

Docket no. 14.97.00076	Lugano 9 April 1998/B/fc/fb	In the name of the Republic and Canton of Ticino
Debt Collection and Bankruptcy Chamber of the Court of Appeal		

Members of the Court: Cometta, Presiding judge,
Pellegrini and Zali,
Clerk: Baur Martinelli, Deputy clerk

Ruling on the appealable summary proceedings filed on 27 March 1997 by

_____ represented by _____, Attorney-at-law

versus

_____ represented by _____, attorney-at-law,

seeking final dismissal of the objection raised against payment order no. _____
of 14/16 December 1992 issued by the Debt collection office of Lugano;

ruling on this request the First Instance Court of Lugano, Section 5, in a decision of 16
May 1997 decided the following:

*“1. The request is admissible and thus the objection raised against the payment order
is definitely dismissed regarding the amount of CHF 390,615.655 as well as interest at
a rate of 4.75% from 20.12.1993 and CHF 1,620,418.35 as well as interest at
7.5625% from 27.7.1991.*

*2. Legal fees of CHF 1,000, paid in advance by the plaintiff, shall be borne by the
defendant together with the obligation to refund to the opponent compensation of CHF
7,000.”*

The debtor appealed this decision in a timely manner on 27 May 1997, seeking
dismissal of the request, claiming expenses and recoverable costs;

In submissions of 24 June 1997, the appellee objected to the appeal, claiming expenses
and recoverable costs;

Noting that, by order of the presiding judge of 28 May 1997, the request, which had a
suspensive effect, were held to be inadmissible;

Holding,

in fact:	A.	<p>With payment order no. _____ of 14/16 December 1992 of the Lugano Debt Collection Office _____ (hereafter: _____) sought payment from _____ (hereafter: _____) of CHF 2,226,855.60, as well as interest, based on the LIBOR rate, 3 months + 1.5% from 27.07.1991, on the basis of: “provisions owed on the debtor’s revenue relating to the “_____” contracts, CHF 2,226,855.60 equal to US\$ 1,547,870 at the exchange rate on 21.11.92)</p> <p>As the debtor objected in a timely manner, the plaintiff requested final dismissal of the objection from the First Instance Court.</p>
	B.	<p>The plaintiff based its claim on an arbitral award of 14 March 1997 (doc. G), made by an arbitral tribunal seated in Geneva, ordering _____ to pay _____ the amount of CHF 390,615.655 (= US\$ 269’390.10 at an exchange rate of 25.3.1997 of CHF 1.45) as well as interest at 4.75% from 20.12.1993 and CHF 1,620,418.35(= US\$ 1,117,529.90 at the exchange rate of 25.3.1997 as well as 7.5625% from 27.7.1991.</p>
	C.	<p>At the adversarial proceedings the defendant argued that the arbitral award was not enforceable as it was appealed by way of a public law appeal before the Federal Tribunal and as the latter had to rule on the request to stay enforcement. Moreover, it argued that the award was not enforceable given that <i>exequatur</i> proceedings pursuant to the New York Convention of 10 June 1958 under Art. 192-194 PILS had not been implemented.</p>
	D.	<p>In a decision of 16 May 1997, the First Instance Court of Lugano, Section 5, found the request to be admissible arguing that the arbitral award rendered on 14 March 1997 in the Canton of Geneva, in accordance with the laws in force in the said Canton is not subject to the New York Convention and does not require recognition proceedings and an enforcement order from the cantonal court. At first instance, the arbitral award was held to be a valid basis on which to definitively dismiss the objection, as it is a final award which is enforceable before the Geneva courts because it had been duly notified to the parties by registered letter of 20 March 1997 and as no ruling had yet been handed down regarding the stay of enforcement requested by _____ by way of a public law appeal before the Federal Tribunal on 5 May 1997. Furthermore, the condition that arbitral tribunal be independent was met as the arbitrators were appointed by each of the parties pursuant to Art. 179 PILS. The Court denied the request to stay proceedings under Art. 107 CPC, pending the</p>

		outcome of the proceedings before the Federal Tribunal as to the stay of enforcement, as such law was not applicable to proceedings for definitive dismissal of the objection given the short time frames provided in Art. 84 LEF.
	E.	_____ filed an appeal against the First Instance Court's decision in a timely manner in which it essentially reiterated the arguments relied upon in first instance.
	F.	In submissions of 24 June 1997 the appellee challenged the appeal on grounds, which, if necessary, shall be explained at a later stage.
Considering		
in law	1.	
	a)	Under Art. 321 para. 1 lett. b CPC no new facts, evidence or objections may be raised during an appeal.
	b)	The Federal Tribunal's decision of 27 June 1997 denying a stay of enforcement on the grounds that a public law appeal had been filed by the appellant against the arbitral award of 14 March 1997, produced by _____ on 3 July 1997, as well as the decision of 12 September 1997 of the Federal Tribunal denying the public law appeal, also produced by _____ on 22 September 1997, should be removed from the docket, as no new documents may be produced in appeal pursuant to Art. 321 para. 1 lett. b CPC.
	2.	
	a)	A Swiss arbitral award is a valid basis for definitive dismissal of the objection under Art. 80 para. 1 LEF. Where the dispute is of an international nature (Art. 176 PILS), Art. 193 PILS is applicable as regards the enforcement order (Amonn/Gasser, Grundriss des Schuldbetreibungs- und Konkursrechts, Berne 1997, § 19 no. 38 p. 123).
	b)	Under Art. 194 PILS recognition and enforcement of foreign arbitral awards are governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Pursuant to Art. 194 PILS, foreign arbitral award refers to an arbitral award issued by an arbitral tribunal of which the seat is abroad, regardless of the nationalities of the parties or the applicable law (Patocchi/Jermini in Commentario basilese, no. 12

