

# LEGAL PROBLEMS ON DEMURRAGE IN VOYAGE CHARTERS\*

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## ABSTRACT

Demurrage is a term concerned with delay during the terminal operations, and delays during the voyage, before the ship reaches her destination. The current view is that demurrage is liquidated damages for a failure to complete loading and discharging in the allowed laytime which constituted a breach of charter. Maritime transport has the importance to Thailand, however there is no specific Thai law concerning demurrage. Therefore, when an issue concerning demurrage arising from maritime transportation is submitted to Thai court, there are problems in Thai legal system concerning the application of charter contract, status of demurrage, difference of each legal status, burden of proof. In particular, the crucial problems are whether the Thai court is entitled to reduce demurrage agreed by the parties and why, whether Thai court is entitled to grant the interest, lastly, if the parties do not agree on demurrage, whether the shipowner is entitled to ask for demurrage and why. Moreover, in this article, we will look at demurrage in an Unfair contract perspective according to Unfair Contract Act B.E. 2540. On the question of whether the agreement of the parties to pay demurrage is deemed as an unfair contract. This new image of perspective will reduce the burden of the consumer and the charterer who may have the liability to pay for demurrage.

**Keywords:** Demurrage, Voyage charter, Voyage, laytime

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## บทคัดย่อ

ดีเมอรัจเป็นคำที่เกี่ยวข้องกับคสามล่าช้าในกระบวนการของท่าเรือปลายทาง และในระหว่างเข้าเรือก่อนที่เรือจะไปถึงจุดหมายปลายทาง มุมมองในปัจจุบันนั้น ดีเมอรัจ คือ ค่าเสียหายที่กำหนดไว้ล่วงหน้าหากไม่สามารถบรรทุกของขึ้นเรือและลงจากเรือได้ภายในระยะเวลาที่กำหนด ซึ่งเป็นการผิดสัญญาเข้าเรือ แม้การขนส่งทางทะเลมีความสำคัญสำหรับประเทศไทย แต่ก็ยังไม่มีกฎหมายไทยที่บัญญัติเกี่ยวกับเรื่องดีเมอรัจไว้โดยเฉพาะ ดังนั้นเมื่อมีข้อพิพาทเกี่ยวกับดีเมอรัจขึ้นมาสู่ศาลไทย ระบบกฎหมายไทยจึงประสบปัญหาเกี่ยวกับการบังคับใช้สัญญาเข้าเรือ สถานะทางกฎหมายของดีเมอรัจ และความแตกต่างกันของแต่ละสถานะนั้น รวมถึงการกระการพิสูจน์ โดยเฉพาะอย่างยิ่ง ปัญหาที่ต้องพิจารณาคือ ศาลไทยมีอำนาจปรับลดดีเมอรัจที่คู่สัญญาตกลงกันหรือไม่ เพราะเหตุใด ศาลไทยมีอำนาจให้ดอกเบี้ยหรือไม่ และหากคู่สัญญาไม่ได้ตกลงค่าดีเมอรัจกันไว้ ผู้ให้เช่ามีสิทธิเรียกร้องค่าดีเมอรัจหรือไม่ เพราะเหตุใด ยิ่งไปกว่านั้นบทความฉบับนี้จะศึกษาเกี่ยวกับดีเมอรัจในมุมมองของพระราชบัญญัติว่าด้วยข้อสัญญาอันไม่เป็นธรรม พ.ศ. ๒๕๔๐ ว่าข้อตกลงที่จะชำระค่าดีเมอรัจระหว่างคู่สัญญาจะถือว่าเป็นข้อสัญญาที่ไม่เป็นธรรมหรือไม่ ซึ่งเรื่องนี้ถือเป็นเรื่องใหม่ที่จะลดภาระของผู้บริโภคและผู้เช่าเรือซึ่งมีหน้าที่ต้องชำระค่าดีเมอรัจ

## Introduction

Demurrage is a technical term in maritime transportation which means a sum agreed by the charterer to pay as liquidated damages for delay beyond a stipulated or reasonable period of time for loading or unloading.

