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SOME OF THE RISKS AND PRIVILEGES OF FORCE MAJEURE ON CONSTRUCTION PROJECTS

Although the influence of force majeure is not often encountered in construction and engineering projects, it is a key issue of construction law that should not be ignored. In construction law, both in theory and practice, force majeure is a certain kind of project risk. The articles, laws and clauses in construction contracts regarding force majeure influence the sharing and bearing of the rights and obligations of both parties directly. They also relate to whether a construction contract can continue. Therefore, in construction projects, it is necessary to clarify the scope of force majeure and the corresponding legal consequences, as well as the rights and responsibilities of the parties involved in an event of force majeure.

1. Definition of Force Majeure

In accordance with *Article 180 of Civil Code*[1] （former *Article 180 of the General Principles of Civil Law* and *Article 117, paragraph 2, of the Contract Act*, force majeure means objective conditions that are unforeseeable, unavoidable and insurmountable. It is relatively easy to express the literal meaning of the above-mentioned law, but in fact, this description of force majeure is relatively abstract, and has a different understanding and view on the connotation and extension of force majeure in substantive and theoretical circles.

1.1 Elements of force majeure

（1）unpredictability

The characteristic of unpredictability is that the parties cannot foresee the risk and its consequences when they conclude a construction contract. This is the time requirement and criteria for determining the component of force majeure. In the case of unpredictability, two things need to be noted in practice:

First of all, unpredictability in force majeure is defined from the perspective of human subjective cognitive ability. That is to say that whether or not a force majeure event has occurred is unpredictable by both parties. This element has both a subjective and objective evaluation criteria. The importance of understanding and applying this requirement is that, subjectively, there are individual differences in the ability to foresee. Some people will predict the phenomenon, however some people will not. So, it is necessary to determine whether a certain phenomenon can be foreseen based on the predictive ability of ordinary people in society rather than those

[1] The Civil Code of the People's Republic of China ("Civil Code") was implemented on 1st Jan 2021 and the former General Principles of Civil Law 2017, and the Contract Act 1999 were abolished at the same time.

people with a certain ability. In other words, the foreseeability standard, generally speaking, should in principle follow the “ordinary person” standard. In a case whereby a party to a contract is a professional person or belongs to a professional organization, then the “professional” standard should be used to determine whether a party should have foreseen the certain phenomenon rather than the “ordinary person” standard.[2]

The second is that, from a time perspective, the force majeure event must be unforeseen, by both parties, at the time of the conclusion of the contract and occur after the conclusion of the contract. If the occurrence of the event can be foreseen at the time of the signing of the contract according to the foresight criteria mentioned above, it does not constitute force majeure under the current legal system.

（2）inevitability and insurmountability

The unavoidable and insurmountable elements explain the objective and inevitability characteristic of force majeure events. Inevitability means that, in reference to an occurrence of a force majeure event, the contractual parties cannot prevent the occurrence of the event despite their reasonable attention. The insurmountable element means the contractual parties have tried their best to overcome the force majeure event, but the contract still cannot be performed as a result.

In brief, when talking about the objective phenomena that constitutes force majeure, it shall be taken from the point of view of an ordinary and rational third person. This means that even if the third person tries their best and takes reasonable measures, they still cannot have avoided the occurrence of a certain phenomenon and overcome the damage caused by this phenomenon[3].

1.2 Scope of force majeure events

Except for the principal criterion of unforeseeable, unavoidable and insurmountable elements, there is no further provision in the current laws and regulations regarding the “objective circumstances” of force majeure. Therefore, this is a controversial issue both in theory and in practice, and it is also difficult to grasp in judicial practice. The specific identification may depend upon the contract’s wording and the discretion of the court.

In principle, objective events that contribute to force majeure must come from objective circumstances recognized by society and its existence determined by human experience[4]. The common objective situations of force majeure mainly fall into three different categories: one is natural events, such as earthquakes, floods, typhoons, fires and so on; the other is social events, such as war, turmoil, riots, armed conflict, strikes and so on; the last category is government behavior, such as a change of laws and regulations, specific administrative behavior, etc., which is normally called “political force majeure”.

Of course, in the absence of a contractual agreement, the above classification does not necessarily fully meet the criteria of force majeure, or there are other objective circumstances that have not been included.

