

The stevedoring contractor's liability under the port handling contact

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Abstract:

The freight-and-unloading (stevedoring) contractor is considered to be very effective in the maritime transport process, as he is entrusted with tasks that portend a very heavy liability.

What is the nature and basis of this liability?

Keywords: contractor; maritime transport; responsibility;

ملخص: يعتبر مقاول الشحن والتفريغ شخص جد فعال في عملية النقل البحري حيث يعهد اليه بمهام تنذر بمسؤولية جد جسيمة في إطار العملية التي تسبق تسليم وتسليم البضاعة الى الناقل والمرسل اليه على التوالي من خلال عقد مستقل عن عقد النقل البحري للبضائع، لكنه مقترن به وضروري لإتمام عملية النقل برمتها.

فما هي طبيعة وأساس هذه المسؤولية؟

كلمات مفتاحية: مقاول الشحن والتفريغ. الناقل. نقل البضائع. المسؤولية.

1. INTRODUCTION

The sea has proven its sovereignty over this universe, and has even become the master of the word and the authority, since it is the trade route that guarantees the success and prosperity of nations (eljamil, 2014), as the ideal and inexpensive medium for transportation of various types and sizes.

The essence of transport lies in changing the location of a person or thing by using an appropriate means in which the departure from one place to another is achieved where the ship is considered to be an ideal tool for transporting goods across the sea, since it is the maritime navigation instrument. However, as an effective means of transporting goods, the ship needs to be operated. Therefore, a group of human elements must intervene. All of them cooperate to achieve this goal, for which this facility was established. These activists are known as seafarers (diouidar, 2008).

Otherwise, besides these maritime exploiters, there are other land-based ones, i.e., working in the ports where the ship is anchored, who have an important role in the

maritime transport process and its completion, such as the liberalization of lading bills, the collection of freight, the shipment and delivery of goods to their owners and other services related to their customers. We find among these land persons who work for the supplier, for the shipper, for the carrier, or for the insurer: The Ship Keeper, The Cargo Custodian, The Maritime Broker, The Maritime Pilot, The Transport Contractor... and others. However, what has attracted the interest of researchers is what is known as the freight and unloading contractor whose mission is limited to carrying out the loading or unloading of goods - to which the Algerian maritime legislature referred to through article 912 - with the help of specialized workers and special instruments, as these operations are undertaken by a peculiar department. Regardless of the department that organizes the work in the port, the loading and unloading operations are currently carried out by specialized companies in this field, called the Freight and Unloading Companies, that use skilled workers to perform these jobs (eljamil, 2014). Since the carrier was mandatory committed according to the contract of carriage, to receive, ship, and unload the goods, then deliver them to the consignee; a question was raised to whether each of the shipper or the consignee could have direct recourse to the freight and unloading contractor in the event that the goods were damaged during the process, and the latter was the one to whom the task was entrusted with?

Thus, we will aim to provide answers by determining the stevedoring contractor's legal status and by so, determining the basis and nature of his liability; as follows:

2. Introducing the freight and unloading contractor and determining his legal status.

The maritime transport contract, particularly the cargo carriage contract by sea, is subject to several processes, beginning with the carrier's receipt of cargo from the shipper and ending with the delivery to the consignee. Between receipt and delivery, necessary material operations are performed in line with the increase in modern maritime traffic and ship tonnage, and with the party's desire to complete and carry out expeditiously the carriage of cargo, which requires sufficient labor and usable equipment. With this expansion and the large number of ports accessible to ships from all over the world, the carrier is unable to provide sufficient manpower trained to perform these tasks at each port, nor to provide the necessary equipment to carry out stevedoring operations from and on board the ship (sorkhoua, 1988)

This task is now entrusted to port contractors who ship and unload cargo using specialized workers (eljamil, 2014) who have the technical means to carry out this task. So, who is the freight and unloading contractor? What are his duties?

2.1 Introducing the freight and unloading contractor.

The freight-and-unloading (stevedoring) contractor is a person who is present in the port and whose task is limited to cargo loading or unloading on the ships, using workers, namely port workers, and with special tools, i.e. cranes of various kinds, barges, barnacles and vessels (taha, 2008).

