君合专题研究报告

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中国建设工程争议解决年度观察系列（二）

—典型案例分析

一、常规建设工程领域典型案例

【案例1】总承包合同解除后对分包合同存续性的影响[1]

1、 【基本案情】

2003年12月8日，美国通用电器塑料（中国）有限公司[2]（以下简称“**通用公司**”）聘请三星工程株式会社（以下简称“**三星公司**”）作为加药间控制室及卸料棚PLG站各1幢、办公室及加热间各1幢、生产厂房1幢（以下简称“**扩建工程**”）的总承包单位，并签订了《关于扩建中华人民共和国广州南沙经济技术开发区工程塑料厂的中国国内工程、采购和建筑协议》（以下简称“**EPC合同**”）。

随后，三星公司将土建工程分包给了福建省土木建设实业有限公司（以下简称“**土木公司**”）。

2004年11月15日，因工程拖期，三星公司通知土木公司停工。

2004年12月31日，三星公司与土木公司订立《和解协议》，约定复工后的土建工程完工期限。

2005年12月16日，因未能在《和解协议》约定的完工日期即2005年6月30日完工，通用公司书面通知三星公司于2005年12月31日解除EPC合同，并附表列明要求移交资料。三星公司书面确认同意解除EPC合同。

2005年12月19日，三星公司书面通知土木公司，通用公司已与三星公司解除EPC合同关系，并将于2005年12月31日生效；三星公司与土木公司之间的合同关系相应地于该函之日起14天后解除，土木公司必须立即退出项目场地，并且递交与项目有关的建筑文件及其他文件。

土木公司复函称，由于三星公司违约给土木公司造成巨大损失，在双方就退场费用和赔偿事宜达成一致并签订终止协议前，将依法保护施工现场，其他单位无权干涉。

2005年12月31日，通用公司致函土木公司，要求土木公司于2006年1月15之前无条件离场，之后又通知其参加现场移交会，但土木公司仍拒不离场。

2006年2月27日，通用公司以土木公司为被告发起诉讼，请求判令土木公司立即撤离项目现场，同时申请先予执行。

2006年3月9日，土木公司以三星公司、通用公司为共同被告，提起另案诉讼，请求判令三星公司

[1] 具体案情见美国通用电器塑料（中国）有限公司与福建省土木建设实业有限公司深圳分公司、福建省土木建设实业有限公司侵权责任纠纷案（2016）最高法民再 53 号民事判决书（注：该案于 2016 年 12 月 19 日作出判决，2017 年 2 月 16 日发布）。

[2] 2007 年 11 月 28 日变更名称为沙伯基础创新塑料（中国）有限公司。

继续履行《和解协议》，但此后变更诉讼请求为解除《和解协议》，并要求确认其享有优先受偿权；三星公司在该案中提出反诉，请求判令解除《和解协议》。2011年12月20日，另案终审认定通用公司、三星公司和土木公司之间为发包—总包—分包关系，并判决《和解协议》解除（但未明确解除时间），且土木公司享有优先受偿权。

2、 【争议焦点】

第一，总承包合同与分包合同之间是否具有主从关系；

第二，分包合同（即《和解协议》）何时解除；

第三，分包商不撤离施工现场是否有合法依据。

3、 【裁判观点】

第一，关于总承包合同与分包合同之间是否具有主从关系几方意见不一：通用公司、三星公司均主张土建工程分包合同具有从属性质，是EPC总承包合同的一部分，EPC合同解除必然导致分包合同解除；而土木公司则主张根据另案终审判决，两个合同是独立的合同，不具有从属关系。一审、二审法院均支持了土木公司的主张，认为尽管总包合同、分包合同在内容上有一定关联性，但从法律上是两个独立的合同，不具有主从关系；通用公司与三星公司之间协商解除EPC合同，由于土木公司不是EPC合同的当事人，因此对其没有约束力，EPC合同的解除并不影响分包合同（即《和解协议》，下同）的效力。但是，最高人民法院经过提审，虽然认定三星公司与土木公司之间的分包合同有效且独立于总包合同，但在处理结果上否定了原审法院观点，即认为该分包合同虽然独立于总包合同，但总包合同是签订、履行分包合同的前提和基础。总包合同解除后，三星公司即丧失了总承包人的法律地位，三星公司与土木公司之间的分包合同即失去了继续履行的必要性和可能性，使分包合同陷于履行不能，在此情形下，分包合同应予解除；即使三星公司可能因此向土木公司承担相应的违约责任，但这不能作为阻却分包合同解除的事由；总包合同解除必然导致分包合同解除。

第二，关于分包合同何时解除，一、二审法院根据另案终审判决未写明具体解除时间的事实，认定分包合同应自另案终审判决生效之日，即2011年12月20日。但是，最高人民法院认为，由于总包合同解除必然导致分包合同解除，在本案中，分包合同解除时间应与总包合同解除的时间同步，即为2005年12月31日。

第三，关于分包商不撤离施工现场是否有合法依据，一、二审法院认为土木公司基于分包合同取得占有涉案施工现场的权利，自分包合同生效之日起持续存在，直至合同依法解除或终止，即2011年12月20日。但是，最高人民法院认为，土木公司撤场是分包合同解除的必然法律后果，土木公司对三星公司的债权不能对抗通用公司对施工现场的物权，通用公司要求土木公司2006年1月15日前撤离施工现场的诉求应当得到支持。

4、 【纠纷观察】

本案从2005年12月争议发生到2016年12月最高人民法院终审判决，前后超过10年。本案对当前建设工程领域，特别是工业EPC工程领域日益频发的与合同解除有关的争议处理，具有现实的指导价值，具体体现在：

首先，最高人民法院明确认定总承包合同与分包合同不具有主从关系，且两者为独立的法律关系，但前者的解除将导致后者的同步解除。

其次，最高人民法院明确认定分包合同解除后，分包人无权继续占有施工现场，否则构成违约或侵权。这对于制止实践中施工单位通过占据施工现场主张债权或优先受偿权的不当行为，具有重要的指导意义。

再次，我们特别注意到，在本案中，最高人民法院认为《中华人民共和国合同法》（以下简称**“《合同法》”**）第268条规定“定作人可以随时解除承揽合同，造成承揽人损失的，应当赔偿损失”，据此，分包合同发包人三星公司也可以根据该规定随时解除分包合同——这应当是最高人民法院首次在判决中认定，建设工程合同发包人有权根据《合同法》第268条的规定，享有随时解除合同的权利。必须强调的是，尽管在国际工程实践中，合同约定发包人享有任意解除权或便利解除合同权利

（Termination for convenience）是一种惯例做法[3]，但在中国建设工程实践中，一方面，中国建设工程合同示范文本罕有约定发包人任意解除权；另一方面，发包人能否依据《合同法》第268条享有法定任意解除权，仍存在不同司法实践，其中具有代表性的持否定意见的，是广东省高级人民法院在《关于审理建设工程合同纠纷案件疑难问题的解答》（粤高法〔2017〕151号）的立场[4]。

二、工程总承包领域典型案例

【案例2】EPC合同分拆模式下的实际履行与节点付款条件成就[5]

1、 【基本案情】

2013年9月25日，陇川鸿宇安新能源科技有限按公司（以下简称“**发包人/甲方**”）与陕西达华电力工程有限责任公司（以下简称“**EPC总承包人/乙方**”）签订关于云南省陇川县生物质发电厂2×15MW机组《EPC总承包合同》，约定工程采用设计、采购、建造及服务的EPC总承包方式，计价方式为固定总价。

关于进度款支付，合同第二卷第5.2.3款约定，申请付款提供的材料及证明文件包括：（1）进度款支付申请4份；（2）节点完工报告及验收证明；（3）与完成进度节点对应的实际完成工程量报表；（4）已完工程节点应提交的过程技术文件的交付证明；（5）根据合同规定在本次付款中增减款项的证明文件。第5.2.4款约定付款条件如下：（1）已经按5.2.3提交完整的证明文件，并经甲方代表审核确认；（2）乙方已经按照甲方最终确定的支付额开具了相应的发票，同时需提供相应的完税证明。

