Res Judicata – a 2022 update

The English High Court has considered abuse of process (res judicata in the wider sense, or *Henderson v Henderson* abuse) on three occasions in as many months.

Res Judicata Defined

Before looking at those cases it is helpful to remind ourselves of the relevant law on res judicata, which is now well settled. It is convenient to take as a starting-point the following summary by Lord Sumption JSC in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46100 at [17][1]:

> "*17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.*
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> *(1) The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.*
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> *(2) Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example, to recover further damages: see Conquer v Boot [1928] 2 KB 336.*
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> *(3) Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). […]*
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> *(3) Fourth, there is the principle that 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 on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198.*
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> *(5) Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.*
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> *(6) Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."*

Cause of Action Estoppel

In understanding cause of action estoppel it is, of course, necessary to understand what a 'cause of action' is. It was described by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at p. 243 as "*a factual situation the existence of which entitles one person to obtain from the court a remedy against another*

[1] Divided into subparagraphs here, for ease of reading.

person". The courts have held that an estoppel can arise when the same factual situation is relied on in two cases.

In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 Lord Keith held at p.104D that:

> "*Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened*."

In *Conquer v Boot* [1928] 2 KB 336, the claimant brought a second action against the same defendant relying on different particulars (relating to a failure to use proper materials) than those put forward in the first action (relating to a failure to complete the work in a good and workmanlike manner). In allowing the defendant's appeal, Sarkey LJ (at p. 340) referred to the proposition set out by Bowen LJ in *Brunsden v Humphrey* (1884) 14 QBD 141:

> *"It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all."*

Conquer v Boot was considered by the House of Lords in *Republic of India v India Steamship Co Ltd (The Indian Grace)* [1993] AC 410. Lord Goff held at pp. 420‑1 that, in a contractual context (emphasis added):

> "⋯*as is shown by Conquer v. Boot [1928] 2 K.B. 336, it is necessary to identify the relevant breach of contract; and if it transpires that the cause of action in the first action is a breach of contract which is the same breach of contract which constitutes the cause of action in the second, then the principle of res judicata applies, and the plaintiff cannot escape from the conclusion by pleading in the second action particulars of damage which were not pleaded in the first. In Conquer v. Boot the relevant breach of contract was identified as being breach of a promise to complete a bungalow which the defendant was building for the plaintiff. Talbot J. said, at pp. 344-345:*
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> > *"Here there is but one promise, to complete the bungalow; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From that moment the Statute of Limitations began to run as to the whole. The plaintiff could not alter the fact that he was recovering damages for the breach of this single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled. The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same."*
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> *Talbot J. expressed his conclusion as follows, at p. 346:*
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> > *"I think therefore that the plea of res judicata or judgment recovered is an answer to the whole of this action, and that the defendant is entitled to judgment."*
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> *If I turn to the present case, I find that the situation is not precisely the same. The present case is not concerned with the failure to construct a building in accordance with a certain specification, which can result in a whole series of defects which may nevertheless lead to a single breach of contract, i.e., the failure to hand over the building constructed in accordance with the terms of the contract. It is rather concerned with a single incident, i.e., the fire during transit which broke out in the cargo over which the plaintiffs' consignment of munitions was stowed, which resulted in the damage to that consignment and to loss (by jettison) of a small part of it. Furthermore, as appears from the pleadings, that loss or damage might have resulted from breach of more than one term of the contract, for example breach of the obligation to make*

the vessel seaworthy under article III, rule 1, of the Hague-Visby Rules, or breach of the obligation to load and stow, etc., the vessel carefully under article III, rule 2. However, for present purposes, there is no need to distinguish between the two breaches; because the factual basis relied upon by the plaintiffs as giving rise to the two breaches is the same, and indeed was referred to compendiously by the plaintiffs in the Cochin action as "negligence." In these circumstances, I am satisfied that there is identity between the causes of action in the two sets of proceedings."