This is a task that may be undertaken by the shipper during the loading of cargo on board the ship, while the consignee or the shipper's agent undertakes to unload cargo upon arrival. It may be required in the freight contract to carry out both the loading and

unloading operations by the carrier. However, these tasks are often entrusted to specialized contractors, who are responsible for bringing experienced and professional workers at the port level, who are not subject to the provisions of maritime law but are subject to the provisions on land work. In this regards, the tasks of the maritime contractor are limited to purely physical operations related to freight and unloading, since he is not responsible for the examination or cargo delivery, but it may be subject to action when the consignee entrusts the latter with the receipt of cargo and handing over the bill of lading. In this case, the maritime contractor acquires, in addition, the status of a shipping agent, as the article 920-921 of the Algerian Maritime Code requires that such legal operations be conducted under a contract concluded by free negotiation and lead to a payment. And if the stevedoring operations are carried out under the contract, what is meant by the loading and unloading? and what are the parties to this contract?

2.2 Cargo loading and unloading.

The Algerian maritime legislator has linked the processes of freight and unloading to port activities, by referring to this meaning as "handling and stowage". The legislator has differentiated between the latter, as he assigned a chapter for each of them; the first of which defines "handling" through Article 912 of Chapter I of Part V, entitled "Port activities", by saying: "Port handling includes the operations of loading, stacking, packing, landing, and the processes of placing and taking cargo on earthen surfaces."

The second is referred to by Article 920 of Chapter II under the same heading: "Cargo stowage includes operations directed to secure the delivery, identification, and guarding the loaded or unloaded cargo on land until they are shipped or delivered to the consignee."

The Algerian legislator has differentiated between handling and stowage, as he presented the first as purely physical operations, while the second, in addition to being physical operations entrusted to the contractor, may extend to legal operations provided that this is done in accordance with the agreement. In order to further deepen, it was necessary to explain both terms: cargo loading and the unloading.

2.2.1 Freight

We mean by "freight" the process of cargo lifting from the quay and placing them on the deck of the ship, regardless of the means used for this operation. This operation may be carried by the cranes when the latter is capable of docking along the berth, it may as well be carried by port cranes, floating cranes, pipes, or hoses if the nature of the cargo and the established customs so require. Moreover, the development of the shipping industry since the latter half of the last century has led to the use of containers for cargo loading on the ship's deck. So that, ships specializing in this type of transport have occurred with advantages in terms of reducing transport costs in terms of packaging, freight and unloading on the one hand, and in terms of shortening the duration of the voyage by shortening the time allocated for on the other hand, prompting the international community to conclude international agreements to regulate the transport with containers. While most likely the shipping is carried out with instruments that are already on board the ship, more often the ship cannot stand by the berth for various reasons, so it anchors somewhere inside the port. In this case, (deposits) vessels

and barges are used for freight and unloading to and from the ship.

As for the proof process, the freight can be established by all means of proof as a physical fact (hatoum, 2011)(Hatoum, 2011), although it is established by delivering the ordinary bill of lading, marked by the word "loaded" or any similar statement.

A distinction must be made between the obligation to shipping and the obligation to pack the goods. This latter aims at placing the cargo in the ship's hold properly in order to preserve it, unlike freight that means placing the cargo on the ship, i.e. lifting them from the dock or barge according to the circumstances and bypassing the ship's wall. The aim of the packing is to ensure the ship's balance to ensure its safety, which is an obligation that falls on the carrier and that cannot be agreed otherwise.

2.2.2 Unloading

Unloading means disembarkation of cargo from on board the ship to the berth or to barges and vessels as the case may be. Such unloading is the process corresponding to the shipping process that takes place at the port of shipment. The unloading process is also proved by all means as a mere material fact. It should be noted, however, that there is another "obligation" associated with the unloading process, i.e., the unpacking of cargo. The cargo cannot be unloaded from the ship without being unpacked and removed from the wards. The commitment to this process is incumbent on the carrier, and it is counterbalanced at the shipment port with the packing of cargo in the wards. Errors occurring during the unpacking of cargo, such as those occurring in the stacking, are commercial errors and not navigational ones. Nor should unloading be confused with delivery. Unloading is a physical act that does not indicate actual delivery of cargo, while delivery is a legal act with which the maritime transport contract expires.

