaulting another passenger, for example, the carrier is not liable for the damages caused to the passenger in this case, and the provisions of compensation do not apply to it even if it results in damage to the passenger.

The second trend expands the concept of the accident, and sees in the latter that it is every incident that results in compromising the safety of the passenger, whether related to the use of the aircraft or not, so that the accident is an air accident every factor external to the damaged person and independent of the carrier's will and its subordinates, which results in the damage to or death of the passenger, and occurs during the term of the air transport contract[23], regardless of whether the accident can be foreseen or not, but it is sufficient that the damage to the passenger leads to his death or injury, which means that the accident includes every incident that disrupts the normal course of the air transport process.

This expansion of the concept of accident has led to the liability of the air carrier to include any incident that harms the safety of the passenger, such as incidents of terrorism and piracy as incidents that disrupt the normal course of air transport process[24], but also for those incidents that are not related to aviation hazards in the traditional sense, such as those related to the contamination of the food served to the passenger or his illness or contamination inside the aircraft. The incident is now viewed from an objective rather than subjective perspective. It does not matter the source of the causes that led to the passenger's damage, nor does it matter whether the passenger's behavior was positive or negative, once he suffers damage, the objective responsibility of the air carrier for the damages suffered by the passenger arises[25], and this is what the Montreal Convention of 1999 has adopted[26].

The provisions of the aforementioned Article 145 shows that the legislator adopted the narrow concept of an accident that causes damage to the passenger, which occurs on board the aircraft or during the disembarkation or embarkation of passengers, as did the Warsaw[27] Convention, which some believe leaves the door wide open for the carrier to evade accountability in other cases such as air piracy offences, air terrorism offences, and hijacking[28].

2.2.2 - The occurrence of the accident during the performance of the air contract

It is clear from the Warsaw Convention, the 1999 Montreal Convention[29] and Article 145 of the Civil Aviation Law that the temporal scope of the obligation to ensure safety continues throughout the flight, after landing and until the carrier finishes delivering the passengers to the terminals of the airport of arrival. Therefore, the air carrier is not liable for operations preceding or following the transport process, such as registration, baggage removal or customs procedures, because the air carrier has no authority in these places, and damages incurred therein are subject to compensation in accordance with the general rules[30].

The air carrier is also not liable for damages caused to the passenger while he is in the waiting hall, or when he wanders through the various halls of the airport, because this period is not considered as part of the air transport process. Therefore, the passenger is not under the guard of the carrier, its representatives or one of its subordinates, as the airport building is not owned by the air carriers, and they do not exploit it as, for example, railway transport companies do. The air carrier is liable for damages to the passenger from the moment the passenger leaves the waiting room at the request of the carrier or one of its representatives to go to the aircraft to transport him, and this liability remains for the duration of the flight and

ends the moment the passenger enters the airport of arrival[31].

As for the transport of the traveller or passenger by road from the city to the airport building by the same transport company with which the air transport contract was concluded, it is noted that the Warsaw Convention and the aforementioned Article 145 did not provide for the liability of the carrier, and limited it damages that occur either on board the aircraft or during the boarding or disembarkation process. Some jurists believe that the air carrier is also liable in this case for damages to the passenger, as the transport in this case is only a continuation of the air transport contract[32].

3.2.2 - Damage to Passenger

Damage is defined as the harm suffered by a person due to the infringement of one of his rights or a legitimate interest, whether this right or interest relates to his physical or psychological integrity or relates to his property, money or freedom, and with reference to Article 17 of the Warsaw Convention, it is clear that there must be damage to the passenger. This damage is represented by either the passenger's death, injury or any other bodily damage. A jurisprudential debate has arisen regarding the interpretation of this text since the Convention did not specify whether moral damage is covered by compensation or not[33], and entrusted the task of determining the nature of the damage covered by compensation to national laws.

