Neutral Citation Number: [2014] IEHC 115

THE HIGH COURT

COMMERCIAL

[2013 No. 34 MCA]

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 1998

AND IN THE MATTER OF SECTION 41 OF THE ARBITRATION ACT 1954 AND IN THE MATTER OF SECTION 7 OF THE ARBITRATION ACT 1980 AND IN THE MATTER OF SECTION 41 OF THE ARBITRATION ACT 1998 AND IN THE MATTER OF ORDERS 56 AND 56A OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

YUKOS CAPITAL S.A.R.L.
APPLICANT

AND

OAO TOMSKNEFT VNK (OTKYTOYE AKTSIONERNOYE OBSHCHESTVO *"TOMSKNEFT"* VOSTOCHNAYA NEFTYANAYA KOMPANIA)

RESPONDENT

JUDGMENT of Mr. Justice Kelly delivered on the 13th day of March, 2014

Introduction

1. This is the respondent's application to set aside an order of Peart J. of 8th February, 2013, granting the applicant leave to serve these proceedings outside the jurisdiction. The order is sought pursuant to O. 12, r. 26 of the Rules of the Superior Courts.

2. The respondent also seeks an order pursuant to the same rule or the inherent

jurisdiction of the court setting aside the order of Peart J. which dispensed with the requirement for personal service of the proceedings and which granted leave to effect substituted service on the respondent.

Background

3. These proceedings seek (pursuant to s. 7 of the Arbitration Act 1980 and s. 41 of the Arbitration Act 1954) the enforcement in this State of an arbitral award made by the International Court of Arbitration of the International Chamber of Commerce in New York City on 12th February, 2007.

4. Alternatively, an order is sought pursuant to s. 14 of the Arbitration (International Commercial) Act 1998 and Article 35 of the UNCITRAL Model Law (to which effect is given in Ireland by s. 4 of the Arbitration (International Commercial) Act 1998) enforcing the award in the State in the same manner as if it were a judgment of this Court. Judgment is sought in respect of the amounts dealt with in the award which are:-

(a) 3,838,794,521 RUR;

(b) 2,067,164,932 RUR;

(c) 1,348,727,671 RUR;

(d) USD$153,622;

(e) USD$121,603.28; and

(f) GBP£52,964.84.

The Parties

5. The applicant is a Luxembourg company which was incorporated on 31st January, 2003. The respondent is a Russian open joint stock company. It is located at Burovikov Street, Tomsk Region, Strezhevoi in Russia. It is wholly owned jointly by OAO Rosneft through Rosneft's subsidiaries and 50% by OAO Gazprom through Gazprom subsidiaries. Rosneft is one of the biggest international oil companies in the world with its majority shareholding owned by the Russian Federation. Gazprom is a large global energy company employing over 400,000 people and accounting for 15% of

global gas output.

The Loans

6. The award was made in respect of three loans made by the applicant to the respondent.

7. The first loan is the subject of an agreement made on 20th July, 2004, with an addendum to that agreement of 22nd November, 2005. The agreement was for a total amount not exceeding 2.3 billion RUR.

8. The second agreement was dated 27th July, 2004, together with an addendum of 22nd November, 2005 and was for a total amount not exceeding 1.24 billion RUR.

9. The third agreement was for a sum not exceeding 810 million RUR and was made on 4th August, 2004, with an addendum of 22nd November, 2005.

10. The applicant advanced the principal sums provided for in those agreements to the respondent. The total sum paid was 4,350,000,000 RUR.

11. The applicant contends that the respondent defaulted on the repayment of the loan, resulting in a demand being made in December 2005 for repayment of the total principal sums.

12. In the absence of payment of those monies, the applicant filed a request for arbitration in respect of the loans with the International Secretariat of the ICC International Court of Arbitration (the ICC). The applicant's entitlement to make such a request derived from clause 5.1 of each of the loans as amended by the addendum agreements of 22nd November, 2005.

13. Under the addendum agreements, the original Article 5.1 was amended and restated so as to provide for any dispute to be finally resolved by arbitration in accordance with the then current Rules of Arbitration of the ICC. The addenda also provided that judgment on the award might be entered in any court having jurisdiction in respect thereof. They went on to provide that the seat of the arbitration would be New York City and that the language of the arbitration would be English. The matters in dispute were to be decided in accordance with the substantive law of the State of New York. The addenda provided that the dispute would be heard and determined by an Arbitral Tribunal consisting of three arbitrators, each of whom

was to be independent and impartial.

The Arbitration

14. In the event, a single arbitrator, the late Dr. Robert Briner, was appointed. In his award, he records that the request for arbitration was sent by the ICC to the respondent on 20th January, 2006, and that on 21st February, 2006, the respondent replied directly to the applicant, acknowledging receipt of the "*legal claim*". The respondent claimed in that letter that the parties had not validly agreed to ICC arbitration.

15. On 13th February, 2006, the applicant proposed that the arbitration should be decided by a sole arbitrator, notwithstanding the provision for a tribunal consisting of three arbitrators. In his award, Dr. Briner stated that the respondent confirmed that it had no objection to the appointment of a sole arbitrator. This was done by letter of 20th March, 2006, signed on behalf of the respondent by a management company.

16. On 2nd June, 2006, Dr. Briner was appointed by the ICC Court of Arbitration as sole arbitrator.

17. As is recited in Dr. Briner's award, on 8th June, 2006, by letter sent by DHL (a courier firm) to the respondent, he invited it (if it so wished) to give further reasons regarding its contention that the ICC Court was not competent to decide on disputes arising under the three loan agreements. No communication was received from the respondent.

18. Dr. Briner also records that on 27th June, 2006, he sent draft terms of reference to the parties with a deadline of 7th July, 2006, for comments. That deadline was extended at the applicant's request to 17th July of that year, and the applicant confirmed that it had no comment. He did not receive any communication from the respondent. A statement of claim was delivered by the applicant on 11th October, 2006. The award recites that the respondent was obliged to file a reply by 8th November, 2006, but that none was received from it.

19. The award records that the parties were invited to attend a hearing on 14th December, 2006. The respondent was not represented at that hearing, nor did it send any communication to the arbitrator.

20. On 14th December, 2006, the applicant's case was presented. At the conclusion of that hearing, the arbitrator declared the proceedings closed but that the respondent

would still be authorised to submit its comments on the applicant's documents which were presented at that hearing. A transcript and all documents produced at the hearing were sent to the respondent and a time was fixed for the receipt of its comments. No communication was received from the respondent. The arbitrator twice noted in his award that all communications were sent to the respondent *via* DHL and that according to receipts from that entity, all such communications were received by the respondent.

The Award

21. The arbitrator published his award on 12th February, 2007.

22. The arbitrator first stated his conclusions on the question of jurisdiction. He concluded that the addenda on 22nd November, 2005 had been validly entered into and bound the parties. Therefore he, as sole arbitrator, had jurisdiction to decide the dispute under the ICC Rules and to apply the substantive law of the State of New York, USA.

