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Scope and Conditions of Damages for Air Carrier's Liability Caused by Delay in Terms of the Travel Contract Issued by Emirate Airlines

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This article detects the scope and conditions of the damages award compensation for the air carrier's liability caused by delay, in terms of the Standard Form Contract issued by the UAE air carriers (the sample of the Emirates Airiness). The Travel Contract is drafted by the Air carrier and not individually negotiated, and that the other party is not authorized to influence or modify its terms. It is necessary to examine its fairness, its representation to the interests of the contracting parties equally, and its compatibility with the relevant provisions provided by the relating international conventions and national laws. This study confirms the fairness of the Travel Contract' provisions relating to the subject of the research, its fair representation as regards the interests of both contracting parties and its adoption to the broad scope of damage award compensation in agreement with the best practices of both national and international law.

Key words: *Travel Contract, Emirate Airlines, Air Carrier's Liability, Liability of Air Carrier's Delay.*

Introduction

The civil contractual liability is defined as "the obligation of the breaching part to cure the damages of the other contracting party, whether it was caused by his personal action or by the act of his affiliates" (Haanappel, 2003, P. 109). The contractual liability of the air carrier arises when it breaches one of its contractual obligations to the detriment of a co-contractor, for instance a passenger, one of the most common forms of such a breach being the air carrier's breach to transport passengers or goods on the agreed upon time, on the condition that such a delay causes damages (*ḍarar*) to the other contracting party (Woon, 2012; Verschoor, 2001; Lee,

201; Arpad, 2013). The reason for this is that time is a core condition in air transportation contracts, regardless of their high expenses, compared to other means of transportation. Nevertheless, delay in flight times may in some cases be unavoidable, and this may cause damages to the traveler, which raises questions about the scope of liability of the carrier and in particular how to determine damages which are recognized by law in addition to the conditions of damages which award compensation.

The regulatory frame of the air transportation contracts in the UAE rely on international and national sources. At the international level, the UAE ratified the Warsaw Convention 1929 by Federal law No. 13/1986, and the Hague Protocol 1995 amending some provisions of the treaty, which the UAE ratified by Federal law No. 12/1992. In addition, the UAE ratified the Montreal Convention by Federal law No. 13/2000 (Published in the Official Gazette on 01/31/2000) which clearly stipulates the liability of the air carrier for a delay in accordance with what is provided in the Warsaw 1929 convention Article (19) of the Montreal Convention (corresponding to Articles 19 and 20 of the Warsaw Convention) which states the air carrier's liability for the damage that results from delay).

In many jurisdictions, said treaties became part of the national law governing air transportation contracts. However, these international conventions do not provide clear conditions and standards to identify the scope of damages to be awarded in cases of "late performance" as meant in Article (19) of the Montreal Convention; on the contrary, these refer to national laws to answer these questions (Abu Dhabi Cassation Court decision No. 259/2012).

As regards the national law of the United Arab Emirates, the Federal Law on commercial transactions No. 18/1993, which regulates commercial transactions, follows the same approach as the abovementioned international conventions. This law should moreover be interpreted in accordance with the general principles of the law on civil transactions No. 5/1985, in addition to the general principles of Sharia law which mandate financial transactions between individuals in general (Articles 353-370; the Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 121 of Judicial Year 16, dated January 21, 2008; Dubai Court of Cassation No. 364/2005; Dubai Court of Cassation, Civil Judgments, Appeal No. 172 of 2009; dated 10/25/2009, Technical Office 20, Part 3, p. 2060; Appeal No. 166/2005 issued by the Dubai Court of Cassation on 3/20/2006; Dubai Court of Cassation, Civil Judgments; Appeal No. 172 of 2009, dated October 25, 2009, Technical Office 20, Part 3, p. 2060). There still exists a jurisprudential disagreement regarding the question whether or not the scope of compensation under contractual liability may include moral damages and/or damages for loss of profit, and this is clearly to be detected in the judiciary judgments within the UAE (Fayyad, 2019).

On the other hand, the UAE legislator issued the civil aviation law No. 20/1991 as the relevant national legislation to the extent that it does not contradict with international treaties which the UAE ratified (Dubai Court of Cassation, Civil Judgments, Appeal No. 172 of 2009, Date of 10/25/2009, Technical Office 20, Part 3, p. 2060; the Federal Supreme Court, Civil and

Commercial Judgments, Appeal No. 121 of 16 Judicial Year dated January 21 2008; Court of Cassation, Civil Judgments, Appeal No. 470 of 2003 Judicial, Session Date 3/27/2004, Technical Office No. 15, Part 1, p. 561).