合同约定的进度款节点及支付金额：（1）主厂房基础出零米、A排#1柱第一罐混凝土浇筑，支付合同总价的15%；（2）第一榀锅炉钢架到达现场，土建结构到运转层，支付合同总价的10%；（3）主厂房（汽机间及除氧仓间）土建结构施工完（封顶），支付合同总价的10%；（4）#1锅炉水压试验完成，支付合同总价的10%；（5）#1汽轮机扣缸结束，支付合同总价的15%；（6）#1机完成72小时试运、移交试生产，支付合同总价的10%；（7）#2锅炉基础交安，钢架开吊；（8）#2锅炉水压试验完成，支付合同总价的5%；（9）#2汽轮机扣缸结束，支付合同总价的5%；（10）#2机完成72小时运行、移交试生产，支付合同总价的5%；（11）一年保修期结束，支付合同总价的5%。

合同第三卷附件5“检验、试验、和验收”第1条约定：“……承包商应向业主提供包括本合同附件要求的所有设备和材料工程试验使用的标准和规定、试验记录及制造商的质量控制计划等材料。……”第2条约定：“……最终产品的质量是乙方的责任，所有测试的成本应由承包商承担。甲方参与的质量活动，包括参加见证并签署见证报告，并不能豁免乙方应承担的质量责任以及由此带来的质量及进度方面的责罚。若乙方未按本节规定条款进行有效工作，则甲方有权拒签《进度款支付证明》。乙方必须按此文条款进行有效工作且提供相关证明给甲方，甲方经过审核及评审才能出具《进度款支付证明》，乙方才能按商务合同相关条款进行进度款的办理”。

由于本工程主要资金由国家金融机构贷款，融资机构要求贷款必须专款专用，直接支付至工程管理和施工单位，因此，发包人、EPC总承包人进行了如下EPC合同分拆安排：

设计（E）部分：2013年10月24日，发包人与设计单位中机电力公司签订《勘测设计及工程管理合同》。

采购（P）部分：2013年10月28日，发包人、EPC总承包人、中设石化公司三方签订《设备成套采购合同》，约定由发包人按支付节点支付给中设石化公司，中设石化公司在收到发包人的款项后再支付给EPC总承包人。

施工（C）部分：2013年10月31日，发包人与施工单位西北电建四公司签订《施工总承包合同》。

[3] 见 1999 版 FIDIC 合同条件第 15.5 款。

[4] 针对“4.发包人或承包人能否按照承揽合同的规定解除建设工程合同”这一问题，广东省高院的答复为“发包人或承包人行使建设工程合同的解除权应符合《建设工程司法解释》第八条和第九条的规定，其以《合同法》第二百六十八条和第二百八十七条规定为依据主张随时解除施工合同的，不予支持，合同另有约定的除外。”

[5] 陕西达华电力工程有限责任公司与陇川鸿宇安新能源科技有限公司建设工程施工合同纠纷案（2016）最高法民终 695 号民事判决书（2017 年 3 月 31 日作出判决）

此后，EPC总承包人与施工单位另行签订了《全厂建筑安装工程施工合同》。

在《EPC总承包合同》履行过程中，EPC总承包人主张发包人支付拖欠的若干节点工程款合计53,485,080元，发包人以合同约定的节点付款条件不成就为由予以拒绝。

2、 【争议焦点】

第一，《EPC总承包合同》是否有效；

第二，《EPC总承包合同》是否实际履行；

第三，工程节点进度款支付条件是否已成就。

3、 【裁判观点】

第一，关于《EPC总承包合同》的效力，发包人主张EPC总承包人仅具有设计资质，不能进行工程总承包，因此合同无效。对此，裁判机构认为，EPC总承包人具有工程设计电力行业乙级资质，而住建部颁布的《工程设计资质标准》以及EPC总承包人持有的资质证书中均已明确持有设计资质的主体可以从事资质证许可范围内的相应工程总承包、工程项目管理和相关的技术、咨询管理服务，故EPC总承包人可以从事总承包业务。关于发包人主张涉案工程规模为2×15MW，超出EPC总承包人的资质规模问题，裁判机构认为涉案工程项目（生物质发电工程）属于电力行业新能源工程，而住建部颁布的《电力行业建设项目设计规模划分表》未对新能源建设项目的设计规模做出划分，故发包人的该项抗辩理由法院不予采信。

第二，关于《EPC总承包合同》是否实际履行，发包人主张该合同并未实际履行，其与EPC总承包人之间只存在设备采购合同关系，设计单位、施工单位分别为中机电力公司、西北电建四公司；EPC总承包人则主张该合同已实际履行，发包人与设计、施工单位直接签订的合同均为贷款需要而签订，并未履行。裁判机构根据查明的事实，认定实际履行设计的为EPC总承包人，而实际施工单位为EPC总承包人的分包单位，同时结合周例会会议纪要、当事人之间往来函件、节点进度款请款单等证据，裁判机构最终认定《EPC总承包合同》已实际履行。

第三，关于若干工程节点进度款支付条件是否已成就，EPC总承包人主张其第一节点（主厂房基础出零米）工程进度款申请虽未满足合同约定支付条件，但发包人同意支付该笔进度款的行为表明，双方已变更约定的节点付款条件。裁判机构认为，根据《EPC总承包合同》第二卷第1.5条约定，“除非用书面形式写出、标明日期、清楚的针对合同、并且有双方的授权人的签字批准，否则任何关于合同的补充和变更都是无效的。”据此，发包人同意付款的效力仅及于第一节点付款，并不能延伸扩张解释为变更其他付款条件条款的效力，且EPC承包人也未能提交证据证明双方已就变更节点付款条件达成新的书面一致。由于EPC承包人未按《EPC总承包合同》第5.2.3约定提供请款文件材料（特别是相应技术文件，包括采购设备和材料工厂试验所使用的标准和规定、试验记录及制造商的质量控制计划等），导致发包人无法核算节点工程款数额，因此发包人行使先履行抗辩权，即拒绝支付节点工程款的行为，并不违反合同约定。

4、 【纠纷观察】

首先，本案系最高人民法院首次确认住建部颁布的《工程设计资质标准》可以作为认定工程总承包市场准入的法律依据。关于工程总承包资质，《国务院关于取消第一批行政审批项目的决定》（国发[2002]24号）取消了工程总承包资格核准的行政审批后，原建设部（现住建部）通过发布一系列行政规范性文件和部门规章[6]，规定取得工程设计资质、施工总承包资质的企业可以从事工程总承包业务。但由于上位法《建筑法》、《建设工程质量管理条例》、《建设工程勘察设计管理条例》主要基于设计和施工分割的建设管理体制而制定，这样，因缺乏上位法的支持，上述行政规范性文件和部门规章能否作为工程总承包市场准入的法定依据，在实践中仍存在一定争议。例如，北京、天津仍要求工程总承包单位应当同时具备设计和施工资质[7]。在此背景下，

[6] 《建设部关于工程总承包市场准入问题说明的函》（建市函[2003]161 号）、《住房与城乡建设部关于进一步推进工程总承包发展的若干意见》、《建筑业企业资质标准》（建市〔2014〕159 号）、《建设工程勘察设计资质管理规定》（建设部令第 160 号，2015 年修改）等。

[7] 北京：《关于在本市装配式建筑工程中施行工程总承包招投标的若干规定（试行）》（京建法[2017]29 号）；天津：《市建委关于天津市建设项目推行工程总承包试点工作有关事项的通知》（津建筑[2017]477 号）。

本案例对统一解决因工程总承包资质条件引发的合同效力争议，具有重要指导意义。

其次，在国内工程总承包实践中，特别是以生产设备、工艺为主的工业EPC项目中，基于贷款、税收筹划等方面的诉求，当事人对EPC合同进行分拆是一种较为普遍的做法。但合同交易结构的复杂化，很容易导致相关各方当事人之间的真实法律关系不易梳理，相关履约事实（如支付和结算）不易查明，各方主体之间的责任范围不易界定，甚至出现不同合同之间的争议解决条款的冲突。在本案中，裁判机构对《EPC总承包合同》是否实际履行这一争议焦点的审理过程，体现了此类EPC合同纠纷的典型特征。

再次，本案中EPC总承包人针对节点进度款起诉发包人。对于涉案合同约定的里程碑（节点）进度款支付条件，特别是相应技术文件，裁判机构精确把握了“涉案项目系电力行业的EPC总承包项目，包含大量的设备采购以及技术问题，施工只是其中一方面”——即此类工业EPC项目区别于常规施工项目的典型特征，这是值得称赞的。

