

# Kluwer Arbitration Blog

## Sovereign Immunity and Issue Estoppel: English High Court's Latest Decision in the Longstanding Yukos v. Russia Enforcement Saga

Arushie Marwah (Herbert Smith Freehills) · Thursday, December 28th, 2023 · Herbert Smith Freehills

The English High Court (“**Court**”) in *Hulley Enterprises Limited and others v. Russian Federation* [2023] EWHC 2704 (Comm) has recently dismissed a jurisdictional challenge brought by the Russian Federation (“**Russia**”), concluding that the State could not invoke sovereign immunity to resist enforcement of arbitral awards, which were issued in 2014 in favour of the former majority shareholders (“**Shareholders**”) of OAO Yukos Oil Company (“**Yukos**”). Nearly a decade later, these awards, which are now in excess of US\$60 billion, have given rise to a series of enforcement-related legal battles before courts in the Netherlands, the U.S., and England.

This case marks yet another chapter in that story, where the English courts have for the first time determined that issue estoppel can be applied against a State in relation to a determination in a foreign judgment, notwithstanding the Court’s positive duty to give effect to sovereign immunity conferred by the State Immunity Act 1978 (“**SIA**”).

### Brief Background to the Case

Much has been written about the *Yukos* cases since arbitration proceedings were initiated by the Shareholders against Russia in 2005. To provide a brief overview, in 2014, an arbitral tribunal seated in The Hague found that Russia had unlawfully expropriated Yukos’ assets in breach of the Energy Charter Treaty (“**ECT**”) and awarded more than US\$50 billion in damages to the Shareholders.

Russia challenged the awards before the Hague District Court as the seat of the award, claiming *inter alia* that the tribunal did not have jurisdiction over the dispute. In parallel, the Shareholders brought enforcement proceedings before English courts, which Russia contested among other things on the basis of state immunity pursuant to the SIA.

The Hague District Court set aside the awards, which ruling was successfully appealed by the Shareholders and overturned before the Hague Court of Appeal. In response, Russia initiated a cassation appeal on several grounds before the Dutch Supreme Court. In 2021, the Dutch Supreme Court rejected Russia’s appeal on all grounds, except for the ground that the awards were procured by fraud on the tribunal. The Dutch Supreme Court referred the case to the Amsterdam Court of

Appeal to further consider and decide the grounds of fraud but upheld the Hague Court of Appeal's findings on all other bases, including that the tribunal did, in fact, have jurisdiction under the ECT and that there was a valid agreement to arbitrate.

The English proceedings had in the meantime been stayed due to the ongoing Dutch proceedings, but the stay was lifted in October 2022 after the Dutch Supreme Court issued its judgment.

In this context, the Court was tasked with determining the preliminary issues of whether (i) by reason of the Dutch court judgments, Russia was precluded based on issue estoppel from rearguing “the question of whether it has agreed in writing to submit to arbitration the disputes that are the subject of the awards”; and (ii) if so, if Russia's jurisdictional challenge should be dismissed on that basis. The Court answered both questions in the affirmative.

### **The “*Novel Point*” on the Interplay Between Issue Estoppel and State Immunity**

Russia had argued before the Court that the Dutch court judgments cannot give rise to any issue estoppel as the Court has a “*freestanding duty*” to consider for itself, as a matter of English law, whether there is in fact a valid and binding arbitration that curtails the State's immunity from jurisdiction pursuant to Section 9 of the SIA. Such determination cannot be based on issue estoppel arising from a foreign judgment, especially considering the recognition of state immunity under the SIA.

While acknowledging that there is a lack of clear authority on this issue, the Court concluded that state immunity does not bar issue estoppel. Issue estoppel can indeed arise against a foreign state through a foreign judgment, provided the necessary conditions for issue estoppel (*i.e.*, identity of issues and finality) are met.

The Court noted that there was nothing in the SIA which prevented the application of common law doctrines such as issue estoppel to a State, and that there was:

*“no reason why, if the relevant hurdles are cleared, there cannot be an issue estoppel arising out of a foreign judgment against a state, just as there can be against an ordinary company or individual”.*

Accordingly, the Court concluded that issue estoppel could arise against Russia even in circumstances where the SIA applies and indeed, even where public international law questions are involved subject to the necessary conditions of identity of issues and finality being fulfilled.

