Docket no. 14.2002.00042	Lugano 16 September 2002/CJ/fc/fb	In the name of the Republic and the Canton of Ticino

Debt Collection and Bankruptcy Chamber of the Court of Appeal

Members of the Court: Cornetta, Presiding judge,
Pellegrini and Rusca

Clerk: Jaques, Deputy clerk

ruling on the appealable summary proceedings (docket no. _____) filed on 19 April 2002 by

_____

versus

_____

seeking definitive dismissal of the objection raised against payment order no. _____ of 31 October 2001of the Lugano Debt Collection Office;

regarding which the assisting judge of the First Instance Court (segretaria assessore) of the District of Lugano, Section 5, in a decision of 19 April 2002, ruled the following:

"1. The request is held admissible and, thus the objection raised against the aforementioned payment order is definitively dismissed.

2. Legal fees and total costs of CHF 1000, paid in advance by the plaintiff, shall be borne by the defendant, which shall refund the to the plaintiff compensation of CHF 9,000.

3. Redacted."

_____ filed an appeal in a timely manner on 8 May 2002, requesting that the First Instance decision be reformed in the sense that the proceedings be dismissed, with a claim for expenses and compensation as regards both first instance and appeal proceedings;

Given the appellee's submissions of 17 June 2002, objecting to the appeal and seeking costs and compensation;

holding,

in fact:	**A.**	With payment order no. _____ of the Lugano Debt Collection Office (doc. B), _____ (hereafter _____), sought payment from _____ of CHF 2,837,605.30, with interest at 5% from 3 November 1998 and costs, on the basis of the "Award of 3.1.98 of the International Court of Arbitration of the Chamber of Trade and Industry of the _____ Federation, regarding _____ - Decision of 21.5.99 of the Municipal Court of _____, regarding _____ - Ruling of 3.8. 99 of the Supreme Court of _____ for civil matters, regarding _____. Amount equal to USD 1,700,000 + 24,452 and 13,2121 (contribution to arbitration costs), at the USD/CHF exchange rate on the day of USD1/CHF 1,633". The debtor objected to the payment of the debt and the plaintiff requested final dismissal of that objection.
	B.	At the adversarial hearings of 8 February 2002, _____ challenged the entire action in the 22-page reply it produced.
	C.	In a decision of 19 April 2002, the assisting judge of the First Instance Court of Lugano, Section 5, admitted the request. First, she dismissed the objection raised by _____ regarding the absence of legitimate representation of _____ by _____, holding that _____'s power to represent _____ was validly obtained. The first judge then held the French translations of Russian documents produced by the plaintiff to be admissible within the meaning of Art. IV para. 2 of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral awards. Moreover, the Court also held that there had been no infringement of a party's right to be heard, stating that, as was clear from the award issued by the International Court of Commercial Arbitration (hereafter ICCA) – relied on for definitive dismissal – and the decisions of the Municipal Court of _____ and the Supreme Court of _____ that _____ had validly been summoned to the hearings of 3 November 1998. Neither could the dispute between the debtor and Fondazione "_____" regarding unsatisfactory legal representation undermine the validity of the

