

Kluwer Arbitration Blog

Should Issue Estoppel Apply to Questions of State Immunity?

Simon Bushell, Liang-Ying Tan, Deekshitha Swarna (Seladore Legal) · Wednesday, April 30th, 2025

In February 2025, the Court of Appeal of England & Wales [unanimously dismissed](#) Russia's appeal against the English High Court's [decision](#) that issue estoppel applies to its determination of the applicability of exceptions to state immunity under the [State Immunity Act 1978](#) ("Immunity Act") ("CoA Decision"). The case forms part of long-running, multi-jurisdictional proceedings surrounding the 18 July 2014 awards (the "Awards") (see [here](#), [here](#) and [here](#)) worth more than US\$50 billion, plus interest in favour of the former majority shareholders in OJSC Yukos Oil Company ("Claimants") for Russia's breach of its obligations under Article 13(1) of the [Energy Charter Treaty](#).

Russia commenced proceedings in the Netherlands to set aside the Awards, arguing that there was no arbitration agreement between Russia and the Claimants and that the Awards were tainted by fraud (para 6, [CoA Decision](#)).

Around the same time, the Claimants initiated recognition and enforcement proceedings in England under Section 101 of the [Arbitration Act 1996](#) (para 7, [CoA Decision](#)). Russia challenged the jurisdiction of the English court, asserting that it was immune under Section 1 of the [Immunity Act](#) (para 7, [CoA Decision](#)).

While the Dutch proceedings continued, the English proceedings were stayed by consent (para 8, [CoA Decision](#)). In 2016, the Awards were [set aside](#) by the District Court of The Hague. In 2020, the Dutch Court of Appeal [rejected](#) Russia's argument that there was no binding arbitration agreement and reinstated the Awards ("Decision"). Russia challenged this decision to the Dutch Supreme Court, which delivered its [judgment](#) in November 2021. It upheld the Dutch Court of Appeal's decision that there was a binding arbitration agreement but found that the latter had erred on the issue of procedural fraud and referred the case back to the Dutch Court of Appeal on that point. The Dutch Court of Appeal subsequently [rejected](#) Russia's case on procedural fraud. Russia appealed this further to the Dutch Supreme Court, and that appeal is pending (see para 15, [CoA Decision](#)).

The Claimants applied to lift the stay on the English proceedings following the Dutch Supreme Court decision (para 12, [CoA Decision](#)). The stay was [lifted](#) to determine two preliminary issues, including whether Russia was precluded from rearguing the question of whether it agreed in writing to submit the disputes that were subject of the Awards to arbitration due to the Decision.

Decision of the English High Court

In November 2023, Mrs Justice Cockerill [ruled](#) in favour of the Claimants, finding that the Decision gave rise to issue estoppel (as the test for a foreign judgment to result in issue estoppel in *Good Challenger Navegante SA* was met), preventing Russia from re-arguing whether it had agreed in writing to submit the dispute to arbitration. Consequently, Russia could not claim state immunity as submission to arbitration in writing falls within the exception at Section 9 of the [Immunity Act](#).

Grounds of Appeal

Russia primarily appealed the decision of the High Court on the following grounds.

First, the High Court had an obligation (under Section 1 of the [Immunity Act](#)) to give effect to a state's immunity from jurisdiction unless it determined that one of the exceptions under Sections 2-11 of the [Immunity Act](#) applied (here, Section 9). Russia argued that a conclusion based on issue estoppel from a foreign judgment did not constitute such a determination at all.

Alternatively, issue estoppel from a foreign judgment should not apply when determining whether an exception to state immunity applies, as the exceptional nature of state immunity constituted "special circumstances".

CoA Decision

Issue Estoppel

The Court of Appeal agreed that English courts must give effect to a state's immunity from jurisdiction under Section 1 of the [Immunity Act](#) unless one of the exceptions applies. However, it rejected Russia's argument that applying issue estoppel from a foreign judgment did not amount to such a determination.

It noted that the application of issue estoppel does not mean that a court declines to make a decision on the basis that there is no issue for the court to decide (such that there is no determination at all). Instead, it means that there is no issue to which evidence contradicting a prior judgment would be relevant. That was simply an application of the principle that substantive law will determine what evidence is relevant to the determination of an issue (paras 54-55, [CoA Decision](#)).

The Court of Appeal further found that the [Immunity Act](#) does not prescribe a specific method for determining whether an exception applies. It emphasized that English courts should apply common law, including issue estoppel, when determining if an exception applied. There was support for this position in *Zhongshan Fucheng Investment Co Ltd v Nigeria*, where the court applied English procedural rules in deciding whether an exception to state immunity applied and dismissed Nigeria's attempt to resist enforcement of an award on the grounds of state immunity for being out of time (paras 57-61, [CoA Decision](#)).