For example, it is difficult to define whether a pandemic should be treated as force majeure in the absence of laws and regulations. In 2020, the Supreme Court ruled that for those disputes directly affected by the Covid-19 epidemic or by the epidemic’s prevention and control measures, if the legal requirements of force majeure are matched, *Article 180 of General Principle of Civil Law* and *Article 117 of Contract Act* (both of those

[2] Ye Lin, On the Force Majeure System, Northern Law Science, No.5, 2007.
[3] Zhao Yongshan, Legal Essence and Basis Guide of Damages Compensation, 2005, People's Publishing House.
[4] Ye Lin, On the Force Majeure System, Northern Law Science, No.5, 2007.

are force majeure clauses[5]), should be applied; where there are other provisions in other laws and administrative regulations, such provisions shall prevail; where a party asserts partial or total immunity from liability of force majeure, it shall bear the burden of proof for the fact that the force majeure directly caused partial or total non-performance of the contractual obligation[6].

There are also different views and practices on whether state and government acts constitute force majeure. In 2003, the Supreme Court explicitly stated that disputes arising from a failure to perform a contract due to measures for the prevention and treatment of the SARS outbreak directly by the government and other relevant administrative departments, or due to the influence of the "SARS" epidemic, *Article 117 of Contract Act* should be applied accordingly[7].

In the author's opinion, the intervention and supervision from governmental authorities, under the current Chinese legal environment in the construction industry is much greater than in other industries. So, changes to laws, administrative regulations and local regulations, as well as administrative actions taken by local authorities where a project is located, can be considered and included as "political force majeure".

Practically, it can be said that the supervision and influence of local administrative departments is not uncommon, as well as other matters such as the inspection of an authority's leadership and the unit in charge of it and so on. For example, the annual College Entrance Examinations in China, two annual party sessions or other major international conferences may also affect the normal progress of construction projects. It is much more difficult to give qualitative and quantitative analysis for the delay and suspension of a project together with other problems caused by the above circumstances. Therefore, it is necessary for courts and arbitral tribunals to further discern and make decisions according to the specific facts in dealing with certain cases, in which to provide better guidance in practice.

Generally speaking, a case whereby a specific administrative act by a local government against the illegal behavior of an employer or contractor is not "political force majeure". As a matter of fact, in such cases, the obligations and responsibilities of an employer and the contractor may be determined directly subject to the laws and regulations rather than determined by the construction contract.

1.3 Definition of force majeure in construction contracts

Due to the lack of uniform specific provisions on the objective circumstances of force majeure, generally it relies upon the principle of party autonomy of the construction contract with which the parties may independently agree upon and recognize events and objective circumstances as force majeure.

In reference to the domestic standard conditions of construction contracts, clause 17.1 of the general building contract conditions (GFC-2017 form)[8], clause 21.1.1 of the standard design and construction contract conditions (SDC-2012 form）[9]and the standard construction contract conditions (SCC-2007 form), all provide the same definition of force majeure, that include natural disasters and social emergencies which are unforeseeable when the parties sign a contract and unavoidable and insurmountable during the performance of a

[5] Now Article 180 of the Civil Code, A person who is unable to perform his civil-law obligations due to force majeure bears no civil liability, unless otherwise provided by law.

[6] The Guiding Opinions of the Supreme People's Court on Several Issues Concerning the Proper Trial of Civil Cases Related to the Covid-19 Epidemic (I)（Law [2020] No. 12）.

[7] Notice of the Supreme People's Court on the Relevant Trial and Enforcement Work of the People's Courts well in accordance with the Law during the Prevention and Treatment of SARS (Law [2003] No. 72).

[8] The GFC-2017 form was officially published by the Ministry of Housing and Urban-Rural Development (the MHURD).

[9] The SDC-2012 form and SCC-2007 form were officially published by the National Development and Reform Commission (NDRC).

contract such as earthquakes, tsunamis, plagues, riots, martial law, insurrection, war and other circumstances as stipulated in the special contract terms.

Distinguished from the above three standard contracts, clause 1.1.51 of the general design and building contract conditions (DBC-2011 form)[10] has relevant clauses on force majeure but endows the parties to agree on the scope of force majeure themselves.