With reference to the Civil Aviation Law, especially the provisions of Article 145 thereof, we note that it makes the carrier liable for the damages and losses suffered by the passenger that lead to his death or cause injury or damage, so the term damage is used in a broad sense, which means that it includes both material and moral damages, which is confirmed by the second paragraph of the aforementioned article, which states that ‘the term damage within the meaning of this article includes any physical, organic or collateral damage, including damage to mental perception.Therefore, if the aforementioned conditions are met, the air carrier is liable for breach of its obligation to ensure the safety of the passenger

3- Nature of the air carrier's obligation to ensure the passenger's safety

The nature of the air carrier's obligation to ensure the passenger's safety has been the subject of jurisprudential and judicial dispute between those who consider it a duty of care **(3.1)** and those who consider it a duty of performance **(3.2).**

3.1- The air carrier's obligation to ensure safety is a duty of care

A duty of care is defined as ‘a commitment whereby the debtor undertakes to exert effort and care to achieve a goal or a possible outcome that may be achieved.... The debtor is not liable unless the creditor proves that the debtor did not exert the effort of an ordinary man in the execution of his obligation...'[34], or it is that commitment of the debtor to make a certain effort, and if he makes it, he meets his obligation even if the desired result is not achieved. Therefore, this obligation is not related to non-performance but to the element of attention and vigilance in the behavior of an ordinary man if the debtor is an ordinary person, and the behavior of a professional if the debtor is skilled and experienced[35].

There are some legal systems that have made the air carrier's obligation to the safety of the passenger an obligation of conduct, so the air carrier is considered to have fulfilled its obligation when it proves that it has taken the maximum possible precautions in order to ensure the safety of passengers during their transport, and the burden of proving the air carrier's failure to fulfil this obligation falls on the passenger. This is the position of US and British law and jurisprudence[36], where the air carrier's liability is a tort liability arising by operation of law and not from the contract of carriage[37].

According to some scholars, the Warsaw Convention makes the air carrier's obligation duty of care with the burden of proof shifted to the carrier, whereby the carrier's fault is presumed, which requires it to be held liable as soon as the passenger is damaged or dies until the carrier proves otherwise, i.e. that it and its representatives took all necessary measures to prevent the damage, which is inferred from the provisions of Article 20 thereof and consistent with Article 148 of the Civil Aviation Law in its first paragraph. It states that the air carrier is not liable if it provides evidence that it and its representatives took all necessary measures to prevent the loss or the impossibility of taking them (the necessary measures), thus making the carrier's duty one of care while shifting the burden of proof to the carrier, since its liability is based on the presumed fault on its side, subject to proof to the contrary[38], which is considered by some scholars to serve the air carrier's interest more than the passenger's interest[39].

However, with the development of the Warsaw Convention, which required the air carrier to take the necessary measures for the safety of flights, the objective responsibility of the air carrier emerged, and its obligation to ensure the safety of the passenger became seen as an obligation of result[40].

3.2 - The air carrier's obligation to ensure safety is a duty of performance

The duty of performance refers to an obligation under which the debtor undertakes to achieve a specific result; otherwise, it is liable once it is not achieved. The majority of scholars have held that the air carrier's obligation to ensure the safety of the passenger is one of performance that is sufficient for the victim to prove the damage suffered as a result of an air accident without having to prove the carrier's fault, as the latter is considered in breach of its obligation to ensure safety once the desired result is not achieved, namely the arrival of the passenger at the arrival airport safe and sound[41].

This shift in the nature of the air carrier's liability for breach of its obligation to ensure safety is mainly due to the development of air transport and the aviation industry in general, where the aircraft, like other means of transport, has become safer, in which the owners are obliged to ensure the safety of the passenger with certainty rather than probability, especially after the 1971 Guatemala Protocol amending the Warsaw Convention and the 1999 Montreal Convention, where the international legislator adopted the rules of objective liability which excluded the air carrier's right to exempt from liability by proving the absence of its fault.

The air carrier's obligation thus became an obligation to achieve a result that it cannot evade simply by proving that it took all necessary measures to prevent the damage, unless it proves the existence of an external cause, which is the approach taken by the Egyptian

legislature[42], as well as the French legislature, which referred to the provisions of the Montreal Convention in this regard[43].

The shift from the personal liability of the carrier to objective liability, as mentioned above, is due to the development of air transport, where the jurisprudence has become a call for increased liability in line with the evolution of the basis of liability, which has become based on hazard rather than fault[44], so that the carrier is legally liable once the passenger suffers damage[45].

As for the Algerian legislator, with reference to the Civil Aviation Law, especially Articles 145 to 156 of the Code, he went along the lines of the Warsaw Convention, by making the liability of the air carrier a liability based on presumed fault that can be proven otherwise, and that the nature of the carrier's duty is a one of care while shifting the burden of proof to the carrier[46], noting that Algeria has not ratified the Montreal Convention of 1999, which made damage the basis of the air carrier's liability.

