SPC Guiding Case No. 198: Application by Industrial and Commercial Bank of China Co., Ltd. Yueyang Branch and Liu Youliang to Set Aside an Arbitral Award

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil litigation / application to set aside an arbitral award / arbitration agreement / actual constructor

Holding

An actual constructor is not a party to the construction contract entered into between the developer and the contractor, and has not entered into a valid arbitration agreement with the developer or the contractor, and therefore should not be bound by the arbitration agreement between the developer and the contractor. Where the actual constructor applies for arbitration pursuant to the arbitration agreement between the developer and the contractor, and the arbitral institution renders an arbitral award, the people's court shall support the developer's request to set aside the arbitral award.

Basic Facts

On August 30, 2012, Industrial and Commercial Bank of China Co., Ltd. Yueyang Branch (hereinafter "ICBC Yueyang Branch") and Hunan Baling Construction Co., Ltd. (hereinafter "Baling Company") entered into a Decoration Engineering Construction Contract, under which ICBC Yueyang Branch contracted out to Baling Company the overall renovation and interior decoration project of its office building, and in Article 15.11 of the contract agreed: "If a dispute arises under this contract, it shall first be resolved through negotiation between the parties; if negotiation fails, it shall be submitted to the Yueyang Arbitration Commission for arbitration." On September 10, 2012, Baling Company and Liu Youliang entered into an Internal Project Responsibility Contracting Contract, under which Baling Company contracted out to Liu Youliang, by way of an all-inclusive package, the engineering content and warranty of the overall renovation and interior decoration project of ICBC Yueyang Branch's office building, and charged a certain management fee and relevant security deposit. On July 23, 2013, ICBC Yueyang Branch and Baling Company entered into a Supplementary Contract for Decoration and Installation Engineering Construction, under which ICBC Yueyang Branch contracted out to Baling Company the carbon fiber reinforcement, waterproofing, base-layer decoration, external screen pipeline renovation, indoor demolition, and related works not yet included in the final account of its eighth-floor main equipment room. Because ICBC Yueyang Branch failed to pay the project price as agreed, on July 4, 2017, Liu Youliang applied for arbitration before the Yueyang Arbitration Commission with ICBC Yueyang Branch as the respondent. On August 7, 2017, ICBC Yueyang Branch raised an objection to the arbitral jurisdiction on the ground that it had not reached an arbitration agreement with Liu Youliang. On August 8, 2017, the Yueyang Arbitration Commission dismissed ICBC Yueyang Branch's objection to arbitral jurisdiction by Decision Yue Zhong Jue Zi [2017] No. 8. On December 22, 2017, the Yueyang Arbitration Commission rendered Award Yue Zhong Jue Zi [2017] No. 696, ordering ICBC Yueyang Branch to pay Liu Youliang the due and payable project price and liquidated damages. ICBC Yueyang Branch then applied to the Yueyang Intermediate People's Court of Hunan Province to set aside the arbitral award.

Judgment

On November 12, 2018, the Yueyang Intermediate People's Court of Hunan Province rendered Civil Ruling (2018) Xiang 06 Min Te No. 1, setting aside Award Yue Zhong Jue Zi [2017] No. 696 rendered by the Yueyang Arbitration Commission.

Reasoning

The court in its effective judgment held that an arbitration agreement is the consensus reached by the parties to voluntarily submit to arbitration all or specific disputes, whether contractual or non-contractual, that have arisen or may arise between them. An arbitration agreement is the basis on which an arbitral institution acquires jurisdiction, and is the foundation of the legality and legitimacy of arbitration; it centrally embodies the principle of voluntary arbitration and the system of agreed arbitration. In this case, Article 15.11 of the Decoration Engineering Construction Contract entered into between ICBC Yueyang Branch and Baling Company agreed: "If a dispute arises under this contract, it shall first be resolved through negotiation between the parties; if negotiation fails, it shall be submitted to the Yueyang Arbitration Commission for arbitration." Therefore, disputes arising between ICBC Yueyang Branch and Baling Company over the settlement and payment of the project price should be resolved through arbitration. However, Liu Youliang, as the actual constructor, was not a party to the Decoration Engineering Construction Contract entered into between ICBC Yueyang Branch and Baling Company, and no arbitration consensus was reached between Liu Youliang and ICBC Yueyang Branch or Baling Company, so he was not bound by the arbitration clause in that contract. Unless otherwise agreed, Liu Youliang had no right to invoke the arbitration clause in the Decoration Engineering Construction Contract between ICBC Yueyang Branch and Baling Company to assert rights against the parties to the contract. Liu Youliang performed the construction in the name of Baling Company, and Baling Company, as the subject of the Decoration Engineering Construction Contract, still existed and bore the corresponding rights and obligations. The parties to the case did not constitute the "succession" circumstance of a contractual arbitration clause prescribed in Article 8 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China, nor did they constitute the circumstance of a change of contract subject prescribed in Article 9 of that Interpretation. Although Article 26 of the 2004 Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Construction Engineering Construction Contracts provides that an actual constructor may assert rights against the developer with the developer as defendant, and that the developer shall bear liability to the actual constructor only within the scope of the project price owed, the aforesaid content only prescribes the actual constructor's right of action against the developer and the scope of the developer's liability, and should not be regarded as the basis for the actual constructor to invoke the arbitration clause in the Decoration Engineering Construction Contract. In summary, there was no arbitration agreement between ICBC Yueyang Branch and Liu Youliang, and there was no legal basis for the Yueyang Arbitration Commission to resolve the project price dispute between ICBC Yueyang Branch and Liu Youliang by arbitration based on Liu Youliang's application. Where the actual constructor applies for arbitration pursuant to the arbitration agreement between the developer and the contractor, and the arbitral institution renders an arbitral award, the people's court shall support the developer's request to set aside the arbitral award.

Relevant Legal Provisions

Article 58 of the Arbitration Law of the People's Republic of China.

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