

LIQUIDATED DAMAGES IN AIRLINE BUSINESS EMPLOYMENT CONTRACTS^{*}

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Abstract

Penalty is one part that employers write in employment contract to protect their benefits such as to control the employee not to resign before the limit time stipulated by the employer. This can be advantages to the employer to receive the penalty excessively. However, when it reaches the court consideration in Section 14/1 under the Labor Protection Act B.E. 2541, it mainly focuses on the employee's benefits which are not easy to award the excessive amount to the employer

Thus, it is foremost to study and analyze Thai laws, especially Thai Labor Protection Act B.E. 2541, whether they are sufficient to find a solution to award the excessive amount, with legitimate interest and being reasonable to the cases. Moreover, foreign laws concerning about liquidated damages and penalty laws should be studied and adapted to be used with interpretation of the laws in Thailand.

Keywords: Liquidated Damages, Penalty, Excessive Amount.

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1. Introduction

Employment contracts are the contract made between employers and employees to have an agreement related to its work. Generally, it seems easy to make an employment contract, but when there is a terms and conditions given as an extra conditions to both parties, it creates a complication, leading to a dispute that needs a good resolutions to a problem that occurs. Employment contracts are very interesting because two parties have different status in which both engage to have an agreement to work together. For example, an employer needs an employee to work for the company, so the employer will stipulate all the terms and conditions in the contracts where the employee who needs to work and earn salary would apply for a job and must agree to those terms and conditions stated in the contract. In most cases, employers will be the one who stipulates the terms and conditions in the contract which the employee will have no chance to negotiate and change any details in the contract. Employees will only choose to accept those terms and conditions and get employed or deny the offer and get unemployed.

Besides, labor law is the law that controls both parties' benefits and has the purpose to protect the employee's benefits from the employer taking advantages as well. However, it is an interesting point to study why the current law still cannot solve the dispute when the dispute between both parties occurs.

One of the good examples of employment contracts is airlines employment contract, which is different from those of other businesses in some specific parts. For example, there will be a training cost that the airline will pay for the employee to be trained to become a pilot or a flight attendant.¹ The training includes a training program abroad in which the company covers the cost for air transportation, accommodation and training equipment, but the air fare will not be the same rate offered to usual

¹ Annex 1

customers who buy the ticket from the airline services. When the employer claims in the contract of penalty for the amount of cost, it should reflect the actual losses. Also, the details stated in the contract will have an extra condition requiring that flight attendant must work for a certain period of time. Otherwise, it will be a penalty for resigning or being expelled.

Nonetheless, this kind of contract is similar to other businesses as well such as hotel business that there are employment contracts to hire employee to work in their business. For example, once an employee is hired to work for the company such as in the position of Creative Officer, who designs all kinds of creative work, there will be a contract where it stipulates the penalty if the employee is in default. However, in this paper, only airline employment contract will be focused as a case study. The details will be discussed later.

Airline business consists of many kinds of contracts, for example, purchasing, hire of work, hire of services, and sales. In order to run an airlines business, one type of contract that cannot be avoided is employment contract, which is the contract that plays important role to hire employees to work for the company to move the business forward. Employment contracts in airlines business will be mainly discussed in this paper with a focus on flight attendant employment contract as a case study of employment contract.

Flight attendant employment contract is one of the contracts that are very interesting to study because it contains a training contract and an employment contract, which could be separated or combined together. In the contract of hiring a flight attendant, one important part is penalty, which is effective when the hired personnel breach the contract. This paper will focus on this part of the contract as a major discussion in relation with others related terms and law. In the contract of hiring a flight attendant, there will be a penalty written in the contract to control flight attendant not to breach the contract. Penalty that is written comes with a time condition that the penalty will be effective. For example, a flight attendant

has to work for airlines at the minimum of 2 years. If a flight attendant resigns or is expelled before the minimum period, then there will be a penalty of 120,000 baht.²

In Thailand, the contract made between employers and employees will be related with the labor law and the Thai Civil and Commercial Code (TCCC). The TCCC plays a role as the main law that is used in hire of services with regard to Sections 575 – 586. In addition to the hire of services, there are the law that can be put in the contract as an extra condition in order to enforce the employee not to breach the contract, which is penalty. Penalty in the TCCC is generally used in the contract in order to control the performance as agreed in the contract so that the party will not breach the contract. Otherwise there will be a consequence.

The other law related to the employment contract is the labor law. Labor law is applied accordingly with the TCCC. Labor law is a law that protects employee and also helps employer and employee to know the duty and the benefit that both parties will receive from the hire of services and also consist of the protection on the benefit of both parties.