In spite of these clear definitions and scope, it cannot be excluded that, in the practice field, circumstances outside the agreement are "force majeure". For instance, none of the above standard construction contracts stipulate that government acts belong to the category of force majeure, which is inconsistent with the theoretical scope of force majeure. Therefore, it is still necessary for parties, in order to avoid disputes, explicitly stipulate the events that include or exclude force majeure events through special conditions.

More importantly, in the practice of construction law, it is necessary to consider and pay attention to the following issues regarding the application of the rule of force majeure:

(1) No matter whether the force majeure clause is stipulated in the construction contract, it does not affect the party's direct use of the relevant provisions of laws and regulations. In other words, even though a construction contract does not stipulate force majeure provisions, it does not negate the application of force majeure rule.

(2) Force majeure is a legal exemption event. Under the current legal system, firstly, parties cannot exclude the application of force majeure via agreement. If the contractual terms stipulate that one party shall still bear the corresponding liability in the event of force majeure, then the terms could be deemed as being invalid. Secondly, if the scope of force majeure agreed upon by the parties in the contract is less than the statutory scope, the parties may still invoke the provisions of law to claim exemption from liability. On the contrary, if the agreed scope is greater than the statutory scope, the excess part shall be deemed as an additional exemption clause agreed to by both parties.

1.4 Distinguishing force majeure from change of circumstances[11]

Force majeure and change of circumstances are usually compared under the Chinese legal system, and the diversity of these two circumstances are quite often confounding. "Change of circumstances" means a fundamental condition upon which the contract concluded was significantly changed after the contract was formed. These circumstances are unforeseeable by the parties upon the conclusion of the contract and are not one of the commercial risks, therefore if continuing to perform the contract is obviously unfair to one of the parties, then the party that is adversely affected may re-negotiate with the other party; where such an agreement cannot be reached within a reasonable timeframe, the parties may request the court or the arbitration tribunal to rectify or rescind the contract.

(1) legal constitutive requirement of change of circumstances[12]

As an exception to contract performance, change of circumstances may not be consistent with the spirit of the contract. Hence, there are strict constitutive elements and applicable conditions:

a. it must be a change of circumstance, which means the "fundamental condition" of the parties to conclude the contract is changed. The "change"

[10] The DBC-2011 form was officially published by the Ministry of Housing and Urban-Rural Development (the MHURD).
[11] There is no doctrine of frustration in China law. However, it is notable that the principle of "change of circumstances" is formally established in Article 533 of the Civil Code after more than ten years of debate.
[12] Li Lin, Legal Aspects to Project Finance and PPP, China Legal Publish House, 2018, P98.

hereby refers to abnormal changes that have taken place in the objective circumstances, resulting in abnormal changes in the rights and obligations of the parties, which are difficult to understand and are acceptable by the general concept of fairness.

b. change of circumstances cannot be attributed to either party, or the change of circumstance occurs objectively that is beyond the control of either party, or it is not caused by either party.

c. the adverse consequences caused by the change of circumstances exceed the reasonable foresight of the parties who are at a disadvantage due to the occurrence of the objective events. In the author's opinion, the foresight should be adopted on the basis of the standard of an ordinary third person.

d. the change of circumstances occurs after the conclusion of a contract but before the completion of the contract. If a change occurs before or at the time of the conclusion of the contract, the party adversely affected shall be deemed to have assumed such risk if it still accepts the terms of the contract. Specific to the project contract, this time should be advanced to the tender preparation stage, that is, 28 days before the tender. At the same time, if the circumstances changed during the delay in performance due to the delay in performance by the obligor, such change shall not be entitled to claim.

e. continuing to perform the contract after the change of circumstances would be a clear violation of the principle of fairness, resulting in the scale of the balance of interests between the benefit of one party and the damage suffered by the other party exceeding the limit allowed by law, or it will lead to the purpose of the contract being unachievable.

There is still no specific and uniform criteria for the application of the above elements of change of circumstances. It still remains at the discretion of the tribunal.

(2) legislation and judicial review evolved

The change of circumstances is essentially a risk that cannot be reasonably distributed to the parties. The reallocation of risk when circumstances change, embody the spirit and basic principles of fairness and good faith in the Civil Code.