The Demurrage concept is one of the aspects of the Maritime Transportation, particularly, the law relating to *voyage charters*. In foreign laws especially English law, demurrage is becoming more important to maritime transportation all over the world. For these reasons, lawyers or those involved in Maritime transportation should pay more attention to demurrage both in practical and legal aspects.

The development of this branch of the law has been closely allied to the historical and social changes that took place as sail gave way to steam, and more recently as improved methods of communication have given greater central control to those controlling

the commercial adventure, which voyage charter still represent. It is perhaps one of the few remaining areas of English common law in which there has been little intervention.

The establishment of standard forms of charter, the meaning of almost each word of which has been the subject of judicial interpretation, might have resulted in a statute law, but fortunately that has not been so and the law continues to develop to meet present and future needs. The increasing use of additional clauses to charterparties, some of which are not always accidentally ambiguous, will also no doubt to be continued to provide much material for future litigation.<sup>1</sup>

Whilst most of the cases relating to demurrage arise in the context of the charterparties, it must always be remembered that the law relating to these matters also plays an important role in contracts, such as sale contracts.

Demurrage on English American law is always a contractual creation, while in other systems it may be provided by law.<sup>2</sup>

To understand the background of demurrage, we need to understand the principle of the Charter contract. Basically, there are two parties to the contract which are a freighter and a carrier. The carrier has a duty to carry goods from one place to another. The freighter's main obligation is to pay the freight. Anyhow, the freighter need not be the goods owner or the shipper who delivers the goods nor the consignee to whom the goods are consigned at the port of discharge, or even the receiver who has to pay for the freight. He may be the third party who charters the ship for carrying goods belonging to other persons.<sup>3</sup>

Under *Voyage charter*, a vessel is operated for a single voyage. The person who charters the ship is known as voyage

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<sup>1</sup> John Schofield. **Laytime And Demurrage**. 1 (5<sup>th</sup> ed. London Singapore. 2005)

<sup>2</sup> Hugo Tiberg. 530 **The Law of Demurrage**, (3<sup>rd</sup> ed. London Stevens & Sons, 1979)

<sup>3</sup> *Id* at 4.

charterer; the payment is called freight and the contract a voyage charter-party.

This form of charter is running within tramp traffic (free traffic). The charterer may be the person owning the cargo but may also charter the vessel for someone else's account. The "owner" of the vessel from whom the actual voyage charterer chartered the ship may himself be a time charterer or even a voyage charterer who sub-charterers (sub-lets) the ship. In case the owner is not the registered owner of the ship, he is normally described as "time chartered owner" or "disponent owner". Thus there may be a chain of charter parties which must all be regarded as separate and distinct.<sup>4</sup>

For a voyage charter, the owner retains the operational control of the vessel and is responsible for the operating expenses such as port charges, bunkers, extra insurance, taxes, etc. The charter's costs are usually cost and charge relating to the cargo.

From a practical point of view, a voyage charter means that the owner promises to carry on board a specific ship a particular cargo from one port to another. The vessel shall arrive at the first loading port and be ready to receive the cargo on a certain day or within period of time.

Where the charterer carries out the loading and/or discharging, the parties generally agree that he will have a certain period of time at his disposal for the loading and discharge of the vessel, the so called *Laytime*. The laytime is a reflection of the basic idea of voyage charter, that the owner, who is operating the ship, will be liable for delay in connection with the transit, whereas the charterer may be liable (or partly liable) for delay in connection with the loading and discharging. If the charterer fails to load and/or discharge the vessel within the laytime specified, he has to pay compensation for the surplus time used, this so-called *Demurrage*. On the other hand, if the charterer saves time for the ship by carrying out of his

