Legal Nature Of Contractual Liability: A Comparative Study

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Abstract: The binding force of a contract transforms, in terms of a subject-matter, into compulsory implementation through compensation, where an obligor is therefore responsible for compensating an obligee for the damage incurred by the latter. Thus, an obligor’s contractual liability exists only if his contractual fault exists, i.e. breach of a contractual obligation, where he is required therefore to compensate the injured party. It is agreed in the modern legal jurisprudence that the civil liability means the situation in which a person commits an act for which he is required to compensate others for damage. The Arab and foreign civil codifications unanimously adopt the general rule that a person is civilly liable only for faults that cause damage to others personally committed by him. However, in defining the contractual liability, the Islamic jurisprudence differentiates between a contract guarantee and a violation guarantee. The contract guarantee relates to reparation for breach of terms of a contract, while the violation guarantee deals with reparation for violation of the provisions of the Islamic law.

Index Terms: Contractual Liability, civil codifications, contract guarantee, reparation for violation.

1 INTRODUCTION

The binding power requires implementation of the contractual obligation, since implementation of such obligation is the effect of a contract itself [1]. However, if an obligor does not implement his contractual obligation and implementation of an obligation is not in rem for any reason whatsoever, then the binding force of a contract transforms, in terms of subject-matter, into compulsory implementation in return for something or through compensation, where an obligor is therefore responsible for compensating an obligee for the damage [2]. In this case, an obligor’s contractual liability only exists on the basis of his contractual fault, namely breach of a contractual obligation. Upon the foregoing, jurists argue that non-implementation is not sufficient to establish the contractual liability; rather non-implementation should be attributed to an obligor’s fault. Liability is generally defined as “the situation in which a person commits an act that requires culpability”, while civil liability is defined as “the situation in which a person commits an act for which he is required to compensate others for the damage”. The Arab and foreign civil codifications unanimously adopt the general rule that a person is civilly liable only for torts personally committed by him [3].

Civil liability is divided into: contractual liability and tort, where the former (the subject matter of this paper) is established in case of breach of a contractual obligation, while latter is established in case of violation of a legal obligation. The Islamic jurisprudence differentiates between a contract guarantee and a violation guarantee [4]. The contract guarantee relates to reparation for breach of terms of a contract, while the violation guarantee deals with reparation for violation of the provisions of the Islamic law. In principle, a contract is made to be implemented, where each party to a contract is entitled to obtain his right in rem as contained in a contract [5]. If either party fails to fulfil his contractual obligation, then he is civilly liable, where he is required to compensate an obligee for all damages incurred by him for non-implementation of a contract. Hence, an obligor in the contractual liability is responsible for non-implementation of the contractual obligation unless it is proven that a foreign cause has prevented him from implementation of his obligations.

1.1 Problem of the Study

This study examines nature of contractual liability, and whether it is another aspect of tort or has its own system. In fact, there has been considerable controversy in French jurisprudence about the legal nature of contractual liability [6]. This controversy is the issue of this study to find outroots of the contractual liability and its relationship with tort [9].

2 RESEARCH METHODOLOGY

The comparative analytical approach is used in this study, whenever possible. Examination of contractual liability requires tackling this subject under the following basic ideas:

1. Conditions of establishment of contractual liability.
2. Elements of contractual liability.
3. Extent of agreement to amend the provisions of contractual liability.
4. Differentiation between contractual liability and tort.

