

Neutral Citation Number: [2026] EWHC 1918 (Comm)

Case No: CL-2023-000799

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/07/2026

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Before:

His Honour Mark Pelling KC
(Sitting as a High Court Judge)

Between:

YUKOS CAPITAL LIMITED
(FORMERLY YUKOS CAPITAL S.A.R.L.)

Claimant

- and -

THE RUSSIAN FEDERATION

Defendant

Lord Charles Falconer of Thoroton KC (instructed by **Gibson Dunn & Crutcher UK LLP**)
for the **Claimant**

Mr Mark Wassouf, Mr Cameron Miles and Ms Maud Mullan (instructed by **Pinna Goldberg Ltd**) for the **Defendant**

Hearing dates: **7th–8th July 2026**

JUDGMENT

JUDGE PELLING KC

1. This is the hearing to determine three preliminary issues that it was directed should be tried between the parties by a consent order of Waksman J made on 17 February 2026.
2. The background is relatively straightforward. On 23 July 2021, the claimant obtained an arbitral award in its favour against the defendant for breaches of the Energy Charter Treaty 1994. The arbitration was seated in Switzerland. The defendant applied for an order from the Swiss courts setting aside the award. That application failed when, on 22 August 2022, the Swiss court dismissed the claim on all grounds that the defendant had relied upon in those proceedings.
3. On 8 November 2023, the claimant issued proceedings seeking an order recognising and enforcing the award under Section 101 of the Arbitration Act 1996, and on 5 March 2024, I made the order sought. On 3 April 2025, the defendant applied for an order declaring it had immunity from suit pursuant to Section 1(1) of the State Immunity Act 1978 and for an order setting aside my order made under Section 101 of the 1996 Act.
4. Waksman J's order directed the trial of three preliminary issues, being:
 - (1) whether the Swiss set-aside judgment gives rise to any cause of action estoppel and/or any issue estoppel that precludes the defendant from denying that it has agreed in writing to submit to arbitration the dispute that is the subject of the final award;
 - (2) whether the Swiss set-aside judgment satisfies the requirements for recognition and enforcement of a foreign court judgment against a foreign state in the United Kingdom as set out in Section 31 of the Civil Jurisdiction and Judgments Act 1982; and
 - (3) whether, if the answers to the above issues are, respectively, (i) the Swiss set-aside judgment gives rise to a cause of action estoppel and/or an issue estoppel as set out in preliminary issue 1, and (ii) the Swiss set-aside judgment satisfies the requirements for recognition and enforcement of a foreign court judgment

against a foreign state in the United Kingdom, the defendant is, by reason of the Swiss set-aside judgment, precluded from denying that it agreed in writing to submit to arbitration the dispute that is the subject of the final award, such that the immunity application ought to be dismissed forthwith.

Of these issues, there is no dispute between the parties about issue 2 and it is agreed that the answer to it should be in the affirmative. Issue 3 is not in dispute either, assuming that the claimant is successful in relation to issue 1. In the result, issue 1 is the key issue for determination.

5. The claimant's case is that the defendant is not entitled to rely on the immunity conferred by Section 1(1) of the 1978 Act because the defendant had agreed to submit the dispute the subject of the award to arbitration, thereby engaging the exception to immunity conferred by Section 9 of the 1978 Act. The claimant submits that whether this is so depends upon whether the arbitral tribunal had jurisdiction to deliver the award that the claimant seeks to enforce. In relation to that, the claimant submits that the jurisdiction issue has been determined finally and conclusively in the claimant's favour by the judgment of the Swiss court in the Swiss set-aside proceedings. The claimant maintains those proceedings give rise either to a cause of action estoppel or an issue estoppel as a matter of English law, which precludes the defendant from rearguing the jurisdiction issue in this jurisdiction.
6. The defendant's case is that any case based upon a cause of action estoppel is bound to fail because the proceedings in Switzerland were not concerned with either recognition or enforcement of the award in England, and the issue estoppel claim is bound to fail either altogether, because there is no such doctrine known to Swiss law that would preclude the defendant from arguing the same issue again in Switzerland, other than the effect of a procedural time bar, and in any event cannot operate as issue estoppel in respect of any of those issues which were not argued before the Swiss courts as barring jurisdiction, since by definition there can be no final, or indeed any, determination in respect of them. It further argues that there can be no issue estoppel in relation to issues that were declared inadmissible by the Swiss courts because there has been no determination on the merits in relation to those issues.