23. He held that having agreed that the dispute should be decided by a sole arbitrator, and after having declared in its correspondence that the addenda were not valid and binding and that the dispute, therefore, should not be heard under the ICC Rules, the respondent chose to no longer participate in the arbitration. Despite that failure to participate, he went on to say that in international commercial arbitration, default by a party does not constitute an admission of liability and does not automatically validate the arguments of a claimant. He held that an arbitral tribunal has to examine the merits of the claimant's legal and factual arguments without going so far as acting as advocate for the defaulting party. Having adopted that approach, he came to the conclusion that the applicant was entitled to repayment of the principal advanced under the loans and to simple interest to the date of the award to be calculated in accordance with the terms of the loans. He also held that the applicant was entitled to demand the immediate repayment of the principal amount on the loans on 1st December, 2005, and was also entitled to penalties to be calculated in accordance with clause 3.2 of the loans from 1st December, 2005. The award also dealt with the payment of fees, expenses, costs and post-award interest.

24. It is common case that the respondent has not paid the award. The applicant now seeks the recognition and enforcement of the award in this jurisdiction.

25. The applicant contends that having regard to the provisions of the New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, s. 7 of the Arbitration Act 1980, and s. 41 of the Arbitration Act 1954, or, in the alternative, s. 14 of the Arbitration (International Commercial) Act 1998, this Court is obliged to recognise and enforce the award unless the respondent can establish the existence of one or more of the grounds upon which the Court is entitled to refuse recognition and enforcement.

26. The respondent contends that before one ever gets to consider the substantive relief sought in the proceedings, the question of this Court assuming jurisdiction to hear the matter must first be decided.

27. Before dealing with that, I ought to sketch out briefly the rather unsuccessful attempts that have been made to date by the applicant to enforce the award in suit.

The Russian Attempt

28. The applicant filed an application with the Tomsk Regional Arbitration Court in the Russian Federation (the Tomsk Court) to have the award recognised and enforced there.

29. The respondent objected to that application on a series of grounds. They included an alleged improper notification of the hearing with the consequent denial of the opportunity to present its comments; the invalidity of the addenda; non-conformity of the arbitration body with the agreement of the parties; failure on the part of the arbitrator to apply the substantive law agreed by the parties; failure by the applicant to conform to the deadline for the enforcement of the arbitral award under the legal code of the Russian Federation, and finally, that recognition and enforcement would be contrary to the public policy of the Russian Federation. Most if not all of these objections relied upon Article V of the New York Convention as constituting grounds upon which enforcement ought to be refused.

30. On 7th July, 2010, the Tomsk Court refused to recognise and enforce the award. It held in favour of the respondent on its argument of improper notification of the arbitral hearing and also on the basis that it would be contrary to public policy to enforce the award.

31. An appeal was taken by the applicant to the West Siberian Circuit Federal Arbitration Court (the Russian Appeal Court). The applicant's contention was that the Tomsk Court had reached the wrong conclusion on the facts and evidence presented in finding that the respondent had not had the opportunity to submit its comments in

the arbitration and that it was also wrong in concluding that recognition or enforcement of the award would be contrary to the public policy of the Russian Federation.

32. On 27th October, 2010, the Russian Appeal Court upheld without variation the decision of the Tomsk Court.

33. The applicant continues to argue that the Russian decision holding that the respondent did not receive adequate notice of the proceedings runs directly contrary to the arbitrator's statement in the award that he sent all communications to the respondent directly by DHL and that, according to the DHL receipts, all such communications were received by the management company as well as directly by the respondent. The applicant also contends that insofar as the Russian courts held that enforcement of the award would be contrary to Russian public policy, that it has been widely recognised in the international community that the Russian Government's campaign against the applicant's parent company, Yukos Oil, is politically motivated and that the Russian courts are not impartial in these matters.

The French Attempt

34. On 9th July, 2010, the applicant submitted an application to the Tribunal de Grande Instance of Paris seeking recognition and enforcement of the award in that jurisdiction. An order to that effect was granted on 20th July, 2010.

35. The respondent appealed to the Paris Court of Appeal on 22nd February, 2011.

36. Four grounds were relied upon in support of that appeal. They were:-

> (a) that as the respondent owned no assets in France, the applicant had no proper interest in taking legal proceedings there;
>
> (b) that the arbitrator lacked jurisdiction because the addenda were invalid;
>
> (c) that the respondent had not been provided with all relevant documents exchanged during the arbitration; and
>
> (d) that the award ran counter to international public policy.

37. On 22nd November, 2012, the applicant applied to the Paris Court of Appeal to

have the original order upheld.

38. On 15th January, 2013, the order of the Tribunal de Grande Instance was overturned on appeal.

39. The Paris Appeal Court rejected the application for recognition and enforcement holding that the respondent's procedural rights had not been respected because of a failure to provide it with all relevant documents exchanged during the arbitration. The basis for this, apparently, was that the arbitrator had failed to retain the DHL receipts proving that the various communications had been received by the respondent. The ground relied upon concerning the respondent's lack of assets in France was rejected and the other grounds were not addressed.

40. An appeal to the Cassation Court has now been taken and a result is awaited.

The Singapore Application

41. The applicant has also applied for the enforcement of the award in Singapore.

42. That application was coincident with the swearing of the first grounding affidavit to launch the proceedings in this jurisdiction (8th February, 2013).

Arbitration Awards

43. The governing law on arbitration in this jurisdiction is now the Arbitration Act 2010. Section 4(1) of that Act repealed the Arbitration Acts 1954 – 1998. However, s. 4(2) provides:-

> *"Subject to section 3, the repeal of the Acts referred to in subsection (1) shall not prejudice or affect any proceedings, whether or not pending at the time of the repeal, in respect of any right, privilege, obligation or liability and any proceedings taken under those Acts in respect of any such right, privilege, obligation or liability acquired, accrued or incurred under the Acts may be instituted, continued or enforced as if the Acts concerned had not been repealed."*

44. The Act of 2010 does not apply to arbitrations commenced prior to 8th June, 2010, and consequently this case falls to be governed by the Arbitration Act 1980 (the 1980 Act).

45. The purpose of the 1980 Act was to give effect to the New York Convention on the

Recognition and Enforcement of Foreign Arbitral Awards (the Convention).

The 1980 Act

46. Part III of the 1980 Act provides the basis for the enforcement of a Convention Award in this State. The Convention is set out in the first schedule to the 1980 Act.

47. Section 7 provides that an award shall be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of s. 41 of the principal Act i.e. the Arbitration Act 1954.

48. Article III of the Convention provides:-

> *"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*

49. Article V of the Convention which deals with the recognition and enforcement of an arbitral award provides as follows:-

> *"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> > *(a) The parties to the agreement referred to in article II were, under the law applicable to them, 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*
> >
> > *(b) 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; or*
> >
> > *(c) 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; or

(d) The composition of the arbitral authority 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

(e) The 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

50. Section 9(1) provides that:-

"Enforcement of an award shall not be refused otherwise than pursuant to the subsequent provisions of this section."

The remainder of s. 9 sets forth the rules governing the refusal of enforcement which largely mirror what is contained in Article V of the Convention.