		<p>at Art. 194 PILS).</p> <p>Under Art. 192 para. 2 PILS, if parties have entirely excluded the possibility of appealing an award and if that award must be enforced in Switzerland then the New York Convention shall be applied by analogy. In this case and contrary to the appellant's argument, the conditions for the application of the New York Convention are not met, as the seat of the arbitral tribunal was not abroad but in Switzerland, in Geneva. Moreover, it does not appear that the parties excluded the possibility of appealing the arbitral award because, as the appellant noted, it was appealed on 5 May 1997 by way of a public law appeal before the Federal Tribunal.</p>
	c)	<p>Under Art. 190 para. 1 PILS an award is final when it has been notified. Upon notification, the award has <i>res judicata</i> and is enforceable. The means of recourse against such award, even though final, are set forth in Art. 190 para. 2 PILS, on condition, as seen in the previous recital, of a valid waiver under Art. 192 PILS, which imposes verification of awards to be enforced in Switzerland at the time of exequatur proceedings. If no challenge is brought against the award, it becomes final once the time lapse in which to do so expires. If, however, an appeal is filed in time, it does not necessarily limit the enforceability of the award. Indeed, recourse against arbitral awards does not stay their enforcement; meaning that an award is final even before the time span in which to appeal it expires, and also where an appeal has been filed. Immediate enforcement may thus be requested in Switzerland, except where the authority examining the recourse has expressly ruled to stay enforcement (Berti/Schnyder in Commentario basilese, n. 8 at Art. 190 PILS; Lalive/Poudret/Reymond, Le droit de l'arbitrage, n. 2 at Art. 190 PILS; Bernard Dutoit, Commentaire de la loi Fédérale du 18 décembre 1987 n. 1 at Art. 190 PILS).</p>
	d)	<p>In this case, on 27 March 1997, _____ requested definitive dismissal of the objection on the basis of the arbitral award issued on 14 March 1997. At the adversarial hearings of 6 May 1997 _____ noted that the arbitral award had been appealed by way of a public law appeal on 5 May 1997 before the Federal Tribunal, requesting that its enforcement be stayed. However, no decision of the Federal Tribunal with regard to the stay was produced before the First Instance Court. The First Court therefore rightly held that, according to Art. 190 para. 1 PILS, the arbitral award was final and enforceable as it was notified to the parties.</p>

	e)	As already noted in recital 2.b), the New York Convention was not applicable to the arbitral award and thus there was no need for recognition and enforcement proceedings as per the formalities set out in the aforementioned convention.
	f)	<p>Under Art.193 para. 1 PILS each party may, and at their own cost, file a copy of the arbitral award at the Swiss court of the place of the seat of the arbitral tribunal.</p> <p>Parties may, but are under no obligation to, file the award. Contrary to Art. 35 Concordato intercantonale sull' arbitrato (an intercantonal arbitration convention) the arbitral tribunal does not have to file the award with the judicial authorities of the seat of the arbitral tribunal. Such filing has no effect on the validity or enforceability of the award. According to para. 2 Art. 193 PILS, upon one of the party's request to that effect, the tribunal shall certify the enforceability of the award. This statement, which is a mere declaration, does not render the award enforceable but only states that the award is enforceable under Swiss law.</p> <p>Under Art. 193 para. 3, upon a request by one of the parties, the arbitral tribunal shall state that the award was made in accordance with the provisions of the PILS; such statement equates to filing the award with the court and has no effect on the enforceable nature of the award. It only refers to compliance with the PILS (Berti in Commentario basilese, no. 7 and 19 at Art. 193; Bernard Dutoit, op. cit., n. 1-3 at Art. 193 PILS; Lalive/Poudret/Reymond, op. cit. no. 2 at Art. 193 PILS).</p> <p>In this case, none of the parties filed the arbitral award or even requested a statement of enforceability. Under Art. 190 PILS, arbitral award doc. G nonetheless became final and therefore enforceable when issued, and is thus a valid document on the basis of which to definitively dismiss the objection, pursuant to Art. 80 LEF. For this reason, the First Instance Court's decision must be upheld.</p>
	3.	_____’s appeal of 27 May 1997 must thus be denied. As the party is unsuccessful, it shall bear legal fees and compensation (Art. 48, 49, 61 para. 1 and 62 para. 1 OTLEF).

For these reasons,

Considering Art. 80 LEF and 190 para. 1 PILS

The Court:	1.	Denies the appeal of 27 May 1997 _____ _____.
	2.	Legal fees of CHF 1,500, paid in advance by the appellant, shall be borne by _____. which shall also refund compensation of CHF 5,000 to _____.
	3.	Communication: - to _____ Communicated to the First Instance Court of the District of Lugano, Section 5.

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