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The Study on Law Disputes in Construction Project Contract Relationship

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Abstract

Because the disputes and case facts of construction project contracts are intricate, there are many new conditions and problems involved in application of law, it's very difficult to dispose in the judicial practice with the difference in judicial theories and understanding spirit of the laws, and the juridical criterions of judgment are not unified in the courts of various regions. As judicial organs, people's courts should keep pace with the times, take precautions, and do well investigations and researches on such application of law in such cases in order to give full play to the judicial function, to safeguard the lawful rights and interests of disadvantaged groups and to promote the sustained, rapid and sound development of real estate market.

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1. Introduction

Constructional project contracts contain project investigation contracts, design contracts and construction contracts.

- The construction unit should be the subjects of litigation to prosecute or response in the case of disputes when construction contracts are signed by their functional departments or subdivisions that don't have the qualification of legal person.
- If the construction contracts are signed by the branches of construction enterprises (sub-companies, project departments, work areas, project management teams, construction teams and so on), the branches are usually the subjects of litigation when disputes happen, but if the branches don't have independent properties, the construction enterprises should be the added colitigant.
- If the construction contracts are signed with borrowed business licenses, quality certificates and under the name of others, borrowers and lenders shall be colitigants to prosecute or response in the cases of disputes.

- If the construction projects are jointly contracted or co-contracted, the joint contractors should be the subjects of litigation to prosecute or response; if joint contractors form joint ventures that have the qualification of legal person, the joint ventures should be subjects of litigation. More than two legal persons, other economic organizations or individuals cooperate to construct the projects and enjoy the common interests in the projects, if one part signs construction contract with the contractor of the project and disputes happen, the other cooperating parties should be regarded as plaintiffs or defendants.
- In the totally subcontracted construction projects, overall contractors and subcontractors should be colitigants to prosecute or response because of disputes in subcontracted projects; if subcontractors prosecute overall contractor, subcontracting subjects shall be subjects of proceeding, whether construct units are regarded the third parties depends on the actual cases.
- In the construction contracts signed by individual construction teams or individual partnership construction teams, individual construction teams or individual partnership construction teams are usually subjects of litigation when disputes happen.
- If the contracts signed by the construction enterprises with the relationship of affiliating operation under the name of themselves or titular enterprises, affiliating operators and titular units are usually colitigants to prosecute or response. (It's stipulated in Article of Supreme Court "Suggestions on Civil Procedure Law" that "if individual businesses, individual partnership or private enterprises affiliate themselves with collective enterprises and operate under the name of collective enterprises, the individual businesses, individual partnership or private enterprises and the titular collective enterprises shall be the colitigants.") Constructors are affiliated to other construction enterprises and sign construction contracts under the name of titular construction enterprises, but the titular construction enterprises don't want to prosecute, the constructors can be plaintiffs, titular construction enterprises are not necessary to be regarded as co-plaintiffs.
- In the contract disputes that happen because of subcontracting, transferors and subcontractors should be co-defendants if contract-issuing parties prosecute; if disputes happen because of subcontracting contracts, transferors and subcontractors shall be subjects of litigation and construction units are regarded as the third parties; the other parties except litigants shall be regarded as the third parties in multilevel subcontracting.
- In the projects that are contracted under the name of preparatory organizations or temporary organizations, if the units have been legally approved, they should be subjects of litigation to prosecute or response after involved in lawsuit; if the units are only temporary and not approved or the temporary units are repealed, the organizations that found or establish such units shall prosecute or response.
- If the enterprises that undertake contractual operation are corporate organizations, they shall be the subjects of litigation to prosecute or response after disputes happen; if the enterprises are not corporate organizations, contract-issuing parties and contracting enterprises shall be co-parties to participate in the litigation.
- If contractors subcontract the construction project contracts and the actual contractors prosecute contractors, the contract-issuing parties shall be not the parties to the case of disputes caused by default on construction cost; if contractors demand contract-issuing parties to be the third parties, require the rights and contract-issuing parties are responsible for contractors, contract-issuing parties can be regarded as the third parties and all the parties undertake legal liability; if subcontracting is approved by contract-issuing parties, that is assignment of contracts, contract-issuing parties should be directly regarded as defendants.
- In the case of disputes caused by project quality, contract-issuing parties can prosecute only contractors, if subcontracting is found in the inquisition, actual constructors should be attached to defendants, actual constructors and contractors bear joint responsibility for the quality of projects.

2. How to confirm the validity of construction contracts

2.1. The fundamental principles that should be followed in concluding contracts.

According to the rules of General Provisions of Civil Law and Law of Contract, principle of equality, principle of voluntarism, fairness, compensation of equal value and good faith, principle of civil rights and interests protected by law, principle of prohibiting abuse of rights and principle of negotiated consensus are the fundamental principles to engage in civil activities and to conclude contracts. As a kind of civil contract, construction contract can't be exceptive, which should follow above fundamental principles. However, what needs to notice in the practice of civil trial is the validity of construction contracts can't be determined according to the validity standard of common contracts and the particularity of such contracts should be considered. Some local laws and regulations, departmental rules, rules and normalizative documents of local governments can't be the basis of contract validity, but provisions on Administration of Construction Enterprise Qualification by Ministry of Construction is exceptive, which is mandatory, the qualification of constructors are approved according to provisions.