Merger

Associated with the notion of cause of action estoppel is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given. In *Clark v In Focus Asset Management* [2014] 1 WLR 2502, 105 Arden LJ (as she then was) held as follows at [5] – [12]:

"5. Merger explains what happens to a cause of action when a court or tribunal gives judgment. If a court or tribunal gives judgment on a cause of action, it is extinguished. The claimant, if successful, is then able to enforce the judgment, but only the judgment. The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to (see, for example, Wright v London General Omnibus Co [1877] 2 QBD 271 and Republic of India v Indian Steamship Company Ltd (The Indian Grace) [1998] AC 878). As Mummery LJ held in Fraser v HMLAD [2006] EWCA Civ 738 at [29], a single cause of action cannot be split into two causes of action.

6. Res judicata principally means that a court or tribunal has already adjudicated on the matter and precludes a party from bringing another set of proceedings (see generally Lemas v Williams [2013] EWCA Civ 1433). The doctrine also covers abuse by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which the claimant ought to have brought in the first set of proceedings (this is known as the rule in Henderson v Henderson (1843) 3 Hare 180; 67 ER 313).

7. The requirements of res judicata are different from those of merger. All that is necessary to bring merger into operation is that there should be a judgment on a cause of action…

8. I take as the requirements of cause of action estoppel the summary from Spencer Bower and Handley on Res Judicata cited with approval by Lord Clarke (with whom Lords Phillips, Rodger and Collins agreed) in the recent case of R (o/a Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] 2 AC 146 at [34]:

> *"34 In para 1.02 Spencer Bower & Handley, Res judicata, 4th ed makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are:*
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> *(i) the decision, whether domestic or foreign, was judicial in the relevant sense;*
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> *(ii) it was in fact pronounced;*
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> *(iii) the tribunal had jurisdiction over the parties and the subject matter;*
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> *(iv) the decision was – (a) final; (b) on the merits;*
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> *(v) it determined a question raised in the later litigation; and*
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> *(vi) the parties are the same or their privies, or the earlier decision was in rem.'*

9. If the requirements of res judicata are fulfilled, they constitute an absolute bar and the court has no discretion to hold that res judicata should not apply in any particular case.

10. If the requirements of merger are satisfied, it is unnecessary to see if the requirements of res judicata were fulfilled, and vice-versa.

11. There is a powerful two-fold rationale for the doctrines of merger and res judicata. The first rationale is 'the public interest in finality of litigation rather than the achievement of justice as between the individual litigants' (see per Lord Goff in The Indian Grace at 415). Mr Clive Wolman, for the respondents, suggests that the public interest in finality arises out of a concern that the public courts and tribunals should not be clogged by repetitious re-hearings and re-determinations of the same disputes. This is clearly a powerful consideration.

12. Second there is the private interest. As Sir Nicolas Browne-Wilkinson V-C put it in Arnold v National Westminster Bank plc [1983] 3 All ER 977 at 982: 'it is unjust for a man to be vexed twice with litigation on the same subject matter'."

Issue Estoppel

Issue estoppel can be distinguished from cause of action estoppel because it is narrower in scope. It was described in the following terms by Lord Keith in *Arnold v National Westminster Bank* at p. 105D:106

"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

Henderson

Finally, in *Henderson v Henderson* (1843) 3 Hare 100, in a statement of the law described by Lord Sumption JSC in *Virgin Atlantic* at [18] as "*justly celebrated*" and which articulates "*probably the commonest form of res judicata to come before the English courts*", Wigram VC held as follows at pp. 114-115:

"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

The relation between cause of action estoppel and the rule in *Henderson* was considered by the House of Lords in *Johnson v Gore-Wood & Co* [2002] 2 AC 1, where a second claim brought by a majority shareholder of a company which had previously brought proceedings was held not to be abusive. At p. 31, Lord Bingham said this:

"Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify

> *any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."*

In a concurring judgment, Lord Millett held at pp. 58‑59 that:

> *"Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. In Barrow v Bankside Members Agency Ltd [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in Manson v Vooght [1999] BPIR 376, 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented."*

Abuse of Process

Having cited these passages in *Virgin Atlantic*, Lord Sumption JSC went on to consider the relationship between *res judicata* and abuse of process at [25] ‑ [26]:

> *"25. […] Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank at p 110G, "estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process" .*
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> *26. It may be said that if this is the principle it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to reargue a point which was raised and rejected on the earlier occasion. But this point was addressed in Arnold, and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."*

Application to Arbitration

These principles of res judicata apply to arbitral proceedings in England as they do in court proceedings.

