

The Application of Principle of Relativity of Arbitration Agreements in the Resolution of Construction Engineering Contracts Disputes

—Starting from Guiding Case No. 198 of the Supreme People's Court

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Abstract

This article uses Guiding Case No. 198 from the Supreme People's Court as a starting point to discuss the principle of relativity of arbitration agreements and their impact on the resolution of disputes in construction engineering contracts. By specifically interpreting the relevant provisions of the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Disputes over Construction Engineering Contracts (I)", it explores the basis and nature of the claim rights of the actual constructors in the resolution of construction engineering contract disputes. Furthermore, the article elaborates on the reasons why the actual constructors are not bound by the arbitration agreement between the contractor and the employer, and analyzes the impact of the actual constructors not being bound by the arbitration agreement on the resolution of disputes. Guiding Case No. 198 emphasizes the fundamental position of arbitration consensus and clarifies the legal application of the principle of relativity of arbitration agreements in disputes over construction engineering contracts. It has resolved the controversy in judicial practice over whether the arbitration agreement between the employer and the contractor can bind the actual constructors, and has a positive impact on the resolution of disputes in construction engineering contracts and the protection of the rights and interests of actual constructors. However, when the employer is aware that the actual constructor is the factual contracting party, this case should not be applied.

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1. Origin of the Problem

Arbitration judicial review is not only an embodiment of legal system and legal technology, but also an expression of value judgment and legal art. The important value of arbitration judicial review lies in achieving a balance, particularly a dynamic balance between safeguarding the rights of the parties and regulating the arbitration order, respecting the autonomy of will of the parties and maintaining the public interest of society.³ An analysis of the guiding cases on judicial review of arbitration issued by the Supreme People's Court helps to understand the current situation of judicial review of arbitration in China and gain inspiration for further promoting the development of arbitration in China. Guiding Case No. 198 emphasizes the fundamental position of the arbitration agreement and clarifies the binding effect of the relativity of the arbitration agreement, which helps to avoid conflicts in the application of law.

In Guiding Case No. 198, the employer and the contractor signed the "Construction Contract for Decoration Works" and agreed to apply for arbitration to the Yueyang Arbitration Commission to resolve the dispute. After that, the contractor signed an "Internal Project Responsibility Contract" with the actual constructor and contracted the project to the actual constructor on a lump-sum basis. As the employer failed to pay the project funds on time, the actual constructor filed an arbitration with the Yueyang Arbitration Commission against the employer as the respondent. The employer raised an objection to jurisdiction on the grounds that no arbitration agreement was reached with the actual constructor. Yueyang Arbitration Commission rejected its objection to jurisdiction and made a ruling. The employer applied to the court for the annulment of the arbitration award. The Intermediate People's Court of Yueyang City, Hunan Province, ruled to revoke the award of the Yueyang Arbitration Commission. The court held that there was no arbitration agreement between the employer and the actual constructor, and there was no legal basis for the Yueyang Arbitration Commission to resolve the dispute over the project payment between the employer and the actual constructor by arbitration based on the application of the actual constructor.

In disputes over construction projects, legal disputes arising from the inconsistency between the actual constructor and the contractor are not uncommon. One of the important difficulties is the question of how the actual constructor seeks relief, especially when the construction contract stipulates an arbitration clause. There is no clear and relatively uniform answer in judicial practice as to whether the actual constructor needs to be bound by the arbitration clause. Article 26 of the "Interpretation of the Supreme People's Court on the Application of Law in the Trial of Disputes over Construction Project Contracts" (now invalid, hereinafter referred to as the "2004 Construction Engineering Interpretation") in 2004 granted the actual constructor the right to break the relativity of the contract and directly sue the employer. The above-mentioned provisions are retained in Article 43 of the 2021 Interpretation of the Supreme People's Court on the Application of Law in the Trial of Disputes over Construction Contracts (I) (hereinafter referred to as the "New Construction Engineering Interpretation (I)"). But the current laws and judicial interpretations do not provide for the question of whether the actual constructor shall be bound by the arbitration clause agreed upon by the employer and the contractor, and the practice is not uniform. Guiding Case No. 198 reflects the Supreme People's Court's understanding of the nature of the arbitration agreement, clarifies one situation of the relativity of the arbitration agreement, emphasizes that the arbitration agreement

³ Shuo Feng, *The Balance of Public Policy in Arbitration Judicial Review: From the Perspective of the Guiding Case No. 199 Decided by the Supreme People's Court of the People's Republic of China*, Chinese Review of International Law, Chinese Review of International Law, 2024(03), p.146.

between the employer and the contractor cannot bind the actual constructor, and gives a clear view on the long-standing differences in the practice of arbitration judicial supervision in China.⁴ This article intends to start with Guiding Case No. 198 to discuss the application and impact of the principle of relativity of arbitration agreements in the resolution of disputes over construction project contracts.

2. The Relativity of Arbitration Agreements Stems from Autonomy of Will

In Guiding Case No. 198, the Supreme People's Court particularly emphasized that the principle of voluntary arbitration and the system of consensual arbitration are important guarantees for the legality and legitimacy of arbitration. In theory, an arbitration agreement is a concentrated manifestation of the autonomy of the parties' will, and the autonomy of the arbitration agreement determines relativity. The autonomy of will of the arbitration parties can only function between the counterparties, and the arbitration agreement can only have an impact on the parties.

2.1 The Relationship between the Autonomy and Relativity of an Arbitration Agreement

Arbitration agreement is the basis of commercial arbitration. An arbitration agreement requires mutual agreement between the parties, and an effective arbitration agreement is a prerequisite for an arbitration institution to obtain jurisdiction over a case.⁵ Guiding Case No. 198 emphasizes that "an arbitration agreement is a voluntary agreement reached by the parties to submit to arbitration all or all of a particular legal dispute, whether contractual or non-contractual, that has arisen or may arise between them." The Supreme Court held that an arbitration agreement is the basis on which an arbitration institution acquires jurisdiction and is the foundation of the legality and legitimacy of arbitration, embodying the principle of voluntary arbitration and the system of consensual arbitration. This reflects the Supreme Court's respect for the autonomy of arbitral will. Arbitration, as a means of resolving commercial disputes, must be based on the voluntary choice of the parties and guarantees the right of the parties to autonomy of will in commercial arbitration.⁶

The autonomy and relativity of an arbitration agreement are interrelated. The autonomy of an arbitration agreement is mainly based on the principle of autonomy of will, the content of the agreement is negotiated by the parties, and the arbitration agreement is the embodiment of the parties' mutual consent. In addition, reaching an arbitration agreement means that the parties are excluded from the jurisdiction of the court. Therefore, an arbitration agreement has the dual effect of choosing arbitration and excluding litigation. Fundamentally, the autonomy of an arbitration agreement determines relativity, and relativity is one of the manifestations of autonomy. An arbitration agreement is an agreement reached by the parties through voluntary negotiation, which excludes the jurisdiction of the court and chooses to resolve disputes through arbitration. It is the result of the parties' exercise of the right of autonomy of will and therefore only binds the parties involved in the arbitration agreement. The general attribute of an arbitration agreement is relativity.⁷ In other words, the effect of an arbitration agreement is limited to the parties to which the agreement is reached and not to a third party, otherwise it would undermine the legal basis

⁴ Lianbin Song, *Support Arbitration, Supervise in Accordance with the Law, and Enhance the Attractiveness of International Preferred Arbitration Venues*, People's Court News Media Group, at [https://weibo.com/3268047813/4874433632930703], (August 4, 2024).

