Docket no. 14.2012.102	Lugano 22 August 2012 CJ/fp/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: Pellegrini, Presiding judge,
Walser and Bozzini

Clerk: Jaques

Ruling in the summary proceedings for the dismissal of an objection to pay a debt (docket no. _____) filed on 6 March 2012 by

CO 1
represented by PA 1

versus

RE 1
Represented by its Director _____ RA 1, _____

Seeking definitive dismissal of the objection to pay a debt raised by the defendant against payment order no. _____, issued by the Debt Collection Office of Lugano for the payment of CHF 170,893, as well as other interests and expenses;

On which the First Instance Court of Lugano, Section 5, decided the following in a decision of 11 June 2012:

> ***"1.*** *The request is admissible and therefore the objection raised against the aforementioned payment order is definitively dismissed.*
>
> ***2.*** *Legal fees of CHF 350, paid in advance by the plaintiff, shall be borne by the defendant, which is ordered to refund the other party compensation of CHF 5,000.*
>
> ***3.*** *redacted".*

On 25 June 2012 the defendant filed an appeal against this award;

Considering the plaintiff's observations of 18 July 2012, challenging the appeal, with expenses and recoverable costs;

Holding,

in fact:	**A.**	With payment order no. _____ of the Debt Collection Office of Lugano (doc. P), CO 1 sought to obtain payment from RE 1 of CHF 170,893, as well as interest and expenses, on the basis of the "Arbitral Award of 14.9.2011, for € 110,000, equal to CHF 132,626 + € 31,739.38 equal to CHF 38,267, at that day's exchange rate of 1,2056". As an objection was raised, the plaintiff requested its definitive dismissal.
	B.	At the hearing of 11 June 2012 in the presence of both parties, the defendant objected to the request, stating that it entrusted the matter to the "judgment of the court", and claimed that an amount of € 2,025 paid on 16 June 2012 for arbitrator's fees (doc. 1) should be deducted from the total amount. The plaintiff contested that deduction, arguing that there was no proof that the amount paid was included in the amounts set in the arbitral award of which enforcement was sought. The defendant decided not to counter.
	C.	In a decision handed down on the same day, the First Instance Court of Lugano, Section 5, found the request to be admissible, dismissing the defendant's objection on the grounds raised by the plaintiff during the adversarial hearings.
	D.	The defendant appealed that court's decisions, on the grounds that the debt was non-recoverable at the time that the enforcement order was requested, dated 31 January 2012, and the payment order of 7 February 2012 was notified, as the award was only declared in enforceable by the Rome Court of Appeal in a decision issued on 29 February 2012, in which it dismissed the defendant's request to stay the effects of the award. Moreover, as the award had not yet become *res judicata*, it was contrary to Art. 1 no. 3 and Art. 3 para. 2 of the Convention between Switzerland and Italy on the enforcement of judicial decisions (RS 0.276.194.541).
	E.	The plaintiff's observations shall be discussed in the following recitals, to the extent necessary for the purpose of deciding the matter.