II: Penalty for the air carrier's breach of its obligation to ensure the safety of the passenger

It is clear from Article 17 of the Warsaw Convention and Article 145 of the Civil Aviation Law that the air carrier's obligation to ensure the passenger's safety is based on presumed fault that can be proven otherwise, which is also confirmed by Article 148 of the same law. Therefore, the air carrier is obliged to compensate the passenger (1), unless we prove that the damage or loss caused to the passenger is unrelated to the carrier (2).

1- The air carrier's liability is based on the damage caused to the passenger

If a passenger is damaged because of an air accident during the performance of an air transport contract, the air carrier's liability arises, and the air carrier is obliged to compensate the passenger for the damage he/she suffered. Compensation is the penalty imposed by civil liability on the responsible party as a result of the damage caused to the victim[47], or the restoration of the balance disturbed by the damage by returning the victim to the state in which he or she was before the damage occurred, in kind or in exchange. Therefore, we will address the air carrier's obligation to compensate (1.1) and then the limits of this compensation (1.2) in addition to the role of the air carrier's insurance on his liability to compensate for the damage (1.3).

1.1 - Air Carrier's Obligation to Compensate

According to Article 145 of the Civil Aviation Law, the air carrier is liable for losses and damages to a transported person that leads to his death or causes him/her injury or damage, and is also under obligation to compensate for damages that affect his/her mental perception or what is known as moral or psychological damage[48]. As for the Warsaw Convention and its amending protocols, and even the Montreal Convention of 1999, the jurisprudence, as mentioned above, did not specify the nature of the damage suffered by the passenger, which requires compensation, whether it includes only physical or psychological damage[49], and this has sparked a jurisprudential and judicial debate in this regard[50].

If the failure of the Warsaw Convention to mention psychological damage is justified by the fact that it was drawn up at a time when countries did not recognize compensation for psychological or moral damage[51], the 1999 Montreal Convention also failed to provide for compensation for such damage, despite changes in air transport conditions, its growth and the increase in terrorist incidents and piracy. Therefore, some believe that this convention should be amended to allow the judiciary to award compensation for psychological damage, especially since it can be proven whether it affected the victim before his death or his heirs after his death[52].

There are those who believe that the interpretation of the provisions of Article 17 of either the Warsaw or Montreal Convention 1999 should be left to the national judiciary in different countries according to their legal system, whether it allows compensation for psychological damages or not[53].

We note that the national legislator has settled the issue by obliging the air carrier to compensate passengers for all damages, be they material or psychological. However, this compensation is subject to limits stipulated by international agreements and national legislation.

1.2 - Limits of Compensation

As for the air carrier, the Warsaw Convention defines the maximum limits of compensation Article 22 of the Convention, from which it is clear that the liability of the air carrier for damages caused to the passenger is limited to an amount estimated at 125,000 French francs. This amount set by the Convention is not considered as a lump sum compensation[54], as it represents the maximum amount that cannot be judged more than that, even if the damage exceeds the limits of compensation.

However, if the damage is estimated to be less than this amount, the damaged party shall be awarded an amount equal to the damage suffered, according to Article 22 mentioned above. In the interest of the passenger, Article 23 of the Warsaw Convention prohibits the carrier from including in the air transport contract any clause limiting its liability to less than what is stated in the aforementioned Article 22, as the maximum amount of compensation is of a peremptory nature[55].

The maximum amount of compensation was subject to several increases in the various protocols amending the Warsaw Convention, but they were not successful for various reasons[56], which prompted the ICAO in 1975 to propose the Third Montreal Protocol, which approved the calculation of compensation according to the system of Special Drawing Rights, a unit of account that is valued based on a choice of currencies of 16 countries, and assesses the carrier's liability on the basis of objective liability. The Protocol also authorizes member countries to establish a supplementary compensation system within the scope of their territory, a limit that is also stipulated in Article 21 of the 1999 Montreal Convention.

As for the national legislator, Article 150 of the Civil Aviation Law stipulates the same limit of compensation mentioned in the Warsaw Convention, but this limit does not apply if it

is proven that the damage suffered by the passenger is due to a serious fault or fraud of the carrier or its representatives[57]. In this case, it is permissible to exceed the maximum limit of compensation, as confirmed by Article 25 of the Warsaw Convention. Therefore, although it is not permissible to agree to reduce the liability of the air carrier, it is permissible to agree to increase it, as is clear from the provisions of Article 22 of the Warsaw Convention.