3 CONDITIONS OF ESTABLISHMENT OF CONTRACTUAL LIABILITY

Contractual liability is simply the penalty for breach of an obligation under a contract between the breaching party and the injured party. This means that will of the parties to a contract- under which the contractual obligation is established- may interfere in determining the penalty for breaching such contract, even if such interference is contrary to the penalty required by the legislator when he has organized the liability [13]. Establishment of contractual liability assumes that there is a valid and enforceable contract under which an obligor does not fulfill his contractual obligation. This is called conditions of establishment of contractual liability, so what are these conditions? Contractual liability assumes existence of a valid contract between an obligee and an obligor. Existence of contractual liability requires existence of a valid contract between an obligee and an obligor, where such contract contains mutual obligations between them [7]. This only takes place in the scope of contracts binding upon both parties that are based on mutual obligations. As to unilateral will contracts, it is only required that a contract contains specific obligations to be fulfilled by such sole party in order for the contractual liability to exist if he refrains from fulfillment. This also applies if a contract does not exist (like free transportation as a courtesy, or the fault that occurs in the negotiation state before
concluding a contract) [8]. In the said cases, the contractual liability does not exist; rather rules of tort should be raised. In cases like free transport (for example, a person does courtesy to his friend and invites him to get into the car with him, or a person invites another person to have lunch), if a fault occurs and it leads to a damage, then it is a tort and not a contractual liability[10]. Jurists believe that in these cases we should differentiate between the contract and agreement of two wills as courtesy, where the two wills are not intended to make a certain legal effect. The requirement that the contract is valid - even if there is no legal provision in the Syrian Civil Code and other Arab legislation – is inferred from the nature of contractual civil liability which is based on non-implementation of the obligations arising from a contract properly and lawfully [11]. If the obligation is not based on a valid reason, or if its reason is unlawful, or it is contrary to public order or morals, then an obligor is not obliged to implement it, where no liability exists here, and he may request annulment of this voidable contract. Furthermore, if an obligation contains mistakes or fraud, then the contract containing such obligation is invalid. Hence, if a contract is void or voidable and it is decided to be void, then the tort but not the contractual liability exists. The Syrian legislator requires application of this requirement under Article 120 of the Civil Code, which provides that “without prejudice to payment of compensation, a person of diminished capacity may annul a contract, unless he fraudulently conceals his diminished capacity” (corresponding to Articles 119 of Egyptian Civil Code, 114 of Algerian Civil Code, 123 of Qatari Civil Code and 122 of Lebanese Civil Code). The said Article shows that if the court decides to annul a contract for diminished capacity of a contacting party, this will not prevent recourse against him under rules of civil tort due to the fraudulent means used by him to conceal his diminished capacity. A person of diminished capacity has the right to request annulment of a contract, but he is obliged to compensate for his fault. According to the French judiciary, the most appropriate compensation in this case is to reject the annulment action and oblige the person of diminished capacity to implement terms of the contract. The German jurisprudence commended an old theory called theory of fault when making a contract. The said theory states that the liability arising from this situation is a contractual liability rather than tort (In brief, this theory implies that “every person makes a contract will comply with the provisions of such contract, where no annulment cause should be attributed to him. If annulment cause is attributed to a party, then the fault will be attributed to him whether he knows or does not know, and even if he could not know, and he will compensate the other party for the damage caused to him due to annulment of contract....”. Accordingly, it is established in jurisprudence that the civil liability in the previous case, diminished capacity and other cases, is a contractual liability rather than tort.

Contractual Liability arises between Contracting Parties: Indeed, a valid contract is not sufficient for the contractual liability to exist; rather such contract should be made between a party responsible for damage (obligor) and the injured party (obligee). A person who instigates another person not to fulfill his contractual obligation is tortuously liable to the injured person since there is no contractual relationship between them, while a party who fails to fulfill such obligations is contractually liable to the injured person. This requirement has raised some doubts as to whether the beneficiary can recourse to the obligor in requirement for the benefit of third parties on the basis of contractual liability. The French judiciary gives the beneficiary the right to institute contractual liability claim though he is not a party to a contract on the ground that he is granted under the third-party requirement contract a direct right that permits him to request the obligor to fulfill his obligations. This matter is practically applied in the transport contract, where if a transport contractor fails to fulfill his contractual obligations as to guarantee safe arrival for the traveler, his wife and children, then these persons will have the right of recourse against him according to rules of contractual civil liability. In this context, general and special successors and beneficiaries are deemed to be parties to a contract. If a person has insured his liability against the damages caused by his vehicle to others and such liability is established, then it will definitely be according to the rules of contractual liability due to the contractual relationship between the owner and the insurer. However, liability of insurer to the person injured by car accidents will be tort due to absence of a contractual relationship [14].