⁵ Xiansen Li, *The Protection and Restriction of Autonomy of Will in International Commercial Arbitration: A Review of the Amendment of the Arbitration Law*, Law Science, 2022(04), p.179.

⁶ Jingdong Liu, *A Judicial Model for Actively Supporting and Supervising Arbitration*, People's Court News Media Group, at [https://baijiahao.baidu.com/s?id=1759218988388607838&wfr=spider&for=pc], (August 4, 2024).

⁷ Bei Wang, *Review and Improvement of the Access System for the Third Party Arbitration procedure*, ECUPJL Journal, 2021(3), p.30.

of the arbitration system, and therefore there is no third party system in arbitration.⁸ In the face of different legal relationships, the autonomy and relativity of an arbitration agreement have different applicability and interpretative power. The role of autonomy is more prominent when dealing with the legal relationship between the parties to an arbitration case; Relativity is more effective when dealing with the legal relationship between the parties to an arbitration case and a third party. From the perspective of legal relations, in guiding Case No. 198, the actual constructor who initiated the arbitration, in relation to the employer and the contractor who signed the arbitration agreement, is a third party outside the case and cannot directly intervene in the arbitration case. At the same time, the claim right of the actual constructor against the employer is different from the right of subrogation. It is a special substantive right stipulated by the judicial interpretation. Therefore, the standard of its application should be strictly limited. In the absence of explicit provisions in the law, this right cannot break through the relativity of the arbitration agreement and cannot be used as the legal basis for the actual constructor to apply for arbitration by invoking the arbitration agreement between the employer and the contractor.⁹

An arbitration agreement is a written form of the arbitration agreement and a concrete representation of the parties' intentions. To determine whether the actual construction should be bound by the arbitration agreement is fundamentally to determine whether there is an arbitration agreement between the actual constructor and the employer. Article 140 of the Civil Code stipulates that "a person may express or impliedly make an expression of intent. Silence may be regarded as an expression of intent only if it is prescribed by law, agreed upon by the parties, or in accordance with the trading practices between the parties." Therefore, the parties may reach an arbitration agreement by express or implied means, but not by silence. Specifically, whether it is an express or implied expression of intent, there is an "indicated" positive act, a way that is directly manifested without the need for speculation or consideration; Silence, on the other hand, is a mere passive inaction, and its means of expression is only static "silent".¹⁰ How to distinguish between implied and silent is one of the difficulties in judicial practice. "Implied" requires an act that can be inferred, and this indirect expression must be directed to the other party.

2.2 Determination of Arbitration Agreement in Disputes over Construction Project Contracts

In previous judicial practice, when actual constructors assert their rights based on judicial interpretations, if there is an arbitration agreement between the employer and the contractor, courts have always been divided on whether actual constructors should be bound by such arbitration agreement, and actual constructors often find themselves in a dilemma over this. For example, in some cases, the actual constructor filed a lawsuit with the court, and the court dismissed the lawsuit on the grounds that there was an arbitration agreement. The actual constructor then applied for arbitration to the arbitration institution, which determined that he was not a party to the contract in question and notified that he would not accept the case, and the actual constructor had no choice but to file another

⁸ Lili Jiang, *Keep Pace with The Times and Innovatively Explore the Rules for Judicial Review and Adjudication of Arbitration*, People's Court Daily, March 2, 2023, at p.8.

⁹ Yan Tang & Zhile Xiao, Hongyan Song, etc. *Understanding and Reference of the "Case of Industrial and Commercial Bank of China Co., LTD. Yueyang Branch v. Liu Youliang for Revocation of Arbitration Award" - The Actual Constructor is not a Party to the Construction Contract Signed by the Employer and the Contractor and is not Bound by the Arbitration Clause in the Contract*, People's Judicature, 2024(2), p.32.

¹⁰ Daixiong Yang, *Silence and Fiction in the Theory of Declaration of Will*, Journal of Comparative Law, 2016(6), p.156.

lawsuit with the court.¹¹ This puts cases in a dilemma, reduces the efficiency of dispute resolution and increases the cost of dispute resolution.

Different courts have different views on whether actual constructors are bound by arbitration clauses. The fundamental reason lies in whether the special provisions for actual constructors can reach the point of breaking the "relativity of contract", and there are differences in understanding among different courts. From Guiding Case No. 198, the fundamental reason why the actual constructor is not bound by the arbitration agreement between the employer and the contractor is the lack of an arbitration agreement, and thus is not bound by the arbitration clause in the contract. An arbitration clause or agreement is a concrete manifestation of the arbitration agreement between the parties and is characterized by written requirements and independence.¹² This requires courts to strictly adhere to the criteria for determining whether there is an arbitration agreement between the actual constructor and the contractor, and not to easily break through the relativity of the arbitration agreement.

To determine whether there is an arbitration agreement between the actual constructor and the employer in the absence of the actual constructor's signature on the construction project contract is essentially an interpretation of whether there is an expression of consent to arbitration between the two parties, and this interpretation must be based on a detailed examination of the specific facts of the case.¹³ Therefore, in judicial practice, specific facts such as whether the actual constructor participated in the negotiation process of the contract, whether he signed the contract, whether he actually performed the contents of the contract, and whether he incorporated the contents of the contract into the agreement between himself and the contractor should all be taken into account when considering the actual constructor's expression of intent to arbitrate. According to the description of facts in guiding Case No. 198, there is no express expression of arbitration intent between the actual constructor and the employer, nor is there any inferential act made to the counterparty. Therefore, it is difficult to infer that there is an implied expression of arbitration intent between the two parties. Guiding Case No. 198 clarifies the boundary between substantive rights and procedural rights of the parties to an arbitration case, that is, the claim rights that a party enjoys against a specific subject in accordance with substantive legal provisions cannot be the legal basis for determining that there is an arbitration agreement between the party and the specific subject. In the resolution of disputes over construction project contracts, the actual constructor's choice of dispute resolution method should not violate the principle of relativity of arbitration agreements, the Arbitration Law and relevant judicial interpretations.