However, the UAE General Civil Aviation Authority (GCAA) has not issued an executive regulation governing the air transport contract yet. Instead, it authorized air carrier companies to draft so-called "standard form contracts" (hereafter: "the Travel Contract") to deal with the contractual relations between such air carrier companies and their passengers. One has in this regard to notice the similarity of all contracts issued by the Emirati Air carriers; therefore, the relevant Travel Contract issued by the Emirates Airlines is chosen to serve for the purpose of this research. It has also to be noted that Paragraph 2/3 of the Travel Contract hereby provides the nullity of any of its conditions which conflict with the relevant laws and applicable treaties of the UAE.

This article examines the scope of the air carrier's liability for damage caused by delay in terms of the Travel Contract, at the same time dealing with the question to what extent the relevant Travel Contract's terms are in accordance with the general rules governing contract law in the civil transactions law and the relevant international treaties' provisions, in addition to the approaches of the UAE judiciary, in order to detect the validity of these provisions.

In order to achieve the article's objectives, its first part examines the classification of damages award compensation for liability caused by delay, while the second part focuses on the requirements and conditions of damages which award compensation.

1. Classification of damages Award Compensation

Under the law of the UAE, damage (*Darar*) is a basis of contractual liability; it is defined as the loss of properties, body injury, honor or emotion of other. In the context of contractual liability caused by an air carrier's delay, damages include both financial and moral damages (Sultan, 2012). Financial damages compensate the loss of any financial right, but also incorporate "suffered loss" (*ḫsarh laḥqh*) and "loss of profit" (*ksb fa't*). In contrast, moral damages do not match the financial position of the aggrieved party but deal with psychological or moral pain due to a prejudice to a person's feeling, emotions, honor, dignity, reputation, or social position (Al-Zahawi, 2020).

In this regard, Art. (19) of the Warsaw Convention provides that: "the carrier shall be liable for the damage that results from delay in the transportation of passengers, luggage or goods by air". In contrast, the treaty does not provide the nature and the scope of that damage, nor do the subsequent protocols to the Warsaw Convention (Hague Protocol, 1955 and the Montreal Four Protocols, 1975) amending the provisions of this article (Philepin et al, 2008). The Montreal Convention for the Unification of Air Transport Rules 1999 adds to this that an air carrier will not be liable for damage resulting from a delay if it is proven that the air carrier or its affiliates took all reasonable measures necessary to avoid damage, or that it was impossible to consider such measures (Frank, 2007).

At the national level, the UAE legislator issued a similar provision in Art. (357) of the UAE commercial transactions law, which stipulates that: "the air carrier shall be liable for the damage that occurs as a result of the delay in the arrival of the passenger or goods".

Most of jurists in this regard distinguish between "contractual liability" and "tortious liability" when judging which damages award compensation in terms of civil liability (Sarhan & Khater, 2012). Said jurists hold that both suffered loss and loss of profits, in addition to moral damages, are recognized in terms of tortious law, while the scope of the contractual liability is limited to suffered loss only.

The abovementioned provisions of said rules of law do not contain clear provisions to settle this debate. The question hence arises how the Travel Contract recognizes the scope of these damages.

1-1 The Compensation of Financial Damages

Financial damages affect the financial position of individuals and cover the suffered loss of the aggrieved party in addition to his loss of profits. The aggrieved party (the passenger) may prove that the delay caused him to miss an opportunity to acquire profits (missed gain), such as the opportunity to enter into a profitable deal or an opportunity to profit from his participation in an activity against payment of a fee (*tafwit fursa*) (Franks, 2007). Usually, these damages also may occur in contracts regarding the transport of goods, as in such a case, a delay may lead to miss the opportunity to sell these goods in the relevant season, or may lead to a price reduction due to a delay in marketing them. The question which arises here is what the regulatory framework is for handling these cases.

1.1.1 The Regulatory Approach

According to the provisions of the Warsaw Convention and the Montreal Convention, the scope of damages requiring compensation include suffered loss and loss of profits ((Franks, 2007).

The reason behind this approach is that the provisions of both treaties are influenced by common law which recognizes the theory of contract (Giemulla, 2006). This approach places the burden of proof regarding the existence of such damages, as well as their amount, on the traveler (Giemulla, 2006).

International jurisprudence supports this approach. For instance, in the case of "Robert Houdin v. Panar do Brasil" (Paris, 9 July 1960, 1961, 24 RGA 285.), the Paris Court of Appeal awarded damages to a passenger for both his missed profit and loss suffered resulting from the air carrier's delay in performance, as a result of which the passenger had missed an opportunity to participate in a theatrical performance. In another case, "Panalpina international transport ltd v Densil underwear ltd" (Panalpina international transport ltd v densil underwear ltd, 1981, 1

Lloyd's Rep. 187), the English Queen's Bench Division awarded damages to the shipper of goods for a delay in the deliverance of these goods at the agreed upon airport, resulting in a loss of profits due to the fact that the goods could no longer be sold during the Christmas season.