The English courts will apply the principles to prevent re-litigation within the courts of causes of action or issues already decided by an arbitral tribunal (see for example *Smith v Johnson* (1812) 15 East Rep 213, *Dunn v Murray* (1829) 9 B&C 780, *H. E. Daniels LD v Carmel Exporters and Importers Ltd* [1953] 2 Q.B. 242, *Purser and Co (Hillingdon) Ltd v Jackson* [1977] Q.B. 166, *Dallal v Bank Mellat* [1986] 1

QB 441 and *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] 1 CLC 963).

The Court of Appeal has also held that the principle applies to prevent re-litigation in an arbitration hearing of causes of action or issues already decided by an arbitral tribunal earlier in the same proceedings: *Fidelitas Shipping Co Limited v V/O Exportchleb* [1966] 1 QB 630, in which both Lord Denning MR ("*Like principles [having discussed res judicata and specifically cases such as King v Hoare, Thoday and Henderson] apply to arbitration*" at p. 640) and Diplock LJ ("*Issue estoppel applies to arbitration as it does to litigation*" at p. 643) stated that the principles apply to arbitrations.

Recent Cases

*PJSC National Bank Trust & Anor v Mints and Others [2022] EWHC 871 (Comm) ("**National Bank**")*

In *National Bank* Foxton J considered the degree to which an arbitration award[2] could have preclusive effects against non-parties to the arbitral proceedings. He concluded that although an arbitral award did not completely rule this out, it did set a high bar. This is an unsurprising result given the general requirement for res judicata that the parties in the two proceedings must be the same or their privies: as a matter of English law, issue estoppels which arise from court judgments bind not only the parties, but also their "privies". There is a significant body of English case law which has developed since the decision in *Gleeson v Wippell & Co Ltd* [1977] 1 WLR 510 which proceeds on the basis that the concept of privy extends not only to the parties' successors in title in respect of the litigated right which has given rise to the issue estoppel, but also a wider class of persons where "*having due regard to the subject matter of the dispute, there [is] a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is party*" (pp.514-515 of *Gleeson*). That wider class of potential privies beyond successors in title are known as 'Gleeson Privies'.

In the litigation before the court, two claimant banks had brought tort claims under foreign law against a number of defendants. Broadly speaking, these concerned allegations that the defendants had acted dishonestly in relation to a transaction whereby one of the banks (O) had released security provided to it by certain Cypriot companies.

In relation to that transaction, those Cypriot companies had commenced arbitrations against that bank (the relevant documentation having contained LCIA arbitration agreements) for declarations that the release was valid. The tribunal, however, rejected that request and accepted a counterclaim by O to the effect that the Cypriot companies had acted dishonestly, and this was attributable to acts of certain of the defendants who they were alleged to be associated with.

Before the court, the banks said that the defendants should be precluded from re-litigating these conclusions even though it was the Cypriot companies (and not the defendants) who were party to the arbitration.

In the face of authority such as *Gleeson*, the defendants' main argument was that, in the arbitration context, the concept of Gleeson Privies should not apply; i.e. binding effect should be limited to those parties, in a *contractual* sense, to the arbitration agreement.

Although the judge acknowledged the attractions of such an argument, in his view the issues were not, on the face of it, the same. In particular, the question of the binding effect of an award was capable of raising public interest finality issues and, furthermore, the doctrine of issue estoppel was more concerned with a rule of law of the 'second' tribunal, rather than the nature of the rights adjudicated on by the 'first' tribunal.

As a matter of principle, therefore, the issues fell to be treated differently. In the judge's view, however, this did not mean that the arbitration context was irrelevant; features of the process such as its

[2] By an eminent tribunal: Sir Stephen Tomlinson, Sir Christopher Clarke and Sir Rupert Jackson

contractual foundation and the fact that a non-party would generally be excluded from any participation meant that a more restrictive approach to any application of *Gleeson* should be taken.