3. The Basis and Characterization of the Actual Constructor's Claim in Disputes over Construction Project Contracts

Generally speaking, contracts are relative, and actual constructors cannot assert their rights against the employer beyond the relativity of the contract. Article 43 of the New Construction Engineering Interpretation (I) provides

¹¹ Dashiqiao City People's Court of Liaoning Province, *Civil Ruling of the First Instance on the Dispute over Construction Project Contract between Liaoning Yuchang Construction Engineering Co., Ltd. and Dashiqiao City Urban Construction Investment Co., LTD*, Case Number: (2021) Liaoning 0882 Min Chu 669. Intermediate People's Court of Yingkou City, Liaoning Province, *Civil Ruling of the Second Instance on the Construction Contract Dispute between Dashiqiao City Urban Construction Investment Co., Ltd. and Liaoning Yuchang Construction Engineering Co., LTD.*, Case Number: (2021) Liao 08 Min Xia Zhong 103.

¹² Hengjuan Xun & Shengcui Zhang, *An Empirical Study of Judicial Review of Issues of Arbitration Consent*, Journal of Shanghai University of Finance and Economics, 2018(2), p.139.

¹³ Hangping Chen, *Reconstruction of the Subjective Scope Theory of Arbitration Agreements*, Chinese Journal of Law, 2023(2), p.189.

a clear set of litigation procedures for the actual constructor to sue the employer for the project payment and offers specific operational steps for the actual constructor to recover the project payment. This provision lays the foundation for the actual constructor to go beyond the limitations of contractual relativity, the basis and characterization of the actual constructor's claim against the employer need to be analyzed specifically.

3.1 The Scope of the Actual Constructor

The concept of "actual constructor" originated from the "2004 Construction Engineering Interpretation" of the Supreme People's Court. Article 26 of the interpretation breaks through the relativity of the contract and allows the actual constructor to Sue the project owner as the defendant.¹⁴ After the promulgation of the Civil Code, the Supreme People's Court reviewed the relevant judicial interpretations and issued the New Construction Engineering Interpretation (I) in December 2020, which largely retained the above provisions in Article 43.¹⁵ The normative documents of the Supreme People's Court have never explicitly defined the concept of actual constructors. In practice, the actual constructor usually refers to the entity that actually completes the construction project in a construction contract that is deemed invalid by law, including construction enterprises, branches of construction enterprises, foremen and other legal persons, unincorporated associations, individual citizens, etc. According to common understanding, actual constructors are divided into the following three types: 1. Borrowing qualifications or affiliation. When an actual constructor borrows the name of a qualified enterprise to bid and sign contracts, etc., and pays the management fee to the enterprise, the actual constructor organizes the construction, and the lending enterprise does not bear responsibility. 2. The contractor who illegally subcontracts the entire project. After contracting the project, the contractor fails to fulfill the contractual obligations and transfers the entire project to the actual constructor or disassembles it and subcontracts it to other units under the name of subcontracting. 3. Contractors who illegally subcontract the part of the project. A contractor who subcontracts parts of the project to a third party without the consent of the construction entity is the contractor who subcontracts illegally. However, it should be noted that the meeting summary of the Supreme People's Court 20th professional judges' meeting of the First Civil Division in 2021 hold that the "actual constructors" referred to in Article 43 of the Construction Engineering Interpretation (I) do not include two situations: 1. the actual constructors who borrow qualifications; 2. the actual constructors in multi-level subcontracting and illegal subcontracting relationships.

3.2 The Basis and Characterization of the Actual Constructor's Claim against the Employer

According to the relativity of arbitration agreements, the validity of arbitration agreements is generally limited to the parties involved. The exceptional expansion of the validity of arbitration agreements should be subject to the

¹⁴ Article 26 of *The Interpretation of the Supreme People's Court on the Application of Law in the Trial of Disputes over Construction Project Contracts* (Judicial Interpretation [2004] No. 14) stipulates that "Where an actual constructor sues a subcontractor or an illegal subcontractor as the defendant, the people's court shall accept the case in accordance with the law." Where the actual constructor asserts rights against the project owner as the defendant, the people's court may add the subcontractor or the illegal subcontractor as a party to the case. The employer shall only be liable to the actual constructor within the scope of the outstanding project price.

¹⁵ Article 43 of *The Interpretation of the Supreme People's Court on the Application of Law in the Trial of Disputes over Construction Project Contracts (I)* (Judicial Interpretation [2020] No. 25) stipulates that "Where an actual constructor sues a subcontractor or an illegal subcontractor as the defendant, the people's court shall accept the case in accordance with the law." Where the actual constructor asserts rights against the project owner as the defendant, the people's court shall add the subcontractor or the illegal subcontractor as a third party in the case. After ascertaining the amount of the construction project price that the project owner owes to the subcontractor or the illegal subcontractor, the court shall rule that the project owner shall be liable to the actual constructor within the scope of the outstanding construction project price.

explicit provisions of the law.¹⁶ In a dispute over a construction project contract, the actual constructor is not a party to the arbitration agreement. If the actual constructor is to be bound by the arbitration agreement, there must be some legal prerequisite, in addition to reaching an arbitration agreement with the employer, there are special circumstances such as company division, merger, and inheritance and transfer of claims as prescribed by law.¹⁷ In the absence of being bound by the arbitration agreement between the employer and the contractor, there are several viewpoints on the basis of the actual constructor's claim against the employer:

3.2.1 Asserting Rights against the Employer on the Factual Contractual Relationship

The actual constructor's claim of rights against the employer based on the factual construction contract relationship is a more common theory of the actual constructor's rights protection basis. When the actual constructor asserts his rights, according to Article 43 of the Construction Engineering Interpretation (I), the court may add the subcontractor or the illegal subcontractor as a party, and the employer is only liable to the actual constructor if the project price has not been paid. There is an opinion that this measure is intended to protect the legitimate rights and interests of migrant workers. When there is a situation of subcontracting or illegal subcontracting, the actual constructor has actually fulfilled the contractual obligations and formed a substantive rights and obligations relationship with the contractor. However, since the actual constructor has not received the project payment, it directly affects the wages of downstream migrant workers. If they are not allowed to assert their rights, it will be detrimental to the protection of the interests of migrant workers. According to this view, the actual constructor may demand that the employer assume the liability for payment within the scope of the outstanding payment, and this claim is derived from the rights of the contractor in the construction contract.

3.2.2 Assert Rights against the Employer on the Basis of a Claim for Return of Unjust Enrichment

The actual constructor's claim against the employer is subject to three conditions: First, the actual constructor has completed the work and the quality of the work is qualified. One of the conditions for the protection of the rights of the actual constructor is that the quality of the completed construction project is qualified. If the quality of the construction project is unqualified and the repair is refused, or the repairment is still unqualified, then the claim for the project price of the actual constructor loses the basis of legality and reasonableness. The second is that the employer fails to pay the construction price to the subcontractor or the illegal subcontractor. Third, the actual constructor can only assert rights within the scope of the construction price owed by the employer to the subcontractor or the illegal subcontractor. From these three points, the employer may have unjust enrichment in respect of the qualified works completed by the actual constructor. The actual constructor's claim against the employer on the basis of a claim for the return of unjust enrichment has a certain legitimacy basis, but it ignores the fact that the return of unjust enrichment needs to be returned in accordance with the performance relationship.