		arbitral award. These two courts' findings were in line with those of _____ on the matter of the arbitrability of the dispute, dismissing _____'s objection. Lastly, the latter failed to prove or even demonstrate the plausibility of a violation of Swiss Public Policy, or the arbitrator's partiality.
	D.	_____ appealed the First Instance Court's decision in a timely manner, stating that the "checks" performed by the Russian courts regarding the proper summonsing of the debtor to the hearings of 3 November 1998, as far as it is based on their domestic law, does not bind the court examining a request for enforcement, as its basis for assessment of such request is the New York Convention. Now it is materially impossible for the summons in question, sent on 16 September 1998, to have arrived in Lugano on 18 September 1998, while it arrived in _____ where the other party received it in person only on 24 September 1998. Moreover, the other two communications of the ICCA (doc. 7 and 8) took 7 and 9 days respectively to arrive in Lugano. The appellant alleges that it effectively received a communication from the ICCA on 18 September 1998, but that it was the letter of 7 September 1998 (doc. 10, original produced) regarding the appointment of arbitrators. The arbitral award relied on for the dismissal was thus issued without the debtor having been heard. The debtor had, furthermore, done everything in its power to have this procedural error corrected at all possible levels. The International Humanitarian Fund for Employees of Law Enforcement Bodies "_____" to which _____ turned to defend its rights against _____, contrary to the assurances given, failed to act. It even kept the documentation required for the defence of _____'s rights, thus preventing its new representative, the law firm _____ from effectively representing the debtor in the legal proceedings. Furthermore, the appellant objects to ICCA's jurisdiction, on the grounds that, pursuant to Art. 19.1 of tender agreement 117/97 entered into on 20 August 1997 by _____ and _____, ICCA only had jurisdiction to decide disputes regarding the performance of the tender contract and not its annulment, which fell under the jurisdiction of the Arbitral Court of the _____ Federation (Art. 20.1). Yet, the award produced as a basis for definitive dismissal decides _____ 's claims for compensation of following the annulment of the contract. Lastly, the appellant argues that the failure to summon it to the hearing amounts to a breach of Art. V para. 1 d) of the New York Convention, regarding § 23 of the ICCA Rules ("notification to the

		parties of the hearing"), as well as Art. V para. 2 of that same Convention (breach of Swiss Public Policy).
	E.	In its submissions, _____ challenges the appeal, highlighting that the factual issues – in this case, the appellant's receipt of a summons to appear – cannot be re-examined by the Court ruling on enforcement, which must base its decision on the factual findings of the foreign court. Under the New York Convention, factual or legal errors are not grounds on which to refuse enforcement. _____ reiterates that the issue of _____'s being summoned to the arbitration hearings was assessed and positively resolved by all the Russian courts, with particular reference to the receipt signed by _____. Moreover, a letter sent by express courier, which was the case here, can undoubtedly travel from _____ to _____ in two working days; and the arbitral Tribunal confirmed that it had sent the summons on 16 September 1998 (doc. R). Furthermore, _____ on various occasions demonstrated the bad faith of the appellant, which denied having received any communication from the arbitral Tribunal during the Russian court proceedings. The appellee remarked that even if the party had indeed not been summoned to attend the arbitral hearings, that would have had no influence on the outcome of the award, as its representative _____, according to his own admission, failed to act. As for the objection to the arbitration Court's jurisdiction, the appellee maintains that the appellant's arguments are mere pretexts as they are primarily based on the fact that the Court's name was abbreviated in the arbitration clause.
	F.	The other allegations of the parties shall be discussed below, if necessary.
Considering		
In law	**1.**	The appealed decision was communicated to the appellant on Friday 26 April 2002 and collected by it on 29 April 2002, as shown by a search of the "Track and Trace Letter" feature of the _____ website using the tracking number on the envelope attached to the copy of the decision of 19 April 2002 produced by _____ in the appeal. Therefore, the appeal was brought in a timely manner.

