In the matter of an application pursuant to **s. 23** of the **Arbitration Act 2010** and in the matter of **Danish Polish Telecommunication Group I/S**, Applicant v. **Telekomunikacja Polska S.A.**, Respondent [2011] IEHC 369, [2011 No. 19 MCA, 2011 No. 35 COM]

High Court 6th October, 2011

Arbitration – Foreign award – Enforcement – Principles applicable – Application to set aside award pending – Adjournment of decision on enforcement pending appeal – Whether necessary to adjudicate on foreign law – Whether reasonable or substantial grounds that party seeking to set aside award would succeed – Whether award manifestly invalid – Security – Partial enforcement – Whether court having jurisdiction to enforce undisputed part of award – Arbitration Act 2010 (No. 1), ss. 6 and 23(1) – UNCITRAL Model Law on International Commercial Arbitration.

The UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on the 21st June, 1985, with amendments as adopted by that Commission at its thirty-ninth session on the 7th July, 2006, and as implemented in the State by s. 6 of the Arbitration Act 2010) ("the Model Law") provides, *inter alia*:-

"Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute 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; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

Section 23(1) of the Arbitration Act 2010 provides, *inter alia*:-

"An award ... made by an arbitral tribunal under an arbitration agreement shall be enforceable within the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and where leave is given, judgment may be entered in terms of the award."

A dispute arose between the parties in relation a revenue sharing clause in a contract relating to the construction in Poland of an optical fibre system. In accordance with the contract, the dispute was arbitrated in Vienna, Austria in accordance with the Model Law. A partial award was made ordering the respondent to pay to the applicant a principal sum of €268,052,488. The respondent issued proceedings in the Commercial Court of Vienna, Austria seeking to set aside the partial award.

The applicant issued proceedings in the High Court, pursuant to the Act of 2010, seeking recognition and enforcement of the partial award. The respondent, in addition to resisting the application, sought, in the alternative, an adjournment of the decision on enforcement pursuant to s. 36(2) of the Model Law pending the determination of the Austrian proceedings.

Prior to the hearing, the parties agreed that the same approach should be taken in relation to the proceedings, as had been taken by the High Court (Kelly J.) in relation to foreign law disputes in *Broström Tankers AB v. Factorias Vulcano SA* [2004] IEHC

198, [2004] 2 I.R. 191. The agreed approach was that the court should decide whether, even if all the questions of foreign law were decided in favour of the respondent, it would provide a basis for enforcing the award.

Held by the High Court (Finlay Geoghegan J.), in adjourning the decision on enforcement of the award and in ordering security of €1.5 million to be provided by the respondent, 1, that the provisions of the Model Law indicated a pro-enforcement policy. Article 36(2) of the Model Law permitted the court to adjourn its decision on enforcement, as distinct from placing a stay on a decision in favour of enforcement already reached. Accordingly, the court should determine the application for an adjournment before proceeding, if necessary, to determine the application for enforcement.

Dalimpex Ltd. v. Janicki [2003] 64 O.R. (3d) 737 and *IPCO (Nigeria) v. Nigerian National Petroleum* [2008] EWHC (Comm) 797, [2009] 1 All E.R. (Comm.) 611 followed.

2. That, in making its decision on adjournment, it was neither necessary nor appropriate for the court to determine questions of Austrian law. The court needed only to be satisfied that there were reasonable or substantial grounds for contending the respondent would succeed in setting aside the partial award in the Austrian proceedings.

Broström Tankers AB v. Factorias Vulcano SA [2004] IEHC 198, [2004] 2 I.R. 191 distinguished.

3. That the mere existence of proceedings to set aside an arbitration award did not normally of itself constitute grounds for an adjournment. The correct approach was for the court to engage in a brief consideration of the strength of the application to set aside the arbitration award. If the award was manifestly invalid, there should be an adjournment and no order for security. If the award was manifestly valid there should either be an order for immediate enforcement or an order for substantial security. In between, the court should be guided by its preliminary view. It was not for the court to decide any of the disputed issues of foreign law in its decision on adjournment.

IPCO (Nigeria) v. Nigerian National Petroleum [2008] EWCA Civ 1157, [2009] 1 All E.R. (Comm.) 611 and *Soleh Boneh v. Uganda Govt.* [1993] 2 Lloyd's Rep. 208 approved.

4. That s. 23 of the Arbitration Act 2010 only permitted the court to enter judgment in terms of the award. The court could not order enforcement of an undisputed sum where the award did not contain any order separately directing payment of that sum.

5. That, having regard to the long period to which the award related, the long duration of the arbitration, the response to the arbitration by the respondent, the timely commencement of the respondent's appeal, and the nature of the respondent's assets in the State, it was appropriate to order security.

Quaere: Whether the court could, pursuant to s. 23 of the Arbitration Act 2010, enter judgment for some of the figures comprising the principal sum of the award, without entering judgment for the balance, where the award did not contain any order separately directing payment of the sums.

Cases mentioned in this report:-

Broström Tankers AB v. Factorias Vulcano SA [2004] IEHC 198, [2004] 2 I.R. 191.

Dalimpex Ltd. v. Janicki [2003] 64 O.R. (3d) 737; [2003] 228 D.L.R. (4th) 179; [2003] B.L.R. (3d) 41; [2003] O.A.C. 312.