It's important to note that in legal practice, before the implementation of the Civil Code, there was no rule in the Contract Act 1999 nor in the General Principle of Civil Law. In fact, the Supreme Court has published some relevant guidance for judicial practice[13], and some relevant cases supporting the application of change of circumstances[14]. During the legislative process of the Contract Act 1999, there have been discussions specifically in response to the change of circumstances and these are expressed in the Bill of Contract Act. However, the change of circumstances principle had been deleted. It can be seen that the attitude to change of circumstances in China's legislation is quite cautious.

Similarly, judicial opinion regarding change of circumstances is scrupulous. However, these objective situations do not mean that change of circumstances has been denied completely by legislation and the court at that time, but that the conditions for clearly stipulating the principle under the existing legal environment are not mature enough[15]. On the contrary, it does not exclude the possibility of its application in some special cases. The court should, "in accordance with the law, identify the applicable conditions of the principle of changes of circumstances and

[13] Article 4 and Article 7 of the Opinions of the Supreme People's Court on Some Issues Concerning the Trial of Cases Concerning Disputes over Rural Contracts issued on April 14, 1986.

[14] Wuhan Gas Company v. Chongqing Testing Instrument Factory and the corresponding Supreme People's Court Law Letter (1992) No. 27 document, Changchun Foreign Trade Company v. Changchun Chaoyang Real Estate Development Company in 1992.

[15] Sun Lihai, a selection of legislative materials on contract law of the People's Republic of China, law press, 1999, p. 26.

strictly examine the 'unforeseeable' claims made by the parties concerned".[16]

For example, in its promulgation and implementation of the *Interpretation on the Application of the Contract Act (II)*[17], the Supreme Court explained that after the conclusion of a contract, if the objective circumstances have undergone major changes which were not foreseen by the parties at the time of the conclusion of the contract, which were not caused by force majeure nor belong to business risk, continuing the performance of the contract is manifestly unfair to either party or the purpose of the contract cannot be realized, whereby a party requests the court to alter or rescind the contract, the court shall, in accordance with the principle of fairness and in light of the actual circumstances of the case, determine whether to alter or rescind the contract.

But shortly after the promulgation of the *Interpretation on the Application of the Contract Act (II)*, the Supreme Court published a series of judicial guidance and rules, one of which stated that the courts shall strictly limit the application of the change of circumstances principle, identify the change of circumstances, and the demonstration of fairness and commercial risks case by case. Moreover, it also pointed out that courts at all levels must correctly understand and prudently apply the above-mentioned interpretation. If in light of the special circumstances of the case it is necessary to apply the change of circumstances principle in individual cases, the higher-level court shall examine and verify the application. If necessary, it shall be submitted to the Supreme Court for examination and verification.[18]

It is understood that at that time, the basic spirit of the court's application of the change of circumstances was prudent under the general principle of maintaining the validity of a contract, and it needed to be submitted to the Provincial Court, or even the Supreme Court, for further review. As for the distinction in epidemic situations between force majeure and change of circumstances, the Supreme Court, according to the different effects of the degree of contract performance, stated that[19]:

a. if a contract continues to perform, the court will handle the responsibilities of the parties in case of change of circumstances, under the rule of "fair sharing": this means a contractual dispute arising from the performance of the original contract having a significant negative impact on the rights and obligations of one party due to the SARS epidemic, then the court could handle the dispute based upon the specific situation with regards to the principle of fairness.

b. if the contract could not be performed directly because of the administrative measures taken by the government and relevant departments to prevent and cure SARS, or the dispute arising out of the parties that cannot perform the contract was caused by the SARS epidemic，then the rule of force majeure would be applied.

The above perspective and review reflect the different routes of legislation and jurisdiction in relation to the change of circumstances and force majeure. In the author's understanding, force majeure is more focused upon the issues exempt when one party is in breach of a contract, however the change of circumstances is normally used as a condition of changing or terminating the concluded contract.

2. Risk Allocation of Force Majeure

[16] The Supreme People's Court's Guiding Opinions on Several Issues Concerning the Trial of Civil and Commercial Contract Dispute Cases under the Current Situation issued on 7th July 2009.

[17] The Interpretation on the Application of the Contract Act (II) was promulgated on 9th February 2009 and was repealed by the Supreme Court on 23th December 2020.