Airlines employment contract with the condition of penalty is a contract that the airlines stipulate the penalty in sum amount of money to avoid the breach of contract from the employee because it can affect their business.³ For example, a contract regulates if employees terminate the contract before completing 2 years of working, they are liable for a compensation of 120,000 baht as a penalty for airlines.⁴ Mostly, this kind of contract will be used accordingly with the company expenses paid for employees on certain benefits such as employee training to become a flight attendant. These training expenses could be a lot such as training equipment, flight simulation, and air ticket and accommodation, if training

² Annex 1

³ Jonathan Morgan, *Great Debates in Laws*, (2nd edn, Palgrave Macmillan 2015) 234.

⁴ Annex 1

abroad. In the view of the company, it is the company's expense to train employees to work for the company. Once the employees resign before the time specified in the contracts, it is the loss to company because the company expects high-quality employees as a result of the paid training. In other words, the training is invested in employees with the expected work quality for the company in return, not to work for other companies when they resign.

On the other hand, the employee may question where the amount of 120,000 baht comes from. Does this amount reflect the actual cost that the company loses? If the company stipulates the damages in the contract to clarify the loss of company when a breach of contract happens in the future, it will be fair to the parties. This can be called liquidated damages that simply mean damages designated during the formation of a contract for the injured party to collect as compensation upon a specific breach. However, the problem is that there are different opinions about penalty and liquidated damages in Thai law. There are lawyers who interpret the penalty as liquidated damages while some interpret it differently as penalty which is an amount that can be claimed excessively.

Moreover, airline employment contracts do not have a form of the contract. In other words, it means that the contract can be made as in general rule as freedom of contract. However, the Unfair Contract Terms Act Section 3 has given a definition of "standard form contract" as written contract in which the essence of contract has prescribed in advance, regardless being executed in any form and used either contracting parties in the businesses. Then, airline employment contract needs to be made based on the Unfair Contract Terms Act as well.⁵ There is Section 4 that controls terms in the contract to prohibit unfair terms and the terms that allow one party take advantages over the other party. In order to consider which term

⁵ Unfair Contract Terms Act 2540, s 3

is fair and reasonable, Section 10 will be applied as it is used accordingly with Section 4.

Furthermore, the dispute may occur when the employee breach the contract, the employer will definitely file a lawsuit against the employee to claim such damages. If the case is pursued to the court, the employer has to clarify how much the employees really damage the employer's company.⁶ This is because it needs to show the evidence to the court in order to consider the case. In this case, it wastes time for both parties to find a lawyer and attend all the court appointments until the dispute is settled down.

Also, the court can decrease the penalty as it is stated in Section 14/1 under the Labor Protection Act B.E. 2541 – if a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by the court. In determination of reasonableness, every legitimate interest of the creditor, not merely his/her property interest, shall be taken into consideration. After payment of the penalty, the claim for reduction is barred.⁷ In fact, Section 14/1 is a law that allows the court to consider reducing the amount of the penalty. It is not easy to use this section immediately when the court considers the case because it must fall into the condition under Section 14/1 that might not be in consideration in the view of business area. Also, the intention of making a contract under the rules of the TCCC is an important factor that the court will consider and may grant penalty to employers according to their requested amount that represents real lost and damages when the court perceives it fair and appropriate. Thus, this process takes time to both parties and may not be resolved even in a one-year period. However, the standard of the excessive amount is hardly found and currently Thai law has different opinion whether the

⁶ Thai Civil Procedure Code, s 84/1

⁷ Labor Protection Act B.E. 2541, s 14/1

penalty can be claimed excessively or it should be the amount that reflects the actual losses only.

Another problem with Section 14/1 is that it can lead to different judgment by different judges because the court may consider through different point of view and standard as the Section 14/1 is open to the court considerations. Besides, the Unfair Contract Terms Act is another law that the court will need to consider if the contract stipulates penalty prohibited by laws or not and if it is fair to both parties. This is to prevent unfair contract between the employer and employee when the employer claims for a penalty that is not an actual loss and gains profit from that penalty. However, the problem is that this has to be decided by the court to consider whether it void or not. As the Unfair Contract Terms Act does not state the consequences of breaking the law, the court will use the power in Section 14/1 to consider the cases and also it can lead to a question how much the penalty should be considered as excessive amount that is not appropriate to the case in which different judge can decide differently.⁸ For example, if A claims for a penalty from B for 800,000 baht but A actually loses only 100,000 baht or A stipulates the condition in the contract that B cannot work again in the area of creative. This is not a fair condition to put it in the contract. A as an employer takes advantages over B as an employee. When it reaches to the court, the court will consider if the amount is excessive or not. In Thai law, it is still unclear whether the penalty can be excessive.