7. The trial took place between 7 and 8 July 2026. I heard evidence from two Swiss law experts, being Dr Berger, who was retained by the claimant, and Dr Arfazadeh, who was retained by the defendant.
8. Before turning to the issues that matter, I must determine a dispute between the parties concerning the admissibility of Dr Arfazadeh's evidence. Lord Falconer KC, appearing on behalf of the claimant, argued that I should reject Dr Arfazadeh's evidence because his report did not contain a statement in the terms required by Practice Direction 35. It was submitted that the effect of this omission was to render the evidence inadmissible. The claimant relied on R (OAO the Good Law Project) v The Secretary of State for Health, [2021] EWHC 2595 (TCC) *per* Fraser J, as he then was, at paragraphs 38 to 41. However, the failures identified in that case were materially different from the omissions that occurred in this case, and therefore the basis on which it was decided that the evidence in that case should be excluded was a fact-sensitive decision decided on the facts of that case. The other authority relied upon by Lord Falconer was R (OAO MQ) v The Secretary of State for the Home Department, [2023] EWHC 205 (Admin), where His Honour Judge Bird refused to admit an expert report because the expert had omitted a statement that complied with CPR Rule 35.10(2) there was no statement of truth or a statement that the expert was aware of CPR Part 35, or the Part 35 Practice Direction or the guidance for the instruction of experts. This led Judge Bird to conclude that the absence of the appropriate certificate was "*fatal to the admission of the report*" because the certificate: "*... provides the court with the confidence it needs to admit the evidence.*" The proceedings that Judge Bird was concerned with were Administrative Court proceedings. The expert evidence was given entirely in writing. In those circumstances, it was entirely understandable that the judge should have taken a strict view of the omissions to which I have referred. However, I do not see anything within the Rules that renders evidence where there has been such an omission as inadmissible as a matter of law, although undoubtedly it is open to a court, in the exercise of its discretion, to come to that view. Where, as here, the evidence was given orally and tested on its merits in cross-examination, there is no similar reason to adopt such a strict approach.

9. Further, in my judgment, the taking of this point for the first time at trial was opportunistic. Had there been a real, as opposed to a forensically contrived concern about the omission, the point could and should have been taken earlier than at the commencement of cross-examination.
10. Mr Wassouf informed me that the relevant provisions of CPR Part 35 had been supplied to Dr Arfazadeh by the defendant's solicitors in the letter of instruction and that a copy had been provided to the claimant's advisers after this dispute arose. Whilst Dr Arfazadeh had provided an answer in cross examination to the effect that he was not aware of the requirements of Part 35, Dr Arfazadeh had confirmed after his evidence had been given that he was aware of the requirements of Part 35 and had in fact complied with them. There was an offer to produce a substitute report with the omissions corrected.
11. In my judgment, that is a proposal I should accept. Lord Falconer did not suggest to Dr Arfazadeh that he had breached any of his Part 35 duties, nor did he suggest that there had been a breach in the course of his oral submissions. I am satisfied that the omission was an error. For those reasons, I accept the defendant's proposal for the formal substitution of the reports with the omission corrected and admit Dr Arfazadeh's evidence. In any event, as will be apparent from what I say later in this judgment, there was very little that separated the experts and that I have been able to proceed by reference to the evidence given by Dr Berger.
12. I turn first to the cause of action estoppel issue. Where this form of estoppel applies, its effect is to preclude a party from advancing the same cause of action in subsequent proceedings; see Virgin Atlantic Airways v Zodiac Seats UK Limited [2013] UKSC 46, [2014] AC 160, *per* Lord Sumption at paragraph 17. For such a plea to succeed, the proceedings from which the estoppel flows must have been between the same parties or their privies, as in the later claim. There is no dispute about that in this case. The estoppel arises only if the cause of action in the later proceedings is identical to that in the earlier proceedings; see Arnold v National Westminster Bank [1991] 2 AC 93, *per* Lord Keith at page 105D. The sole focus of attention in this case was on whether the cause of action in the Swiss proceedings was the same as that which arises in the

immunity claim in this jurisdiction. Thus, the focus of attention is on what constitutes a cause of action for these purposes.