As regards the law of the Emirates, the law on civil transactions does not provide an explicit provision to recognize the compensation of such missed profits, so it is important to invoke the provisions of Islamic Sharia as a further source of law within the UAE. Despite a disagreement of Sharia jurists on this issue, we notice that there is a trend that allows for the compensation for missed profits by adopting the broad concept of "direct damages" (Mahsna, 2011). This approach has also acknowledged the opportunity of getting an advantage (that was sought by the aggrieved party) under the concept of missed profits, provided that the advantage sought is based upon reasonable expectations – in light of the normal course of affairs –, making these missed profits more likely to be compensated (The Federal Supreme Court Cases No. (196/2007), (118/2000), (384/2006). In this regard, the judge should distinguish between, on one hand, suffered losses, which would be represented by the deprivation of the opportunity itself, and, on the other hand, the potential damages which the plaintiff is not entitled to claim compensation for. This has to be done in accordance with the circumstances of each case separately (The Dubai Cassation Court decision No. (298/2001).

In accordance with this approach, the Emirates Federal Supreme Court has interpreted the scope of damages in accordance with the provisions of the Montreal Convention and these of national law in the broad sense, to include both suffered losses and missed profits. The legal limitation of the responsibility of the air carrier in the case of transporting persons before each passenger an amount of 125,000 francs stipulated in Article 22/1 of the aforementioned Warsaw International Treaty - and applicable to the incident - has come in absolute terms not limited to a specific type of damage, covering all damages It is attached to the passenger, both physical and psychological, and then if the appellant's request is submitted to a medical committee to prove that he has a satisfactory fear of boarding aircraft as a result of the accident, he becomes unproductive, not the right to turn him away (Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 545 of Judicial Year 23 dated 4/22/2003, Technical Office No. 25, Part 2, p. 993).

The Supreme Court thus held that the evaluation of damages and the determination of compensation are issues which the court is authorized to evaluate both as regards their existence and scope (…) and as regards the extent to which the aggrieved person is entitled to compensation for it, and it was decided, in accordance with the articles 292 and 293 of the civil transactions law, that compensation covers suffered loss and missed profit, provided that this is a natural consequence of the breach caused by the other contracting party (Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 144 of Judicial Year 25 dated November 27 2005, Technical Office 27, Part 4, p. 2608). In another case, the Supreme Court similarly ruled

in favor of the discretion of the authorized court to evaluate and assess damages and to reward compensation in terms of the articles 292 and 293 of the civil transactions law which recognize suffered loss and missed profit (Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 144 of Judicial Year 25 dated November 27, 2005, Technical Office 27, Part 4, p. 2608).

1.1.2 The Travel Contract's Approach

The provisions of the Travel Contract agree with the abovementioned approach, by also adopting a broad concept of damages. More precisely, the definition of damages is comprehensively provided in the preamble of the Travel Contract to include all damages resulting from the air carrier's failure to meet its obligations. As regards the case of delay, it is clear from the terms of the Travel Contract that the air carrier's liability covers the broad scope of financial damages arising from delay in the process of the air transport of both passengers and luggage, to the extent that the Travel Contract uses the term "damages" in general and without specifications, while the Travel Contract uses the term "physical injuries" in reference to the death or injury of a passenger as a result of an accident occurred on board the plane, or during any of the embarkation or disembarkation operations. In addition, paragraph 15/3/5 of the Travel Contract provides that: "our liability towards you is limited to compensable damages that you are entitled to recover in exchange for proof of losses and costs under the Warsaw Convention and the Montreal Convention or the local laws that apply only", whereby is known that the term "costs" indicates the costs of transportation, while the term "losses" extends to include all losses suffered as a result of the air carrier's breach of its obligations, including missed profits. Finally, paragraph 15/6 of the Travel Contract provides that: "our liability for the damage resulting from the delay in your transfer process is determined in relation to the Warsaw Convention and the Montreal Convention", while both these treaties recognize a comprehensive concept of the term damages, as mentioned above.

1-2 The Compensation of Moral Damages

Moral damages have been defined as: "physical or moral suffering, caused by actions, which violate the unproperly rights of others or infringe their intangible benefits as well as in other cases which are provided by law" (Dyson, 2006). Moral damages may include both "mental suffering", in case the damages cause psychological suffering of a person without being related to physical injuries, and "consequential moral damages" which result from physical injuries which are caused by an accident that causes pain and suffering for both the victim and his family (Federal Supreme Court Decision No. 387/2005; Abu Dhabi Cassation Court case no. 96/2002; Dubai Cassation Court cases no. 38/2004).