According to Article 985 of the Civil Code, "Unjust enrichment means obtaining an unjust benefit without legal basis and causing loss to another person, the person who has suffered the loss may request the beneficiary to return the benefit." The actual constructor has completed the construction project, and the employer has ultimately obtained the project or gained an benefit from it, but there is no contractual relationship with the actual constructor and no corresponding consideration has been paid. Therefore, there is an opinion that the employer constitutes

¹⁶ Junhai Li & Zicheng Xu, *The Validity of the Arbitration Agreement has been Expanded*, People's Judicature, 2021(23), p.103.

¹⁷ Article 8 and Article 9 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 (Revised in 2008)* have respectively made provisions. In this case, neither of these two situations exists between the actual constructor and the contractor.

unjust enrichment, and the actual constructor can request the employer to return the project payment on the basis of unjust enrichment. The main reason in support of this view is that there is no legal basis or contractual agreement for the employer to obtain the benefit. There is no contractual relationship between the employer and the actual constructor, nor are there any other legal obligations. Therefore, there is no legal basis for the benefits obtained from the project. The actual constructor completed the project but was unable to obtain the due payment for the project and thus suffered a loss. Unjust enrichment is an effective means of balancing the interests of both parties. Demanding the return of the project payment from the employer can effectively balance the interests of both parties and prevent the legitimate rights and interests of the actual constructor from being damaged.

However, there is also the view that unjust enrichment cannot be a claim of the actual constructor and does not constitute a legal basis for his claim. The main reason is that there are three parties involved, namely the contractual relationship between the employer and the contractor and the contractual relationship between the contractor and the actual constructor, and there is no contractual relationship between the actual constructor and the employer. In this case, the return of unjust enrichment can only be based on the relationship of performance, which exists only between the employer and the contractor and between the contractor and the actual constructor, and the actual constructor cannot claim unjust enrichment from the employer beyond the relationship of performance with the contractor. In other words, when both of the above contracts are invalid, the actual constructor can only claim the return of unjust enrichment from the contractor. The performance relationship is limited to the parties to the unjust enrichment legal relationship and does not depend on whether the contract is valid or not.¹⁸

3.2.3 Assert Rights against the Employer Based on the Right of Subrogation

The actual constructor's claim of rights against the employer in accordance with Article 43 of the Construction Engineering Interpretation (I) is a special provision for disputes over construction project contracts and is not equivalent to subrogation litigation. Article 44 of the "Construction Engineering Interpretation (I)" stipulates: "Where an actual constructor, in accordance with Article 535 of the Civil Code, brings a subrogation lawsuit on the ground that the subcontractor or the illegal subcontractor failed to exercise the due claim or the accessory right related to such claim against the employer, thereby affecting the realization of the due claim, the people's court shall support it." According to the provisions of Article 535 of the Civil Code on the right of subrogation, the conditions for the exercise of the right of subrogation are: (1) the creditor's claim against the debtor has matured; (2) The debtor is negligent in exercising his claim or the accessory rights related to that claim; (3) The debtor's failure to exercise his rights has affected the realization of the creditor's due claim; (4) Rights that are exclusive to the debtor himself may not be exercised by subrogation.¹⁹ For an actual constructor to assert his rights against the employer by exercising the right of subrogation, the following conditions must be met: (1) The quality of the construction project completed by the actual constructor is qualified and he has a claim against the contractor (subcontractor or illegal subcontractor); (2) The employer must not have paid the price of the project to the subcontractor or the illegal subcontractor. Even if the subcontracting contract and the illegal subcontracting contract are invalid, as long as the construction project completed by the contractor and the actual constructor

¹⁸ Zejian Wang, *Unjust Enrichment (Second Edition)*, Peking University Press, p.81, (2015).

¹⁹ Article 535 of *The Civil Code of the People's Republic of China* stipulates that "Where a debtor is negligent in exercising his claim or the accessory rights related to such claim, thereby affecting the realization of the creditor's due claim, the creditor may request the people's court to exercise the rights of the debtor against the counterparty in his own name, except for those rights that are exclusively attributable to the debtor himself." The scope of the exercise of the right of subrogation is limited to the creditor's due claims. The necessary expenses incurred by the creditor in exercising the right of subrogation shall be borne by the debtor. The counterparty's defense against the debtor may be asserted against the creditor.

has passed the final acceptance inspection, the actual constructor has the right to demand payment of the project price from the employer; (3) The subcontractor or the illegal subcontractor is negligent in exercising its due claims against the employer, causing damage to the actual constructor;²⁰ (4) The claim of the subcontractor or the illegal subcontractor is not an exclusive claim of his own.²¹

The right of subrogation is the right of a creditor to exercise in his own name the right of the debtor against a third party in order to preserve his claim when the debtor is negligent in exercising his rights against a third party and thereby harms the creditor's rights.²² One of the purposes of the provision of the right of subrogation in China is to solve the "triangle debt" problem that has plagued enterprises for many years. The nature of the right of subrogation is an inherent substantive right of the parties.²³ Subrogation involves two legal relationships, namely the legal relationship between the creditor and the debtor and the legal relationship between the debtor and a third party. According to Article 535 of the Civil Code, the right of subrogation belongs to the preservation of debt and is an substantive right granted to the creditor in order to prevent the debtor's failure to exercise the right from posing a risk to the creditor's realization of the due claim.²⁴ The actual constructor's exercise of the right of subrogation is subject to the determination of the claim between the employer and the contractor (subcontractor or illegal subcontractor). In disputes over construction contracts, there is uncertainty as to whether the contractor's claim against the employer is due. If the works between the contractor and the employer have not been settled, it is generally considered that the contractor's claim has not matured.²⁵ Article 44 of the Construction Engineering Interpretation (I) explicitly cites the general provisions of subrogation rights in Article 535 of the Civil Code, which limits the scope of exercise of subrogation rights to the due claims of the creditor. Therefore, if the contractor's claim against the employer is not due, it will be difficult for the actual constructor to bring a subrogation lawsuit against the employer to assert his rights.