13. It was common ground that in deciding whether a cause of action estoppel had arisen, it was necessary to test for the existence of the identical cause of action, applying English law principles. The classic formulation of what constitutes a cause of action in English law was that of Diplock LJ, as he then was, in Letang v Cooper [1964] 2 All ER 929 at 934, where he defined a cause of action as being "... *a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person ...*" or, as it was put over 40 years later, it is "... *that combination of facts which gives rise to a legal right.*" – see Berezovsky v Abramovich [2011] EWCA Civ 153, [2011] 1 WLR 2290, *per* Longmore LJ at paragraph 59. It necessarily follows that where different legal rights are being considered in different jurisdictions where different laws apply, it is likely that there will be different causes of action - see Co-operative Group v Birse Developments Limited [2013] EWCA Civ 474, *per* Tomlinson LJ at paragraph 22.
14. The effect of this, in essence, is that there will be a different cause of action where either the duty allegedly breached is the same but the facts alleged as constituting the breach are different or where the facts are broadly the same but a different duty is relied upon. This last point is well illustrated by Thoday v Thoday [1964] P 181, where a wife had petitioned for divorce on grounds of cruelty. That petition had been dismissed and the husband then petitioned on the ground of desertion, in which petition the wife defended on the ground of just cause and constructive desertion. The first instance judge struck out the relevant paragraphs of the wife's Answer on the basis that they reprised allegations that had failed when her petition had been dismissed. The Court of Appeal overturned that decision. In his supporting judgment, Diplock LJ referred, strictly I think *obiter*, to cause of action estoppel as a doctrine which precludes a party from asserting or denying a cause of action the existence or non-existence of which had been determined by a court of competent jurisdiction in previous litigation between the same parties - see page 197. He concluded that cause of action estoppel could not arise in that case because "*The wife does not seek in the present litigation to allege the same matrimonial offence, namely, cruelty, as she unsuccessfully alleged in the first petition.*"

15. Translated into the context of this case, cause of action estoppel cannot arise for the same reason it could not arise in Thoday v Thoday (ibid.) because the defendant is not seeking to allege in these proceedings that the award should be set aside under Article 190 of the Federal Law on Private International Law of Switzerland but is seeking an order that it is entitled to immunity under Section 1(1) of the State Immunity Act. In my judgment, this is fatal to an assertion of cause of action estoppel because the cause of action concept focuses on both the right or remedy and the facts on which the claim to that right or remedy depend. Here, the right or remedy sought in the Swiss proceedings was not the same as the right or remedy sought in the English immunity proceedings.
16. In those circumstances, I reject the claimant's submission that it follows from the decision of the Court of Appeal in Hulley Enterprises v The Russian Federation [2025] EWCA Civ 108, [2026] KB 1 that issue estoppel is available to determine, or assist in determining, state immunity, that therefore cause of action estoppel is also available. Contrary to the claimant's submission that there is no principles basis for distinguishing between the two, I consider that the two concepts are both logically and jurisprudentially different. Cause of action estoppel is not available because the right or remedy sought in the Swiss proceedings is different from that sought in the English proceedings. Hulley v The Russian Federation was concerned exclusively with issue estoppel - see the judgment of Males LJ at paragraph 1 – and so has no impact on the cause of action estoppel issue.
17. In those circumstances, issue 1 must be answered in the negative as far as it is concerned with cause of action estoppel.
18. I now turn to issue estoppel. The classical definition of the concept is that of Diplock LJ in Thoday (ibid) at page 198, where he said:

"There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction,

either upon evidence or upon admission by the parties to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

As Lord Sumption put it in Virgin Atlantic (ibid) at paragraph 17, "... even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding upon the parties..." constitutes issue estoppel. It is critical to note however that the doctrine applies only to facts the existence of which are necessary to the cause of action being litigated in the first action that can found an estoppel in the second action.

19. Issue estoppel arises from judgments of foreign courts just as it can arise from judgments of the English courts; see Carl Zeiss v Rayner & Keeler Limited (No 2) [1967] 1 AC 853. When findings by a foreign court are relied on to found an issue estoppel, the conditions that must be satisfied are those identified by Clarke LJ, as he then was, in The Good Challenger [2004] 1 Lloyd's Report 67 at paragraph 50, which are that:

- (1) the judgment must be given by a foreign court of competent jurisdiction;
- (2) the judgment must be final and conclusive on its merits;
- (3) there must be an identity of parties; and
- (4) the issue to be determined by the foreign court must be the same as that arising in the English proceedings.