1.2.1 The Regulatory Approach

At an international level, there prevails a jurisprudential and judicial consensus that the passenger deserves compensation for consequential moral damages, while jurists disagree about the compensation for mental suffering (Giaschi, 2003; Katouzian, 2007; Steven, 2008). A first approach does not recognize compensation for mental suffering, thereto relying on Art. (17) of the Warsaw Convention, which explicitly limits the scope of damages to death, injury, or other physical damages (Giaschi, 2003; Katouzian, 2007; Steven, 2008). This viewpoint finds much support from decisions of American, English and Australian courts which all refused compensation for mental suffering unless the latter relates to physical damages. Reference can in this regard be made to, for instance, a judgment of the Central Court of Appeals of the state of Texas in the US case "Lee v. American Airline Inc." (United States District Court, N.D. Texas, Dallas DivisionJul 2, 2002).

In contrast, the second approach recognizes the compensation for mental suffering, thereto even so relying on (the English text of) Art. 17 of the Warsaw Convention (on "Personal Injury"), which is thus understood as to include both types of damages to the extent that these both affect the human body negatively. Many court decisions support this approach (Dyson, 2006). For instance, in the case "Esther Kalish v. Transworld Airline case" of 1977, the New York Civil Court held a passenger entitled to get compensation for the mental suffering which the passenger endured because of the fear caused by the engine fire of an air carrier plane when traveling from Spain to New York. In another case "Opera Select v. KLM case Airlines", the District court of Harlem obliged an air carrier to compensate a group of passengers for the mental suffering they endured as the result of delay in transporting their personal luggage, which made said passengers attend an annual party in costumes other than the outfit that they had prepared on beforehand, in its own turn resulting in an embarrassment in front of the rest of the audience (De Lon, 2017, Footnote No. 389).

We do agree with the second approach based on the fact that the mental suffering compensation issue caused a great controversy in the context of the discussion of the texts of the Montreal Convention 1999, as the representators of the air carrier sector practiced much pressure to exclude it from their civil liability, while other interest groups exercised pressure in order to recognize this type of damages within the civil liability of air carriers. Finally, the decision was made not to modify that what was provided in the Warsaw Convention. In the minutes of the convention sessions, reference was made to the comprehensiveness of the meaning of damages, especially with regard of the question whether or not these include moral damages that affect a person's ability to continue his daily activities in a normal manner, compared to the situation before suffering the harmful act (Michael, 2008).

It should in this regard also be pointed out that compensation for mere moral damages has been adopted by the Montreal General Risks Convention 2009, which relates to compensation for damages caused to others by acts of unlawful interference involving an aircraft. This agreement

aims to develop the 1952 Rome Convention on compensating the third party for damages caused by the plane on the surface of the earth and avoiding the points that prevented the required number of states from joining it, and thus it did not enter into force and among the most important of these points is the reduction in compensation limits, as the agreement took into account the importance of balance between interests and the protection of aviation activity from heavy compensation that may eliminate it. The agreement included a number of items, the most important of which are: determining the scope of application of the agreement in international trips while giving the member state an extension of the application of this on domestic flights with a request submitted by the state to the headquarters of the ratification of the agreement, limiting the liability to the operator while giving him the right to recourse to the request for compensation against whoever started the accident Limits of compensation in line with the size of compensation accepted by most countries, the right of the injured to obtain an advance payment, which has been adopted by many international agreements recently, determining the competent court and limiting it to the court of the country in which the accident occurred, reviewing the compensation limits to avoid a protocol to amend the agreement.

Regarding the Emirates national law, the law on civil transactions does not constitute a clear provision to settle the issue. Islamic jurists disagree on this issue as well. Some of these do not recognize a compensation for mental suffering in civil liability in general to the extent that the function of compensation is to repair damages by compensating the occurred damages with an amount of money, which may not be used to cover or cure mental suffering (El- Sanhory, 1998; Fayyad, 2012). In contrast, another group of Islamic jurists has come up with another approach; this group op scholars recognizes the possibility to compensate mental suffering, provided that the term damages, in its general sense, consists of infringing on the right or legitimate interest of the aggrieved party, in a manner that defects his financial or social position, whereby there is no doubt that mental suffering represents an assault on the right of that party to the integrity of his person ((El- Sanhory, 1998).