51. Section 9 of the 1980 Act provides a very restricted basis for refusing enforcement of a Convention Award. Refusal of recognition and enforcement can only be by reference to what is set forth at ss. 9(2) and (3) of the 1980 Act which reflect, as I have said, what is contained in Article V of the Convention. Support for this restrictive approach is to be found in the judgment of MacMenamin J. in *Kastrup Trae-Aluvinduet A/S v. Aluwood Concepts Ltd.* [2009] IEHC 577, where he held that the grounds set out in s. 9 of the 1980 Act are exhaustive.

52. Clearly, the principal purpose of Article V of the Convention was to ensure that national courts would not be able to review the substance of an arbitrator's findings on the merits.

53. Should the court get to the stage where it has to consider the substantive application to enforce the award, it will have no discretion but to do so unless it is satisfied that the respondent has proved one or other of the matters which are specified in s. 9 of the 1980 Act.

54. But this application is not concerned with such matters. This is a respondent's application which seeks to persuade me that the exorbitant jurisdiction which has been invoked successfully by the applicant in obtaining the order of Peart J. should not stand.

55. The applicant contends that in the event of the respondents succeeding on this application, it amounts to nothing more than, in effect, a refusal by this Court to enforce the award on grounds other than those contemplated by s. 9 of the 1980 Act and Article V of the Convention. That, it is said, is to act in a manner which is inconsistent with the entire spirit, purpose and express terms of the Convention. I do not believe this to be correct.

56. If the respondent persuades me that the order of Peart J. ought to be set aside, it is a mischaracterisation of that success to describe it as a refusal to enforce the award. It is merely a finding by the court that there is no proper basis for the court exercising its exorbitant jurisdiction over the respondent.

The Statutory Mechanism

57. The long title to the 1980 Act makes it clear that it was enacted to enable effect to be given to the Convention. The legislature decided on the mechanism that would be employed to bring about that result. It followed the normal dualist approach of this State.

58. The legislature did not legislate in the 1980 Act so as to enable an applicant to institute proceedings as of right against an entity or person normally resident or domiciled abroad. It would have been open to the legislature to do that but it chose not to. Thus, the implementation of this Convention differs from the way in which the legislature implemented the obligations arising under the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Those obligations were given effect to in this country by the

Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988. That Act was subsequently repealed by the Jurisdiction of Courts and Enforcement of Judgments Act 1998, s. 5 of which provides that the Brussels Convention shall have force of law in the State and that judicial notice shall be taken of it. One of the major practical effects of these Acts was to dispense with the necessity of obtaining leave of the court pursuant to O. 11 of the Rules of the Superior Courts in order to issue and serve an originating summons on a defendant out of the jurisdiction. An entitlement to so proceed arises if the claim made by a summons or other originating documents is one which, by virtue of the Convention, is one that the court has power to hear and determine and, of course, provided that no proceedings between the parties concerning the same cause of action are pending in another contracting State.

59. In implementing the Convention as it did, the legislature did not attempt to dispense with the necessity to obtain leave to serve out of the jurisdiction in a case where the respondent is not normally resident within it.

60. Such leave is precisely what the applicant sought here by applying for the order which it obtained from Peart J. Given this statutory scheme it follows that, before the court ever proceeds to consider the merits of the application to enforce this award, it must be satisfied that the relevant provisions of O. 11 have been met. Peart J. was so satisfied on the application made to him *ex parte*. But any such application is susceptible to challenge *inter partes* pursuant to the provisions of O. 12, r. 26 of the Rules of the Superior Courts. This judgment is concerned with such a challenge.

61. In the case of a respondent normally resident abroad it is necessary for an applicant who seeks to enforce an award to obtain leave of the court pursuant to Order 11. That is a precondition to an application for enforcement being considered on its merits. A failure to persuade the court that the provisions of O. 11 have been met cannot be viewed as a wrongful refusal by the courts of this State to implement the obligations assumed under the Convention. This was a large part of the case made by the applicant.

62. It is perhaps a little surprising that the applicant sought to make this case. Most legal systems require that, preliminary to recognising and enforcing a foreign award, there must be *in personam* jurisdiction established.

63. Nobody suggests that the United States of America is in breach of its Convention obligations by insisting that jurisdiction be established over a defendant before

considering an application to enforce an award.

64. For example, in *Glencore Grain Rotterdam RBV v. Shivnath Rae Harnarain Co.* 28 F. 3d 114, the United States Court of Appeals (Ninth Circuit) had to consider the position of a Dutch corporation seeking to enforce a Convention award against an Indian rice exporter arising from a contract dispute. The United States District Court dismissed the application for lack of personal jurisdiction and the Dutch corporation appealed. The judgment of the appeal court was delivered by Trott J. Under the heading *"The Convention Does Not Abrogate the Due Process Requirement That Jurisdiction Exist Over the Defendant's Person or Property*", he said this:-

> *"Before considering Glencore Grain's arguments for the existence of jurisdiction over Shivnath Rai, we feel it necessary to address briefly Glencore Grain's intimation that the FAA contemplates reduced jurisdictional requirements over a defendant in suits to confirm arbitral awards. For the reasons stated below, we find this position without merit.*
>
> *The Convention and its implementing legislation have a pro-enforcement bias, a policy long-recognized by the Supreme Court:*
>
> > *'The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'*
>
> *The mandatory language of the Convention itself and of the FAA reflects this partiality and leaves the district courts with 'little discretion'. Article III of the Convention is illustrative: 'Each Contracting State shall recognize arbitral awards as binding' without creating conditions or procedures more onerous than those applied to domestic arbitration awards. Similarly, the FAA instructs that a federal court 'shall confirm the award unless it finds one of the grounds for refusal…of recognition or enforcement of the award specified in the…Convention.'*
>
> *In light of this mandate to confirm awards, Glencore Grain seems to find significance in what the Convention and the FAA do <u>not</u> say: (1) neither*

the Convention nor its implementing legislation expressly requires personal jurisdiction over the party against whom confirmation is sought; and (2) lack of personal jurisdiction over the defendant in the state where enforcement is sought is not among the Convention's seven defenses to recognition and enforcement of a foreign arbitration award. We do not.

…Thus, it is not significant in the least that the legislation implementing the Convention lacks language requiring personal jurisdiction over the litigants. We hold that neither the Convention nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards"

65. Similarly, in *First Investment Corporation of Marshall Islands v. Fujian Mawei Shipbuilding Limited* 703 F. 3d 742, the plaintiff, a Marshallese Corporation sought enforcement of a Convention Award against a group of Chinese companies. Enforcement had already been denied in China.

66. The Court of Appeals (Fifth Circuit) pointed out that when a foreign corporation is forced to appear in the United States to defend itself against a claim, it is entitled to the protection of the due process clause. It held:-

"Even though the New York Convention does not list personal jurisdiction as a ground for denying enforcement, the Due Process Clause requires that a court dismiss an action, on motion, over which it has no personal jurisdiction. Because the New York Convention, through its implementing legislation, is an exercise of presidential and congressional power, whereas personal jurisdiction is grounded in constitutional due process concerns, there can be no question that the Constitution takes precedence. Congress could no more dispense with personal jurisdiction in an action to confirm a foreign arbitral award than it could under any other statute."