Having so concluded, the judge then turned to consider whether this hurdle was cleared in the case before him. After declining an invitation to delve into whether *Gleeson* was wrongly decided, and considering some indicia from what was an "*essentially conclusory*" test, the judge decided that it was "*not realistically arguable*" that the matters relied upon by the Banks, even if established at trial, could support a finding of privity. These included allegations that some of the defendants controlled or funded the Cypriot companies in the arbitrations and gave evidence for them in those proceedings. These features, the judge noted, were (in addition to issues already highlighted such as the exceptional nature of *Gleeson* and its even more restricted application in the arbitration context), factors over which previous authority had urged caution on the basis of separate corporate personality.

Separately, the judge also concluded that, in the event that the award raised no issue estoppel, the defendants should not, by way of abuse of process, be barred from litigating the issues. In the judge's view, the same factors which meant that there was no res judicata effect weighed heavily in favour of such a conclusion.

National Bank deals with a novel point, upon which the court's conclusion is interesting in its characterisation of the issue as, ultimately, a procedural rule of the *lex fori*. And in that respect, the court takes a highly pragmatic approach to its resolution. In particular, although the judge confirms that, before the English courts, there is no *absolute* rule against an arbitration award having res judicata effects against an entity that is not (in a contractual sense) party to the arbitration agreement, his approach reconciles that power with the consensual nature of arbitration by, in his words, making it "*extremely challenging*" to persuade the court that this will, in any given case, be appropriate. It would seem, therefore, that it may take a somewhat exceptional case for that bar to be cleared and, on the facts before the court, this was not it.

*Union of India v Reliance Industries Limited and another [2022] EWHC 1407 ("**Union of India**")*

In *Union of India* Sir Ross Cranston considered whether an arbitral tribunal was right to reject a party's submission on the basis that it should have been raised earlier in the arbitration.

The court agreed with the tribunal that it was an abuse of process for the submission to be made, when it could have been made earlier, and the court also said that the tribunal's decision was in accordance with its duty under the Arbitration Act 1996 to avoid unnecessary delay or expense in an arbitration. The tribunal's award of US$111 million was upheld.

Union of India is part of a long-running dispute between the Government of India and two oil and gas companies, Reliance and BG (which is now part of Shell). The dispute concerns production sharing contracts (PSCs) for various gas and oilfields off the west coast of India which are being developed by Reliance and BG.

As is typical with such contracts, Reliance and BG must share revenues from the fields with the Government, but before they do so, they can recover their exploration and production costs. However, a dispute has arisen over whether the actual costs claimed are recoverable under the PSCs. Reliance and BG started an arbitration in relation to these costs in 2010. The arbitration is seated in England and is still ongoing, but via a series of partial awards (eight in total, so far) the tribunal has already decided that Reliance and BG can recover over US$400 million.

The Government's application to the Commercial Court related to the latest of the partial awards, which was issued in January 2021. This award followed an earlier court application, after which the Commercial Court had referred an issue back to the tribunal for reconsideration.

When the tribunal invited submissions from the parties on that issue, the Government argued that the claims did not fall within the scope of the PSCs. Reliance and BG responded that this argument could have been raised earlier in the case, prior to a previous award which had been made in 2016; and since the Government had not done so, it was now barred from raising the argument by virtue of res judicata.

The tribunal agreed with Reliance and BG. The Government therefore applied to the Commercial Court under section 69 of the Arbitration Act (appeal on a point of law).

The first issue related to whether the res judicata point was a question of substantive law or procedural law. If it was substantive, then Indian law (the governing law of the PSCs) would apply; if it was procedural, English law (the law of the seat of the arbitration) would be applicable.

The court concluded that this was a procedural matter, following the analysis of *Virgin Atlantic*. As noted above, Lord Sumption explained there that "*res judicata*" is a term which covers several different legal principles, among which is the procedural rule first formulated in *Henderson* that a party is precluded from raising in subsequent proceedings matters which were not, but could and should have been, raised earlier. This procedural rule applies to both judicial and arbitral proceedings and is supported by the duty in s.33 of the Arbitration Act 1996 under which a tribunal must adopt procedures to avoid unnecessary delay or expense.

It applies not only to different set of proceedings, but also within the same arbitration: so if a party could have raised an argument earlier in the timetable and has not done so, the tribunal would be entitled to dismiss the argument as an abuse of process. In addition, the Government had not shown that the outcome would have been any different even if the Indian law relating to *res judicata* had applied, with the Commercial Court noting that the Indian courts had endorsed Lord Sumption's analysis in the *Virgin Atlantic* case. This disposed of the Government's application under section 69 of the Arbitration Act.

