# CURRENT DEVELOPMENTS

## PRIVATE INTERNATIONAL LAW

Edited by Peter McEleavy

## I. THE 'CAUTIOUS LEX FORI' APPROACH TO FOREIGN JUDGMENTS AND PRECLUSION

*Yukos Capital Sarl v OJSC Rosneft Oil Co*

If from the imperfect evidence of foreign law produced before it, or its misapprehension of the effect of that evidence, a mistake is made by an English court, it is much to be lamented, but the tribunal is free from blame.[1] The mistake to be lamented presently is the High Court decision in *Yukos Capital Sarl v OJSC Rosneft Oil Co*[2] that a Dutch judgment[3] gave rise to an issue estoppel in English proceedings, precluding a party from disputing as a fact the partiality and dependence of the Russian judiciary.[4] The decision was a mistake because on a proper construction of Dutch law the significance of the Dutch judgment was—if anything—*evidential*, not preclusive.[5] The outcome is lamentable, because a party was unduly shut out from litigation by the application of English preclusion law to a foreign judgment that was not preclusive in the jurisdiction where it was originally given.[6]

The focus of this note is on the *cause* of the court's mistake. Why was it wrong to base an issue estoppel on the Dutch judgment? Owing to the particularities of the

[1] *Castrique v Imrie* (1869–70) LR 4 HL 414, 427 (Blackburn J), adding that 'all that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and bona fide to determine on that, as well as it can, what the foreign law is.'

[2] [2011] EWHC 1461 (Comm), [2011] 2 Lloyd's Rep 443, [2011] 2 CLC 129, (2011) 108(26) LSG 17 (Hamblen J) ('*Yukos EN*'). For the background of the dispute see text (n 12–15).

[3] Hof (Court of Appeal) Amsterdam 28 April 2009, LJN: BI2451 (*Yukos Capital Sarl/OAO Rosneft)*.

[4] [2011] EWHC 1461 (Comm), [2011] 2 Lloyd's Rep 443, [2011] 2 CLC 129, (2011) 108(26) LSG 17.

[5] In the High Court the judgment would be inadmissible as an irrelevant statement of the Dutch court's opinion. *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. A Dutch court would freely assess the judgment's evidential value (see Article 152(2) of the Dutch Code of Civil Procedure ('Rv')), which would be limited (at best) as it was based on indirect evidence. See *Yukos NL* (n 3) [3.9.4] on which critically A van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, 28 April, 2009' (2010) 27(2) Journal of International Arbitration 179, 180–1. In fact, the ECHR in *OAO Neftyanaya Kompaniya Yukos v Russia* (Application no 14902/04) ECHR 20 September 2011 rejected allegations of corruption in Yukos' insolvency-related litigation.

[6] At least not in the circumstances pertaining in the English proceedings where in the eyes of *Dutch* law the relevant issue was different, though the question of fact was the same. See the text (n 68–72).

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English approach to issues of (issue) preclusion arising in respect of foreign judgments, both English and Dutch law are potentially relevant for an answer to this question.[7] In this particular case, however, despite the court's unsatisfactory explanation of one of the core requirements for an issue estoppel under English law pertaining to what constitutes an 'issue',[8] the root of the error was the Dutch law evidence the court relied on as the basis for its decision.

In other respects, the decision is unremarkable. As most would have thought, Act of State or non-justiciability principles cannot prevent an English court from considering allegations of partiality and dependence of a foreign judiciary in the process of deciding whether or not to recognize foreign judgments in England and Wales.[9] Also, no lawyer familiar with English private international law will be surprised to hear that, in the interests of finality, foreign judgments can found an issue estoppel under English law, with the effect of precluding a party from disputing such serious allegations.[10] In both

[7] See text (n 45–47).

[8] *Yukos EN* (n 2) [50]ff. Hamblen J emphasised that '[t]he issue must be necessary for the decision' for it to found an estoppel. But this is the wrong test. It is respectfully submitted that English law differentiates, not between various categories of issues (some necessary, others collateral), but between questions that qualify as 'issue' and those that do not. The proper test then involves asking, not whether the question of partiality and dependence addressed by the Amsterdam Court of Appeal was a 'necessary issue', but whether it was an 'issue' at all, since only findings on issues can give rise to an issue estoppel. This slip is not discussed in detail here, since it did not directly cause the court's mistake. Nonetheless, the point should be noted, as it goes to the heart of the English estoppel *per rem judicatam* doctrine. See *Thoday v Thoday* [1964] P 181, 198, [1964] 2 WLR 371, [1964] 1 All ER 341, (1964) 108 SJ 15 (Diplock LJ); and *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, [1966] 1 QB 630, [1965] 2 All ER 4, [1965] 1 Lloyd's Rep 223, [1965] 2 WLR 1059, (1965) 109 SJ 191 (Diplock LJ).

