



Study of the Right of Government to Change Contracts Unilaterally of PPP Project in the Context of Chinese Civil Law

Qian Jiuling¹, Cao Fuguo^{2,*}, Zhen Deyun³

¹The School of Public Finance and Taxation, Central University of Finance and Economics, Beijing, P. R. China

²The School of Law, Central University of Finance and Economics, Beijing, P. R. China

³National Tax Institute of State Taxation Administration of China, Yangzhou, P. R. China

Email address:

qianjiuling@163.com (Qian Jiuling), cao_fuguo@aliyun.com (Cao Fuguo), zhdyun@126.com (Zhen Deyun)

*Corresponding author

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Abstract: The PPP project contract as an incomplete contract with long-term, complex and uncertain characteristics. The Contract Law gives a party the right to change unilaterally on the basis of the principle of “frustration of contract.” The contract law stipulates that certain contracts may be unilaterally changed under certain circumstances. The change of the contract is based on the ex parte implication, which changes the civil legal relationship. In the PPP contract, giving the government the right to change contracts unilaterally is better to protect the public interest. The right need of government’s unilateral change of contractual has a very important relationship with the public interest, changes in government public service demand and changes in the situation caused by the long-term nature of the contract. In order to safeguard the public interest, meet the changes in the actual needs of public services and the change of circumstances, the government could also change the contract unilaterally on the basis of the theory of “frustration of contract”. When the government exercises the right to change the contract unilaterally due to the public interest, changes in the actual demand of the public service, and changes in the situation, the contract counterparty shall be compensated accordingly.

Keywords: Civil Law, PPP Contract, Government Unilateral Change

1. Introduction

With the development of the market economy and improvement of internationalization degree, in the practical application of large-scale enterprise supply contracts, procurement contracts and engineering construction contracts, it is interesting to note that the total number of long-term contracts used in enterprises and the proportion of economic proportions gradually increase [1]. According to the 1.11 of the General Principles of International Commercial Contracts (2016), a long-term contract is a contract that is performed over a period of time, usually involving the complexity of transactions to varying degrees and the continuing relationship between the parties [2]. Types of long-term

contracts include commercial agents, distribution, outsourcing, franchising, leasing (such as equipment leasing). Long-term contracts are characterized by long-term, relational, and incomplete nature, and there are situations in which the original contractual terms need to be renegotiated and changed.

Mostly, the traditional contract law regulates short-term contracts. Even though long-term contracts also have explicit rights and obligations, they are not complicated, such as long-term leases, construction projects, etc.. The traditional "Contract Law" stipulates three modes of contract change: (a) agreement change; (b) one party has the right to change the contract unilaterally, and the change needs to be confirmed by the court or arbitration institution (serious misunderstanding, obviously unfair, etc.); (c) The change of the contract is based

on the unilateral expression of the rights holder and does not require confirmation by the court or the arbitration institution. According to Article 50.1 of the Government Procurement Law, the contract changes have strict scope of application, and the rules for traditional contract changes cannot be directly applied. However, dramatically, PPP project has the characteristics, for example, the investment amount, involving subjects, timeline. In the process of PPP contract performance, in order to safeguard the public interest, meet the actual needs of public services and the change of the economic situation and legal policies, it is necessary to give the government the right to change the contract unilaterally in the PPP project contract.

2. Contract Change Under the Theory of "Failure of the Contract"

The civil law adheres to the spirit of the contract, and contracts established according to law operate like the "law" between the parties [3]. A contract is a legally enforceable agreement. The spirit of the contract is reflected in the fact that the contract must be complied with, and neither party may change or terminate the contract without the stipulations of the law or the parties. While adhering to the spirit of the contract, the Contract Law also insists on economic rationality and flexibility and gives the subject of contracts the right to change the contract under special circumstances.

2.1. Contract Change Regulations

During the performance of the contract, major changes have occurred due to objective conditions, such as the need to perform the contract in advance, the number of items subject to the contract, the need to adjust the contract price, etc. The parties may change the content of the contract by agreement, or change the contract through the provisions of the law [4]. According to the principle of economic rationality in the contract law, the parties expect to receive the best contract benefits with the least cost [5]. For example, in the contracts of deposit, construction, hired work etc, from the time when the contract is established, the parties concerned about their obligations to perform the contract with the other party. The legal system for contract changes in China reflects the principle of economic rationality, allows contract changes, and sets up corresponding procedures.