Penalty and liquidated damages in other legal systems are important to study in order to understand the concepts and the intentions of the law of penalty and liquidated damages as well as their practice. The court's decisions and explanations of the judicial reasoning help understand how the court considers cases related to the penalty and liquidated damages. This will help to see how important to propose the other point of view on

⁸ *Supreme Court Case No. 690/2552*

penalty in the Thai law and to see the problem of using penalty and liquidated damages in other legal systems. Thai law can apply the good point of penalty and liquidated damages from other legal systems in order to interpret and close all the loopholes to make the law fair to all parties with justice. On the other hand, the stipulated amount in both penalty and liquidated damages has to be considered whether it is excessive or not by the court in which currently there is a question whether penalty and liquidated damages can be claimed excessive.

Then, the questions are raised in Thai law – Can the penalty be claimed excessively? Can it be interpreted as liquidated damages to claim for an excessive amount in the contract under Thai law? Is this possible? How can employees be protected from paying a disproportionately forfeited penalty to employers? Are penalty and Section 14/1 sufficient to find a good dispute resolution under the Thai law? Is there any provision in the Unfair Contract Terms Act that prohibits an unfair agreement? What are the consequences? This paper attempts to provide answers to these questions.

2. Penalty Issues

The law that describes about penalty with an interesting point of view to be further studied is Italian law. In Italian law, there are three groups of people who have different opinion on penalty. The first group thinks that penalty is in duty to compensate; the second group thinks that penalty is both compensation and punishment; and the third group thinks that penalty is both compensation and punishment with one obligation to compensate the losing party and punish the breach party.⁹ Penalty is a tool to prevent the breach of contract to ensure that the obligations will be performed as agreed in the contract.

⁹ Sanunkorn Sotthibandhu, Kham Athibai Nitikam Sanya [Juristic Act-Contract] (18th edn, Winyuchon 2014) 409 (ศันันท์กรณ โสติดิพันธุ์, คำอธิบายนิติกรรมสัญญา (พิมพ์ครั้งที่ 18, วิญญูชน 2557) 409)

However, the intention of penalty should be acceptable only if it uses in a proper way rather than to take advantages from the other party by gaining benefit from a penalty. There will be a chance that the employer will stipulate excessive amount of penalty. Thus, the employer should be limited for the stipulated amount not to be excessive but reflects the actual losses in which this will prevent the employer from gaining profit from such a stipulated excessive amount.

The reason for this proposal idea is that the law only permits the courts to reduce the excessive amount if it is not appropriate, but there is no law that awards the excessive amount if it is appropriate, especially in penalty law. So, this means that if the employer pre-estimates the losses which lawyers have two opinions that it is liquidated damages and pre-estimates it is not liquidated damages. The author agrees with the second opinion that it is not a liquidated damages. Once there is a default, the court will not be permitted to award the losses that are higher than the stipulated amount in the contract. Also, there will be a chance that the court will believe that the stipulated sum amount is appropriate and the employer will lose what they deserve to get. This will not have a conflict of the freedom of contract and with good faith.

Penalty has been used to protect the employer for the loss that comes from employee resigning or being expelled. It is used to claim for what company believes as their losses. In airlines employment contract, the penalty is stipulated in the contract with a sum amount that is randomly stipulated without knowing where it comes from and what is the calculation of those amounts.¹⁰ It can be advantages that the employer takes over the employee. Employer status in the contract is higher than the employee who cannot really negotiate and ask about the penalty. The options are limited – to sign the contract to get a job or not to sign the contract and get no job. There are no other choices for employee to do anything about it.

¹⁰ Annex 1

Once signing the contract, in the future, if there is a dispute in which penalty is one of the tools that employer uses to claim for the losses, employees face the limited choices again, either to pay it or to go to court. In reality, employee would prefer to pay penalty rather than go to the court, and this will be advantages for employer. At the first place, employer knows that if the employee cannot negotiate anything, then it is easy to stipulate the penalty at a high amount to make benefit to the company. Moreover, if the penalty is stipulated at 2 years minimum of working period, those who work more than 2 years can resign or are expelled without paying penalty. But for those who work under 2 years, they should not pay the penalty at the same amount at 120,000 baht when the working period is varied. Those who resign at 5th month will not have to pay the same penalty amount as those who resign at 2nd month. The penalty is still 120,000 baht and has not been reduced. This is not fair and reasonable to employee who is in a lower status, making it impossible to negotiate at the time of signing contract. There is no choice at all for the employee and the law that can protect this at the first place should be the Unfair Contract Terms Act because under the TCCC has no law to control the employer to make a fair stipulated penalty.