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<sup>4</sup> Lars Gorton, Rolf Ihre, Arne Sandeværn. 82 **Shipbroking And Chartering Practice** (2<sup>nd</sup> edition, Lloyd's Of London Press Ltd., 1984)

undertakings more quickly than agreed, he may be entitled to claim compensation, which is called *Despatch Money*.<sup>5</sup>

Demurrage, in its strict meaning, is a sum agreed by the charterer to pay and be paid as liquidated damages for delay beyond a stipulated or reasonable period of time for loading or unloading. Where the sum is only to be paid for a fixed number of days, and a further delay takes place, the shipowner's remedy is to unliquidated "damages for detention" for the period of delay. The phrase "demurrage" is sometimes loosely used to cover both this meaning.<sup>6</sup>

The practical functions of demurrage are for the shipowner's immediate benefit and for the charterer's benefit. The whole purposes of demurrages are<sup>7</sup> (1) a reparative function for the carrier when his ship has suffered delay, (2) a retentive function (that of the preventing the premature abandonment of voyages) and (3) a punitive and incentive function for the charterer to pursue duties diligently.

In Thailand, there are not any laws or regulations stating or governing demurrage. However, any person involving maritime transportation has to abide by the clauses of the charter contract, bill of lading, or intention of the charter parties, for which demurrage is normally mentioned. Also Thai Supreme Court has rendered the verdict relating demurrage for years.

In light of the above, the objectives of this article consist of the following;

Firstly, to explain demurrage in various contents which are (1) charter parties, (2) laytime, and (3) late layday, including legal status, legal enforcement, procedure and effect of demurrage in foreign

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<sup>5</sup> Lars Gorton, Rolf Ihre, Arne Sandeværn. **Shipbroking And Chartering Practice**, 81-84 (2<sup>nd</sup> edition, Lloyd's Of London Press Ltd., 1984)

<sup>6</sup> Stewart C. Boyd, Andrew S. Burrows, Davidp- Foxton. **Scrutton on Charterparties and Bill of ladings**, 298 (20<sup>th</sup> edition London: Sweet and Maxwell 1996)

<sup>7</sup> Hugo Tiberg. **The Law of Demurrage**, 40-41, 95 (3<sup>rd</sup> ed. London Stevens & Sons, 1979)

laws, focusing on USA , UK , and Europe in comparison to Thai legal system.

Secondly, to analyze and criticize legal principles and procedures relating to demurrage in Thai court, including legal status of demurrage in Thai legal system on the question of whether it is penalty, or damages. Also, the study will include the legal consequences of earnest, penalty, or damages comparing to foreign laws.

Lastly, to find a solution and legal procedure in order to apply demurrage in Thai court.

## **DEFINITIONS AND NATURE OF LAYTIME AND DEMURRAGE**

When the shipowner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract of the affreightment. Such contracts may take a variety of forms, although the traditional division is between those embodied in the charterparties and those evidenced by the bills of lading. Where the shipowner agrees to make available the entire carrying capacity of his vessel for either a particular voyage or a specified period of time, the arrangement normally takes the form of the charterparty. On the other hand, if he employs his vessel in the liner trade, offering a carrying service to anyone who wishes to ship the cargo, then the resulting contract of carriage will usually be evidenced by the bill of lading.

### **1. Definitions and Objectives of Demurrage**

Demurrage is a term concerned with delay during the terminal operations, and delays during the voyage, before the ship reaches her destination.<sup>8</sup>

In origin, however, demurrage did not mean a sum payable for breach of contract, but ‘a sum payable under and by reason of the

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<sup>8</sup> *Id* at 529.

contract for detaining a ship at the port of loading or discharge beyond the allowed time.<sup>9</sup> In *Lockhart v. Falk*, Cleasby B<sup>10</sup> said:

“The word demurrage no doubt properly signifies the agreed additional payment for an allowed detention beyond a period with specified in or to be collected from the instrument: but it has also the popular or more general meaning of compensation for undue detention; and from the whole of each charterparty concerning the clause in question we must collect what is the proper meaning to be assigned to it.”