Clarke LJ emphasised three other features that must be borne in mind whenever an issue estoppel based on a foreign judgment is asserted, namely:

- (a) caution is required because the procedures of the court may be different and it may not be easy to determine the precise identity of issues being determined;
- (b) the decision of the court relied on must be necessary for its decision; and
- (c) the application of the principle of issue estoppel is subject to the overriding consideration that it must work justice, not injustice.

20. Of the four core conditions identified by Clarke LJ, there is no dispute that conditions (1) to (3) are satisfied. The focus of attention in this case was on (i) what constitutes an "issue"; (ii) whether the issue or issues in the immunity proceedings is or are exactly the same as those decided in the Swiss proceedings, and (iii) whether those issues were necessary rather than incidental.
21. In order to resolve the issues that arise, it is necessary first to turn to the Swiss proceedings and to the determination by the Swiss court. In order to undertake that task, it is necessary to recognise that there is significant factual complexity about the index dispute which I summarise below only to the extent that is necessary in order to understand the conclusions that I have reached.
22. By the early 2000s, Yukos Oil Company OJSC ("Yukos Oil") was privately owned. In proceedings commenced by the Russian state, it was found to have been responsible for a substantial tax fraud for which a number of its beneficial owners and controllers were convicted by the Russian courts and sentenced to terms of imprisonment. By 2006, Yukos Oil had been declared insolvent and by the end of November 2007 it had been dissolved.
23. The arbitration proceedings with which these proceedings are concerned were commenced by an entity called Yukos Capital SARL ("Yukos SARL") which was registered in accordance with the laws of Luxembourg but was itself struck off in February 2017, after the commencement of the arbitration but before the final award being published. The claim concerned two loans by two offshore entities to Yukos SARL that it alleged it had then lent to Yukos Oil. The defendant maintains that Yukos SARL was simply a conduit and that the real lenders were the two offshore entities that had ostensibly lent funds to Yukos SARL. Yukos SARL commenced the arbitration claiming that its loans to Yukos Oil were investments within the meaning of the Energy Charter Treaty that were rendered irrecoverable as a result of an alleged breach by the Defendant of its obligations under the treaty. The Russian Federation challenged jurisdiction before the tribunal and failed.
24. During the arbitration, Yukos SARL entered into a statutory merger scheme with a BVI registered entity called Miwok Wealth PIC Limited ("MWP"). The defendant alleges

that the effect of this scheme was that Yukos SARL's assets were transferred to MWP, which then changed its name to Yukos Capital Limited -- that is the claimant in these proceedings -- and thereafter Yukos SARL was struck off, as I have said. The claimant continued the arbitration notwithstanding these events, and the tribunal apparently proceeded on the basis that Yukos SARL had moved its registration from Luxembourg to the BVI, whereas on the defendant's case, Yukos SARL had ceased to exist following its strike-off, having transferred its assets to MWP as a result of the scheme. The defendant maintains that the transfer of assets could not include any rights Yukos SARL had under the treaty because such rights are not assignable or transferable.

25. Following publication of the final award, the defendant issued its proceedings in Switzerland by which it sought an order setting aside the award for alleged want of jurisdiction. In doing so, the defendant relied on the following grounds:

- (1) that Article 26 of the treaty did not confer jurisdiction because the Russian Federation had never ratified it and only provisionally applied it ("provisional application ground");
- (2) the loan was not a loan by Yukos SARL but of the offshore entities that Yukos SARL had notionally borrowed from, ("passive conduit ground");
- (3) that the claim was an abuse of process because
 - i. the loans were artificial tax mechanisms and/or
 - ii. it was reasonably foreseeable at the time the loans were made that they would be irrecoverable,(collectively the "abuse of process ground"); and
- (4) the loans were part of a scheme of tax evasion and therefore the tribunal should have refused jurisdiction as a matter of international legal policy ("unclean hands ground").