[18] Interpretation of the Supreme People's Court on Some Issues Concerning the Correct Application of the Contract Law of the People's Republic of China (2) Notice of the Supreme People's Court on Serving the Overall Work of the Party and the State (Fa [2009] No.165).

[19] Article 3 of the Notice of the Supreme Court on the execution of trials during SARS.

2.1 Risk allocation of force majeure under law

Force majeure is an objective circumstance which is unforeseeable, unavoidable and insurmountable by both parties and the fundamental nature is not attributable to either contract party. Therefore, in principle, each party shall neither be liable to the other party nor bear the adverse legal consequences. Each party shall be solely responsible for and deal with the damage caused by force majeure. *Article 590 of the Civil Code* expressly states that, unless otherwise stipulated by other acts, if a party fails to perform a contract due to force majeure, it shall be exempt, in light of the impact of the force majeure event, from liability in part or in whole.

2.2 Risk allocation of force majeure under construction contracts

Attention needs to be paid that the above text regarding force majeure under the Civil Code is more focused on exemption of liability. Except for the principle provisions on the risk sharing of force majeure, it does not involve the work and obligation of the parties after the occurrence of force majeure. So it is necessary to further clarify this via the relevant clauses in construction contracts.

Most standard construction contracts, such as clause 21.3 of the SCC-2007 form, clause 21.3 of the SDC-2012 form, clause 17.2 of the DBC-2011 form and clause 17.3 of the GFC-2017 form, specify the sharing of responsibilities and consequences for casualties, property damage, increased costs and/or delays caused by force majeure as the following:

a. the employer shall be responsible for the damage to the permanent works, including the materials and engineering equipment that has been transported to the construction site, as well as the third-party casualties and property losses caused by the damage；

b. damage to the contractor's equipment shall be borne by the contractor；

c. the employer and the contractor shall bear their own personal casualties and other property losses and related expenses；

d. the contractor shall bear the losses caused by work stoppages, but the amount of the project to be taken care of, cleaned up and repaired as required by the engineering supervisor during work stoppages shall be borne by the employer.

Of course, apart from the same rules of the principles described above, there are some differences in the detail and expression of different standard contracts, which need to be paid attention to by all parties when deciding to use different contract conditions.

Take the DBC-2011 form as an example, which states that:

a. after the occurrence of a force majeure event, the party delayed in performing the obligations of protection stipulated in the contract shall bear the corresponding liabilities and losses for the continued loss or damage caused by the delay in performing the obligations;

b. when the employer notifies the contractor to resume construction, the contractor shall, within 20 days after receiving the notice, or within the time agreed to by both parties according to the specific clauses, submit the plan for cleaning and repair and its estimation as well as the programme information and reports. The necessary cleaning and repair costs shall be borne by the employer and the completion date of the resumption of construction shall be reasonably postponed and shall be confirmed by the employer.

Differently from the above form, the SCC-2007 form and the SDC-2012 form, it specifies that:

a. if the project cannot be completed as planned, the construction time shall be reasonably extended, and the contractor shall not pay

liquidated damages for the delay. If the employer requires acceleration, the contractor should take measures to accelerate, and the expenses for the acceleration shall be borne by the employer;

b. during work stoppage periods, the contractor shall take care of, clean up and repair the works according to the requirements of the employer, and the employer shall bear the expense.

The GFC-2017 form expresses this another way, which is that

a. if the project has been delayed or will be delayed due to force majeure that affects the contractor's performance of their obligations, the time shall be extended accordingly, and the costs and losses resulting from the work stoppages of the contractor shall be reasonably shared by the employer and the contractor, and the wages that must be paid during the work stoppages shall be borne by the employer;

b. if the project is delayed or will be delayed due to force majeure, and the employer requires to accelerate, then the employer shall bear the additional expenses for such works.

3. Treatment and Relief of Force Majeure

If force majeure occurs during the performance of a contract, it would affect the progress of the project directly. At a minimum, it leads to the suspension of the contract performance usually; in the worst case, it could lead to the termination of the contract. Hence, in terms of disputes connected with force majeure and the follow-up treatment, the parties need to pay attention and make appropriate plans from both aspects of prevention and solution.