Contract changes in civil law are broad and narrow, and the former includes changes in the content of the contract and the subject. The latter includes changes in the contract object, the number of contracts, the place of performance, the manner of performance, the period of performance of the contract, the adjustment of the payment or remuneration, the terms of the contract guarantee, and the method of dispute resolution. From the perspective of reasons and procedures, there are several types of changing in Chinese contract law:

2.1.1. Agreement Change

Article 77 of the Contract Law stipulates that the parties may change the contract by consensus. The parties need to

agree and reach a new agreement on the basis of the original contract. If either party does not agree with the other party and changes the contents of the contract without justifiable reasons, it will be liable for breach of contract. Before the new contract is concluded, the original contractual relationship still exists.

2.1.2. One Party has the Right to Change the Contract Unilaterally, and Needs to Be Confirmed by the Court or Arbitration Institution

In the case of a contract established due to major misunderstanding and unfairness, and in the case where the contract was established due to fraud, coercion or vicius, and does not harm the national interest. The right holder may appeal to the court or the arbitration institution to change or cancel the contract, and the contract may be changed or revoked after the ruling. When the change of situation makes the performance of the contract unfair, the parties may also appeal for the change, and the court or the arbitration institution may decide to change or cancel the change.

The unilateral meaning expression of the right holder, such as serious misunderstanding and obvious unfairness, which changes the legal relationship needs to be confirmed by the court or the arbitration institution. The right of formation can change the legal relationship between the two parties based on the meaning of the unilateral. This means that once the right holder makes a meaning expression, the opposite party must accept the decision made by the right holder. However, in some cases, in order to control the exercise of rights in order to avoid uncertainty in the effective aspect, the law sets up the right to form a lawsuit, requiring the right holder to file a lawsuit, and the right to form will not take effect until the judgment takes effect [6].

2.1.3. Unilateral Expression of the Right Holder and Does Not Require Confirmation by the Court or the Arbitration Institution

The change of the contract based on the direct provisions of the law is not subject to the judgment of the court or the arbitration institution or the agreement of the parties. For example, a debtor's breach of contract makes the performance of the contract's debt into damages, which of course occurs. The change of the contract is based on the meaning expression of the right holder. If the option owner exercises the option, the contract is changed. The Contract Law stipulates that the "special party" party has the "unilateral right of termination without any reason" and "unilateral arbitrarily change right". If the loss is caused by exercising the right of rescission or change to the other party, it shall be liable for damages. The contract law stipulates that the ordering party can change the requirements of the contracting work. The ordering party can change the requirements at any time according to his own needs. The contractor should work according to the new requirements put forward by the ordering party, and the new requirements of the ordering person will be caused to the contractor. Before the carrier delivers the goods to the consignee, the shipper can ask the carrier to suspend the transportation, return the goods, change the place of arrival or hand over the goods to other consignees. In the passenger

contract, if the passenger needs to change the contract for his own reasons, he shall go through the refund or change procedure within the agreed time. The carrier gives the passenger the right to unilaterally cancel the contract of carriage or unilaterally change the contract of carriage, but this right has time limit.

In the civil law contract change system, the Contract Law gives a party the right to arbitrarily change the contract unilaterally, and the law clarifies the compensation for the loss to exercise the right of unilateral change. The change of such a contract is based on the unilateral expression of the right holder, which changes the established civil legal relationship and does not require the confirmation of the court or the arbitration institution.

2.2. The Theoretical Basis for Unilateral Change of the Contract

The reason why the contracting party be given the right of unilaterally change the contract is that the system design of the Contract Law takes into account the complex situation and situational changes of contract performance, and its theoretical basis comes from the theory of frustration of contract. There are three types of frustration of contract: one is the failure of the contract that cannot be caused by the performance, such as the loss of performance of a party, the loss of certain things, etc. Second, due to changes in the law, the purpose of the contract is lost. After the contract is concluded, it is necessary to change or terminate the contract

if it is not legal [7]; Third, the common interests are lost, and the purpose of the contract or the contractual interests are difficult to achieve. The Failure of purpose emphasizes the contracting purpose which lurks in the contract

3. Methods: Case Study

The PPP project contract is a long-term contract. The investment is large, the project is complex, and there are many uncertain risk factors in the construction and operation phases. This long-term contractual relationship usually last 10 to 30 years, or even longer, and the changes that cannot be predicted and controlled by the parties will occur over such a long period of time. In essence, a PPP project contract is an incomplete contract and a long-term contract.