The Swiss court dismissed the application to set aside the award. In its reasons for making that order, the Swiss court:

(5) rejected the provisional application and passive conduit grounds on their merits;
and

(6) held that the abuse of process and unclear hands grounds were inadmissible but alternatively were to be rejected.

26. In the immunity proceedings in England, the defendant contends that it is entitled to immunity from suit pursuant to s.1(1) of the State Immunity Act 1978 because s.9 is of no application since Russia had not agreed in writing to submit a dispute which may arise to arbitration, the core requirement contained in s.9(1) of the Act. In support of that claim, the defendant relies on eight grounds, being:

(1) the provisional application, passive conduit, abuse of process and unclear hands grounds relied on in the Swiss proceedings;

(2) (a) the claimant in these proceedings is not and never has been a party to the arbitration agreement underpinning the tribunal's jurisdiction and which was formed with Yukos SARL, which no longer exists (the "not privy to arbitration agreement ground");

(b) neither the claimant nor Yukos SARL were an "Investor of another Contracting Party" within the meaning of Article 26(1) and Article 1(7) of the Treaty because they were both owned and controlled by Russian nationals at all material times (the "no investor ground");

(c) the defendant properly exercised its right to deny the benefits of Article 26 of the Treaty to Yukos SARL by means of a letter of 11 April engaging Article 7(6)(iii) of the treaty (the "denial of benefits ground"); and

(d) the claims raised in the arbitration related to taxation measures and thus fell outside the scope of the Treaty pursuant to Article 21(6)(iv) of the Treaty (the "taxation measures ground").

27. Returning to the role of issue estoppel in this case, the claimant submits that following the decision of the Court of Appeal in Hulley (ibid), I should conclude that the defendant is precluded from arguing any of this because:

- (1) the issue should be treated as being whether the tribunal had jurisdiction, and that has been finally determined by the Swiss courts; or
- (2) if the issues are those I have summarised as the basis of the defendant's set-aside application in Switzerland then:
 - i. the defendant is precluded from rearguing those points in the immunity proceedings, and
 - ii. to the extent that the grounds now relied on were not relied on by the defendant in the Swiss proceedings, they could and should have been relied on there, and for that reason the defendant is likewise precluded from arguing those points.

28. In response, the defendant contends:

- (1) the issue for present purposes is not whether the tribunal had jurisdiction but is confined to the facts proved in issue on each of the grounds relied upon by the defendant in the immunity application;
- (2) issue estoppel can only arise in relation to findings in a foreign judgment where the jurisdiction in which the foreign judgment was produced itself recognises issue estoppel or a functionally similar doctrine, and Switzerland does not, with the result that no issue estoppel can arise at all by reference to the Swiss judgment;
- (3) even if that is wrong, the only issue resolved by the Swiss courts concerned the effect of grounds that were deployed in the Swiss proceedings, save for those that were held inadmissible; and
- (4) issue estoppel does not preclude reliance other than on issues determined by the foreign court concerned. The only doctrine that precludes a party from relying on issues which could and should have been, but were not, argued in earlier proceedings is that first identified in Henderson v Henderson (1843) 3 Hare 100, and that is not the subject of any of the preliminary issues.

29. Both parties relied upon the first instance decision of Cockerill J, as she then was, in Hulley v The Russian Federation [2023] EWHC 2704 (Comm), [2024] KB 208. The judge turned to the issue point at paragraph 62 of her judgment, where she held:

"The only question here is as to the identity of issue. Again there is no complication raised by the procedural aspects, and I am able to be sure that there is identity of issue. In essence, the reality of the issue is that (i) the decision in the Dutch courts is about whether the tribunal lacked jurisdiction, which is the same issue which is raised here and, (ii) at the more granular level, the Dutch courts' decisions have now considered and decided the exact points which were raised by way of jurisdiction challenge here."

The question this analysis begs is whether the judge's conclusion in (i) would have been different if the position had not been as stated in (ii). This issue was not considered in the Court of Appeal. Given the identical overlap of the grounds in the Dutch and English proceedings, it was not necessary to do so. It is clear, however, that Cockerill J favoured the view that the issue that arose was whether the tribunal lacked jurisdiction - see both paragraphs 58 and 62.