67. In dealing with the earlier decision in *Glencore Grain*, the Court of Appeals said:-

"The Glencore Grain court provided the most complete analysis for why suits under the New York Convention are still constrained by personal jurisdiction. As here, the plaintiff in that case argued that, because personal jurisdiction was not listed as one of the New York Convention's seven defenses to recognition and enforcement of a foreign arbitral award, dismissal for lack of personal jurisdiction was improper. The court rejected that argument as misunderstanding a court's obligation to have

> *jurisdiction over both the character of the controversy and the parties… it was irrelevant that the New York Convention and its implementing legislation lacked an explicit personal jurisdiction requirement. ('We hold that neither the [New York] Convention nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards.')."*

68. Thus, in the United States, jurisdiction must be found to exist before enforcement can be considered. It is also necessary in England in certain circumstances.

69. Likewise in this State, jurisdiction must exist before enforcement can be considered. Jurisdiction must always exist before substantive relief can be considered but it does not feature as an issue in respect of defendants within the State. Defendants without the State do raise such an issue and jurisdiction must be asserted.

70. This question is also discussed by Gary Born, a recognised expert in the field of international commercial arbitration. At p. 2399 of his book *International Commercial Arbitration* Vol. 2, he says this under the heading:-

> *"Jurisdiction objections to recognition or enforcement of foreign arbitral award*
>
> *If neither of the parties to an arbitration, nor the substance of the dispute, has any connection with the particular national forum, jurisdictional issues may arise in seeking to recognise and enforce a foreign arbitral award in that forum. In many states, national courts are unable to exercise jurisdiction unless a defendant (or, in enforcement actions, its assets) has sufficient contacts with the State in question. Indeed, a State's assertion of judicial jurisdiction over parties that had no contacts with the State would raise significant international law issues."* (My emphasis)

71. On p. 2400, he writes that seeking to enforce an award in a jurisdiction where the award debtor has no assets "would involve an arguably exorbitant exercise of jurisdiction, which the Convention's drafters may not have intended to require. Although there is scant authority on the issue, there is a substantial argument that the Convention's requirement that contracting States recognise foreign arbitral awards should be interpreted in light of, and not inconsistently with, customary jurisdiction or limitations on the judicial powers of contracting States." (My emphasis)

72. Whatever about the due process considerations alluded to in the United States decisions (which have no application here) in this country the legislature saw fit to have Ireland honour its Convention obligations in the manner provided for in the relevant legislation.

73. Given those statutory provisions I hold that it is necessary that the court must, in the case of a defendant resident outside the jurisdiction, satisfy itself that it should assume jurisdiction by reference to the prescriptions of O. 11 of the Rules of the Superior Courts before considering the substantive case. In the case of an application to enforce a Convention award, this approach is not inconsistent with Convention obligations.

74. In coming to this conclusion I have not overlooked Article III of the Convention which prohibits the imposition of more onerous conditions on the enforcement of Convention awards than apply to domestic award enforcement. I do not regard the establishment of in personam jurisdiction as falling foul of this stipulation. As I have already pointed out the court must always have jurisdiction before considering the merits of any case. That jurisdiction may be one acquired ordinarily or exorbitantly. That is so in the enforcement of all arbitral awards whether Convention ones or not.

75. I do not find relevant to this issue some cases cited dealing either with forum non conveniens or alleged Article III infringements such as security for costs requirements (e.g. Gater Assets v. Nak Naftogaz Ukrainy [2007] EWCA 98).

76. I now turn to a consideration as to whether the applicant has met what is required under the relevant provisions of Order 11.

Order 11

77. The order of Peart J. of 8th February, 2013, demonstrates that he was of the view that the applicant's case fell within the class of action set out in O. 11, r. 1(q) and (s) of the Rules of the Superior Courts. It was on that basis that he gave leave to issue and serve an originating notice of motion against the then intended defendant.

78. The order is clearly incorrect insofar as it refers to the provisions of Order 11, rule 1(s). That particular sub-rule is applicable only in proceedings brought to enforce an interim measure issued by an arbitral tribunal having its seat outside the jurisdiction.

This application does not seek to enforce an interim measure. I set aside the order insofar as reliance was placed on sub-rule (s) of Order 11, rule 1. This aspect of the matter was not the subject of any controversy between the parties.

79. Order 11, rule 1 provides that service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the court. The circumstances in which that can be done are then set out *in extenso*. One such circumstance is when the proceedings relate to the enforcement of an award under Part III of the 1980 Act. This is to be found, for example, in sub-rule (l) of the 1986 amendment to the Rules of the Superior Courts introduced by S.I. No. 15 of that year. There have been a number of subsequent amendments to the relevant provisions dealing with such arbitrations. In S.I. 316 of 2010, the rules were amended by the substitution in O. 11, r. 1 of paras. (k), (l), (q) and (s). The new paras. (l) and (q) read respectively:-

> *"(l) the proceeding relates to the enforcement of an award made by an arbitral tribunal, having its seat outside the jurisdiction or of the pecuniary obligations imposed by such an award;"; and*
>
> *"(q) the proceeding is brought to enforce any foreign judgment;"*

80. In applying to Peart J., the applicant opted to rely upon sub-rule (q) although sub-rule (l) seems the more appropriate. (Indeed, it was also sub-rule (l) which dealt with Convention awards under S.I. 15 of 1986). In any event, whether it be (l) or (q) what is not in doubt is that there is jurisdiction conferred on the court to permit service out of the jurisdiction in respect of an application to enforce a Convention award.

81. Two further provisions of O. 11 fall for consideration. They are of general application to all applications which fall to be made under the order.

82. Order 11, rule 2 provides:-

> *"Where leave is asked from the Court to serve a summons or notice thereof under rule 1, the Court to whom such application shall be made shall have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence, and particularly in cases of small demands where the defendant is resident in England, Scotland, or Northern Ireland, to the powers and jurisdiction, under the statutes establishing or regulating them, or of the courts of limited or local*

jurisdiction in England, Scotland or Northern Ireland respectively."

83. Sub-rule (5) provides:-

> *"Every application for leave to serve a summons or notice of a summons on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not, and where leave is asked to serve a summons or notice thereof under rule 1 stating the particulars necessary for enabling the Court to exercise a due discretion in the manner in rule 2 specified; and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."*

The Court's Approach

84. In International *Commercial Bank Plc v. Insurance Corporation of Ireland* [1989] I.R. 453, Costello J. said:-

> *"The rule in this country is that Irish courts have jurisdiction in cases involving a foreign element only when it can be said that the defendant has been duly served with the proceedings, so that it is necessary to look to the law relating to the circumstances in which a summons can be served on a defendant out of the jurisdiction to decide whether the court has jurisdiction to try the claim."*

85. Order 11, rules 1(a) – (s) enumerate the circumstances in which proceedings may be served out of the jurisdiction. That list is an exhaustive one. So it is necessary for an applicant seeking an order under the rule to place himself squarely within one of the categories there specified. But even if one falls within one such category, as is undoubtedly the case here, that does not create an entitlement as of right to succeed in an application for leave to effect service out of the jurisdiction. One must satisfy the court that the other considerations dealt with in O. 11 have been met.