IPCO (Nigeria) v. Nigerian National Petroleum [2008] EWHC 797 (Comm), [2008] EWCA Civ 1157, [2009] 1 All E.R. (Comm.) 611.

Soleh Boneh v. Uganda Govt. [1993] 2 Lloyd's Rep. 208.

Originating motion on notice

The facts have been summarised in the headnote and are more fully set out in the judgment of Finlay Geoghegan J., *infra*.

By originating notice of motion dated the 26th January, 2011, the applicant sought to enforce an arbitration award obtained in Vienna, Austria.

The application was heard by the High Court (Finlay Geoghegan J.) on the 28th, 29th and 30th June, 2011.

John L. O'Donnell S.C. (with him *Joe Jeffers*) for the applicant.

Paul Gallagher S.C. (with him *Rossa A. Fanning*) for the respondent.

Cur. adv. vult.

Finlay Geoghegan J. 6th October, 2011

[1] Danish Polish Polish Telecommunication Group I/S ("DPTG") seeks recognition and enforcement of an international arbitral award pursuant to article 35(1) of the UNCITRAL Model Law on international commercial arbitration ("the Model Law") given force of law in the State by s. 8 of the Arbitration Act 2010.

[2] The award sought to be recognised and enforced is the corrected award set out in the dispositive section of the addendum dated the 2nd November, 2010, and will, in this judgment, be referred to as "the partial award". Nothing turns on the fact that it is a corrected award.

[3] The partial award obliges Telekomunikacja Polska SA ("TPSA") to pay the principal amount of DKK1,998,422,812 (€268,052,448). Further paragraphs of the partial award require payment of interest and costs.

[4] The partial award was made in an arbitration which took place in Vienna, Austria pursuant to the UNCITRAL Arbitration Rules and commenced in 2001. The partial award is an award made in respect of the first phase of the arbitration which deals with the first period of relevant time (February, 1994 to June, 2004). It is common case that it is an award which may be the subject of recognition and enforcement in the State pursuant to article 35 of the Model Law unless recognition and enforcement is refused pursuant to article 36.

[5] For the purposes of this judgment, the background to the dispute need only be briefly recorded. The dispute to which the arbitration relates concerns a contract (the "NSL contract") in writing of the 17th April, 1991, between Polish Foreign Trade Company ELECTRIM S.A., acting on behalf of the Polish PTT, and DPTG in relation to the construction in Poland of the North/South Link optical fibre system. TPSA is the legal successor of the Polish PTT under the NSL contract.

[6] A dispute arose between DPTG and TPSA regarding the amounts owed by TPSA pursuant to the revenue sharing provision in clause 8 of the NSL contract. Article 15 of the NSL contract provides for the settlement of disputes by arbitration in accordance with the UNCITRAL arbitration rules, as follows:-

> "Article 15.
> DISPUTES. APPLICABLE LAW.
>
> 1. Any dispute and/or difference between the parties which could not be settled in an amicable way shall be finally settled, without the recourse to the common courts of law, by the arbitration in accordance with the UNCITRAL arbitration rules. The place of arbitration shall be Vienna, Austria. The language of the proceedings shall be English. The number of arbitrations shall be three. The appointing authority shall be the President of the Federal Economic Chamber, Vienna, Stubenring 12, Austria. The award of the arbitration shall be final and binding and the parties agree to fulfil it voluntarily.
> 2. The Austrian law shall apply to this contract. If any issue in question is covered by the International Telecommunication Convention to which both Denmark and Poland are members, then this Convention will be correspondingly applied."

[7] Three arbitrators were appointed in purported compliance with article 15. There have been changes to the composition of the arbitral tribunal and two changes of chairman. The first phase of the arbitration has been lengthy and exceedingly complex. The reasoned partial award dated the 24th August, 2010, comprises 1,050 paragraphs. There were further hearings subsequent to the delivery of that award and the *addendum* delivered on the 2nd November, 2010.

[8] By proceedings issued in the Commercial Court of Vienna, Austria on the 2nd December, 2010 ("the Austrian proceedings"), TPSA seeks to challenge the partial award and requests that it be set aside. Those proceedings are being vigorously defended by DPTG. They are relevant to the issues to be determined in this application.

[9] This application commenced by originating notice of motion on the 26th January, 2011, grounded on affidavit. It was admitted to the commercial list and case managed by directions in the usual manner. Further affidavits were filed by both parties and lengthy expert opinions exhibited both in relation to the UNCITRAL rules and in relation to Austrian law, including the prospect of success and failure of the Austrian proceedings. The Austrian experts expressed differing views on aspects of Austrian law, its application to the Austrian proceedings and the probable outcome of the Austrian proceedings.

[10] Prior to a directions hearing before Kelly J. on the 3rd June, 2011, it appears that the parties agreed that the same approach should be taken at the hearing of the application for recognition and enforcement herein to the disputes in relation to Austrian law, as had been taken in relation to foreign law disputes in proceedings heard and determined by Kelly J. in *Broström Tankers AB v. Factorias Vulcano SA* [2004] IEHC 198, [2004] 2 I.R. 191. That was an application to enforce a New York Convention award in an international arbitration pursuant to s. 7 of the Arbitration Act 1980. In the affidavits filed in those proceedings, there was conflict between Spanish and Norwegian lawyers on questions of Spanish and Norwegian law. The approach suggested by Kelly J. and adopted by the parties in those proceedings is recorded by Kelly J. in his judgment, at p. 196, in the following terms:-

> "[21] Without, therefore, deciding any of these vexed questions of foreign law, I am now going to decide whether, even if they were all decided in favour of the defendant, it would provide a basis for refusing enforcement of the award.
>
> [22] If I decide that it would, I will then have to hear the cross-examination of the foreign lawyers and decide whether as a matter of

fact the plaintiff or the defendant's experts are correct in their opinions as to the relevant legal questions.