This confirms that the analysis of the Supreme Court in the *Virgin Atlantic* case applies to arbitral proceedings (including to attempts to raise arguments late within the same arbitral proceedings).

*National Iranian Oil Co v Crescent Petroleum Co International Ltd [2022] EWHC 1645 (Comm) ("**National Iranian**")*

In the third of the trilogy, *National Iranian*, the claimant in arbitral proceedings sought permission to appeal to the court against an arbitration award under section 69 of the Arbitration Act 1996.

The dispute between the parties arose under a Gas Sales and Purchase Contract (GSPC) whereby the claimant agreed to supply and sell, and the first defendant agreed to purchase, specified quantities of natural gas for a 25-year period beginning in December 2005. The first defendant had assigned its rights under the agreement to the second defendant. The claimant failed to deliver the gas, and in September 2018 the defendants terminated the GSPC and commenced arbitration. The arbitral tribunal ordered the bifurcation of the proceedings so that there would be a phase covering all jurisdictional and liability issues and another phase covering remedies. In the jurisdiction and liability phase, the tribunal declared that the claimant was in breach of the GSPC. In the subsequent remedies phase, the claimant advanced arguments and led evidence relating to sanctions and various other events affecting the claimant's ability to supply gas and the defendants' ability to receive, pay for and benefit from it. The tribunal found that many of the arguments were precluded by the doctrines of res judicata and abuse of process.

The claimant sought to appeal under s.69 on the basis the tribunal had stated and applied the legal test incorrectly when determining the res judicata and abuse of process issues. In particular, it argued that, in accordance with *Virgin Atlantic* , the tribunal ought to have considered whether the points it had raised "could and should" have been raised sooner, rather than whether they "might or could" have been raised sooner.

Picken J held that there was no reason to suppose that the tribunal had not had the correct test in mind. The fact that it had not referred to *Virgin Atlantic* or spelt out the test which it intended to apply was nothing to the point, having considered *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep. 215 and *Virgin Atlantic*. It would have been better if there had been reference to what the claimant "should" have done at the liability stage of the arbitration, but it did not follow that the tribunal had misapplied the law. The tribunal had been saying something quite straightforward: not having advanced a defence based on sanctions to excuse the non-performance of its contractual obligations, it had no longer been open to the claimant to put forward a case which required the tribunal to take sanctions into account as a reason why the defendants should not have the damages which they sought. Implicit

in its approach was a criticism of the claimant which went further than merely "could" and which extended by necessary implication, to "should".[3]

Is New Evidence a Saviour?

As is clear from the above, *Henderson* is authority for the general principle that parties must normally advance the totality of their case on the first round of litigation or arbitration. It is not open to them, save in exceptional circumstances, to bring up a point which should have been raised earlier and which could, with reasonable diligence, have been discovered and canvassed on the first trial. *Henderson* does not speak, however, on some subjects which are critical if new evidence is discovered.

The primary subject concerns the question whether the rule in *Henderson* requires modification or disapplication where the new issue raises an allegation of fraud by which, it is claimed, the original judgment or award was obtained.

The Supreme Court considered this issue in *Takhar v Gracefield Developments* . In cases of fraud the test for setting aside judgment is that in *Royal Bank of Scotland plc v Highland Financial Partners lp* [2013] 1 CLC 596 at [106]. There, Aikens LJ said:

> *"The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."*

In *Takhar* the Supreme Court held that the law did not expect people to arrange their affairs on the basis the others might commit fraud. The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of their opponent seemed antithetical to any notion of justice. The defrauder had perpetrated a deception not only on their opponent and the court, but on the rule of law. The policy arguments for permitting a litigant to apply to have a judgment set aside where it could be shown that it had been obtained by fraud were overwhelming.