3.1 Notice of the occurrence of force majeure

(1) obligation of notice

Under the current law, if a party is unable to perform a contract due to force majeure, it shall promptly notify the other party, so as to mitigate the losses that may be caused to the other party and shall also provide proof within a reasonable timeframe[20].

In practice, it is notable that the obligation of notice within a certain timeframe after the occurrence of force majeure is not only a legal obligation, but also an agreed obligation. Therefore, if either party encounters a force majeure event, it shall give notice to the other party in good faith and with a cooperative attitude.

Clause 21.2.1 of the SCC-2007 form, clause 21.2.1 of the SDC-2012 form and clause 17.2 of the GFC-2017 form express similar rules that if a party to a contract is hindered from performing its contractual obligations due to a force majeure event, notice shall be given to the other party to the contract and the engineering supervisor immediately, stating in writing the particulars of force majeure and obstruction with necessary evidence.

Whereas the expression in clause 17.1 of the DBC-2011 form is much stricter: once a party is aware of the occurrence of a force majeure event, it is obliged to give notice immediately to the other party.

(2) report when force majeure continues

In practice, some force majeure events conclude quickly after occurrence, however others may last a long time. Therefore, in a case whereby the force majeure event is a continuing situation, the party that is impacted by the force majeure event shall report periodically as necessary. The time of periodic reporting and the time of final reporting can be agreed upon by the parties themselves. Generally, the time of the former is seven days and the time of the latter is 28 days. For instance, clause 17.1.2 of the DBC-2011 form specifies, regarding a sustained force majeure event, the

[20] Article 590 of the Civil Code.

contractor shall report the situation to the employer and the engineering supervisor weekly. The parties may also agree otherwise on the reporting period according to the actual situation of the project and their respective project management system.

Other standard contracts, such as the SCC-2007 form, the SDC-2012 form and the GFC-2017 form, provide that a party to a contract shall, in the case of a sustained force majeure event, promptly submit an interim report stating the force majeure event and the situation impeding the performance of the contract.

(3) report after the end of force majeure

As mentioned above, the duration of the force majeure may be long or short, and the obligations of a party to report accordingly, after the end of the force majeure event, may be different on a case by case basis, depending upon different standard contracts. In clause 17.1.2 of the DBC-2011 form, in case of force majeure on site, the contractor (if they are the caregiver of the site) shall give notice to the employer of the damage and loss within 48 hours after the end of the event. While in relation to a sustained force majeure event, the SCC-2007 form, the SDC-2012 form and the GFC-2017 form specify that the final report and the relevant particulars shall be submitted within 28 days after the end of the force majeure event.

Considering the time limit for the above reports and particulars, the parties shall, in order to avoid damage to their relevant rights and subsequent interests due to procedural defects, strictly abide by a certain timeframe if it is clearly stipulated in the contract.

3.2 Obligation to avoid and mitigate loss

In case of force majeure, considered together with *Article 590 of the Civil Code*, avoidance and mitigation of losses shall belong to the obligations of each party and shall not be obligated to the other party. Furthermore, *Article 591 of the Civil Code* states that after a party defaults, the other party shall take appropriate measures to prevent further loss. Where the loss is aggravated due to the failure of taking appropriate measures, no compensation shall be claimed for the aggravated part of the losses. The reasonable expenses incurred by a party in preventing the aggravation of the loss shall be borne by the breaching party.

However, the above article is based upon default of contract parties. For force majeure situations, there are different understandings and opinions on whether the rules of avoidance and mitigation losses are equally applicable.

In clause 21.3.3 of the SCC-2007 form, clause 21.3.3 of the SDC-2012 form and clause 17.3 of the GFC-2017 form, it is stipulated that after force majeure occurs, both the employer and the contractor shall take measures to avoid and mitigate the expansion of losses as much as possible. If either party fails to take effective measures to prevent the expansion of losses, it shall be liable for such expanded losses.

However, it is notable that it remains unclear whether the “expanded losses” referred to in the above clauses refer only to oneself or the other party to the contract, and it is also unclear whether one party has the same obligation to avoid the expansion of losses to the other party.

Comparatively speaking, clause 17.1 of the DBC-2011 form is slightly different in that it stipulates that the responsible party in charge of the site, in the event of force majeure, shall take prompt measures within its capacity to reduce the loss; the other party shall fully assist and take measures; works that need to be suspended shall be done so immediately.