三、境外工程领域重大案例

（一）【案例3】独立保函的性质以及独立保函欺诈例外的认定[8]

1、 【基本案情】

中机新能源开发有限公司（以下简称“**总承包人**”或“**中机公司**”）作为总承包人承建了Jaguar Energy Guatemala LLC（以下简称“业主”或“JEG”）危地马拉2×15MW电站项目。

2008年11月27日，华西能源工业股份有限公司（以下简称“**分包人**”或“**华西能源**”）和中机公司签订了JAGUAR2×15MW电站项目480t/h循环硫化床《锅炉供货和服务合同》，约定由华西能源向中机公司提供危地马拉电站项目所需的锅炉设备、技术资料和技术服务等，合同总价1.8亿元。

2010年2月8日，业主、总承包人和分包人签订了《分包商承诺协议》，约定业主对《锅炉供货和服务合同》享有介入权，具体为：按照EPC合同如总承包人违约造成业主终止EPC合同，包括但不限于在《锅炉供货和服务合同》下，总承包人重大违约造成分包人终止合同，则业主有权介入《锅炉供货和服务合同》代替总承包人和转让《锅炉供货和服务合同》；一旦发出介入通知，分包人应全力执行，应对业主或其指定人负责以替代对总承包人负责。

2010年6月2日，华西能源向中国建设银行股份有限公司自贡分行（以下简称“**建行自贡分行**”）申请就《锅炉供货和服务合同》提供《履约保函》。2010年6月9日，华西能源与建行自贡分行签订《出具保函协议》，约定由建行自贡分行为华西能源出具以中机公司为受益人、保证金额为2565万元整的保函。同日，建行自贡分行向中机公司出具《履约保函》，承诺“我行作为担保人在此无条件地、不可撤销地承诺：一旦接到贵公司要求索赔的第一次书面通知时，不需被担保人的同意，即在五个银行工作日内按本保函的规定支付不超过上述保函金额的款项至贵公司指定的账户，无需贵公司出具证明或陈述理由。本保函是担保人无条件、不可撤销的直接义务。在向我行提出要求前，我行将不要求贵公司首先向被保证人索要上述款项。我行同意，合同的任何修改、变更或补充，都不能免除我行按本保函所应承担的义务，有关上述修改、变更或补充也无须通知我行。本保函自开立日生效，有效期截止到2013年12月30日。”

2013年11月29日，业主向华西能源发出业主行使介入权通知，称总承包人中机公司发生违约行为导致业主可以根据EPC合同行使解除权、业主介入成为总承包人并且承担《锅炉供货和服务合同》转让的权利现在已经生效，业主特此选择行使解除权，介入成为总承包人并且承担《锅炉供货和服务合同》转让，《锅炉供货和服务合同》继续有效，华西能源应当向业主承担责任以代替向总承包人的责任。

此后，中机公司通过传真、邮件方式向华西能源发送通知，称其在业主介入之前已向业主发出接管通知，业主已变更为中机公司，业主的介入是无效的，要求华西能源不能与业主进行合作，否则视同违约，中机公司将按合同约定进行索赔。

2013年12月27日，建行自贡分行收到中机公司

[8] 中机新能源开发有限公司与华西能源工业股份有限公司保函欺诈纠纷案（2017）川民终 72 号民事判决书。

发出的索赔通知，称因华西能源未能完全履行《锅炉供货和服务合同》的约定，要求建行自贡分行履行保函项下的支付义务。为此，华西能源诉请法院判令建行自贡分行终止《履约保函》项下的支付行为。

本案审理过程中，国际商会仲裁院(ICC)已就业主与中机公司之间的纠纷作出裁决，认定业主有效终止EPC合同。

2、 【争议焦点】

第一，案涉《履约保函》是独立保函还是《锅炉供货和服务合同》从合同；

第二，如果是独立保函，中机公司索赔是否存在保函欺诈情形。

3、 【裁判观点】

第一，关于案涉《履约保函》是独立保函，还是《锅炉供货和服务合同》的从合同。一审法院认为：《履约保函》是《锅炉供货和服务合同》的从合同，根据《中华人民共和国担保法》（以下简称“**《担保法》**”）的规定，主合同转移的，从合同有关权利义务一并转移。因此，业主行使介入权后，《锅炉供货和服务合同》权利人变更为了业主，《履约保函》项下的债权因而一并由JEG继受，中机公司不再享有基于《履约保函》向保函开立人请求支付的权利。因此，一审法院认为中机公司无权要求建行自贡分行根据《履约保函》对其进行支付。但是，二审法院认为：独立保函是开立人出具的附单据条件的付款承诺，在受益人提交符合独立保函要求的单据时，开立人即需独立承担付款义务，受益人无需证明债务人在基础交易中的违约事实，开立人不享有传统保证所具有的主债务人抗辩权以及先诉抗辩权。因此，独立保函独立于基础交易关系和开立申请关系。根据《履约保函》载明内容，二审法院认定其性质应为独立保函。针对分包商“案涉独立保函因系国内交易而不具备独立性”的主张，二审法院援引最高人民法院《关于审理独立保函纠纷案件若干问题的规定》（法释[2016]24号）（以下简称“**《独立保函司法解释》**”）第23条规定：“当事人约定在国内交易中适用独立保函，一方当事人以独立保函不具有涉外因素为由，主张保函独立性的约定无效的，人民法院不予支持。”一审法院根据《担保法》认定案涉《履约保函》系《锅炉供货和服务合同》的从合同，属适用法律不当，予以纠正。

第二，关于中机公司是否构成独立保函欺诈。二审法院认为，根据《独立保函司法解释》第18条的规定：“人民法院审理独立保函欺诈纠纷案件或处理止付申请，可以就当事人主张的本规定第十二条的具体情形，审查认定基础交易的相关事实。”虽然独立保函具有独立性，但在认定独立保函欺诈的案件中，人民法院有权对基础交易合同的履行情况进行有限度的审查，以判断中机公司有无行使索赔权的正当理由及其索赔申明是否进行了虚假陈述，在此限度内审查基础交易合同的履行情况并不与保函独立性相冲突。二审法院认定华西能源基于《分包商承诺协议》的约定，对业主的介入是否具有正当性不具有审查义务，也没有权利审查业主的介入权是否正当，一旦接到介入通知，只能接受业主的介入权，而向业主履行《锅炉供货和服务合同》项下的义务。因此，华西能源在业主介入后，直接向业主履行《锅炉供货和服务合同》项下的义务，不构成违约。中机公司与业主之间因履行总承包合同发生的纠纷属另外的法律关系，与华西能源无关，不能因此认定华西能源存在违约行为。本案中，中机公司作为《分包商承诺协议》的当事人，按照理性第三人的通常判断和认识能力，应当明知华西能源依据该协议约定，负有无条件接受业主方的介入，并直接向业主履行《锅炉供货和服务合同》项下的合同义务。换言之，在业主行使介入权的情况下，中机公司应当明知华西能源向业主履行《锅炉供货和服务合同》项下的合同义务符合三方约定，自己基于华西能源直接向业主履行《锅炉供货和服务合同》项下的合同义务的事实，主张华西能源存在违约行为，与《分包商承诺协议》的约定相矛盾。故中机公司据此提出的独立保函索赔请求，属于滥用权利，依照《独立保函司法解释》第12条第5项之规定，构成独立保函欺诈。故，本案能够排除合理怀疑地认定中机公司构成独立保函欺诈，华西能源请求终止支付《履约保函》项下的款项，有事实和法律依据，二审法院予以支持。

4、 【纠纷观察】

本案是最高人民法院《独立保函司法解释》于2016年12月1日施行后，在海外工程纠纷案件中适用该司法解释的第一案。

《独立保函司法解释》是在中国法院服务和保障“一带一路”建设、促进对外开放的背景下发布实施的，是中国境外工程争议解决领域最重要的法律规范性文件之一。首先，该司法解释对涉外独立保函的管辖权、准据法的裁判规则进行了统一规定，具有重要的司法实践指导价值。其次，该司法解释的内容和亮点集中体现为：第一，明确界定独立保函性质，统一裁判思路；第二，统一国际国内独立保函交易效力规则，坚持平等保护当事人权益；第三，明确独立保函的独立性和单据性特征，保证付款的快捷性和确定性；第四，严格界定欺诈情形及证明标准，审慎确定独立性原则的例外；第五，严格规范止付程序，维护程序公正和实体公正等。再次，该司法解释还对独立保函的开立与生效、转让、终止等进行了具体规定。