Considering		
In law	**1.**	An action may be brought against a decision dismissing an objection (Art. 309 b. no. 3 and 319 a CCP combined), within 10 days of receipt of the decision under appeal (Art. 251 a and 321 para. 2 CCP combined). Filed on Monday 25 June regarding a decision notified to the defendant on 13 June 2012, the action was filed in a timely manner pursuant to Art. 31 LEF and 142 CCP combined, and falls under the jurisdiction of the Debt Collection and Bankruptcy Chamber (Art. 48 e no. 1 LOG).
	2.	In accordance with Art. 320 CCP such action may sanction either an incorrect application of the law or a manifestly inaccurate account of the facts of a matter. No new submissions, accounts of new facts or new evidences may be produced (Art. 326 CCP). In the case at hand, the plaintiff's grounds, while new, are however, admissible as they regard issues which a court must examine *sua sponte* (see infra ad rec. 3.1).
	3.	Under Art. 80 para. 1 LEF when a debt arises from an enforceable decision, the creditor may request a ruling to definitively dismiss the objection to pay that debt.
	3.1.	When ruling on a request for dismissal the court shall ascertain, *sua sponte* and at all stages of the proceedings, whether the decision upon which the payment order is based complies with all the necessary legal conditions for it to be considered enforceable (see GilliÉron, Commentaire de la LP, vol. I, Lausanne 1999, no. 22 at Art. 80 and 68 at Art. 84; StÜcheli, Die Rechtsöffnung, thesis Zurich 2000, p. 112-113; Staehelin, Basler Kommentar zum SchKG, vol. I, 2nd ed., Basel 2010, no. 50 at Art. 84), as well as whether the debt of which payment is ordered was recoverable at the time the payment order was notified (see StÜcheli, op. cit., p. 198 at 8/a). This obligation of automatic verification has remained constant even since the entry into force of Art. 255 CCP (thus implicitly: Staehelin, op. cit., no. 50 at Art. 84), which does not prescribe the application of the inquisitorial principle for dismissals of objections, as the existence of an enforceable decision (and not the existence of the debt for which payment is claimed) is a material prerequisite for the proceedings to be admissible (see DTF 136 III 583, rec. 2.3 and references). It is up to the plaintiff to demonstrate the existence of such prerequisites. However, the defendant must state and prove that enforcement of the decision

		was stayed or annulled (see Staehelin, op. cit., no. 8 and 9 at Art. 80), or that an extension was granted after the decision was issued (Art. 80 para. 1 LEF). In such proceedings, the higher cantonal authority shall automatically verify the existence of an enforceable decision on the basis of the documents produced at first instance. Potential objections on the part of the defendant are only admissible within the scope of Art. 326 CCP (exclusion of new arguments, see. supra at rec. 2).
	3.2.	The notion of an "enforceable decision" is defined in federal law only as regards decisions 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 foreign courts decisions and assimilated decisions are governed by bilateral or multilateral conventions entered into by Switzerland or, where there are none, by the PILS (see Art. 25 *et seq.* and 28, 194 PILS). In order to dismiss an objection based on a foreign decision in which payment of an amount of money is ordered, the court examining that request for dismissal must issue an order declaring that decision enforceable (known as enforcement proceedings, Staehelin, op. cit., no. 59 at Art. 80).
	a)	Pursuant to Art. 194 PILS, recognition and enforcement of foreign awards are governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (NYC, RS 0277.12), which came into force in Switzerland on 30 August 1965 and which also applies to awards rendered in States which are not party to the Convention (see Staehelin, op. cit., n. 93 at Art. 80). Art. VII no. 1 NYC states that it shall not affect the validity of multilateral or bilateral conventions into which a contracting State may have entered for the recognition and enforcement of arbitral awards. Under Art. 7 of the convention between Switzerland and Italy on the recognition and enforcement of judicial decisions of 3 January 1933 (RS 0.276.194.541), arbitral awards rendered in one of the two states, having the same effects in that State as a judicial decisions, shall be recognised and declared enforceable in the other State, on condition that they comply with the requirements of the Convention to the extent to which they apply. Art. 5 requires the applicant to produce, in particular, "documents proving that the decision is *res judicata* and, where appropriate, that it is enforceable" (no. 2), while Art. IV NYC does not contain the same requirement in order to avoid "double enforcement", (see DTF 135 III 140, recital. 2.2), and merely

