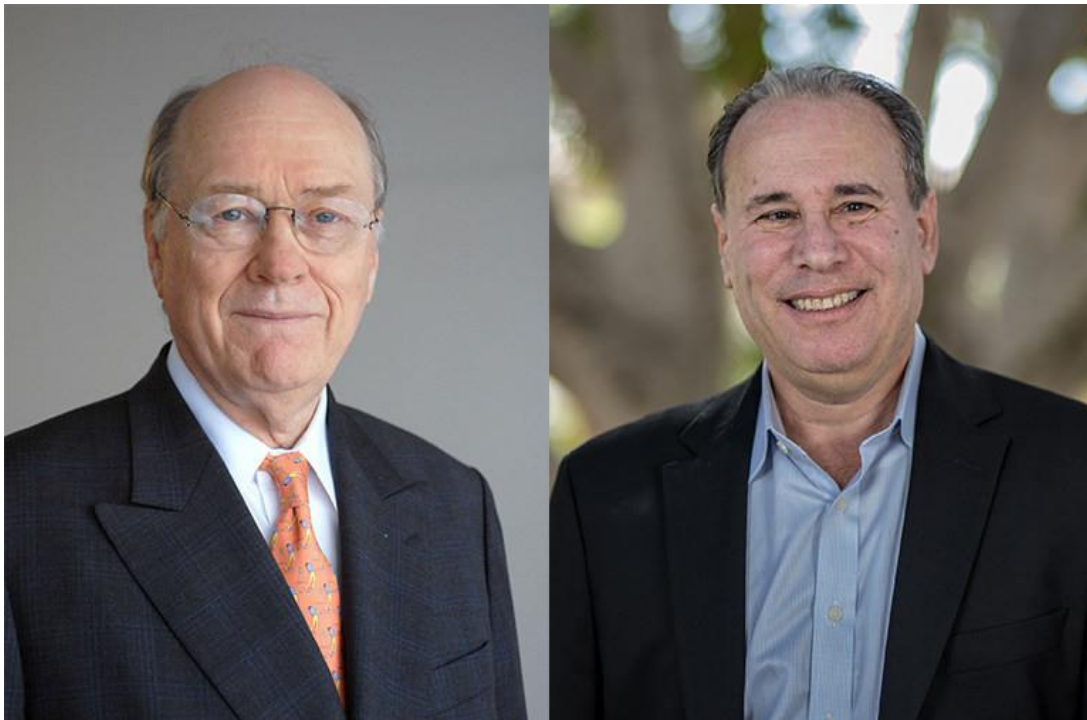


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The Perils of Deference: ‘Hulley Enterprises’ and the New Landscape of Sovereign Immunity in the D.C. Circuit

In their International Litigation column, the authors look at the recent *Hulley Enterprises* decision in which the D.C. Circuit held that a U.S. court must independently determine whether an arbitration agreement exists to establish jurisdiction under the Foreign Sovereign Immunities Act, even if the arbitral tribunal already decided the issue.

By **Lawrence W. Newman and David Zaslow** | September 16, 2025



In 2014, an arbitral tribunal ordered Russia to pay over \$50 billion in damages to the former majority shareholders of the defunct oil company, OAO Yukos Oil Company (Yukos). This is the largest known arbitration award.

It has led to an 11-year (and counting) multi-jurisdictional odyssey to enforce the historic award. One of the more recent episodes played out on Aug. 5, 2025, when the United States Court of Appeals for the District of Columbia Circuit vacated a district court ruling, which had held that there was jurisdiction under the Foreign Sovereign Immunities Act (FSIA) to enforce the award.

In *Hulley Enterprises Ltd. et al. v. Russian Federation*, 2025 WL 2216545 (D.C. Cir. Aug. 5, 2025), the D.C. Circuit held that a U.S. court must independently determine whether an arbitration agreement exists to establish jurisdiction under the FSIA, even if the arbitral tribunal already decided the issue.

The Underlying Arbitration

The dispute traces its origins to the early 2000s, when the Russian Federation expropriated the most valuable assets of Yukos, once Russia's largest private oil company.

