



Client Alert

昊理文法律动态

September 2009

[Dispute Resolution/争议解决]

To Sue or not to Sue, That Is the Question

-- Analysis on Article 24 of Judicial Interpretation (II) of the Contract Law

Deming Zhao/Zhang Yan/Guan Yang

In accordance with Article 24 of Judicial Interpretation (II) by the Supreme People's Court of the People's Republic of China of Several Issues concerning the Application of the Contract Law of China (effective from May 13th, 2009) ("**Article 24**"), where a party objects to the contract termination prescribed in Article 96 of the Contract Law ("**Article 96 Termination**"), the court will not uphold such objection if the objecting party sues after elapse of the agreed time limit for raising objections, or after 3 months

of receipt of the notice of termination if there is no agreed time limit.

Under Article 96 of the Contract Law, the non-terminating party may object to the unilateral termination by the terminating party. Such objection can be made through initiating an affirmative action where the termination can be "affirmed" by the court not justified and therefore invalid. Such action can be taken at any time as long as the claim is within the time bar of 2 years.

Of course, if the non-terminating party does not raise objection in a timely manner, the fate of the contract as unilaterally terminated by one party remains uncertain. Possibly out of considerations of maintaining the security and stability of transactions, Article 24 imposes a shorter time limit of 3 months for the non-terminating party to sue the terminating party on validity of termination. However, Article 24 itself is confusing and problematic to the non-terminating party. The paramount issue is: what is the termination prescribed in Article 96 of the Contract Law?

Pursuant to Article 24, the three-month time limit only applies to objection to Article 96 Termination. As covered by Article 96 of the Contract Law, six instances of termination are permitted, which include termination by agreement, force majeure events, anticipatory breach of contract, delay in performance, frustration of the purpose of contract as a result of breach and other instances prescribed by law.

Guided by Article 24, the non-terminating party needs to ensure in the first place whether a termination is one of the Article 96 Termination so as to determine if a suit within 3 months is necessary. In determining whether to sue to challenge the termination, the non-terminating party faces a following dilemma.

I. Justified Termination?

Literally the Article 96 Termination means termination in accordance with Article 96. In other words, Article 96 Termination is a termination justified on the basis of Article 96. If this understanding is correct, only the challenges to justified termination are subject to the three-month time limit.

Assuming the non-terminating party can ascertain that the unilateral termination by the other party was justified under Article 96, the objection to a justified termination would be a nuisance and such a nuisance can be made within 3 months, according to Article 24. Then, why does the Judicial Interpretation stir efforts to tolerate nuisance and solemnly grant nuisance a time limit of 3 months to sue at court?

Assuming the non-terminating party can determine that the termination is not justified under Article 96, the objection will not be subject to the three-month time limit. The non-terminating party may sue to challenge the termination as long as the challenge is within the time bar of 2 years. If so, the Judicial Interpretation will fail to achieve the purpose of maintaining the security and stability of transactions.

Gazing at Article 24, the non-terminating party would be at a total loss. How could the non-terminating party venture a human judgment on the meaning of “Article 96 Termination”? If one party terminated a contract and cleverly did not state a reason or did purport to state that the termination was one of the Article 96 Termination, what should the non-terminating party be supposed to do? To sue or not to sue, that is still a question.

Perhaps the non-terminating party may be suddenly enlightened. When the termination is justified, the time limit is only set for the possible nuisance. In such a case, there is no necessity on the part of the non-terminating party to exhibit itself as an nuisance by suing to challenge the termination; when the termination is not justified, the non-terminating party will not be bothered with the time limit, and will be able to challenge the termination and claim for damages as well at any time in one suit against the terminating party, provided, of course, that the challenge and claim are within the two-year time bar. Given the enlightenment, the non-terminating party does not need to sue. Article 24 merely turns out to be an alarming dream.

II. Unjustified Termination?

Unjustified termination of contracts is obviously not Article 96 Termination, and the objection to unjustified termination will not be subject to the time limit prescribed in Article 24. Given the absurdity of confining the time limit to objection to justified termination, the court might further construe that the termination prescribed in Article 24 also includes relevant termination. However, what termination can be relevant to the Article 96 Termination? The more interpretation, the more

confusing it becomes. If the further construction proceeds this way, Article 24 would become a nightmare to the non-terminating party. Where does Article 24 intend to drive the non-terminating party after all?

Scared by the problematic Article 24, the non-terminating party may haste a decision, at cost, to sue within 3 months to challenge the termination, no matter whether the termination is justified.

III. Conclusions

Article 24 implies the importance of self-remedy by the parties. The parties may agree to a time limit longer than 3 months (of course shorter than the two-year time bar) that shall apply to all instances of termination. With such agreement or provision in place, the non-terminating party would not be bothered with Article 24. Instead, if the agreed time limit is two years which is the general time bar, it may eliminate the necessity of lodging a separate action on validity of termination. If so, to sue or not to sue on termination will not be a question.

Should you have any questions about this Client Alert, please contact:

如对本法律动态有任何疑问,请与下述合伙人联系:

Shanghai:

Partners: 赵德铭 Zhao Deming zhaodeming@haoliwen.com
倪建林 Jianlin Ni nijianlin@haoliwen.com
张燕 Zhang Yan zhangyan@haoliwen.com

Tel (电话): +86 21 5840 6188

Fax (传真): +86 21 5840 6288

Chicago:

Partner: 黄正东 John Z. Huang johnhuang@haoliwen.com

Tel (电话): 773-277-6888

Fax (传真): 773-277-7888

Dublin:

Partner: 熊雪旦 Shelly Xiong shellyxiong@haoliwen.com

Tel (电话): (353) 1 640 4847

Fax (传真): (353) 1 640 4847

HaoLiWen Client Alert is published solely for the interests of friends and clients and should not be relied upon as the legal advice of any kind from us.

《昊理文法律动态》意在不时向客户通报有关中国法律方面的动态和信息，不构成本所的任何法律意见或建议。

HaoLiWen

PRC ATTORNEYS

昊理文律师事务所

上海浦东南路 500 号国家开发银行大厦 37 楼

37F, 500 Pudong South Road, Shanghai

200120, China

www.haoliwen.com

| Shanghai/上海

| Chicago/芝加哥

| Dublin/都柏林

© 2008 - 2009 HaoLiWen PRC Attorneys