[23] If I decide to the contrary, then the matter is at an end. That is so because, even with all of the foreign legal questions decided in favour of the defendant, it would not provide a basis for refusing enforcement under s. 9(3) of the Act of 1980."

[11] Unfortunately, what appears to have been overlooked by the parties in these proceedings at the time that they decided to adopt this approach (which, may often make sense in relation to a decision on enforcement or refusal of enforcement), was that in these proceedings, unlike in the proceedings in *Broström Tankers AB v. Factorias Vulcano SA* [2004] IEHC 198, [2004] 2 I.R. 191, TPSA seeks, in the alternative, an adjournment pursuant to article 36(2) of the Model Law pending the determination of the Austrian proceedings. Unfortunately, the potential complication of the *Broström* approach to the adjournment application only became apparent towards the end of the hearing. It was decided between the parties that I should hear the application, including the application for the adjournment upon the basis of the *Broström* agreement. Nevertheless, counsel for TPSA submitted, at all times, that it was not necessary for this court to actually determine questions of Austrian law for the purposes of the adjournment application. I will refer to this further below.

Legislative framework

[12] Articles 35 and 36 of the Model Law govern the issues which must be determined on this application. They provide:-

"*Article 35. Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
  (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
  or
  (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  (iii) the award deals with a dispute 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; or
  (iv) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:
  (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the ap-

plication of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

[13] There is substantial agreement between the parties on the proper approach of the court to the construction and application of these provisions. Most importantly, they indicate a pro-enforcement policy and should be so construed. Article 36 sets out exhaustively the grounds upon which recognition and enforcement may be refused and it appears to be common case in accordance with the authorities that those grounds should be construed restrictively. The public policy referred to in article 36(1)(b)(ii) is that of Ireland.

[14] In summary, TPSA contends that this court ought to refuse recognition or enforcement of the partial award in this jurisdiction upon the basis that:-

(i) TPSA was unable to present its case (article 36(1)(a)(ii) of the Model Law);

(ii) the composition of the arbitral tribunal and/or the arbitral procedure were not in accordance with the agreement of the parties or, failing such agreement, with the law of Austria (article 36(1)(a)(iv) of the Model Law); and,

(iii) it would be contrary to the public policy of Ireland to recognise or enforce the partial award (article 36(1)(b)(ii)). The factual basis of this ground is similar to those of (i) and (ii). It was submitted that an opportunity to present one's case to an independent arbitral tribunal forms part of the public policy in Ireland.

[15] TPSA seeks, in the alternative, that the court exercise its power under article 36(2) to adjourn the decision on recognition or enforcement of the partial award pending the determination of TPSA's Austrian proceedings. Whilst its primary submission was that this court should first determine (in its favour) the issues raised by the substantive defences of TPSA to the application for recognition or enforcement, it also submitted that on a proper construction of article 36, it is open to the court to determine that it should adjourn its decision on the application for recognition and enforcement and the defences raised thereto pending the determination of the Austrian proceedings.

[16] DPTG, in summary, submits that:-

(i) each of the grounds relied upon by TPSA pursuant to article 36(1) are without foundation;

(ii) this court should refuse the application for adjournment pending the determination of the Austrian proceedings. It submits

that the expert opinions of TPSA's Austrian lawyers, when properly analysed, do not establish reasonable or substantial grounds in favour of TPSA succeeding to set aside the partial award in the Austrian proceedings; and,

(iii) if this court were to exercise its discretion to adjourn its decision on recognition and enforcement pending a determination of the Austrian proceedings, it should now:-

(a) make an order for the recognition and enforcement of part of the partial award; and,

(b) make an order requiring the provision of security.

Austrian proceedings

[17] The parties appear to be in agreement that the jurisdiction of the Austrian courts to set aside the partial award is governed by article 595 of the former Austrian Code of Civil Procedure. This provides:-

"(1) The award shall be set aside,

1. if an arbitration agreement according to article 577 does not exist, if the arbitration agreement has become invalid before the making of the award or ceased to have effect for the particular case or if a party was unable to conclude the arbitration agreement because of its status;
2. if the party applying to have the award set aside was unable to present its case in the proceedings before the arbitrators or if required by statute to be represented by an agent or guardian was not so represented in those proceedings unless in the latter case the procedure has been subsequently properly ratified;
3. if statutory or contractual provisions regarding the composition of the arbitral tribunal or the method of reaching a decision have been infringed or if the original of the award has not been signed in accordance with the provisions of article 592(2);
4. if a challenge to an arbitrator has been rejected unjustifiably by the arbitral tribunal;
5. if the arbitral tribunal dealt with matters beyond those referred to it;
6. if the award is incompatible with the basic principles of the Austrian legal system or if it infringes mandatory provisions of the law, the application of which cannot be set aside by a choice of law of the parties even in a case where a foreign

contact according to article 35 of the International Private Law Act is involved;

7. if the conditions are present in which a request can be made under article 530(1) figures 1 to 7 for a court judgment to be set aside and the case re-opened."