We furthermore argue that Art. 293/1 of the civil transactions law should be interpreted in agreement with the second of these approaches, the advantages of such interpretation being that: it allows for the recovery of mental suffering, while said Art. 293/1 of the civil transactions law provides that: “the right to indemnity for harm shall include moral harm, and an infringement of the liberty, dignity, honor, reputation, social standing or financial credit of another shall be regarded as being moral harm”. Although said article of the civil transactions law relates to tortious liability, the UAE high courts apply it to contractual liability as well. For instance, the Federal Supreme Court has in this regard judged that: “it is settled that moral damages are recoverable in addition to material damages without the risk of double recovery” (Federal Supreme Court judgment, Cassation No. 322 of 1994.) Similarly, the Dubai Court of Cassation has held that: “the Court of Appeal has identified the elements of material and mental suffering in assessing the respondent’s recovery of damages (…) moral damages include pain,

grief, and distress over what she has suffered (…)" (Dubai Court of Cassation decision No. 345 of 1999).

Another decision of relevance in this debate is a judgment of the Federal Supreme Court judgment, in which it was held that "the flight was scheduled on 27/3/1979, the passenger went to Abu Dhabi airport and prepared himself for travel, but he was surprised by the cancellation of the flight on that day, so he was obliged to travel the next day. Therefore, he was unable to catch a second flight which was heading from London to the United States of America, causing the endurance of moral damages which the court estimated at an amount of eight thousand dirhams" (Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 898 of Judicial Year 24 dated 2/25/2004, Technical Office 26, Part 1, p. 365).

1.2.2 The Travel Contract's Approach

The Travel Contract itself does not provide a clear provision to address the issue of moral damages in a conclusive manner, although many indications support the comprehensive approach.

Firstly, the notion "damages" is defined in the preamble of the Travel Contract in accordance with Art. 17 of the Montreal Convention as "damages that cause the death of the passenger or cause physical injury due to an accident". It also includes damages resulting from total or partial damage of luggage during an air flight.

It has in this regard already been mentioned above that the phrase "physical damage" which is provided in Art. 17 of the Montreal Convention, includes all human damage (physical and moral), which affect the performance of a person's daily work negatively in comparison to what he was accustomed to before the occurrence of that damage. Although the apparent meaning of that article suggests that this definition explicitly excludes physical damage, the text of Paragraph 5/3/15 of the Travel Contract refers to the provisions of the Montreal Convention and to national law in order to fill any gap in its provisions, and it is given fact that the national judiciary extends the scope of the damage to include both types of moral damages, and has thereto explicitly interpreted Art. 17 of the Montreal Convention as compatible with this conclusion.

For instance, the Federal Supreme Court has in this regard held that: "the legal limitation of the liability of the air carrier, in the case of transporting persons, towards each passenger to the amount of 125,000 francs as is provided in Article 22/1 of the Warsaw International Treaty, is not exclusive to a specific type of damage, so it covers both of physical and moral damages of the passenger", and "the appellant's request to be submitted to a medical committee to prove that he has a satisfactory fear of boarding airplanes as a result of the accident is recognized" (Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 545 of Judicial Year 23 dated 4/22/2003, Oral Office No. 25, Part 2, p.993).

Secondly, Paragraph 15/2 of the Travel Contract uses the term "damage" in general when referring to the scope of the air carrier's liability, while Article 15/3/5 provides the liability of an air carrier for losses and costs suffered by the other contracting party. It is hereby known that the term "costs" indicates financial expenses which are incurred by a person, while the term "losses" extends to cover all the damages that this person has suffered as a result of the harmful act. It is, furthermore, also known that the national judiciary interprets the term "damage" to include mental suffering (as has already been mentioned above).

For instance, the Federal Supreme Court held that "as for moral damages, these deal with the damage caused to the plaintiff as regards his freedom, honor, reputation, social position, or financial consideration (…) in addition to the pain and heartbreak that he suffered as a result of preventing him from traveling because of his nationality." Therefore, the court granted him compensation of 150,000 dirhams Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 144 of Judicial Year 25 dated 27/11/2005, Technical Office 27, Part 4, p. 2608).

Thirdly, Art. 16 of the Travel Contract contains time limits for legal claims regarding damages, and those time limits are recognized in subsidiary provisions which regulate the legal procedures in regard with physical damages and damages to baggage only. Said Article then moves to govern the legal procedures for claiming compensation for damages resulting from delay, without reference to a similar specification (16/1/2 /C). This paragraph provides that: "If you wish to claim compensation from us for delayed checked baggage, you must notify us within 21 days of the date the baggage was placed at your disposal." This could be interpreted as an argument that the compensation of any damage resulting from a delay of performance extends to include moral damages.

Finally, Article 335 of the law of commercial transactions, which governs the contract of transporting people in general, stipulates the obligation of a carrier to compensate the traveler for the damages resulting from the delay in carrying out his obligation, in addition to all the damages that occur to the passenger during the transport (both physical and non-physical). This provision indicates an explicit orientation to the legislative policy for the UAE legislator to compensate both types of damages resulting from a transport contract in general.