30. The defendant submits that where there is, as here, not a total overlap of grounds relied on, this issue has been resolved. It submits that each of the grounds are either causes of action themselves or at any rate issues, and thus, where there has been no final determination in relation to the grounds that the defendant relies on, there can be no issue estoppel. It submits that this was the approach adopted by the Singapore International Commercial Court in Hulley v The Russian Federation [2025] SGHC(I) 19 at paragraph 146, where it was held:

"We hold that the Russian Federation is precluded from arguing otherwise than that it agreed in writing to submit to arbitration its dispute with the Claimants concerning their investments in Yukos Oil. We do so because the legal and factual issues which are determinative of that question are the subject of final and conclusive decisions on the merits by the two relevant Dutch appellate seat courts and give rise to issue estoppels under Singapore law which are relied upon by the Claimants and have that effect."

That strongly suggests that the focus of attention of the Singapore court was on the underlying grounds relied upon by the Russian Federation for contending that there was no jurisdiction, rather than on the conclusion that there was no jurisdiction.

31. A similar approach appears to have been taken by the Singapore Court of Appeal in India v Deutsche Telekom AG [2023] SGCA(I) 10, where exactly that approach appears to have been taken - see paragraphs 174 and 176. That this was so is also apparent from paragraph 2, where the focus was on whether the appellant was precluded from relitigating those points that had already been determined between the parties in the seat court, and paragraph 4, where the issue was described as being one of "*transnational issue estoppel*" and its effect as being "*to prevent parties to a prior decision of the seat court ... from re-litigating points ... previously raised and determined*".
32. In summary, the defendant's argument concerning the nature of the "issue" that is capable of engaging the issue estoppel principle (assuming the doctrine is capable of applying at all) is that it applies only to the grounds on which the defendant had relied in the Swiss proceedings. However, that means that the issues in respect of which an estoppel is capable in principle of arising are limited. This is particularly the case here, where some issues were resolved in the foreign proceedings on alternative bases because, as Clarke LJ held in Good Challenger (ibid) the decision of the foreign court had to be necessary for its decision. In relation to those issues before the Swiss court where it was held that the ground relied on was inadmissible, what was necessary for the decision was that the ground was inadmissible, not what in a common law jurisdiction would be regarded as the obiter conclusion on the merits on the basis that the court had been wrong to consider the ground inadmissible. The defendant goes further and submits that, in these circumstances, neither of the bases can give rise to an issue estoppel. I decline to go that far. As far as I am aware, no court in England has done so, and I consider it better to leave the issue to be decided in a case where the point is material, which it is not on these facts.
33. To the extent it matters (and it does not for reasons I come to later in this judgment), I accept the defendant's submission that if issue estoppel is available at all, it is available only in respect of the provisional application ground, the passive conduit ground and the abuse of process/unclean hands grounds. It is not available in respect of (a) the not privy to arbitration agreement ground, (b) the no investor grounds, (c) the denial of benefits ground and (d) the taxation measures ground unless the doctrine extends to

grounds that could have been, but were not, advanced in the Swiss proceedings. I turn to that point next.

34. In my judgment, it is wrong in principle to consider that a party is precluded by the doctrine of issue estoppel from arguing something that it could and arguably should have argued in the earlier proceedings but did not. The reasons for this approach are twofold being:

(1) issue estoppel, where it applies, has the effect of restricting or denying a litigant's access to a court for the purpose of advancing what would otherwise be a good claim or defence; see Skatteforvalningen v MCML Limited [2026] UKSC 19, *per* Lord Sales and Lord Doherty at paragraphs 1 and 38; and

(2) there is an alternative doctrine which provides a proportionate means of controlling any abuse caused by a party seeking to litigate issues that could have been litigated in earlier proceedings.

35. This led the Supreme Court in Skatteforvalningen to emphasise, at paragraph 40, that the issue determined in the prior proceedings must have been necessary to the decision; and at paragraph 43, that whether an issue was necessary was to be determined by whether the issue arose on the pleadings, or the foreign court equivalent, in the prior proceedings. These formulations are inconsistent with the notion that an issue estoppel can arise in respect of an issue that has not been pleaded or argued.