Where it could be shown that a judgment had been obtained by fraud, and where no allegation of fraud had been raised at the trial, a requirement of reasonable diligence should not be imposed on the party

[3] There was a further issue of whether the parties had "otherwise agreed" to waive their right to appeal on a question of law under s.69 by incorporating the ICC Rules into their arbitration agreement. In particular, the defendants argued that art.28.6 of the Rules was sufficient to exclude the s.69 right of appeal because it stated that every award would be binding on the parties and that by submitting the dispute to arbitration under the Rules, the parties should be deemed to have waived their right to any form of recourse. That of course is the orthodox approach on incorporation of the ICC (and most other institutional) Rules. However, Article 22.2 of the GSPC also provided that any dispute, controversy or claim was to be finally settled by arbitration in accordance with the "Procedures for Arbitration" which stated that in the case of a gap in the procedural rules of arbitration, "the procedural rules of arbitration of the International Chamber of Commerce (ICC) shall apply". The defendants maintained that since the arbitration agreement did not contain any rules about appeals to the court on points of law, the court should proceed on the basis that there was a gap which was filled by art.28.6. The court was not persuaded. The parties should not be taken to have agreed to waive their right to appeal on a point of law. There had been no general or wholesale incorporation of the ICC Rules into the GSPC since it provided for the incorporation of the ICC Rules only in the case of disagreement or gap. The provisions of the GSPC were concerned with the procedures of the arbitration, not with any right of appeal. It was in that very specific context that the ICC Rules had application in case of disagreement or gap. There was no gap in the procedural rules of arbitration otherwise agreed by the parties. They had chosen to use wording which the authorities indicated was insufficient to amount to a waiver, *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corp) [2009] EWHC 2097 (Comm)*. It was unnecessary and unrealistic to expect that the parties should have to explicitly reserve the right to appeal: the default position was that there was a right of appeal, not the other way round. The parties had preserved their right of appeal under s.69.

seeking to set aside the judgment. However, where fraud had been raised at the original trial and new evidence about it was advanced to set aside the judgment, or where a deliberate decision was taken not to investigate the possibility of fraud, the court dealing with the application to set aside should have discretion as to whether to entertain the application.

This was the outcome of a fight between two long-established principles of public policy: first, that fraud unravelled all and, second, that there had to come an end to litigation. On the facts of *Takhar* the fraud principle should prevail. However, there should not be a bright-line boundary between the types of case where one principle should prevail over the other. A more flexible basis was preferred, where the court could apply a fact-intensive evaluative approach to whether lack of diligence in pursuing a case in fraud in the first proceedings ought to render a claim to set aside an abuse of process.

Similarly, in *Hayward v Zurich Insurance Co* [2016] UKSC 48 insurers who settled a personal injury claim when they suspected fraud by the claimant would be entitled to set aside that settlement if they later discovered proof of fraud. When seeking to set aside a settlement on the basis of fraudulent misrepresentation, insurers did not have to prove that they settled because they believed that the misrepresentations (statements made by the claimant about the extent of his injury) were true; they merely had to show that they had been influenced by those misrepresentations. However, that was not to say that the representee's state of mind might not be relevant to the issue of inducement. Indeed, it could be very relevant. If the representee did not believe that the representation was true, he might have serious difficulty in establishing that he had been induced to enter into the contract or that he had suffered loss as a result. However, inducement was a question of fact. Qualified belief or disbelief did not rule out inducement. As the respondent knew, the insurer was settling on a false basis.

Outside the sphere of fraud, the essential question is whether potential new evidence satisfies the *Ladd v Marshall*[4] test[5]:

> *" …it is not open to the [parties] to raise fresh points that could and should have been raised before the original [proceedings], or on appeal in the proceedings that gave rise to the first decision, in order to justify such a departure. There must be fresh evidence which meets the*

[4] [1954] 1 WLR 1489: "*In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."* In *Muscat v Health Professions Council* [2009] EWCA Civ 1090, Smith LJ stated "*The Ladd v Marshall principles were indeed at the heart of the exercise of discretion [to admit new evidence]*."

