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Unilateral Termination of Construction Contract

A Comparative Study between Chinese Law and UAE Law

إنهاء العقد من طرف واحد

مقارنة بين قانون الصين وقانون الإمارات العربية المتحدة

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Abstract

Construction contract is a legal binder of the contracting parties for a certain project and there are also many industries and other parties linking to such project behind the contract. To terminate the contract will definitely affect, firstly, the contracting parties and sequentially the indirect involvers such as the manufacturers and suppliers; whereas to terminate unilaterally would even render a worse situation. So it is important for the contracting parties to fully understand the embedded unilateral termination mechanisms in their contract; this dissertation aims to achieve this point by a thorough examination to the laws, the legal and industrial publications and the standard contracts including the ones for undergoing projects to illustrate entire pictures of the unilateral termination in China and UAE. Emphasis will be also given to the application of the change of circumstance since it is found significantly remarkable and different in both countries under certain situations. Also, the most important part of this dissertation is the comparison of the unilateral terminations between China and UAE to contrast and then to demonstrate the relative advantages and common recognitions.

ملخص

عقد المقاولات هو رابط قانوني بين الأطراف المتعاقدة في مشروع معين ويوجد أيضا أطراف أخرى ذات صلة بالعقد ولكن بطريقة غير مباشرة. ان إنهاء العقد سيؤثر بالتأكيد على أولا الأطراف المتعاقدة بصفة مباشرة في المشروع وبالتالي الأطراف الغير مباشرة مثل المصنعين والموردين، في حين إنهاء العقد من طرف واحد سيؤدي الى وضع أسوأ. لذلك انه لمن المهم أن تفهم الأطراف المتعاقدة آلية إنهاء العقد من طرف واحد الموجودة في العقد ، هذه الرسالة تهدف الى تحقيق هذه النقطة عن طريق الفحص الشامل للقوانين، الدراسات والمطبوعات القانونية والصناعية و العقود الرسمية بالإضافة الى تلك المشروعات التي تحت الإنشاء. وتركز هذه الدراسة على التطبيق في حالة تغير الظروف في حين انها تختلف بدرجة كبيرة من دولة لأخرى تحت ظروف معينة. ان أهم جزء في هذه الرسالة هي المقارنة بين الصين والإمارات العربية المتحدة في حالة إنهاء العقد من طرف واحد و ايضاح الفرق بينهم ثم شرح المميزات المتعلقة بكل منهم.

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Keywords

Construction Contract, Contract Law, Termination, Unilateral Termination, Termination by Law, Termination by Agreement, Force majeure, Anticipatory Breach, Main Obligation, Non-performance, Delayed Performance, Frustration, Supreme People's Court, Legal Publications, Change of Circumstance, Defense to Uncertainty, Standard Contract, FIDIC 1999 Red Book, Civil Transaction Code, Muqawala, Court Order, Prevention to Performance, Prevention to Completion of Performance, Defective Performance, Termination by Employer, Termination by Contractor, Employer's Entitlement to Termination

Table of Abbreviation and Short Titles

ACLA	All China Lawyers Association
Construction Law 2011	Construction Law of People's Republic of China 1998, Revised in 2011
Contract Law 1999	Contract Law of People's Republic of China 1999
CTC1985	Civil Transaction Code, Law No.5 of 1985
GF1999	Construction Contract (GF-1999-0201)
GF2013	Construction Contract (GF-2013-0201)
GRPC	Grass-Root People's Court
HPC	High People's Court
IPC	Intermediate People's Court
Implementation Regulation	Implementation Regulations of Standardization Law of People's Republic of China
Muqawala	Muqawala is a contract that to undertake by a party to make a thing or to perform a task
SBA	Shanghai Bar Association
SPC	Supreme People's Court

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Chapter 1-Introduction

Unilateral termination of a construction contract means any of the contracting parties may terminate the contract under the embedded mechanism applicable in the contract without consent of the other party. It is important for a party to understand his right to terminate the contract unilaterally and legally; one of the reasons is, post the termination, some issues which are really onerous such as entitlements, claims and rights under the contract shall be followed and solved; also, the continuity to the incomplete project will definitely generate heavier burden to the employer side whereas it is not only in terms of money; meanwhile, for the prepared work by the contractor such as ordered or under delivery process materials for the project would be also affected. And the most important point is if the contract is terminated by termination mechanisms including unilateral ones, it would definitely vary the original purposes and intentions of the covenant parties.

Knowing the sequences after the unilateral termination is far from enough, it shall be observed by the contracting parties that such termination must be valid under the related laws; then the termination shall also be effective to the applicable situations stated in other legal resources other than the law articles. Moreover, some standard contracts need to be studied well to understand how the contained unilateral termination mechanism would work as the original context and vary according to changes based on mutual consent at the time of covenant in practice. These are actually the main objectives of this dissertation.

Choosing China and UAE as research objects is not only because the author was born in China and is currently working and living in UAE; it is also because these two developing countries have recently reached remarkable and significant achievements worldwide in trade and construction industries. So, to know their systems and markets situations through this dissertation, useful information and knowledge can be extracted and gleaned from as valuable characters of this research work.

1.1 Dissertation Overview:

This dissertation will, primarily and mainly under the Chinese legal system, examine how the unilateral termination of the construction contract works and such examination, to the law articles and legal interpretations, is to demonstrate the evolving perspective of the law makers and how the unilateral termination changes under the Chinese Law in recent history. In Addition, publications from arbitrators and lawyers associations will be brought into this dissertation to show the compliance and conformance from the industries. Meanwhile, standard construction contracts and FIDIC 1999 Red Book will be also discussed to explore, dedicatedly, how the unilateral termination is in such contracts and how it evolves with the contracts alongside the time being; the emphasis here is the termination for convenience by the employer under FIDIC 1999 Red Book. Simultaneously, the market practice, such as undergoing contract of construction project, is also cited into discussion to show how the unilateral termination contained in the contract is varied, amended or even vitiated in the market.

Secondarily, all the above-mentioned points will be repeated as they are under the UAE law. A limitation to expand the research will be the availability of the legal reference or publications in English language; but the industrial reference and construction documents, mainly made in English, are found much available and more accessible than they are in China.

Further, there will be a comparative analysis, between Chinese and UAE laws, based on what would have been discussed in previous chapters. The objective of having such comparison is not to tell which system or any existence under such system is better or worse; it is aimed to show the relative advantage on the same benchmark and the reasonability of the current situation and application of the unilateral termination of a construction contract under the respective system in combination and consideration with the historical, religious and recent development aspects of the country.

1.2 Research Methodology:

The dissertation will analyze and discuss the Chinese and UAE laws and the cases with judgments will be also imported to support as necessity and availability. Meanwhile,

courts' publications will be also cited and supported by the cases available and suitable and the opinions from industrial practitioners will be also listed for reference. Also, undergoing construction contracts will be used herein for discussion to illustrate the difference and variation of the unilateral termination mechanisms between the principle and the practice.

Chapter 2-Unilateral Termination of a Construction Contract under Chinese Law

The People's Republic of China is an ancient eastern country consists of four municipalities, twenty-three provinces, five autonomous regions and two special administrative regions including Hong Kong and Macau which were occupied by Great Britain and Portugal as colonies till the end of 20th century. China, a civil law country newly built in 1949, is also featured by Chinese communist system and holds a population of 1.4 billion. Exceptions are found in Hong Kong and Macau, permitted by the central government, these two Self-Autonomous Regions (the "SAR") are still implementing English common law system and Portuguese civil law system which are succeeded from their respective colonists; these two legal systems are not within the scope of this study.

2.1 Laws Applicable to Construction Industry and Its Contract

To govern the construction industry and its activity, the central government of China promulgated several laws; the Tendering Law 1999, Cities and Towns Planning Law 2007, Cities Real Estate Management Law 2009 and the Construction Law 2011¹ are the four currently effective laws. Whereas the recently revised Construction Law is found the most closed to construction activity itself; it states the scope of application, construction permits, contracting and subcontracting, legal obligations and liabilities of parties, engineering consultant and the construction quality and safety which two are considered as core concerns of this law. Not surprisingly, the construction contract is only mentioned in the law that it must be in a written form²; meanwhile this is no circumstance or situations regulated in the law to terminate the contract by a party. Then what is available for the party to resort to terminate a construction contract, the general principles and articles are found in the Contract Law 1999³.

¹ Construction Law of People's Republic of China 1998, revised in 2011

² Construction Law of People's Republic of China 2011, Article 15

³ Contract Law of People's Republic of China 1999

2.2 The Applicable Parts in Contract Law 1999 to the Construction Contract

The Contract Law 1999, in its Chapter 16 <Construction Contract> which is made up by nineteen articles, regulates the covenant and content of construction contract, prohibition of illegal subcontract, acceptance of the work, payment and its method and other rights and obligations of contracting parties.

Going back to the previous Chapter 15 <Contract to Work> which consists of eighteen articles, it states methods of contracting, material supply, time limit of performance, payment as remuneration, liability of custody, right of lien and other rights and obligations of contract parties. In the last article of Chapter 16, it concludes that any issue not covered in this chapter, it would be governed by Chapter 15 that means the committee of the Contract Law considered the construction contract is a specific and special segment of contract to work which must be emphasized and detailed by a separate section.

By examining these two chapters, there is no trace of termination of contract is captured; this automatically means the general contract termination is completely and utterly applicable and compatible to all construction contracts.

2.3 General Unilateral Termination of a Construction Contract under the Contract Law 1999

In Contract Law 1999, there are generally two types of termination are permitted: termination by agreement and termination by law.

2.3.1 Article 93 <Termination by Agreement>

This article defines two circumstances that parties can terminate their contract: the first one is to terminate by mutual agreement and the other is to terminate by one party according to fulfillment of pre-agreed termination conditions in the contract. The latter one actually falls into the scope of this study.

In the case *Beijing Jiaqun Culture Co. Ltd suing Beijing Shimao Media Co. Ltd*⁴, the claimant contracted to transfer the copyright of a TV Serial to the defendant in total amount of 400,000 RMB⁵. The contract stated that the defendant should make his first payment in a portion of 50% of the contract value within three working days after the contract date, the second and final payment shall be made within five days after the completion of videotaping by the claimant dated on 15th of January 2006. In addition, parties also agreed if the second payment is failed to be made, the contract would be treated void automatically, the paid first payment then would be also confiscated as damages and extra damages against the loss of the claimant in 8% of the total contract value would be also imposed.

The court found the second payment was not made by the defendant till the date of hearing and the mentioned serial was shown in Beijing TV since February of 2008 which proved the videotaping was completed. Accordingly, the judge decided in his judgment that: the contract reflects true intention of parties and is found no conflict against any mandatory law and regulation, so it is confirmed as a valid contract; the failure of payment agreed in the contract was treated in aspect of law as a pre-agreed condition for unilateral termination, so the failure actually triggered such termination. The judge upheld the claim and the defendant should pay the extra penalty within ten days since the release of judgment.

Since this study is not targeted to demonstrate the overall picture of the Contract Law 1999, it is necessary, from this judgment, to show the prerequisites prior to the activation of unilateral termination under the governance of the law: firstly, the contract and its content shall be representing true intentions of parties⁶; Secondly, the contract shall be valid and not be found contravening to laws and administrative regulations related and social morals⁷. And definitely, the pre-agreed unilateral termination in the contract shall comply with the same. Meanwhile, by referencing this judgment, legal

⁴ *Beijing Jiaqun Culture Co. Ltd suing Beijing Shimao Media Co. Ltd*, [2008] Beijing GRPC No.20575

⁵ Chinese Currency

⁶ Contract Law 1999, Article 14

⁷ Contract Law 1999, Article 7

practitioner suggested and also recommended, during the negotiation process prior to the contract, to combine penalties or damages in combination with the termination to recover the likely or pre-estimated loss⁸.

