A STUDY OF SHOULDERING OF COMPENSATORY LIABILITY FOR DELAYED CONSTRUCTION FERIODS FOLLOWING BAD WEATHER CONDITIONS

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ABSTRACT : In the case that construcion period is delayed because of the force majeure such as a typhoon or a flood, the owners in general should compensate the damages caused by those. But with exception the weather worsening of ordinary level is paid by contractors, while that of exceptional level by the owners.

It is critical that it is difficult to distinguish objectively between ordinary and exceptional level weather worsening. Although the term of "ordinary" itself is too abstractive, we can reduce the disputes between owners and contractors by setting the appropriate and objective standard of distinction.

For example in the case of rainfall it may be the standard of distinction whether the days of actual rainfall exceed those of average rainfall or not. If the days of actual rainfall don't exceed those of average rainfall contracters should pay the damages because it is distinguished with a ordinary level weather worsening. Besides the standard of distinction in another weather worsening such as severe cold/hot, strong wind etc. which have a effect on delaying the term of works could be settled as a similar model.

Key words : Constructon contrac,t Weather worsening, Compensatory liability

1. INTRODUCTION

1.1 Background and Purpose of Research

In the case of delayed construction periods, the contractor incurs losses from his inability to use the target construction object, and the subcontractor likewise incurs additional costs. When the construction period is prolonged for reasons such as design changes attributable to the contractor, the contractor should shoulder the subsequent losses, and furthermore pay the subsequent losses to the subcontractor. Also, if the construction period is prolonged due to reasons of force majeure for which neither the contractor nor the subcontractor is liable, such as typhoons and floods, as well as third parties' hindrance of construction work, generally, the contractor shall be liable for subsequent losses.[1)] Eventually, the subcontractor is supposed to limit his compensatory liability to cases of delayed periods due to reasons attributable to him, and compensate for the contractor's loss by paying delay penalties.

If the construction period is prolongated due to bad weather, the subcontractor is normally not responsible for the situation. But, the subcontractor may shoulder subsequent losses in rare cases. Likewise, the subcontractor may shoulder losses from normal bad weather, and the contractor may shoulder losses from bad weather beyond the normal level.

As such, the subcontractor is liable for normal bad weather-caused delays in construction, although he is not supposed to do so, and this requires him to compensate the contractor for delay penalties or leaves him not to seek subsequently incurred construction costs. The reason for this is this: “Generally, in agreeing on the construction period in the construction agreement, the subcontractor considers occasions where rainfalls may prevent normal work, and thus reflects this in the agreement”[2)].

According to the purport of judicial precedents on which party of the contractor and the subcontractor is liable in bad weather conditions, the ruling determines the responsible party depending on whether the weather condition is normal or above normal levels.

However, the word, normal, is abstract, perhaps resulting in different judgments on normal bad weather conditions according to its evaluators. Also, if objective criteria for normal bad weather conditions are not specified, the dispute between the contractor and the subcontractor will continue.

Against such backdrop, this research presents appropriate and objective criteria for determining the normalcy of bad weather conditions.

1.2. Scope and Methods of Research

This research limits itself to construction period delays attributable to bad weather conditions.

Also, this research assumes that rulings by court consider the fact that the construction period is determined by taking bad weather conditions below normal levels into account. Thus, if it is proved that the subcontract is concluded without assuming bad weather conditions below normal levels[3], this research would not apply to such cases.

Also, this research, mainly based on the position of court's rulings, was conducted, and seeks to induce normal levels of bad weather conditions from court rulings.

Also, this research used as criteria rulings on bad weather conditions from Law Village LX DVD 2004 compiled by Court's Library[4] and rulings made until December 2003 by Seoul Central District Court and Seoul Higher Court.

2. GENERAL THEORIES ON SHOULDERING OF LOSSES FOLLOWING PROLONGED CONSTRUCTION PERIODS

2.1 When one party is unilaterally liable

Prolonged construction periods incur losses to both the contractor and the subcontractor. In particular, the contractor sustains losses from his inability to use the target construction object. The contractor's such losses are considered an equivalent to loss of rental fees for the same construction object. However, the contractor, for his part, specifies larger loss amounts than an equivalent to rental fees for the related construction object in the construction contract to require the subcontractor to meet the construction period.