[18] Dr. Christian Aschauer, a lawyer representing TPSA in Austria, summarises at para. 36 of his first affidavit, the principal grounds in the Austrian proceedings:-

"Below is a synopsis of the fundamental defects in the award that make up the principal grounds for setting aside in the Austrian Setting Aside Proceedings, along with the Austrian statutory grounds for the setting aside of the award:-

(a) the award violates the prohibition of arbitrariness and thus also contradicts the basic principles of the Austrian legal system (section 595 paragraph 1(6) of the Code of Civil Procedure);
(b) the value of DPTG's performance – DKK 126,369,487 (approximately €17 million) – is in such a gross disparity to the alleged payment claim of DPTG – approximately DKK 4,600,000,000 (approximately €616 million) (which consists of the amounts for Phase 1, Phase II and the amounts already paid by TPSA in the past) – that this amounts to usury under Austrian law by reason of the lack of proportionality between the two sums and therefore must be considered a violation of the basic principles of the Austrian legal system (section 595 paragraph 1(6) of the Code of Civil Procedure);
(c) TPSA was unable to present its case (section 595 paragraph 1(2) of the Code of Civil Procedure);
(d) the Tribunal dealt with matters beyond those referred to it by applying section 273 of the Code of Civil Procedure (section 595 paragraph 1(5) of the Code of Civil Procedure);
(e) the Tribunal was not properly composed when passing its decision, and TPSA's challenges to the members of the Tribunal were unjustifiably rejected, which means that, pursuant to section 595 paragraphs 1(3) and 1(4) of the Code of Civil Procedure, the Award has to be set aside."

Dr. Aschauer, in his first affidavit in relation to each of the above grounds, expresses a view there is either, "at least a seriously arguable case" or a "serious likelihood" that the partial award would be set aside by the Austrian courts.

[19] In response, Mag. Florian Haugeneder, a lawyer acting for DPTG in Austria, has sworn an affidavit in which he exhibits a detailed joint legal opinion from Dr. Paul Oberhammer and Dr. Walter H. Rechberger, both highly renowned experts in the field of Austrian arbitration and civil law. He summarises those opinions as confirming, "that no good legal basis exists for setting aside the award".

[20] In response, the second affidavit of Dr. Christian Aschauer exhibits legal opinions in relation to the Austrian proceedings, one each from Professor Gert Iro from the University of Vienna, Professor Marianne Roth from the University of Salzburg and Professor Bernd-Christian Funk from the University of Vienna. Each of these persons appears to be a leading expert in Austrian civil and constitutional law. Those opinions deal with different aspects of the challenge in the Austrian proceedings.

[21] Following the order of the grounds set out at para. 36 of the first affidavit of Dr. Aschauer, the views expressed by the experts may be shortly summarised as follows.

[22] Dr. Roth, at paras. 171 to 175, of her opinion, sets out her understanding of the principles relating to the contention that the award violates the prohibition of arbitrariness and, thus, also contradicts the basic principles of the Austrian legal system (s. 595(1)(6) of the Code of Civil Procedure) and concludes, at para. 175:-

> "The interpretation of the revenue sharing clause by the Arbitral Tribunal results in a partial award that is unjustifiable and 'objectively untenable' in light of the generally recognized principles of interpretation and therefore results in an arbitrary decision that is to be set aside according to §595/1 (6) Code of Civil Procedure."

[23] All three experts express an opinion in relation to ground (b) that the NSL contract, as interpreted in the partial award, is usurious and in violation of fundamental principles of Austrian law within the meaning of s. 595(1)(6) of the Code of Civil Procedure. The prohibition on usuriousness appears to be contained in s. 879 of the Austrian Code of Civil Procedure. Professor Iro, in his opinion, deals exclusively with this question and in the most detail. At para. 133, he concludes:-

> "Thus, the conditions to assume that the NSL contract, as interpreted by the Arbitral Tribunal, is usurious and a violation of fundamental principles of Austrian law within the meaning of §595, para. 1, no. 6 (old version) of the Austrian Code of Civil Procedure, are clearly fulfilled."

[24] Professor Roth, in her opinion, expresses agreement with Professor Iro, at para. 98:-

> "… that the prohibition of usury is of a public policy character because it has the purpose of protecting the society and its legal principles from the abuse of private autonomy."

She then concludes, at para. 99, on this issue:-

> "Therefore, the violation of the prohibition of usury is a violation of the public order and in case of arbitral awards such a violation requires the setting aside of the award according to § 595/1 (6) Civil Code as well as a refusal to recognise and enforce the arbitral award respectively. In the present case the delivery of DPTG and the awarded sum is of such flagrant imbalance that the partial Award constitutes a violation of the Austrian basic values and, accordingly, is to be set aside."

[25] Professsor Funk, at para. 24 of his opinion, states:-

> "The prerequisites to a finding of usury under sec. 879(2)(4) Austrian Civil Code have likewise been met."