Another point not addressed in this case is also important to be mentioned here: what if the terminated party raises a doubt or disagreement to such unilateral termination made? The answer is he shall request the court or arbitrator if applicable to confirm the efficacy of such unilateral termination⁹. This means the court or arbitrator appointed by a separate or inserted arbitration agreement is ultimately empowered to determine.

2.3.2 Article 94 <Termination by Law>

Article 94 defines that a contract would be unilaterally terminated if any of the following five circumstances occurs, whereas these five can be categorized, in well-known law definitions, in Force Majeure, Anticipatory Breach, Delayed Performance of Main Obligation, Frustration of Contract by Delayed Performance or other breach and other conditions found in Laws.

2.3.2.1 Force Majeure

<Article 94.1>: The purpose of contract becomes unachievable by the influence of the force majeure.

In the case *Mr. Zhang suing Chongqing XX Property Development Co. Ltd*¹⁰, the claimant signed, on 23rd of November 2000, with the defendant a sales-on-map contract for an outlet which was at 4th floor and on the grade of the adjacent main street. Prior to the completion date, the claimant had paid 80% of the contract value and his payment was evidenced by valid invoice; meanwhile, city planning department changed the elevation of the main street which directly made claimant's house a semi-basement under the grade. The claimant rejected to take over the house and when he was refused

⁸ Ying Li, 'Termination by Agreement- The Contract Law Article 93' (*Sina Blog*, 1 June 2012) <http://blog.sina.com.cn/s/blog_a09a8d3e0101718v.html> accessed 15 October 2014

⁹ Contract Law 1999, Article 96

¹⁰ *Mr. Zhang suing Chongqing Property Development Co. Ltd*, [2005] Chongqing GRPC

to be refunded by the defendant, he sued to terminated the contract and claim his payment.

In the grass-root court, the judge considered the contract was valid and the change of street elevation was a sort of force majeure which under no control of the contract parties; the claimant was upheld. The defendant appealed at the intermediate court and argued that the purpose of the contract had been reached by the completion of the construction, so he requested a judgment to receive his full payment. The judge in the intermediate court re-affirmed that, the purpose of the contract are the completed construction of the house and its elevation, especially in this case, was set on the grade level which means the claimant would put it for commercial use; whereas the elevation variation rendered impossibility for this purpose of use. The appeal was rejected and the defendant was subjected by the grass-root court judgment.

Hu Yuanwei, a judge in Chongqing Supreme Court, commented this case and extended his commentary to illustrate the whole picture of termination by force majeure: the force majeure must render impossibility to reach the contract purpose; when the force majeure causes temporary hardship and/or partial impossibility, parties are advised to , firstly, consider variation to the contract and if it is found by one party his original intention by the time of contracting has been changed, his right to ask for termination by law shall be admitted¹¹.

An interesting point found in Contract Law is the force majeure is only defined as objective circumstance which is unforeseeable, unavoidable and cannot be overwhelmed¹²; thus the Act of God and Change of Legislations are both covered under this umbrella.

2.3.2.2 Anticipatory Breach

¹¹ Hu Yuanwei 'Impossibility to Reach the Contract Purpose by Force Majeure- Terminate the Contract by Law' (2006) Chongqing HPC <<http://cqfy.chinacourt.org/article/detail/2006/04/id/613183.shtml>> accessed 18 November 2014

¹² Contract Law 1999, Article 117

<Article 94.2> Prior to the end of performance date, a party declares expressly or shows by his conduct that he will not perform his main obligation.

There is no named concept as anticipatory breach in Chinese Law and anticipatory breach, regardless the disagreement to its existence under certain legal system, is usually a concept in case law system, but the adoption by Chinese law was to absorb advantages from other law systems¹³.

In case *Xianfeng Co. Ltd suing Zhengkang Co. Ltd*¹⁴, the claimant signed a decoration contract on 10th of December 2005, in a lump sum price, to design and decorate the defendant's project. The contract also stated that if, prior to the decoration work started, a party wish to terminate the contract, he shall inform the other party in written form. Whereas the claimant stated that prior to the contract date, he had submitted the completed design drawings, plans and shop drawings to the defendant for approval; but after the contract date, by informing several times to the defendant to commence the work, he obtained no response regarding to the commencement date. It was later discovered, by the claimant, that the project had been awarded to another company and the undergoing decoration was completely based on his submissions. So the claimant sued to terminate the contract and request for agreed damages in the contract. The defendant counter-claimed that the submission drawings failed to meet design specifications and requested the court to terminate the contract and approve agreed damages.

The judge confirmed firstly the validity of the contract under the law and he also stated that the defendant signed the contract after his reception of the drawings and raised no objection in any form which meant his acceptance of the work; and during the hearing, the defendant failed to provide any proof to evidence the claimant's submission failed

¹³ Shan Zhang, 'Discussion to Anticipatory Breach System in Our Contract Law' (*Dissertation Alliance of China*, April 2014) <<http://www.lwlm.com/hetongfa/201404/726834p2.htm>> accessed 15 October 2014

¹⁴ Kaiyun Hu, 'To Terminate under Anticipatory Breach' (*66Law*, 2011) <<http://www.66law.cn/goodcase/10697.aspx>> accessed 15 October 2014

to meet design requirement. The court upheld the claimant and terminated the contract under article 94.2. The defendant appealed but the original judgment was affirmed.

This article seems simple in the last cast since it was found clearly that the contract was awarded to another entity and the work was undergoing, but its clarity might be doubted not enough to test whether any loophole would exist under this article. And also the 94.2 had been criticized in aspect of lacking standard to guide the judge to determine whether the breach has been constituted¹⁵; this means the determination will be totally made by the discretions of the judge based on his expounding to this article and/or construing to the contract context. The following case may demonstrate this point.

In the case *Fu Zhenming suing Xin Shaoping and Lixiumian*¹⁶, the claimant signed a two-year commercial tenancy contract with defendants from 1st of January 2003 till the end of 2005; the rental was in 11,000 RMB monthly and should be payable on the first day of each quarter. It was also stated if the claimant delays more than fifteen days from the due date to pay, the defendant could terminate the contract and confiscate the refundable deposit which was available in the condition and in amount of 22,000 RMB. By 28th of June 2003, the claimant served a letter to not continue his rent from the third quarter; then the defendant moved in to the premises for his own temporary residential use. On 4th of July, the claimant revoked his letter and requested a minor renovation to the premises; whereas the defendants, instead of renovating, posted a sign board for rent to others. Then the claimant argued the defendant had no more intention to keep the contractual relationship and sued for termination and the refundable deposit. The defendants also counter-claimed to terminate under the contract by 15th and confiscate the deposit.

The judge, found held a different benchmark to determine constitution of breach in this case, stated that the posted sign to rent, which was revocable, was different with a

¹⁵ Shan Zhang, 'Discussion to Anticipatory Breach System in Our Contract Law' (*Dissertation Alliance of China*, April 2014) part 3 <<http://www.lwlm.com/hetongfa/201404/726834p2.htm>> accessed 15 October 2014

¹⁶ SPC, *Selected Cases in People's Court*, (2005) vol.3 p242-246

rented situation which should be considered breach constituted; the anticipatory breach is not constituted in this case, so there was found no reason for the claimant not to pay the rental for the third quarter and the defendants obtained, by the contract, their contractual right to terminate since 15th of July. The counter-claim was upheld by the judge.

This case showed more than one loopholes under the article 94.2: the first is how to define a constituted anticipatory breach? In this case, to post a sign should be a must procedure to let the premises, was this less than enough to prove a breach by conduct? Should the conduct be justified by the claimant? What if, in the previous case, the ongoing decoration work was under a process of tendering? Will the different judge will give the same decision in this case since the tendering is different with the awarding. It seems that no clear line could be drawn to make all cases clearly distinguished.

The second loophole is termination seems the only remedy if anticipatory breach is confirmed. In one hand, this is coercive and also risky for a party to terminate the whole contract which contains his real intention to perform. In the other hand, will a subjective perspective to a behavior reflect the objective situation which means will a party's judgment to other's conduct can reflect the real intention of the other party? It is hard to answer and if it wills so, will it also make a chance for a party to abuse his right under this article? Scholars also criticized this single availability has discrepancy with international customs¹⁷; it is advised to subdivide the situation in this article into fundamental or substantial breach such as they are¹⁸ found in CISG 1980¹⁹ to afford more one remedies other than the termination.

The third loophole is there is no exact or clear definition found in Contract Law about the main obligation; how the judge's discretion will vary the scope of this definition? It is not easy to answer.

¹⁷ Daocui Sun, 'Discussion to Anticipatory Breach Mechanism' (*Law Education of China*, 17 April 2009) <http://www.chinalawedu.com/new/16900_174/2009_4_17_wa346493611714900222152.shtml> accessed 16 October 2014

¹⁸ CISG 1980, Article 71 72

¹⁹ United Nations Convention on Contracts for the International Sales of Goods 1980

2.3.2.3 Delayed Performance of Main Obligation

<Article 94.3> A party delays the performance of his main obligation, and then he also fails to perform within a reasonable period after being informed by the other party.

Besides what had been addressed in last section about the main obligation definition; a new issue also found in this article is the methodology to define a reasonable period. By skimming the whole context of the Contract Law, there is no defined exact duration or date post an occurrence to describe the reasonable period. Shall the judge decide by his discretion in each different case? If this is the mechanism, there would be flexibility exists; but can all the judges unify their opinions in similar cases? It is hard to conclude here. Since 2003, there are publications by People's Supreme Court can be resorted to as reference to decide the reasonable period by the judges and legal practitioners.

The first is an explanatory publication²⁰ regarding dispute resolution in premises sales contracts by People's Supreme Court; this interpretation governs sale contracts especially to premises for commercial and residential purpose, its articles are also found supplementary to fill vacuum or void in the Contract Law and other laws related and it became effective since 1st June of 2003. In Article 15, it is stated that, except parties agree otherwise, if the seller delays to deliver the premises or buyer is late to pay his payments, and there is no remedy to such delay within ninety days since he is officially informed to perform, the other party's request to terminate the contract under the Article 94.3 in Contract Law 1999 shall be upheld by the court.

The second is also a People's Supreme Court publication²¹ regarding to explanations to issues in application of the Contract Law 1999. It is regulated, in Article 24, that if a party fails to resort to the court for his objection within agreed period, such objection shall not be heard after the expiry; if there is found no agreed period or date in the

²⁰ SPC's Explanations to Issues to the Applicable Laws in Hearing Dispute of Commercial Premises Sales Contract, Judicial Interpretation [2003] No.7

²¹ SPC's Explanations to the Several Issues in Contract Law Applications by People's Supreme Court, Judicial Interpretation [2009] No.5

contract to raise an objection, the court shall not hear after ninety days from the objection rose. This judicial interpretation applies to the case post the effective date of Contract Law 1999 without being finally judged.

The first interpretation is cleared applicable to the premises sales contracts and to construe in a combination with the second publication, can an understanding or opinion, of the judgment committee, to the reasonable period in Article 94.3, especially to be applied in Construction Contract, could be refined hereby and defined as ninety days? The answer is hard to be given.

There is legal advice by practitioner available for judges, lawyers and even contract parties to refer to. It is advised²², by setting the ninety days as a general reasonable period, that there are at least three types of contract found obviously improper to apply this period: contract with a comparatively short duration, contract with obviously occasional or seasonal feature and a contract which needs a relatively short time for the obligor to perform such main obligation. Are these three types applicable to the construction contract? Except the project fits for the second type such as a stadium for certain ceremony or a boiler house at a community for winter radiation, it is not easy to conclude whether this advice applicable for construction contract and sequentially it would be adopted, up to which degree, by the courts.