[9] *Yukos EN* (n 2) [108]ff, in particular [131]–[135]. See *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] 1 CLC 205, [2011] UKPC 7; *Berezovsky v Abramovich* [2011] 1 WLR 2290, [2011] EWCA Civ 153; and *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2002] UKHL 19, [2002] 2 AC 883, [2002] 2 WLR 1353, [2002] 3 All ER 209, [2002] 1 All ER (Comm) 843, [2003] 1 CLC 183. At [136]ff the court suggests that an English court's decision to refuse a foreign judgment recognition in England and Wales is an *exception* to the Act of State principle. Is this correct? A logical distinction applies between questions on the validity of a foreign judgment as a matter of (a) the legal order of the judgment-rendering State, (b) the legal order of the judgment-recognizing State and, finally, (c) the international legal order. The Act of State principle then concerns (only) validity in sense (*a*), whereas an English court's refusal to recognize a foreign judgment pertains (only) to its validity in sense (*b*), not (*a*).

[10] *Yukos EN* [42]ff. See *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, [1966] 3 WLR 125, [1966] 2 All ER 536, [1967] RPC 497, (1966) 110 SJ 425; and *DSV Silo und Verwaltungsgesellschaft mbH v Owners of the Sennar (The Sennar)* [1985] 2 All ER 104, [1985] 1 Lloyd's Rep 521, (1985) 82 LSG 1863, (1985) 135 NLJ 316, (1985) 129 SJ 248, [1985] 1 WLR 490. Also see *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, [1996] 5 Bank LR 98, [1996] CLC 1132, [1996] ILPr 406, (1996) 140 SJLB 64; and *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ 1668. See already *Harris v Quine* (1868–69) LR 4 QB 653 (Blackburn J). See (especially) A Briggs and P Rees**,** *Civil jurisdiction and judgments* (5th edn, Lloyd's Commercial Law Library, London, 2009) [7.75]ff; and A Dickinson, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process: Report for England and Wales' (2008) British Institute of International and Comparative Law available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=1537154>. Also Lord Collins of Mapesbury (ed), *Dicey, Morris & Collins: The Conflict of Laws* ('*Dicey, Morris & Collins*') (14th edn, 2006) Rule 35(2) and the comment at [14-027]ff; P Barnett**,** 'The Prevention of Abusive Cross-Border Re-Litigation' (2002) 51 ICLQ 943ff; by the same author, *Res Judicata, Estoppel, and Foreign Judgments* (OUP, Oxford, 2001) [5.01]ff; and P Rogerson**,** 'Issue Estoppel and Abuse of Process in Foreign Judgments' (1998) 17 CJQ 91ff.

respects the judgment of Hamblen J is customarily well reasoned and irreproachable as a matter of English law.

### *1. The background of the decision*

#### a) The dispute

The case related to a number of intra-group loans within the 'Yukos Group',[11] a well-known Russian group of companies engaged in oil production and trading, headed by OAO Yukos Oil Company ('Yukos Oil') until its insolvency, forced break-up and re-nationalization in December 2004.[12] Failing repayment of the loans by the borrowing party, OJSC Yuganskneftegaz ('Yuganskneftegaz'), a Russian production subsidiary, the lender, Yukos Capital Sarl ('Yukos Capital'), a Luxembourg company (still controlled by Yukos Oil and its shareholders), filed for arbitration in Russia.[13] In September 2006, the tribunal rendered four awards[14] in favour of Yukos Capital for the equivalent of US$425 million exclusive of interest and costs (the 'Awards').

Having recovered the Awards, Yukos Capital pursued their enforcement through the 1958 New York Convention,[15] first in The Netherlands and after that in England and Wales. In the interim, however, the Awards were annulled by the Moscow Arbitrazh court in a series of judgments on 18 and 27 May 2007 (the 'Annulment Judgments'),[16] on application of OJSC Rosneft Oil Company ('Rosneft'), a Russian company controlled and majority owned by the Russian State, which in 2004 had acquired the majority of the assets of the Yukos Group, including Yuganskneftegaz.[17]

#### b) The Dutch proceedings and the 'Dutch judgment'

The enforcement proceedings in The Netherlands got under way in March 2007, when Yukos Capital filed an application for leave to enforce the Awards at the Amsterdam District Court.[18] Rosneft challenged the application on the basis of Article V(1)(e) of the 1958 New York Convention, by reference to the Annulment Judgments.[19] In reply, Yukos Capital alleged that these judgments were the product of a partial and dependent judicial process and, hence, unworthy of recognition in The Netherlands, in which case

[11] On the loan agreements see Rb (District Court) Amsterdam 28 February 2008, LJN: BC8150 (*Yukos Capital SARL/OAO Rosneft*).

[12] See *OAO Neftyanaya Kompaniya Yukos v Russia* (n 5) for more background.

[13] At the International Commercial Arbitration Court at the Chamber of Trade and Industry of the Russian Federation.

[14] Nos 143/2005, 144/2005, 145/2005 and 146/2005.

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed in New York on 10 June 1958, entered into force on 7 June 1959) 330 UNTS 4739, Article III.

[16] On appeal these decisions were confirmed on 13 August 2007 by the Federal Arbitration Court of Moscow. Yukos Capital entered an appeal in cassation which by June 2011 had not been determined.