On the other hand, in *Harris v. Jacobs*<sup>11</sup>, having said in the course of argument that demurrage is an elastic term, Brett MR said in his judgement:

“Demurrage is the agreed amount of damage which is to be paid for the delay of the ship caused by a default of the charterers at either the commencement or the end of the voyage.”

Ten years later, in *Lilly v. Stevenson*<sup>12</sup>, Lord Trayner took the view:

“Days stipulated for by the merchant on demurrage are just lay days, but lay days that have to be paid for. If the charterparty provides that charterer shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load, although he pays something extra for the last ten, loading within twenty days is fulfilment of the obligation to load...”

The Court of Appeal in *Steel, Yoing & Co v. Grand Canary Coaling Co*<sup>13</sup> took a similar view, Collins MR said:

“...it was also contended that the charterparty was broken by the vessel being allowed to go on demurrage; but this is not so, for

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<sup>9</sup> John Schofield. **Laytime And Demurrage**. 1 (5<sup>th</sup> ed. London Singapore. 2005)

<sup>10</sup> *Lockhart v. Falk* (1875) LR 10 Ex 132, at 135.

<sup>11</sup> *Harris v. Jacobs* (1885) 15 QBD 247, at 251.

<sup>12</sup> *Lilly v. Stevenson* (1895) 22 Rett 278, at 286.

<sup>13</sup> *Steel, Yoing & Co v. Grand Canary Coaling Co* (1902) 7 AC 213, at p. 217.

the payment of demurrage is merely a payment for the use of the ship, and not damages for a breach of charterparty”

And in the same case, Mathew Lj said:<sup>14</sup>

“There is no ground for suggesting that the obligation to pay demurrage is by way of damages for a breach of charterparty. It is merely a payment for use of the ship.”

In *Inverkip Steamship Co v. Bunge & Co, Scrutton Lj*<sup>15</sup> suggested that both views were tenable, saying:

“The sum agreed for freight in charter covers the use of the ship for an agreed time for loading or discharging, known as ‘the lay days’, and for the voyage. But there is almost invariably a term in the agreement providing for an additional payment known as demurrage for detention beyond the agreed lay days. This is sometimes treated as agreed damages for detaining the ship, sometimes as an agreed payment for extra lay days.”

Many of the terms used have been the subject of consideration by committees comprising representatives of Bimco, CMI, FONSARBA, GCBS and INTERCARGO and this has resulted in the production of two documents, Charterparty Laytime Definitions 1980, as amended, and Voyage Charterparty Laytime Interpretation Rules 1993.<sup>16</sup>

The Voylayrules 1993 define demurrage in rule 24 saying:

“Demurrage” shall mean an agreed amount payable to the owner in respect of delay to the vessel beyond the laytime, for which the owner is not responsible. Demurrage shall not be subject to laytime exceptions.

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<sup>14</sup> *Id.*

<sup>15</sup> *Inverkip Steamship Co v. Bunge & Co* (1917) 22 AC 200, at 204.

<sup>16</sup> Julian Cooke, Timothy Young, Andrew Taylor, John Kimball, David Martowski, Leroy Lambert. **Voyage Charters**, 351 (3<sup>rd</sup> edition Lloyd’s Of London Press Ltd.)



In Gencon Charter (Uniform General Charter 1976 provides the possibility of a limited period on demurrage as did in many early charters, and if the vessel is further delay beyond that, then the shipowner's claim is one for detention.<sup>17</sup> However in 1994, Gencon Charter has been revised and this resulted that the fixed time limit on demurrage was ejected.