1.3- Insurance as a guarantee to obtain compensation

The development of insurance has had a great impact on the liability of the air carrier in general and in particular, the limitation of the air carrier's liability has played a major role in the acceptance of insurance companies to cover the damages incurred by the air carrier resulting from the operation of the aircraft and which may affect passengers or others[58].

Insurance in the field of air transport is mandatory, as indicated in Article 171 of the Civil Aviation Law, as well as in Article 196 of the Insurance Law[59], which obligated the carrier to insure its liability under penalty of punishment[60]. Thus, insurance companies, when an air accident occurs and causes damage to passengers according to the aforementioned conditions, are bound to pay compensation under the insurance contract concluded with the carrier. This insurance is not an exemption for the carrier from liability, but an affirmation of it.

Liability insurance includes all the compensation that the carrier is obligated to pay to the damaged person, i.e. passengers or their heirs, in addition to all the expenses that the air carrier has spent to escape liability. Therefore, insurance is a dual function, on the one hand, it guarantees all the negative effects of the carrier's liability due to the claim of passengers or their heirs for compensation by filing a liability suit, and on the other hand, it guarantees the victims to obtain compensation as soon as possible and in the easiest way possible[61].

2- Exempting the air carrier from liability for damages caused to the passenger

It is clear from the provisions of Articles 148-1 and 149 of the Civil Aviation Law as well as Articles 20 and 21 of the Warsaw Convention that an air carrier that breaches its obligation to ensure the safety of passengers may be legally exempt from liability if it proves that it took the necessary measures to avoid the damage **(2.1)**, or that it was impossible to take them **(2.2)**, and if it proves the fault of the damaged person or passenger **(2.3)**.

2.1- The air carrier must take the necessary measures to avoid damage

According to the provisions of Law 98-06, especially Article 145, as well as the provisions of the Warsaw Convention, the air carrier is exempted from liability for damages caused to the passenger if it proves that it has taken all necessary measures to prevent the occurrence of damage. Since the carrier's obligation to ensure the safety of the passenger in these provisions is a duty of care based on presumed fault, the interpretation of what is meant by necessary measures is based on the nature of this obligation[62]. It means that the carrier proves that it and its representatives have taken all necessary precautions to avoid the occurrence of damage and that the latter is not due to its fault.

The necessary measures include the need to take into account the technical safety of the

aircraft, the use of a highly qualified and skilled air navigation crew during flights in favorable weather conditions, ensure the comfort of the air passenger during the flight, take measures related to the inspection of passengers and their bags, as well as other measures during the flight, such as providing passengers with instructions to protect themselves if the aircraft suffers any accident, in addition to the measures owed to the airport authorities, such as communicating with the latter to ensure the safety of the flight[63].

2-2 Impossibility of taking the necessary measures

The carrier is exempt from liability for the damages suffered by the passenger if it proves that it and its representatives were unable to take the necessary measures, as this impossibility is considered force majeure[64], and the latter is defined as an accident or incident that is unexpected, unavoidable, and external to the defendant, leading to the impossibility of the debtor's fulfilment of its obligation. The most important forms of force majeure in the field of air transport are natural factors such as bad weather conditions (storms and hurricanes...) provided that they fulfil the conditions of force majeure previously mentioned in the definition.

The inherent defect of the aircraft is also considered a form of force majeure and one of the reasons that lead to the impossibility of taking the necessary measures. An inherent defect is that defect that is unknown to the air carrier and cannot be detected by the usual diligence, such as a defect in the installation of the aircraft or in the installation of its engine or one of its parts.

In this regard, jurisprudence has taken two directions, including those who believe that the carrier should not be held liable for the inherent defect in the aircraft and should be relieved of liability when it proves that the defect could not have been foreseen, as well as that it could not have been avoided. While others argue that the inherent defect in the aircraft is considered an incident within the carrier's facilities and not external to its activity. This makes it missing one of its elements, which is that it is external to the defendant (carrier), which is a requirement for the occurrence of force majeure. Consequently, the carrier is liable for all damages resulting from this defect and may recourse against the manufacturer with a claim of recourse, especially within the warranty period of the defect[65].