86. The decision of the Supreme Court in *Analog Devices BV v. Zurich Insurance Company* [2002] 1 I.R. 272, deals with this important jurisdiction. In the course of his judgment, Fennelly J. said at p. 281:-

> *"When the court grants leave for the service out of the jurisdiction of proceedings, it requires a person, not otherwise within the jurisdiction of our courts, to appear here and to answer the claim of a person made in*

what is for him a foreign court rather than leaving the plaintiff to pursue his remedy against that person in that other jurisdiction. The international comity of the courts have (sic) long required, therefore, that our courts examine such applications with care and circumspection."

87. At p. 282, he said:-

"…I think it must be borne in mind that the issue of jurisdiction is being determined irrevocably and that a foreign defendant is being summoned involuntarily before our courts. Therefore, I believe that, though disputes of fact cannot always be satisfactorily resolved on affidavit, the court must look at the matter carefully. It is not a case where the applicant's allegations must be presumed to be true. The foreign party's affidavit evidence must also be considered."

Given this situation, Fennelly J. indicated that an applicant for leave must show a *"good arguable case"*.

88. Later in the judgment at p. 286, he said:-

"there must be a sound basis for the contention that a party to be served out of the jurisdiction is a proper party... His inclusion must not be a mere device to get a foreign party before the Irish courts."

89. At p. 287 of the judgment, he said:-

"An order granting leave to effect service out of the jurisdiction is a matter of discretion. The court should grant leave only after careful consideration, not only of the existence of grounds upon which the court is empowered to grant leave, but of the appropriateness of the courts of this jurisdiction to try the case. The latinism, 'conveniens', may, as has been pointed out in some of the cases, mislead; the proper translation is not 'convenient', but suitable or appropriate. This is illustrated, in particular, by O. 11, r. 5 of the Rules of the Superior Courts, 1986, which obliges the applicant to state, 'the particulars necessary for enabling the court to exercise a due discretion in the manner in rule 2 specified'. The latter provision obliges the court to 'have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence…'. Rule 5 goes on to lay down a fundamental principle regarding the exercise of what has been stated to be a discretionary power; '…and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this order'.

These provisions, taken together, mean that the applicant must satisfy the court, i.e. has the burden of proving, at the ex parte stage, that Ireland is the forum conveniens. This means, according to Lord Goff of Chieveley in Spiliada Maritime Corporation v. Cansulex Limited [1987] 1 A.C. 460 at p. 480, 'the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice'. Lord Goff had reviewed a range of dicta on the issue, some emphasising the 'exorbitant' character of the jurisdiction and some (older cases) the annoyance and inconvenience for a foreigner at being brought to contest proceedings in England. Lord Goff himself found the word 'exorbitant' to be 'an old-fashioned word which carries perhaps unfortunate overtones'. He also said that the defendant's place of residence may be no more than a tax haven. It seems to me that the dictum of Lord Wilberforce, in Amin Rasheed Corpn. v. Kuwait Insurance [1984] A.C. 50 expresses a correct balance. He said at p. 72:-

'The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense.'

The principal difference between this rule, which concerns the original grant of leave and the application by the second defendant is that, in the latter instance, the burden of proof rests on the moving party." (My emphasis)

90. I turn now to a consideration of whether the applicant has, in the light of all of the evidence, placed itself within the ambit of the relevant provisions of O. 11 so as to justify the order in suit which was granted *ex parte*. At this stage, I have much more evidence before me than was placed before Peart J.

Convenience

91. The provisions of O. 11, r. 2 make it clear that the *"shall have regard to the amount or value of the claim or property affected and to the comparative cost and*

convenience of proceedings in Ireland, or in the place of the defendant's residence".

92. Before the Irish Courts assert jurisdiction over a foreign defendant, they must be satisfied that the case is a proper one in which to do so. One consideration which has to be borne in mind in that evaluation is the comparative cost and convenience of the proceedings in this country.

93. The matter was succinctly dealt with by Fitzgibbon L.J. in *McCrea v. Knight* [1896] 2 I.R. 619, where he said at p. 625 and 626:-

> *"In other words even where service out of the jurisdiction may be allowed, it is not necessary to be allowed, and it ought not to be allowed, unless there is some ground of 'comparative convenience' to guide the discretion of the court to the conclusion that a foreign defendant ought to be brought to Ireland to stand his trial. I cannot limit the meaning of 'convenience'. It means fitness, propriety, and suitableness – each and all three in the general sense."*

94. In applying that test, it seems to me that some assistance can be gleaned from decisions dealing with *forum non conveniens*. Whilst this is not a *forum non conveniens* case, I have found observations from some of the judgments dealing with that topic helpful in my consideration of the evidence on this aspect of the matter.

95. The leading Irish case on the topic is *Intermetal Group Limited v. Worsale Trading Limited* [1998] 2 I.R. 1. In that case, Murphy J. speaking for the Supreme Court held that a dictum of Goff L.J. in *Spiliada Maritime Corporate v. Cansulex Limited* [1987] A.C. 460 which was quoted with approval by Bingham L.J. in *In Re Harrods (Buenos Aires) Limited* [1992] Ch. 72 represented a correct statement of the law in this jurisdiction. This is what Murphy J. said:-

> *"Bingham L.J., (as he then was), delivering a judgment in which Stocker L.J. concurred, explained that his starting point in applying the doctrine of forum non conveniens was the principle formulated by Goff L.J. in Spiliada Maritime Corp. v. Cansulex Ltd. in the following terms:-*
>
> > *'That a stay would only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and*

the ends of justice.' [emphasis added by Bingham L.J.]

Bingham L.J. then went on himself to comment (at p. 124) as follows:-

> *'The words I have emphasised make clear, as does the reference to justice, that a broad overall view must be taken: the primary task is not to decide which forum is advantageous or disadvantageous to any particular party. The court should look first to see what factors there are, taking this broad overall view, which point in the direction of another forum: at that stage it is connecting factors (including convenience, expense, availability of witnesses, governing law, place of residence and place of business) which must be considered. If it is shown that there is some other available forum which prima facie is clearly more appropriate for the trial of the action a stay will ordinarily be granted unless on a consideration of all the circumstances justice requires that a stay should not be granted.'*

Bingham L.J. pointed out (at p. 123) that:-

> *'One cannot decide where a matter should be most appropriately and justly tried without being clear what is to be tried.'*

He then went on to identify the principle which underscored the distinction between the conclusion reached in the High Court and that of the Court of Appeal. He said:-

> *'But I do not think the question should be answered simply by reference to the relief claimed, since in an English action the relief claimed will almost inevitably be framed in English terms, particularly where it is statutory. An English pleader will not claim triple damages or dommage-intérêt, appropriate as such relief may be elsewhere. Thus when the judge answered the question by quoting part of the language of section 459 of the Companies Act 1985 he was unconsciously building in a bias towards the choice of an English forum.'"*

96. Later in his judgment, Murphy J. said:-

"To refuse a stay because it would 'deprive the plaintiff of a legitimate

personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court' is, in my view, too narrow a test. The proper test is as Bingham L.J. said in In re Harrods (Buenos Aires) Limited [1992] Ch. 72 and Blayney J. had anticipated in Doe v. Armour Pharmaceutical Co. Inc. [1994] 3 I.R. 78, the broader principle of justice for both parties. To apply a narrower test might involve refusing a stay on the grounds of relatively minor procedural differences or the perception as to quantum of damages awarded in different jurisdictions."