2. The Conditions of Damage Award Compensation

Due to the lack of clear regulatory provisions regarding the conditions of damage award compensations in international conventions, the interpretation of some parts of the Travel Contract may be of help in settling this challenge.

2.1 The Regulator Approach

The jurisprudence on an international level seems to limit the scope of the Warsaw Convention to foreseen and direct damages only, while - as a general rule - indirect and unforeseen damages

do not warrant compensation (Fank, 2007). Direct damages are the damages that occur as a natural consequence of a harmful act, on the basis that the inclusion of compensation for suffered losses requires that these are the direct result of said act alone. The reason behind this approach is that the provisions of the Warsaw Convention concern contractual liability, hence relying on the (contractual) fault of the air carrier in carrying out its contractual obligations arising from the transport agreement (Szakal, 2013).

On the other hand, the convention seems to be in agreement with the orientation of the common law approach with regard to the rules of liability where it provides that the obligation of the air carrier is an obligation to perform to the best of one's ability, rather than an obligation of result (Szakal, 2013). This is due to the fact that common law is very strict in determining the damages that demand compensation in terms of the contractual liability in accordance with what has been indicated above as regards the provisions of the Montreal Convention.

For instance, the cancellation of exclusion clauses in terms of this convention implies that the air carrier acts in bad faith in two cases (Fayyad, 2014; Fayyad, 2013): the first is in case it is proven that the air carrier has committed fraud or gross negligence in the implementation of its contractual obligations, while the second case occurs in case the Travel Contracts, such as the travel ticket and the baggage card, are missing, or in case these Travel Contracts do not contain the mandatory data mentioned in the Warsaw Convention. This approach is in accordance with the English legal system on exclusion clauses in terms of contractual liability (Mazaheri & Basiri, 2018; Raffaele, 2008).

In addition, the convention recognizes the theory of the air carrier's presumed fault in case it did not perform its contractual obligations in a manner similar to the common law approach, which implies the existence of contractual liability once the breach takes place, whereby the plaintiff is not required to prove its conditions, unless the air carrier proves the existence of a foreign cause that prevented it from executing its contractual obligation(s), in addition to proving that it has taken all precautions and measures necessary in order to prevent the occurrence of such a breach as provided in Art. 20 of the Convention (Frank, 2013).

The notion "necessary measures" imposes the air carrier to prove the following (Bin Saghir, 2018): (1) to prepare and equip a navigable air plane in accordance with all national and international standards, (2) to ensure the presence of an air crew licensed to fly the aircraft in accordance with national licensing conditions and that follows the rules of flight ("Rules of the Air") that are internationally recognized and stipulated in the annexes of the 1944 Chicago Convention, (3) to ensure that the plane is committed to take off after being equipped with an adequate amount of fuel, and to ensure the distribution of its cargo in accordance with the flight manual issued by the manufacturer, (4) to make sure that the flight crew got brief from the meteorological department at the departure and arrival airports in order to ensure the validity of the flight weather during the flight, and (5) to take all measures to confront the dangers of terrorist acts that the plane may face during the flight. Even after the Montreal Convention of

1999 modified the contractual liability provisions contained in the Warsaw convention, these amendments were exclusive to the rules which organize the liability of the air carrier in case of death or in terms of bodily injuries in addition to damages of goods and luggage only, while the liability rules of delay in the implementation of the performance have not been modified and still rely on the Presumed fault (Bin Saghir, 2018).

As regards national law, Arts. 386 and 472 of the law of civil transactions provide a right of cancellation in case it is impossible for the debtor to implement its obligation due to a foreign cause, stating that: "the judge may reduce the amount of compensation or not award compensation if the creditor, by default, participated in or increased the damage" (Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 21 of the 12th Judicial Year, dated 11/25/1990).