Later on, in *Union of India v. Compania Naviera Aeolus SA (The Spalmatori)*<sup>18</sup>, Lord Guest said:

“Lay days are the days which parties have stipulated for the loading or discharge of the cargo, and if they are exceeded, the charterers are in breach; demurrage is the agreed damages to be paid for delay if the ship is delayed in loading or discharging beyond the agreed period.”

In *Dias Compania Naviera SA v. Louis Dreyfus Corporation*<sup>19</sup>, Lord Diplock said:

“If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages.”

In the oriental Envoy, Parker J said of demurrage:<sup>20</sup>

“In my view, however, while demurrage can no doubt be regarded as being in the nature of damages, for detention, it is not be equated with such damages. It is very different. It is a simple contractual obligation by the charterer to pay a certain sum if he fails to complete discharge within the stipulated laytime, the

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<sup>17</sup> John Schofield. **Laytime And Demurrage**. 344 (5<sup>th</sup> ed. London Singapore. 2005)

<sup>18</sup> *Union of India v. Compania Naviera Aeolus SA (The Spalmatori)* (1964) AC 868, at p.899.

<sup>19</sup> *Dias Compania Naviera SA v. Louis Dreyfus Corporation* (1978) 1 **WLR** 261, at p. 263.

<sup>20</sup> *Transamerican Steamship Corporation v. Tradax Export S.A. (The oriental Envoy)* (1982) 2 **Lloyd's Rep** 266, at 271.

commencement and the calculation of which is itself a matter of agreement.”

However, that view of demurrage as a debt, is clearly incompatible with what was said five years later by Lord Brandon in the House of Lords in *The Lips*,<sup>21</sup> who put it this way:

“I deal first with what demurrage is not. It is not the money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days. If demurrage were that, it would be a liability sounding in debt. I deal next with what demurrage is. It is a liability in damages to which a charterer becomes subject because, by detaining the chartered ship beyond the stipulated lay days, he is in breach of his contract. Most, if not all, voyage charters contain a demurrage clause, which prescribes a daily rate at which the damages for such detention are to be quantified. The effect of such a claim is to liquidate the damages payable: it does not alter the nature of the charter’s liability, which is and remains a liability for damages, albeit liquidated damages. In the absence of any provision to the contrary in the charter the charterer’s liability for demurrage accrues *de die in diem* from the moment when, after lay days have expired, the detention of the ship by him begins.”

The current view is that demurrage is liquidated damages for a failure to complete loading and discharging in the allowed laytime which constituted a breach of charter.

John F Wilson, emeritus professor of law at the institute of Maritime Law, University of Southampton, has written in the book called “*Carriage of Goods by Sea*” sixth edition published in 2008 saying:<sup>22</sup>

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<sup>21</sup> *President of India v. Lips Maritime Corporation (The Lips)* (1987) 2 **Lloyd’s Rep** 311, at p. 315. See also *Odfiell Seachem A/S v. Continentale Des Petroles et D’ Investissements and Another* (2005) 1 **Lloyd’s Rep** 275, at p. 280.

<sup>22</sup> John Schofield. **Laytime And Demurrage**. 74 (5<sup>th</sup> ed. London Singapore. 2005)

“If the charterer detains the vessel beyond the agreed lay days, then he is in breach of the contract. The majority of charterparties include the clause providing that they may retain the vessel for additional days in order to complete the loading or discharging operation on payment of a fixed daily amount, known as demurrage.”

Whilst, strictly speaking demurrage is the money payable for time in excess of the allowed laytime, it is often used to describe the period during which such money is payable. The Laytime Definitions for Charter Parties 2013 also provide that:

“On Demurrage” means that if laytime has expired, the charterer has to pay the amount of money to the shipowner. Such time ceases to count once the berth becomes available. When the vessel reaches a place where she is able to tender Notice of Readiness, laytime or time on demurrage resumes after such tender and, in respect of laytime, on expiry of any notice time provided in the charterparty.

“Demurrage” means that an agreed amount payable to the owner in respect of the delay to the vessel once the laytime has expired, for which the owner is not responsible. Demurrage shall not be subject to exceptions which apply to laytime unless specifically stated in the charterparty.

