

What Venezuelan Gold Fight Means For UK One Voice Doctrine

By **Charles Claypoole, Isuru Devendra and Michelle Taylor** (July 31, 2023, 3:17 PM BST)

On June 30, in *Deutsche Bank AG v. Central Bank of Venezuela*, the Court of Appeal of England and Wales handed down the latest judgment in the ongoing battle between the board of the Central Bank of Venezuela, or BCV, appointed by the former interim President of Venezuela Juan Guaidó and the BCV board appointed by Nicolás Maduro.

The case concerns the issue of who controls \$1.95 billion of gold and gold-related assets of BCV held by the Bank of England and \$120 million in proceeds of a gold swap contract.

The Court of Appeal held that the "one voice" doctrine precludes U.K. courts from recognizing judgments of the Venezuelan Supreme Tribunal of Justice — the so-called STJ decisions — nullifying Guaidó's appointment of the Guaidó board and a special attorney general.

The court clarified that the fact that the U.K. government no longer recognizes Guaidó as president of Venezuela does not affect the application of the one voice doctrine to Guaidó's executive acts during the period in which the U.K. government recognized Guaidó as president.

The Court of Appeal also affirmed the primary judge's finding that the reasoning in the STJ decisions depended on Guaidó not being recognized as president of Venezuela, and hence the STJ decisions could not be recognized in the U.K.

Background

In December 2021, in *Maduro Board of the Central Bank of Venezuela v. Guaidó Board of the Central Bank of Venezuela*,^[1] the U.K. Supreme Court determined that

- The one voice doctrine required U.K. courts to act consistently with statements made by the U.K. government and recognize Guaidó as the interim president of Venezuela; and



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- The act of state doctrine precluded English courts from adjudicating the lawfulness or validity under Venezuelan law of Guaidó's appointment of the Guaidó board, or his appointment of a special attorney general, unless such appointments had been quashed by the STJ.[2]

Whether and to what extent U.K. courts should recognize or give effect to the STJ decisions was, however, found to fall outside the issues before the Supreme Court, and the issue was remitted to the English Commercial Court.

The STJ decisions in question effectively held that certain acts of Guaidó and the Venezuelan National Assembly, which exercises legislative power in Venezuela under its constitution, were a nullity and declared the appointment of the Maduro board to be valid.

In the remitted proceedings in the English Commercial Court,[3] Judge Sara Cockerill concluded that the Maduro board could not rely on the STJ decisions.

This was because they were not decisions in rem, and that according recognition to the STJ decisions would conflict with the one voice doctrine in circumstances in which the U.K. government had recognized Guaidó as the interim president of Venezuela, and natural justice.

Appeal to the Court of Appeal

The Maduro board was given permission to appeal the judgment of Judge Cockerill on three grounds:

- Judge Cockerill should have held that the STJ decisions were essentially in rem, or sufficiently akin to in rem judgments, for the purposes of recognition, given their erga omnes, or towards all, effect and there being no material distinction between those two concepts in determining authority to act on behalf of a central bank;
- Judge Cockerill was wrong to adopt a "starting point" approach in finding that recognition of the STJ decisions would conflict with the one voice doctrine, rather than considering the reasoning in the judgments and determining whether it could be properly distinguished and severed; and
- Judge Cockerill erred in fact and law in determining that there was a serious breach of natural justice and the denial of a fair trial, and ought to have found that domestic remedies were available that addressed that issue.

Developments in Venezuela and the Related Stay Application

Shortly before the appeal was heard, the Maduro board applied to vacate the hearing, stay the appeal and remit certain questions to the Commercial Court for trial.

The stay application was based on recent developments in Venezuela.

In late December 2022, the National Assembly reformed the Transition Statute under which Guaidó had been appointed as interim president, and thereby abolished, or purported to abolish, the position of interim president that had been held by Guaidó.

It also provided that all appointments made by Guaidó were abolished, save for a list of appointments that were expressly preserved, including the Guaidó board, but not the special attorney general.