[5] There appears to be a different, more relaxed, test in France. Whilst France recognises res judicata in that a litigant whose case has already been tried is normally unable to sue the same party on the same subject again, however, the court provides an exception if the litigant can prove that new events occurred or were revealed following the first judgment. In one case (Cass, Com, June 21 2016, 14-29.874) there was a dispute relating to the purchase of a shop. The purchaser blamed the seller, who failed to inform of the imminent opening of another shop doing the same business nearby. In the first action, the appeal court found liability but nevertheless refused to indemnify the purchaser as the competitor was not yet opened and any damage was not actual and not certain. Later the claimant filed a second action based on the same grounds after the competing shop had opened. The Cour de Cassation confirmed an award of damages (this would appear to full squarely within the *Angelic Grace* and hence be barred in England). Res judicata is codified by Article 1351 of the Civil Code: "*The authority of res judicata applies only to what was the object of a judgment. It is necessary that the thing claimed be the same; that the claim be based on the same cause; that the claim be between the same parties and brought by them and against them acting in the same qualities*."

The Cour de Cassation added a new element to the conditions from *Cesareo* (July 7 2006) (Cass, Ass Plen, July 7 2006, 04-10.672) based on the principle of the 'concentration of legal arguments', which requires the litigant to submit all his or her legal arguments on the first legal action. Thus, a litigant who would like to introduce a new action using new legal arguments on the same case would face the res judicata principle and the action would be dismissed. Nevertheless, several exceptions to the res judicata principle may be underlined, including the evolution or modification of facts which may justify a new legal action. The source of the modification can be either the occurrence (For ex Cass Civ 2nd, June 10 2010, 09-67.172) or revelation (For ex Cass Civ 3rd, November 14 2012, 11-21.901) of a new fact brought to the attention of the litigant. This new situation then constitutes a new cause (as provided by Article 1351 of the Civil Code) which overrides res judicata (For ex Cass Civ, February 8 1926, DP 1927, 1, Page 191 – CA Rennes, February 21 1929, DP 1931. 2. 24 – and more recently Cass, Com, December 4 2001, 99-15.112 – Cass Civ 1st, October 22 2002, 00-14.035 – Cass Civ 3rd, April 25 2007, 06-10.662 – Cass Civ 1st, April 16 2015). However, despite relatively clear theory, implementation of this exception proves difficult. Indeed, it does not cover the litigant's negligence. A party who does not produce a piece of evidence in a first trial cannot invoke this deficiency as a new fact justifying a new action (Cass Civ 1st, November 3 2004, 02-18.509 – Cass Civ 1st, February 25 2009, 07-19.761). Thus, the qualification of a new fact is subject to the interpretation of the judge who will examine the case. It essentially covers the situation in which a fact known by a third party is legitimately ignored by the litigant during his or her first action.

Ladd v Marshall test, … or a material change in circumstances. If those conditions are not met, any attempt by either party to relitigate the same issues may be treated as an abuse of process,... The decision maker does, however, evaluate whether the claim now being put is substantially the same as the claim that has already been determined."[6]

Reflections on the Courts' 2022 Decisions

All of these cases emphasise that the courts will uphold the finality of awards and not permit 'second bites at the cherry'. *National Bank* makes it clear that Gleeson Privies will ordinarily be bound in arbitration in the same way as in litigation, and it will need an exceptional fact pattern to avoid the Gleeson Privies extension.

Union of India makes it clear that res judicata can (and generally will) apply to different stages of the same arbitration in the same way that it applies to entirely different proceedings. This is consistent with the general principle of 'not being vexed by the same point twice' but clearly there would need to be an (interim) award on the first issue. This will ordinarily happen in bifurcated proceedings.

National Iranian is also consistent with the general non-interventionist policy. If the tribunal slightly mis-stated the relevant test there was no reason to believe that they did not have the correct test in mind.

It seems from the evidence of these cases that res judicata (especially *Henderson* or abuse of process) is prevalent in cases at present. That is consistent with our own experience as we successfully argued for res judicata (arising in two separate arbitral references albeit between the same parties) in an ICC arbitration where the award was promulgated earlier this year. We relied on the orthodox law as set out above.

Fraud unravels all and hence there can be no res judicata where an award is obtained by fraud. Outside the sphere of fraud, res judicata may not apply where there is new evidence satisfying the *Ladd v Marshall* test.

The two key take-aways are that you only get one chance so make sure you advance all your arguments at the right time, and the courts will not assist the indolent.

September 2022

[6] *Abidoye v Secretary of State for the Home Department* [2020] EWCA Civ 1425 at [46]