2.3- The fault of the damaged passenger

The air carrier may invoke the fault of the damaged passenger in order to defend itself, according to the provision of Article 149 of the Civil Aviation Law, as well as Article 21 of the Warsaw Convention, which is the same as the 1999 Montreal Convention in Article 20 thereof, when the carrier can prove that the damage suffered by the passenger is due to the latter's fault, which is considered a deviation from the usual behavior of an ordinary man[66].

Therefore, when the passenger alone contributes to causing the damage he suffers, he bears the responsibility for it and the carrier is exempt from liability[67], such as when the passenger hurries to get off the aircraft or leaves his seat during take-off and landing operations despite the carrier's warnings to stay in place and suffers damage.

If the carrier's fault plays a role in addition to the damaged person’s fault, we distinguish

between the case where the damaged person's fault absorbs the carrier's fault or not. In the case where the passenger's fault absorbs the carrier's fault, and this is in the case where the passenger's fault is deliberate or reaches a great degree of gravity, or the carrier's fault is merely the result of the damaged person's fault, in this case the carrier is exempt. If the opposite is the case, he is liable, and the criterion relied upon here is the degree of fault committed and the resulting damage[68].

Conclusion

We conclude from the above that the air carrier's obligation to ensure the safety of the passenger, whether in the 1929 Warsaw Convention or in Law No. 98-06, is a contractual obligation based on presumed fault that can be proven otherwise, and is an obligation of conduct. However, with the development in the field of air transport, the air carrier's liability for damages to passengers is based on an objective basis, namely damage, and is considered an obligation of result, as in the Montreal Convention of 1999, but Algeria has not ratified this convention.

According to the Civil Aviation Law (Law No. 98-06), the air carrier's liability is a contractual liability based on presumed fault, subject to proof to the contrary. Therefore, the carrier can defend itself by proving that it and its subordinates took all necessary measures to avoid the damage, or by proving that the damaged person caused the damage to himself.

However, in light of the developments in civil aviation and the increasing dangers to which passengers are exposed, it would have been desirable for the legislator to introduce the objective liability of the air carrier when it breaches its obligation to ensure the safety of the passenger, as it did in the general rules governing the contract of carriage in the Commercial Law, especially Article 65 et seq. Also, in light of the amendment of the Civil Aviation Law in 2015, which introduced a special section on safety and security, especially Article 16sixies, which requires aviation service providers to prepare a safety and security management system.

Therefore, it is necessary to update the provisions of the air carrier's liability in general and its obligation to ensure the safety of the passenger in particular by establishing new rules that keep pace with developments in air transport in order to achieve a balance between the different interests, especially those in line with the Montreal Convention of 1999, which established rules that balance the interests of the carrier and the passenger, especially by combining personal and objective liability.

It is also necessary to stipulate the air carrier's obligation to ensure the passenger's safety explicitly, and to specify each element of this obligation precisely, especially the meaning of the accident or incident that leads to the passenger's damage or loss. The legislator, by amending the Civil Aviation Law No. 15-14, completely changed the content of Article 93, which defined an air accident in general terms.

Citations:

1 - Alaa Mohamed Omar, Zainab Haidar Hashim, The Effects of Failure to Ensure Passenger Safety in Air Carriage Contracts: A Comparative Study, Basra Studies Journal, Fourteenth Year, Supplement to Issue 32, 2019, p 198.

2 - This was in the decision of the French Court of Cassation of 21 November 1911, which ruled that the execution of a contract of carriage imposes on the carrier an obligation to transport the passenger safe and sound to his destination. This obligation was then enshrined in other contracts, and then became a legal obligation originating from the contract.
Cass. Civ., 21 novembre 1911, Zbidi Hamida contre la Compagnie Transatlantique.
http://droit.wester.ouisse.free.fr/pages/support_responsabilite/RCOS3.htm.
See also Ali FILALI, Private Contracts, Contract of Sale, ENAG Edition, First Edition, Algeria 2018, P280 et seq.

3 - Ordinance No. 75-59 of Ramadan 20, 1395 (corresponding to September 26, 1975), on the Commercial Code as amended and supplemented

4 - Law No. 98-06 of Rabi' al-Awwal 3, 1419 AH, corresponding to June 27, 1998, establishing the general rules relating to civil aviation, Official Gazette No. 48.