UAE law voids the limitation of liability as well, as provided in international conventions, in case it is proven that the default of the air carrier is due to fraud or gross negligence of its part or the part of any of its affiliates (Fayyad, 2012); this is what the Dubai Court of Cassation held when stating that: "the air carrier is not authorized to invoke the limitation of its liability if the damage resulted from its (own) act or omission or the act or omission of its affiliates, either with intention or gross negligence, and it is the responsibility of the claimant to prove that there was a mistake on the part of the carrier or one of its affiliates which directly caused the damage" (Court of Cassation, Civil Judgments, Appeal No. 362 of 1997, Date 28/3/1998, Technical Office 9, Part 1, p. 266; Dubai Court of Cassation, Civil Judgments, Appeal No. 470 of 2003 Judicial, Session Date 3/27/2004, Technical Office No. 15, Part 1, p. 561). In another case, the Federal Supreme Court held that: "the air carrier's obligation to respect the transport times is an obligation to achieve a result, so his responsibility for the damages that may result as a consequence of a delay in the transportation of passengers occurs if it is proven that this damage resulted from his intentional act or intentional omission. In such a case, Art. 12 of the Warsaw convention, which stipulates the evaluation of compensation with a specific amount of money, is not invoked, and the liability can be kept off by proving the fault of the breaching party. For these reasons, the passenger deserves compensation due to the delay to return him because the destination country did not allow him to enter its territory" (Federal Supreme Court, Civil and Commercial Judgments, Appeal No. 144 of Judicial Year 25 dated November 27, 2005, Technical Office 27, Part 4, p. 2608).

2.2 The Travel Contract's Approach

The provisions of the Travel Contract seem to be in accordance with the similar clauses contained in both the abovementioned international conventions and the national law. Paragraphs 15/1 and 15/3 of the Travel Contract, which provide the applicable law for governing the relationship between the contracting parties, in this regard refer to the provisions of the Warsaw and Montreal Conventions for determining the conditions of demanding damage compensation.

Furthermore, paragraphs 3/2/15 to 3/15/6 of the Travel Contract provide that the air carrier is totally or partially exempt from his contractual liability in the following cases: (i.) in case the damage takes place due to the (own) fault or negligence of the passenger; (ii.) in case the damage was caused by (a) foreign reason(s); (iii.) in case it is proven that the air carrier was not negligent in the execution of its obligation(s); and (iv.) in case the damage was due to the air carrier's commitment to apply local legislation which caused damage to the other party (such as a legal ban preventing the passenger from leaving).

This approach is in line with the jurisprudence of several national high courts. For instance, the Dubai Court of Cassation has exempted the air carrier from its civil liability in case it is proven that the damage was caused by one or more of the following reasons: (1) the nature of the cargo or a personal defect in it; (2) mis-packaging of goods by the owner or his affiliates or by any person other than the air carrier itself; (3) an act of war or an armed conflict; and/or (4) an act of public authority regarding the entry, exit, or transit of goods (Court of Cassation, Civil Judgments, Appeal No. 256 of 2006 Judicial, Session Date 2/13/2007, Technical Office 18, Part 1, p. 130). In another decision, the same court held that: "the Russian authorities' confiscation of the goods shipped by the appellant at Moscow airport is one of the cases of foreign cause in which the carrier does not bear any responsibility resulting from failure to execute, especially since the shipped goods consisted of 1750 mobile phones that were grouped into 16 cartons and shipped via the air carrier without the shipper obtaining an import permit from the competent Russian authorities" Court of Cassation, Civil Judgments, Appeal No. 131 of 2009, Session Date 8/2/2010, Technical Office 21, Part 1, p. 328; Appeal No. 166/2005 issued by the Dubai Court of Cassation on 3/20/2006). In another case it was held that: "if the aggrieved party proves that the carrier caused by his mistake the public authority to take action with regard to the goods subject to the transport contract, then the liability of the carrier for the loss of the goods remains" (Court of Cassation, Civil Judgments, Appeal No. 131 of 2009, Session Date 8/2/2010, Technical Office 21, Part 1, P. 328). In another case, it was held that: "if the air transport contract obliges the air carrier to perform its obligation on the agreed time and without delay, the carrier's failure to do so makes it liable to compensate the passenger without the need from the aggrieved party to prove the existence of fault from the air carrier or one of its affiliates, unless the later proves that it and its affiliates had taken all necessary measures to avoid the damage or that it was impossible for them to prevent its occurrence" (Federal Supreme Court, Civil and Commercial Rulings, Appeal No. 621 of Judicial Year 20, dated 10/29/2000, Technical Office 22, Part 3, p. 1425).

About the foreseen damage, the basic principle in order to estimate the compensation arising from the liability of the air carrier for damages of the shipped goods which are the subject of international air transport contracts, is to determine this compensation on the basis of "the value indicated weight" of the goods (Dubai Court of Cassation decision No. 1/2003, dated 3/30/2003). This is because, according to Art. 292 of the law of civil transactions, the legislator's policy is that this compensation should be estimated on a basis which represents the direct and foreseen damages at the time of contracting (Court of Cassation, Civil

Judgments, Appeal No. 372 of 2002, Session Date 1/5/2003, Technical Office 14, Part 1, p. 59). In addition, national jurisprudence recognizes the criterium of the weight of the goods as the main criterion for making this determination.