[26] Professor Roth discusses the ground based upon the allegation that TPSA was unable to present its case to the arbitral tribunal in sections F.2 (paras. 120 to 138) and H. (paras. 176 to 193) of her opinion. At paras. 121 and 122, she summarises her view of the present position in Austrian law in relation to setting aside an award pursuant to s. 595(1)(2) of the Code of Civil Procedure:-

> "121. According to §595/1 (2) Code of Civil Procedure an award must be set aside if the party requesting the setting aside of the award was not granted the right to be heard in the proceedings before the arbitrators. Therefore, violation of the right to be heard is a ground for setting aside an award. The Austrian Supreme Court established with its RS0045092 a restrictive approach. Accordingly, the arbitral award will only be subject to challenge where the parties were not granted their right to be heard at all.
>
> 122. However, this approach has been heavily criticized by legal commentators. In terms of standards of article 6 of the European Convention on Human Rights the approach of the Austrian Supreme Court appears outdated."

Her conclusion on the alleged failure of the arbitral tribunal to give TPSA an opportunity to be heard in relation to the proposed application of s. 273(1) of the Code of Civil Procedure, is set out at para. 138:-

> "Therefore, the only proper way to eliminate the remaining uncertainties would have been to obtain a further expert opinion. The surprise decision by the Arbitral Tribunal to apply §273/1 of the Code of Civil Procedure constitutes a violation of the right to be heard pursuant

to article 6 of the European Convention on Human Rights and thus renders the decision challengeable under § 595/1 (2) of the Austrian Code of Civil Procedure and unenforceable pursuant to Art. V/1, letter b, of the New York Convention."

[27] Professor Roth, in part in reliance upon facts set out in an opinion of Professor Born (exhibited, not in relation to Austrian law, but in relation to the UNCITRAL trial model rules), refers to further contentions that the arbitral tribunal failed to deal with submissions made by TPSA, in particular in relation to revenue sharing. Having referred to the restrictive approach, already set out, of the Austrian Supreme Court in accordance with its current jurisprudence, and the criticism of same, at para. 193, she concluded:-

> "Even if the Arbitral Tribunal addressed part of TPSA's arguments, it did not properly examine TPSA's main arguments as well as TPSA's alternative submission regarding the reduction of the revenue share. Pursuant to §595/1 (2) and (6) of the Code of Civil Procedure a violation of the right to a fair trial and the right to be heard within the meaning of article 6 of the European Convention on Human Rights is also a ground for the setting aside of an award. Therefore, there is a reasonable chance that the partial award, which is the consequence of several violations of TPSA's right to be heard and to obtain a fair trial, will be set aside."

[28] Professor Funk also deals with this issue, explains the jurisprudence of the Austrian Supreme Court and the application of article 6 of the European Convenstion on Human Rights in relation thereto, and ultimately expresses his view in relation to all the issues he deals with, including the present issue, at para. 30 of his opinion:-

> "The procedural irregularities asserted in the present case and the errors in the arbitral tribunal's decision are so severe, that, when taken together (both in and of themselves and in their impacts) they constitute infringements of elementary principles of a fair trial and of the right to be heard, including in terms of the substantive decision, and the arbitral award must be specifically regarded as incompatible with the fundamental values underlying the Austrian legal system. For this reason, this arbitral award must be set aside in accordance with sec. 596 (1) (2) (3) (4) and (6) Austrian Code of Civil Procedure."

[29] Professor Roth primarily deals with this issue, as already stated, at section F.2 of her opinion. In addition to referring to the application of s. 273 of the Code of Civil Procedure in relation to the right to be heard, she also expresses the view that the conditions for the application of s. 273 of

the Code of Civil Procedure (para. 154) are not met and further expresses the view at paras. 155 and 158 that Article 33 of the UNCITRAL arbitration rules only permits such an equitable decision (by application of s. 273(1) of the Code of Civil Procedure where the arbitral tribunal has been "expressly authorized" to do so. She concludes that there is no such express authorisation on the facts herein and that the arbitral tribunal:-

> "… acted *ultra vires* so that the grounds for setting aside the partial award according to §595/1 and (5) of the Code of Civil Procedure are also met."

[30] Professor Roth discusses the ground based upon the contention that the arbitral tribunal was not properly composed when passing its decision (section I. paras. 194 to 209) and concludes this issue, at para. 209:-

> "For the reasons set out above, the improper composition of the arbitral tribunal leads to the legal consequence that the award is to be set aside under §595/1 (3) and (4) of the Code of Civil Procedure."

[31] The overall conclusion of Dr. Roth, set out at para. 210 of her opinion, is:-

> "… that the partial award of the 24th August, 2010, is to be set aside in the proceedings currently pending before the Vienna commercial court and in my view, there is a reasonable chance that it will be set aside."

I have already set out the conclusions of Professor Iro and Professor Funk on the issues dealt with by them.

[32] Each of the opinions of Professor Iro, Professor Roth and Professor Funk were given following the consideration of the joint opinion of Professor Oberhammer and Professor Rechberger.

[33] A second affidavit was then sworn and filed by Mag. Florian Haugeneder, in which he disputes many of the opinions and conclusions expressed by Dr. Aschauer, Professor Roth, Professor Iro and Professor Funk. He does so, in part, in reliance on his own opinion and, in part, on the joint opinion of Dr. Oberhammer and Professor Rechberger, already exhibited by him.

[34] Having regard to the agreement of the parties as to the basis upon which I should firstly decide this application, I do not propose referring, at this stage, to the opinion on Austrian law or on the likelihood of success of the Austrian proceedings, as expressed on behalf of DPTG, save to the extent already set out.