## 2. Legal Problems relating to demurrage

For Thai legal system, there is no specified Thai law concerning demurrage. Therefore, when an issue concerning demurrage arising from maritime transportation is submitted to Thai court, there are problems in Thai legal system concerning the application of charter contract, status of demurrage, difference of each legal status, burden of proof. In particular, the crucial problems are whether the Thai court is entitled to reduce demurrage agreed by the parties and why, whether the Thai court is entitled to grant the interest, lastly, if the parties do not agree on demurrage, whether the shipowner is entitled to ask for demurrage and why. Moreover, in this

thesis, we will look at demurrage in an Unfair contract perspective according to Unfair Contract Act B.E. 2540. Whether the agreement of the parties to pay demurrage is deemed as an unfair contract. This new image of perspective will reduce the burden of the consumer and the charterparty who has the liability to pay for demurrage.

## **THE LEGAL STATUS AND THE APPLICATIONS OF DEMURRAGE UNDER FOREIGN LAWS**

### **1. Scandinavia**

The Scandinavian Maritime Codes were revised in 1936 – 1939 (Swedish Act 1936, Danish Act 1947, Norwegian Act 1938, Finnish Act 1939), and substantial conformity in the affreightment rules was then achieved. The Codes represent a step towards a somewhat freer treatment of the contract of affreightment. The fixed legal scale of lay time and demurrage has been abandoned in the principle and retained only for smaller ships, for which it is considered to fulfil a useful function. Provisions in the Codes of importance in demurrage connections are found in sections 77 – 97 and 105 – 115.<sup>23</sup>

### **2. Germany**

The German Commercial Code was finally adopted in 1863 and was readopted in a modified in 1897. Its provisions of the importance for the demurrage situations are found in section 560 – 606. The Code is similar to the Scandinavian Codes though somewhat less rigid than the Swedish Code of 1864. Thus although the old provision from Hanseatic times remains, that the time on demurrage shall be fourteen days (fifteen days in the Wisby and Lubeck Codes), the laytime is determinable, when no customs or local regulations exist, according to the circumstances of the cases. The fixed demurrage time is less serious because the ship is then always entitled to compensation in the form of demurrage. The demurrage rate is not fixed but is determined in the fairness by the

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<sup>23</sup> Hugo Tiberg. **The Law of Demurrage**, 6 (3<sup>rd</sup> ed. London Stevens & Sons, 1979)

judge. A revision of the Commercial Code has long been on the program, latest in 1940, when, however, its realization was delayed by the war effort.

More rigid instead, is the law of Interior Waterways Transportation (*Binnenschiffahrtsgesetz*), covering transportation on board barges and other craft used on rivers and canals. Provisions relating to demurrage are here found in section 27 - 57 and contain scales both for laytime and for demurrage time and rate. There is apparently a need for more detailed provisions regarding the smaller tonnage for which, it will be remembered, the Scandinavian Codes also have certain exceptions.

Committee reports, edited by J. Luz, are available from deliberations of the 1861 – 1863 Committee of the general Commercial Code. These reports do not have the standing of a recognized source of law. They do not voice the definite opinion of the committee as such but consist in a rather verbose account of the various views advanced by its members in the course of the discussions. They are however sometimes used by German writers to furnish a background to the regulations on the Commercial Code and will also be referred to occasionally in the text under the name of *Protokolle*.