Subsequently, on Jan. 12, the U.K. Foreign, Commonwealth & Development Office's, or FCDO, minister for the Americas and Caribbean issued a ministerial statement in which he noted that the National Assembly of Venezuela had "democratically voted to disband the interim government and the position of constitutional interim president held by Guaidó, with effect from 5 January 2023," and that the U.K. respected the result of this vote.[4]

The FCDO then wrote to the court, drawing its attention to the Jan. 12 ministerial statement, and noted that a consequence of the ministerial statement is that the FCDO's letter sent to the court on March 19, 2020 — the basis pursuant to which the Supreme Court had found that the U.K. government recognized Guaidó as interim president of Venezuela — no longer reflected the position of the U.K. government.

The Maduro board argued that this change to the U.K. government's position meant that the hearing should not proceed at this stage, as the basis of the December 2021 U.K. Supreme Court judgment no longer addressed the key issues and that the one voice doctrine no longer applied.

It argued that, under the circumstances, the Court of Appeal should remit the proceedings to the Commercial Court to conduct a factual inquiry in accordance with the 1992 High Court decision in *Republic of Somalia v. Woodhouse*[5] to identify who is to be regarded as the president of Venezuela.

The Guaidó board opposed the application, and submitted that the appointment of the Guaidó board remained valid unless and until validly repudiated.

The Court of Appeal dismissed the stay application on the basis that granting it would be contrary to the interests of justice.

Decision on Appeal

On the appeal, the Court of Appeal — Justice Sarah Falk, with whom Justices Stephen Phillips and Stephen Males agreed — rejected the appeal on the basis of the second ground of appeal, i.e., relating to the one voice doctrine.

This ground of appeal comprised three arguments.

(1) The Timing Argument

First, the Maduro board argued that the change in the U.K. government's position with respect to the recognition of Guaidó as interim president of Venezuela meant that there was no longer a certificate from the executive branch of the U.K. government that required the U.K. courts to speak with one voice and recognize Guaidó as president.

This argument was predicated on the contention that the one voice principle applies with respect to the position of the U.K. government as of the date that the matter is being considered by the court.

The Court of Appeal rejected this argument on the basis that the question under the one voice doctrine is whether the U.K. government recognized Guaidó as president at the time of the appointments that are the subject of the STJ decisions — rather than at the time the English courts are considering whether to recognize the STJ decisions in England.[6]

In this case, the FCDO's Jan. 31, 2023, letter did not withdraw its recognition of Guaidó as interim president of Venezuela, such that the U.K. government recognized Guaidó as the president during the period of Feb. 4, 2019, to Jan. 5, 2023.

The Court of Appeal held that the effect of this is that foreign judgments, whenever given, which are treated as conflicting with the U.K. government's view that Guaidó was the president of Venezuela between Feb. 4, 2019, and Jan. 5, 2023, cannot be recognized or given effect by U.K. courts.

This includes STJ decisions invalidating the appointments of the Guaidó board and special attorney general during this period on the basis that Guaidó was not the president. The fact that there was no certificate from the U.K. government recognizing Guaidó at the time of the appeal was therefore otiose to this issue.

The Court of Appeal's approach is consistent with the principle underpinning the one voice doctrine, i.e., that the executive and judicial branches of the U.K. government must speak with one voice as to who the head of a foreign state is at a specific time, in this case when the Guaidó board and the special attorney general were appointed.

If the Maduro board's position had been accepted, it would have led to a temporal disconnect between the position of the U.K. government and the position of the U.K. courts for the purposes of the one voice doctrine.

It would have also restricted the function of the one voice doctrine where there had, for instance, been a change in the government or head of state of a foreign state between the time of the events at issue and when recognition of a foreign judgment with respect to those same events is being sought in U.K. courts.

(2) The Starting Point Argument

Second, the Court of Appeal rejected the Maduro board's argument that it was wrong not to recognize an STJ decision on the basis that the "starting point" of the STJ decision's reasoning was that Guaidó was not the president, and that the correct test is whether nonrecognition of Guaidó was a "necessary part" of the reasoning.