本案的一个特别之处在于由业主、总承包人、分包人三方通过签订《分包商承诺协议》，约定了业主在EPC合同解除下的介入权(step-in right)，而这也成为本案被告是否构成保函欺诈的关键。介入权在国际工程项目中较为常见（特别是在项目融资模式下），但在国内工程实践中较为罕见。在本案中，裁判机构充分尊重当事人的约定，对当事人按约行使介入权的行为给予支持。这对于切实维护国际工程各方当事人的合法权益，服务和保障“一带一路”建设，具有积极的示范效应。本案也因此作为典型判例，被选入《四川高院商事审判裁判规则指引》。

（二）【案例4】境外建设工程合同纠纷的管辖与法律适用[9]

1、 【基本案情】

2013年9月12日，福贡腾鸿外贸有限责任公司（以下简称“**发包人**”） 与自然人李某（以下简称“**承包人**”）签订《工程承包劳务合同》，约定发包人将位于缅甸境内的一段林区公路发包给承包人施工，双方就工期、公路开挖标准、工程单价及付款方式进行了约定。

在合同履行过程中，发包人认为承包人未严格按照合同要求进行施工，双方协议解除合同。合同解除后，在结算工程款时，双方就工程款发生争议。发包人认为，承包人仅完成了已修路段中工程总量的40%，仅同意按40%的工程量结算工程款；而承包人要求结算已修路段的全部工程款。

2、 【争议焦点】

第一，中国法院是否具有管辖权；

第二，是否应当适用中国法律作为本案准据法。

3、 【裁判观点】

第一，关于中国法院是否具有管辖权。发包人认为，本案为建设工程施工合同纠纷，根据《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第28条有关建设工程施工合同纠纷适用专属管辖的规定，本案应由不动产所在地即缅甸法院管辖，被告住所地人民法院审理本案违反专属管辖的相关规定。最高人民法院认为，基于司法主权原则，《中华人民共和国民事诉讼法》第33条所称不动产纠纷专属管辖系以民事案件由人民法院管辖为前提，不应依据该规定排除人民法院管辖。本案虽有涉外因素，但双方当事人并未约定选择由外国法院管辖，中国法院依法有权受理。

第二，关于能否适用中国法律作为准据法。首先，发包人认为本案为涉外案件，根据《中华人民共和国涉外民事关系法律适用法》（以下简称“**《涉外民事关系法律适用法》**”）第36条“不动产物权，适用不动产所在地法律”的规定，应当适用工程所在地国缅甸的法律。对此，最高人民法院认为本案系建设工程施工合同纠纷，并非不动产物权纠纷，发包人主张不能成立。其次，发包人主张，根据《涉外民事关系法律适用法》第10条及相关法律，法院应依职权查明该外国即缅甸国的法律，在未查明缅甸国法律的情况下，对案涉合同作出无效的认定错误。对此，最高人民法院认为：《涉外民事关系法律适用法》第41条规定：“当事人可以协议选择合同适用的法律。当事人没有选择的，适用履行义务最能体现该合同特征的一方当事人经常居住地法律或者其他与该合同有最密切联系的法律。”本案中，双方在案涉合同中并未就发生纠纷时适用的准

[9] 参见福贡腾鸿外贸有限责任公司、李昌奎建设工程施工合同纠纷案（2017）最高法民申 629 号民事裁定书。

据法进行约定，发包人亦未举证证明双方就本案协议选择适用外国法律，案涉合同双方当事人均系我国公民或法人，其住所地及合同缔结地亦在我国，故依最密切联系原则适用中国法律并无不当。

4、 【纠纷观察】

《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》（法释[2015]5号）第28条规定了建设工程施工合同案件的专属管辖。对于境外建设工程合同，在总包或分包合同当事人住所地均位于中国境内，且未约定由境外工程所在地法院管辖的情形下，是否也应适用专属管辖，即由境外工程所在地法院管辖，在实务界存在不同观点。特别是我们注意到，在中国法院受理的境外工程施工合同纠纷案件中，大量存在管辖权争议。在本案中，最高人民法院首次通过再审裁定，明确在上述情形下不适用专属管辖。

基于本案及类似案例的分析，对于中国当事人之间的境外建设工程合同纠纷，权衡利弊，事先约定由中国境内具有丰富涉外裁判经验的仲裁机构进行仲裁，应当是更高效的争议解决途径。

声明：本文是作者执笔的《中国建设工程年度观察（2018）》的部分研究成果，全部研究成果收录于北京仲裁委员会主编的《中国商事争议解决年度观察（2018）》，该年度观察将于近期在中国法制出版社正式出版，欢迎关注。

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JUN HE
SPECIAL REPORT

JUNHE

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Annual Review on Construction Disputes in China (Series 2)---Analysis of Major Cases

1. Major Cases in in the Field of Conventional Engineering Construction

[Case One] Impact of the Termination of a General Contract on the Existence of a Subcontract[1]

1.1 [Facts] On 8 December 2003, America General Electric Plastics (China) Co., Ltd.[2] (hereinafter referred to as the "**Employer**") awarded Samsung Engineering Co., Ltd. (hereinafter referred to as "**Samsung**") as the General Contractor of a rehabilitation project which involved a dosage control room and an unloading shed PLG station, an office and a heating room as well as a production workshop (hereinafter referred to as the "**Project**"). Employer and Samsung signed an EPC contract for the Project.

Afterwards, the General Contractor subcontracted the civil works to Fujian Civil Engineering Construction Co., Ltd. (hereinafter referred to as the "**Subcontractor**").

On 15 November 2004, due to delays in work, the General Contractor informed the Subcontractor to suspend the works.

On 31 December 2004, the General Contractor reached and signed a Settlement Agreement with the Subcontractor, which provided the completion date of the civil works after the resumption thereof.

On 16 December 2005, the Employer gave a written notice to the General Contractor to terminate the EPC contract on 31 December 2005, on the grounds that the Subcontractor had failed to finish the work by the agreed completion date, 30 June 2005. The General Contractor confirmed in writing the termination of the EPC contract.

On 19 December 2005, the General Contractor gave a written notice to the Subcontractor that the EPC contract between the Employer and the General Contractor had been agreed to be terminated and such termination would be effective on 31 December 2005. Consequentially, the contract between the General Contractor and the Subcontractor would be terminated 14 days after the notice date, and the Subcontractor must then leave the site immediately and make a delivery of Project-related construction documents as well as other relevant documents.

The Subcontractor replied by letter that because the Subcontractor suffered a significant loss out of the General

[1] See the Supreme People's Court Civil Judgment (2016) Zui-Gao-Fa-Min-Zai No.53. The judgment of the case was entered on 19 December 2016 and was publicized on 16 February 2017.

[2] The name of the company was changed to SABIC Innovative Plastics (China) Co., Ltd on 28 November 2007.

Contractor's breach of contract, the Subcontractor would stay and protect the construction site in accordance with the law until an agreement regarding exit fee and compensation issues had been reached, and a formal termination agreement had been signed, during which period no other entities had the right to interfere with it.

On 31 December 2005, the Employer wrote to the Subcontractor requiring the latter to leave the site unconditionally by 15 January 2006. Afterwards, the Employer informed the Subcontractor to participate in the on-site delivery meeting, but the latter continued to refuse to leave.

On 27 February 2006, the Employer initiated a lawsuit against the Subcontractor, petitioning the court for an order requiring the Subcontractor to leave the Project site immediately, and applying for advance execution at the same time.

On 9 March 2006, the Subcontractor filed a separate lawsuit against the General Contractor and the Employer, petitioning the court for an order requiring the General Contractor to continue to execute the Settlement Agreement; however, it subsequently changed its petition to terminate the Settlement Agreement and confirm its' entitlement to a preemptive right to payment. The General Contractor made a counterclaim in that case to terminate the Settlement Agreement. On 20 December 2011, the latter case was decided at final instance that it was an employer – general contractor – subcontractor relationship amongst the parties concerned, that the Settlement Agreement was terminated (however the termination date thereof was not made clear), and that the Subcontractor was entitled to a preemptive right to payment.

1.2 [Key Issues]

Firstly, is the Subcontract subordinate to the General Contract?

Secondly, when was the Subcontract (i.e. the Settlement Agreement) terminated?