	2.	A simple reference to the facts and grounds set forth in the exhibits produced in the first instance does not comply with the requirement of clear and detailed explanations for the appeal, pursuant to Art. 309 para. 2 f CCP (applicable in this case by reference to Art. 25 LALEF) (see COCCHI/TREZZINI, op. cit., no. 21 at Art. 309, with references). Such requirement also applies to the appellee's submissions (CEF 3 May 2001 [14.2001.10/11], recital 1.5b).
	3.	The Court examining the request for dismissal, certifies, *sua sponte*, and at all stages of the dispute (thus also at the appeal's stage, regardless of the parties' presence at the first instance hearings and, if present, of the reasons submitted), issues such as the existence of a basis for dismissal, the triple identity criteria as well as, for foreign arbitral awards (see Art V no. 2 New York Conv.), the arbitrability of the dispute under Swiss law and its compatibility with Swiss Public Policy (see Daniel STAEHELIN, Basler Kommentar zum SchKG, Basel/Geneva/Munich 1998, vol. I, no. 50 at Art. 84 as well as no. 95 and 97 at Art. 80; Pierre-Robert GILLIÉRON, Commentaire de la LP, vol. I, Lausanne 1999, no. 103 and 124 at Art. 81).
	4.	Under Art. 80 para. 1 LEF when a debt is based on an enforceable decision, the creditor may request that a court definitively dismiss the objection to that debt.
	4.1	The concept of "enforceable decision" is defined by federal law on debt collection only with regards to deeds governed by federal or cantonal law (see DTF 67 I 9; GILLIÉRON, op. cit., no. 30 at Art. 80; STAEHELIN, op. cit., no. 3 at Art. 80). However, recognition and enforcement of decisions and assimilated foreign decisions are governed by multilateral or bilateral conventions entered into by Switzerland, or where there are none, by the PILS (see Art. 25 *et seq.* and 28 PILS).
	4.2	In this case, the applicability of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0277.12), which entered into force in Switzerland on 30 August 1965 and is also applicable to awards rendered in States which are not party to the Convention (see Andreas BUCHER, Le nouvel arbitrage international en Suisse, Basel 1988, no. 411, 421 and 461; Paolo Michele PATOCCHI/Cesare JERMINI, Basler Kommentar zum IPR, Basel 1996, no. 18 and 24 at Art. 194; STAEHELIN, op. cit., no. 93 at Art. 80) is not contested. Moreover,

		the basis for dismissal relied upon (doc. F) was issued by an arbitral tribunal seated abroad, more specifically in Moscow (see Art. 194 PILS and BUCHER, op. cit., no. 427; PATOCCHI/JERMINI, op. cit., no. 12 at Art. 194; STAEHELIN, op. cit., no. 93 at Art. 80; GILLIÉRON, no. 33 at Art. 80; Kurt SIEHR, Das Internationale Privatrecht der Schweiz, Zurich 2002, p. 726 at IV.1.a). In addition, there is no bilateral recognition between Russia and Switzerland on the recognition and enforcement of arbitral awards (see RS 0.2777).
	5.	Whenever proceedings for definitive dismissal are based on a foreign award, as is the case here, the court must examine the matter of *exequatur* before ruling. The conditions for a foreign award to be enforceable in Switzerland, are set in the applicable international convention on enforcement and, absent such, by Art. 25 *et seq.* PILS (see STAEHELIN, op. cit., no. 59 and 94 at Art. 80; GILLIÉRON, op. cit., no. 31-33 at Art. 80).
	5.1	Under Art. IV no. 1 of the New York Convention, in order to obtain recognition of the enforcement of an arbitral award, the applicant must produce a duly authenticated original copy of the award and the original arbitration agreement (arbitration clause or arbitration agreement, see Art. II no. 2 New York Convention), or a copy of such documents that satisfies the conditions required for its authenticity, as well as translations into an official language of the country in which enforcement is sought. An enforcement certificate is not required (see STAEHELIN, op. cit., no. 95 at Art. 80).
	5.2	In the case at hand, production of doc. E (Art. 19 of contract 117/97, stating in the margin “résolution de disputes et droit applicable”, “dispute resolution and applicable law”), F (arbitral award bearing apostille plus French translation) and O (Italian translation of the award), met the conditions set in Art. IV no. 1 of the New York Convention (see. PATOCCHI/JERMINI, op. cit., no. 48 *et seq*. at Art. 194). As will be shown below, (recital 6), Art. 20 of contract 117/97 alone cannot be deemed an arbitration clause .
	6.	Under Art. 81 para. 3 LEF, where there is a treaty for mutual enforcement of judgments, the debtor may rely on the grounds for objection set forth in that treaty, as well as those provided in Art. 81 para. 1 LEF (extinction, delay or prescription). This also applies to foreign arbitral awards governed by the New York Convention (see *e.g.* BUCHER, op. cit., no. 421; Thomas RÜEDE / Reimer

		HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2nd. ed., Zurich 1993; PATOCCHI/JERMINI, op. cit., no. 43 at Art. 194; STAEHELIN, op. cit., no. 96 at Art. 80).
	6.1	According to Art. V no. 1 of this Convention, recognition and enforcement of arbitral awards may be denied only on certain grounds comprehensively listed, which the defendant must raise and prove. In particular, the two grounds alleged by the debtor in this case are grounds for opposition: - The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (let. b) - The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; (let. c)
	6.2	First of all, _____ argues that its right to be heard was infringed stating that it had not received the summons to attend the arbitration hearings. **a)** This argument is, *per se*, a clearly valid ground to refuse enforcement under Art. V no. 1 b of the New York Convention, as issuing an award without having heard one of the parties, even if the request for arbitration and name of the arbitrators had been communicated to that party, clearly breaches due process and in particular, the standard of adversarial hearing, which must be observed at every stage of arbitral proceedings (see Art. 182 para. 3 PILS and PATOCCHI/JERMINI, op. cit., no. 81 at Art. 194). **b)** The dispute between the parties concerns whether _____ is allowed to produce proof that it had not received a summons to attend the proceedings or whether the Russian decisions certifying that the debtor was summoned bind this Court. However, the findings of the arbitral award do not totally bind the Court examining enforcement, otherwise Art. V no. 1 b of the New York Convention would no longer hold any

meaning (in this sense regarding the Lugano Convention: Yves DONZALLAZ, La Convention de Lugano, vol. II, Bern 1998, no. 3304, stating that the merits of arbitral awards may not be reviewed, pursuant to Art. 29 and 34 para. 3 LC, but that such preclusion must not prevent a thorough assessment of the grounds upon which to deny enforcement under Art. 27 CL –no. 2 which in essence reiterates Art. V no. 1 b New York Conv). While the Court examining enforcement may not review the facts and legal reasoning regarding the merits of the award for which enforcement is sought, this principle does not entirely apply to the grounds for refusal in Art. V New York Conv, which do not regard the factual findings but only their legal characterisation. Naturally, according to one author (Franz SATMER, Verweigerung der Anerkennung ausländischer Schiedssprüche wegen Verfahrensmängeln, thesis Zurich 1994, p. 103 s. and note 62), foreign judicial awards are not deemed preliminary judgments before the Court examining enforcement/ are not res judicata as far as the Court examining enforcement is concerned. In fact, foreign courts assess procedural violations under their on law and not under the New York Convention. However, from such argument it can be deduced that the Court examining enforcement may only ascertain whether the procedural rules of the state of origin of the award comply with the requirements of the New York Convention and with its own law (as regards procedural public policy).

c) In light of the above, this Court thus does not have jurisdiction to assess the appellant's factual objections.
From a legal point of view, Art. 3. 1 of the Russian Federation's law on "International Commercial Arbitration", on which basis the _____ Municipal Court examined the validity of the notification of various documents regarding the arbitration in question (see doc. G, p. 3 *et seq*. and P, p. 2), states that any written communication is deemed to have been received by the recipient if he or she receives it in person or if it is delivered to his or her company, their permanent residence or postal address; where such addresses cannot be identified through a reasonable search process, the communication is deemed to have been received if sent to the last known address of the company, or the permanent residence or postal address of the recipient by registered

letter or any other means of tracking delivery attempts. Irrespective of the assessment of admissibility – under the New York Convention – regarding the other means of notification, it is in any event evident that delivery in person as certified by a proof of receipt can only be deemed valid notification. The _____ Municipal Tribunal found that the appellant had received the summons to attend the arbitration hearings, which was confirmed by a receipt slip produced in the case file. Russian Supreme Court confirmed this decision (doc. H and Q). Such findings bind this Court.