5 - Damana Mohamed, Removing the Civil Liability of the Carrier, PhD Thesis, Abou Bakr Be lkaid University, Tlemcen, 2016, P 118.

6 - The Warsaw Convention for the Unification of Rules Relating to International Carriage by Air, signed in Poland on October 12, 1992, as amended by the Hague Protocol of September 18, 1955, and ratified by Executive Decree No. 64-74 of March 2, 1964, Official Gazette No. 26, 1964.
https://www.idit.fr/legislation/documents/Conv_varsovie_modif55.pdf

7 - ARTICLE 17: 'The carrier is liable for damage sustained in the event of death, wounding or any bodily injury suffered by a passenger when the accident which caused the damage occurred on board the aircraft or during any embarkation or disembarkation operations.'

8 - Law No. 15-14 dated 28 Ramadan 1436, corresponding to 15 July 2015, amending and supplementing Law No. 98-06 establishing the general rules relating to civil aviation. Official Gazette No. 41, published on 29 July 2015.

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10- Cass. Civ.21 nov. 1911 ; DP . 1913, I, 249. https://www.legifrance.gouv.fr/juri/id/JURITEXT000006953018/.

11 -The air carrier is now responsible for the safety of the traveller under contractual liability rather than tort liability based on the provisions of Article 1147 of the French Civil Code (Article 1231-1 amended in 2016), which corresponds to Article 176 of the Algerian Civil Code which provides for the debtor's contractual liability for compensation whether for default or delay in the performance of the obligation unless a foreign cause is proven.

12 - Ali FILALI, Private Contracts, Private Contracts, previous reference , P. 280 et seq.

13 - Si Youssef Kajar Houria, The Extent of Algerian Legislation's Dedication to the Obligation to Ensure Safety in the Consumer Protection Law and its Implementing Texts, Al-Wahat Journal of Legal Research, Volume 15, Issue 1, 2022, p-1436.

14 - Mahmoud WAHID, Obligation to Ensure Safety in Contracts, Dar Al-Nahda Al-Arabiya, Cairo, 2001, P 08 et seq. Jaber Ashraf Al-Sayed, Liability for the Acts of Things Used in the Implementation of the Contract, Helwan Journal of Legal and Economic Studies, Issue 5, 2001, p. 137.