		provides for production of the decision and the agreement, with translations thereof where necessary.
	b)	Both Switzerland and Italy are parties to the 1958 New York Convention and the bilateral Convention of 1933. As already stated, the first maintains multilateral or bilateral agreements, be they more or less restrictive. However, the New York Convention is more recent than that between Switzerland and Italy and seeks to facilitate international recognition and enforcement of international arbitral awards. Moreover, when adopting the New York Convention, the representatives of Switzerland and Italy showed neither the will nor the desire to maintain in their bilateral relations the more stringent rules of the Convention between Switzerland and Italy, and in an opinion, the Federal Council even stated that applicants may base their claims on the most favourable clause (FF 1964 II 1755), in compliance with the same objective of the New York Convention (see DTF 110 Ib 193-194, regarding relations between France and Switzerland). It is evident that the New York Convention is more favourable to the recognition and enforcement of Italian arbitral awards than the 1933 Convention (see CEF 7 August 1995, docket no. 14.94.21, recital. 1), and, moreover, the same applies to all other bilateral treaties entered into by Switzerland (see Dutoit, Commentaire de la LDIP, 4. ed., Basel 2005, no. 2 at Art. 194).
	c)	In the case at hand, the applicant's ground based on the bilateral Convention of 1933 must thus be dismissed. Also, Art. IV of the New York Convention does not make the enforcement of a foreign award conditional on its being *res judicata*, and Art. V does not allow the defendant to raise such objective, but merely to state that "[t]he award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" (lett. e). Yet the applicant itself stated that the Rome Court of Appeal had dismissed its request to suspend enforcement of the award in an order issued on 29 February 2012. An appeal against a foreign arbitral award does not, in and of itself, suffice to stay its binding effect (DTF 135 III 136, rec. 2), at least not in cases where it does not have an *ex lege* suspensive effect, which is the case for appeals on the grounds of nullity according to Italian law (see Art. 830 para. 3 It. CCP).

	d)	In order to avoid any misunderstanding, it must be recalled that from 1 January 2012, definitive dismissal may be granted on the basis of a Swiss decision as soon as it becomes enforceable, even if it has not yet become binding (see Art. 79 and 80 para. 1 LEF; Jaques, Alcune questioni aperte nel nuovo diritto del sequestro, p. 154-155 ad I, with references) Thus it can no longer be said that the enforcement of foreign awards enjoys any privilege over domestic decisions.
	e)	In light of the above, the arbitral award of 14 September 2011, validly declared to be enforceable on 8 November 2011 by the First Instance Court of Rome (doc. C), together with the arbitration clause contained in the document dated 1 June 2008 (doc. S, at VIII), is a valid basis for the definitive dismissal of the objection pursuant to Art. IV NYC.
	3.3.	The claimant's objection on the grounds that the debt was not yet recoverable at the time payment was ordered is unfounded. Indeed, the arbitral award on which the request for definitive dismissal is based shows that the amount the arbitral tribunal ordered the defendant to pay became recoverable as of 31 March 2010, as statutory interest which that party was also ordered to pay to the claimant would apply from that date (doc. C, provision no. 1). Thus the debt was already recoverable at the time the payment order was issued on 7 February 2012 (doc. P). In this regard, the date of the order issued by the Rome Court of Appeal in which it dismissed the request to suspend the enforcement of the award is irrelevant, as the award was immediately enforceable (Art. 825 para. 3 It. CCP.), unless the Court of Appeal rules to suspend its enforcement (Art. 830 para. 3 It. CCP).
	4.	The action must thus be dismissed. Legal fees and compensation shall be borne by the unsuccessful party (see. Art. 48 and 61 para. 1 OTLEF, 95 *et seq*. CCP).

For these reasons,

Pursuant to Art. 80 LEF, as well as 194 PILS, 95 *et seq*. CCP, 48 and 61 OTLEF;

The Court:	**1.**	Dismisses the action.
	2.	Legal fees of CHF 550 already paid by the appellant remain at its expense. It shall refund the other party CHF 1,200 for recoverable expenses.
	3.	Communication: – to counsel for RA 1; – to counsel for PA 1, _____. Communicated to the First Instance Court of Lugano, Section 5.

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

As the sum in dispute amounts to CHF 170,893, a civil appeal may be lodged against the present decision with the Federal Tribunal, 1000 Lausanne 14, within 30 days of notification (Art. 72* et seq. *LTF).