SPC Guiding Case No. 37: Shanghai Jinwei Machinery Manufacturing Co., Ltd. v. Swiss Retec Company (Arbitration Award Enforcement Reconsideration)

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

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Keywords

Civil litigation / enforcement reconsideration / foreign-related arbitration award / enforcement jurisdiction / commencement of the period for applying for enforcement

Holding

Where a party applies to a Chinese court for enforcement of a legally effective foreign-related arbitration award, and it is found that the person against whom enforcement is sought or his or her property is within the territory of China, the Chinese court shall have enforcement jurisdiction over the case. The limitation period for a party to apply to a court for compulsory enforcement shall be calculated from the date on which it is found that the person against whom enforcement is sought or his or her property is within the territory of China.

Basic Facts

In the sales contract dispute between Shanghai Jinwei Machinery Manufacturing Co., Ltd. (hereinafter "Jinwei Company") and the Swiss company RETECH Aktiengesellschaft (hereinafter "Retec Company"), the China International Economic and Trade Arbitration Commission rendered an arbitration award on September 18, 2006. On August 27, 2007, Jinwei Company applied to the Lenzburg Court of the Swiss Confederation (hereinafter the "Lenzburg Court") for recognition and enforcement of the arbitration award, and submitted a translation of the arbitration award translated by the China Central Translation Agency and certified by the Shanghai Foreign Affairs Office and the Consulate General of Switzerland in Shanghai. On October 25 of the same year, the Lenzburg Court dismissed Jinwei Company's application on the ground that the translation of the arbitration award submitted by Jinwei Company did not satisfy the requirement of Item 2 of Article 4 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention") that "the translation shall be certified by an official or sworn translator or by a diplomatic or consular agent." Thereafter, Jinwei Company twice more submitted to the Lenzburg Court translations of the arbitration award respectively translated by a local Swiss translation agency and a translation translated by the Shanghai International Studies University Translation Company and certified by the Shanghai Foreign Affairs Office and the Consulate General of Switzerland in Shanghai, but the court dismissed the applications on March 17, 2009, and August 31, 2010, respectively, on the ground that the translation documents of the arbitration award did not strictly conform to Item 2 of Article 4 of the New York Convention.

On July 30, 2008, Jinwei Company found that a batch of Retec Company's machinery and equipment was being exhibited in Pudong New Area, Shanghai, and on that day applied to the Shanghai No. 1 Intermediate People's Court (hereinafter the "Shanghai No. 1 Intermediate Court") for enforcement. The Shanghai No. 1 Intermediate Court accepted the case for enforcement on the same day and sealed and seized the exhibited machinery and equipment of Retec Company. Retec Company then raised an objection on the ground that Jinwei Company's application for enforcement had exceeded the period prescribed in the Civil Procedure Law of the People's Republic of China (hereinafter the "Civil Procedure Law"), requesting the Shanghai No.

1 Intermediate Court not to accept the case, to lift the seizure, and to stop enforcement.

Judgment

On November 17, 2008, the Shanghai No. 1 Intermediate People's Court rendered civil ruling (2008) Hu Yi Zhong Zhi Zi No. 640-1, dismissing Retec Company's objection. After the ruling was served, Retec Company applied to the Shanghai Higher People's Court for enforcement reconsideration. On December 20, 2011, the Shanghai Higher People's Court rendered enforcement ruling (2009) Hu Gao Zhi Fu Yi Zi No. 2, dismissing the reconsideration application.

Reasoning

The court's effective judgment held that: the issues in dispute in this case were whether Chinese courts had jurisdiction over the case and from what point in time the period for applying for enforcement should be calculated.

I. On the issue of the enforcement jurisdiction of Chinese courts: according to the Civil Procedure Law, where an arbitration award made by a foreign-related arbitration institution of China is such that the person subject to enforcement or his or her property is not within the territory of the People's Republic of China, the party shall directly apply to a foreign court with jurisdiction for recognition and enforcement. Since, when the arbitration award involved in this case took effect, the person subject to enforcement, Retec Company, and its property were not within the territory of China, the people's court had no jurisdiction over the enforcement of the award at the time it took effect.

On July 30, 2008, Jinwei Company found that the person subject to enforcement, Retec Company, had property being exhibited in Shanghai. At this time, the fact that Retec Company, the person against whom enforcement was sought, had property within the territory of the People's Republic of China created enforcement jurisdiction of Chinese courts over this case. The applicant for enforcement, based on the provision of the Civil Procedure Law that "where one party fails to perform an arbitration award, the other party may apply to the intermediate people's court at the place where the respondent has his or her domicile or where the property is located for enforcement," and based on the fact that the person subject to enforcement had failed to perform the obligations under the arbitration award, exercised the right to claim civil compulsory enforcement and applied to the Shanghai No. 1 Intermediate Court for enforcement. This conformed to the requirements of the Civil Procedure Law for people's courts to exercise jurisdiction over enforcement cases of foreign-related arbitration awards, and the Shanghai No. 1 Intermediate Court had jurisdiction over the enforcement application.