While delivery often takes place after unloading (discharge), nothing prevents it from being prior, in the case where the shipper agrees with the carrier that delivery should take place under the ship's cranes, i.e. on its back, which means that discharge is a commitment incumbent on the carrier, which is not permissible under the Brussels Convention, unlike some domestic laws. However, delivery may not be agreed upon prior to the unpacking and removal of cargo from the wards on the basis that the unloading of cargo is the equivalent of their stowing at the time of shipment. These obligations fall exclusively on the carrier and relate to public order. It should be noted that, in the vast majority of cases, shipments and discharges, if there are non-crane, are carried out by the freight and unloading contractor operating independently, who undertakes this task under the agreement (eljamil, 2014).

2.3 Introducing the stevedoring contract

The stevedoring contract is the contract whereby one of the parties to the maritime transport contract, whether it is the carrier, the shipper or the consignee, is entrusted to a specialized contractor to carry out the freight or unloading of cargo from the ship. The maritime contracting contract, as it is called, is concluded between the contractor and the carrier if the latter is bound by virtue of the carriage contract to ship or unload cargo, or between the contractor and the shipper or consignee, if the shipper is obligated by virtue of the carriage contract to ship the cargo or if the consignee is obligated to unload them. The bill of lading may also contain a provision whereby the

shipmaster chooses, by proxy from the shipper or the consignee, the maritime contractor; at which time the shipmaster contracts with the contractor as an agent for the shipper or the consignee, so that the effects of the contracting contract will be, according to general rules, upon the shipper or the consignee as the original party. Since the maritime contractor performs work on behalf who assigned him, article 915-924 of the Maritime Code has been keen to confirm this meaning, as article 915 states that: "...The handling contractor shall be responsible towards whoever requested his services...", where he is entitled to a remuneration for his work, and may hold cargo until the referendum of his right in accordance with the general rules (hatoum, 2011). So, the primary place of the stevedoring contract is physical loading and unloading, but this does not negate the fact that the contract may involve the contractor's carrying out, in addition to material operations, other legal operations related thereto.

As for the characteristics of this contract, it is consensual, whose effects result on the concordance of two wills. It is binding on the two parties that create obligations. It is a commercial contract for the maritime contractor, as well as for the carrier, if he contracts with the maritime contractor. If the contractor is the shipper or the consignee, the contract is commercial for both of them if each is a merchant or falls within the scope of the subsidiary business, which is a private law contract and not an administrative one.

Furthermore, it is an immediate contract and not a time one. The agreement is made for freight or unloading of a ship, which is executed without interruption, and is not subject to writing, whether the acts are material or legal (eljamil, 2014, p. 426).

The services of stevedoring companies are required either for the port customs or under the conditions followed by both parties, and if no contract has been concluded in this regard, the stevedoring operations tariff is a typical contract. Otherwise, the contract shall state the amount of the remuneration and the manner in which it is paid.

Thus, the maritime stevedoring contracting contract is purely an application of the contracting contract. It is governed by the contract's rules regulated by the legislator through the Civil Code (eljamil, 2014, p. 427).

3. The legal status of the stevedoring contractor.

Views differed and varied on the determination of the legal status of the stevedoring contractor, with some considering it a carrier and others not.

3.1 Considering the stevedoring contractor a carrier.

Some has held that the stevedoring contractor is a carrier, and that the contract that binds him with the maritime carrier, the shipper, or the consignee, is a carriage contract. the argument of this view is that the stevedoring contractor carries out cargo usually from the wharf to the ship or vice versa. These are similar acts to what the carrier does while transporting cargo from the railway station to a destination to which the train does not reach. Other actions, such as cargo packing and unpacking, are secondary obligations when compared to the obligation of transporting (eljamil, 2014, p. 427)

According to this view, the carriage contract focuses on the carriage of cargo from one place to another, whereas the contractor's task is limited to cargo loading or

unloading from and on the ship (feroun, 1978, p. 190), as the transport process he carries out from berth to the ship is only a secondary obligation. The transport tools used in this process are not from ships, since its description is linked to its seaworthiness - to which Article 13 of the Algerian Maritime Code refers - which cannot be ascertained to the instruments used by the contractor to implement his commitment (sorkhoua, 1988, p. 89)

3.2 Considering the stevedoring contractor as an other than the carrier.

We have stated that the stevedoring contractor is not considered a carrier, and on this basis another jurisprudence went to consider that.