The 2004 Construction Engineering Interpretation stipulates that actual constructors can assert their rights against the employer as the defendant, which is a special institutional arrangement to solve the problem of wage arrears for migrant workers in a certain period and context. It is not equivalent to a subrogation lawsuit and does not have the nature of a subrogation request. The "Reply of the Supreme People's Court to Suggestion No. 3784 from the Fifth Session of the 13th National People's Congress" in 2022 clearly states that "the reason why Article 26 of the Interpretation of the Supreme People's Court on the Application of Law in the Trial of Disputes over Construction Project Contracts published on October 25, 2004 breaks through the relativity of contract, It is to

²⁰ Zejian Wang, *Unjust Enrichment (Second Edition)*, Peking University Press, p.81, (2015).

²¹ Specifically, it is manifested as follows: First, the debt owed by the subcontractor or the illegal subcontractor to the actual constructor has already matured. The second is that the subcontractor or the illegal subcontractor fails to fulfill the due debt to the actual constructor. The third is that the subcontractor or the illegal subcontractor has a claim against the employer that involves monetary payment. This claim includes the construction project price claim that the subcontractor and the illegal subcontractor have against the employer, as well as other claims. Fourth, the creditor's rights with monetary payment content that the subcontractor or the illegal subcontractor has against the employer have matured. If the claim of the subcontractor or the illegal subcontractor against the employer has not yet matured, the employer may raise a defense on this ground to oppose the subrogation right of the actual constructor. The fifth is that the subcontractor or the illegal subcontractor does not assert the due claim with monetary payment content against the employer through litigation or arbitration. Sixth, the subcontractor or the illegal subcontractor is negligent in asserting the due creditor's rights with monetary payment content from the employer, resulting in the failure to realize the due creditor's rights of the actual constructor.

²² Jianyuan Cui, *Contract Law (Fourth Edition)*, Law Press China, p.143, (2007).

²³ Shiyuan Han, *General Theory of Contract Law (Third Edition)*, Law Press China, p.328, (2011).

²⁴ Weixing Shen & Xueting Fu, *On the Constituent Elements and Legal Effects of the Creditor's Right of Subrogation*, Jilin University Journal of Humanities and Social Sciences, 2022(4), p.123.

²⁵ Yinli Gao, *Research on Several Issues of Subrogation Rights of Actual Constructors*, Commercial Arbitration & Mediation, 2021(2), p.90.

protect the legitimate rights and interests of migrant workers engaged in the construction industry." At the same time, Guiding Case No. 198 also emphasizes in its reasoning that although the "2004 Construction Engineering Interpretation" stipulates the right of the actual constructor to sue the employer and the scope of the employer's liability, it should not be regarded as the basis for the actual constructor to invoke the arbitration clause in disputes over construction engineering contracts, indicating the attitude of the Supreme People's Court in insisting on the relativity of the arbitration agreement. Articles 43 and 44 of the "Construction Engineering Interpretation (I)" respectively stipulate two situations where the actual constructor initiates a lawsuit to assert rights against the project owner as the defendant and the actual constructor initiates a subrogation lawsuit in accordance with Article 535 of the Civil Code. The legitimacy of the actual constructor system is based on the valuation compensation in cases where return cannot be made.²⁶ Article 43 stipulates that the employer shall be liable to the actual constructor within the scope of the outstanding project price in order to prevent the employer from being further liable. As a special institutional arrangement, the actual constructor's direct assertion of rights against the employer has broken through the relativity of contract, and therefore it is necessary to prevent the expansion of the scope of civil liability borne by the employer. Article 44 cites the general rule of subrogation in Article 535 of the Civil Code, which limits the exercise of subrogation to the due claims of the creditor, and therefore the scope of liability of the employer is limited to the due claims. Article 43, as a special institutional arrangement, grants the actual constructor a special substantive claim right, which should not be extended beyond the relativity of the arbitration agreement to the arbitration procedure. As for Article 44, the legal basis of arbitration is different from that of litigation. Subrogation arbitration cannot be institutionally established, and the right of subrogation cannot be used as a legal basis for the actual constructor to bring arbitration against the employer.

4. Reasons and Effects that the Actual Constructor is not Bound by the Arbitration Agreement

4.1 Reasons Why the Actual Constructor is not Bound by the Arbitration Agreement

The actual constructor is not bound by an arbitration agreement between the employer and the contractor mainly because there is no direct contractual relationship between the actual constructor and the employer, and there is also a lack of an effective arbitration agreement between the two parties, specifically:

a. Different legal relationship: The actual constructor is not a party to the construction contract signed between the employer and the contractor. The construction contract between the employer and the contractor is voluntarily signed by both parties, while there is no direct contractual relationship between the actual constructor and the employer. According to Paragraph 2 of Article 465 of the Civil Code, a contract formed by law shall be legally binding only on the parties, except as otherwise provided by law. A construction contract between the employer and the contractor shall be binding only on the parties to the contract and not on the actual constructor. According to the principle of contractual relativity, the actual constructor is not a party to the construction contract and therefore is not bound by the arbitration agreement in the contract.

b. Source of the rights of the actual constructor: Article 43 of the Construction Engineering Interpretation (I) provides that the actual constructor may break the principle of contractual relativity and assert rights against the employer. But this right of the actual constructor stems from the direct provisions of the judicial interpretation and

²⁶ Mingtao Shi, *Understanding and Perfection of the Actual Constructor System in the Era of Civil Code*, Hebei Law Science, 2022(9), p.138.

is not an inheritance of the rights of the contractor, nor is it dependent on the rights that the contractor has over the employer. Therefore, the actual constructor shall not be bound by an arbitration agreement between the employer and the contractor. Guiding Case No. 198 also supports this view.

c. Binding force of the arbitration agreement: According to Article 4 of the Arbitration Law, "When parties resolve disputes through arbitration, they shall reach an arbitration agreement. In the absence of an arbitration agreement, the arbitration commission shall not accept an application for arbitration by one party." The construction contract between the contractor and the employer is a different legal relationship from the subcontracting contract between the actual constructor and the contractor. The actual constructor is not a subject of the construction contract, and the provisions in the construction contract regarding the arbitration agreement are merely expressions of intent between the employer and the contractor. The autonomy of the will of the parties is a positive source of the effect of the arbitration agreement.²⁷ There is no arbitration agreement between the actual constructor and the employer or the contractor, so the arbitration institution lacks jurisdiction over the dispute. It should be noted, however, that in such cases, it should be made clear whether the actual constructor participated in the signing of the construction project contract between the contractor and the employer, or even signed the contract in the name of the contractor. If such a situation exists, the actual constructor's direct claim of rights against the employer should still be bound by the arbitration agreement.