The majority shareholders of Yukos—Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd.—initiated arbitration proceedings under the Energy Charter Treaty (ECT), alleging that Russia's actions violated Article 13 of the Treaty, which prohibits unlawful expropriation of investments by signatory states.

Although Russia signed the ECT in 1994, it never ratified the Treaty and later withdrew from it in 2009. Nonetheless, the ECT provides for provisional application of its terms upon signature, unless such application is inconsistent with a signatory's domestic laws (Article 45).

The arbitration, seated in The Hague, lasted for a decade. In July 2014, the tribunal issued a final award, finding that it had jurisdiction and awarding the shareholders over \$50 billion.

Russia immediately challenged the award in the Dutch courts, arguing that the tribunal lacked jurisdiction because there was no valid arbitration agreement. Russia contended that it was not bound to provisionally apply the ECT's arbitration clause.

The Dutch courts ultimately upheld the tribunal's jurisdiction and affirmed the award. The Dutch Supreme Court concluded that Russia had provisionally applied the ECT and that the claimants qualified as protected investors.

The U.S. Enforcement Proceedings and FSIA Jurisdiction

While the Dutch legal proceedings were ongoing, the Yukos shareholders sought to enforce the award in various jurisdictions around the world. In the U.S., those efforts were in a proceeding in the U.S. District Court for the District of Columbia.

Under U.S. law, foreign states are presumptively immune from the jurisdiction of U.S. courts unless one of the enumerated exceptions to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA) applies.

The relevant exception here is the so-called arbitration exception, codified at 28 U.S.C. §1605(a)(6), which removes immunity in cases to enforce an arbitration agreement or award governed by a treaty in force for the U.S.

To apply this exception, a plaintiff must establish three jurisdictional facts: (1) the existence of an arbitration agreement, (2) the existence of an award, and (3) a governing treaty. Russia moved to dismiss the case, asserting sovereign immunity and arguing that the arbitration exception did not apply because there was no arbitration agreement.

Russia contended, as it had before the arbitral tribunal, that its provisional application of the ECT did not create a binding agreement to arbitrate, primarily because it was allegedly inconsistent with Russian law.

The district court held that it had jurisdiction and was not required to re-litigate the question of the existence of an arbitration agreement.

The district court reasoned that since the arbitral tribunal had already considered and decided this jurisdictional question—in a context where the parties had “clearly and unmistakably” delegated such authority to the tribunal—its findings were binding and not subject to *de novo* review by the court. It was this point of deference that the D.C. Circuit found to be an error of law.

The D.C. Circuit's Holding: Independent Judicial Review Required

The D.C. Circuit, in an opinion by Judge Neomi Rao, clarified a fundamental and often-overlooked principle of U.S. federal jurisdiction: when a plaintiff seeks to establish jurisdiction over a foreign state under the FSIA, the

federal court must independently determine the “jurisdictional facts” that trigger an exception to sovereign immunity.

This duty may not be “outsourced.” The court emphasized that the existence of an arbitration agreement under the FSIA is a “jurisdictional fact” that must be confirmed by the federal court itself, without deferring to the tribunal's prior determination.

The D.C. Circuit’s reasoning hinged on the nature of sovereign immunity as a jurisdictional bar. Unlike other challenges to an arbitral award (*e.g.*, arguments about the scope of an arbitration clause or the merits of the dispute), a foreign state’s claim of sovereign immunity goes to the very subject-matter jurisdiction of the court.

The FSIA provides the sole basis for jurisdiction over a foreign state in U.S. courts. Therefore, a court must satisfy itself that one of the FSIA’s enumerated exceptions applies before it can hear the case.

The court drew a clear line between the existence and the scope of an arbitration agreement. While challenges to the scope are non-jurisdictional and can be left to the arbitrator, a dispute about whether a foreign state ever agreed to arbitrate in the first place is a jurisdictional question for the court to decide on its own.

This distinction between existence and scope is where the D.C. Circuit's decision found its critical legal footing.