d) Furthermore, the appellant's factual objections seem to have expired, as they were not raised before the competent authorities in the State of origin (see PATOCCHI/JERMINI, op. cit., no. 59 and 86 at Art. 194, with references; STAEHELIN, op. cit., no. 96 at Art. 80). In fact, before the Russian courts, the appellant alleged that it had not received any communication from the arbitral tribunal (see doc. G, p. 4 e P, p. 3). Thus, the theory that a document other than the summons was delivered on the day that the receipt was signed by one of the appellant's employee _____ (see doc. U last page) was not presented and therefore not examined by the Russian courts.

e) It should also be noted that that the appellant had not, in any event, proved this new theory, as it is required to do under Art. V no. 1 New York Convention (see SATMER, op. cit., p. 117; PATOCCHI/JERMINI, op. cit., no. 55 at Art. 194), noting that the fact that, in this case, the debtor had to prove that an event did not occur (that it was not summoned to the hearings) did not reverse the burden of proof, but that, under the rules of good faith, it simply obliged the other party – the creditor – to cooperate in the process of providing proof.
In doc. S, the postal department of company OOO "_____" certified with its stamp that it had delivered on 18 September 1998 to _____ the summons to appear at the hearings of 3 November 1998 (see the back of the receipt, doc. S, as well as doc. U, p. 4). While the signature of the recipient does not appear on the third page of the receipt (see block "Date and signature of recipient"), doc. S as well as U, p. 5), it is clear from the final page of doc. U that on 18 September 1998, at 11.18, the debtor effectively took receipt of a communication from "_____", as

demonstrated by its employee, _____.

The appellant does not deny having received documents from the ICCA on 18 September 1998, but maintains that it was not the summons dated 16 September 1998 for the hearings of 3 November 1998 (doc. T and U), but the notification of 7 September 1998 (doc. 9 and 10, exhibits A/B) regarding the appointment of the Chairman of the Arbitral Tribunal. In addition, the appellant produced an affidavit (doc. 10) – a written declaration of which the signature was certified by a Ticino notary – signed on 7 February 2002 by _____, assistant to the CEO of _____ from 1996, in which she states that she received on 18 September 1998 the letter of 7 September 1998, that she had personally signed the proof of delivery and asserted, on the basis of her understanding of Russian, that the letter contained only information regarding the appointment of the Chairman of the arbitral tribunal. She also certified that the appellant had received a further communication on 25 September 1998 dated 14 September 1998 (doc. 10, exhibits C/D, and 11), of which the content was similar. Noting that it was surprising to send two documents with the same content, _____ deduced that the "tribunal wished to thus obtain proof of having sent a communication, without having to prove that it had sent a summons to the hearing of 3 November 1998" (appeal, p. 6 to 9).

The probatory nature of the declarations contained in the affidavit in doc. 10 will be freely assessed by this Court in the same manner as any means of proof. However, in this particular case, special caution shall be applied, as the declarations are those of an employee of the appellant, who, even though not a body of that company, was nonetheless economically reliant on it. Furthermore, doc. 10 is not an authentic affidavit under Anglo-American law as the employee did not swear to anything and, in any event, in the decision cited by the appellant (STF 5P.63/1999, p. 5 ad 3), the Federal Tribunal had held to be probatory a (true) affidavit concerning notification in Switzerland of an American decision because it was "combined" with two other official documents. Also, _____ does not state that it had received only the document of 7 September 1998 (doc. 9) on 18 September 1998 and not (also) that of 16 September 1998 (doc. T). It must also be noted that the document of 7 September 1998 was not said to have been