36. The Skatteforvalningen judgment that I have referred to a moment ago went on to resolve the point that arose in that case, which was whether the fact that it had not been alleged in the earlier proceedings that the misrepresentations relied upon in those proceedings had been made fraudulently prevented that being argued in subsequent proceedings - see paragraphs 46 to 47. It was held that there was no issue estoppel that prevented Skatteforvalningen from arguing that the same misrepresentations relied on in the earlier proceedings, but on the basis that they were fraudulent rather than negligent misrepresentations, since that issue had not been decided. This approach is inconsistent with the notion that the issue estoppel doctrine can preclude a party from arguing in subsequent proceedings that what he did not but could have argued in the

former proceedings gives rise to an estoppel. As Lords Sales and Doherty put it at paragraph 49:

"... the doctrine of issue estoppel would be profoundly unfair and would work injustice if it were found to be applicable in a case where a party could have put some point in issue but chose not to do so."

As I have mentioned already, there is established law that enables a court to control abuse of process of this sort, being the principle established in *Henderson v Henderson* (ibid). As Lords Sales and Doherty said in *Skatteforvalningen* (ibid) at paragraph 50:

"The force of these considerations is underlined by the fact that there is a distinct aspect of the law of *res judicata* which seeks to control against any unfairness between litigants if one of them omits to raise a point in the first set of proceedings and then seeks to raise it later, namely the law on abuse of process first identified in *Henderson v Henderson* and explained in *Virgin Atlantic*. The law on abuse of process is carefully modulated to balance the equities between the litigants in that sort of situation, to achieve overall justice between them. In the present case, it is now accepted that, as held by Bright J and the Court of Appeal, SKAT's bringing the 2022 Claim does not involve any abuse of process. By contrast, the doctrine of issue estoppel, when it applies, operates in an inflexible way which is not sensitive in the same way as the doctrine of abuse of process to wider considerations of justice and the balancing of relevant interests. It would be contrary to the coherent application of the law in this area, and would work injustice, to give the doctrine of issue estoppel an expansive interpretation which cut across and significantly displaced the rules on abuse of process, which provide the appropriate framework for regulation of what has happened in this case."

37. For those reasons, and to the extent it matters, I conclude that issue estoppel, if it applies in this case at all, applies only in respect of the three grounds that were determined by the Swiss court on their merits. I say nothing about whether the principle in *Henderson v Henderson* may have a preclusive effect in the circumstances of this case because that issue could have been, but was not, part of the preliminary issue that Waksman J ordered should be tried.
38. The only issue which remains, and one which, in my judgment, is fundamental to this case, is whether issue estoppel is available at all.
39. The defendant submits that issue estoppel is only available where the relevant foreign legal system recognises a system of issue preclusion - see MAD Atelier International BV v Manès [2020] EWHC 1014 (Comm), [2020] QB 971, *per* Bryan J at 49. In that

case, there had been a joint venture agreement between the claimant and the defendant. Following a breakdown in the relationship, the claimant sued in the courts of France, seeking to overturn an agreement connected to the joint venture. That claim failed. He then commenced proceedings in England against the defendant claiming breach of the joint venture agreement. The defendant applied to strike out part of the claim on the basis that the facts and matters on which the claimant relied had been determined by the French courts. The application failed because the French law had no doctrine of issue estoppel or its functional equivalent, and that prevented an issue estoppel from arising - see Bryan J's judgment at paragraphs 49 to 50. The reasons for this conclusion included that the foreign legal system must treat issues decided in the first judgment as precluding reconsideration - see *Carl Zeiss (No 2)* (ibid) at page 919, where Lord Reid said that it: "... verge[d] on absurdity that we should regard as conclusive something in a German judgment which the German courts ... would not regard as conclusive." The point, in essence, is that a foreign judgment should not be given any more preclusive effect in England than it has in its home jurisdiction.

40. Against that background, it is now necessary to turn to the expert evidence in this case.
41. The experts were agreed that whilst Swiss law recognised a doctrine of *res judicata*, it only applied to the operative part of the judgment, and that the underlying reasoning had no preclusive effect - see paragraph 5 of the joint memorandum. Dr Arfazadeh's opinion was that the reasoning was relevant only to ascertaining the scope of the dispositive part of the judgment, and the dispositive part of the judgment in this case was confined to the order dismissing the defendant's set-aside application. Dr Berger did not, in the end, dispute this analysis - see his comment at paragraph 6 in the joint memorandum. The operative part of the Swiss judgment is paragraph 1 of the dispositive section, by which the appeal was "... *dismissed insofar as it is admissible*", and paragraphs 2 and 3, which addressed costs.
42. In the course of cross-examination, Dr Berger accepted, at transcript Day 1, page 27, line 1, that Swiss law does not recognise a doctrine of issue estoppel and that *res judicata* applies only to the operative part of the judgment, being that I've just referred to - see transcript Day 1, page 28, lines 4 to 10; that the reasoning set out in the earlier stages of the judgment "*do not have any preclusive effect in the sense of issue estoppel*" - see