Contractual liability arises due to non-implementation of a contractual obligation
For existence of the contractual liability, the law requires that the damage caused to the injured person is attributed to an obligor’s failure to implement his contractual obligation, and such liability does not exist if the damage is not attributed to an obligor’s failure to implement his obligations under the contract, where this is one of civil tort cases. Another example, if a defect appears in a donated object and such defect causes a damage to the done, then donor’s liability is tortious and not contractual. In principle, non-implementation of any obligation, whether original or subsidiary, like obligation of a transporter for safety arrival of passengers, while determination of original obligations is an easy matter, it is difficult to determine subsidiary obligations, where it is sometimes difficult to know whether the contract has arisen such subsidiary obligation or not. This cannot be achieved but by accurate recognition of contents of a contract and intentions of contracting parties. Mostly, the judiciary, in particular the French judiciary, tends to expand the scope of contractual obligations with a view to relieving the injured person in relation to the proof, because in the obligations arising from the contract, which aim to achieve a result, it is sufficient here that the obligee proves that such result has not been achieved. Thus, presumed presumption of fault is in favor of the obligor. This has been evident in numerous judicial decisions arising from a large stream of contracts in determining the transporter’s obligation to ensure the safety of passengers in transport contracts. (See also many judicial decisions indicated to in book).Like tort, contractual liability is composed of three elements: contractual fault, damage, and casual link between fault and damage. The study will briefly explain these elements because of the need to be as brief as possible.

Contractual Fault: contractual fault simply means an obligor’s failure to perform his contractual obligations: this fault is a breach of a contractual obligation, and such breach is a deviation in an obligor’s behavior as to such obligation that is not exercised by a normal person if he is under the same normal circumstances of an obligor, where a straight person cannot breach his obligations unless there is a foreign cause that prevents him
from fulfilling his contractual obligations. An obligor who is governed under a certain contract must fulfill his obligations. There are many legal principles that require an obligor to implement his contractual obligations, for example the principle of pacta sunt servanda, a contract must be executed according to the provisions contained in it, and obliging an obligor to implement his contractual obligations in rem. If an obligor fails to implement his contractual obligations, this constitutes a contractual fault [15]. For establishment of breach for which an obligor’s liability exists, existence of a contractual obligation is required, and an obligor’s failure to implement such obligation is proven, whether non-implementation is in whole or in part, or it is delay in implementation. This breach is attributed to an infringement or default of the obligor in the obligation. The French jurisprudence differentiates between an obligation of due diligence and an obligation of result (for more details, see). In the obligation of result, an obligor must achieve the desired result of the contract. For example, a contractor must complete a project and deliver it to the project owner, and a seller must deliver the sold object to the buyer for certain price. In these cases, if the desired result is not achieved, an obligor is in breach of his contractual obligations, and an obligee is not required to prove this as long as the result has not been achieved. However, an obligor has the right to deny presumption of assumed fault by proving existence of a foreign cause out of his control and the casual link is therefore broken and the desired result is not achieved [17]. Jurists believe that an obligor is in fault even if non-performance of his obligations is due to a foreign cause beyond his control like force majeure. It should be mentioned here that if the contractual fault occurs, and an obligor fails to fulfill his contractual obligations for a foreign cause, this will definitely break the casual link, which is an element of the contractual liability, and thus the result is not achieved [16]. As to obligation of due diligence, an obligor is not required to achieve a certain result, rather he is required to make due diligence to achieve such result. If he makes such due diligence, then he fulfills his obligation and the contractual liability does not exist. The due diligence required from an obligor is a normal person’s diligence, like a lawyer’s obligation to defend his client, where he may win or lose. However, failure to win the case does not establish an obligor’s contractual liability as long as he makes the normal due diligence in defending his client according to the legal principles, (for further details, see). The obligations applicable to a lawyer also apply to a physician. In sum, an obligor’s behavior should be assessed by comparing what he did with what he should have done so that his negligence or infringement is revealed [20]. The contractual fault is subject to the general rules of proof. In principle, an obligee is required to prove the obligation and an obligor is required to prove the contrary [21]. Breach of a contractual obligation may occur in the form of refrainment from fulfillment of an obligation, in the form of infringement by performing an act that he should not have performed, and in the form of refrainment from performing a certain act [19].