2.2. The General Principle of determining the validity of contracts.

According to the rules of Article 58 of General Principles of Civil Law and Article 52 of Contract Law, examinations are done from the following 4 aspects:

- *Examine if contract subjects are qualified;*
- *Examine if contract contents are legal;*
- *Examine if contracts perform legal approval process.*

The same with all contracts, declaration of intention is untrue, which will lead to invalidity, partial invalidity or application for revocation of construction contracts.

3. Dealing with the disputes of valid construction contracts

3.1. The General Provisions of Dealing with Valid Contracts

- *The general principles should be followed in dealing with valid contracts*
 - a) *Principle of being beneficial to the sound development of construction market*
 - b) *Principle of protecting contracts, respecting autonomy of will of the parties*
 - c) *Principle of fairly protecting the lawful rights and interests of parties.*
- *The composing elements of liability, forms of behavioral expression, methods of bearing liability and excuses of exception from liability of contravention to valid contracts.*
 - d) *Composing elements of liability.* Default actions and faults are the basic elements of liability of contravention to valid contracts.
 - e) *Forms of behavioral expression.* The forms of expression such as non-performance, incomplete performance, delay in performance, inadequate performance and others are included.
 - f) *Methods of bearing liability.* The methods of bearing liability such as actual performance, taking remedial action, payment of liquidated damage, compensation for losses and others are included.
 - g) *Excuses of exception from liability.* Force majeure, exemption clause agreed by parties, faults of right claimers themselves and others are included.

3.2. The Liability Judgment and Bearing of Contravention to Valid Contracts in the Case of Disputes over Construction Project Contracts

- *The liability judgment and bearing of contractors*

h) Liability of construction preparation. Leveling of construction sites, water and electricity used in construction area, construction of roads and temporary facilities; draw up construction organization design (or construction plan) and finish preparation work of construction.

i) Liability of materials preparation. Do well purchase, supply and management of materials and equipments according to agreed scope of division.

j) Liability of informing in time. Offer contract-issuing parties notices to commence, schedules of construction, constructional layout plans, Notices for Concealed Works Inspection, acceptance reports of completed projects; offer monthly construction schedule, monthly statistical report forms of construction, project accident reports and put forward the supply plan of materials and equipments supplied by contract-issuing parties.

k) Liability of project quality. If the project quality is against the contracts because of contractors, contractors should repair or rework for free and pay overdue penalty because of delayed delivery of projects.

l) Liability of keeping projects. Contractors should keep completed houses, structures, equipments and clean sites before handing over the projects.

m) Liability of handing over projects. The projects should be completed and handed over within the stipulated time by contractors, and contractors should bear corresponding liabilities for breach of contracts caused by contractors.

n) Liability of acceptance of completed projects. Contractors should offer technical information of acceptance of completed projects, finish settlement of accounts for completed project and attend completion acceptance.

o) Liability of guarantee to keep the projects. The problems of project quality of contractors' liability should be solved by them for free.

p) Liability of preventing loss from increasing. If the projects are stopped halfway or delayed because of contract-issuing parties, contract-issuing parties should inform contractors in time to adopt appreciate measures to prevent loss from increasing; if contractors don't adopt appreciate measures, which causes loss increasing, the increased loss can't be claimed for compensation.

4. Dispose Of Invalid Construction Contracts

The general principles of dispose of invalid construction contracts are: the judgments that haven't be performed shall be not performed; the ones are being performed should be stopped at once, and disposed according to actual faults; if the contracts have been already finished, they should be disposed according to the faults of parties and project cost components of invalid contracts. The party with faults should return the project expense that should be got by contractors without faults and compensate for the loss. If both make faults, the amount of compensation shall be determine according to fault degree. If one part or both parties intentionally break the law and impair social public interests, the illegal gains should be escheat to national treasury. What's to be noticed is that the overlapping phenomenon of compensation for loss and escheat of illegal gains will emerge in some occasions in dispose of disputes of invalid construction contracts in above way. The intent of laws and regulations should be correctly understood and mastered to make the intentional party compensate for the actual loss of the party without fault and to escheat illegal gains thus to embody civil sanction. The invalid construction project contracts are still protected by laws, but both parties can't realize the prospective results based on the contracts. The reasons that cause

invalidity of construction project contracts include the serious defects of qualification of contract subjects, illegal contract content and so on.