3.2.1 The maritime contractor is a subordinate of the carrier.

This trend indicates that the maritime contractor is a subordinate to the carrier, as long as he performs material works on his behalf. This means that the stevedoring contract is considered to be a contract of employment or lease.

Whereas, the disadvantage to this view is that the employment contract must consist of a subordinate and submissive relationship between the employee and the employer. While the maritime contractor is operating independently; even if the captain determines the work to be performed, the location, and the way cargo should be allocated in the wards, the contractor privileges absolute freedom in choosing the means and methods by which his work is to be carried out.

3.2.2 Considering the maritime contractor as a depositary.

As such, he is asked about the cargo in his possession as a custodian. Some have criticized this opinion on the grounds that the obligation of the freight and unloading contractor differs in scope from that of the custodian. The obligation of the former is to achieve a result, while that of the latter is an obligation of care, as adaptation isn't consistent neither with the intent of the contracting parties, nor with the contract's economic function. The contractor is entrusted to place cargo on land so that the consignee could receive them, since the preservation of cargo is a secondary operation that does not happen in all cases. In addition, the deposit is solely for items in a rest state, while the maritime contractor moves cargo to and from the ship (eljamil, 2014, p. 430)

3.2.3 The maritime contractor is an agent for the other party.

According to this view, the maritime contractor is an agent for the other party to the contract, whether it is a carrier, a shipper, or a consignee.

However, this opinion cannot be accepted either, for the agency focuses on legal acts, while those performed by the maritime contractor are material ones.

3.2.4 The stevedoring contract is a contracting contract.

Which is the most corresponding view, primordially based on the physical works of cargo stevedoring on and off the ship. The contract that corresponds to these operations is the contracting contract, which avoids the criticisms leveled at the previous opinions, as it conforms to the reality of the stevedoring contract.

The freight-and-unloading (stevedoring) contractor is a person who is present in the port and whose task is limited to cargo loading or unloading on the ships, using workers, namely port workers, and with special tools, i.e. cranes of various kinds, barges, barnacles and vessels (sorkhoua, 1988, p. 255)

This is a task that may be undertaken by the shipper during the loading of cargo on board the ship, while the consignee or the shipper's agent undertakes to unload cargo upon arrival. It may be required in the freight contract to carry out both the loading and unloading operations by the carrier. However, these tasks are often entrusted to specialized contractors, who are responsible for bringing experienced and professional workers at the port level, who are not subject to the provisions of maritime law but are subject to the provisions on land work. In this regards, the tasks of the maritime contractor are limited to purely physical operations related to freight and unloading, since he is not responsible for the examination or cargo delivery, but it may be subject to action when the consignee entrusts the latter with the receipt of cargo and handing over the bill of lading. In this case, the maritime contractor acquires, in addition, the status of a shipping agent, as the article 920-921 of the Algerian Maritime Code requires that such legal operations be conducted under a contract concluded by free negotiation and lead to a payment. And if the stevedoring operations are carried out under the contract, what is meant by the loading and unloading? and what are the parties to this contract?

4 Effects of the charging and discharging contract.

4.1 obligations of the parties of the stevedoring contract.

The stevedoring contract establishes obligations for its parties, whether it is the maritime contractor, the carrier, the shipper or the consignee, i.e. it establishes obligations for the contractor and his contracting party, where the breach of these obligations results in liability. We will address through this requirement the following.

4.1.1 Obligations of the stevedoring contractor.

Article 912 of the Algerian Maritime Code stipulates that: "Port contracting includes: loading, packing, dismantling and unloading of cargo and the operations of placing and taking them on earthen surfaces." These are physical operations related to loading cargo on board the ship in preparation for their transport, or their unloading from the ship upon arrival at the port in preparation for delivery to the consignee. The contractor may also be entrusted with other additional work for the supplier, shipper or consignee, related to freight and unloading, such as receiving or maintaining cargo until they are loaded or delivered to the consignee. However, since these acts are not part of his main function, some legislations, including the Egyptian, through Article 148 of the Maritime Trade Law, stipulated that this mandate be linked to an explicit written agreement from the one who assigned him these acts, whether the latter was the ship or the shipment agent (sayes, 2013, p. 1292)

The physical works of freight and unloading involves lifting cargo off the dock and placing them on board the ship, and this happens by means of cranes, machines, pipes or pumps, depending on the nature of the cargo being shipped. It is often done by port cranes installed on the shore or floating or by ship cranes that are less used at the

present time due to their availability on land, and in order to increase the ship's carrying capacity. Freight must also be carried out at the time agreed upon in the maritime transport contract. If the contract is devoid an agreement to set that, it is necessary to refer to the shipment port customs. Loading cargo on board the ship takes place in two phase (eljamil, 2014, pp. 431-432-433)

The first phase consists in placing cargo to be shipped alongside the ship, where the cranes can pick them up. This obligation falls on the shipper's liability, so that the maritime contractor may carry out the second phase, which is "the shipping".