The Court also agreed with the Claimants that if the Dutch courts would have applied rules corresponding to the SIA, Russia would have been considered to have waived its immunity because it submitted to the jurisdiction of Dutch courts by challenging the awards before the Dutch courts. The same principle applied under Section 2(1) of the SIA which provides that a State “*is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts*“, and Section 2(3) which states that a State is “*deemed to have submitted – (a) if it has instituted the proceedings*“. The Court did not, however, consider (and indeed was not asked to consider) the question of whether the requirements for state immunity were the same in the

Netherlands and England.

Once the Court had concluded that sovereign immunity was no bar to issue estoppel arising from a foreign judgment as a matter of principle, the Court then considered whether the conditions for issue estoppel, namely identity of issue and finality had been met. The Court held, contrary to Russia's assertion, that on the facts of the case, the conditions for issue estoppel had been met since: (i) both the Dutch and English proceedings related to the identical "*central question of whether there was a valid agreement to arbitrate*", and (ii) the decision from the Hague Court of Appeal on the jurisdiction challenge which overlapped with the English proceedings, was final and binding and the only finding that had been overturned by the Dutch Supreme Court related to a separate ground of fraud which would have no impact on the jurisdictional challenge raised by Russia.

As a final point, the Court considered and rejected the notion that there were any "*special circumstances*" which would make it inappropriate for the Court to recognise an issue estoppel in this case. It noted that the presence of a novel point – issue estoppel based on a foreign judgment against a State – and the involvement of the ECT, a multilateral treaty, were not enough for the "*special circumstances*" exception to apply in this case.

For these reasons, the Court dismissed the application, effectively preventing Russia from relitigating before the English courts, the same jurisdictional issue as had been previously raised and dismissed in the Dutch proceedings. Russia has sought permission to appeal this ruling and a decision on the papers is awaited.

### **Key Takeaways From the Court's Decision**

This case is the latest instalment in the several attempts made by the Shareholders since 2014 to enforce the *Yukos* awards. Notably, despite the extensive sovereign immunity-related jurisprudence available under English law, this decision was the first to determine that a final and binding determination by a foreign court can give rise to issue estoppel against a State party in English proceedings.

This decision is likely to have implications for enforcement proceedings in England and Wales, especially in relation to awards against States. It highlights that while courts recognise and respect a State's sovereign immunity, a State can be precluded from relitigating the same issue in several jurisdictions in the context of enforcement proceedings.

In the words of the Court, when assessing a claim for issue estoppel, it will consider if "*a particular legal battle has already been fought out fully between the parties*", including before a foreign court. The Court's ruling on issue estoppel can accordingly be expected to provide useful ammunition to claimants in enforcement proceedings against States and avoid duplication of arguments across numerous jurisdictions.

While the Court in this case did not find that there were any "*special circumstances*" which militated against an application of issue estoppel, different findings may be reached depending on the facts and circumstances of a case. Parties should however expect that a high threshold would apply for the Court finding "*special circumstances*", as in this case, the existence of a novel point (i.e. issue estoppel based on a foreign judgment of another State) and issues relating to the ECT, a

multilateral treaty, were found to be insufficient.

More broadly, the case is a useful reminder of the increasingly and continuously inter-connected nature of international arbitration – whether against private parties or States. Parties must remember that there are likely to be potential implications of decisions from one jurisdiction on proceedings in another. These concerns may be further amplified when considering enforcement proceedings against States as these may often take place in parallel in several different jurisdictions.

Parties should accordingly carefully consider their enforcement strategies and be mindful of the possible interplay between the positions they adopt before courts in different jurisdictions, and the findings that such courts may make on relevant issues given that this could impact the chances of enforcement in another jurisdiction.

---

*To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).*

### **Profile Navigator and Relationship Indicator**

Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels, derived from Kluwer Arbitration's comprehensive collection of international cases and awards and appointment data of leading arbitral institutions, to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Newly updated

# Profile Navigator and Relationship Indicator Tools

Wolters Kluwer

Request your free trial now →

The advertisement features a dark background with a green and orange light streak effect. It displays two overlapping screenshots of the software interface. The left screenshot shows a 'Profile Navigator' dashboard with a list of profiles and filters. The right screenshot shows a detailed profile page for 'Judit Székely', including a profile picture, name, and various statistics and details.

---

This entry was posted on Thursday, December 28th, 2023 at 8:50 am and is filed under [Uncategorized](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.