Bearing of Fault Liability of Invalid Construction Project Contracts

The fault liability of contracts should be distributed reasonably after contracts become invalid according to the fault size of parties. If invalidity of contracts is caused by seriously infringement of national basic construction program, contract-issuing parties shall bear major fault liability, contractors shall bear minor fault liability; if invalidity of contracts is caused without Business License for Legal Person and relevant qualification certificate of construction, contractors shall bear major liability; if contract-issuing parties don't handle the adjacent land use procedure and planning permission procedure of lands for construction, contract-issuing parties shall bear major liability and contractors shall bear minor liability. The project price shouldn't be determined according to the contracts in principle after construction contracts are confirmed invalid, but constructors contribute their labor and invest capital, the direct expenses of project exist, such properties just translate from one form to another form, the values don't change, and all are transferred to new projects in the process of construction. So constructors should get reasonable compensation, that's to say the above direct expenses of projects should be paid by contract-issuing parties. The value of indirect expenses of projects such as labor insurance fund, taxes, construction management expenses and others are not directly transferred to the projects, if the expenses have already existed, they can be regarded as loss of constructors and reasonably shared according to the faults of both parties. The profits of constructors should not be sustained in principle. On the base of such principle, dispose should be done by distinguishing the following cases:

As for the case of contract-issuing parties haven't finished the procedures of proposal, plan and execution approval of construction projects, or constructors don't have the corresponding qualification of project cost settlement to take projects, proposal, plan and execution approval is the legal precondition of execution of construction projects and also the standard to judge if construction projects are legal; the corresponding qualification of construction enterprises is the legal requirement for them to take projects and sign contracts. So the contracts because of illegality should be valid with regard to the condition that contract-issuing parties haven't finished the above procedures before litigation or construction enterprises haven't got corresponding qualification.

As for the case that project owners don't have the construction conditions and construction enterprises have the corresponding qualification to take projects, project owners usually conceal the illegal fact and don't perform the obligation to inform according to the principle of good faith, it belongs to breach of pre-contract obligations. So project owners bear major fault liability for invalidity of contracts. Under this circumstance, it's fair and reasonable for construction enterprises to obtain the prospective project payment of signed contracts from the angle of justice, that is, construction enterprises should get the payment for direct expenses, indirect expense, profits and others. If both parties have determined the valuation standards and methods of project settlement which are not against legal rules, the payment of project settlement should be according to the contracts. The construction enterprises don't perform the necessary obligation of checking the fact of project owners' illegal construction, there are certain processes subjectively to cause invalidity, thus as for such loss as the default payment and others agreed in the contracts, construction enterprises shouldn't get full payment according to the principle of negligence offset.

Similarly, as for the case that project owners have the corresponding conditions, but construction enterprises don't have the corresponding qualification to take projects, construction enterprises bear major fault liability for invalidity of contracts. So the agreement about project payment in the contracts shouldn't be the basis of settlement, the project payment should be settled according to facts and the quota standard set by construction administrative departments. If the building enterprises with low qualification level take the projects that demand higher qualification level, the project payments are settled according to the actual qualification level of construction enterprises in above way; if construction enterprises don't have construction qualification, only the funds, structure component expenses, mechanical equipment using expenses, cost of labor and direct expenses of other projects that they have advanced can be paid. In such cases, there's no legal basis for project owners to obtain the price differentials of contracted project

payment and practical payment, which shall be escheat in judicial practice according to Article 134 of General Provisions of Civil Law that “the properties of illegal activities and illegal gains”.

5.The problems of contracting with own capital and construction contracting without advance payment

The problems of contracting with own capital and construction contracting without advance payment are not prohibited by our current laws. It's stipulated in “Notice about Strictly Forbidding Contracting with Own Capital in Construction” issued by Ministry of Construction, State Development Planning Commission and Ministry of Finance on June 4, 1996 that any construction project owners can't demand construction enterprises' contracting with own capital as a bidding condition, and can't forcibly demand construction enterprises write such content in construction contracts.....and construction enterprises can't take projects by contracting with own capital as competitive method. It's stipulated in Article 3 of Bank Issue [2003]121 “Notice about Further Strengthening Management of Credit Business in Real Estate” that commercial banks should strictly prevent construction enterprises from using bank loans to contract with advance payment in real estate development projects. The construction building enterprises that take the projects of real estate construction can only use the obtained working capital loans to purchase necessary equipments (such as tower cranes, excavators, bulldozer and so on). If the enterprises embezzle the loans for other purposes, administering banks should retrieve embezzled funds within a definite time, and notify other local commercial banks about the illegal behaviors of such enterprises, and all commercial banks shouldn't offer such enterprises corresponding credit aid.

In practice, contracting with own capital and construction contracting without advance payment are very common, especially in the projects started by some government institutions. The main forms of contracting with own capital and construction contracting without advance payment include: A. contractors' contracting with own partial capital is obviously expressed in the formal contracts of contract-issuing parties and contractors, and contracting without advance payment is regarded as a contractual obligation of contractors; B. there're no terms of contracting without advance payment in the formal contracts, but the obligation of contracting without advance payment is stipulated in the supplementary agreements; C. although there's no obviously agreed contractors' obligation of contracting without advance payment in the formal contracts, both parties reach tacit agreement in the practical performance of contracts, contractors construct with own capital or they are forced to construct without advance payment because contract-issuing parties delay project payment.

6.Conclusion

Constructional project contracts are the agreements made by construction project owners (contract-issuing parties) and construction enterprises (contractors) according to basic construction procedures in order to complete specific construction and installation projects and to define the rights and obligations of both parties.