Thus, if the construction period is delayed, emerging as core controversies are which party should shoulder subsequent losses, and in particular, whether the subcontractor should pay the delay penalties to the contractor.

With such losses, either the contractor or the subcontractor, who is clearly liable for the other party, should compensate for the non-defaulting party under Civil Act, Article 390.

If the non-defaulting party has contributed to the expansion of losses, the defaulting party will have its compensatory damaged deducted in proportion to his contributory degree. Also, if the estimated compensatory damages, especially, the delay penalties are excessively large, the court may arbitrarily reduce such damages.

2.2. When neither party is liable

If the prolongation of construction periods is not attributable to either the contractor or the subcontractor, each party should, in principle, shoulder their respective losses. For one party to require the other party to compensate him for sustained losses, there should be reasons attributable to the other party. If there is no reason attributable to the other party, one party should be liable for his own losses. Thus, in this case, the contractor should shoulder losses, an equivalent to delay penalties, and the subcontractor should also shoulder costs from the delayed construction period.

If the lessee occupies the construction site and does not evacuate it, thus delaying the construction period, or if the proceeding constructor delays his construction period, thus delaying the following constructor's construction period, all these cases should be seen as construction period delays for reasons attributable to the contractor. The reason for this is because the contractor is obliged to take delivery of the construction site in his relation with the subcontractor to allow the latter to conduct construction, apart from his bid to seek compensatory damages from the lessee or the preceeding constructor.

Typical cases where neither the contractor nor the subcontractor is liable for delayed construction periods include reasons of force majeure. The general construction contract terms of Ministry of Finance and Economy's accounting and budgets regulations define force majeure as “typhoons, floods, and other bad weather, war and calamities, earthquakes, fire, epidemics, commotion, and incidents beyond the control of the contracting parties.

Under circumstances involving force majeure, general construction contract terms, privatized standard construction subcontracts, standard subcontracts provide that the subcontractor should not pay delay penalties. Also, as described above, even by the general principle of compensation of damages following defaulting, the subcontractor is not obliged to pay delay penalties.

Meanwhile, the contractor is not obliged to compensate the subcontractor for costs sustained due to delayed construction, by the general principle of compensation of damages following defaulting. However, general construction contract terms and standard contracts provide that even in the case of prolonged construction periods, the contract money should be adjusted. For example, under General Construction Contract Terms Article 23 (Adjustment of Contract Money following Amendment of Contract), Section 1, provides that in case the official responsible for contracts sees a need to adjust the contract money following changes in the construction period, transportation distance, etc., he shall do so within the subsequent actual incurred expenses. Thus, even in case the construction period is postponed by force majeure following the conclusion of such a standard construction subcontract, the contractor must pay the subcontractor for the cost incurred following the construction period delay in accordance with the contract.

3. OUTLINE OF JUDICIAL PRECEDENTS FOR ANALYSIS

There were all ten judicial precedents related to shouldering of compensatory damages between contractors and subcontractors following bad weather conditions, of judicial precedents in Law Village LX DVD 2004 compiled by Court's Library and judicial precedents handed down until December 2003 by Seoul Central District Court and Seoul High Court. Of the ten cases, there were only two cases

where the court admitted subcontractors' exemption from delay penalties. In such two cases, the court approved such exemptions because it was admitted that by the contract, "at the above subcontracting, the contractor and the subcontractor agreed to exclude the number of rainfall days when work cannot proceed from the above contract period" (ruling with No. 94 Ga-hap 16095 by Seoul Civil District Court), and because it was admitted that "in 1989 when unprecedented much rain fell causing the construction site to collapse, a case of force majeure" (ruling with No. 95-na 45073 by Seoul High Court).
In the case of the other eight cases except these two judicial precedents, the court did not approve the subcontractors' insistence on exemption from delay penalties.
Thus, the court did not admit subcontractors' insistence on exemption from delay penalties in most of cases[5]. In particular, of the above 10 cases, the most significant case with No. 2001-da 1386 ruled on September 4, 2002 by Supreme Court does not admit the subcontractor's insistence on exemption from delay penalties. In exceptional cases of lower courts' decisions, exemption from delay penalties are admitted.

