

## **Contract Characterization, Gap Filling and Suppletory Rules: Focusing on a Supreme Court's Decision of a Construction Dispute**

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### **Abstract**

This article critically examines a recent Supreme Court's decision of a construction dispute and argues for a new approach in dealing with gaps in contract. Conventional judicial approach in contractual dispute usually involves the initial determination of which "statutory contract type" as defined in the Civil Code does the contract in dispute fall into, and the subsequent mechanical application of the corresponding set of default rules associated with the contract type. However, since current default rules are incompatible to the commercial characteristics and purposes of modern construction contracts, a court should exercise great caution in mechanically applying these rules, particularly the rules on termination. In the present case, the Supreme Court erred in applying a default rule that denied the contractor a right to terminate the contract without the obligation to restore the unfinished work to its original condition. Rather, in light of considerations such as economic efficiency, fairness, trade customs and comparative law, the court should focus more on the purpose and function of the law of contract when filling gaps, rather than simply electing to mechanically determine contract type and apply its default rules.

**Keywords: contract characterization, hold up, gap filling, contract interpretation, suppletory rules, construction contract, cancellation of contract, termination of contract, relational contract**

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