97. I have also found helpful in considering this aspect of the matter, the views of Fennelly J. in the *Analog Devices* case from which I have already quoted extensively.

98. Apart from the provisions of O. 11, r. 2, an applicant must also satisfy the provisions of sub-rule (5) where the court is enjoined from granting leave to serve out of the jurisdiction unless it is made sufficiently to appear to it that the case is a proper one. In considering that concept of *"proper"*, I also find helpful the jurisprudence which I have already cited.

99. The wording of the relevant rules and the case law which I have quoted lead me to the conclusion that in considering both comparative cost and convenience and propriety, I have to have regard to the interests of both parties to the litigation and not merely the applicant.

Assets and Connection with Ireland

100. It is not unreasonable to assume that the expenditure of time and money on the part of the applicant in seeking to enforce the award is with a view to making a recovery on foot of it. That presumably is why it sought enforcement in the respondent's home country of Russia in the first instance.

101. In the context of considering whether the case is a proper one for this Court to assume jurisdiction, it is equally reasonable to ask what the prospect of recovery against assets within this jurisdiction might be.

102. In the original grounding affidavit, the deponent Mr. Feldman told Peart J. as follows:-

"The respondent may also seek to argue, as it did in France, that it does not have any assets in the jurisdiction against which the applicant could enforce any order. I am advised and believe that, whether or not this is the case, the presence of assets within the jurisdiction is not a

prerequisite for an order of the recognition and enforcement of the award. The respondent may or may not have assets within the jurisdiction. The applicant believes that companies related to the respondent are incorporated in this jurisdiction and that those companies may own or control assets within the jurisdiction. I am advised that in any event, the presence of assets in the jurisdiction is not a requirement for recognition and enforcement of an arbitration award under the New York Convention and/or the UNCITRAL model law."

103. That was the state of the evidence on the *ex parte* application. In response to that assertion, Mr. Vladimir Paltsev, the general director of the respondent said this:-

"9. I am advised that in the affidavit of Mr. Daniel C. Feldman, sworn on 8 February 2013 on behalf of Yukos Capital, Mr. Feldman states, at para. 46, that it is Yukos Capital's belief that companies related to Tomskneft are incorporated in this jurisdiction and that those companies may own or control assets within this jurisdiction. Mr. Feldman does not state the basis for this belief.

10. I have been informed that Yukos Capital previously brought litigation concerning companies called Rosneft International Limited (RIL) and Trumpet (Trumpet) which I understand to be subsidiaries of Rosneft Oil Company (Rosneft). Rosneft is an indirect shareholder of Tomskneft. Tomskneft has no ownership interest in, and no dealings of any kind with, either RIL or Trumpet, and neither of these entities is indebted to, owes any funds to, or holds any assets or property belonging to Tomskneft. I have no knowledge of any other Irish subsidiaries belonging to Rosneft or to any other direct or indirect shareholders of Tomskneft.

11. Because Tomskneft has no assets in or connection with Ireland, and has no interest in, or dealings with, companies with such assets in or connection with Ireland, there is no real prospect of a legitimate benefit to Yukos Capital from these proceedings to enforce the award in Ireland."

104. Earlier in that affidavit, Mr. Paltsev stated that the respondent had no connection with Ireland. He went on to say that there was no connection between Ireland and the award and gave a general description of the business of the respondent. He said:-

"Tomskneft is an oil and gas company. Tomskneft conducts all its business in Russia and in the Russian language, in which its records are maintained. All of Tomskneft's oil and gas production takes place in

Russia and all of Tomskneft's sales are conducted in Russia.

Tomskneft does not have, and has no reason to believe it will in the future have any assets in or connection with Ireland of any kind. Tomskneft does not own any property, either tangible or intangible, in Ireland, has no offices or bank accounts in Ireland, holds no assets in Ireland and pays no taxes in Ireland. Tomskneft is not licensed to conduct business in Ireland, sells no products to purchasers in Ireland, has no subsidiaries or operations in Ireland, has no personnel or agents based in Ireland, maintains no address or telephone number in Ireland, does not solicit business within Ireland and has no other connection with Ireland. I am unaware of any reason for Yukos Capital to believe otherwise."

105. Those averments are fortified by an affidavit sworn by Matthew Slater, a partner in a Washington law firm acting on behalf of the respondent.

106. He says:-

"5. As set out in paras. 5 through 11 of the affidavit of Vladimir Alexandrovich Paltsev, General Director of the respondent, made herein on 23 April 2013, Ireland has no connection with Tomskneft, the award, or the background facts of this case. Tomskneft has no assets – whether actual or prospective – within this jurisdiction, nor does it have subsidiaries within the jurisdiction.

6. At para. 46 of the affidavit of Daniel Feldman sworn on 8th February, 2013, which grounded Yukos Capital's originating motion, Mr. Feldman does not provide contradictory evidence regarding Tomskneft's connection to Ireland, making only the statement that Tomskneft 'may or may not have assets within' Ireland. Mr. Feldman further asserted Yukos Capital's belief 'that companies related to Tomskneft are incorporated in this jurisdiction and that those companies may own or control assets within the jurisdiction', but failed to state the source of his belief and failed to provide any basis on which purported assets of 'related' companies could be accessed by Yukos Capital. Thus, at the 8th April, 2013 hearing before Mr. Justice Kelly, (to admit the case to the Commercial List) counsel for the applicant was compelled to acknowledge (without conceding the point) that 'it may well be that ultimately those assets will not be available to satisfy the award if enforced here'. In fact, Mr.

Paltsev's affidavit establishes that Tomskneft has no interest in any such 'related' company or in other assets in Ireland.

7. The lack of connection with Ireland goes well beyond the fact that Tomskneft has no assets in Ireland. There is, for example, no relationship between the facts underlying this case in Ireland. By way of background, the award at issue concerned certain loan agreements (the 'loan agreements) ostensibly made in 2004 between Yukos Capital and Tomskneft at a time when the parties were under common control, as explained in para. 12 below. The loan agreements are appended as exhibit DCF1, Tabs 3-5 to the affidavit of Mr. Feldman. The loan agreements were to be preformed entirely within Russia. They provided for Yukos Capital to lend Russian rubles from its account in a Russian bank to Tomskneft's account in a Russian bank, and for Tomskneft to make repayment in Russian rubles to Yukos Capital's Russian bank account. The loan agreements were governed by Russian law and provided for dispute resolution before an arbitral body in Russia, to be conducted in the Russian language. While the loan agreements were later purportedly amended to change the dispute resolution provisions (which amendments Tomskneft denies are valid and binding on it) the amendments did not change the place of performance from Russia, nor did they create any connection with Ireland – they purported to provide ICC arbitration in New York, not Ireland."