A situation addressed in Article 107 of Contract Law 1999 is important to be mentioned here; if an objective circumstance, aforementioned and nicknamed as force majeure, happens with the delayed performance, it will not exempt liability of a party performs with delay. So, the scope of this article shall include the discussion of this section, it means, if a party is late in his main obligation performance, during and due to his delay, the occurrence of force majeure, if any, which, may trigger his right under Article 94.1, will not be effective any more.

²² Min Zhang, 'An Understanding to Article 94.3 of the Contract Law' (*Sina Blog*, 05 March 2010) part 3< http://blog.sina.com.cn/s/blog_655de34d0100hk0q.html> accessed 17 October 2014

2.3.2.4 Frustration of Contract Caused by Delayed Performance of Obligation or Other Situations

<Article 94.4> A party delays the performance of his obligation or his other breach whichever renders the contract purpose unachievable.

This article shall be split into two parts: delay performance of an obligation which is not considered as main and other breach which frustrates the contract also.

In the case *Quanzhou Licheng Zongda Moulding Factory suing Shanghai Lichi Lier Machineries Co., Ltd*²³, the claimant contracted to purchase a molding machine originated from Taiwan. The down payment was agreed in a figure of 20,000 RMB and delivery shall be one week after down payment made. After the delivery, the claimant, during his commissioning, found the machine is defective and raised a serious doubt to the origin of the machine. By urging the defendant many times to serve him documentations to prove the origin, the claimant was refused and he failed to justify his doubt; then he sued to terminate the contract and to return a doubled down payment as per stated in the contract.

After the machine had been officially tested by the court assigned agency, the judge stated in his judgment that the origin place document is an important proof to justify the agreed origination in the contract, so such document shall be considered in the same importance as the contract itself; failure to prove by the defendant directly reached the contract for a Taiwan-originated machine became frustrated. Meanwhile, testing agency also confirmed the machine was not made in Taiwan.

In the second case, *Yantai Food Co., Ltd suing Beijing Jinghua Bus (Daxing) Co., Ltd*²⁴, the other situation was applied in the judgment. By October of 2001, the claimant signed a contract to buy ten buses, the defendant should deliver as described in the contract by December and one payment in 700,000 RMB should be received prior to the

²³SPC, *Selections of Cases Judgments from People's Court*, (2007) vol 2 p 222-229

²⁴ SPC, *Judgments Review of China*, (2005) vol. Commercial & Business Cases Judgments

delivery. By taking over the buses on time, the claimant started to use them for his operation; but within two weeks, it was found fuel leakage in several buses. By June of 2002, rims of five buses cracked and exploded during driving; sequentially, in July and August, seven buses were found break system malfunctions, the claimant was forced to report to his managing group and to rent vehicles to maintain his operations. Since the first discovery to the defect, two full time mechanicals were dispatched to solve problems; remedial work such as scrutinizing, repairing, replacing and commissioning was made through all the time. In 2003, all the ten buses were confirmed stopped and the rims were tested unsatisfactory under the national standard; so the claimant sued to terminate the contract but the defendant argued that the defects at the rims could be solved by replacing new tires and he could not accept to terminate a contract after a year since the performance.

The judge, by citing Article 111<Defective Performance>, stated that when the performance is defective in aspect of quality, the claimant allowed the mechanicals to do in all possible manners to fix the defects; as per written in the law, to refund is also one of the solutions, besides the applied by the defendant, for defect. Simultaneously, the purpose of purchase buses for operation cannot be reached since the uninterrupted defects showed up; the contract should be terminated by Article 94.4 and Article 111. Depreciation value shall be taken into account to offset the usage of buses by the claimant; and the defendant was judged to return the first payment in around 600,000RMB after depreciation and loss caused to the claimant, according to Article 112 <Loss Occurs Post the Performance and/or Remedy> in approximate amount of 530,000 RMB. Interesting point is this case both parties appealed but this judgment was reaffirmed.

2.3.2.5 Other Conditions which are Applicable

This is a brief article just to leave the opening to the other articles and laws to cooperate with this termination section. In practice, mostly mentioned condition shall be put under this article is the defense to uncertainty which was a concept imported from other legal system.

Article 68 states that a party, who shall perform his obligation first, can suspend his performance if he can clearly evidence the other party has (1) serious deterioration in operation, (2) asset transfer and/or cash withdrawal which might be doubted to evade obligation, (3) commercial credit loss (4) or other loss or potential loss of performance capability situations. The party suspend without a clear proof he will become liable for the breach. Sequentially, in Article 69, if the other party can provide assurance then the suspended performance shall be resumed; if the other party fails to assure or recover in his capability, the suspending party can terminate the contract.

The situation found and defined as defense to uncertainty in the abovementioned articles are agreed originated from the German Civil Code²⁵ whose concept was widely adopted by many civil law countries and their systems. Such introduction, in combination with the Article 94.2 Anticipatory Breach, constructs very unique characteristic in Chinese contract law which holds civil and common law features simultaneously. Of course such characteristic received positive comment due to its enrichment, but it was also criticized²⁶ harshly in the following aspects: (1) the law didn't state the occurrence of the mentioned four situations; prior to the contract, can a party, who shall know but fails to notice, treated discard such right of defense? (2) The word "suspend" is not reasonable since the performance has not been started yet; (3) Is the Article 68, in a construction contract, still applicable if the performance bond is made by the contractor? It is not answered by the law also; (4) The party, performs after, would not enjoy this right under Article 68 according to its context, even he can prove the same; and this point is also found contradicting to the Article 108 which states that a party can seek to be remedied under the liability of the anticipatory breach.

²⁵ German Civil Code, S 321 <Defense for Uncertainty>

²⁶ Limin Hui, 'A Discussion to Defense to Uncertainty in Our Law' (2009) CUST Journal Vol.5 56
<<http://wenku.baidu.com/link?url=MzqgRnuWwkzxcwGnA1OxyYuaDSHtAY68isgPm0JLpeEFVeCf4ikwTEtSZp5wE4HvIMAUDDxfqCzU1dPJh5gSfhjXUijqHpu2DIU0hPeNvm>> accessed 18 November 2014

Meanwhile in the application of this article, it is also commented by legal practitioner that this article must be used under a strict interpretation²⁷. One important reason is to terminate a contract means the deal which most probably reflects true intentions is frustrated; it is not only the loss of parties but also cost waste to the market. Also, besides this comment, to terminate shall be used in good faith which is to avoid bigger or larger loss in continuous or further performance whereas is not to abuse the right conferred by the law which may reach a level of disturbing the good order of the society.

²⁷ Tao Xv, 'Misunderstanding to Contract Termination in Practice' (*Find Law*, 12 April 2013) <<http://china.findlaw.cn/lawyers/article/d201424.html>> accessed 19 October 2014

Chapter 3-Chinese Courts' and Industries' Publications Related to Unilateral Termination of Construction Contract

Besides the laws governing the unilateral termination of a construction contract, there are also publications by courts and other associations such as arbitrator and lawyers. For the courts' publications, the importance is not only the authority is conferred but also the filling effort to the gap or vacuum existing under the law; meanwhile such effort can be considered supplementary to the current law and additional articles which are not found in laws. For other publications by arbitrator and lawyer associations, they do affirm the conformance to the courts especially the SPC's guidance, they also aim to help a party get advised prior to the trial.

3.1 Judiciary of China and its Hierarchy, Functions and Publications

Judiciary of China was organized, by Constitution Law of China 1982, and divided into four levels. The final and highest is the Supreme People's Court (the "SPC") which located in the capital Beijing; its function²⁸, as the highest judgment organ, is to hear all sorts of cases, to publish the judiciary interpretation and commentary, to monitor the lower courts' judgments and to administrate national judicial works within the scope defined by the law.

Under the SPC, there are two court systems running in parallel: local people's court and the special people's court; the former system contains three levels which are the High People's Court (the "HPC") in provincial level, Intermediate People's Court (the "IPC") in city's level and the Grass-Root People's Court (the "GRPC") at city's district level and towns level. The latter system, which is within the scope of this study, consists of military, railway, maritime and forestry courts.

The most important concern in this study, which shall be drawn from the abovementioned, is the publications of the judiciary interpretation and commentary from the SPC and its inferiors. The former's work would govern nationally whereas the

²⁸ SPC, 'Introduction to the People's Court' <<http://www.court.gov.cn/jigou.html>> accessed 13 January 2015

others' are applied within their respective jurisdictions. The publications are important not only because it interprets, guides and even imports what considered missing or vacuum under the current laws but also it is shown up to fulfill special needs at a specific time or duration. The construction industry, also and especially, benefitted much from such publications dedicated to it during its suffering from external shock and internal fluctuations.

3.2 SPC's Publications

First of all, there are around twenty dedicated publications by the SPC are found directly related to the construction and its activities; they could be categorized into legal interpretations, advices either in long term or temporary basis, guidance to the lower courts in hearing cases and responses or replies to certain issues or specific cases which are found typical in the industry. To be more specific among these published, four, but into two sorts, are found vital and heavy weighted to construction contract terminations. These two sorts are the detailed construction contract termination under the contract law and change of circumstance which is newly imported into the legal system to cope with contemporary issues.

3.2.1 Detailing to Construction Contract Termination under Contract Law 1999

In 2004, the SPC published its legal interpretation named <SPC's Interpretation to the Applicable Laws in Hearing Construction Contract Disputes >²⁹(the "Interpretation 2004") there are two articles defined detailed situations that the party can terminate the contract unilaterally.

Article 8:The employer's request to terminate the contract shall be upheld by the court if the contractor is found, as one of the followings, (1) expressly states or shows by conduct not to perform his main obligation; (2) fails to complete the project by the stated date in the contract and fails again, after been urged by the employer, to complete

²⁹ SPC's Interpretation to the Applicable Laws in Hearing Construction Contract Disputes, Judicial Interpretation [2004] No.14

within a reasonable period; (3) his built work is unsatisfactory in quality and he refuses to remedy; (4) unlawfully contracts out the whole project or illegally subcontracts.

Article 9: The contractor's request to terminate the contract shall be upheld by the court if the employer is found, as one of the followings which all render the contractor unable to construct and he fails to perform certain obligations within reasonable period after being urged by the contractor, (1) fails to pay as agreed; (2) supplies, under the mandatory standards, unsatisfactory main construction material, components and machineries; (3) fails to assist as agreed.

The first point needs to be pinned here is the Article 8 forms a construction version of Contract Law Articles 94.1-94.3 and the Article 9 falls in to Contract Law Article 94.4; but both articles and their each contained will render the purpose of unachievable. It is obviously found here that the intention of this publication is to define the constructional situations but not to go out of the Contract Law scope; it is actually a specifying.

Secondly, the Vice President of SPC commented that, by specifying the termination under contract law in general to fit construction contract, it is aimed, at large and utmost, to avoid termination ad libitum in order to guarantee the contract to be performed as agreed³⁰. Meanwhile, he also confirmed the three situations listed in Article 9 are the failures in main obligations performance.

Further, in Article 8, its first two situations are exactly the same as they are in contract law; the other two seem so general by construing, but to address them here is to build direct links with other regulations and laws available for judge's applications. The third point mentions unsatisfactory quality, this connects to the quality requirement³¹ under the Contract Law 1999. In last point, the unlawful wholly-contract out and the illegal

³⁰ Huang Songyou, 'Answers to the Questions Asked Regarding the Interpretation' (*Sina Blog*, 20 April 2012) <http://blog.sina.com.cn/s/blog_4d53e51101012ntx.html> accessed 24 October 2014

³¹ Contract Law 1999, Article 111

subcontract are falling into all circumstances³² in <Construction Project Quality Management Regulations>.