Order of decisions to be taken

[35] Both parties seek to have the court take a decision on the application for recognition and enforcement and TPSA's defence that recognition and enforcement should be refused in reliance upon article 36(1)(ii) and (iv). TPSA presented its application for an adjournment under article 36(2) as an alternative.

[36] In my judgment, on the facts herein, the court must firstly determine TPSA's application for an adjournment of its decision on recognition and enforcement pursuant to article 36(2), for the following reasons.

[37] What a court is permitted to do, under article 36(2), is to adjourn its decision on enforcement, as distinct from placing a stay on a decision in favour of enforcement already reached. Notwithstanding the pro-enforcement policy underlying articles 35 and 36, this appears to be the correct construction, having regard to the wording used in article 36(2) and its interconnection with article 26(1)(b) which permits refusal of enforcement where the award, *inter alia*, has been set aside or suspended by a court of the country in which, or under the law of which the award was made. The purpose of article 36(2) appears to be to avoid the enforcement of an award and then a subsequent decision of the home court that the award be set aside.

[38] I am reinforced in the view I have reached that it is an adjournment of the decision of the court rather than any stay on a decision already made by the judgment of Charron J.A. in the Court of Appeal for Ontario in *Dalimpex Ltd. v. Janicki* [2003] 64 O.R. (3d) 737, Case 509 on UNCITRAL's Clout database, paras. 4 and 54 to 61, and an observation of Tomlinson J. in the High Court in England in *IPCO (Nigeria) v. Nigerian National Petroleum* [2008] EWHC 797 (Comm), [2009] 1 All E.R. (Comm.) 611, at para. 15. In each, the judge made clear that it is the decision on enforcement which must be adjourned.

[39] The difficulty which the court is presented with, in the present application, is that the parties have agreed that all issues, including the determination of the application for an adjournment should, in the first instance, be determined upon an assumption that the statements of Austrian law, as set out by the experts retained on behalf of TPSA, is correct. It was further agreed that if I were to decide to grant an adjournment based upon such uncontested statements, that there should then be cross-examination of both sets of experts for the purpose of this court determining, as a question of fact, any relevant issues of Austrian law in accordance with the

approach of Kelly J. in *Broström Tankers AB v. Factorias Vulcano SA* [2004] IEHC 198, [2004] 2 I.R. 191.

[40] Notwithstanding this agreement, counsel for TPSA submitted that it was neither necessary nor appropriate for the court to determine questions of Austrian law in relation to the application for an adjournment under article 36(2). Rather, he submitted that the court need only be satisfied on the expert opinions adduced that there are reasonable or substantial grounds for contending that the Austrian proceedings may succeed in having the partial award set aside by the Austrian courts.

[41] That submission appears to me correct. A pro-enforcement construction of article 36(2) of the UNCITRAL model rules suggests that the mere existence of proceedings seeking to set aside an arbitration award would not normally of itself constitute grounds for an adjournment. Correctly, counsel for TPSA did not seek to so submit. I was referred to an observation to similar effect by Tuckey L.J. in the Court of Appeal on the appeal from Tomlinson J. in *IPCO (Nigeria) v. Nigerian National Petroleum* [2008] EWCA Civ 1157, [2009] 1 All ER (Comm.) 611, at p. 661:-

> "[15] … The mere fact that a challenge has been made to the validity of an award in the home court does not prevent the enforcing court from enforcing the award if it considers the award to be manifestly valid (see *Soleh Boneh International Ltd v Government of the Republic of Uganda and National Housing Corp* [1993] 2 Lloyd's Rep. 208 at 212)."

[42] Each of those decisions concerned a similar adjournment provision to article 36(2) in the English legislation applicable to the New York Convention. In *Soleh Boneh v. Uganda Govt.* [1993] 2 Lloyd's Rep. 208, Staughton L.J stated at p. 212:-

> "In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point."

[43] The above must be treated with caution, as the substantive appeal appears only to have related to the security ordered rather than the order for

adjournment. However earlier in the judgment he gave some indication of the "brief consideration" (albeit *obiter*) where having referred to one of the grounds of invalidity contended for that the arbitrator was not validly appointed and to two opposing opinions from Professor Goode QC and Professor Guest QC, he then stated, at p. 210:-

> "What we are not asked to do is to decide the point ourselves, here and now. So I must be careful to express no opinion on it, except to say that in my judgment it is seriously arguable, although in a short compass. Indeed the very fact that two such eminent teachers of commercial law take opposite views shows that to be the case."

[44] I find the judgment of assistance and respectfully agree with the approach. It is not a matter for this court as the enforcement court to decide any disputed issues of Austrian law in the context of the application for an adjournment pursuant to article 36(2). That is a matter for the Austrian courts in the Austrian proceedings. Hence, notwithstanding the agreement reached between the parties, cross-examination will not be permitted prior to a decision on the adjournment application. Rather, what the court must do is engage in a "brief consideration" of the materials before it and then decide whether TPSA has demonstrated that it has reasonable grounds or a seriously arguable case for the setting aside of the partial award in the Austrian proceedings.