What are the most important types of breach of contractual obligation?

A. Breach of a contractual obligation for safety: - in this obligation, an obligor spares no effort to implement his contractual obligation without causing damage to an obligee, like a transporter’s obligation to drop off the passengers safely to their destination. Jurists disagree as to nature of such obligation, whether it is obligation of due diligence or obligation of result, which is not our point here. The French courts, for example, ruled that an owner of a laundromat is civilly liable for the damage to some clients when he personally used the auto-washing machine in the shop. In a quarrel occurred in a bar among a number of people, the bar owner was not held contractually liable due to absence of a contractual relationship. See the website.

B. Refrainment from providing necessary information related to the subject of the contract:

Indeed, an obligor is required to provide necessary information in connection with a contract, like the pharmacist who is required to provide the instructions for use of the medicine prescribed by the physician otherwise he will be contractually liable for the damage resulted from this. This is also a matter of disagreement in France, whether it is obligation of due diligence or obligation of result. It is not our point and for further details, see, specialized references.

C. Breach of Monetary Obligation

If an obligor delays repayment of the payable amount, then he is requested to compensate the obligee for the damage, where no contrary assumption may be arisen since the benefit is permanently assumed in contracts. The Syrian Civil Code provides that the damage is assumed in breach of a monetary obligation (Article 229, corresponding to Article 228 and Article 232 of the Egyptian and Qatari Civil Codes, respectively). As to assessment of compensation in this case, the judge is required to assess, upon agreement of both parties, the payable compensation for delayed payment of the amount in the form of delay interest to be determined in percentage [21]. Such interest may different from legislation to another. In the Law issued on 24.12.1992, the French legislator determined the interest by 10.40%, which is the maximum limit permitted under the law, while the Syrian legislator determined such percentage, in absence of agreement, by 4% in the civil transactions and 4% in commercial transactions. Concerning the interest calculation date, the Syrian legislator requires that the interest is payable as of the date of judicial claim until the full payment, while the Qatari legislator does not regulate the legal compensation (legal interest) in compliance with the Islamic Law, which prohibits interest [22].

D. Breach of contractual obligation within the scope of liability arising from things:

If non-implementation of a contract is not attributed to an obligor’s contractual fault or breach of his obligation but to an act of things under his custody, then an obligor is contractually liable not on the basis of his personal act but on the basis of the act of things under his custody. For example, an obligor’s obligation to carry a passenger to his destination without damage, if a passenger is injured due to a traffic accident, and then a contractual liability exists [23]. This also applies to a lease contract, where an obligor is required to return the premises to an obligee - and he is the legal custody of such premises-, so if something else in intervenes positively his custody as explosive substances that led to the burning of the premises, then the tenant has breached his obligation to return the premises [24]. Thus, he is contractually liable not on the
basis of his personal act but on the basis of the action of the explosive substances.