3. Liquidated Damages with Section 14/1

Section 383 of the TCCC is not sufficient to solve the problem of excessive amount as the court cannot decide the case without the law that empowers the court to make decision or the law that does not state what both parties can do. In this case, penalty law does not state that the employer can claim for an excessive amount and also for what the party does not request the court to decide the case. For example, if the employer pre-estimates the cost at 150,000 baht, but, at the breach of contract from employee, the losses is at 200,000 baht, the amount that is excessively higher than 150,000 baht. The court may not be allowed to award at the amount of 200,000, which can be seen excessive to the court.

Section 383 cannot solve this problem because it only allows the court to reduce the amount, but not to award the excessive amount.

The main idea of liquidated damages is to make the amount reflect actual losses. Nowadays the trend of using liquidated damages has changed to allow the court to award the excessive amount.¹¹ Liquidated damages in Common law country is a good example to compare the way it awards the excessive amount. There are some cases in the Common Law country that the courts are starting to consider the liquidated damages that can be claimed in excessive amount with the appropriate reason. The court considered the validity of the penalty.¹² However, with the above example, it cannot reflect actual losses if the court does not award the amount in 200,000 baht. Basically, Thai law does not really have the law that is the same as the concept of liquidated damages.

Therefore, it should not be interpreted that liquidated damages have existing in Thai law. The author proposes that with the adaptation of liquidated damages, it can be used under the Thai law for the court to consider on giving an excessive amount with the concern of legitimate interest. Also, it can be a concept that is adapted with the labor law and the TCCC as it can be consistent. Although the concept of liquidated damages does not currently exist in Thai law, with the study of liquidated damages, it is the concept that will bring to use with the court's consideration by using the guideline that the author proposes later in the recommendation. Changing the law is difficult, and to make it a written law will not be easy. So, the suggested way is to use them with the court's consideration as said in Section 14/1 to yield the results with the same standard for all the judge decisions to avoid the problem of different judge having different opinion on the cases.

¹¹ *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, UKSC 2013/028

¹² *ibid* 11

To make it functional, it must be interpreted and understood very well. Liquidated damages can make a fair system to both parties agreeing to the stipulated sum. It is a good faith concept that protects one party from being taken advantages by the other party. It can be used to reduce the stipulated sum of money with the time that the employee has completed the work for airlines or it can be used to in excessive. Liquidated damages is not only fair during the court process but it is also fair throughout the process, starting from the contract signing process. In other words, liquidated damages will make the whole system fair to every party. Even when the parties are having a dispute with the contract such as in the case that employee does not pay liquidated damages as agreed, there will be a lawsuit that leads the court to use Section 14/1 under the Labor Protection Act B.E. 2541 to rule on the stipulated sum amount agreed by both parties. It will not be difficult for the court to consider the dispute of liquidated damages. The court can rule based on the contract stipulated sum of money that both parties agree if the court sees that it is not a fraud or any misleads. Section 14/1 under the Labor Protection Act B.E. 2541 is used to consider the fairness and appropriateness to the case that the court has power to decide. If the court does not consider liquidated damages at all, there might be a chance that one party will gain advantages over the other party. Liquidated damages can be applied consistently with Section 14/1 so that it will result in fairness to every party. Also, it can affect the practice of the employer. The author proposes that using court proceeding will be at the last resource to find the solution to the case. The result of Section 14/1 and liquidated damages together will be appropriate and fair to every party in the way that makes consideration on the stipulated amount easier and less complicated.

On the other hand, the interpretation of Section 14/1 is an issue whether it can award the excessive amount or not. In the author's opinion, the interpretation of Section 14/1 can be interpreted to award the stipulated amount in an excessive amount if it is appropriate to the case

and reasonable. As mentioned previously in the Topic 3 about liquidated damages with Section 14/1, liquidated damages are now changing in some cases that the court can award an excessive amount. So, it is a good point that Thai law can be improved by considering award excessive amount as long as it is appropriate in all angles. This is not because that the Common Law country like UK is changing and Thai law has to be changed. It is an example of the trend that the courts are now changing. The reason that the author proposes that Section 14/1 should be interpreted to award the excessive amount is because of the different status of both parties that employer and employee are not equal. If the court considers with a concern whether employer or employee gains more interest than the other, there will not be a fair result. As mentioned earlier, Thai courts consider not only the assets but also in terms of law to bringing justice to all people. If there is an only part to reduce the excessive amount but not award the excessive amount when it is appropriate, then it would not be fair at all. Sometime employer's losses can be excessive from the stipulated sum of amount. If it cannot be claimed, then the employer has to take responsibility for the losses that they should be compensated.