If, however, the shipping is not in accordance with the agreement within the original time period specified by the contract or custom, an additional time period not exceeding the original one shall apply, and the shipping date shall begin the next day after the captain's announcement of the ship's readiness to ship cargo therein. As it may be agreed otherwise, in which case the shipping date will be effective from the agreed time.

Such physical works also require the preservation of cargo, including care and control necessary to accomplish the freight and unloading operations. It is the physical possession of cargo by the maritime contractor that enforces him to preserve and monitor them for fear of any damage, no matter how long cargo remains or whether additional work, such as agency or deposit, is assigned to him (sorkhoua, 1988, pp. 255-256)

4.1.2 Obligations of the contracting party with the contractor.

The contracting party with the maritime contractor, shall abide to pay the agreed remuneration, whether it is the carrier, the shipper or the consignee. The general principle is that the remuneration is determined by agreement, but the freight and unloading contract has a remuneration tariff on the basis of which the remuneration due is determined, a tariff issued by the public authority with a specific decision on its maximum. However, a lower wage may be agreed upon without the possibility of claiming a higher wage. In accordance with the general rules, the maritime contractor is also entitled to seize cargo until his right is duly fulfilled.

4.2 The second requirement: the maritime contractor's liability.

The stevedoring contractor shall be responsible for carrying out his assignment before the person contracting with, as such, for any loss or damage of cargo during the freight or unloading process against the shipper, consignee or carrier. So, what is the basis and nature of this liability?

4.2.1 the basis of the stevedoring contractor's liability.

Article 915 of the Algerian Maritime Code provides that: "In the event of an error, the handling contractor shall be liable towards who ever request his services." This was affirmed by the Supreme Court, which held that there is no legal relationship between the consignee and the port of establishment, where the action is brought by the consignee, against the carrier and not the port of establishment; whose services are part of the contracting contract.

On this basis, the maritime contractor's liability shall only be incurred if the contractor proves that the damage was caused by the fault of the contractor or of

one of his subordinates. Accordingly, the obligation of the maritime contractor is to exercise care, and take the necessary precautions in accordance with the principles of the profession for each type of cargo. In order for the maritime contractor's liability to be raised, the plaintiff must prove the contractor's fault in performing his functions, as there is no presumption of fault that weighs on him. Thus, the legislator did not establish the maritime contractor's liability to make him a guarantor of cargo during the freight and unloading operations, as error must be proved by the plaintiff.

Examples of the error considered the breach of the contractor's obligation to take special care of cargo, include trolley hook strike that caused partial or total loss of contents, inadequate precautions when handling fragile cargo, or failure to observe the technical assets to be followed in the event of transporting dangerous cargo. It should be noted that the acts performed by the stevedoring contractor are subject to the State's Law provisions in which the port where the acts are carried out is located. Maritime customs also require tolerance in certain incapacity ratios resulting from the nature of cargo or its transportation method, for which the carrier is not responsible. Whenever the deficit is due to what is lost during freight and unloading, the contractor shall not be asked about it either.

4.2.2 The nature of the maritime contractor's liability and the scope of his accountability.

The Algerian legislator didn't regulate in details the tasks or responsibilities of the maritime contractor, but it is decided under it, that the contracting with, may refer to him on the grounds of contractual liability. The Algerian maritime legislator held the maritime contractor responsible for his errors in carrying out the freight and unloading operations. He preferred to settle the dispute and to rule on whether the shipper or the consignee; except those contracting with the maritime contractor, can directly sue the latter for damages during the operations. The "legislator" ruled that the responsibility of the freight and unloading contractor is prior to the person who assigned him the work, who alone has the right to file the lawsuit, taking into account the provisions of the French legislator in 1966 (eljamil, 2014, p. 434)