transcript Day 1, page 28, lines 11 to 18; that this opinion was entirely consistent with at least one decision of the Swiss Supreme Court - see transcript Day 1, page 30, lines 11 to 25; and that the only relevance of the reasoning as a matter of Swiss law is for the purposes of identifying the arguments that had been advanced - see transcript Day 1, page 31, lines 9 to 17. The practical effect of this was described at transcript Day 1, page 38, line 23 to page 39, line 5 as being that if another claim was referred by the claimant to arbitration under the treaty, then it would be open to the defendant to take exactly the same jurisdictional points all over again that had been advanced in the Swiss proceedings. As Dr Berger put it, this followed from "*... the fact that Swiss law does not know ... issue estoppel*". He gave evidence to similar effect at transcript Day 1, page 40, lines 17 to 21, and see also transcript Day 1, page 41, lines 7 to 16. He said again that the relevance of the reasoning is confined to understanding the dispositive element of the judgment; see transcript Day 1, page 42, lines 3 to 9. In light of this evidence, it is not necessary for me to consider the evidence of Dr Arfazadeh in detail because on the issues that matter, there is no dispute between them; and as I have said, Dr Berger's evidence was adduced on behalf of the claimant.

43. In my judgment, the evidence to which I have referred above is fatal to any assertion of issue estoppel in this case. It is entirely clear that in Swiss law, the reasoning in the judgment has no preclusive effect. It follows that there can be no issue estoppel by reference to the reasoning in the Swiss judgment, applying Bryan J's reasoning in MAD Atelier (ibid). Whilst reliance was placed by the claimant on the first instance decision in Hulley, the expert evidence is not the same; indeed, the foreign jurisdiction in this case (Switzerland) is different from that case (which was Holland). Although MAD Atelier (ibid) is referred to in both the argument at first instance in Hulley - see [2024] KB 208 at page 218D to E - and is referred to in the judgment at paragraph 22, that was not for the purpose of addressing the issue that arises in this case.
44. Returning to MAD Atelier, if paragraph 91 is read as a whole, there would appear to be no material difference between the position in French law as found in that case and the evidence concerning Swiss law that I have summarised earlier. In that case, Bryan J concluded at paragraph 91(1) that:

"... if MAD ... were to bring a new civil claim in France against the parties to the French Civil Proceedings claiming a different remedy or based on a different cause of action, MAD ... would not be prevented from relitigating any of the issues in the new proceedings."

45. That is the evidence in this case. If there was a new arbitration between the same parties by reference to the same treaty seated in Switzerland, the defendant would be entitled to challenge jurisdiction by reference to each of the arguments on which it failed in the Swiss proceedings on which the claimant relies, and indeed on those that had not previously been argued and on which it wishes to rely in the immunity proceedings.

46. In those circumstances, I conclude that:

- (1) Issue estoppel is not available to the claimant because it is not available as a matter of Swiss law.
- (2) It follows that it does not matter whether (assuming the issue estoppel doctrine was available) the issue is (i) that the Tribunal had jurisdiction or (ii) the findings made by the Swiss court on the grounds under which jurisdiction was challenged; but
- (3) If, in principle, issue estoppel is available, I consider it arises only in relation to those issues that the Swiss court decided which the defendant is seeking to rely on again in these proceedings. It could not apply to those which were rejected as inadmissible, for the reasons I have explained, and could not apply in any event to issues that were not argued in the Swiss proceedings at all.

It follows that Issue 1 is to be answered in the negative and in consequence Issue 3 does not arise.

47. As I said earlier in this judgment, nothing said here has any impact on whether the position adopted by the defendant is abusive in the Henderson v Henderson sense. That is not before me because it did not form part of the list of preliminary issues and must be resolved at trial.