[17] On the forced auctioning of Yuganskneftegaz see *OAO Neftyanaya Kompaniya Yukos v Russia* (n 5) [223]ff.

[18] See Article 1075 Dutch Code of Civil Procedure ('Rv').

[19] 1958 New York Convention (n 15) ('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: . . . (e) The award . . . has been set aside . . . by a competent authority of the country in which . . . that award was made.').

they lacked validity in the eyes of the Dutch legal order, so that they could not be taken into account for the purpose of determining the application. On 28 April 2008, the District Court rejected the application in accordance with the 1958 New York Convention, Article V(1)(e), after finding that Yukos Capital had failed to prove or even sufficiently allege partiality and dependence of the Russian judiciary.[20] Yukos Capital appealed.

The Amsterdam Court of Appeal reconsidered and granted the application by judgment of 28 April 2009 (the 'Dutch Judgment').[21] The court found that 'it is so likely that the Russian civil court judgments setting aside the arbitral awards are the result of an administration of justice which is to be qualified as partial and dependent, that it is not possible to recognize those judgments in The Netherlands.'[22] The court therefore ignored the Annulment Judgments and, for that reason, it refused to apply Article V(1)(e) of the 1958 New York Convention. Its judgment became irreversible on 25 June 2010 when Rosneft's appeal in cassation failed on procedural grounds.[23]

c) The English proceedings

Matters in England and Wales got under way in March 2010, when at the request of Yukos Capital and following an *ex parte* hearing, freezing orders were granted against Rosneft (and a number of associated companies) to secure funds for the enforcement of the Awards in England and Wales.[24] Specifically, Yukos Capital sought to recover the *interest* on the principal sum of the Awards (valued at over US$160 million at Russian Central Bank rate) it had lost owing to Rosneft's failure to satisfy the Awards between 2006, when they were issued, and 2010, when they were finally complied with following their enforcement in The Netherlands.

Up to a point the High Court proceedings mirrored the proceedings in The Netherlands. Like in the Dutch proceedings, Rosneft opposed enforcement by invoking the Annulment Judgments in conjunction with Article V(1)(e) of the 1958 New York Convention. In answer, as it had done in the Dutch courts, Yukos Capital alleged that the judgments invoked by Rosneft were in fact the product of a partial and dependent judicial process so offensive against English principles of substantial justice, that the resulting judgments could not be recognized in England and Wales.[25] But then proceedings took a markedly different course: when Rosneft freshly denied Yukos Capital's allegation, Yukos Capital replied that Rosneft was precluded—'issue estopped'—from disputing its allegation, because the Amsterdam Court of Appeal, whose judgment English courts were bound to recognize, had previously determined the

[20] *Yukos Capital SARL/OAO Rosneft* (n 11).

[21] *Yukos NL* (n 3).

[22] ibid [3.10].

[23] HR (Supreme Court) 25 June 2010 LJN: BM1679 (*OAO Rosneft/Yukos Capital SARL*). The ground for rejecting the appeal was jurisdictional, because in cases of enforcement of an award under the New York Convention, Dutch law does not permit an appeal against the grant of exequatur. See Article 1062(4) in conjunction with 1064(1) Rv and Article III 1958 New York Convention.

[24] On 16 April 2010, Steel J rejected Rosneft's application to discharge or vary those freezing orders. See *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2010] WL 1368769.

[25] *Pemberton v Hughes* [1899] 1 Ch 781, 790 (Lord Lindley). cf *Adams v Cape Industries Plc* [1990] 1 Ch 433. See *Dicey, Morris & Collins* (n 10) Rule 45.

issue of partiality and dependence in its favour.[26] Yukos Capital further submitted that if Rosneft was indeed so precluded, it was essentially established that the Annulment Judgments should be refused recognition in England and Wales. This, in turn, would open the way to the granting of the claim for enforcement. Hamblen J clearly acknowledged the implications of Yukos Capital's plea of finality, or 'res judicata', as shown by his observation that: 'If it [ie the court] decides not to do so [ie recognize the Annulment Judgments] that will be consistent with the decision reached by the Court of Appeal and *it is in the interests of finality that the underlying factual issue decided by that court should not have to be relitigated*.'[27]

*2. Evaluation—The decision to base an issue estoppel on the Dutch judgment*

a) What is the nature of the question?

When a foreign judgment is invoked in an English court for preclusive purposes, two frequently associated but fundamentally distinct questions crop up: first, should the foreign judgment be recognized (as valid)[28] in England and Wales and, *if so*, what preclusive effects properly attach to the foreign judgment as a matter of English law? While recognition is a precondition for the attribution of preclusive effects, it is not equivalent to the attribution of preclusive effects. In other words, whereas every foreign judgment in order to have preclusive effect must first be recognized, not every recognized judgment is also preclusive. Hence, by asking the question whether the Dutch Judgment gave rise to an issue estoppel in the English proceedings, Hamblen J was concerned with the *consequences of* recognition, as opposed to the recognition itself. Still this is what Hamblen J appears to suggest, for instance,[29] where he notes that:

> Considerations such as that it may have been impractical for a litigant to deploy his full case in an 'earlier case of trivial character abroad' are more likely to be relevant to whether there are 'special circumstances' which would make it unjust to *recognise* the decision.[30]

But is application of the 'special circumstances' exception tantamount to refusing a foreign judgment recognition? It is respectfully suggested that this is conflating the issues. As the judge correctly explained, the exception applies in circumstances where the conditions for an issue estoppel are technically met, but where an issue estoppel would cause an injustice. In truth then, the exception is concerned with the legal consequences of a foreign judgment, as opposed to its recognition.

b) Does the common law control the issue?