Thirdly, is there a lawful ground for the Subcontractor not to leave the construction site?

1.3 [Judicial Reasoning]

Firstly, on the issue whether the Subcontract is subordinated to the General Contract, the concerned parties held different opinions. Both the Employer and the General Contractor contended that the Subcontract was subordinate to the General Contract and was part of the EPC contract; as such, the termination of the EPC contract would inevitably cause the termination of the Subcontract. While the Subcontractor contended that as per the final judgment of the separate case, the two contracts were independent to each other with no relationship of subordination.

Both the court of first instance and the court of second instance stand for Subcontractor, opining that although the General Contract and the Subcontract are related to some degree in terms of their contents, they are two independent contracts from the perspective of the law and with no principal-subordinate relationship. The termination of the EPC contract between the Employer and the General Contractor through negotiation does not bind the Subcontractor as the Subcontractor is not a party thereto and thus does not affect the effectiveness of the Subcontract (i.e. the Settlement Agreement).

However, the SPC retried the case and overruled the opinion of the court of original instance in terms of the substantial outcome, despite the SPC recognizing that the Subcontract between the General Contractor

and the Subcontractor was valid and independent to the General Contract. The SPC held that the existence of the General Contract was the prerequisite and basis for the entry into and performance of the Subcontract and that, after the termination of the EPC contract, Samsung (i.e. the General Contractor) had lost the legal status as the General Contractor and thus the Subcontract between the General Contractor and the Subcontractor lost the necessity and possibility to continue to be implemented, which results in the impossibility of performance of the Subcontract. As such, the Subcontract shall be terminated, and even though the General Contractor may possibly take on liability towards the Subcontractor, such shall not constitute the grounds for hindering the termination of the Sub-Contract. In other words, the termination of the General Contract will inevitably cause the termination of the Subcontract.

Secondly, on the issue of when the Subcontract was terminated, both the court of first instance and the court of second instance held that, pursuant to the fact that the judgment of the separate case did not provide a specific termination date, the Subcontract (i.e. the Settlement Agreement) shall be terminated as of the date that the judgment of that separate case came into effect, i.e. on 20 December 2011. However, the SPC held that in view that the termination of the General Contract will inevitably cause the termination of the Subcontract, in this case, the termination date of the Subcontract shall be synchronically in line with that of the General Contract, i.e. on 31 December 2005.

Thirdly, on the issue whether there was a lawful basis for the Subcontractor not to leave the construction site, both the court of first instance and the court of second instance held that the Subcontractor enjoyed the right to possess the involved construction site based on the Subcontract. Such right became effective since the day the Subcontract came into effect and would not be extinguished till the lawful termination of the Subcontract, i.e. on 20 December 2011. But the SPC held that the Subcontractor's leaving the site is an inevitable consequence of the termination of the Subcontract and the Subcontractor's right in personam against the General Contractor shall not prevail over the Employer's right in rem towards the construction site; therefore, the Employer's claim for the Subcontractor to leave the construction site by 15 January 2006 shall be supported.

1.4 [Review of Dispute]

This case started from December 2005 and the SPC entered the final judgment in December 2016, spanning more than 10 years from the beginning to the end. This case is of practical and instructive significance in the current construction engineering field, especially in the industrial EPC field where disputes related to contract termination have been increasing. Its value concretely embodies as follows:

Firstly, the SPC explicitly recognized that there isn't a principal-subordinate relationship between General Contract and Subcontract, and that the general contract and the subcontract are independent of each other. Nonetheless, the termination of the former will cause the termination of the latter synchronically.

Secondly, the SPC explicitly recognized that a Subcontractor has no right to occupy the construction site after the termination of Subcontract, otherwise it shall constitute a breach of contract or infringement in tort. This is of great reference significance in preventing misconduct in practice where construction units claim for creditor's rights or preemptive rights by occupying the construction site.

Thirdly, we paid special attention to one opinion delivered by the SPC in this case that, as a result of Article 268 of the *Contract Law of People's Republic of China* (hereinafter referred to as the "**Contract Law**") which provides that the Client may terminate the Contract of Hired Work at any time, but it shall bear the liability for making compensation for losses if the Contractor suffers such losses therefrom, the client of the Subcontract, i.e. the General Contractor, may also terminate the Subcontract at any time as per this Article. It is the first time the SPC confirms in a judgment that the employer of a construction contract is entitled to a legal right to terminate the contract at any time in accordance with the provision of Article 268 of the Contract Law.

What is to be stressed here is that even if in the international construction field, where the employer being contractually entitled to a right of arbitrary termination or termination for convenience is a customary practice, in China's construction field it is a different story. On one hand, the PRC's standardized model construction contracts rarely grant the right of termination for convenience to the employer.[3] On the other hand, whether or not an employer may enjoy the statutory right of arbitrary termination pursuant to Article 268 of the Contract Law was often handled inconsistently in judicial practices, among which a typical negative view was taken by Guangdong Higher People's Court in its *Answers on Knotty Issues Concerning Cases of Disputes over Construction Engineering Contracts (Yue-Gao-Fa [2017] No.151)*.[4]

2. Major Cases in the Field of EPC

[Case Two] Actual Implementation and Satisfaction of Conditions for Payments on Milestones under EPC Contract Splitting Model[5]

2.1 [Facts]

On 25 September 2013, Longchuan Hongyu Anxin New Energy Technologies Co., Ltd. (hereinafter referred to as the "**Employer**" or "**Party A**") signed an EPC contract with Shaanxi Dahua Electric Engineering Co., Ltd. (hereinafter referred to as the "**EPC Contractor**" or **"Party B**") concerning 2×15MW biomass power plants in Longchuan County, Yunnan Province, for which the parties agreed to adopt EPC approach of design, procurement, construction and service for the works and fixed lump sum as the pricing method.

On progress payment, Clause 5.2.3 of Volume II of the Contract provided that the materials and documentation required for application for payments include: (1) 4 copies of progress payment application, (2) close-out report and Acceptance Certificate on the relevant milestone, (3) statement of quantities of work that have been actually completed in correspondence with the completed milestone, (4) certificate of delivery of process technology documents that shall be handed over on the completed milestone, (5) other documentation on the amounts added or deducted in this payment in accordance with the provisions of the Contract. Clause 5.2.4 further provides the conditions for payments as: (1) a complete package of documentation has been handed over in accordance with Clause 5.2.3 and has been examined and verified by Party A's representative, (2) Party B has issued

[3] See FIDIC *Conditions of Contract for Construction (First Ed. 1999)*, Article 15.5.

[4] With respect to the issue that "whether the employer or the contractor may terminate a construction contract in accordance with provisions of Contract for Work", Guangdong Higher People's Court replied that "the right to terminate a construction contract exercised by the employer or the contractor must comply with Article 8 and Article 9 of the *Interpretation on Certain Issues Concerning the Application of Law in the Trial of Cases Involving Project Construction Contract Disputes* by the Supreme People's Court. Those contentions to terminate construction contract for convenience on the grounds of Article 268 and Article 287 of the Contract Law shall not be upheld, unless otherwise provided in the contract."

[5] See the Supreme People's Court Civil Judgment (2016) Zui-Gao-Fa-Min-Zhong No.695 (the judgment was entered on 31 March 2017).

invoices in accordance with the payment amounts determined by Party A and provided corresponding tax-paid proof at the same time.

Milestones and amounts of progress payments were provided in the Contract, and included: (1) main building's foundation soil exceeded zero meter and first concrete applied for No.1 column of line A, 15% of the total contract value shall be paid, (2) first steel frame for boiler delivered to the site and civil works reached the operation level, 10% of the total contract value shall be paid, (3) civil works of main building (steam engine room and deoxygenation room) completed (roof sealed), 10% of the total contract value shall be paid, (4) hydrostatic test for No.1 boiler finished, 10% of the total contract value shall be paid, (5) No.1 steam turbine's cylinder buckled, 15% of the total contract value shall be paid, (6) 72-hour commissioning and delivery for trial production for No.1 Unit finished, 10% of the total contract value shall be paid, (7) No.2 Boiler foundation handed over for installation and steel frame successfully hoisted, 10% of the total contract value shall be paid, (8) hydrostatic test for No.2 boiler finished, 5% of the total contract value shall be paid, (9) No.2 steam turbine's cylinder buckled, 5% of the total contract value shall be paid, (10) 72-hour commissioning and delivery for trial production for No.2 Unit finished, 5% of the total contract value shall be paid, (11) at the end of the one-year warranty period, 5% of the total contract value shall be paid.