		sent by registered mail and was received by the appellant in an envelope which does not indicate that it was a registered letter (see envelope attached to doc. 9), while the summons of 16 September (doc. T) states “Air Mail Registered. Advice of Receipt” (sic.) (see doc. 7). It thus seems likely that only the notifications imposing deadlines on the defendant, such as the notification of the request for arbitration (doc. 7), with the relevant deadline for appointing an arbitrator and submitting its position on that request, as well as the summons to attend the hearings of 3 November 1998 (doc. T), were sent with notification of receipt, whereas the other letters (doc. 8, 9 and 11) were sent as ordinary mail (indeed, an envelope similar to that accompanying doc. 9 was attached to doc. 8). That is probably why the correspondence dated 10 August 1998 (doc. 8), 7 September 1998 (doc. 9) and 14 September 1998 (doc. 11) are only numbered in the arbitral tribunal’s case file (paper 111, 114 and 117), while notification of the request for arbitration, the summons to the hearing of 3 November 1998 and notification of the award are each recorded with three documents (communication, notification of receipt and “delivery route sheet”), noted under numbers 106-107-108, resp. 120-123-124, and 143-144-145 (see decision of _____ Municipal Tribunal, doc. G, p. 4 and doc. P, p. 2-3). It should then also be noted that it is entirely possible for a letter sent by _____ (on Wednesday) by airmail to arrive (Friday) in _____ in two working days, using, for instance, a private courier service such as _____ or a similar Russian company, like OOO “_____”. As for _____’s conspiracy theory to the detriment of _____ (see Appeal p. 7 et seq. At 13), it is entirely based on the affidavit (doc. 14) signed by the assistant to the CEO and now outside consultant for the appellant, _____, which essentially provides unverifiable statements and opinions of third parties. It thus seems likely that _____ had received the summons to attend the hearings of 3 November 1998, like all the other letters sent by the arbitral tribunal, and that it forwarded them to its representative, Fondazione “_____” which failed to act. However, the appellant is responsible for its representative’s non-action.

		f) The grounds for refusal based on Art. V let. d (breach of arbitral procedural rules) and V no. 2 let. b (breach of public policy, see PATOCCHI/JERMINI, op. cit., no. 90 a Art. 194) must be rejected for the same reasons.
	6.3	As regards the ground for refusing exequatur based on the fact that the arbitral award of which enforcement is sought refers to a dispute not covered by Art. 19 of contract 117/97 (see Art. V no. 1 let. c New York Convention), the arguments exposed above at recital 6.2b apply: the Arbitral Tribunal's decisions and those of the Russian authorities on this matter do not bind this Court. However, _____ 's theory that Art. 19 of contract 117/97 (see doc. E, 2a and 2b) is an arbitration clause only insofar as disputes relating to the performance of the contract are concerned while any disputes regarding its rescission would be arbitrated by another tribunal, pursuant to Art. 20.1, can nonetheless not be accepted. In fact, given the marginal note ("solution ["resolution"] of disagreements ["disputes"] and applicable law") Art. 19 must be considered *sedes materiae* regarding the arbitration clause. Both from a teleological and systematic point of view, Art. 20.1 para. 2 must thus be interpreted as, notwithstanding the parties' inaccurate wording – abbreviating the name of the arbitral tribunal, which is also the case in Art. 19.2 – the parties intended to submit all disputes relating to contract 117/97 to the same Arbitral Tribunal. Moreover, the appellant did not prove, even though the burden lies with it, that there is an arbitral tribunal in _____ with exactly the same name as that mentioned in Art. 20.1 para. 2.
	7.	The appeal of 8 May 2002 must thus be denied. Legal fees and compensation shall be borne by the unsuccessful party (see Art. 48, 49, 61 para. 1 and 62 para. 1 OTLEF).

For these reasons,

Given Art. 80, 81 LEF, IV, V New York Convention and 49, 61 para. 1 and 62 para. 1 OTLEF;

The court:	**1.**	Denies _____'s appeal of 8 May 2002.
	2.	Legal fees of CHF 2,000 paid in advance by the appellant shall remain at its expense; it shall refund CHF 8,000 in compensation to _____.
	3.	Communicated to: - _____.

For the Debt Collection and Bankruptcy Chamber of the Court of Appeal
Presiding Judge Clerk