In applying *Carl Zeiss*[31] as directing his basic approach to the problem of preclusion and foreign judgments and *The Sennar (No 2)*[32] as offering a further clarification of that approach specifically in relation to Dutch judgments, Hamblen J seems to take for granted that the *common law* controlled the consequences of the Dutch Judgment's

[26] *Yukos EN* (n 2) [16]. [27] ibid [105].

[28] *Shaw v Gould* (1868) LR 3 HL 55, 81 (Lord Westbury). cf *Dallal v Bank Mellat* (n 45) 462; and *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co* [1990] 1 AC 295, [1988] 3 WLR 230, 347 (Lord Goff of Chieveley).

[29] Another example is at [66]ff where the judge considers the '[i]rrelevance of criticism of the foreign judgment or procedure'. Whether the foreign procedure offends against English principles of substantial justice is a question of recognition, not estoppel.

[30] *Yukos EN* (n 2) [49]. [31] (n 10). [32] Ibid.

recognition. This assumption is not as self-evident as it is correct; common law plainly governs if common law was the basis for recognition of the Dutch Judgment, but it was not. Admittedly, the Brussels I Regulation was entirely irrelevant in the circumstances.[33] This instrument could not, then, interfere with the judge's analysis, even if it were true that its reach would otherwise extend (implicitly) to the consequences of recognition.[34] However, of the two remaining options—the Foreign Judgments (Reciprocal Enforcement) Act 1933[35] and the common law[36]—the common law applies only residually and for the Dutch Judgment stood superseded by the 1933 Act.[37] It follows that Statute as opposed to common law was determinative of the consequences of recognition of the judgment,[38] in addition to defining the conditions for[39] and exceptions to[40] its recognition. Nevertheless, Hamblen J was right to revert back to the common law, since the House of Lords in *Black Clawson*[41] clarified that section 8(1) of the 1933 Act did not vary the common law for judgments recognized under the act as far as concerns the consequences of recognition.[42] In particular, the act did not affect the rule in *Harris v Quine*,[43] stated by Blackburn J, that 'wherever it can be shewn that a court of competent jurisdiction has decided the matter, the plaintiff is

[33] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1 (as amended) Article 1(2)(d).

[34] See Case 145/86 *Hoffmann v Krieg* [1988] ECR 645 [11]. Some continental courts regard this decision as mandating the application of the preclusion law of the judgment-rendering State. For instance, see HR 12 March 2004, NJ 2004, 284 [3.6] (*IDAT/BJG*). However, as More-Bick LJ correctly emphasised in *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] 2 CLC 1004, [2009] EWCA Civ 1397 [114], '[t]here was no discussion [in *Hoffmann v Krieg*] of the effect of recognition as giving rise to estoppel by record, which is the question that we have to decide, and the judgment does not contain any clear indication of how that question should be decided.' More recent CJEU decisions seem more pervasive. For example, see Case C-444/07 *Probud* [2010] ECR I-417 [26] (Insolvency Regulation); and Case C-420/07 *Apostolides v Orams* [2009] ECR I-3571 [66].

[35] 23 and 24 Geo 5 C 13. See the Reciprocal Enforcement of Foreign Judgments (the Netherlands) Order 1969 No 1063 (as amended) adopted pursuant to the 1967 Convention between United Kingdom and The Kingdom of the Netherlands on the reciprocal recognition and enforcement of judgments in civil matters (signed at The Hague on 17 November 1967, entered into force on 21 September 1969) 699 UNTS 10022.

[36] *Ricardo v Garcias* (1845) XII Clark & Finnelly 368. On enforcement see in *Russell v Smyth* (1842) 9 Meeson and Welsby 810, 819, 152 ER 343; *Godard v Gray* (1870–71) LR 6 QB 139; and *Schibsby v Westenholz* (1870–71) LR 6 QB 155. See generally A Briggs, 'Which Foreign Judgments Should We Recognise Today?' (1987) 36 ICLQ 240. On the older authorities see F Piggott, *Foreign judgments: their effects in the English Court* (Stevens and Sons, London 1879) 3ff.

[37] Consistent with the 1967 convention, the 1933 Act does not exclude from its scope Dutch judgments in arbitration matters, nor specifically judgments granting leave to the enforcement of arbitral awards. See the 1933 Act, section 8(1) in conjunction with section 1(2A), which excludes various types of judgment, but not judgments granting leave to enforcement of arbitral awards. cf 1967 Convention, Article II(2).