Article 1 of Appendix 5 "Inspection, Test and Taking-over" of Volume III of the Contract provides, "… the Undertaker shall provide, inter alia, all such standards and specifications for engineering tests on equipment and materials, test records and quality control plan by the Manufacturer as are required hereby..." Article 2 provides, "… Party B shall be responsible for the quality of final products and all the costs of tests shall be borne by the Undertaker. Quality activities Party A participates in, including witnessing and signing witness reports, shall not exempt Party B from taking responsibilities for quality and for penalties in respect of quality or progress therefrom. In the event that Party B fails to effectively work in compliance with this Section, Party A shall have the right not to issue the Progress Payment Certificate. Party B may go through progress payments formalities in accordance with relevant provisions in the business contract, provided that Party B has worked effectively and delivered to Party A the relevant proofs in accordance with provisions herein and that Party A has accordingly issued Progress Payment Certificate after examining and reviewing the documentation."

Funds for this Project were mainly loans from national financial institutions, which required such funds to be used for specified purposes and be paid directly to the project management and construction units. Therefore, the Employer and EPC Contractor split the EPC contract in the following structure:

Engineering (E) part: on 24 October 2013, the Employer and the engineering unit signed a Survey and Design and Engineering Management Contract.

Procurement (P) part: on 28 October 2013, the Employer, EPC Contractor and the equipment supplier signed a Complete Set of Equipment Procurement Contract, stipulating that payments shall be made to the equipment supplier by the Employer on milestones for payments and the equipment supplier may deliver such equipment to the EPC Contractor after receiving the payments from Employer.

Construction (C) part: on 31 October 2013, the Employer and the Construction unit signed a General Contracting Construction

Contract. Afterwards, the EPC Contractor signed a separate Construction Contract of Building and Installation Project for the Whole Plant with the Construction unit.

During the implementation of the EPC contract, the EPC Contractor claimed for the Employer to pay progress payments in arrears of RMB 53,485,080 in aggregate. The Employer refused to pay such on the ground of dissatisfaction of conditions for progress payments.

2.2 [Key Issues]

Firstly, was the EPC Contract valid?

Secondly, was the EPC Contract actually implemented?

Thirdly, had the conditions for progress payments been satisfied?

2.3 [Judicial Reasoning]

Firstly, on the validity of EPC Contract, the Employer contended that the EPC Contractor only had design qualification and thus was not qualified to engage in an EPC project, insomuch that the EPC contract was invalid. In this regard, the court opined that the EPC Contractor has Grade B qualification for engineering design in the electric power industry. Both the *Qualification Standards for Engineering Design* promulgated by MOHURD and the qualification certificate issued to the EPC Contractor provides that entities with engineering design qualification may engage in EPC projects, project management and other relevant technical and consultative management services in correspondence with the permitted scope of the qualification certificate. Hence, the EPC Contractor may engage in EPC business. As for the plea by Employer that the involved project scale is 2×15MW and exceeds the permitted scale for the EPC Contractor's qualification, the court opined that the involved project (a biomass power plant) is attributed to the new energy project in the electric power industry, the design scale of which is not classified in the *Classification Table of Design Scale for Construction Projects in Electric Power Industry* promulgated by MOHURD; and hence, such Employer's plea was refused.

Secondly, on the issue of whether or not the EPC contract was actually implemented, the Employer contended that the EPC contract was not actually implemented as it only had an equipment procurement contractual relationship with the EPC Contractor while the design unit and construction unit were two other entities. Nevertheless, the EPC Contractor contended that such EPC contract was actually implemented as the contracts signed by the Employer respectively with the design unit and construction unit were both for the purpose of loan requirements and were not implemented. The court found that, pursuant to the established facts, the EPC Contractor was the one that actually performed the design work while the actual construction unit was also a subcontractor of the EPC Contractor. Combined with the minutes of weekly meetings, correspondences among the parties and letters for application of progress payments, the court eventually recognized that the EPC contract was actually implemented.

Thirdly, on the issue of whether or not the conditions for progress payments for certain milestones had been satisfied, the EPC Contractor contended that despite the application for progress payment on the first milestone (main building's foundation soil exceeding zero meter) did not meet the conditions agreed in the contract, the consent by the Employer on paying such payment indicated that both parties had reached an agreement in changing the milestones for progress payments. The court

opined that, as per Article 1.5 of Volume II of the EPC contract which provides that "unless otherwise made in writing, marked with date, clearly aimed at the Contract and approved and signed by the authorized persons by both parties, any addendum or amendment to this Contract is invalid", the effect of the consent by the Employer on making the first payment shall be constrained only to the first milestone and the validity of such consent cannot be extended to change all the other conditions for payments. In addition, the EPC Contractor did not submit evidence to prove the parties had reached a written agreement on the change of conditions for progress payments on milestones. Since the EPC Contractor did not submit the materials for payment application in accordance with Clause 5.2.3 of the EPC contract (especially the relevant technical documents, including standards and specifications for engineering tests on procured equipment and materials, test records and quality control plan of Manufacturers), which caused the Employer to be unable to account for the amount of the progress payment, the Employer may thus refuse to pay the progress payment by exercising its right of defense against the advance performance and such refusal is not a breach of contract.

2.4 [Review of Dispute]

Firstly, this case is the first time the SPC confirms that the *Qualification Standards for Engineering Design* promulgated by MOHURD can serve as the legal basis for recognizing the market access for EPC projects. Regarding the qualification for EPC, after the *State Council Decisions on Cancellation of the First Batch of Administrative Approval Items (Guo-Fa [2002] No.24)* abolished the administrative approval of the qualification for EPC, the previous Ministry of Construction (now the "MOHURD"), had issued a series of administrative regulatory documents and departmental regulations[6] providing that the enterprises with Engineering Design Qualification or General Contracting Construction Qualification may engage in EPC projects. However, the superordinate legislations such as *Construction Law, Regulation on the Administration of Quality Management of Construction Projects* and *Regulation on the Administration of Survey and Design of Construction Projects* were mainly enacted on the basis of a construction management system in which a line was drawn between designing and building; and thus, due to the lack of support from the superordinate legislations, whether the aforementioned administrative regulatory documents and departmental regulations of MOHURD can serve as the legal basis of market access for EPC projects remains controversial in practice. For instance, Beijing and Tianjin Municipalities still require EPC contractors to be qualified with both design qualification and construction qualification.[7] In such situation, this case shall have reference significance in unifying the courts' approach in dealing with such disputes about the validity of contracts arising out of qualification for EPC.

Secondly, in the domestic practice of EPC projects, especially those industrial EPC projects based on equipment production and technology, it is a common practice that parties concerned would split the EPC contract in consideration of loans raising and tax planning. However, the more complicated transactional structure of contracts may easily make the real legal relationships

[6] *Clarification Letter on Issues of Market Access to EPC (Jian-Shi-Han [2003] No.161)* by MOHURD, *Opinions on Further Promoting the Development of EPC (Jian-Shi [2016] No.93)* by MOHURD, *Qualification Standards of Construction Enterprises (Jian-Shi [2014] No.159)* by MOHURD, *Administrative Regulations on Qualifications for Survey and Design of Construction Projects (MOHURD Order No.160, revised in 2015),* and so on.

[7] Beijing: *Regulations on Implementing EPC Bidding for Prefabricated Building Projects in Beijing (For Trial) (Jing-Jian-Fa [2017] No.29);* Tianjin: *Notice on Pilot Work of Implementing EPC for Construction Projects in Tianjin by Tianjin Urban & Rural Construction Commission (Jin-Jian-Zhu [2017] No.477).*

among relevant parties more difficult to be recognized, the relevant facts of performance (such as payment and settlement) more difficult to be found out, the liability scopes of each party more difficult to be defined, and moreover, there might be dispute resolution clauses in conflict among different contracts. In this case, the process of the court's analysis of the key issue whether or not the EPC contract was actually implemented reflects a typical characteristic of EPC contract dispute of this kind.