d. Protect the litigation rights of actual constructors: If actual constructors are bound by an arbitration agreement between the employer and the contractor, it may limit their right to resolve disputes through litigation, resulting in ineffective protection of their rights. In terms of legislative purpose, Article 43 of the Construction Engineering Interpretation (I) is a special provision that breaks the relativity of the contract. In the case of "Rongsheng (Bengbu) Real Estate Co., Ltd. v. Wang Xiuhu, Hefei Huaxing Construction and Installation Engineering Co., LTD. Construction Project Contract Dispute", the Supreme People's Court stated that the purpose of this provision was to include the employer as the defendant in order to solve the problem of a large amount of wage arrears for migrant workers existing in the construction industry, thereby maintaining social stability.²⁸ Therefore, the rights of the actual constructor are protected over the autonomy of will of the employer, regardless of whether there is an effective arbitration clause between the employer and the contractor, the actual constructor is not bound by the arbitration clause, and the arbitration clause is not enforceable against the actual constructor's right to sue. When the actual constructor brings a subrogation lawsuit against the employer in accordance with Article 44 of the "Construction Engineering Interpretation (I)", according to Article 28 of the "Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (Amended in 2022)", the jurisdiction for disputes over construction project contracts shall apply to exclusive jurisdiction. Subrogation litigation jurisdiction may exclude the limitation of the parties' jurisdiction agreement or arbitration agreement, but shall be subject to the limitation of exclusive jurisdiction.²⁹ Where an actual constructor asserts a claim for the price of the construction project through subrogation and the debtor's claim against the secondary debtor is derived from the construction project contract, the principle of exclusive jurisdiction over general

²⁷ Zhenguo Wu, *The Basis of the Validity of Arbitration Agreement and the Reconstruction of Its Requirements: With Focus on the Guiding Case No. 196 Decided by the Supreme People's Court of the People's Republic of China*, *Chinese Review of International Law*, 2024(3), p.131.

²⁸ Supreme People's Court, "Rongsheng (Bengbu) Real Estate Co., Ltd. v. Wang Xiuhu et al. Construction Contract Dispute Case", Case No. (2014) Min Shen Zi No. 1575.

²⁹ Hu Zhu & Zhifu Lei, *Procedural Construction of the Creditor's Right of Subrogation*, Northern Legal Science, 2024(4), p.20.

jurisdiction shall apply, and the court where the construction project is located shall have jurisdiction. This excludes territorial jurisdiction of other courts, as well as jurisdictional agreements and arbitration agreements between the creditor and the debtor, and between the debtor and the counterparty. The debtor and the counterparty may not use this as a defense of jurisdiction. Therefore, in order to protect the procedural rights of the actual constructor and the legislative purpose of the judicial interpretation, the actual constructor's right to sue against the contractor should not be bound by the relevant arbitration agreement.

4.2 The Impact of the Actual Constructor not being Bound by the Arbitration Agreement on Dispute Resolution

The impact of the actual constructor not being bound by the arbitration agreement on dispute resolution is mainly reflected in the following aspects:

a. The actual constructor may assert rights against the employer based on the contract involved in the case. The actual constructor cannot directly apply for arbitration based on the arbitration agreement between the employer and the contractor. The basis of arbitration is mutual consent. According to Article 4 of the Arbitration Law, the arbitration agreement between the parties is a prerequisite for the arbitration institution to accept the case. The actual constructor is not a party to the construction contract signed between the employer and the contractor, and there is no arbitration agreement between him and the employer, the actual constructor cannot apply for arbitration based on the arbitration agreement between the employer and the contractor, otherwise there will be no legal basis. Guiding Case No. 198 clarifies that if the actual constructor applies for arbitration based on the arbitration agreement between the employer and the contractor and the arbitration institution makes an arbitration award, the employer requests to revoke the arbitration award, the people's court shall support it. This is actually an important protection mechanism for actual constructors, ensuring that their rights and interests will not be adversely affected by the existence of the arbitration agreement. Not being bound by an arbitration agreement means that actual constructors can directly file a lawsuit with the court to protect their legitimate rights and interests, which avoids the uncertainty of actual constructors' rights protection, especially for the recovery of labor remuneration such as migrant workers' wages.

b. An actual constructor who is not bound by an arbitration agreement may file a lawsuit directly with the people's court. The actual constructor may bring a lawsuit against the employer in accordance with Articles 43 and 44 of the Construction Engineering Interpretation (I). Where an actual constructor brings a lawsuit against the employer, the people's court shall accept the case, but if it is necessary to use the arbitration result between the employer and the contractor as the basis, the hearing may be suspended and resumed after the arbitration proceedings are concluded. Where a construction project contract involves subcontracting, illegal subcontracting, affiliation, etc., the contract shall be invalid in accordance with the Construction Engineering Interpretation (I). But the non-effectiveness, invalidity, cancellation or termination of the contract shall not affect the validity of the provisions in the contract concerning the means of dispute resolution. The actual constructor's lawsuit against the employer shall not extend beyond the scope of the Contractor's rights against the employer and shall be subject to the arbitration clause in the contract between the Contractor and the employer regarding the method of dispute resolution. And the court must find out the amount of the construction project price owed by the employer to the contractor before it can rule that the employer is liable to the actual constructor within the amount of the construction project price owed by the employer, and the finding out of this fact falls under the arbitration institution because of the agreement of the arbitration clause between the employer and the contractor.

The arbitration between the employer and the contractor is based on their contractual relationship and the arbitration agreement, and the arbitration procedure is professional and independent. If the adjudication of a construction contract dispute relies on the outcome of the arbitration, before the arbitration award is made, the case between the actual constructor and the employer heard by the court may lack the necessary factual and legal basis. The suspension of the proceedings can also prevent a conflict between the court's judgment and the arbitration award. If a court makes a judgment before an arbitration award is made, it may cause a conflict in the determination of facts and application of law between the two parties, affecting the uniformity of the outcome of the dispute resolution. Resuming the trial after the arbitration proceedings have ended will help to bring about consistency between the court's judgment and the arbitration award. At the same time, by suspending the proceedings, courts can wait for the arbitration results, which helps to reduce duplication and improve judicial efficiency. The court shall recognize facts that have been confirmed by the effective award of the arbitration institution in accordance with Article 10 of the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings (Amended in 2019). Once an arbitration award is made, the court may refer to the award to determine whether the employer is in arrears with the project payment and the specific amount of the arrears, thereby making a judgment more quickly. This not only strictly adheres to the relativity of the arbitration agreement, but also provides an effective solution for the actual constructor's payment of the project funds.