[45] By reason of the agreement already reached and the reasons next set out, it appears to me that I must now give DPTG an opportunity to consider whether there are any further submissions they wish to make to the court in reliance upon the affidavits and exhibits (including the joint opinion) already filed, but without an opportunity of cross-examining any of the experts in Austrian law prior to making a determination as to whether or not TPSA has, on the affidavits already filed, satisfied the court that it has reasonable grounds or a seriously arguable case for contending that the partial award may be set aside in the Austrian proceedings.

[46] Counsel for DPTG made full submissions at the hearing that the expert opinions of Professor Roth, Professor Iro and Professor Funk did not, even in their own terms, set out substantial or reasonable grounds for contending that the partial award may be set aside by the Austrian courts. I do not accept that submission. The views expressed are by persons expert in the relevant field of law and on my consideration appear to include reasonable grounds or a seriously arguable case for setting aside the partial award. In expressing this view, I am not determining that each and every ground appears seriously arguable. However, it does not appear that I should express a view on the individual grounds. The opinions expressed

may of course be ultimately proven incorrect by the decision of the Austrian courts as happens in relation to differing opinions properly held and expressed on the outcome of proceedings. I have formed this preliminary view in the knowledge that the views expressed are disputed by relevant experts retained by DPTG but without submissions relating to the content of the joint opinion. I am conscious that counsel for DPTG, in making the submission, was limited in the material to which he could refer by reason of the agreement reached and did not have the opportunity to refer to the differing views in the affidavits of Mag. Florian Haugeneder and the legal opinion from Dr. Paul Oberhammer and Dr. Walter H. Rechberger. That is material before the court on the application for the adjournment and hence it appears to me that DPTG should be given an opportunity to consider whether it wishes to make any additional submission based on that material and in the context of the approach set out in this judgment prior to my taking a final decision on the adjournment application. In accordance with this decision, any assessment of any further submissions will not involve this court in resolving disputes between the experts on questions of Austrian law or even determining the relative strengths of the differing opinions. It will be confined to a summary or "brief" consideration as put by Staughton L.J.

[47] I also consider that there may be additional factors which will be relevant to a judge exercising his or her discretion under article 36(2) which will vary, having regard to the facts of the case. I have had regard to the fact that the proceedings in Austria were commenced within a short time of the finalising of the corrected partial award. Also, that the Austrian proceedings have been pursued expeditiously and preliminary hearings have already taken place before the Court of First Instance. Finally there is an overlap between some of the grounds relied upon by TPSA in the Austrian proceedings and in this application which the Austrian courts may be better placed to resolve. In such circumstances, in my judgment, I should adjourn the decision of this court on enforcement if satisfied that TPSA has demonstrated that it has reasonable grounds or a seriously arguable case for the setting aside of the partial award in the Austrian proceedings. Nothing turns on the different formulation of the criteria.

[48] There are two further issues which were fully argued before me and which would become relevant in the event that I determine that I should grant an adjournment pending the determination of the Austrian proceedings. I propose setting out my conclusions on them now.

[49] First, DPTG, in reliance upon the *IPCO (Nigeria) v. Nigerian National Petroleum* [2008] EWCA Civ 1157, [2009] 1 All E.R. (Comm.) 611,

submitted that even if I decide to adjourn the decision on the application for enforcement of the partial award, by reason of the fact that TPSA, in the arbitration, had acknowledged that there is money due to DPTG pursuant to the revenue sharing clause, and the dispute only related to the amount, that this court should now make an order for enforcement of part of the partial award. This was referred in the judgment in *IPCO (Nigeria) v. Nigerian National Petroleum* as "partial enforcement".

[50] The factual basis of the submission is that the arbitral tribunal, at para. 214 of its partial award, records the response of TPSA to the claim of DPTG as, *inter alia*, to:-

> "(c) Reject all principal claims which DPTG submitted with regard to the accounting periods November, 1999 to June, 2004 that are
> - above the principal amount of DKK 313, 490,838 (in words: three hundred thirteen million four hundred ninety thousand eight hundred thirty-eight Danish Kroner) in the aggregate; or ..."

DPTG submits that having regard to such acknowledgement recorded in the partial award, this court may and should now give leave to enforce part of the partial award even if it adjourns its decision on the enforcement of the balance of the partial award.

[51] Section 23(1) of the Arbitration Act 2010 is relevant to this issue as it governs the nature of the order to be made by the High Court when it gives leave to enforce an award pursuant to article 35 of the Model Law. It provides:-

> "An award (other than an award within the meaning of section 25) made by an arbitral tribunal under an arbitration agreement shall be enforceable in the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and where leave is given, judgment may be entered in terms of the award."

An award within the meaning of s. 25 is one rendered pursuant to the Washington Convention and does not include the partial award.

[52] Accordingly, where the court gives leave to enforce an award pursuant to article 35, it then may (and normally will) enter a judgment "in terms of the award". This is the mechanism by which the award is enforced in Ireland. If leave is ultimately given to enforce in these proceedings, then judgment will be entered in favour of DPTG against TPSA "in terms of the award".

[53] The Irish court, as the enforcing court, is limited to entering judgment "in terms of the award". In my judgment, the "award" for the

purposes of this provision is the order made by the arbitral tribunal. The partial award is a reasoned award running to 1050 paragraphs. It is only in the last of these that it makes its award and "orders as follows". A similar view was taken in relation to the court's jurisdiction being limited to enter judgment "in terms of the award" pursuant to a similar provision in the English legislation at para. 18 of the judgment of Tuckey L.J. in the *IPCO (Nigeria) v. Nigerian National Petroleum* [2008] EWCA Civ 1157, [2009] 1 All E.R. (Comm.), upon which counsel for DPTG relies.