In Article 9, the prerequisite to apply is that the failure must trigger contractor's incapability to continue its work, this means fall to pay on time which does not render this incapability will not automatically active such right to terminate. The reasonable time found in this article receives pros and cons from the legal and constructional industries; one positive voice comments that flexibility is offered³³ by this article since there are available either in international practice such as twenty-eight days in many standard contracts such as FIDIC and national contract promoted by government are ready to be applied. But the negative sound, which was raised prior to the official publication of this interpretation, also doubts that this might be still subject to the sole discretion of the judge³⁴; this advice was unfortunately not adopted, but it is worth to be raised as a concern from the industry. Also, the unsatisfactory found in supplied opens a channel to <Standardization Law of People's Republic of China>³⁵ and its <Implementation Regulations>³⁶ which both require a mandatory achievement to the minimum standards in supply. Meanwhile, the last part of Article 9 states failure in assistance by the employer can be traced in contract law³⁷.

To conclude this legal interpretation, firstly, since the laws governing the construction contract are found still in principle status which results different understandings and interpretations in legal system either in hierarchical or regional aspect, it finally unifies and helps reach legal judgment work consistency; this accomplishment sequentially assured the macro fairness by the legal system. Secondly, this interpretation builds links

³² <Construction Project Quality Management Regulations>, [2000] No.279, State Council of China, Article 78

³³ Huanan Xv, 'Construction Contract Termination and its Legal Consequences' (*Tongfeng Lawyer*, 15 March 2012) Ch 4 Part 2 <<http://www.jstongfeng.com/nview.asp?id=246>> accessed 22 October 2014

³⁴ Min Chen, 'Advice to Revise the Pre-published SPC Interpretation 2004' (*Law Library*, 28 January 2004) part 5 <http://www.law-lib.com/lw/lw_view.asp?no=2502> accessed 22 October 2014

³⁵ <Standardization Law of People's Republic of China>, [1988] No.11, Article 14

³⁶ <Implementation Regulations of Standardization Law of People's Republic of China>, [1990] No. 53

³⁷ Contract Law 1999, ch 15 Article 259

to various special and specific governing laws and regulations, such network built sums up all available resources to be implemented effectively and uniformly. Also, at large, in perspective of a nation, this interpretation guarantees good order of the construction market and protects also rights and interests of participants.

3.2.2 Change of Circumstance Applied to Unilateral Termination of a Construction Contract

3.2.2.1 Historical Background of the Change of Circumstance in China

Firstly, change of circumstance is a formal legal definition from other civil law countries and secondly, it is, so far, not shown in any article of any existing laws; but such definition is found in several publications of courts in different levels such as interpretations, comments, guidance and suggestions.

Change of circumstance was, by its first time, shown up in <SPC's Interim Suggestion in Hearing Construction Contract Dispute>³⁸; the Article 27 of Part 4 stated that if it is agreed as lump sum price in the contract, the price shall be finally settles as per stated if the contract itself is valid. The contractor can request to increase the contract price if the construction materials prices increase significantly which is found obviously unfavorable to the contractor due to the change of circumstance; but if the increment in the materials prices are within the normal range of the market risk, such request shall not be considered.

This is the first time that the change of circumstance is shown in a legal opinion as a definition in perspective of the SPC; but still, the prerequisite to apply was so general, and such as the unfavorable level and range of the market risk were also so ambiguous in the article. It was commented that there were three main reasons³⁹ for the change of circumstance not adopted in the legal process: the first is to apply the change of

³⁸ SPC's Interim Suggestion in Hearing Construction Contract Dispute, 8 May 2002

³⁹ Gang Zhao, 'A Brief Discussion to the Application of the Change of Circumstance in Construction Contract' (*China Commercial and Civil Law*, 10 September 2010) part 2
<<http://www.civillaw.com.cn/article/default.asp?id=50484>> accessed 24 October 2014

circumstance may result undesirable instability of the contract; the second is it is hard to define a difference change of circumstance and commercial risk; and also the judges' discretions may vary not only among different regional courts but also between a court and its superior or inferior counterpart; this may potentially make the change of circumstance as a principle be abused or render unfairness in the justice. Also, since this suggestion was named in an interim character, it might be another reason of the discard.

3.2.2.2 Activation of the Change of Circumstance in China

The SPC published the <SPC's Interpretation No.2 to Issues in Application of Contract Law>⁴⁰(The "Interpretation No.2 2009") and made it effective since 13th May of 2009. The Article 26 stated that post the covenant of the contract, if the objective circumstance significantly changes and such change is not predictable at the time of covenant and out of the huge change within the ordinary commercial risk; the party may request the court to vary or terminate the contract if to continue the performance may render unfairness to this party or make the contract purpose unachievable. The Court shall combine the fairness principle with the physical truth of the case to decide the variation or termination.

To construe the body of the article, it is found no large difference with the one published in 2002; but this time, the national economy as a macro circumstance had been changed due to the financial crisis sweeping the whole globe since October of 2008, would this factor make a force to implement this principle? The answer is it immediately triggered the application in the legal system. To demonstrate, two cases judged at a short period prior to and post this publication would be cited hereafter.

In the case *M Contractor suing G Water Treatment Co Ltd*⁴¹, the claimant signed a lump sum contract with the defendant at a value of 30 million RMB by April of 2007 and he should complete the project on 1st February of 2008. Since the commencement

⁴⁰ SPC's Interpretation No.2 to Issues in Application of Contract Law, Judicial Interpretation [2009] No.5

⁴¹ Gang Zhao, 'A Brief Discussion to the Application of the Change of Circumstance in Construction Contract' (*China Commercial and Civil Law*, 10 September 2010) part 1
<<http://www.civillaw.com.cn/article/default.asp?id=50484>> accessed 24 October 2014

of the project in June of 2007, the prices of the main materials had hugely changed, such as the rebar's price jumped from 3700 RMB/ton to 7200. In order to complete on time, the claimant requested a variation valued in around 5 million to cover the prices increment in combination of showing a guidance published by provincial construction committee regarding adjustment of the contract value due to the fluctuation of the market prices in October of 2007. But the defendant argued that the contract was in lump sum form and there was no unit rate could be referred to for variation and the guidance was an administrative document which should not be considered to have legal effect. Since the contention continued and the defendant refused to pay as requested, the claimant sued but finally, before the end of 2008, he was not upheld by the court.

Whereas in the case *Mrs. Liu suing Bureau 6 of China State Construction Engineering Company*⁴², accused on 6th May of 2009 which was after the Interpretation No.2, reached a totally different result. The claimant, in April of 2008, signed to construct a plant and office building for the defendant in lump sum price in 19.66 Million RMB. Since the July of 2008, the claimant declared significant changes in various construction materials prices in comparison to the contract date; and this declaration was confirmed in a circular between her company and the defendant, breakdown recorded in showed that the concrete C20 increased to 340 RMB/meter cubic from 210 RMB, cement leaped to 400 RMB/ton from 230 and stone's price soared to 65 RMB/meter cubic from 26 only. The claimant started to pay from her own money, due to the huge increment of materials prices, from September of 2008 even she was paid monthly by the defendant on time; by the December of 2008, she ceased all the site work due to the hardship in cash flow even the remaining work is less than 10%. The claimant requested prior to her stop several times to adjust the contract price, but she was refused by being stated the contract was in lump sum price; and before she filed a case, she verified the cost was approximately 29.86 Million RMB. An interesting point here was the attorney of the claimant, by 26th May of 2008 before the trial but post the Interpretation No.2 published,

⁴² *Mrs. Liu suing Bureau 6 of China State Construction Engineering Company*, Jinan IPC, [2009] Case No.1328

expressed during an interview⁴³ that the change of circumstance would be applied in this case since the Interpretation No.2 was freshly published and this case might be the No.1 succeeded under the principle of Change of Circumstance. On the 13th June of 2010, the Intermediate Court upheld the claimant and confirmed his attorney's opinion; this case became the first successful post the publication of the Interpretation No.2.

Unsurprisingly, the principle of the Change of Circumstance was officially adopted, admitted and applied by the legal system; another factor cannot be neglected here was a further opinion, which should be treated as a tamping machine to the adoption and application, was published by the SPC to explain, in detail, how the application of Change of Circumstance should be implemented.

3.2.2.3 Tamping the Application of the Change of Circumstance

By July of 2009, the SPC issued its <Guiding Suggestions in Hearing Civil and Commercial Contract Dispute under the Current Circumstance>⁴⁴ (the "Guiding Suggestion 2009"). This Guiding Suggestion expressed SPC's concern to the increase of civil and commercial disputes due to the impact of the global financial crisis; the SPC, upon this suggestion, aimed to coup with, on time, the prevalent, representing and key issues and problems in order to effectively resolve the conflicts and disputes. The final destination was to maintain the market trade order and then to rebuild the confidence in the market.

There are six parts in this Guiding Suggestions, the first and the foremost part is found solely dedicated to the application of Principle of the Change of Circumstance; and such guiding effort was firstly given so strong and detailed. The four key points are as the followings:

(1) Due to the huge fluctuation in raw materials prices, change of the demand and supply relationships in market, insufficient cash flows and other various factors, large

⁴³ Yuan Gao, 'Lump Sum Price Faced Huge Price Change, the Contractor Sued to Vary' (*Sina News*, 26 May 2009) < <http://news.sina.com.cn/c/2009-05-26/075915685520s.shtml> > accessed 24 October 2014

⁴⁴ SPC's Guiding Suggestions in Hearing Civil and Commercial Contract Dispute under the Current Circumstance, [2009] No.40

numbers of disputes emerged; the disputants' requests, by applying the change of circumstance, to vary or even terminate the contract, their requests must be strictly scrutinized by the People's Courts according to principles of the fairness and the change of circumstance.

(2) The People's Court, while applying the principle of change of circumstance, shall sufficiently observe that the global financial crisis and domestic macroeconomic circumstance change are gradual whereas not totally unforeseen and abrupt processes; during such gradual process, the market participants shall, in certain degree, be able to predict and judge. The People's Court, also, shall strictly scrutinize the a party's claim in unforeseeable event or situation; a further and stricter degree in shall be given to the contracts especially dealing with petroleum, coke, metals and others risk investments such as stocks and future goods which are all having frequent fluctuations and long-term higher risks.

(3) The People's Court shall reasonably distinguish the change of circumstance and the ordinary commercial risk. The latter one is the inherent risk for commercial activities such as change of demand and supply or fluctuation of the price which both do not reach an abnormal level; whereas the change of circumstance is not an inherent risk which cannot be foreseen at the time of covenant. The court shall also, in combination with the particular case, judge whether the predictability and degree of the risk fall into the scope of high risk and high return trade.

(4) The People's Court shall emphasize to protect the party who performs his obligations. To apply the change of circumstance is to sufficiently focus on the interest balancing and then adjust parties' relationship to their contractual interests reasonably and fairly, whereas not simply to release a party from performing his obligation and to let the other undertake the adverse sequence. To avoid abusing the principle of the change of circumstance which may stir up the trade order of the market, the court must strictly apply its verification to the change of circumstance.

Actually, this suggestion, published at this impacted time, delivered several strong signs and information that the government of China concerned: the first is number of disputes increased and the conflicts were created by global crisis; secondly, among the disputes, there were situations suitable for application of change of circumstance; thirdly, by each single case, its suitability to application must be strictly examined by the court to avoid abuse to claim in change of circumstance and unfairness for not been upheld if it should been; fourthly, variation to the contract must be tried under the effort of the court prior to the termination; at last, the ultimate task for the court or judicial system was to maintain the society and its market in the best order under the global impact by adding change of circumstance to offer flexibility in law and fairness. Meanwhile, if the implementation at this critical time can reach a desirable outcome, it would be a successful legal improvement even for the time post the crisis or after the recovery from the impact.