5. Matters to be Noted when Referring to the Application of Guiding Case No. 198

The publication of Guiding Case No. 198 makes it clear that in disputes over construction project contracts, the actual constructor is not bound by the arbitration agreement between the employer and the contractor. The actual constructor may bring a lawsuit against the employer through Articles 43 and 44 of the Construction Engineering Interpretation (I), but cannot directly bring an arbitration against the employer based on the arbitration agreement. The guiding case determines the source of the rights of the actual constructor and helps to realize the rights of the actual constructor. At the same time, there are some matters to note when referring to the application in the resolution of disputes over construction project contracts:

5.1 This Case should not be Applied when the Employer is Aware that the Actual Counterparty to the Contract is the Actual Constructor

Where an unqualified actual constructor uses the name of a qualified enterprise to enter into a construction contract with the employer, and the employer knows that it is an actual constructor using qualifications to carry out the construction, a de facto construction contract relationship is formed between the employer and that actual constructor. The unqualified actual constructor is the affiliated party, and the enterprise whose qualifications are borrowed is the host party. According to Article 146 of the Civil Code on "Collusive False Representation", the host party is merely the nominal subject, whose true intention lies in lending qualifications rather than performing the construction contract. The true intention of the employer and the affiliated party is to enter into and perform a hidden true construction contract with the other parties, and to enter into a false contract under the name of a qualified affiliate only for the sake of contract filing and other considerations. If the counterparty knows that the actor is using another person's name, the act cannot be established between the nominal subject and the counterparty. Therefore, the actual subjects of a construction contract are the employer and the affiliated party.

In disputes over construction project contracts, the employer's "knowledge" can be determined from the following aspects: 1. The affiliated party directly pays the bid security to the employer or has transactions such as lending

money, security or payment of project funds; 2. The employer is aware of the fact that the affiliated party is the actual performance entity during the signing and performance of the tender; 3. The affiliated party negotiates the contract directly with the employer, or the employer is aware of the fact of affiliation between the host party and the affiliated party. Where the employer is not aware of it, based on the principle of contractual relativity and protection of reliance, the rights and obligations of each party shall be handled in accordance with the relevant contract, and the actual constructor who borrowed the qualification shall have no right to claim the outstanding project price from the employer.³⁰ In the book "Understanding and Applying of the New Judicial Interpretation (I) on Construction Engineering Contracts" compiled by the First Civil Division of the Supreme People's Court, the Supreme People's Court holds that Article 43 of the "Construction Engineering Interpretation (I)" does not apply in principle to actual constructors in the case of affiliation.³¹ In the case of a de facto construction contract, the basis legal relationship for the actual constructor who borrows the qualification to claim the project payment is the construction contract signed between the employer and the contractor. The actual constructor knew or should have known of the existence of the arbitration clause in the construction contract before the dispute occurred. Although Article 1 of the Construction Engineering Interpretation (I) stipulates that a construction contract signed by borrowing qualifications is invalid, the invalidity of the construction contract does not affect the validity of the arbitration clause, and the actual constructor's lawsuit shall be bound by the arbitration clause.³² Therefore, Guiding Case No. 198 should not be applicable to the situation where the actual constructor who borrowed qualifications sued the employer, especially when the employer knew that the actual constructor was actually the counterparty of the construction contract. The actual constructor has the right to list the employer as the respondent in the arbitration based on this clause to assert rights, which is in line with the parties' expectations of the dispute resolution method. It also avoids procedural conflicts in the application of law.

5.2 The Impact of an Arbitration Agreement between the Employer and the Contractor on the Direct Lawsuit of the Actual Constructor against the Employer

Article 43 of the Construction Engineering Interpretation (I) stipulates that the actual constructor's right to assert against the employer must be based on the employer's outstanding payment of the contractor for the works. When an actual constructor sues the employer under Article 43, the court shall, after accepting the case, ascertain the amount of the construction project price owed by the employer to the contractor. In the case where there is an arbitration agreement between the employer and the Contractor, disputes over the settlement and payment of the project funds for the implementation of the contract shall be settled through arbitration first, and the court proceedings shall be based on the arbitration result between the employer and the contractor for fact-finding. Since in cases where the actual constructor directly sues the employer, the issue of project payment settlement is a fact that must be ascertained. Only after ascertaining the amount of project payment owed by the employer to the contractor can the court rule that the employer is liable within the scope of the debt. But according to the stipulations of the construction contract, the dispute over the payment of the project must be settled through arbitration, which excludes the jurisdiction of the court. In such cases, if there is an ongoing arbitration

³⁰ Xiwei Gu & Yanfei Cao, *The typification of the right of the affiliated party to claim the project price*, People's Judicature, 2022(19), p.32.

³¹ Civil Division I of the Supreme People's Court, *Understanding and Application of the New Judicial Interpretation on Construction Project Contracts (I) of the Supreme People's Court*, People's Court Press, p.441, (2021).

³² Yan Tang & Zhile Xiao & Hongyan Song, etc. *Understanding and Reference of the "Case of Industrial and Commercial Bank of China Co., LTD. Yueyang Branch v. Liu Youliang for Revocation of Arbitration Award" - The Actual Constructor is not a Party to the Construction Contract Signed by the Employer and the Contractor and is not Bound by the Arbitration Clause in the Contract*, People's Judicature, 2024(2), p.32.

proceedings between the employer and the contractor, the court may suspend the hearing and resume it after the arbitration award is made.

It is necessary to be aware of possible obstacles in the process. In 2023, the Zhuhai Intermediate People's Court released "Top Ten Typical Cases of Arbitration Judicial Review by Zhuhai Courts", in which case 7 presented such a situation: The actual constructor filed a lawsuit against the project employer and the contractor as defendants, demanding the return of the project payment and the expected interest. The court held that the claim was premised on the settlement of the project price between the employer and the contractor. In the case where there was an arbitration agreement between the employer and the contractor, disputes such as the settlement and payment of the project price between the two parties should be settled by arbitration, and the content of arbitration review should be separated in the lawsuit. Therefore, the lawsuit of the actual constructor was dismissed.³³ In 2021, the Supreme People's Court also held in the case of Qingdao Xiangrong Construction Labor Service Co., Ltd. v. Qingdao Municipal Construction Development Co., Ltd. and other construction contract disputes that the employer's liability to the actual constructor within the scope of the outstanding construction price should be based on the settlement of the construction price between the employer and the contractor. The determination of the aforementioned facts has been excluded from the jurisdiction of the people's court by the arbitration clause.³⁴ In cases where the actual constructor directly sues the employer, if the contractor does not initiate arbitration, it is difficult for the court to determine the amount of the construction project price owed by the employer based on the arbitration award, and subject to the arbitration agreement, the court has no authority to review and handle disputes such as project settlement and payment between the employer and the contractor. If the fact that the employer owes the contractor the amount of the construction project price cannot be ascertained, it will be difficult for the court to rule that the employer is liable to the actual constructor within the clear scope of the outstanding construction project price. In such cases, the actual constructor may consider filing a subrogation lawsuit in accordance with Article 44 of the Construction Engineering Interpretation (I).