[38] 1933 Act, section 8(1).

[39] 1933 Act, section 8(1) in conjunction with section 1, in particular section 1(2)(a), which requires that the judgment is final and conclusive. For an accurate explanation of the meaning of these requirements see *Nouvion v Freeman* (1890) LR 15 App Cas 1, 8–10 (Lord Herschell).

[40] 1933 Act, section 8(2) in conjunction with section 4(1)(a).

[41] *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 [1975] 2 WLR 513, [1975] 1 All ER 810, [1975] 2 Lloyd's Rep 11, 15 (1975) 119 SJ 221.

[42] ibid 618E-F, 626C-D, 634A-B, 650D-E.

[43] (1868–69) LR 4 QB 653.

estopped from disputing the decision, or litigating the matter in another court, while the decision of the first court remains unreversed.'[44]

c) The cautious lex fori approach

English law invariably governs issues of preclusion arising in respect of foreign judgments recognized in England and Wales, not because this law is thought to be on balance the proper law of preclusion, but because issues of preclusion continue to be regarded as questions of procedure insusceptible to any choice of law analysis whatsoever.[45] At the same time, English courts are slow to impose English standards of finality of litigation if it is pleaded and, if contested, shown by evidence of foreign law that the issue in question can be (re)litigated in the jurisdiction where the foreign judgment was originally given which is invoked for purposes of preclusion. Thus there is an element of caution in the English approach; the imperative acknowledged by Lord Reid in *Carl Zeiss*, that English preclusion law be applied to foreign judgments in a manner consistent with 'good sense'.[46] In keeping with this 'cautious *lex fori*' approach, Hamblen J applied English preclusion law to the Dutch Judgment and verified whether on that basis an issue estoppel arose with the effect of precluding Rosneft from disputing the fact of partiality and dependence of the Russian judiciary.[47] At the same time, he appropriately heard evidence on Dutch law when counsel for Rosneft alleged that this fact could be disputed afresh in The Netherlands. Logically this note should first assess the judge's application of English law and then the manner in which he took Dutch law into account. However, while the application of English law in the case is not entirely convincing,[48] it did not cause the eventual mistaken conclusion that the Dutch Judgment could properly found an issue estoppel. Accordingly, it is suggested to turn directly to the judge's assessment of Dutch law.

d) Taking account of Dutch law

When prompted to do so by counsel for Rosneft,[49] Hamblen J considered whether the Dutch Judgment would *in The Netherlands* have 'force of res judicata' (*gezag van gewijsde*), in the sense of being preclusive of litigation.[50] The judge's willingness to take Dutch law into account is illustrative of the good-sense approach of English courts

[44] ibid 658.

[45] See *Carl Zeiss* (n 9) 919 (Lord Reid); and *Vervaeke v Smith* [1983] 1 AC 145, 162, [1982] 2 WLR 855 (Lord Simon of Glaisdale). See generally on the procedural question exception *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1, [2006] 3 WLR 83, [2006] 4 All ER 1; [2006] 2 CLC 193, [2006] RTR 35, (2006) 156 NLJ 1136, (2006) 150 SJLB 917, Times, July 6, 2006. cf already *Castrique v Imrie* (1869–70) L.R. 4 H.L. 414, 427 (Blackburn J); and further *Dallal v Bank Mellat* [1986] QB 441 (Hobhouse J). On this approach see S Szaszy**,** 'The Basic Connecting Factor in International Cases in the Domain of Civil Procedure' (1966) 15 ICLQ 436ff.

[46] (n 10) 918.

[47] *Yukos EN* [42]ff.

[48] See (n 8).

[49] English courts do not consider foreign law of their own motion and will refer exclusively to English law, assuming foreign preclusion law is the same, if the relevance and difference of foreign preclusion law is not explicitly pleaded and, if contested, proved. See *Carl Zeiss* (n 10) 919 (Lord Reid). On the approach of an English court to a question of foreign law, see *Hilal Abdul Razzaq Ali Al Jedda v The Secretary of State for Defence* [2010] EWCA Civ 758 [54] (Arden LJ) with further references.

[50] *Yukos EN* [77]ff.

to issues of preclusion arising in respect of foreign judgments, which mandates caution so as to avoid precluding issues that may be (re)litigated abroad. Accordingly, the judge heard expert evidence on Dutch law. In a joint memorandum,[51] the experts[52] agreed that Dutch preclusion law, specifically Article 236 of the Code of Civil Procedure ('Rv'),[53] attaches preclusive effect to the Amsterdam Court of Appeal's final decision (*geschilbeslissing*) on Yukos Capital's claim for enforcement of the Awards in The Netherlands.[54] However, they disagreed on whether the same was true for that court's findings which preceded its decision on the claim (*voorbeslissingen*), including the finding of partiality and dependence.[55] The expert for Rosneft denied the existence of such preclusive effect, albeit without proving his contention.[56] Conversely, the expert for Yukos Capital asserted that this effect does attach by virtue of Dutch law.[57] In support, he cited the Dutch Supreme Court decision in *Siegers v Citco Bank Antilles NV*.[58] Ultimately, following cross-examination, the expert for Rosneft was forced to concede that 'res judicata extends to the establishment of a fact which ''is part of a decision regarding the legal relationship in dispute''.'[59] On that basis, Hamblen J concluded that it was 'common ground on the expert evidence that the finding that the Annulment Decisions were the result of a partial and dependent legal process would be res judicata in the Netherlands'.[60]