Through comparative analysis, it is not difficult to find that, generally speaking, prior to the delivery of the project to the employer, the contractor shall be responsible for taking care of the completed works together with the equipment and materials stored on the site. As a result, the relevant clauses

of the DBC-2011 form actually increase the responsibilities of both parties, especially the obligation of the contractor, on the basis of the mitigation rules in contract law and expand the legal consequences of the application of the mitigation rules in contract law.

4. Termination of Contract Due to Force Majeure

The influence of force majeure on a project is uncertain. Some have less impact such as a brief delay, others may have a huge impact and serious consequences, such as the suspension and disruption of a project, or even the destruction or rescission of a project. And it is important to pay attention to the factors that, in the case of the termination of a construction contract due to force majeure, how to reduce the losses, protect the completed works and how to protect the rights and interests of the parties, all of which need to be considered both from the legal aspect and project management aspect at the same time.

4.1 Conditions of termination due to force majeure

As mentioned before, the impact of force majeure events may be large or small and the occurrence of force majeure does not necessarily lead to the termination of a contract. In fact, whether or not to terminate a contract still follows the principle of party autonomy and the agreed contractual conditions. For instance, both clause 21.3.4 of the SCC-2007 form and clause 21.3.4 of the SDC-2012 form express that a party to a contract who is unable to perform the contract due to force majeure shall promptly notify the other party to terminate the contract. For another example, clause 17.4 of the GFC-2017 form specifies that if a contract cannot be performed for more than 84 consecutive days or more than 140 days in total due to force majeure, both the employer and the contractor shall have the right to terminate the contract. This clause also shows the limitations and restrictions on a party in terms of the rights to terminate a contract, which is helpful to avoid terminating a contract randomly.

In the application of the aforesaid clauses of construction contracts, in the author's understanding, the consequences caused by the occurrence of force majeure factors vary from case to case. In fact, according to *Article 528 of the Civil Code*, after the occurrence of force majeure, both the employer and the contractor have the right to choose to suspend the performance of the contract in the first place, and then decide to terminate the contract, if the purpose of a contract is not able to be achieved, in accordance with *Article 563 of the Civil Code* or based upon agreement. That is to say, firstly, it is necessary to evaluate the impact of force majeure and determine whether the performance of a contract becomes impossible so as to seek various possible solutions; secondly, if failure to perform a contract, after analysis and demonstration, becomes or is already inevitable, then the contract could be terminated.

4.2 Notice of termination

The requirements of termination of a contract due to force majeure are quite similar as termination due to other reasons. Both of them need to follow the general substantial and procedural requirements pursuant to the current laws, one of which is giving notice of termination in *Article 509 of the Civil Code*.

Similarly, the relevant articles of notice in contract laws are also reflected in standard construction contracts. Both of these clauses, the same as clause 21.3.4 of the SCC-2007 form and the SDC-2012 form stipulate that a party to a contract who is unable to perform the contract due to force majeure shall promptly notify the other party to terminate the contract.

There is no uniform understanding in the laws and regulations on the meaning of "promptly". In the absence of a specific agreement, the tribunal would determine whether a party to a contract performs the obligation of notification "promptly"

according to the facts on a case by case basis. Nevertheless, in any case, the original intention and principle of timely notification and the avoidance of losses caused or increased by force majeure with the contract parties remain unchanged, which is also the embodiment of the principle of contract performance with honesty and credibility both in specific contracts and in the contract law.

4.3 Settlement of cost sharing

The final termination of a construction contract due to force majeure not only involves many complicated legal issues, it also involves the protection of the status quo of the completed works, follow-up treatment, payment and other project management issues.

In addition to the clauses concerning the risk sharing of force majeure in construction contracts as described above, the *Bill of Quantities Valuation Specifications (2017 version)* also deals with the relevant costs, and provision 9.11 states that the expenses caused by force majeure events shall be borne and adjusted by both parties in accordance with the following rules:

a. the employer shall be liable for the damage to the project itself, the injury and death of third party personnel and property loss caused by the project damage, and the damage to the materials transported to the site for construction and the equipment to be installed;

b. the employer and the contractor shall be responsible for the injury or death of their employees and bear the corresponding expenses;

c. the contractor shall be liable for the damage to construction machinery and equipment and the loss of work due to the stoppage;

d. during the stoppage period, the contractor should, as required by the employer, stay at the site with the necessary security and management personnel, and the employer shall bear the cost of such personnel;

e. the employer shall bear the expense for the cleaning and repair of the project.