3.2.2.4 Is the Change of Circumstance Applicable Unilaterally to a Party Only?

Some interesting discussions about ideas and opinions to the application of the change of circumstance shall be address here to show how the application may vary due to different situation or simply, if a party claim under change of circumstance and he succeeds, can the other party does the same if the situation flips or becomes unfavorable to him?

The first example, if a real estate developer sold an apartment on map to a buyer at the price of 4000 RMB/M², but prior to the handing over the market price raised up to 6000 RMB/M², can the developer request to vary or terminate the contract? The second, if the market price dropped down to 2000 RMB/M², can the buyer claim the same? There is so far no clear answer in from the court, but a practical opinion from lawyer may found suitable for these two questions: if the contract purpose for a party is not varied to the unachievable degree, he may not claim under the change of circumstance⁴⁵. This means,

⁴⁵ Li Hui, Quanyang Project Estimation Information, 'The Practical Application and Operation of the Change of Circumstance in Construction Contract' (2010) SCECI

in the first example, even the price increased surprisingly, but the purpose to hand over at the contract price as contract purpose was not changed; and besides this, the developing might be considered similar to high risk and high return industry. To the second example, the same shall be applicable which means to buy apartment for accommodation at the contract price was not frustrated, so the change of circumstance shall not be applicable also.

Another questions also shall be addressed here is what if in the case *Mrs. Liu suing Bureau 6 of China State Construction Engineering Company*, the price would keep changing until a level could not be undertaken by the defendant for temporary time? Can he terminate the contract? Let this to be left for answer in further discussion of this study.

3.3 Publications of HPC and IPC for Unilateral Terminations

There are lots of publications by lower levels of courts and several of them are found mentioning termination of construction contract and the change of circumstance; they are aimed to deal with the common issues merged prior to, during or post the financial crisis in courts' jurisdictions. Due to the hierarchical system of courts, the lower court will not prevail over its superiors; so the publications are mainly and firstly to comply with the SPC's Guiding Suggestion then secondly to detail or personalize as the situation required in perspective of the publishing court. The related publications and its parts needed this study is to be listed briefly in the following for highlighting:

(1) Jiangsu Provincial HPC:

It published a research⁴⁶, which is found even earlier than the SPC's Guiding Suggestion. It mentioned the application issues to the principle and it also emphasized that the first mark of the principle of the change of circumstance could be dated back to

⁴⁶ Jiangsu Provincial HPC, *Judicial Research on Commercial Issues under the Change of Macroeconomic Circumstance* (23 April 2009) part 3

year of 2002⁴⁷ which meant it was admitted as a general principle unofficially since long period ago but it was seldom applied.

(2) Shandong Provincial HPC:

By 2011, it distributed a meeting minutes⁴⁸ officially for reference of whole province legal entities. It answered clearly that the change of circumstance could be applied for lump sum price contract if the court finds it is suitable for the case situation by referencing to the SPC's Interpretation No.2 2009 and Guiding Suggestion.

(3) Fujian Provincial HPC:

In 2008, it answered in its reference⁴⁹ that any unilateral termination by the employer shall be in strict compliance with the Article 8 of SPC's Interpretation 2004 and the court shall be aware of the invalidity of any extension or expansion of the scope defined by the SPC.

(4) Yancheng Municipal IPC:

The city's IPC trial committee published their suggestion⁵⁰ to confirm that the unilateral termination by contractor or employer must comply with Article 8 and 9 of SPC's Interpretation 2004 and the Article 93 and 94 in Contract Law. An interesting point here is the committee put the SPC's interpretation in front of the contract law; this demonstrate that the judge-made law such as the interpretation may taking more important place beside complementing the prevalent laws.

(5) Hangzhou Municipal IPC:

⁴⁷SPC's Legal Issuance [1992] No.27

⁴⁸ Shandong Provincial HPC, *Provincial Civil and Commercial Judgments Works Meeting Minutes* (30 November 2011) part 5

⁴⁹ Fujian Provincial HPC, *Answers to Difficult Issues in Hearing Construction Contract Dispute* (Fujian Civil and Commercial Judgment Reference, 2008) Vol. 1 part 9

⁵⁰ Yangcheng Municipal IPC, *Guiding Suggestions to Several Issues in Hearing Construction Contract Dispute* (15 July 2010) part 27

It confirmed⁵¹ the same as it is in Fujian Provincial HPC's reference mentioned above.

(6) Shenzhen Municipal IPC:

Besides confirmation of the unilateral termination right of the contractor by referring to Article 9 of the Interpretation 2004; it⁵² also stated that the following situations may also trigger the same termination if the employer: fails to supply geotechnical and underground piping documents and information; fails to hand over the site or to supply path, water or electricity for the work as the time agreed; fails to afford material as agreed or unsatisfactory materials; fails to inspect and take over the section work as the time agreed; fails to assist the contractor as agreed.

3.4 Other Industrial Publications Related to Construction Contract

Other than the previously mentioned official publications, there are also other available resources for the usage of unilateral termination of construction contract by arbitrators and lawyers by their respective committees or associations; but an important point shall be addressed here is such other resources are not compulsory and not binding to any member or participant in his industry. The main purposes of the publications are as references for the practitioners.

(1) Tianjin Arbitration Association:

For the convenience of the registered arbitrator, the association published its guidance⁵³ to ease the arbitration process.

The Part 10, which named contract termination listed, actually combined, all related to unilateral terminations under laws, legal interpretations and decrees; meanwhile an extra circumstance which is only advised under this guidance is if the main structure

⁵¹ Hangzhou Municipal IPC, *Answers to Practical Questions in Hearing Construction Project Premises Related Disputes* (1 November 2010) part 8

⁵² Shenzhen Municipal IPC, *Guiding Suggestions in Hearing Construction Contract Disputes* (9 March 2010) part 13

⁵³ Tianjin Arbitration Association, *Arbitration Guidance to Construction Contract Dispute* (1 April 2010) part 10

fails to pass test or the project fails to pass the test on completion and the contractor refuses to remedy or is unable to remedy, the employer can unilaterally terminate the contract. Also, if the employer supplies unsatisfactory materials or components and he refuses to replace satisfactory ones, the contractor can do the same unilaterally. The later Part 11 listed all laws and regulations must be referred to.

(2) All China Lawyers Association (the “ACLA”):

The ACLA, which established in 1986, includes all registered lawyers as its members and its publications⁵⁴ included the unilateral termination by law in general and it stated that termination by law shall be in compliance with the Article 8 and 9 in SPC’s Interpretation 2004 which based on Article 93 and 94 of Contract Law. Regarding to the change of circumstance, it stated that the claim under this principle must be requested to be determined by the People’s court who shall decide case by case after its scrutiny. Besides stating the laws and related regulations, this publication, in its Article 114, also reminds the attorney what must be aware of and referred to under the lawful terminations.

(3) Shanghai Bar Association (the “SBA”):

The SBA is a social community established in 2002 under Lawyers Law of China and operated under the supervision and guidance of Judicial Bureau of Shanghai Municipality. Its Guidance 2007⁵⁵ also stated the same as it is mentioned in Tianjin Arbitration Association’s guidance but in the view and perspective of lawyers and attorneys.

⁵⁴ All China Lawyers Association, *Operational Guidance for Lawyer’s Legal Business in Dealing with Construction Projects* (19 August 2013) article 109 120

⁵⁵ Shanghai Bar Association, *Operational Guidance for Lawyer’s Legal Business in Dealing with Construction Projects* (18 December 2007) ch 3

Chanter 4-Unilateral Termination in Standard Contracts under Chinese Law:

China is a communist country whose construction market is different with it is in capitalisms countries, there are interferences by competent authorities which may consider more prevailing than the contract itself. It is a need for the standard contract to coup with all these existing or potential challenges; so to have articles to interact and also interlock with related authorities and even their publications is ultimate purpose of the maker of the standard contract.

In this chapter, unilateral termination mechanisms will be examined by going through different versions of the standard contracts in China; also the FIDIC 1999 Red Book and its unilateral terminations will be also examined to see how it would work under the industrial perspectives.

4.1 Standard Contract of China:

In the construction market of China, the most widely used contract is the Construction Contract (GF-2013-0201) co-produced by Ministry of Housing and Urban-Rural Development and General Administrative Bureau of Commerce and Business; this contract had been firstly made in 1991 and significantly updated and revised in 1999 and 2013. The trend of change was to adapt the rapid change of the domestic market and also to cooperate with currently effective laws and regulations without conflicts. This chapter will only examine the unilateral termination mechanisms under the 1999 and 2013 versions. One important point has to be addressed here is this standard contract is advised to be promoted by the government but it is not compulsory to be used.

4.1.1 The Construction Contract 1999 and its Unilateral Terminations

The Construction Contract 1999⁵⁶(the “GF1999”) was announced in December of 1999 and it immediately replaced the 1991; the publisher also stated the fabrication was according to the Construction Law and the Contract Law of China.

⁵⁶Construction Contract (GF-1999-0201)

The GF1999 has forty-seven articles in its general conditions; and the same was arranged and scheduled in its particular conditions but only twenty-six articles are found revisable and negotiable based on the general conditions.

Regarding to the contract termination, the Article 44 defines all circumstances: The 44.1 states the right to terminate after mutual consent has been reached; the 44.2 empowers the contractor, if he suspends the work due to non-payment as stated in Article 26.4, can terminate the contract after fifty-six days of the suspension; the 44.3 confers the power to the employer to terminate if he finds the contractor illegally subcontracts his work by referencing the Article 38.2; the 44.4 defines that any party can unilaterally terminate the contract due to the force majeure or other party's breach which renders the contract purpose unachievable. The rest of the Article 44 lists the time and delivery requirements of the termination and rights of parties post termination. The terminations especially the unilateral ones in GF1999 are found generally in line with the Contract Law and its Article 94 except the anticipatory breach stated in 94.2; so the scope under the GF1999 is a bit narrower than the Contract Law in this point. And another thing which must be mentioned here is in particular conditions, the Article 44 is found wholly missing which means it shall not be revised in the perspective of the contract publishers.

4.1.2 The Construction Contract 2013 and its Unilateral Terminations

In 2013, the Construction Contract was totally revised and renamed as Construction Contract 2013⁵⁷ (the "GF2013"); its general conditions contain twenty articles and it is accompanied hereafter by particular conditions for individualization as needed for certain project. Meanwhile, the GF2013 states in its preambles that it is fabricated in line with Construction Law of China, Contract Law of China, Tendering Law of China and other related laws and regulations; it is also not compulsory but highly advised to be used in the industry by the co-authors Ministry of Housing and Urban-Rural Development and General Administrative Bureau of Commerce and Business.

⁵⁷Construction Contract (GF-2013-0201)

The Article 16 named as Breaches defines all circumstances identified by GF2013. If the employer, under Article 16.1, (1) fails to issue commencement permit within seven days prior to the agreed commencement date; (2) fails to pay the agreed amount of payment as stated in the contract; (3) revokes the work and either execute such work by himself or subcontract it to others under the Article 10.1 Variation; (4) supplies materials, machineries not comply with agreed specifications, quantities or qualities; (5) renders a suspension of the construction due to his own breach; (6) , without rational reason, fails to instruct resumption of the suspended work within agreed period or renders impossibility to the contractor to resume the work; (7) expresses explicitly or by his conduct not to perform his main obligations under the contract or (8) fails to perform his other obligations under the contract, the contractor shall inform the employer to rectify within a reasonable period; if the employer fails to remedy within 28 days, the contractor empowers under this article to suspend the related work. If another 28 days post the suspension, the contractor is entitled to terminate the contract unilaterally.