5.3 The Impact of an Arbitration Agreement between the Contractor on the Actual Constructor's Right of Subrogation

According to Article 44 of the Construction Engineering Interpretation (I), the actual constructor may bring a subrogation lawsuit against the employer. Whether subrogation litigation is also affected by the arbitration agreement between the employer and the contractor requires specific analysis. The creditor's right of subrogation refers to the right of a creditor, in his own name, to request the people's court to perform his obligations to the debtor in order to preserve and realize his own claim when the debtor is negligent in exercising the rights enjoyed by his counterparty and thereby affects the realization of the creditor's due claim.³⁵ The right of subrogation is a means of compulsory recovery of claims, and its legitimacy is based on the urgency of the realization of the creditor's rights. It is mostly applicable to the subrogation of monetary claims based on monetary claims or the subrogation of delivery claims based on delivery claims of the same subject matter. The establishment of the right of subrogation will enable the creditor to obtain the right to receive the target claim.³⁶

³³ Zhuhai Intermediate People's Court, *The Intermediate People's Court of Zhuhai City released the "Top Ten Typical Cases of Arbitration Judicial Review by Zhuhai Courts"*, at [https://mp.weixin.qq.com/s/8El2bi4rD34HN8SKYeYg_Q], (June 4, 2024).

³⁴ Supreme People's Court, *Civil Ruling Retrial of Construction Contract Dispute between Qingdao Xiangrong Construction Labor Service Co., Ltd. and Qingdao Municipal Construction Development Co., Ltd.* Case No. (2021) Min Shen 1073,.

³⁵ Liming Wang, *General Principles of Contract Law*, Peking University Press, p.341, (2022).

³⁶ Yantao Yu, *The Characterized Structure of the Creditors' Substitutionary Rights*, Chinese Journal of Law, 2024(2), p.94.

Article 535 of the Civil Code stipulates that where a debtor is negligent in exercising his claim or the accessory rights related to that claim, thereby affecting the realization of the creditor's due claim, the creditor may request the people's court to exercise the rights of the debtor against the counterparty in his own name, except for the rights that are exclusive to the debtor himself. Specifically in disputes over construction project contracts, Article 44 of the "Construction Engineering Interpretation (I)" further explains the subrogation lawsuit initiated by the actual constructor against the project owner (subcontractor or illegal subcontractor), "The actual constructor, in accordance with Article 535 of the Civil Code, Where a subcontractor or an illegal subcontractor is negligent in exercising the due claim or the accessory right related to such claim against the employer, thereby affecting the realization of the due claim, the people's court shall support it."

According to the jurisdiction provisions of subrogation litigation, subrogation litigation can better address the procedural obstacles that actual constructors may face as mentioned above. Article 34 of the Civil Procedure Law (Amended in 2023), which came into effect on January 1, 2024, stipulates that construction contracts are subject to exclusive jurisdiction. Article 35, Paragraph 1 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the General Provisions of the Contract Chapter of the Civil Code of the People's Republic of China (referred to as the Interpretation of the General Provisions of the Contract Chapter), which came into effect on December 15, 2023, clarifies the jurisdiction provisions for subrogation litigation: "Where a creditor brings a subrogation litigation against the counterparty of the debtor in accordance with Article 533 of the Civil Code, The people's court at the place where the defendant is domiciled shall have jurisdiction, except where the exclusive jurisdiction provisions shall apply by law. Therefore, in disputes over construction project contracts, where a creditor brings a subrogation lawsuit against the counterparty of the debtor, the provisions of exclusive jurisdiction shall apply and the court where the construction project is located shall have exclusive jurisdiction. In addition, Paragraph 1 of Article 36 of the Interpretation of the General Contract Code stipulates that "after a creditor initiates a subrogation lawsuit, if the debtor or the counterparty raises an objection to the court authority on the ground that there is an arbitration agreement between the creditor and the debtor, the people's court shall not support it." This removes the limitation of the exclusive jurisdiction of the court by the arbitration agreement between the debtor and the counterparty, and makes it clear that the arbitration agreement between the debtor and the counterparty has no binding force on the creditor's subrogation lawsuit. However, if either the debtor or the counterparty applies for arbitration regarding the creditor-debtor relationship between the debtor and the counterparty before the first hearing, the people's court may suspend the subrogation lawsuit in accordance with the law. These provisions effectively link the relationship between subrogation rights and arbitration agreements, reflect respect for the autonomy of will of the parties, maintain the application of the rule of contractual relativity in arbitration, and also resolve disputes that have long existed in judicial practice.³⁷

Article 43 of the Construction Engineering Interpretation (I) has a certain degree of similarity in form with subrogation litigation, but it is not the same as subrogation litigation and does not have the nature of a request on behalf of the contractor. Article 43 is a special institutional arrangement for the protection of migrant workers' wages, while the essence of the right of subrogation is the preservation and realization of debt, and there is a jurisdictional difference between the two. Therefore, when the actual constructor sues the employer under Article 43, the arbitration clause between the contractor and the actual constructor may have procedural effects on the

³⁷ Liming Wang, *On the Impact of Arbitration Agreements on the Exercise of Subrogation Rights—Comment on Article 36 of the Judicial Interpretation of the General Principles of Contract Compilation of the Civil Code*, Social Sciences in Guangdong, 2024(1), p.221.

actual constructor. When the actual constructor initiates a subrogation lawsuit as a creditor, the subrogation is a means of debt preservation. The creditor exercises the debtor's claim in his own name and is not the subject of the creditor-debtor relationship between the debtor and the counterparty. According to Article 35, Paragraph 2 of the Interpretation of the General Contract Code, subrogation in construction projects can only be under the exclusive jurisdiction of the court where the project is located, excluding an arbitration agreement between the debtor and the counterparty. The debtor and the counterparty may not defend jurisdiction on the grounds of the existence of an arbitration agreement.

6. Conclusion

This article, in combination with the analysis of Guiding Case No. 198 of the Supreme People's Court, explores the impact of arbitration agreements on the resolution of disputes over construction project contracts. The principle of relativity of the arbitration agreement is the cornerstone of the arbitration system, and its effect is generally limited to the two parties to the agreement. For actual constructors, unless there is a clear arbitration agreement, they are not bound by the arbitration agreement between the employer and the contractor. Guiding Case No. 198 guides future similar cases, unifies adjudication standards, facilitates proper law enforcement, and ensures fair and timely protection of parties' legitimate rights. Article 43 of the Construction Engineering Interpretation (I) is a special provision for the protection of the rights of actual constructors, and Article 44 is a special provision for the subrogation right system in the field of construction engineering. Both provide effective means for the rights protection of actual constructors and together constitute the important system for the protection of the rights of actual constructors in the Construction Engineering Interpretation (I). The Construction Engineering Interpretation (I) is a refinement and supplement to the application of the current law in the field of construction project contract disputes, providing specific guidance on the application of the law. Guiding Case No. 198 clarifies that actual constructors are not bound by employers' and contractors' arbitration agreements, specifying the relativity principle's application in such disputes. The two complement each other. The case provides specific application scenarios for interpretation, while interpretation provides legal basis and adjudication rules for the case. Both work together to ensure that disputes over construction project contracts are resolved fairly and reasonably.