107. The response to these assertions is rather limp. The applicant appears to accept that there are no assets in Ireland but says that a recognition and enforcement of the award here*"would permit enforcement of the Award against any future assets of the respondent in the jurisdiction, including any debts owed now or in the future to the respondent by any party present in this jurisdiction, during the operative period (12 years) of such order".* (Affidavit of Daniel Feldman of 20th June, 2013).

108. Mr. Feldman goes on to say:-

"It would also be advantageous to the applicant to obtain a judgment recognising and enforcing the Award in keeping with the principles of the New York Convention from the unbiased and internationally respected Irish Court. A judgment or order of the Irish Court may also be enforceable in other jurisdictions."

So, the applicant appears to have moved from a contention made before Peart J. that

the respondent *"may or may not have assets within the jurisdiction"* to accepting that there are no assets within the jurisdiction but hoping (with no real basis for doing so) that at some stage in the future that might not be the case.

109. There are no assets in this State and there is no evidence to suggest that there is any realistic prospect of this. The respondents (and indeed the applicants) lack of any involvement with Ireland appears to be accepted.

110. An additional proposition is now introduced by saying that some advantage would be gained by the applicant in having the award enforced by the "*unbiased and internationally respected Irish Court"*. I will return to this aspect of the matter later.

Lack of Assets

111. I accept that the respondent has no assets within the jurisdiction at present and the best that can be said in favour of the applicant is that it has a forlorn hope based on little or no evidence that at some stage in the future, assets may become available against which execution could take place in this jurisdiction.

112. I am, however, satisfied that the presence of assets within the jurisdiction is not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce a Convention Award. I come to this conclusion having regard in particular to a decision of the Court of Appeal in England.

113. The case is *Tasarruf Mevduati Sigorta Fonu v. Demirel & Anor* [2007] 4 All E.R. 1014.

114. The background to the *Tasarruf* case was that the claimant, which was a Turkish public legal entity, obtained three judgments against the first defendant in the Turkish Courts. The English statutory methods of enforcement and registration of foreign judgments did not apply to Turkey. Accordingly, the claimant had to apply for permission to serve proceedings (which sought to enforce the judgment) out of the jurisdiction. The first defendant applied to set aside that order on the grounds, *inter alia*, that it was a precondition to the exercise of the jurisdiction that there be assets within the jurisdiction. The first defendant did not have any assets in England and therefore, it was said, the English courts had no jurisdiction. At first instance, the judge found that it was not necessary to establish the presence of assets in England and refused to set aside permission to serve proceedings. An appeal was taken against that judgment of Lawrence Collins J.

115. The appeal was dismissed.

116. In the course of his judgment, the Master of the Rolls dealt with the argument which had been made to the effect that jurisdiction to give permission to serve a claim form out of the jurisdiction to enforce a foreign judgment only exists where, at the time when the application is made, there are assets in England and Wales against which the judgment can be enforced or at least where the judgment is otherwise enforceable in England and Wales. He also dealt with an alternative formulation canvassed in the course of the argument to the effect that at the time of the application there must be at least a real prospect of assets within the jurisdiction against which the judgment could be enforced within a reasonable time.

117. In concluding that the presence of assets within the jurisdiction was not necessary in order to find an entitlement to obtain leave to serve out of the jurisdiction, Sir Anthony Clarke M.R. said this.

> *"We would only add three points. The first is that Mr Edward Cohen had considerable difficulty in formulating the restriction which he submits is implicit in the rule. Should it require assets at the date of the issue of the proceedings or at some future date and, if so what? It is not easy to answer these questions, except by saying that it cannot have been intended that the words should be limited.*
>
> *The second point is that we see no reason to limit the jurisdiction of the court. It would, as Mr Lawrence Cohen observes, prevent the giving of permission to serve out in circumstances where there was a belief, hope or expectation that assets belonging to the defendant existed or would or might arrive within the jurisdiction but at the time of the application it was not possible to identify any assets actually within the jurisdiction. Or the claimant may wish to enforce a foreign judgment by compelling a person within the jurisdiction who has the right to call for assets of the defendant outside the jurisdiction to call for such assets.*
>
> *The third point is that there is no reason to give the rule an unnatural construction or to imply restrictions into it. The rule is discretionary so that the court will only grant permission if it is just to do so in all the circumstances of the case. As we see it, it is in connection with the exercise of the general discretion under Rule 6.20 and with the application of 6.21(2A) that the court should have regard to the*

statements of principle in cases like The Hagen."

118. In the light of these authorities, I hold that it is not a precondition to the exercise of the discretion to permit service out of the jurisdiction that the proposed defendant must have assets within the jurisdiction.

119. That said, the Court of Appeal in *Tasarruf* had some useful observations to make on the exercise of the discretion.

Discretion

120. One of the best know English decisions on O. 11 is *The Hagen* [1908] P. 189. In that case, Farwell L.J. said:-

> *"During the present sittings Vaughan Williams L.J. and myself have on more than one occasion had to consider Order XI and we have had many authorities discussed and fully considered by the Court, and the conclusions to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J. in Societe Generale de Paris v Dreyfus Bros. (1885) 29 Ch 239 at 242, that 'it- becomes a very serious question whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked and whether this Court ought, to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country and I for one say, most distinctly that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction'. The second point which we considered established by the cases was this, that if on the construction of any of the sub heads of Order XI there was any doubt it ought to be resolved in favour of the foreigner; and the third is that in as much as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the court in discharging the order even though the party might afterward be in a position to make another application."*

121. In *Tasarruf*, the Court of Appeal considered that dictum and said this:-

> *"In response to the suggestion that some of the statements in the older cases now seem rather old-fashioned or, as someone recently suggested, a sound of distant trumpets, he referred by way of example to Insurance Corporation of Ireland v Strombus International Insurance Co [1985] 2 Lloyd's Rep 138 at 144, where, in the context of a claim for a negative*

declaration of non-liability by insurers, Mustill LJ said that the court should be careful not to bring a foreigner here as a defendant, where no positive relief is claimed against him unless it can be shown that a 'solid practical benefit' would ensue.

That was a very different case from this but we, accept that the court should not automatically exercise its discretion in favour of permitting service out of the jurisdictionunless it is just do so and that it will ordinarily not be just to do so unless there is a real prospect of a legitimate benefit to the claimant from the English proceedings. We see no reason why that benefit should not be indirect or prospective.

Such an approach would we think be consistent with the approach of the court to petitions to wind up unregistered companies to which Arden LJ drew our attention in the course of the argument. In that context it has been held that it is not necessary that the company should have assets within the jurisdiction but the court must be satisfied that there is a reasonable possibility that that the winding up order will benefit the petitioner and the court must have jurisdiction over one or more of those interested in the distribution… Thus, again by way of example, in Banco Nacional de Cuba v Cosmos Trading Corp [2000] BCLC 813 an order was refused because the connection with the United Kingdom was minimal and no benefit to the creditors could reasonably be expected.