E. Breach of contractual obligation within the scope of liability for the act of others:
Civil Liability for act of others may arise when an obligor uses third parties to implement his contractual obligation, so he is contractually liable for errors of such third parties that cause damage to an obligee in the contractual obligation. In this case, it seems that the relationship is between the responsible person (i.e.) the obligor in the contractual obligation and the obligee i.e. the obligee in the contractual obligation, on the one hand, and the third party used by the obligor in fulfillment of his contractual obligation on the other hand. In practice, the liability here exists only as a result of a valid contract between the person liable for the damage and the injured person as indicated above, like a worker in the employment contract and a subcontractor in the contracting agreement (for more details, see), and a sub-tenant in the lease contract. If all these persons fail to implement the obligation, then original obligor will be liable for compensation according to rules of contractual liability [25]. Damage is the second element of contractual liability. It is a material and necessary element to prove liability or an obligor in the contractual obligation [26]. An obligee is responsible for prove the damage since existence of damage is not assumed for only an obligor’s failure to implement his contractual obligations [23]. Hence, the purpose of proving breach of contractual obligation is obliging an obligor to compensate the obligee for the damage he incurs. In the transport contract, if a traveller does not arrive on time, the delay is not sufficient to decide that there is a damage, rather an obligee must prove existence of a damage due to delay. In this context, the French Court of Cassation rejected compensation for a damage due to the late arrival of the train T.G.V. where an obligee could not prove such damage. Damage can be either material or moral. In all cases, compensation in the contractual liability is only paid for an expected damage (we do not know why the French jurisprudence confines the compensation in the contractual obligation to the expected damage only, for brevity purposes, as to types and conditions of damage in the contractual liability, a reader is advised to refer to the specialized resources, where these legal matters are the same in both contractual liability and tort [24].

Causal link between breach of contractual obligation and damage
Existence of a contractual fault and a resulting damage is not sufficient, rather the fault should be the cause for damage (for further details, see). If a fault by an obligor is made and damage to an obligee occurs and such fault is not found in the obligation and an obligee incurs a damage not attributed to such fault, then the causal link does not exist, and there the contractual liability and tort are absent. For example, a truck driver who carries fast-breakable goods exceeds the speed limit, and owner of such goods has not insured such goods, then the damage arising from breakage of such goods and their damage is not caused by fault of an obligor, but fault of the injured obligee himself. The causal link between the fault and damage is often assumed since an obligor is not required to prove it, rather an obligee is required to prove absence of such link, where the latter cannot deny the causal link unless there is a foreign cause as it is proven that the damage is attributed to force majeure, sudden accident, an obligor’s fault, or act of a third party. This is provided for in the provisions of Article 216 of the Syrian Civil Code “If it is impossible for an obligor to implement the obligation in rem, he is required to pay compensation for non-implementation of his obligation unless it is proven that impossibility of implementation has arisen from a foreign cause beyond his control, and the same applies if an obligor delays implementation of his obligation”. The said Article shows that the causal link is independent of the fault, and such link does not exist if the damage is not caused by the error, but for a foreign cause as indicated above. This link is also absent even in the case in which the fault is the reason for the damage but it is not the productive and effective reason for the damage [25]. In fact, talking about the foreign cause and theory of productive and effective reason and other theories combines contractual liability and tort. These matters are often explained in depth in jurisprudence in the area of the provisions of tort. Hence, a reader is advised to refer to the specialized resources on these matters since there are irrelevant in examination of contractual liability [26]. However, what is the position of the legislator on amendment to the provisions of the contractual liability?

4 THE EXTENT OF AGREEMENT TO AMEND THE PROVISIONS OF CONTRACTUAL LIABILITY
If elements of contractual liability exist, then an obligor is held liable and he is obliged to pay compensation since the objective of this liability is compensating the injured person for damage. The amount of compensation must be proportional to the extent of damage no more, otherwise the injured person will be compensated more than her deserve.

Nature of Contractual Liability Agreements: Contractual liability agreements, whether in the form of exemption, mitigation or severity, represent a change to the effects of liability in a manner other than as regulated in the Civil Code. Severity in liability means that an obligor is held liable even if the law exempts him from liability in this case. In other words, the basis in which the damage is caused by a foreign cause beyond an obligor’s control. Mitigation of liability is an agreement to keep an obligor liable so that effect of liability minimal, so that he is required to pay partial compensation for the damage caused to the obligee [20]. As to exemption from liability agreement, it is an agreement between parties to exempt the obligor from his liability and to oblige him to pay compensation. It is an agreement to eliminate effects of liability, where such effects are ineffective even if all elements of contractual liability exist.