The Court of Appeal also:

- found that applying issue estoppel to determine whether a state had agreed to submit a dispute to arbitration did not violate the rule that a court's jurisdiction could not be enlarged or created by issue estoppel. Issue estoppel was simply a convenient label for the legal principle that a court of competent jurisdiction's prior decision creates an enforceable legal right under English law (para 65, [CoA Decision](#)).
- rejected Russia's argument that issue estoppel should give way to state immunity as the latter is of a higher order of importance as a matter of public policy. The Court of Appeal noted that the UK's public policy on state immunity is as set out in the [Immunity Act](#), and state immunity does not have overriding importance beyond what is specifically provided in the [Immunity Act](#). Courts will determine whether an exception in the [Immunity Act](#) applies using English law principles (such as issue estoppel), so there was no question of choosing between competing public policies (para 67, [CoA Decision](#)).

Special Circumstances

The Court of Appeal rejected Russia's argument that "special circumstances" should prevent issue estoppel from applying to state immunity. It noted that such an approach would effectively prevent issue estoppel from ever applying to state immunity, which the Court found unjustified. Once it had been determined that a court of competent jurisdiction had finally and conclusively decided an issue in a fair and contested hearing, and that judgment was entitled to recognition in England and Wales under Section 31 of the [Civil Jurisdiction and Judgments Act 1982](#), there is no reason why issue estoppel arising from that judgment should not be given effect (paras 79-82, [CoA Decision](#)).

State Immunity Does Not Trump Issue Estoppel

The CoA Decision is significant, as it is the first case to find that transnational issue estoppel can apply to determinations of state immunity under English law.

The CoA Decision squarely addresses the interaction between state immunity and the principle of issue estoppel involving a foreign court decision, declining to elevate state immunity to a special circumstance or as a matter of public policy – such public policy already having been reflected in the provisions of the [Immunity Act](#), including its exceptions to state immunity (para 67, [CoA Decision](#)). In addition to reinforcing the pro-arbitration stance of English courts with respect to investor-state disputes, this decision signals that the courts might be slow to accord issues of state immunity overriding significance over other principles of English law.

The Court of Appeal observed that its findings applied "with particular force in the arbitration context when the judgment of the foreign court is given in the arbitration seat, as in this case" (para. 79, [CoA Decision](#)). It remains to be seen whether this remark is properly to be interpreted as leaving open the possibility of distinguishing between the decisions of courts of the seat and courts in other enforcing jurisdictions. It may be that English courts do not make such a distinction in respect of state immunity, as they have previously recognized issue estoppel arising from another enforcing court's decision (*Diag Human SE v Czech Republic*), consistent with the position of not giving state immunity any overriding status. The overriding consideration, in any event, would be

the demands of justice:

“To give effect to the issue estoppel [...] [would be] in accordance with the demands of justice. It is also in accordance with another important public policy [...] that awards, even against states, should be honoured without delay and without the kind of trench warfare seen in the present case.” (para. 79, [CoA Decision](#))

The CoA Decision follows its judgment in *Infrastructure Services v Spain and Border Timbers v Zimbabwe* (see previous coverage [here](#)), which confirmed that an ICSID Contracting State’s agreement to Article 54 of the [ICSID Convention](#) constitutes a “prior written agreement” waiving state immunity under Section 2 of the [Immunity Act](#). State immunity is therefore no bar to the enforcement of ICSID awards in the UK, in line with Australia, New Zealand, the United States, France, and Malaysia (*Infrastructure Services*, para 60).

The combined effect of these recent decisions is to reaffirm the English courts’ readiness to enforce arbitral awards against states (and not just private parties), both within and beyond the ICSID Convention regime, and reinforce the principle that [sovereign immunity](#) cannot be used as a blanket defence to enforcement.

The application of issue estoppel to state immunity streamlines multi-jurisdictional enforcement proceedings, potentially facilitating greater consistency and efficiency in the enforcement of investor-state awards. It also highlights the importance of the choice of seat, as well as potentially the choice of the first jurisdiction in which enforcement is sought. Parties seeking to set aside an award in the courts of the seat may, if that fails, find themselves precluded from making the same arguments in enforcement proceedings in England and Wales (including in relation to state immunity). The choice of enforcing jurisdiction based on that jurisdiction’s jurisprudence regarding state immunity could also become a strategic consideration. Parties should therefore carefully consider their strategies to challenge or enforce awards and be mindful of the interplay between their positions and sequencing in different jurisdictions.

The Claimants in the case at hand are also seeking enforcement in the United States, where Russia has [appealed](#) a [decision](#) of the District Court for the District of Columbia, which [found](#) that it could not invoke sovereign immunity on the basis that the arbitration exception in the [Foreign Sovereign Immunities Act](#) applied. In January 2024, the Claimants [requested](#) that the United States Court of Appeals for the District of Columbia expedite the appeal on the basis that further delay would cause irreparable harm to their ability to enforce the Awards. Their request was [denied](#) in February 2024.

The English proceedings continue next year with a hearing listed in January 2026 to deal with further preliminary issues arising out of Russia’s defences to enforcement.

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