Thus a claimant seeking to enforce a foreign judgment by action does not have to show that there are assets in the jurisdiction. To require him to do so would be tantamount to construing the rule as if it were limited in that way. The claimant must show that he has a good arguable case in the action, that is that he has a good arguable case that judgment should be given based upon the foreign judgment. He must in our opinion ordinarily show further that he can reasonably expect a benefit from such a judgment. Otherwise there would be no useful purpose in the proceedings." (My emphasis)

122. It is clear that the Court of Appeal upheld the decision of the High Court in the circumstances alluded to at paras. 38 and 39 of its judgment. There it said as follows:-

"It is to our mind important that this is a case in which a judgment has been obtained in Turkey on the basis of conclusions that Mr Demirel is guilty of fraud. Experience suggests that in such cases, if the findings are

true, it is often difficult to locate a defendant's assets. Indeed this is often the case where judgments are obtained in large amounts. Judgment debtors are often reluctant to advertise the nature and whereabouts of their assets. There is no evidence that that is the true in the present case but it seems to be a real possibility."

123. The factual situation described in this paragraph is very different to what obtains in the present case.

124. In the absence of assets in or likely to be in this State what *"solid practical benefit"* would ensue if this award was enforced?

Other Advantage

125. The answer to that question was given in the affidavit of Mr. Feldman of 20th June, 2013, from which I have already quoted. He said that it would be advantageous to obtain a judgment recognising and enforcing the award in the *"unbiased and internationally respected Irish Court"*.

126. It is difficult to discern what that advantage might be in the circumstances of this case. The applicant has already invoked the jurisdiction of the Russian Courts, being the jurisdiction where the respondent is based. It has animadverted upon the independence and impartiality of such courts. I am not called upon nor do I express any view on that topic whatsoever. But the applicant has also invoked the jurisdiction of the French Courts against whom no such criticism has been made. The French Courts are unbiased and internationally respected and operate within the European Union network of courts.

127. If the applicant had succeeded before the French Courts, it is difficult to see what advantage would be obtained by seeking a similar recognition and enforcement order in this jurisdiction. The fact is, of course, that the applicant has not had success before the French Courts. That failure is very likely to have triggered the current litigation. Success in France would have almost certainly avoided this litigation.

128. Whilst enforcement usually takes place against assets, the seeking of recognition and enforcement of an award in a country where the losing party may have no assets in order to obtain the imprimatur of a respected court upon the award is acceptable. (See *Redfern & Hunter on International Arbitration* para. 11.14 and footnote 15). But having sought and failed to obtain such imprimatur from the French Courts, such failure is, in my view, a matter capable of being taken into account when considering

the exercise of the discretion to permit service out in this country.

129. In *Tridon Australia Pty Limited v. ACD Tridon Inc.* [2004] NSWCA 146, Giles J.A. took the view that there was a discretion not to enforce a declaratory award as a judgment and said as follows:-

> *"Enforcement is a plain word, and means something quite different from a restatement of the effect of the award in the form of a judgment. The summary procedure provided by s. 33 of the Act is a procedure with a purpose, the purpose of enabling the victorious party in an arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award. There has been nothing put forward in this case to suggest any occasion for enforcement of the declarations made in the interim award. They are binding on the parties, and bind them for the balance of the arbitration and beyond that."*

130. In *West Tankers Inc v. Allianz SpA* [2011] EWHC 829, Field J. drew guidance from that decision and said:-

> *"Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award."*

131. Whilst those observations refer to declaratory awards, they do, it seems to me, underscore once again, the necessity to be able to demonstrate some material benefit to be gained by having the award enforced.

132. I am unable to discern the existence of the supposed befit to be gained by the applicant.

A *"Proper"* Case

133. Order 11, rule 5 lays down what Fennelly J. in *Analog Devices* described as a *"fundamental principle"* regarding the exercise of what has stated to be a discretionary power, *"…and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction"*.

134. I have already held that in considering the challenge to an order permitting service out of the jurisdiction, the court is entitled to take into account the interest of both parties to the litigation and not merely the applicant. In the present case, the respondent says that it has already been put to the expense and inconvenience of having to defend proceedings in Russia, France and latterly Singapore. It asks why should it now have to go through the same procedure all over again in this jurisdiction? Given the lack of assets, connection with or involvement in this jurisdiction; the unsuccessful invocation of the jurisdiction of the French Courts to say nothing of the utilisation of the Russian Courts, the respondents contend that an injustice would be done if the court's discretion were to be exercised in permitting the order of Peart J. to stand. All of this renders this case not to be a *"proper"* one for service out to be allowed, it is said.

135. Before expressing my conclusions on that, I have to turn to one other matter which was raised by the applicants. It arose by reference to clause 5.1 of each of the loans.

Clause5.1

136. At para. 13 of the judgment, I have set out, in shorthand, the amendments which were effected to Article 5.1 by the addenda. One amendment was a provision that judgment on the award might be entered in any court *"having jurisdiction in respect thereof"*. The applicant submits that that clause represents a contractual submission to the jurisdiction of the Irish Court.

137. Reliance was placed upon a decision of Kenny J. in *International Alltex Corporation v. Lawler Creations Limited* [1965] I.R. 264, in support of this proposition.

138. I do not accept that this proposition is correct. Neither do I believe that the judgment of Kenny J. is on point. The plain wording of the amended Clause 5.1 recognises that judgment may be entered on foot of the award in any court *"having jurisdiction thereof"*. That begs the very question which I am called upon to decide on this application. The contractual submission relied upon is not a submission to any court but only to one which has jurisdiction. As that is the very issue that is being contested on this application, this line of argument does not avail the applicant.

Conclusion

139. Having regard to what I have set out above, I am of opinion that this is not a

proper case for the exercise of the exorbitant jurisdiction of this Court.

140. The discretion which falls to be exercised must take into account the fitness, propriety and suitableness of the case.

141. It is a case with no connection with Ireland. There are no assets within this jurisdiction. There is no real likelihood of assets coming into this jurisdiction. This is the fourth attempt on the part of the applicant to enforce this award. There is little to demonstrate any *"solid practical benefit"* to be gained by the applicant. The desire or entitlement to obtain an award from a *"respectable"* court has already been exercised in the courts of France and is underway in the courts of Singapore.

142. The respondent has already had to undertake a defence of the proceedings in Russia and in France and has been successful to date in so doing. It would be unjust to require the respondent to yet again defend its position. The respondent should not be forced to come into a third state (Ireland) which is foreign to it and reargue its case again. It is not appropriate for this Court to assume jurisdiction.

143. Accordingly, the order of Peart J. will be set aside. That being so, it is not necessary for me to consider the other reliefs sought.

Result

144. The order of 8th February, 2013, is set aside. The court refuses to assume jurisdiction over the respondent.