The first step in assessing the accuracy of this conclusion is to note a simple error of translation of one of the key terms of Article 236 Rv.[61] The Dutch law experts tendered a *literal* version of '*rechtsbetrekking in geschil*', which they interpreted as 'legal relationship in dispute'. Accordingly, Hamblen J assumed that Article 236 Rv applies to a 'decision regarding the relationship in dispute', including any finding of fact forming part of such a decision.[62] But in reality, the provision no longer has its literal meaning, which in practice proved to be too vague, rendering it unworkable. Instead, the Dutch Supreme Court has interpreted '*rechtsbetrekking in geschil*' as denoting the '*rechtsvraag*'; that is, literally, the 'legal question' under consideration, or more precisely, the claim (or issue) to be determined by the court.[63] In reference specifically to the *issue* to be determined, that Court has also applied the term '*geschilpunt*'.[64] Hence, an accurate statement of Dutch law to be offered to an English court having to take this law into account would have translated Article 236(1) Rv in light of its

[51] ibid. Due to a lack of access to the expert evidence the expert evidence cited in the judgment—including the Joint Memorandum, supplementary reports and witness statements (see [77]–[78])—it will be assumed here that the court's conclusion accurately reflects it.

[52] Professor Bartels for Yukos Capital and Professor Jongbloed for Rosneft.

[53] *Yukos EN* [77]ff.

[54] ibid. A better translation refers to *gezag van gewijsde* as the 'preclusive effect' of a judgment denoting that the judicial findings of the court are conclusive of litigation, have '*bindende kracht*', as distinguished from the *rechtskracht* (ie force of law) of the court's order.

[55] ibid [77].

[56] ibid.

[57] ibid.

[58] HR 17 November 1995, NJ 1996, 283.

[59] *Yukos EN* [77].

[60] ibid [79].

[61] On this provision see (especially) A van Schaick**,** *Asser Procesrecht Deel 2, Eerste aanleg* (Kluwer, Deventer 2011) [101]–[158]; Y Beukers**,** *Eenmaal andermaal? : beschouwingen over gezag van gewijsde en ne bis in idem in het burgerlijk procesrecht* (Tjeenk Willink, Zwolle 1994); and D Veegens**,** *Het gezag van gewijsde* (Tjeenk Willink, Zwolle 1972).

[62] ibid [77].

[63] See HR 15 May 1987, NJ 1988, 164 [3.4] (*Van Huffel/Van den Hoek*).

[64] HR 14 oktober 1988, NJ 1989, 413 [3.2] (*Wijnberg v Westland/Utrecht Hypotheekbank NV*). cf, for instance, Advocate General De Vries Lentsch-Kostense in HR 6 Februari 2004, LJN: AN8908 [3.1.1].

interpretation in practice, as follows: 'Judicial findings regarding the claim or issue contained in an irreversible judgment, are conclusive between the same parties in another case.'[65]

In light of this clarification, the relevant question to ask for the purpose of applying Article 236(1) Rv is whether the Amsterdam Court of Appeal's *finding of fact* (ie that the Annulment Judgments were the result of a partial and dependent legal process in Russia) was a 'finding regarding an issue'. Answering this question involves an explanation of what exactly was the 'issue' to be determined by the court. There can be little doubt in this respect; the issue was whether recognition of the Annulment Judgments would be in breach of Dutch public order.[66] In relation to this issue, Yukos Capital made the point that the Annulment Judgments resulted from judicial partiality and dependency; a fact Rosneft denied. The court settled this question in favour of Yukos Capital. However, its finding that the Annulment Judgments were the result of a partial and dependent legal process in Russia was not a finding 'on' the issue in question, since the issue was whether the Annulment judgments violated Dutch public order, not whether those judgments were the product of a partial and dependent legal process. Nevertheless, as noted above, Article 236 Rv applies to findings 'regarding' the issue in question, a term broad enough to encompass findings on questions of fact and law made in the process of determining the issue. This broad interpretation was confirmed by the Dutch Supreme Court in *Siegers/Citco Bank Antilles NV*, the case cited by the Dutch law expert for Yukos Capital as authority for his assertion that Article 236 Rv applies to findings of fact. The Court held specifically that:

> The grievance postulates that a judicial finding, despite concerning the issue in question, cannot have preclusive effect if that finding is factual in the sense that it, as the grievance puts it, establishes a fact. This starting point is incorrect. Such a finding is preclusive in another case between the same parties if that finding does not merely establish a fact (cf. HR 15 May 1987, NJ 1988, 164), but is part of the finding on the issue in question, meaning that the issue is (in some measure) determined by the fact's legal consequences which, according to that finding, apply between the parties.[67]

Applying this reasoning to the finding of partiality and dependence by the Amsterdam Court of Appeal, it is clear that, while this is not a finding '*on*' the issue in question, it nonetheless qualifies as a finding '*regarding*' the issue in question covered by Article 236 Rv, because it forms part of the finding that Dutch public policy barred the recognition of the Annulment Judgments in The Netherlands—that is, the question of recognition was (in some measure) determined by the legal consequences (refusal of recognition) which, according to that finding (violation of public policy), apply between the parties on account of the fact established (partiality and dependence of the legal process in Russia).