As similar to the above rules, clause 21.3.4 of the SCC-2007 form and the SDC-2012 form also stipulate that the contractor should withdraw from the construction site in accordance with the contract after termination due to force majeure. For the ordered materials and equipment, the ordering party shall be responsible for returning the goods or canceling the order contract. The employer shall bear the non-refundable payment for goods and the expenses incurred in returning the goods or canceling the order contract. The loss caused by not returning the goods in time shall be borne by the responsible party. Furthermore, clause 17.2.3 of the SCC-2007 form specifies that, prior to the issuance of the Project Taking-Over Certificate, if the advance payment has not been deducted due to force majeure or other reasons when the contract is terminated, the balance of the advance payment that has not been deducted shall be regarded as the due payment of the contractor.

Comparatively speaking, the GFC-2017 form gives more detailed information on the circumstances of the termination of a contract due to force majeure. For instance, in clause 17.4 of the GFC-2017 form, it states that the amount to be paid by the employer, after the termination of a contract due to force majeure, shall be agreed upon or determined by the parties through the engineering supervisor, which include:

a. the price of the works completed by the contractor before termination of the contract;

b. the price of materials, engineering equipment and other goods that the contractor has ordered for the works and delivered to the contractor, or the contractor is liable to pay for the delivery;

c. the expenses caused by the employer requiring the contractor to return the goods or cancel the

contract, or the losses caused by the failure to return the goods or cancel the contract;

d. expenses for the contractor's withdrawal from the site and the removal of the contractor's personnel;

e. other payments to be paid to the contractor prior to the termination of the contract as agreed in the contract;

f. deduct the amount that the contractor should pay to the employer according to the contract;

g. other payments agreed to or determined by both parties.

Simultaneously, clause 17.4 of the GFC-2017 form further specifies that after the termination of a contract due to force majeure, the parties shall agree or determine the amount to be paid by the employer, and the employer shall pay the said amount within 28 days after the agreement or determination.

5. Exception to Liability Exemption of Force Majeure

As mentioned above, if a party fails to perform or even decides to terminate a contract due to force majeure, such party may be exempt from the liability for breach of contract and compensation accordingly[21].

However, it is necessary to pay attention in deciding whether the party should be exempt from liability, the foreseeability standard to determine whether a certain phenomenon is force majeure, and consider the extent to which the party bears the duty of care for the occurrence of the force majeure event, and also consider whether the party has fulfilled their duty of care[22].

Additionally, *Article 590 of the Civil Code* also states that if one party is delayed in performance before force majeure occurs, it shall not be exempt from liability. In other words, if the force majeure event occurs after the breach of the contract by one party or occurs during the continuous breach of the contract by one party, then the party shall still be liable for such a breach.

This legal principle is also reaffirmed in Article 17.2 of the DBC-2011 form. In the same way, clause 17.3 of the GFC-2017 form, clause 21.3.2 of the SCC-2007 form and clause 21.3.2 of the SDC-2012 provide the same rules.

In view of the above rules, it implies that one party, whether it is the employer or the contractor, can notify the other party of the force majeure event in time and provide the corresponding supporting information and it would directly influence the application of force majeure as a condition for exemption from liability. If one party is negligent in performing the notification obligation, they may suffer adverse legal consequences.

6. Conclusion

In conclusion, force majeure, as a common risk in the performance of construction projects, has an important relationship between the constitution, application, risk sharing and distribution of the rights and obligations related to the performance of a construction contract. Force majeure also shares some specific conditions and trends with the application of a change of circumstances.

In the event of force majeure, the parties to a construction contract shall, in accordance with the laws and contract provisions, perform the obligations of giving notice, loss mitigation, etc., and determine whether to continue or terminate a contract according to the impact of the force majeure, consider the timely cleaning up of the site, and solve the price and payment problems.

[21] Article 180 and 590 of the Civil Code.
[22] Ye Lin, On Force Majeure System, Northern Law Science, No.5, 2007.

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