Government Needs to Change Contracts Unilaterally. The right need of government’s unilateral change of contractual has a very important relationship with the public interest, changes in government public service demand and changes in the situation caused by the long-term nature of the contract. In the context of the compilation of the Civil Code, it is necessary to clarify the provisions of the government’s unilateral change of contracts in the section of the Civil Code contract. The government can change the contract unilaterally without the confirmation of the court and the arbitration institution. The 81 environmental protection industry contracts disclosed by the Ministry of Finance PPP project library were selected for analysis.

Table 1. Case Statistics and Explanation.

| | Quantity | Statement case |
|--|----------|---|
| Right of Government to Change Contracts Unilaterally | 17 | The government informs the private sector to change the contract content in writing, and the private sector must implement the change in accordance with the manner and content required by the government’s change notice. |

3.1. Public Interest

PPP is a long-term cooperative relationship between the public sector and social capital. It is used to develop or manage public assets or services. Social capital assumes significant risks and management responsibilities during the contract period, and the government or users pay fees to social capital according to performance [8]. PPP’s long-term partnership is reflected in time-limited long-term contracts in which social capital designs, builds, finances, operates, maintains and delivers assets. The government values output and pays for performance. The risks are shared by both parties and the private sector assumes significant risks and liabilities during the contract period.

PPP usually involves the matters affecting public economic welfare, including fiscal expenditures, and policies related to public services such as health, medical care, and culture. The above public factors reflect that PPP contains “publicity” and is related to the public interest.

The public interest is an important reason for the government to have the right to change the contract unilaterally. It is necessary to change the contract unilaterally

according to the needs of the public interest. In the French administrative contract, the administrative subject enjoys the “administrative superiority right” that unilaterally changes the contract based on the public interest and terminates the contract, and regards this as the main feature different from the private law contract. In fact, there is a misunderstanding. There are also provisions for unilateral change and termination of contracts in civil contracts.

3.2. Contract Change Based on "Frustration of Contract"

As previously described, the unilateral change of contract demand stems from the theory of "frustration of contract", which is related to the complex situation and situational changes of contract performance, and the basis for granting the government a unilateral change of contract is also derived from this. Most of the contracts are characterized by temporary trading relationships, but there are also many long-term trading contracts. The long-term nature of PPP naturally makes long-term one of the basic characteristics of PPP. Because of the long-term nature of PPP project contracts, there is no way to anticipate the situation after many years when the contract is concluded, so long-term contracts are

prone to changes in service demand and situation changes.

(a) Changes in the actual demand of public services

Due to changes in government operational needs, in order to ensure that the infrastructure enables the government to provide services efficiently, it is necessary for the government to unilaterally change the PPP contract. In the long-term implementation of project contracts, the actual needs of the government may change, as reflected in: changes in the use or function of public services, such as the conversion of non-teaching areas into teaching areas; changes in quantity, increased classrooms, waste handling capabilities, project termination, etc. There are also changes to service standards, such as changes in construction standards, and higher waste recycling standards. The government changes the contract on the basis of the change of service demand, which is similar to the unilateral change in the contract of processing and transportation. It is the application of the theory of "frustration of contract" in the contract law.

(b) Change of circumstances

Changes in the economic situation and legal policies have led to changes in the situation, which in turn led to problems with contract changes and dissolutions. The long-term, complex and diverse characteristics of PPP projects lead to more uncertain factors, which are prone to market or other factors changes during the long-term contract performance. If these changes are beyond the foreseeable scope when the contract is concluded, continuing to perform the contract will result in the loss of relative person's interests, which is contrary to the principle of good faith and fairness in the contract law and result in that the purpose of the contract can't be achieved [9], so the law give the parties the rights to change the contract unilaterally.

It is necessary to give the government the right to unilaterally change the contract in the PPP project contract. Based on the long-term, complex and diverse characteristics of PPP projects, PPP contracts are incomplete and it is impossible to fully predict the future possibilities. Therefore, PPP contracts need to be flexible so that they can handle changing situations as much as possible within the contractual framework, rather than leading to renegotiation or termination, which is usually designed to create a clear process and boundary for change.