### **3. Italy France and Belgium**

While Italy has a new Code of Navigation from 1942 the legal provisions on French and especially Belgian law in the field of demurrage are still very limited. Particular weight is in practice given to writings of legal scholars, while the force of precedents is considerably less than in most systems; there is a general lack of consistency in the practice of the courts, and a whole series of cases is usually required to show with reasonable certainty that a particular tendency has become so pronounced that it can be regarded as “law”. Although the Latin law systems have a common origin, important divergencies in the theoretical conception of demurrage often result in varying solutions. But frequently the value of precedents seems to be measured by bulk rather than by quality, and it seems to matter

little to some authors whether their sources are domestic or alien. The existence of very comprehensive law reports in particular *Le Droit Maritime Francais* (cited in the text as DMF) and before the war *Revue Internatioal de Droit Maritime* (RIDM) and *Revue de Droit Maritime Compare* (DMC), and to some extent Italian *DIRITTO Maritimo* (DM) makes the more important decisions available for study.<sup>24</sup>

#### **4. Holland**

Holland has comparatively modern Maritime Code from 1992. Provisions relating to demurrage are found in sections 517 and 518. The Code is essentially Germanic in type but shows more wariness in dealing with contract than both the German and especially the older Scandinavian Codes.<sup>25</sup>

#### **5. United Kingdom**

The English law has been rapidly developed through a vast number of precedents, promptly noted and commented upon in the law reviews, especially, from the latter part of the 19<sup>th</sup> century onwards. The law of Scotland is practically similar in the demurrage field, and Scottish cases are frequently cited in support of some of the leading principles of the English law of demurrage. Cases from other parts of the Commonwealth also have a strong persuasive force on English courts.

#### **6. United States**

In the United States the administration of this area of the law lies almost exclusively with the Federal courts. The development of the law has the whole been rather erratic and unsure and has never received the stimulating comment in law reviews and legal treatises that has been the boon of the English case law development. The publication since 1923 of the *American Maritime Cases* is valuable

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<sup>24</sup> Hugo Tiberg. **The Law of Demurrage**, 18 (3<sup>rd</sup> ed. London Stevens & Sons, 1979)

<sup>25</sup> *Id.*, at 19

for student but does not seem to have contributed much to creation of consistent principles in the field of demurrage.

Commercial arbitration is the normal fate of an American demurrage dispute today, and the bulk of recent demurrage cases reported in the American Maritime Cases are arbitration decisions. Although this tendency certainly has not improved the standard of consistency of the American law of demurrage, it must be recognized that disputes will generally be resolved in this way, and that arbitration decisions, in arbitration cases, at least, are a source of law that must be ignored. Whenever they are cited in the text their character of arbitration decisions will however be noted.

## **ANALYSIS OF THAI LAW AND IN UNFAIR CONTRACT PERCEPTION**

### **1. Analysis of Thai Law**

It is admitted that the demurrage can be deemed as the penalty under Thai law, not the damages because the charterer agree to pay the shipowner a sum of money if the charterer uses the ship beyond the period of time fixed for the departure. In contrast, the damages cannot be agreed before the parties are actually injured. Moreover, the shipowner does not have the burden to prove the amount of the money he is entitled which is in contrast to the damages.

The reasons that the demurrage can be admitted as the penalty under Thai law are as follows;

1) Because the voyage charter and the demurrage concept have their own characteristics substantially different from general contracts, the judge who is involved in the trial and adjudication of the case needs to study and understand the background of demurrage, customs, intention of the parties, conditions and terms of voyage charter, especially the demurrage clause in order to proceed with the trial and render the judgement.

2) Due to the fact that most of voyage charterparty contracts are on standard form and, *inter alia*, Gencon, the most popular one. In those standard forms, a governing law clause is normally

contained, and mostly, English law to apply. Therefore, there may be a question of law on the element of choice of law or conflict of law, particularly, in the case where the parties to the voyage charterparty in question of conflict of law, are not of the same nationality. In some case, the law agreed by the parties and the question of conflict of law must be observed and cannot be overlooked by the parties to the proceedings and the Court. Unless the parties fail to raise such question of law or to produce evidence to satisfy the Court of the stipulated foreign law, the court shall apply Thai law.