The scope of amendment to the provisions of contractual liability: In fact, the French legislation, the origin of most of Arab legislations, does not provide for cases of exemption from the contractual liability as a general principle, even if there are some little special cases. This is unlike the Arab legislations, like Syrian, Jordanian and Egyptian legislations. These legislations indicate to the possibility of exempting an obligor from any liability arising from non-implementation of his contractual obligation save cases of fraud and gross fault. To what extent is condition of agreement on exemption from contractual liability valid? To answer this question, positions of the French and Syrian legislators on this issue will be explained.
Position of the French Legislator
Expressly and contrary to the general rules, The French legislator nullifies agreement on exemption from contractual liability in many contracts, like sale contracts (Article 1628 of the French Civil Code). For example, if it is agreed between a seller and a buyer that the former is not liable towards the latter for any guarantee, then this contract is invalid, where in all cases a seller is liable for the actions performed by him, which leads to having right to the sold thing, as if he resells the sold thing to another person. In this context, the French legislator does not require for invalidity of exemption from the seller’s liability that the act is based on fraud or deception, rather all acts performed by him regardless of their degree, whether light or gross, or fraud. He requires also that a seller cannot invoke the statute of limitations if he retains possession of the thing sold, since the buyer could uphold his permanent right to guarantee. Further, in private law on consumer protection, the French legislator requires that the administrative authority can interfere and cancel arbitrary items that lead to lift or mitigate liability of a professional party against non-professional party (consumer) (Article 1135 of the French Law No. 10 of 1978 on Consumer Protection, as amended by the Law No. 12 of 2009). This is also seen in contracts on work, land, sea and air transport, hospitality and building contracting (see Articles 3/1780 of the French Civil Code, 4/122 of the French Labor Law, and 103 of the French Commerce Law, etc.). The French jurists are not on the same opinion; some jurists argue that the agreement on exemption from contractual liability is invalid if it contains an item with the aim of exempting the obligor from an obligation of compensation, based on considerations of the public order. On the other hand, the French jurisprudence in general justifies non-adoption of the condition for exemption from contractual liability in cases of fraud and gross fault that a party who undertakes an obligation under the contract and he does not at the same time require lack of liability for non-implementation, even if it is attributed to fraud or gross fault. In other words, it makes the obligation dependent on a voluntary condition, which is illegal, and it should be nullified according to the provisions of Article 1174 of the French Civil Code. Other jurists argue that the agreements on exemption from contractual liability are valid since they are not necessarily contrary to the public order, furthermore, the pacta sunt servanda principle must not be ignored. Upon the foregoing, the general juristic trend in French believes that the exemption agreements are valid in case of light fault, and that such agreements are invalid in case of fraud or gross fault.

Position of Syrian Legislator
Article 218 of the Syrian Civil Code provides that “1. It may be agreed that an obligor bears consequence of the sudden accident or force majeure, 2. It may be agreed to exempt an obligor from any liability for non-implementation of his contractual obligation save fraud or gross fault. However, an obligor may require lack of liability for fraud or gross fault made by persons employed by him to implement his obligation”. The said Article shows that the Syrian legislator expands scope of the agreements of exemption from liability unless the fault caused the damage is attributed to fraud or a gross fault by an obligor. The legislator also relieves an obligor from any liability, and the agreement is valid if the liability arises from gross fault or fraud made by the persons used by an obligor to perform his obligation. If it is obligation of result, an obligor is held liable for non-implementation regardless of the reason and he is not exempted from the liability unless existence of a foreign cause is proven. Further, it may be agreed to mitigate such liability by an agreement on lack of liability of an obligor for his faultless act. In such case, his obligation will change from obligation of result into obligation of due diligence, and such obligor will not be held liable unless it is proven that he has made a fault that has resulted in non-implementation. The mitigation agreement may be made for exempting an obligor even from consequences of the trivial light fault, where is not held liable unless an obligee proves that an obligor has committed gross fault or fraud. However, it may not be agreed to exempt an obligor from consequences of the intentional or gross fault unless such fault is attributed to a third party and it has been agreed to exempt it. However, if it is obligation of due diligence, the due diligence required from an obligor is the one made by a normal person unless otherwise provided under the law or the agreement. Hence, an obligor is not liable for the foreign reason nor for his faultless act or the trivial fault, rather he is liable for his intentional act or gross fault. It may be agreed to make liability more severe, where an obligor is therefore liable, under this agreement, for the light or trivial fault or for his faultless act, and in this case an obligor’s obligation transforms from obligation of due diligence into obligation of result. It also may be agreed to mitigate provisions of the contractual liability by agreement on non-liability of an obligor for the light fault, which means that he remains liable for the gross or intentional fault unless that latter is attributed to a foreign cause like, for example, an act of a third party.