4. Result

At present, PPP lacks legal norms, and it is a legal gap for the government to change contracts unilaterally. We can learn from the civil law to change the contract system unilaterally and the foreign provisions on unilateral change right of the government in the PPP project contracts. When the actual demand of public services changes and the situation changes, the government should be granted the right to unilaterally change the contract.

4.1. The Specific Content of the Change

The classification of changes can be divided into subject changes and legal changes according to the reasons for the

occurrence. The subject of the government or private sector has changed, and the legal policy of PPP has changed, which has brought about changes in the contract. According to time, it can be divided into construction stage change, early operation stage and stable operation stage change. Changes made during the construction phase should be kept to a minimum as possible, otherwise it will affect the ability of social capital construction. According to the impact, it can be divided into financial change, engineering change, service change, engineering change and service change. It is difficult for the contracting government to predict the change of service demand during the performance period of the contract. Normally, the contract establishes the method of service demand change to cope with the changing economic environment. According to types, it can be classified as use or function change, capacity or throughput change, change of service specification or performance standard.

4.2. Change Mechanism

Changes to public services should provide a change mechanism. Good change mechanisms should include fast and efficient procedures (suitable for the size and complexity of the change) [10], minimum transaction time and cost, transparent pricing, and value for money. Generally speaking, the government should change the contract after the consensus. If the agreement can be resolved through negotiation, the government can exercise the unilateral change right if the agreement cannot be reached.

The changed protocol should cover at least the following changes, and all types of changes need to follow the prescribed management process: (1) Notices and Specifications: If the government decides to change, it should notify the private sector in a timely manner. (2) The private sector estimates that after receiving the government's request for change, it will give a reasonable time to notify the government whether to refuse to implement the change. (3) Government permission: After receiving the estimate of the private sector, the government should also have reasonable time to consider the reply and then indicate its approval or rejection of the private sector. (4) Change implementation: Once the government issues an estimate of the private sector, the private sector should make changes to the service or other content in accordance with the above provisions. (5) Funds and payments: The government is usually responsible for the costs of the changes, and as the power changes, the budget should be ensured accordingly. (6) Documentation and monitoring: All changes in the service shall be carried out in accordance with the "Change Protocol" and the requirements of the change agreement shall be available on the Ministry of Finance website.

5. Discussion

The PPP contract can be changed and adjusted according to the actual situation, but the content of the change must have a reasonable boundary [11]. What is the boundary of the contract change? The boundary of the change should be

clarified. The contract change must be clear of the content that cannot be changed. It needs to be clear whether the contract is changed or a new contract is generated. If it is only related to the contract change, the contract content is changed after the agreement. However, if it is a new contract, the contract has undergone substantial changes and faces the problem of re-selecting social capital. The "Government Procurement Law" has special requirements for contract changes. Government procurement contracts are generally granted through competitive procurement procedures. If the parties to the contract arbitrarily change the content of the contract, it will cause unfair treatment to other suppliers.

Contract theory can be applied in the context of PPP. Substantial changes are made when there is a major change in the subject, subject matter, quantity or price of the project contract. When a PPP project contract involves a major change in the subject, the change of the target, the quantity or the price, the proposal is classified as an unchangeable category, and involves non-important parts, such as non-major changes in the quality and quantity of the subject matter, performance deadlines, and place of performance. Changes in the non-substantive content, such as performance methods, guarantees, breach of contract liability, and dispute resolution, allow changes in the contract as the economic situation and related laws and policies change, changes based on public interest, and changes in the actual needs of public services.

When the government exercises the right to change the contract unilaterally due to the public interest, changes in the actual demand of the public service [12], and changes in the situation, the contract counterparty shall be compensated accordingly.

6. Conclusion

In the contract change system of civil law, one party also has the right to arbitrarily change the contract unilaterally without the confirmation of the court or the arbitration institution [13]. From the analysis of civil contracts, the government can also enjoy the right to change contracts unilaterally based on the theory of "failure of contract," but it needs to give certain financial compensation to the contract counterparts. Civil law is the basic law of state governance, and its role in national governance is very important [14]. In the context of the formulation of the Civil Code, it is necessary to consider to set up an independent PPP named contract in the contract law. At the same time, in the part of the PPP contract,

the law can stipulate and perfect the provisions on unilateral change by the government, which gives the government the right to change the contract unilaterally in the PPP project and perfect the corresponding procedures and restrictions.

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