The court noted that Russia’s arguments—that provisional application of the ECT was inconsistent with its laws and that the claimants were not “investors” under the treaty—were not challenges to the scope of an existing agreement but, rather, to the existence of an agreement altogether. The D.C. Circuit’s holding puts this question firmly back in the hands of the U.S. federal judiciary.

The Issue Estoppel Approach

Another episode of the Yukos saga took place recently in the English courts. In *Hulley Enterprises Ltd and others v. The Russian Federation* [2025] EWCA Civ 108, the English Court of Appeal upheld the High Court’s application of issue estoppel, precluding Russia from rearguing the “no agreement” issue that had already been decided by the Dutch courts.

Lord Justice Stephen Males ruled that the Dutch Supreme Court’s decision met all of the criteria for issue estoppel under English law: it was rendered by a competent court, was final and conclusive, involved the same parties, and addressed the same subject matter.

He rejected Russia’s argument that sovereign immunity should override issue estoppel, affirming that English courts could rely on foreign judgments to determine whether exceptions to immunity applied.

The Yukos shareholders made a similar argument in the United States. They contended that the Dutch courts determined that Russia had agreed to arbitrate the dispute in question and, therefore, issue preclusion barred Russia from relitigating the existence of an arbitration agreement.

However, because the district court had already deferred to the Tribunal's determination of this jurisdictional question, it declined to address the issue of deference to the decision of the Dutch courts.

The D.C. Circuit made clear that the decision of the Dutch courts would be very much alive on remand. The court had, of course, made clear that the district court must make an “independent review of jurisdictional facts.”

Nevertheless, according to the D.C. Circuit, the decision of the Dutch courts might control the factual questions that the district court will have to answer. The circuit court provided certain “guidance” to the district court on remand.

It explained that issue preclusion applies to threshold jurisdictional issues and that sovereign immunity is a jurisdictional issue. The D.C. Circuit said that it had never decided the issue of whether to give preclusive effect to jurisdictional determinations by domestic courts when analyzing subject matter jurisdiction under the FSIA, but that the district court should consider it.

Another issue of first impression for the district court will be whether preclusion extends to foreign judgments. The D.C. Circuit said that it was not aware of any case in which a court had given preclusive effect to a foreign judgment in order to exercise jurisdiction over a foreign sovereign under the FSIA.

But it also noted the long line of U.S. jurisprudence that recognizes foreign judgments on the basis of comity.

The last piece of guidance from the appellate court was that, because the novel issue before the district court might implicate foreign relations and international law, the court should invite the U.S. to express the government's position through a Statement of Interest or other appropriate mechanism.

Takeaways

Hulley Enterprises is a significant decision. Under 28 U.S.C. §1391(f)(4), the United States District Court for the District of Columbia is the designated venue for actions brought against foreign states if there is no basis for laying the venue elsewhere.

Accordingly, a decision by the D.C. Circuit on an FSIA jurisdictional requirement is outsized as compared with a decision from any other circuit court.

In situations of a foreign state raising a jurisdictional argument relating to the formation or existence of the arbitration agreement, *Hulley Enterprises* effectively raises the evidentiary threshold for invoking the FSIA arbitration exception.

Claimants must now demonstrate, through independent judicial scrutiny, that a valid arbitration agreement exists. This is so even if the issue had previously been delegated by the parties for determination by an arbitral tribunal.

Furthermore, although the D.C. Circuit's decision provides clarity, it also introduces a degree of uncertainty. The court's distinction between a jurisdictional fact (existence) and a non-jurisdictional fact (scope) is not always clear-cut.

Future cases will inevitably test the boundaries of this distinction, forcing courts to grapple with nuanced arguments about what constitutes a fundamental challenge to the very existence of an arbitration agreement. This could lead to a wave of new litigation as parties seek to exploit the *Hulley Enterprises* precedent.

Finally, depending on the ultimate outcome of the issue preclusion question in further litigation of the *Hulley* case, the presence of a decision of a foreign court on the jurisdictional issue could loom large in answering the jurisdictional question in the U.S. Attention should be paid as case law develops.

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