Meanwhile, the employer is able to terminate so, under the Article 16.2, if the contractor (1) breaches the agreed subcontract mechanisms; (2) fails to purchase as agreed in the contract or uses unsatisfactory materials and machineries; (3) fails to make his work achieve the quality as agreed; (4), without any permission from the employer, withdraws any materials or machineries delivered and recorded in the payment; (5) fails to comply with the agreed program which renders any delay; (6) ,within the remedy period, fails to fix defect within reasonable period or refuses to remedy as per requirement of the employer; (7) expresses explicitly or by his conduct not to perform his main obligations under the contract or (8) fails to perform his other obligations under the contract. Unlike the mechanism in Article 16.1, the notification to correct shall be released by the Engineer who shall also define the length of the reasonable period. Fails to correct or to do by the contractor as requested, the employer hereby can unilaterally terminate the contract.

Unlike the GF1999, the new contract allows parties to modify each single circumstance in particular conditions according to their practical needs and to add other situations as per request by each party; the flexibility is confirmed offered herein, but a serious doubt raised here also is can the employer by using his stronger bargaining power to vitiate the right and fairness conferred to the contractor under the general conditions? In construction market of China, the possibility by the employer to do so might be found even higher than other markets; not only because the employer is the payer, but also it is easy for him to find other contractors in the huge market even from different regions.

It clearly shows the intention of the contract publisher that, if any breach occurs, remedies shall be made to maximize the possibility of the continuity of the contract. Termination, either by mutual agreement or unilateral action, will harm the original intention of parties at the time of covenant and meanwhile, the consequence post the termination is also a heavy burden to both of parties.

Compare the GF2013 with its old-timer GF1999, the newer version in context is restructured to approach the most prevalent contract FIDIC Red Book 1999; and the contract price applied in association with Bills of Quantities is also a trend to get close to international practice. Meanwhile, another special point shall be mentioned here is in both GF1999 and GF2013, the contract price shall be made either in fixed lump sum price, variable lump sum price and cost plus remuneration; and any choice to the contract price, it is revisable with either with pre-agreed conditions or compelled condition such as fluctuation out of plus or minus 5%.

4.2 FIDIC 1999 Red Book in China:

In China, FIDIC contract was firstly used in The Yellow River Xiaolangdi Dam Project⁵⁸ which was financed by the World Bank and tendered internationally in 1991. Through the reform and open process in China, FIDIC is getting popular and plays important role in the market. There are two key factors pushing the implementation of

⁵⁸ Xi Xiao, 'History of the Yellow River Xiaolangdi Dam Project' (*China Net*, 28 May 2008) <http://www.china.com.cn/aboutchina/data/zmslgc/2008-05/08/content_15122872_2.htm> accessed 4 November 2014

the FIDIC contract: the first is when international fund, investment or cooperation involved, the foreign party usually has less knowledge of the promoted Chinese contract and current laws and regulations which are considered as extra obstacles rather than the Chinese language, so to choose unfamiliar contract may reach unpredictable sequence or result if any undesirable circumstance happens. The second factor is in recent years, there are many Chinese construction companies expanded their business to other international markets especially Africa and Middle East. The overseas business made these companies experienced with the FIDIC contract, so just simply shift the usage to domestic market, seamlessness and compatibilities are found to the projects in their own country and market.

Since FIDIC is a popular contract in the international aspect, to discuss the unilateral termination circumstance by construing the clauses will make this study overstaffed; so in the following part, the focus will be on compatibility of the termination mechanism under the laws of china and potential conflicts may emerge due to directly application of the FIDIC contract. Meanwhile, the discussion will also only focus on the Red Book 1999 which is the only availability found in civil constructions such as building, bridge and roads projects.

Terminations including unilateral ones by either party are found defined in Clause 15 and Clause 16; if the Red Book is adopted, all circumstances mentioned in shall be treated as termination by agreement stated in Article 93 which is one of the two general terminations under the Contract Law 1999⁵⁹. Such consideration by legal association actually and simply removes the potential conflicts with the Article 94 Termination by Law under the Contract Law 1999; it greatly makes the Red Book 1999's application smooth in the market. The FIDIC Clause 15.5 defines termination by the employer for his convenience, and such termination can be applied but not to execute the project by the employer itself or other contractors. This is actually argued as a high risk in other markets and legal systems to the contractor, but in China, such convenient termination

⁵⁹ All China Lawyers Association, *Operational Guidance for Lawyer's Legal Business in Dealing with Construction Projects* (19 August 2013) article 137

might be working properly or even perfectly with the existence of the principle of change of circumstance. One example can be given here: if the contractor claim for increment of the contract value under the principle of change of circumstance once the market price is found significantly increased. By citing external situation of the case *Mrs. Liu suing Bureau 6 of China State Construction Engineering Company*, such claim would be upheld by the court. But if the increment is also exceed the budget limit of the employer, he must pay more than planned which may also render hardship in his cash flow. Under this circumstance, if the Red Book 1999 is used, the employer may choose to terminate the contract to avoid greater loss; and since the contract will be paid save the completed partial work, there is actually no real loss for both parties.

To use FIDIC Red Book 1999, parties shall also observe certain valid clause might be nullified by the other laws of China. Under the Clause 4.4 Subcontractors in FIDIC, it forbids the contractor to subcontract his work without permission of the engineer, but it does not prohibit (1) subcontract to another contractor without qualification or unfit qualifications, (2) subcontractor to subcontract again and (3) subcontract the main structure work to another contractor. Whereas these three not prohibited, which in other words allowed under the Red Book 1999, will be nullified by the Article 8 (4) of SPC's Interpretation 2004 in conjunction with Article 78 of <Construction Project Quality Management Regulations> mentioned previously as unlawful out-contracting the whole project or illegal subcontracts.

Chapter 5- Unilateral Terminations in Construction Contract under the UAE Law

United Arab Emirates (the “UAE”) is a federal country established in 1972 and contains seven emirates including Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Fujairah, Umm Al Qaiwain and Ajman. UAE is adopting civil law legal system⁶⁰ which is heavily influenced by Roman, French legal systems and Egyptian and Islamic Shari’a Laws. There is federal court system, which includes Court of First Instance, Court of Appeal and Union Supreme Court, is adapted by the emirates except Abu Dhabi, Dubai and Ras Al Khaimah who have their own systems which will primarily use the federal law before their own laws.

The law governing the construction activity and its contract in UAE is the Civil Transaction Code⁶¹ (The “CTC1985”), there is a dedicated section named Muqawala defined all circumstances applicable to construction contract termination including unilateral ones. The Muqawala is an Arabic word which means a contract that to undertake by a party to make a thing or to perform a task⁶²; whereas the building a construction project is wholly fit the thing-making defined in this section of the law. There are three article in Muqawala related to terminations and unilateral terminations which will be discussed in the followings separately.

5.1 Article 892-To Terminate in General

Article 892 states, in general, three conditions for contract terminations which are upon the completion of the work, upon a cancellation by mutual consent and by court order. The first is actually an automatic conclusion of the contract post the completion of the agreed task, the trigger shall be the taking over certificate; the second termination is based on mutual consent; from the context of the article, it can be construed that such termination will either need a separate paper or agreement signed by both parties at later time to terminate or will be triggered by the inserted condition such as allows any party to terminate unilaterally if it is satisfied. If the latter idea is possible, it will open green lights to the standard contracts used if they are found not contradicting any law or

⁶⁰ Mohamed Sakr, ‘The Courts System in the UAE’ (*Liberty Magazine*, March 2005) vol. 3

⁶¹ Civil Transaction Code, Federal Law No. 5 of 1985

⁶² CTC 1985, Chapter III Contracts of Work, Section 1, Part 1 Muqawala, Article 872

public policy; but most probably, by referencing the Article 218 describes the termination to general contract which states that the contract will not be binding if it states that itself can be terminate not by mutual consent or court order, it would not be adopted. whereas by examining the third condition, it seems that the unilateral termination shall most probably fall into it which means the once the unilateral termination is raised, it shall be fully determined by the court through its order; here, the power and discretion of the court shall be focused and explored to discover how it would be done and whether any variation may exist due to different perspectives or considerations of judges.

In the Case 457/24 of the Union Supreme Court⁶³, Judge Salah stated that the interpretation to contract, document and any agreement between parties is within the power of the trial court; and finally, the judgment is based on sound reasons extracted from these papers and any sufficient evidence or documentation supporting it. This means, while a party requests the court's order for unilateral termination, the result of such request might be varied due to the following factors: soundness and sufficiency of papers whose efficacies might fluctuate due to the capabilities of the parties and their attorneys and perspectives of a certain judge; perspective of expert if he is called for a report which might be considered as authoritative by the judge and at the last the legal background of judge since they may came from different countries and received different educations. In other words, the judge in UAE has been much empowered.

5.2 Article 893-Prevention to the Performance and to the Completion of Performance

Besides this general frame of the termination, Article 893 states that if contract performance or completion of such performance is prevented, a party can resort to the court for cancellation or termination. A point has to be emphasized here is to claim under Article 893 it shall be determined by the court case by case.

⁶³Case 457/Judicial Year 24, Union Supreme Court, 26 April 2005

In this article, it is also found that the prevention to the performance and the completion of the performance is hard to be defined by parties and attorneys prior to the test in front of judge. Also the degree of prevention is also a question under this article, will the delayed agreed payment be considered prevention to performance? And what if the employer proves the contract has financial ability to pass the hardship of the late payment? These are the point shall be questioned in this article and it seems that before the judgment of any similar case, it is hard to conclude; and such conclusion could not be guaranteed as unified opinion of all judges.

5.3 Article 877-Defective Performance

Meanwhile in Article 877, if the contractor performs not in accordance with contract condition and the employer finds impossibility to make remedy by the contractor to the work he can require to terminate the contract immediately; if such remedy can be made within a reasonable period but the contractor fails to do so, the employer can also, by requiring the judge, to terminate unilaterally after such period elapses or to leave to himself and give this part of work to another contractor for completion at the expense of the first contractor.

The first point shall be discussed here is the defect is not only the unsatisfactory quality of the work but also the manner in performance⁶⁴ according to the contract conditions. In the judgment of Case 446/21 in Union Supreme Court⁶⁵, Judge Al Husayni stated that the pre-agreed conditions must be followed and if it is found insufficient or missing, the custom in particular industry shall apply; meanwhile standard of care, if necessary, shall be referred to reasonable man test.

The second point is the reasonable period, it is stated, by the judge, that⁶⁶ if the condition does not specify a reasonable period, it shall be referred to nature of the work in combination with professional practice. Here, if the question is raised about the reasonability of the period, it would be most probably left to the expert and his report.

⁶⁴Case 51/2007, Dubai Court of Cassation, 29 April 2007

⁶⁵Case 446/Judicial Year 21, Union Supreme Court, 15 May 2001

⁶⁶Case 644/Judicial Year 24, Union Supreme Court, 31 May 2005

The third point is to leave to engage another contractor for execution of the work. If the contract states reasonable period and there is no specific performance made within such period, shall the employer, prior to contract another contractor, obtain an official order for such leave? The concern here is whether this article gives full way to Clause 15.1 Notify to Correct in FIDIC 1999 Red Book? If not, this common adopted contract might be interrupted by the law.

By construing the context of the Muqawala section, it is found, especially in termination mechanisms, the court and its judges would play significant roles to decide whether the contract should be terminated or not. And the situation could not be unified since the factors mentioned above such as the understanding of the judge to the papers and related supports and expert's perspective in his report. To conclude, there are still uncertainties to the unilateral termination under the CTC 1985.

Chapter 6- Compatibility of FIDIC 1999 Red Book with UAE Law:

First of all, the UAE as a nation has no its own generated or produced standard contracts. For years, most of the contracts are the direct uses of or based on FIDIC. To import or cite a foreign-made contract, the compatibility under the national or federal laws shall be the primary concern; fortunately, FIDIC and its versions seem work properly. In the market, since most of the projects are delivered by design, bid and build, the most popular standard contract is FIDIC Red Book and in recent years, it is observed a slow transition from Red Book 1987 to 1999⁶⁷.