3) Notwithstanding the above, it is to be remembered that Section 5 of the Act on Conflict of Laws, B.E. 2481 of Thailand provides a restriction on the applicability of foreign law. In brief, it can apply so far as it is not against public order or good morals.

4) Having overwhelmed the threshold in the two preceding recommendations, the court needs to consider all circumstances at the time of making the contract as well as the demurrage rate fixed by the contract so that, for example, if the demurrage is reasonably proportionate, the court may grant the agreed amount of demurrage. However, if the demurrage is disproportionately high, the court may reduce the demurrage as he deems appropriate.

5) We also have to consider the provisions of the unfair contract. According to Section 4 of the Unfair contract Terms Act, B.E. 2540 (1997), if the terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. So the charterer may raise the issue of the unfair contract in the court. If the court hears that such term is an unfair contract term, the court may grant the demurrage as he deems fair and reasonable.



## **2. Concept of the Unfair Contract Terms Act B.E. 2540 (1997)**

Usually in voyage charter, the contract between the shipowner and the charterer is a contract between consumer and the business, trading or professional operator or in a standard form contract.

Sometimes, the party who has less bargaining power has to accept the unreasonable term because another party have more advantage over the other party which causes the party to accept the unfair contract terms, such terms can be enforceable to the extent that they are fair and reasonable according to the circumstances.

In the case of the demurrage, the agreement is usually written in voyage charter which already made in a standard form contract. The parties of demurrage are between the shipowner and the charterer. The charterer is usually a consumer and the shipowner is usually the business, trading or professional operator. If the charterparties serve the term of demurrage with the unfair conditions which are for example;

1.terms excluding or restrictions liability arising from breach of contract;

2.terms rendering the other party to be liable or to bear more burden than that prescribed by law;

3.terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party not being in breach of the contract in the essential part;

4.terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;

5.terms granting the right to a party to the contract to claim or compel the other party to bear more burden than that existed at the time of making the contract

The terms on voyage charter concerning demurrage can be enforceable to the extent that they are fair and reasonable according to the circumstances.

## **CONCLUSION AND RECOMMENDATIONS**

According to the reasons mentioned in this thesis, I hereby propose the following recommendations;

1) Because the voyage charter and the demurrage concept have their own characteristics substantially different from general contracts, the judge who is involved in the trial and adjudication of the case needs to study and understand the background of demurrage, customs, intention of the parties, conditions and terms of voyage charter, especially the demurrage clause.

2) Due to the fact that most of voyage charterparty contracts are on standard form and, *inter alia*, Gencon, the most popular one. In those standard forms, a governing law clause is normally contained, and mostly, English law to apply. Therefore, there may be a question of law on the element of choice of law or conflict of law, particularly, in the case where the parties to the voyage charterparty in question of conflict of law are not of the same nationality. In some case, the law agreed by the parties (if any) and the question of conflict of law must be observed and cannot be overlooked by the parties to the proceedings and the court. Unless the parties fail to raise such question of law or to produce evidence to satisfy the court of the stipulated foreign law, the court shall apply Thai law.

3) Notwithstanding the above, it is to be remembered that Section 5 of the Act on Conflict of Laws, B.E. 2481 of Thailand provides a restriction on the applicability of foreign law. In brief, it can apply so far as it is not against public order or good morals.

4) Having overwhelmed the threshold in the two preceding recommendations, the court needs to consider all circumstances at the time of making the contract as well as the demurrage rate fixed by the contract so that, for example, if the demurrage is reasonably

proportionate, the court may grant the agreed amount of demurrage. However, if the demurrage is disproportionately high, the court may reduce the demurrage as he deems appropriate.

5) We also have to consider the provisions of the unfair contract. According to Section 4 of the Unfair contract Terms Act, B.E. 2540 (1997), if the terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. Therefore, the charterer may raise the issue of the unfair contract in the court. If the court hears that such term is an unfair contract term, the court may grant the demurrage as he considers fair and reasonable.

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