15 - Hamr Elain Abdelkader, "The Legal Framework for the Obligation to Ensure Safety in Contracts," Journal of Legal Studies, Volume 6, Issue 2, June 2020, p. 18.
16 - See Articles 35 to 39 and Article 180 of the Civil Aviation Law
17 - Kamel Haddoum, Algeria's Action on Maritime Safety and Security. Presse Universitaire, d'Aix-Marseille, 2016, p66. https://books.openedition.org/puam/5084.
18 - Article 3 of the Warsaw Convention stipulates that air carriers must issue two documents, namely a ticket and a baggage tag, and specifies the mandatory information that must be included in each document. However, passengers may be given other documents in addition to those mentioned above to prove the air transport contract. According to Article 137 of the Civil Aviation Law, a carrier that transports a passenger without the legally required documents is not subject to the provisions of this law relating to the rules of exemption from liability.
19 - Adrien Duhem, Air Transport Passenger Rights. Effectiveness and Limits of European Law - Master 2 Professional European Business Lawyer, University of Paris V René Descartes, 2012-2013. p32. https://www.fnaut.fr/uploads/2014/01/db13drpassaerieneur.pdf.
20 - Wafaa Abdeli and Taher Zawagri, "Breach of the Obligation to Ensure Safety in Air Carriage Contracts in International Agreements and Egyptian Legislation," Journal of Law and Political Science, Khenchela University, Volume 9, Issue 2, 2022, p322.
21 - This is also stipulated in Article 17.1 of the 1999 Montreal Convention, which states:
“the air carrier is to be held liable for damage sustained in case of death or bodily harm of a passenger only if the accident which caused the death or injury took place on board the aircraft or during the process of embarking or disembarking”
22 - Tran, Laurent, The uniform regime of liability of the air carrier of passengers, Geneva: Schulthess ed. Romandes, 2013. (Geneva collection. International law): https://archive-ouverte.unige.ch//unige:81650. P.156
23 - Alaa Mohamed Omar, Zainab Haidar Hashim, previous reference, p 215, Cheikhi Mohamed Amine, previous reference, p113.
24 - Wafaa Abdeli and Taher Zawagri, previous reference, p 227.
25 - The causes of the accident do not influence the principle of liability. Whether the accident is due to the active or passive behavior of the carrier, to the act of a third party or to a force of nature, the carrier is liable for the accident’ Tran, Laurent, op. cit. p.157.
26 - Montreal Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Montreal on 28 May 1999, Algeria has not yet ratified it.
https://www.ssatp.org/sites/ssatp/files/legal-instruments-fr/Annexes/II/Annex%20II-36_fr.pdf.
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28 - Majdoub Nawal, "The Air Carrier's Liability for Passengers in Light of the Warsaw Convention and Algerian Civil Aviation Law," Algerian Journal of Maritime and Transport Law, Volume 4, Issue 1, 2017, p 390.
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38 -Wafaa Abdeli and Taher Zawagri, previous reference, p 225.
39 -Tran Laurent, op. cit, p.140.
40 -Yazid Dellal, previous reference, p 97.
41 -Wafaa Abdeli and Taher Zawagri, previous reference, p 225.
See also, Samira Benboubker, Safety and liability of air carriers towards their passengers. Law. University of Paris 5, 2014, p. 205.
42 -See Article 264 and Article 290 of Egyptian Commercial Law No. 17 of 1999, Official Gazette No. (19) bis, issued on 5/17/1999. It is clear from these articles that the carrier may not deny liability unless it can prove force majeure or passenger fault.
43-Article L6421-3 French Transport Code. https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000023086525/2023-09-06.
44 -Cheikhi Mohamed Amine, previous reference, p109.
It should be noted in this context that the 1999 Montreal Convention adopted a two-tier liability system, with the first tier involving strict liability and the second tier assessing liability based on presumed fault.
45 -Samira Benboubker, op. cit, p.206.
46 -Tayfour Abdel Basset, previous reference, p709 et seq.
47 -Ali Filali, The Development of the Right to Compensation with the Development and Diversity of Damages, Annals of the University of Algiers 1, Issue 1, 2017, p. 11.
48 -See Article 145-2 of the Civil Aviation Law.
49 -Ibrahim Sabri Al-Arnaout, Nasser Mustafa Al-Nousour, previous reference, pp.57-85.
50 -Tran, Laurent, op. cit. p.203 et seq.
51 -The situation has not changed either in the amended protocols to the Warsaw Convention, such as the 1955 Hague Protocol, the 1966 Montreal Convention or the Guatemala Protocol.
52 -Alaa Mohamed Omar, Zainab Haidar Hashim, previous reference, p 230.
53 -Ibrahim Sabri Al-Arnaout, Nasser Mustafa Al-Nousour, previous reference, pp.57-85.
54 -Hiba Haytam, Compensation Rules in International Air Transport (A Study of the Warsaw Convention and its Amended Protocols), Journal of Studies on Algeria and the World, Volume II, Issue 5, 2017, p. 177.
55 -Damana Mohamed, previous reference, 150 et seq.
56 -See Tayfour Abdel Basset, previous reference, pp. 699-717.
57 -See Article 151 of the Civil Aviation Law.

58 -Ben Issa Hayat, "Air Insurance as a Pillar of Air Transport Mobility," Algerian Journal of Maritime and Transport Law, Volume 4, Issue 1, 2017, pp. 9-18
59 -Ordinance No. 07-95 of 25 January 1995 on insurance, Official Gazette No. 13 of 1995.
60 -This is clear from the provisions of Article 196 of the Civil Aviation Law.
61 -Raed Ahmed Khalil, Insurance Against Air Carrier Liability for Damage to Passengers and Their Baggage, Anbar University Journal of Legal Sciences, Volume 9, Issue 2, 2019, p552.
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62- Majdoub Nawal, previous reference, p395.
63 -Yazid Dellal, previous reference, p 97
64 -Article 148 of the Civil Aviation Law stipulates that an air carrier shall not be liable if it proves that it and its subordinates took all necessary measures to avoid the damage or that it was impossible to take such measures.
65 -See details of these opinions in Dana Mohamed, op. cit., p. 139.
66 -Majdoub Nawal, previous reference, p395
67- Tran Laurent, op. cit. p.211.
68- In addition to all this, the carrier may also invoke the fault of a third party to avoid liability, provided that the conditions of force majeure are met.