6.1 FIDIC 1999 Red Book in Abu Dhabi and Other Emirates:

In 2006, Government of Emirate of Abu Dhabi published its own FIDIC 1999 Red Book⁶⁸ and Yellow Book for Design-Bid-Build and Design and Build Projects. Since this was an official adoption and promotion to the contract, it showed the recognition to the FIDIC itself by a government; the attracting part of this Abu Dhabi General Condition is the change based on the original FIDIC 1999 Red Book to demonstrate the expectation of the government and fit the laws, regulations and industrial environment in this Middle Eastern market.

Focusing on the unilateral terminations, Clause 15 Termination by Employer and Clause 16 Suspension and Termination by Contractor, it is found, in general, unfavorable to the contractor or accurately speaking much stricter than the original FIDIC 1999 Red Book.

Clause 15 Termination by Employer:

The Clause 15.2 Termination by Employer is revised by adding the followings after (f):

“(g) is liable to pay the delay damage in excess of maximum amount stated in the appendix to the tender; (h) shall use deception or fraud in its transaction with the employer; (i) shall refuse or ignore the instruction of the engineer without reasonable

⁶⁷ Sona Nambiar, ‘Slow Transition to FIDIC ’99 Contract Forms in the UAE’ (*Emirates* 24/7, 28 January 2010) < <http://www.emirates247.com/eb247/companies-markets/construction/slow-transition-to-fidic-99-contract-forms-in-the-uae-2010-01-28-1.5756>> accessed 10 November 2014

⁶⁸ Abu Dhabi General Conditions, FIDIC Red Book, Version 2006

justification which shall be duly submitted in writing upon immediate receipt of the instruction”

Meanwhile, a new paragraph is added also to stipulate what the contractor shall do post the termination which is mainly in relationship with his equipment and temporary works; in general, it is asking the contractor continue to cooperate after the termination.

Surprisingly, Clause 15.5 Employer’s Entitlement to Terminate is entirely deleted instead of being stated as “Not used”. It would be hard to conclude the intention of such deletion since there was no any further interpretation to be traced.

Clause 16 Suspension and Termination by the Contractor:

The Clause 16.2 Termination by Contractor is the only revised part in the whole clause, the contractor is asked to give sixty days to the employer to rectify prior to the unilateral termination.

In general, even further restrictions, which are unfavorable to the contractor, are inserted in Clause 15 and 16 for unilateral terminations, it shall be commented stricter but not vitiate the balance addressed in original FIDIC between the contractor and employer.

6.2 Termination for Convenience in FIDIC Red Book 1999 under UAE Law

Whether the termination for convenience in the Red Book 1999 is applicable under the termination mechanisms offered in UAE law was highly arguable since long time ago; advices and suggestions were always available by legal and industrial practitioners, since there was no case testified in the court, such sounds still remain as they are. However, opinions were varied at the financial crisis and the whole picture to show the consideration and decision of the court was revealed until the year of 2013.

Prior to the financial crisis, the trend of opinions in the industry was such termination may not be upheld by the court, generally and strictly speaking⁶⁹, since it fell into none

⁶⁹ Andrew Van Niekerk, ‘A Commentary on contractual peculiarities experienced by a newly arrived construction lawyer to Dubai’ (*West Law Gulf*, 1 September 2005)

of the three termination conditions in Article 892 of the CTC1985 which are by completion of the work, by mutual consent and by court order. Actually, these blurred comments were given so due to the non-availability of the case from the court; so all were based on conjectures to the perspective of the court and construing to the context of the law articles.

During and post the financial crisis, opinions were changed since many terminations happened due to the shortage or cut of the cash flow from the employer. An official in Dubai governmental entity considered such termination shall fall into mutual consent, because the contractor had no other choice except accepting the termination; and since there was no money any more, what would be the purpose to keep the contract undergoing? It was better for the contractor to go and reach such mutual consent. But what if the employer was proved or showed by himself he was not in hardship financially; would the same answer be given? It was hard to say at that time.

In 2013, the applicability of the termination for convenience was totally confirmed under the UAE law and the court's interpretation was surprising also. The court held that⁷⁰ the judicial establishment to let the employer unilateral terminate the contract prior to the full completion is an exception to the termination by mutual consent. The reason for such exception is the Muqawala usually need long term performance, during such term, which is between formation of the contract and completion of the work, the circumstance may change; due to such change and based on the interest to not let the employer bear the unnecessary cost, the employer is conferred a legal option to unilaterally terminate the contract on the ground of termination for convenience in FIDIC 1999 Red Book.

It is now clear that the termination for convenience in FIDIC 1999 Red Book is not under any circumstance of termination in Article 892; to trigger such termination any exception is given by importing the principle of change of circumstance in perspective

⁷⁰ Faisal Attia and Zane Anani, 'Terminating Construction Contract for Convenience in UAE' (*Al Tamimi & Co*, September 2013) < <http://www.tamimi.com/en/magazine/law-update/section-5/september-3/terminating-construction-contracts-for-convenience-in-the-uae.html> > accessed 11 November 2014

of not asking the employer to bear unnecessary cost. Two questions shall be raised here: the first is whether such principle of change of circumstance in turn applicable to the contractor in a situation of suffering huge changes in material prices such as it was in 2008 and 2009? At that time, in one hand there was no judgment from the court and in the other hand the court was silent from publishing any interpretations but many contracts prices were adjusted by the employers themselves such as commercial banks. The second question is will this termination simply applicable without change of circumstance but in situation of financial hardship of a single owner? It seems still unclear so far.

6.3 Study of the Undergoing FIDIC 1999 Red Book in UAE Market

By illustrating the Abu Dhabi General Condition to show how it was varied in perspective of a governmental entity to the FIDIC 1999 Red Book in previous section, it is also a necessity to cite an underdoing contract to show how such general condition is actually applied in the industry under the current environment.

A Contract, dated on 27th May of 2012, was made for a mosque project between a public procurement company in Abu Dhabi and a UAE local contractor. The termination for convenience was edited, in particular condition, as the following:

Sub-Clause 15.5 Employer's Entitlement to Termination

Replace Sub-Clause 15.5 with the following:

“The Employer shall be entitled to terminate the Contract at any time for the Employer's Convenience by giving notice of such termination to the Contractor without the need for a court order. The Termination shall take effect 14 calendar days after the date the Contractor receives the termination notice. After such termination, the Contractor shall be paid solely for Works performed up to the time of such termination and for the Materials and Plants reasonably and as per the Contract delivered to the Site.

After this termination, the Contractor shall proceed in accordance with sub-paragraph 16.3 [Cessation of Work and Removal of Contractor's Equipment].”

Insert new Sub-Clause 15.6:

Upon termination of the Agreement by the Employer for any reason whatsoever, the Employer may complete the Works himself and/or arrange for any other entities to do so. The Employer and these entities may use such Materials, Plants, Contractor's Documents and other design documents made by or on behalf of the Contractor and such Temporary Works as he or they may require. The Contractor shall co-operate fully with the Employer and any such new contractor(s) for the orderly transfer of the Works.

It shall be noticed that the contract date was prior to the interpretation of the court made in case judgment which happened in 2013; it seems compatible to the later interpretation to not bear unnecessary cost based on change of circumstance, but at the time of the contract date, these clauses should be treated unfavorable to the contractor and lack of good faith due to the stronger bargaining power of the employer.

Meanwhile, the whole Clause 15 Termination by the Employer was also heavily revised in obvious favor of the employer and several additional conditions to terminate the contract were inserted which were also found not in general accordance to the Abu Dhabi General Conditions. Simultaneously, in the Clause 16 Suspension and Termination of the Contractor, several default conditions were also replaced by "Not used" which definitely confine the termination mechanisms available for the contractor.

This contract, since involves a public entity represents the government, has enough evidence to show that in the UAE market, the bargaining power is still an important factor to vary the default balance set by the FIDIC. And a question, to the revised contract conditions cited herein, shall be raised here is whether such agreed clauses to terminate without any need of the court order applicable, or correctly to say permissible, under the UAE Law? It is still a question hard to be answered.

Chapter 7- An Analytical Comparison of Unilateral Termination between Chinese and UAE Laws:

China is an ancient and oriental country with recent redevelopment, UAE is a typical Muslim country in Gulf Peninsula whose economy and infrastructure were boosted after discovery of the petroleum and natural gas; it is hard, by comparison, to tell which law is better since these two countries have totally different backgrounds in historical, cultural and constitutional aspects. So, the aim here is, by contrast, to show the respective advantages and common recognitions.

7.1 Construction Contract and the Unilateral Termination Are Treated Differently:

First, in termination, the Chinese contract law treats the construction contract no difference with any other contracts; whereas the UAE law classifies the termination of the construction contract into Muqawala section. This classification, in one hand, clarifies the limitation of the application to terminate a construction contract but in the other hand it confines the other applications⁷¹, especially unilateral ones, to terminate under the general termination in CTC 1985.

Second, regarding to the unilateral termination, the Chinese law allows a party to either terminate by agreement once the pre-agreed condition for termination is fulfilled, or to terminate by law which is also detailed into Force Majeure, Anticipatory Breach, Delayed Performance of Main Obligation, Frustration of Contract Caused by Delayed Performance of Obligation or Other Situations and any other conditions such as Defense to Uncertainty. Whereas in UAE law, except the Prevention to Performance and Completion of Performance and the Defective Performance, a party can only terminate unilaterally by resorting to the court which means the termination by law. To compare the unilateral termination by law in Chinese and UAE laws, it is found that in Chinese law, more conditions are offered and some of them which never existed in previous law were imported from both Civil and Common Law Systems; the UAE law has less conditions than Chinese law but it leave the remaining to be solved by the judges who may either expands or details even more than the default in Chinese law. The more

⁷¹CTC1985, Section 5 Dissolution of Contract, Part 2 Unilateral Disposition, Article 276-281

written or regulated in law such as the Chinese one, the more certainties can be confirmed by parties before he tries in the court; in contrast, under the UAE law, it would be submitted to the court for the discretion of the judge and if there is no previous case or judgment can be used as reference, it is hard to predict or conclude before the final judgment.

7.2 Chinese Courts Are More Active to Complement the Laws

As discussed in Chapter 3, the SPC in China is found much active in publication especially as interpretations and commentaries to cope with the contemporary and hard issues, some publications are made dedicated for a single case that is representing or being questioned. Before stating the advantages, one point has also to be mentioned here is the discussions in Chapter 3 are the several publications which fall into the construction contracts and their terminations circle; comparing to all other publications in all aspects, they are merely an edge of an iceberg. Several advantages are found while the SPC is under such active status:

Firstly, the publication fills the gap of the law. It is not possible for a civil law country like China by revising its law to fulfill the practical needs with a high frequency. The SPC can publish its interpretation and commentary, this shows that the SPC actually works as law maker but with only its publications whereas not decrees; this is practical and effective in the legal system. The publication regarding the change of circumstance is an excellent example that the SPC is making a “law” which fills the gap of the current law to fulfill the need of the society; and it is not subject to any formality.

Secondly, the publication minimizes the discretion of the judges and the unfairness from the discretion. Since the contract law and its articles are still in a general or primitive form, such as the termination under the general contract, it is possible to for judges who may have different perspective to have discretions. Meanwhile, China is a large country with huge population which makes this possibility even higher than other countries; this means two similar cases may have different judgment since the discretion may potentially exist. To prevent this, the SPC’s publication in relation to the hearing of

the construction contract disputes gave more detailed situations and conditions, including the ones applicable to unilateral terminations, to unify the judgments.