4. JUDGMENT OF NORMAL LEVEL OF BAD WEATHER CONDITIONS

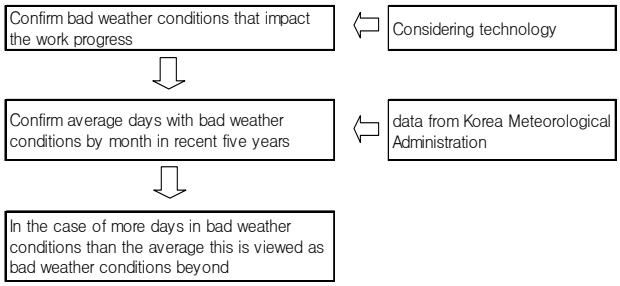
4.1 Meaning of Normal Level

Normal bad weather conditions do not mean that their level is above the normal level. Likewise, on a specific date, hundreds mm of rainfall or severe hot weather or severe cold weather do not necessarily mean that each of these is bad weather condition above the normal level.
The reason for this is because hundreds mm of rainfall or tens mm of rainfall on a certain date equally prevents the work, not requiring the contractor to shoulder the subsequent losses citing the weather condition as one beyond the normal level.
Whether or not bad weather conditions exceed the normal level is significant in that in case the level is above the normal level, the contractor shall compensate for losses sustained by the delayed construction following the bad weather condition. Thus, the normal bad weather condition is determined not by the intensity of bad weather conditions, but by the frequency of bad weather conditions over a certain period.

4.2 Rainy and Freezing Cold Seasons

Rainy and freezing cold seasons must be a kind of bad weather conditions. The impact of some rainfall on the work progress may differ according to the work progress. However, in the case of a day's rainfall of 10㎜, generally, this is seen as impacting the construction period.[6] Also, in the case of a freezing cold season, this impacts mainly frame work and finishing work. Daily average of under minus 4˚ Celsius impacts the construction period.

The judicial precedents on construction period delays following rainy and freezing cold seasons indicate that since"the construction period on the contract is determined normally in consideration of rainy days "[7], the subcontractor, generally, is not exempted from delay penalties, but he instead is liable.[8]
However, in the case of unprecedented much rainfall compared to previous years, it is ruled that the subcontractor is exempted from delay penalties.[9]
Thus, in the case of a construction period delay following rainy and freezing cold seasons, unprecedented much rainfall or freezing cold compared to previous years are the demarcation line between liability and non-liability.
However, the above criteria are unclear, and this paper presents the following clear distinction criteria.
First, calculated is an average rainfall days in recent five years (in the case of an average daily rainfall of over 10㎜) or an average daily temperature of those days measuring below 4˚ Celsius in recent five years. In the case of above such average rainfall days or above average freezing cold days, these should be viewed as beyond the normal bad weather conditions, and cases below them should be viewed as normal bad weather conditions. This is deemed appropriate.
However, in the case of freezing cold, only days with an average daily temperature of below 4˚ Celsius during the frame work and finishing work period of the actual construction period should be calculated.
This is put into the following table.



For reference, Korea National Housing Corporation determines 28 days a year nationwide as the period during which it is impossible to conduct construction work, and adds more such days according to regions. Also, the average rainfall days from 1999 to 2003 in Seoul were 33 days.

4.3 Severe Heat

In the case of severe heat, this impacts mainly frame work. However, severe heat has minimal impact on construction work, and thus the subcontractor must prove that it affects the work. In determining the construction period, generally, severe heat is not necessarily considered unlike rainy or freezing cold seasons. Thus, if the subcontractor proves that severe heat delayed the construction period, the contactor must shoulder losses sustained following the construction period delay as in the case of force majeure.[10]

4.4 Typhoons an Floods

Typhoons and floods are already defined as reasons of force majeure in the standard construction contracts,[11] and in the case of the force majeure, the subcontractor is exempted from delay penalties. Likewise it is provided that the contractor shall shoulder losses to portions already constructed, governmental materials, leased things, and damages to third parties. Thus, the contractor shall be liable for losses sustained following typhoons and floods, and whether or not such cases are beyond the normal level should be judged.

5. CONCLUSION

As described above, it is deemed appropriate that the contractor is liable for compensatory damages by comparing actual affected days and average bad weather days in the case of rainy and freezing cold seasons, and by proving that certain days caused a delay in construction in the case of severe heat. Likewise, the contractor should be liable for compensatory damages from the entire typhoons or floods.