Section 14/1 does not only protect the employer's benefit, but it also protects the employee's benefit as well. The labor law has original intention to protect the employee's benefits, especially the section 14/1. Under the section 14/1, the court can consider the fairness to both parties, not only the employer's losses, which means the section 14/1 will be appropriate to the case for both parties.

4. Recommendations

The author proposes that with the adaptation of liquidated damages, it can be used under the Thai law for the court to consider on giving an excessive amount with the concern of legitimate interest. Also, it can be a concept that is adapted with the labor law and the TCCC as it can

be consistent. The author suggests that Thai law needs to consider the concept of liquidated damages in the TCCC and the Labor Protection Act. The concept of liquidated damages focuses on the actual loss that is a stipulated sum of amount agreed by both parties and is now improving to award an excessive amount in some cases as mentioned earlier. The author proposes the recommendation with a belief that Thai law has a loophole on penalty that causes the employer to use it to take advantages with a claim for an extravagant amount that is not appropriate to the case. Stipulated sum of money will help make it fair for that both parties can clarify the actual damages and acknowledge them in order to protect the default. If a default occurs, the party that causes damages has to be responsible as agreed on the stipulated sum amount. This is to avoid the lawsuit and unfair penalty to the party. However, if there are circumstances where the employer has extra losses or at the time of default the losses are costing more, the employer can call for such losses. If the employee does not agree, there will be a case brought up to the court and let the court decide the amount in which the author proposes that the court uses Section 14/1 to the case as it can be interpreted to award the excessive amount, if it is appropriate to the cases.

Moreover, the author recommends that, in Thai law, especially in the TCCC and the Labor Protection Act B.E. 2541, judges should interpret that the amount of penalty that has been stipulated in the contracts can be claimed excessive if it is appropriate to the case. Amendment the law is never easy. Therefore, as mentioned that changing the law is difficult, using liquidated damages as a written law will barely happen. However, using liquidated damages with Section 14/1 will help create the fairness and appropriateness as intention of the law will not end up with judgment subjective to different judges. Rather, it will bring the same standard with every case. The results will reflect back to the beginning of the contract signing process that both parties will stipulate amount based on the actual losses that will be reduced by the time of completed working period. This

can be accomplished without changing the law. In practice, if it goes to the court consideration, the liquidated damages will be used in consideration at the end as the court already uses the consideration to consider the case as said in Section 14/1 under the Labor Protection Act B.E. 2541. Therefore, the use of Section 14/1 to the case will help the court find good solution to all parties with appropriate results.

Nevertheless, this might not be effective perfectly because it is an idea of the Common Law, but the author proposes to see the good law and the concept that can be adapted to interpret Section 14/1 under the Labor Protect Act. Moreover, this will be consistent with the Unfair Contract Terms Act that it will make the law to be used at the beginning of the contract signing process. Also, it can be consistent to other laws so that it can be used and considered at the same time. As mentioned earlier, the idea of using Section 14/1 under the Labor Protection Act B.E. 2541 should be considered as an exceptional rule of Section 142 under the Civil Procedure Code. The author would consider a lawsuit to be the last choice and last resource to solve penalty issues because the author believes that lawsuit should take part only when it is necessary and there are no other options. With liquidated damages, issues on penalty can be solved before using the court process and it can reduce the number of court cases as well. However, the concept of liquidated damages should be just an option to consider in court. Interpretation of Section 14/1 should be the main focus that the court should interpret to award an excessive amount.

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Thai Civil and Commercial Code 2560

Unfair Contract Terms Act 2540

Cases

Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67, UKSC 2013/028

Supreme Court Case No. 690/2552

Annex 1

To be read and construed as an integral part of this Agreement.

SECTOR	PARTICULARS	
1	Name	
2	ID Card No.	
3	Employee Code	
4	Address	
5	Position	Flight Attendant
6	Training Course Title	FLIGHT ATTENDANT TRAINING
7	Duration of Course	Two (2) months.
8	Number of years	Two (2) years Commencing November 17, 2014
9	Agreed Liquidated Damages	<u>Resign/Dismissed</u> Within 2 nd Year : 120,000 baht