[54] Insofar as s. 23(1) of the Act of 2010 permits this court to enter judgment "in the terms of the award", it is to enter judgment for an amount which the partial award, on its face, directs TPSA to pay to DPTG. The dispositive part of the corrected partial award directs the payment of specified money sums under five separate headings, for principal, interest and costs. If DPTG was now seeking an order for the enforcement of one of those specified amounts, I am satisfied that the court could give leave for enforcement of that part of the partial award and enter judgment for one or more of the amounts specified and at the same time adjourn its decision on the application to enforce the remainder of the amounts awarded. However, that is not DPTG's application.

[55] I have noted that in the *IPCO (Nigeria) v. Nigerian National Petroleum* [2008] EWCA Civ 1157, [2009] 1 All E.R. (Comm.) 611, the Court of Appeal was prepared to look beyond the actual formal dispositive part of the award for payment of a total sum and to have regard to the summary specifying the individual amounts awarded to *IPCO* at para. 29.1 of the award under each head of claim. The dispositive part of the award ordered the payment of a single sum of $152,728,986.4355 being the total of the individual amounts referred to at para. 29.1. The Court of Appeal upheld a decision to enforce a partial award being the amounts awarded in relation to claims 2 and 3 in the summary at para. 29.1 and to adjourn the decision on enforcement of the amounts ordered to be paid in relation to the remaining claims.

[56] If this court were to follow that approach, it might be permissible to have regard to the breakdown of the total amount for principal of DKK1,998,422,812 set out at para. 912 of the partial award as corrected under N912 in the corrected award. It is unnecessary for the purposes of this application to determine whether this court, as enforcing court, could pursuant to s. 23(1) of the Act of 2010 enter a judgment for only one or more of the figures set out at N912 without entering judgment for the balance. I propose leaving that issue for decision on an application where it is material to the facts. The part of the partial award which counsel for

DPTG submits should now be enforced and for which judgment would have to be entered is not an amount which appears in the table at N912. It is an amount recorded by the arbitral tribunal as implicitly not in dispute. However, there is no order of the arbitral tribunal in the partial award separately directing the payment of DKK313,490,838, such that any judgment in that amount could be considered a judgment "in terms of the award" for the purposes of s. 23(1) of the Act of 2010.

[57] Accordingly, I have concluded that this court does not have jurisdiction to give leave to enforce that part of the partial award in respect of which DPTG contends there is no contest.

[58] The second consequential issue is whether the court should award security if it determines to grant an adjournment of its decision on enforcement pending determination of the Austrian proceedings.

[59] In my judgment, if I grant an adjournment, this is a case in which there should be an order for security. As already indicated, my present view on the submissions made and materials considered is that TPSA has adduced evidence of reasonable grounds or a seriously arguable case in favour of the setting aside of the partial award. However, I am also aware, from a consideration of the affidavit of Mag. Florian Haugeneder, albeit without consideration of the content of the joint opinion referred to, that there exists a joint opinion from two distinguished Professors, "that no good legal basis exists for setting aside the award". In my judgment, the evidence which I have considered does not permit me to conclude that the partial award is manifestly invalid as that term was used by Staughton L.J. in *Soleh Boneh v. Uganda Govt.* [1993] 2 Lloyd's Rep. 208, and hence I should consider the question of security. The period to which the award relates, the duration of the arbitration and the response of TPSA as recorded at para. 214 of the partial award, the timing of proceedings in Austria and the nature of TPSA's assets in this jurisdiction, lead me to a conclusion that there should be security.

[60] The solicitor for DPTG in this jurisdiction, in his affidavit delivered on the 23rd February, 2011, states that the assets of TPSA in this jurisdiction are monies receivable by it for "telephone traffic". The then estimate of experts retained by DPTG was that the net sum receivable was in excess of €3.3 million. He also refers to the transfer of assets by TPSA from the Netherlands. Dr. Aschauer, in a subsequent affidavit, does not appear to dispute either the nature of the assets nor the estimate given. Rather, he makes the point that it is a very small sum relative to the principal amount of the partial award, and that DPTG would be fully compensated by the payment of interest.

[61] Having regard to the estimate and nature of the assets against which DPTG may ultimately seek to enforce the award if successful in this application and the timescale of the decision of the Court of First Instance in Vienna, either at the end of this year or early next year, if an adjournment is granted, I would propose ordering security in the initial sum of €1.5 million. I would also propose granting liberty to apply in relation to the continuation of the adjournment pending the determination of any appeal and/or for further security in the event that decision of the Court of First Instance in Vienna is adverse to TPSA. I will also hear the parties on the nature of any security to be given.

[*Reporter's note*: On the 15th December, 2011, the Court of First Instance in Vienna rejected the respondent's application to set aside the partial award. The respondent appealed the rejection. The dispute and Austrian proceedings were settled in January, 2012. On the 2nd February, 2012, the applicant discontinued the Irish proceedings.]

Solicitors for the applicant: *Dillon Eustace.*

Solicitors for the respondent: *Arthur Cox.*

David Boughton, Barrister