5 DIFFERENTIATION BETWEEN CONTRACTUAL LIABILITY AND TORT
Both liabilities arise from breach of a previous obligation i.e. the fault. The basis of each liability is the fault. This does not mean that they are the same, where the obligation to compensate in the contractual liability arises from breach of a contractual obligation, while it arises from breach of a legal duty in tort; the law is the reference that has established it and determined its extent. Further, the contractual liability means breach of a contractual obligation under a valid contractual relationship organized by a common will of an obligor and an obligee, where if such will be absent, the liability does not exist. In tort, there is no breach of a certain obligation, rather a breach of a general legal duty imposed by the law on all for precaution purposes, namely not causing damage to others. Given that the will in the contractual liability is the factor that determines extent of compensation for damage, then no compensation is paid unless for the expected damage. If there are multiple obligors, extent of liability of each obligor should be determined, where joint liability is not assumed and that they may agree on exemption from liability as indicated above. In tort, compensation includes the excepted and unexpected damage as long as it is a direct damage. If the damage is caused by several obligors, then such damage will be attributed to each of them and they must pay full compensation. Thus, joint liability among obligors is assumed. Since the legislator is the one who has determined the legal duty and imposed obligation in tort and for the public order considerations, he has prevented the individuals from exempting from such liability unlike the contractual liability for which he has permitted an agreement on exemption, severity or mitigation of such liability. In fact, there are many
considerable differences between contractual liability and tort that lead to practical results that justify double liability given the different nature of each of them. However, it was necessary to brief the research as much as possible. It is to be noticed that rules of contractual liability can be supplemented by rules of tort in case of absence of special provisions between them; the contractual liability forms the general rules in the civil liability [18].

6 CONCLUSION AND RECOMMENDATION
Scope of contractual liability is determined according to existence of a valid contractual relationship between an obligee and an obligor. Hence, no contractual relationship may exist in the scope of relationships as a courtesy. The liability is only contractual liability between parties to a contract if either of them fails to fulfill his obligations towards the other party. Further, the damage caused to an obligee must be the result of breach of such contractual obligation, and an obligor’s failure to fulfill his obligations is therefore the damage to an obligee. Thus, the contractual liability does not exist unless all its elements (fault, damage and causal link between them) exist, unless it is proven that an obligor’s failure to implement his contractual obligation is attributed to a foreign cause beyond his control. Generally speaking, contractual liability agreements represent a change and regulation of effects of liability in a manner unlike the manner in which it is organized in laws, whether in form of exemption, mitigation or severity of liability of an obligor. Finally, we recommend that the legislator and the Ministry of Justice adopt and enact a draft law to be prepared with the knowledge and advice of a group of judges and lawyers based on legal and sound bases in adopting the rule that the principle is that contractors are free to amend the rules of contractual liability, but within the limits of law and public order and morals. Contractual liability may not be mitigated to the extent of exempting an obligor from willful act or the gross fault. Furthermore, we suggest that the legislative power and the Ministry of Justice interfere in ratifying clear and explicit legal provisions (that need no explanation or interpretation) that request parties not to make agreement on exemption from contractual liability concerning the fraud or severity of liability of his assistants in the public sector; the contractual liability forms the general rules in the civil liability.

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