Thirdly, in this case the EPC Contractor filed a lawsuit against the Employer on progress payments. In the terms of the conditions for progress payments on milestones, especially the relevant technical documents, the court precisely seized a typical characteristic of industrial EPC projects of this kind which distinguishes EPC projects from conventional construction projects; that is, "the involved project is an EPC project in the electric power industry which includes a mass of equipment procurement and technical issues, the construction is just one side thereof." It is praiseworthy that the court lawfully protected the conditions explicitly agreed by both parties for progress payments by taking into account the characteristics of EPC projects.

3. Major Cases in the Field of Overseas Construction Project

3.1 [Case Three] The Nature of Independent Guarantee and Recognition of Exceptions of Fraud for Independent Guarantee[8]

3.1.1 [Facts]

China Machine New Energy Development Co., Ltd. (hereinafter referred to as the "**General Contractor**" or "**CMNC**") contracted to build the 2×15MW power plant in Guatemala as the General Contractor awarded by Jaguar Energy Guatemala LLC (hereinafter referred to as the "**Employer**" or "**JEG**").

On 27 November 2008, a Supply and Service Contract of Boiler in terms of 480t/h circulating fluid bed boiler under the project of JAGUAR 2×15MW power plant was entered into between China Western Power Industrial Co., Ltd. (hereinafter referred to as the "**Subcontractor**" or **"Western Power"**) and CMNC, agreeing that Western Power would provide CMNC with boiler equipment, technical data and technical services, which were necessary to the Guatemala power plant project. The total contract price was RMB 180 million.

On 8 February 2010, the Employer, the General Contractor and the Subcontractor entered into Subcontractor Undertaking Agreement, stipulating that JEG was entitled to a step-in right under the Supply and Service Contract of Boiler. The agreement specified that: if the General Contractor breached the EPC contract, including but not limited to the General Contractor's material breach under the Supply and Service Contract of Boiler resulting in the Subcontractor's termination of the same, and thereby caused the Employer to terminate the EPC contract, then the Employer would have the right to step-in under the Supply and Service Contract of Boiler in lieu of the General Contractor and could further assign the Supply and Service Contract of Boiler; Once receiving the notification of step-in, the Subcontractor shall render full support to its implementation and shall be liable to the Employer or his designated person as a replacement to the General Contractor

On 2 June 2010, Western Power applied to Zigong Sub-branch of China Construction Bank (hereinafter referred to as the "**Zigong CCB**") for Performance Guarantee in respect of the Supply and Service Contract of Boiler. On 9 June 2010, Agreement of Issuing

[8] See the Sichuan Higher People's Court Civil Judgment (2017) Chuan-Min-Zhong No.72

Guarantee was entered into between Western Power and Zigong CCB, providing that Zigong CCB shall issue the guarantee in favor of CMNC with a sum of RMB 25.65 million. On the same day, Zigong CCB issued Performance Guarantee to CMNC, stating that: "We hereby as the guarantor undertake unconditionally and irrevocably: Upon receipt of your first written notification of claim, we must pay the amount of money specified under the provisions of the guarantee, but not exceeding the amount specified in the above guarantee, to your designated account within five working days of the bank, without the principal's consent or your company's submitting certificates or statement of reasons. The guarantee is an unconditional and irrevocable direct obligation of the guarantor. Before making a request to us, we will not require your company to claim the above-mentioned sum from the principal first. We hereby agree that no amendment, alteration or supplement to the contract will relieve our obligations under the guarantee, and any amendment, alteration or supplement of the contract need not be notified to us. The guarantee shall become effective immediately and shall expire on 30 December 2013."

On 29 November 2013, the Employer gave the notice of exercising step-in right to Western Power. JEG claimed that CMNC had defaulted, which caused the Employer to become entitled to exercise the right of termination under the EPC contract, and the right of step-in to become the general contractor and assume the right of Supply and Service Contract of Boiler. The Employer hereby chose to exercise the right of termination, intervened to become the general contractor, and assumed the transfer of Supply and Service Contract of Boiler (which shall remain in force). Western Power should be responsible to the Employer in lieu of the General Contractor.

CMNC subsequently sent notices to Western Power by fax and mail. It claimed that it had given a takeover notice to the Employer prior to the intervention of the Employer. Thus, the Employer had been changed to CMNC and the intervention by the Employer was invalid and null. It required Western Power not to cooperate with the Employer, otherwise such cooperation would be regarded as constituting a breach of contract, resulting in contractual claims by CMNC.

On 27 December 2013, Zigong CCB received the notification of claim, which required Zigong CCB to perform the obligation of payment under the guarantee as a result of Western Power's failure to perform fully in accordance with the Supply and Service Contract of Boiler. Then, Western Power sought the judgment to permanently stay the payment under Performance Guarantee.

During the trial, International Chamber of Commerce (ICC) gave the ruling in respect of the dispute between JEG and CMNC, holding that the Employer had terminated the EPC contract effectively.

3.1.2 [Key Issues]

Firstly, whether the Performance Guarantee concerned was an independent guarantee or an accessory contract to the Supply and Service Contract of Boiler;

Secondly, if it was an independent guarantee, whether the claim of CMNC constituted a guarantee fraud.

3.1.3 [Judicial Reasoning]

Firstly, on the issue whether the Performance Guarantee concerned was an independent guarantee or an accessory contract of the Supply and Service Contract of Boiler, the court of first instance held that the Performance Guarantee was an

accessory contract of the Supply and Service Contract of Boiler. The *Guaranty Law of the People's Republic of China* stipulates that where the principal contract transfers rights and obligations, related rights and obligations of the accessory contract shall transfer at the same time. Therefore, after the Employer's exercise of the step-in right, the General Contractor's rights under the Supply and Service Contract were transferred to the Employer, who inherited the creditor's rights under the Performance Guarantee. As a result, CMNC no longer enjoyed the right for payment from the issuer of guarantee based on the Performance Guarantee. Therefore, the court of first instance concluded that CMNC was not entitled to request payment from Zigong CCB based on Performance Guarantee. However, the court of second instance held that: an independent guarantee is an undertaking of payment accompanied by documentary conditions. When the beneficiary submits the documents that meet the requirements of the independent guarantee without proving the default facts of the underlying transaction, the issuer, who does not enjoy the right of defense and right of discussion as the principal debtor in a traditional guarantee, shall independently undertake the obligation of payment. Hence, the independent guarantee is independent from the underlying transaction or the issuance application. Based on the provisions of the Performance Guarantee, the court of second instance decided that its nature shall be an independent guarantee. With regard to the Subcontractor's claim that "the independent guarantee lacks independence because the underlying transaction was a domestic transaction", the court of second instance invoked Article 23 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Independent Guarantee Dispute Cases*（*Fa-Shi [2016] No.24*）(hereinafter referred to as "**Judicial Interpretation of Independent Guarantee**") providing that "Where the parties had agreed to apply the independent guarantee in domestic transactions, but a party subsequently claimed that the agreement on the independence of the guarantee was invalid because the independent guarantee was not foreign-related, such claim shall not be upheld by the people's court", and accordingly held that the court of first instance was wrong in the application of the Guaranty Law to recognize Performance Guarantee as an accessory contract of the Supply and Service Contract of Boiler, which should therefore be corrected.

Secondly, on the issue whether the claim of CMNC constituted an independent guarantee fraud. The court of second instance invoked Article 18 of the Judicial Interpretation of Independent Guarantee stipulating that "In the trial of the disputes over independent guarantee fraud or handling the application for stay of payment, the people's courts may examine and determine the facts related to the underlying transaction under the specific circumstances set out in Article 12 hereof as claimed by the relevant party". Although the independent guarantees possess the characteristic of independence, in the cases of examining the independent guarantee fraud, the people's courts have the right to conduct a limited review of the performance of the underlying transactional contract, in order to find out whether or not CMNC had good causes to claim and whether or not a false statement had been made in its statement of claim. The reviewing of the performance of the underlying transactional contract within these limits would not conflict with the independence of the guarantee. The court of second instance held that Western Power, based on the Subcontractor Undertaking Agreement, had no obligation or right of reviewing whether the step-in of the Employer was justified. Once the notice of

intervention was received, Western Power had to accept the step-in right of the Employer and fulfill its obligations under the Supply and Service Contract of Boiler to the Employer. Therefore, after the intervention of JEG, Western Power shall directly fulfill the obligations under the Supply and Service Contract of Boiler to the Employer, which did not constitute a default in contract. The dispute between CMNC and JEG on the performance of the EPC contract was a separate legal relationship, which had nothing to do with Western Power. Therefore, it cannot be decided that Western Power had committed an act of default. In this case, as a party under the Subcontractor Undertaking Agreement, CMNC should have, subject to the normal judgment and cognitive ability of a rational third party, been aware that Western Power, in accordance with such agreement, shall unconditionally accept the intervention from the Employer and directly fulfill its contractual obligations under the Supply and Service Contract of Boiler to the Employer. In other words, if the Employer exercised the step-in right, CMNC shall be fully aware that Western Power would fulfill its contractual obligations under the Supply and Service Contracts of Boiler to the Employer in accordance with the tripartite agreement. CMNC's claim of the existence of the default act of Western Power based on the fact that Western Power directly fulfilled its obligations under the Supply and Service Contract of Boiler was inconsistent with the provisions of the Subcontractor Undertaking Agreement. Therefore, the claim under the independent guarantee asserted by CMNC was an abuse of right, which constituted an independent guarantee fraud in accordance with Subsection 12(5) of the Judicial Interpretation of Independent Guarantee. As a consequence, it was beyond a reasonable doubt in this case that CMNC had committed an independent guarantee fraud. Therefore, Western Power's application to stay the payment under the Performance Guarantee had factual and legal basis, which was upheld by the court of second instance.