Nevertheless, it is not sufficient for the applicability of Article 236 Rv that the finding of partiality and dependence by the Court of Appeal in the enforcement proceedings qualifies as a 'finding regarding the issue in question'. In addition there needs to be identity between the issue determined in those proceedings and the issue arising in the

[65] 'Beslissingen die de rechtsbetrekking in geschil betreffen en zijn vervat in een in kracht van gewijsde gegaan vonnis, hebben in een ander geding tussen dezelfde partijen bindende kracht'.

[66] *Yukos NL* [3.5]. On a more general note, the judgment of the Court of Appeal illustrates that, contrary to popular belief, Article 431 of the Dutch Code of Civil Procedure, the infamous provision of Dutch law, is no bar to the recognition and enforcement of foreign judgments in The Netherlands.

[67] (n 58) [3.4].

succeeding case, for Article 236 Rv lacks application to a finding regarding the issue in question in one set of proceedings if the issue in question in the subsequent set of proceedings is different.[68] This requirement was clearly stated by the Dutch Supreme Court in *Van Huffel/Van den Hoek*,[69] where it ruled that 'the finding of the [court whose judgment was relied upon as the basis for preclusion] related to a different issue—that is, the legal relationship in dispute—than that in question in the present case.'[70] Advocate General Asser in his opinion in *Siegers/Citco Bank Antilles NV* concluded similarly that: 'The Supreme Court [in *Van Huffel/Van den Hoek*] accordingly expressed that it is inappropriate to invoke the preclusive effect of a finding of fact isolated from the finding on the issue in question in relation to which it was made.'[71]

The requirement of identity of issues is fatal in the present case, because that identity is manifestly absent; the Amsterdam Court of Appeal determined the issue whether Dutch public policy barred the recognition of the Annulment Judgments in The Netherlands, whereas the High Court was called upon to determine whether English principles of substantial justice prevented the recognition of the same judgments in England and Wales.[72] If any authority is required for this conclusion, which is strictly logical, reference can be made once more to the opinion of Advocate General Asser in *Siegers/Citco Bank Antilles NV*, who made precisely the same point:

> If a new case concerns another issue, a prior factual finding cannot be regarded as having preclusive effect by the court called upon to determine that issue in the new set of proceedings, notwithstanding that the factual finding is equally relevant for the finding on the new issue. This relevance relates to the evidential value of the prior judgment.[73]

Accordingly, it is entirely irrelevant that both cases raised identical questions of fact, because the issue in question was different. This is not to say that the Amsterdam Court of Appeal judgment would be devoid of any relevance. But its proper significance would be *evidential*, not preclusive.

### *3. Is the case cause to reconsider the cautious lex fori approach?*

The English cautious *lex fori* approach to issues of preclusion arising in respect of foreign judgments strikes a middle ground between dogma[74] and good sense. The present case is no reason to reconsider it. While an alternative approach might be to apply the law of the judgment rendering jurisdiction, if anything, the mistake as to Dutch law in the present case would be cited in favour of excluding reference to foreign law altogether. Such a change should be undesirable, however, as it would give rise to complications like those presently inherent in section 34 of the Civil Jurisdiction and Judgments Act 1982[75] as construed by the House of Lords in *The Indian Grace*.[76] As currently understood, this claim-preclusive rule prevents the reassertion of a cause of action for which judgment has been recovered abroad without enabling English courts

[68] HR 18 September 1992, NJ 1992, 747 [3.3] (*Keizer v Van Andel*). cf Hof Amsterdam 28 October 1977, NJ 1978, 350 (*Massoud/Van Os*).
[69] (n 63). [70] ibid [3.4]. [71] (n 58) [2.14].
[72] Hamblen J at [105] clearly acknowledged this discrepancy of the issues.
[73] (n 58) [2.9]. [74] See the text to (n 45).
[75] c 27. See *Dicey, Morris & Collins* (n 10) Rule 35(3) and the comment at [14-034]ff.
[76] *Republic of India v India Steamship Co, The Indian Grace* [1993] AC 410, [1993] 1 All ER 998, [1994] ILPr 498, [1993] 1 Lloyd's Rep 387, [1993] 2 WLR 461.

to take account of the fact that the cause of action can actually be reasserted in the judgment-rendering State. This imposition of English standards of finality of litigation without observing the need for conspicuous caution risks inflicting serious injustice to and between litigants.[77] Against this background, the inclination of English courts to take foreign law into account, as illustrated by the present case,[78] is only admirable.[79]