Accordingly, the maritime contractor carries out the freight and unloading operations and other additional ones, for the account of the one who assigned him, and he is only questioned in this regard by the latter, as he has the right to file a liability claim directly to the contractor, unless the authorization was issued by an intermediary person between the contractor and the contracting party with, who alone has this right before him. Therefore, if unloading was the responsibility of the consignee and the contractor has been selected, the latter is liable before the consignee for all loss or damage to cargo during unloading, unless it is established that these acts were due to the carrier's action (sayes, 2013, p. 811)

If, however, it is the carrier's responsibility to unload and the latter has chosen the contractor, then the contractor is considered to be a subordinate of the maritime

carrier, which remains responsible for cargo until they are delivered to the consignee. In which case, every legal link between the contractor and the consignee is negated. Accordingly, the consignee shall not have any direct claim of liability for loss or damage against the contractor unless the latter commits a personal error, which the consignee is required to establish in accordance with the provisions of tort liability. It is clear from this that the maritime contractor is subject only to his contractual liability by who have contracted with, in application of the inadmissibility of choosing between the raising of contractual liability and tort liability. As it's not permissible to raise his contractual liability, since they are not linked to the maritime contractor by any contract. In any case, the claim of negligence in the light of the current provisions on the maritime contractor for loss or damage of the goods during the process of loading and unloading entrusted to it may not be invoked, and in this respect we shall set forth two basic commitments:

First commitment: The obligation of freight and unloading shall be the responsibility of the maritime carrier, as the shipper or consignee cannot refer directly to the contractor, but rather refer to the maritime carrier itself.

Second commitment: If the shipper or the consignee commissioned the contractor to freight and unload, the contractor is only liable here by the shipper or the consignee, and others may not bring a claim of liability against him, whether the latter is contractual or tort (taha, 2008, p. 180)

For this purpose, however, there is a difficulty in the event that the obligation of freight and unload falls on the shipper or the consignee, and the lading bill includes a requirement that the carrier or the captain be authorized to choose the stevedoring contractor, but at the expense and liability of the shipper or the consignee. Under this requirement, the carrier or the captain contracts with the contractor as an agent of the shipper or the consignee. The effects of this contract are to be paid to the shipper or consignee on whose account the carrier or the captain has contracted, and the contractor is then questioned only to the direction of the shipper or consignee

The principal is that the unloading contractor's intervention is for the benefit of the maritime carrier, which is committed to unloading cargo. The consignee may only seek compensation from the carrier for damages arising from the contractor's work, unless the lading bill contains a provision authorizing the captain to choose the unloading contractor, in which case, the contractor may be brought directly to account. The exception is that the unloading contractor is considered to be in the position of the ship's dependent, and the lading bill authorizes the captain to select the contractor and to contract with him on behalf of the concerned parties (eljami, 2014, p. 435).

Finally, it should be noted that the proceedings arising out of the stevedoring contract are legally scheduled to be brought before the authority in which the freight and unloading port is located. This was confirmed by the Supreme Court when it considered that the judges in question, decided that the judicial authority in Annaba was competent to hear the case, because the shipment was carried out

in its port, which had applied the validity of the decision. The proceedings are dropped within one year from the day the unloading of the ship was completed, as indicated in article 919 of the Algerian Maritime Code, confirmed by the Supreme Court in its decision No. 54006 of 30-04-1989 in the case of "X" against "Y", when it considered that the trial judges, by deciding to drop the case more than two years after the day of unloading the ship's cargo, had applied the law properly (taha, 2008, p. 180)

4- Conclusion

Since the stevedoring contractor may be subject to heavy responsibilities when carrying out the acts entrusted to him in connection with the execution of the maritime transport contract, most legislations, including the Algerian one, after establishing his liability on the basis of the error to be proved, set a scope of this liability by making it of a contractual nature, thus cutting off the way from third parties outside the contracting contract scope, whether in bringing a direct action against him or in triggering his negligent liability. According to the general rules, it is not possible to combine or compare both contractual and tort liability, and it is a reduction in the gravity of the contractor's liability as an active person in the field of maritime exploitation, if another mitigation is added to it, which is the settlement between the latter and the maritime carrier in determining his liability, which is referred to by the Algerian maritime legislation through article 208.

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