3.1.4 [Review of Dispute]

The case was the very first case applying the Judicial Interpretation of Independent Guarantee in overseas engineering dispute cases after its promulgation by the SPC on 1 December 2016.

The Judicial Interpretation of Independent Guarantee is one of the most important legal documents in the field of overseas construction dispute resolution, against the background of Chinese courts' serving and safeguarding the Belt and Road Initiative construction and promoting a new round of opening up. First of all, the judicial interpretation unified the judicial rules regarding the jurisdiction of foreign-related independent guarantees and the rules of governing law, with important guiding value towards judicial practice. Next, the contents and highlights of the judicial interpretation are mainly embodied in the following aspects: firstly, the nature of the independent guarantee was clearly defined, and the judicial reasoning was unified; secondly, the rules governing the validity of the international and domestic independent guarantee transactions were unified, and the rights and interests of the parties are equally protected; thirdly, the independence and documentary character of the independent guarantees are confirmed, and the promptness and certainty of payment thereunder are ensured; fourthly, circumstances of fraud and standards of proof are strictly defined, and the exception to the principle of independence is prudently established; fifthly, the procedures of staying payment are strictly regulated, and procedural and substantive justice are safeguarded. Lastly, the judicial interpretation also stipulated the issuance, taking effect, transfer and termination of the independent guarantees.

What makes the case special is that the Subcontractor Undertaking Agreement signed among the Employer, General Contractor and Subcontractor stipulated that the Employer was entitled to a step-in right at the time of terminating the EPC contract, which also became the key to whether the defendant in this case committed independent guarantee fraud or not. The step-in right is more common in international construction projects (especially in project financing transactions), while it is relatively rare in domestic construction practice. In this case, the court fully respected the parties' agreement and supported the exercise of the step-in right based thereon. The ruling will have a positive demonstration effect in effectively protecting the lawful rights and interests of the parties involved in international construction projects, and in serving and safeguarding the construction of the Belt and Road Initiative. Therefore, the case was also taken as a typical case and selected into the *Guidelines for Judicial Rules of Commercial Trial and Adjudication of Sichuan Higher Court.*

3.2 [Case Four] Jurisdiction and Application of Law with respect to the Disputes over Overseas Construction Contracts[9]

3.2.1 [Facts]

On 12 September 2013, Fugong Tenghong Foreign Trade Co., Ltd. (hereinafter referred to as the "**Employer**") signed a Labor Contract of Project Contracting with an individual, Mr. Li (hereinafter referred to as the "**Contractor**"), agreeing that the Employer shall award the work of a section of forest road located in Myanmar to the Contractor for construction, and both parties agreed on a construction period, standard of road excavation, unit price of the construction and payment method.

During the contractual performance, the Employer argued that the Contractor did not perform strictly in accordance with the requirements of the contract, and both parties agreed to terminate the contract. After the termination, both parties disputed the amount of payment at the time of settlement. The Employer alleged that the Contractor only completed 40% of the overall work of the road already constructed, and therefore only agreed to settle the payment for 40% of the work. Instead, the Contractor requested full settlement of all the works of the road already constructed.

3.2.2 [Key Issues]

Firstly, whether Chinese courts have jurisdiction;

Secondly, whether Chinese law should be applied as the governing law.

3.2.3 [Judicial Reasoning]

Firstly, on the issue whether Chinese courts have jurisdiction. The Employer argued that the case should be attributed to the construction contract dispute and, in accordance with Article 28 of the *Interpretation of the SPC on the Application of the Civil Procedure Law of the People's Republic of China* (Fa-Shi [2015] No. 5) (hereinafter referred to as the "**Judicial Interpretation of the Civil Procedure Law**") in respect of the exclusive jurisdiction applicable to the construction contract dispute, the case shall be subject to the jurisdiction of the court where the real estate was located, namely Myanmar's court. Therefore, the trial conducted by the court having jurisdiction over the place of the defendant's domicile would violate the provision regarding the exclusive jurisdiction. The SPC determined that, based on the principle of judicial sovereignty, the exclusive jurisdiction of real estate disputes under Article 33 of the *Civil Procedure Law of the*

[9] See the Supreme People's Court Civil Ruling (2017) Zui-Gao-Fa-Min-Shen No. 629.

People's Republic of China is premised on the jurisdiction of the people's courts in civil cases, which could not be used reversely to exclude the jurisdiction of the people's courts. Although the case involved foreign-related elements, Chinese courts were still entitled to hear the case when the parties did not agree or choose for the case to be decided by foreign courts.

Secondly, on the issue whether Chinese law should be applied as the governing law. Firstly, the Employer argued the case should be attributed to foreign-related case applying the law of the country of Myanmar where the project is located, as in accordance with Article 36 of the *Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China* which provides that "the laws of the place of immovables shall apply to the right *in rem* of immovables". Regarding this claim, the SPC held that the case was attributed to construction contract dispute instead of real estate right dispute, and therefore the Employer's argument was not valid. Next, the Employer claimed that the court shall ascertain ex officio foreign laws of Myanmar in accordance with Article 10 of the *Civil Procedure Law of the People's Republic of China* and related laws. Without ascertaining the laws of Myanmar, the court was wrong in its decision that the concerned contract was void. For this claim, the SPC invoked Article 41 of the *Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China*, which stipulates that "the parties concerned may choose the laws applicable to their contract by agreement. If the parties did not choose, the law at the habitual residence of the party whose performance of obligations can best reflect the characteristics of the said contract or other laws which had the most significant relationship with the said contract shall apply". In the present case, the parties did not choose the governing law applicable to the disputes in their contract. The Employer also failed to prove that the parties had chosen in an agreement to apply foreign laws for this case. Moreover, both parties to the contract concerned were Chinese citizen or legal person domiciled in China, and the place where the contract was concluded was also in China. Therefore, it was not improper to apply the Chinese law pursuant to the Doctrine of Most Significant Relationship.

3.2.4 [Review of Dispute]

Article 28 of the *Judicial Interpretation of the Civil Procedure Law* (Fa-Shi [2015] No. 5) stipulates the exclusive jurisdiction regarding the construction contract cases. Opinions vary in practice whether the overseas construction contracts should be subject to the exclusive jurisdiction of the court of the place where the overseas construction project is located, when the parties of main contract or subcontract are all domiciled within the territory of China and did not agree to submit to the jurisdiction of the court where the overseas construction project is located. In particular, we noted that a large number of disputes over jurisdiction have occurred in overseas construction contract disputes entertained by Chinese courts. In this case, the SPC for the first time, through the retrial ruling, made it clear that the exclusive jurisdiction shall not apply in the above circumstance.

Based on the analysis of this case and similar cases in regard of overseas construction project contract disputes between Chinese parties, it would be a more efficient way for the purpose of dispute resolution for the parties to choose in advance in their agreement an arbitration institution in China with rich experiences in foreign-related arbitration.

The report is part of the research outputs of the "Annual Review on Construction Disputes in China (2018)". All the research outputs will be included in the *Annual Review on Commercial Disputes Resolution in China (2018)* compiled by the Beijing Arbitration Commission, which will be published by *China Legal Publishing House* in the near future. Welcome attention.

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