At the same time, it should be noted that the cautious *lex fori* approach is clearly not the most efficient method, as it forces English courts and the parties to consider two legal systems cumulatively, while the application of a single law—the law of the judgment-rendering court—would (in theory) suffice to do justice. Moreover, it is unclear how the approach could work justice in circumstances where the scope of preclusion under the law of the judgment-rendering court is wider than in English law.[80] By mandating the application of English law, the approach sets a ceiling on the preclusive effect of a foreign judgment, whereas good sense would back preclusion beyond English standards of finality.[81] This is not the best place to undertake the considerable task of defining an alternative approach which is more efficient and just than the current approach. Nonetheless, two crucial questions which would arise in the process of devising such approach can be briefly identified and summarily addressed. First, should it matter that application of the law of the judgment-rendering court is tantamount to *applying* foreign law? Of course not—English courts are well able to make findings on the meaning of foreign law. It is something they do all the time.[82] The fact that they do so by reference to expert evidence and that this evidence may occasionally be wrong does not outweigh the benefits of international decisional harmony when it comes to the implementation of the principle of finality of litigation between legal systems.

Second, should it matter that application of foreign preclusion law involves applying foreign *procedural* law? Of course not, the belief that for reasons of convenience questions of procedure are always best governed by English law is mistaken, as demonstrated in the present context: whereas English courts theoretically apply only English preclusion law, in truth they have foregone the comfort of the *lex fori* by

[77] See A Briggs, 'Foreign judgments and res judicata: Republic of India v. India Steamship Co. Ltd. (The Indian Grace and The Indian Endurance) (No.2)' (1997) 68 BYBIL 355ff. cf P Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP, Oxford, 2001) [4.33]ff.

[78] *Yukos EN* [70]ff.

[79] For further recent examples see *National Navigation* (n 34); *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* [2011] EWHC 1820 (Comm) (Steel J); and *Naraji v Shelbourne* [2011] EWHC 3298 (QB) (Popplewell J) [124]ff.

[80] It is unclear, for instance, how an English court would be able to take proper account of the law of certain US States allowing for non-mutual preclusion in certain well-defined circumstances. See H Erichson, 'Interjurisdictional preclusion' (1998) 96 Michigan Law Review 945, 965 with further references.

[81] It is suggested that an English court might seek to reach an equivalent result though its inherent power to prevent an abuse of process. On the so-called 'functional equivalence' approach see nothing short of brilliantly A von Mehren and D Trautman, 'Recognition of Foreign Adjudications: A Survey and A Suggested Approach' (1968) 81 Harvard Law Review 1601, 1680ff.

[82] *Al-Jedda v Secretary of State for Defence* [2011] QB 773, [2010] EWCA Civ 758 [191] (Elias LJ).

accommodating foreign law through the back door by taking it into account so as to avoid injustice. What then is left of the legitimacy of the procedural question exception? It is submitted that much is to be said for the approach recommended by Arden LJ in *Harding v Wealands* that 'a reference to the law of the forum must be the exception, and it must be justified by some imperative which, relative to the imperative of applying the proper law, has priority. It may, for instance, be appropriate to apply the law of the forum where the court cannot put itself into the shoes of the foreign court'.[83] This approach was not accepted by the House of Lords in the context of international tort law when it comes to the quantification of damages.[84] However, in this context it may well be preferable. As noted, English courts have shown themselves more than capable to step into the shoes of the foreign judgment-rendering court. Accordingly, the application of English preclusion law as the law of the forum cannot be justified relative to the imperative of applying the proper law of preclusion. This dogmatic shift away from excluding any choice of law analysis in respect of issues of preclusion with a foreign element (here the *judgment*) need not imply that all issues are necessarily governed by foreign law; as Mance LJ (as he then was) in *Raiffeisen Zentralbank* said about the (three-stage)[85] process through which the common law identifies the appropriate law: 'The overall aim is to identify the most appropriate law to govern *a particular issue*.'[86] Accordingly, the appropriate approach would be to look at the particular preclusion issue and to designate 'in a broad internationalist spirit'[87] the preclusion law most appropriate for its resolution. This may be foreign law or the law of the forum *as appropriate*.

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## II. HABITUAL RESIDENCE AND THE NEWBORN—A FRENCH PERSPECTIVE

Where a pregnant woman travels and subsequently gives birth to a child abroad, should the left behind father be able to petition for the 'return' of his child under the 1980 Hague Convention on the Civil Aspects of International Child Abduction? An affirmative answer would not only presuppose that the abduction of the child had been in breach of the father's actually exercised rights of custody, but would also depend on

[83] [2005] 1 WLR 1539, [2004] EWCA Civ 1735 [52]. [84] (n 45).

[85] *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] QB 825, 840, [2001] EWCA CIV 68, [2001] 2 WLR 1344 ('(1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue . . . .').

[86] ibid (emphasis added). [87] ibid.

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