Considering that the principle provided in the New York Convention is that, so long as an arbitration award meets the basic conditions of the Convention, it is allowed to be recognized and enforced in any contracting state, and that the purpose of the New York Convention is to facilitate the smooth enforcement of arbitration awards in the contracting states, the Convention does not prohibit a party from applying for recognition and enforcement of a relevant arbitration award to multiple Convention member states. The person subject to enforcement may raise a defense by proving that he or she has performed the obligations under the arbitration award, and may submit evidence of the amount of debt already paid to the court at the place of enforcement, thereby preventing the person subject to enforcement from being forced to perform repeatedly or to perform in excess of the subject amount. Therefore, the exercise of enforcement jurisdiction by the people's court over this case conforms to the spirit of the New York Convention and will not cause the problem of the person subject to enforcement repeatedly performing the obligations under the effective arbitration award.

II. On the issue of the commencement of the period for applying for enforcement in this case: in accordance with Article 215 of the Civil Procedure Law (2007 Amendment), "the period for applying for enforcement is two years." "The period prescribed in the preceding paragraph shall be calculated from the last day of the performance period prescribed in the legal instrument; where the legal instrument prescribes performance by

installments, it shall be calculated from the last day of each prescribed performance period; where the legal instrument does not prescribe a performance period, it shall be calculated from the date the legal instrument takes effect." Since the provisions of Chinese law on the commencement of the period for applying for enforcement are made for the general situation where, at the time an effective legal instrument is made, the person subject to enforcement or his or her property is within the territory of China; the specific situation of this case is that, when the arbitration award took effect, Chinese courts had no enforcement jurisdiction over the case, and the party lawfully applied to a foreign court for recognition and enforcement of the award but failed to obtain enforcement, so there was no problem of the party's failure to diligently exercise the right to apply for enforcement; the person subject to enforcement had consistently refused to perform the legal obligations determined by the award; and the applicant for enforcement applied to the people's court for enforcement immediately after finding that the person subject to enforcement had property within the territory of China. Considering that in such cases, there is great uncertainty as to when the foreign person subject to enforcement or his or her property will again enter the territory of China, the commencement point of the period for applying for enforcement should be reasonably determined in order to fairly protect the lawful rights and interests of the applicant for enforcement.

After a creditor obtains an effective legal instrument with payment content, if the debtor fails to perform the obligations determined by the effective instrument, the creditor may apply to the court to exercise the right of compulsory enforcement and realize his or her substantive law claim; this right is the right to claim civil compulsory enforcement. The existence of the right to claim civil compulsory enforcement depends on the substantive right, its acquisition depends on the basis for enforcement, and its exercise depends on enforcement jurisdiction. Enforcement jurisdiction is the foundation and premise of the right to claim civil compulsory enforcement. In judicial practice, the enforcement jurisdiction of people's courts and the parties' right to claim civil compulsory enforcement cannot be abstract or uncertain, but must be specific and operable. When the obligor Retec Company failed to perform the obligations determined by the award, the obligee Jinwei Company acquired the right to claim civil compulsory enforcement; however, according to the Civil Procedure Law, with respect to the application for enforcement of an arbitration award made by a foreign-related arbitration institution, if the person subject to enforcement or his or her property is not within the territory of the People's Republic of China, the party shall directly apply to a foreign court with jurisdiction for recognition and enforcement. At this time, because the person subject to enforcement or his or her property was not within the territory of China, Chinese courts had no enforcement jurisdiction over the case; the applicant for enforcement, Jinwei Company, was not subjectively unwilling or negligent in exercising its rights, but rather objectively the dispute itself had not produced a jurisdictional connection point for enforcement by a people's court, resulting in its inability to apply to a people's court for enforcement. After accepting an application for compulsory enforcement, a people's court shall examine whether the application was filed within the limitation period prescribed by law. Having enforcement jurisdiction is the necessary premise for a people's court to examine the relevant application of the applicant for enforcement; therefore, the period for the applicant for enforcement to apply for enforcement should be calculated from the date on which enforcement jurisdiction is determined, that is, the date on which property available for enforcement of the person subject to enforcement is found.

Relevant Legal Provisions

Articles 239 and 273 of the Civil Procedure Law of the People's Republic of China.

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