In contrast, compensation for indirect and unforeseen damage is awarded to the aggrieved party in case it is proven that the damage resulted from an act or omission of the air carrier, or its affiliates, with the intention or the gross negligence to cause damage as provided in Art. 361 of the law of commercial transactions (Dubai Court of Cassation decision No. 372/2002, dated 1/5/2003). Perhaps, the attitudes of the UAE judiciary in this regard will spread this interpretation to include both indirect and unforeseen compensation, based on the provisions of liability for the harmful act provided in the provisions of the UAE Civil Transactions Law, if the aggravated party proves that damage resulted from the gross negligence or mistake of the other contracting party (Appeal No. 372/2002, Dubai Cassation, dated January 5, 2003). If the value of the shipped goods exceeds this estimated limit, the sender must explain the importance and the value of the shipped goods, in addition to his economic or moral expectations from this shipment at the airport of arrival in view of their value, to the carrier and accept to pay the carrier what it may ask by ways of additional fees in return (Court of Cassation, Civil Judgments, Appeal No. 362 of 1997, Date 3/28/1998, Technical Office 9, Part 1, P. 266; Court of Cassation, Civil Judgments, Appeal No. 1 of 2003, Date 30/3/2003, Technical Office 14, Part 1, p. 374). In such a case, the sender of the goods bears the burden of proof regarding such an agreement, as well as the burden of proof regarding his declaration of the true value of the transported goods and of the payment of the additional fees for these (Court of Cassation, Civil Judgments, Appeal No. 362 of 1997, Date 3/28/1998, Technical Office 9, Part 1, p. 266). In a similar decision, the Dubai Court of Cassation ruled that: “in accordance with the provisions of the Warsaw International Treaty to unify some air transport rules for the year 1929, the basic principle in estimating the compensation arising from the responsibility of the air carrier for the damage or loss of the goods shipped under an international air transport document is to determine this compensation on the basis of the weight of the goods at the value indicated in it, and that is in the estimation of the legislator that estimating the compensation on this basis represents the expected damages at the time of Contracting” (Court of Cassation, Civil Judgments, Appeal No. 1 of 2003, Date 30/3/2003, Technical Office 14, Part 1, p. 374). In such a case, the compensation will be estimated based upon the real declared value of the goods unless the carrier proves that this estimation exceeds the real value of the transported goods (Court of Cassation, Civil Judgments, Appeal No. 372 of 2002, Session Date 5/1/2003, Technical Office 14, Part 1, P. 59). It was held by the Dubai Court of Cassation that “the air carrier may not insist on determining his responsibility, if damage arises from an act or abstention from him or one of his subordinates, either with the intention of causing harm or with recklessness coupled with the realization that harm may result from that, and it is the responsibility of the compensation claimant to prove that there has been an error on the part of the carrier or one of his followers (Court of Cassation, Civil Judgments, Appeal No. 362 of 1997, dated 3/28/1998, Technical Office 9, Part 1, p. 266). Therefore, the air carrier does not

have the right to invoke the limitation of its liability in case the damage resulted from an act or omission from it or from one of its affiliates, either with the intention or the gross negligence to cause that damage, and it is the responsibility of the compensation claimant to prove such a fault, next to proving that said fault caused the claimed damage directly (Court of Cassation, Civil Judgments, Appeal No. 362 of 1997, dated 3/28/1998, Technical Office 9, Part 1, p. 266).

Conclusion

This study, to a large extent, indicated the harmony between the provisions of the Travel Contract and the best practices of international and national law as regards the scope and conditions of damage for the air carrier's liability caused by delay. The main challenge of the Travel Contract is that it uses general terms without direct and clear provisions, so it is required to interpret these general rules in terms of the rules of interpretation that prevail to the interests of the party who has not participated in the drafting of the air transport contract (the passenger). These findings are furthermore confirmed by high courts' jurisprudence.

In general, both financial damages, including suffered loss and loss of profit, and moral damages, including mental suffering and consequential moral damage, are covered under the Travel Contract. This is to say that the Travel Contracts prevails to the interests of the passenger.

As for the conditions of the damage, the provisions of the Travel Contract are in accordance with the general principles of contract law which govern contractual liability, to the extent that it is limited to direct and foreseeable damages. National courts however recognize both indirect and unforeseen damages in cases of fraud or gross negligence of the part of the air carrier.

Finally, the study recommends the following modifications to the Travel Contract:

- to explicitly state the broad scope of damages awarded compensation to include both loss of profit and mental suffering.
- to clearly recognize the compensation for both indirect and unforeseen damage in the event of fraud or gross negligence issued by the air carrier or any of its affiliates.
- to clearly invoke the application of the tortious liability in the event of breach, as the UAE Civil Transactions Law does not provide specific rules regarding the contractual liability.

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