Thirdly, the publication guides the participants in construction industry including legal and professional ones. Not all the disputes shall be raised to the court as cases if any or both parties clearly notice there is no such need or necessity; the publication from the SPC also helps in this aspect. If any interpretation or commentary to the law article can be published and used as reference, it would, in one hand, help parties to get better prediction while they are in dilemma whether to go for litigation or not; and in other hand, if the case has been submitted for trial, parties shall also know what would approximately be the outcome as judgment.

Fourthly, not only the SPC, its inferiors are also publishing. Such publications, most of them, are found as restatements or recitations to SPC's opinions; but there are two beneficial efforts can be addressed from the inferior publications: the first is by restating the published by SPC, the inferiors intended to show their full understandings to the guidance from SPC and such intention also eliminates potential different discretions; the second is restatement or recitation also reminds, especially in the territories which are much active in construction activities such as the southern areas and places near by the eastern coast lines, the party who wish to resort from the lower court be aware of the future application in his case prior to the full trial process. The latter one actually helps make decision whether the case shall be filed or appealed in the future.

The last and the most important point is the SPC and its publications have macroscopic considerations to the industry and society in aspects of orders and stabilities. When the external factors, such as financial crisis which reached China by 2009, affecting the whole domestic construction industry, it is necessary to have interference by the government. When the price had huge change especially increment which fell completely out of the risk management scope of the contractor, then the contractor should either continue the project with loss or he would repudiate the contract to avoid sequential huge loss; both choices might harm the contractor physically in his cash. If no interference is made by the government, the situation in the industry would be either

full of loss projects with the contractor or lots of repudiated contracts left to the employer. Thus, the publication by the SPC regarding the change of circumstance, in consideration the balance of interests of the contract parties, primarily maintained the order in the industry which would affect the social stability if destroyed by the crisis.

Meanwhile, another point shall be addressed here is to list only the advantages of the active publication by the SPC and its inferiors in China does not mean the UAE has no such things. In UAE, courts are using Arabic as prevailing language but in industrial practice the English is much popular even in paper works whereas such publications in UAE are really less found in English; this shall be an important factor that SPC in China acts much better than UAE Court at least in their prevailing language publications.

7.3 Industrial Resources in China Are More Than They Are in UAE

Under this view, it has to be clarified that such contrast, not a comparison for advantage or disadvantage, between China and UAE are predominantly formed by different compositions of the construction industry participants; it means in China almost all participants are nationals or national entities, whereas in UAE the situation is the opposite.

In China, different associations for either lawyers or arbitrators are found existing in national and regional levels. Their publications are also found generally in line with the related laws such as the listed in Chapter 3 of this study. These authoritative publications not only guide the practitioners to comply with what had been said by the SPC, they also help the people or entity, prior to submit the case to litigation, to get sufficient information in legal aspect from either their own lawyers or other legal practitioners. Also the association of arbitrators, by publishing, reaches the same effort and it simultaneously helps decide whether there will be a further submission post the arbitration since it has same guidance with further courts from the SPC.

In UAE, it is hard to reach a union like association for lawyers or arbitrators since they are from so many different backgrounds. In this country, the available resources are the articles published by certain law firms and the valuables are those contain practice such

as outcome of the trial as exclusive experience which either never been testified before or have been only tried and completed by the publisher himself.

7.4 Standard Contracts in China and UAE

China has its own standard construction contract since 1991 and it had been significantly updated for two times in 1999 and 2013. The unilateral terminations are found more tailored from the Contract Law 1999 to fit the construction industry. And a trend can be caught from the update of the standard contract in 2013 is that the contract itself and the unilateral termination are getting closer to the international practice. This in one hand creates a seamless connection with the common practice in globe and it in the other hand helps either nationals or international participants to work with higher compatibility. FIDIC Red Book is also used in China, even it is not playing a significant place but the contract itself is found, from the industrial guidance, compatible with the related and governing Chinese laws.

UAE has no its own standard contract, and the prevailing application is to use either FIDIC Red Book 1987 or the Red Book 1999. The latter one is getting more supporters and officially recognized by the government of Emirate of Abu Dhabi by 2007. Since the FIDIC is a foreign element which should be testified under UAE law, it is found working properly and the judge is also found solutions to fill the gap or vacuum, such as the termination for convenience, under the law while trialing the FIDIC case. A point shall be mentioned here is even the FIDIC is a really popular contract in UAE, but in practice it is found that it is revised heavily in favor of the employer and such revision not only, somehow, distorts the original intention of the publishers but also found conflicting to the governing laws; this is actually, in comparing to the situation in China, an outcome of less interference from the government or governmental entities to the construction industry; but since it is a free market with higher return for both contractor and employer, it shall not be criticized and finally the fairness will be given by the justice.

7.5 Change of Circumstance Are Used in Both Countries but to Different Parties

First of all, change of circumstance does not exist under either Chinese or UAE law; but it is shown in both as an import to fulfill the legal need but with totally different perspectives and considerations.

In China, the application of the change of circumstance took a long process and it finally confirmed, by the SPC, to be used to cope with the common issues emerged during the financial crisis in 2009. And the principle of change of circumstance is only, at present, applicable to the contractor for price variation after strict examination by the court; whereas for the employer, when the price drops down significantly, it is commented by legal practitioners not applicable since the commercial risk of employer is considered inherently higher than the contractor. It has to be mentioned here that the standard contract in China does consider 5% increment of the material price is the trigger for contract price variation; in case this mechanism is omitted in particular conditions, the change of circumstance will compensate when the issue raised to the court.

In UAE, the application of the change of circumstance is totally flipped from it is in China. It is only confirmed by the court in a judgment in 2013 that the change of circumstance is used as exception for the employer's termination by his convenience; but it is still highly questionable that whether the termination by convenience works or not if there is not circumstance change.

A conclusion shall be drawn here is there is also no advantage or disadvantage found in comparison between the two different applications in China and UAE since the market backgrounds are totally different. Most of the industrial participants in China are nationals and the construction industry is also involving so many other industries; the primary consideration of the government and its SPC is to guarantee the stability of the industry and the society, and that is why the change of circumstance is only applicable so far to the contractor. In UAE especially Dubai, the market is depending foreign investment and hot money to stimulate the real estate market, so the most important concern is to guarantee the confidence of the investors and the certainty of their

investment amount; and since the contractor in emirates can put much higher percentage in tendering stage, it is also a coverage to the risk of their business. Due to such situation in emirates, the change of circumstance is only applicable to the employer.

Chapter 8- Conclusion:

To conclude the unilateral termination of a construction contract in perspective of law in China, the only focus shall be on the general termination under Contract Law 1999 whereas not on the other laws related to the construction activities. A clear intention of the law maker showed here is, in the aspect of unilateral termination, the construction contract is treated no difference with any other contracts. Further, articles were also discussed with supports of cases judgments; it has to be said that these articles, including termination by fulfillment of pre-agreed termination condition, anticipatory breach, delayed performance of main obligation, frustration of contract by delayed performance of obligation or other situations and other conditions such as defense to uncertainty, are not found perfect in applications. Firstly and generally, all these articles are still not in much detailed text, such as the definition of main obligation, non-performance by a party and the reasonable period to rectify non-performance or delayed performance; these would potentially make a chance to abuse these definitions since it would be alleged not stated clearly. Secondly, the anticipatory breach and the defense to uncertainty are classified without a clear cut; and it is also commented that these two shall not be existing under a law simultaneously which would either create confusion in defending or abusing in claiming in the trial.

To remove the uncertainties existing amongst the law articles, the SPC of China plays undoubtedly significant and active role. The SPC made, specifically for the construction industry, more than twenty publications in forms of interpretation, guidance or advice with either long term or temporary applicability; such as the Interpretation 2004, it practically clarifies how the construction contract can be unilaterally terminated by either contractor or employer based on the original Contract Law 1999, and it also built effective links to other applicable laws and regulations to be resorted for certain definitions and scopes which are found hard for judge in making his decision. Meanwhile, the SPC's publications for the application of the change of circumstance are found being formed by a long process; it is finally confirmed, in the occasion of the financial crisis in 2009 by the Guiding Suggestion 2009, to be applied to the contractor to terminate the contract if there is no possibility to vary the contract price to coup with

the price increment, and the SPC also emphasized that scrutiny by each court from case to case must be strictly done prior to the application. Such publication received immediate action from the court and it is also alleged to be followed by inferior courts in their respective publications. Also, to guarantee the conformance to the SPC's guiding even prior to the litigation, certain lawyer and arbitrator associations also published to apply in line with SPC.

Besides the unilateral termination in law, the standard contract of China, named Construction Contract, also contains detailed termination mechanisms; the Construction Contract was firstly produced in 1991 and significantly updated in 1999 with compliance with the Contract Law 1999; its second revision in 2013 showed a trend, in its structure, to connect with international contract such as FIDIC 1999 Red Book. Also the Construction Contract, in both its 1999 and 2013 versions, clearly requests endeavor by parties to save their contractual relationship prior to the termination. Regarding the applicability of FIDIC Red Book 1999 in China, it is found compatible under the Chinese law in aspect of unilateral termination including termination by the employer for his convenience which is found also much cooperative with the application of the change of circumstance to protect both the employer and the contractor in their respectively unfavorable situations.

In the law of UAE, dedicated unilateral terminations are found in a special section named Muqawala in the federal law CTC 1985; and this section categorizes unilateral terminations upon the approval of the court order, the prevention to performance and completion of performance and the defective performance. It has to be mentioned and emphasized that, in UAE, since the law is not defining every detail for unilateral termination, the judge is left with a vast power to decide. For this point, it might be commented that the uniformity in judgment would not be avoidable and uncertainty is left to the party except his case is trialed or there would be a previous judgment available for his reference. Meanwhile, UAE has a different market situation, the official language is Arabic whereas the popular document language is English; this also creates obstacles for non-Arabs to access the legal reference from the authorities.

FIDIC 1999 Red Book, as an international contract, is also recognized by Abu Dhabi Government in 2007 with its own official version; general terminations in Clause 15 and 16 are kept and left unchanged in such version but the termination for convenience by the employer in Clause 15.5 was deleted. Not surprisingly, such deletion was not done in other unofficial FIDIC in UAE since the employer has an inherently stronger bargaining power in this market. And such clause had been argued regarding to its applicability under the UAE law since long time ago; but finally it is justified by the court that it shall be applied, in form of the change of circumstance as an exception under the law, to the employer only. Another point has to be said here is by showing the undergoing FIDIC 1999 Red Book in UAE, it is found heavily revised in favor of the employer and some contradictions to the law are even found just to daunt the contract to not go for litigation.

In the last part of the dissertation, several comparisons were made between China and UAE; since these two countries are so different in many aspects, the advantage shall be considered in a combination with the condition or situation in the macro level. To the unilateral terminations under the laws, there are more mechanisms available in Chinese law; but ambiguity exists under both laws with different degrees. To the effort of the court to complement the law, the Chinese SPC is absolutely much active and effective. Regarding the available reference from the industries, both countries are found active but in China more authorities could be discovered since associations for lawyers and arbitrators are more than they are in UAE. About the prevailing standard contracts, FIDIC is found much popular in UAE since it has not own contract like China; whereas incompatibility such as termination for convenience has been solved under the UAE law. The most important point to show different perspectives under the Chinese and UAE laws is the application of the change of circumstance; it is applicable to contractor in China whereas to the employer in UAE. Such difference had been discussed and its root is the different composition of construction participants in respective markets, so no right or wrong shall be commented on.

At last, the final aim and destination of this research dissertation is, by examining, discussing, analyzing and comparing within the limit of the author's ability and knowledge, to afford available information gleaned either from authorities or markets and to make a valuable reference for its future readers.

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