Instead, the Court of Appeal applied the test set out by Justice David Lloyd-Jones, with whom the other members of the court agreed, in the December 2021 U.K. Supreme Court judgment in *Maduro v. Guaidó* that:

If and to the extent that the reasoning of the STJ leading to its decisions that acts of Mr Guaidó are unlawful and nullities depends on the view that he is not the President of Venezuela, those judicial decisions cannot be recognised or given effect by courts in this jurisdiction because to do so would conflict with the view of the United Kingdom executive.[7]

The Court of Appeal did not consider that Justice Lloyd-Jones' test required nonrecognition to be a "necessary part" of the reasoning, as the Maduro board had argued.

Rather, the Court of Appeal held that the requirement not to recognize a foreign judgment under the one voice doctrine applies when there is an assumption on which the reasoning in the foreign judgment depends — or a starting point in the sense of an express or implicit first step in the reasoning — that is

contrary to the U.K. government's position on recognition.[8]

The Court of Appeal's decision on this point provides helpful guidance on how to interpret this aspect of Justice Lloyd-Jones' judgment, in particular the scope of the word "depends" in this context, and consequently the breadth of the one voice doctrine with respect to foreign judicial acts.

In this case, the application of that interpretation meant that any foreign judgment, which either assumes or adopts as a starting point in its reasoning that Guaidó is not the president of Venezuela — with respect to matters during a time when the U.K. government recognized Guaidó as president — would conflict with the one voice doctrine and a U.K. court must not recognize that judgment.

(3) The Severability Argument

Third, the Maduro board argued that Judge Cockerill was wrong to conclude that the STJ decisions could not be severed and given effect to the extent their reasoning did not depend on the view that Guaidó was not president.

The Court of Appeal rejected this argument. It held that Judge Cockerill was entitled to reach her findings on the basis of the facts before her, which inextricably linked the position of Guaidó to the reasoning in the relevant STJ decisions.

In particular, the Court of Appeal noted that the reasoning in the STJ decisions depended on impugning Guaidó's actions, and implicitly his role as president, such that Judge Cockerill was entitled to conclude that the STJ decisions purporting to declare null and void the appointment of the Guaidó board depended on the view that Guaidó was not at the material time the president of Venezuela.

Accordingly, the Court of Appeal held that the Maduro board had not established an error of law with Judge Cockerill's conclusion, which meant that her findings of fact on this issue were unassailable.

Based on the above, the Court of Appeal held that recognition of the STJ decisions would conflict with the U.K. government's recognition of Guaidó as the interim president of Venezuela at the time of the relevant appointments, and hence would contravene the one voice doctrine.

The consequence of this is that the appointment of the Guaidó board must be treated as a foreign act of state, the lawfulness or validity of which U.K. courts cannot adjudicate.[9] This was dispositive of the appeal.

Implications

The Court of Appeal's judgment clarifies the application of the one voice doctrine to foreign court judgments.

In particular, the decision provides guidance as to the standard that is to be applied in determining whether a foreign judgment is to be treated as contrary to the position of the U.K. government, namely that its reasoning "depends" on recognition or nonrecognition of a head of state, head of government or government that is contrary to the position of the U.K. government.

The Court of Appeal helpfully elaborated that such dependence could involve the reasoning in the foreign court judgment being implicit or based on the assumption of recognition or nonrecognition that

is contrary to the U.K. government's position.

In this case, that involved the reasoning in the STJ decisions being dependent on nonrecognition of Guaidó as the president of Venezuela, at a time at which the U.K. government recognized him as president, which meant the one voice doctrine precluded the U.K. courts from recognizing the STJ decisions.

The future course of this litigation will now be determined by the Commercial Court in light of the changed circumstances in which Guaidó is no longer recognized by the U.K. government as the interim president of Venezuela.

An issue that may arise in these proceedings is who the English courts should recognize as the president of Venezuela in the period after Jan. 5, i.e., after the U.K. government ceased to recognize Guaidó as president.

In the absence of a statement by the U.K. government as to who it recognizes as the president of Venezuela during a relevant period after Jan. 5, the English courts would likely need to apply the factors set out in *Somalia v. Woodhouse*, adapting them to the presidency rather than the government:

(a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's government has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.[10]

The answers to these questions will depend on the factual situation in Venezuela at the relevant time and the conduct of the U.K. government and other members of the international community with respect to the competing administrations in Venezuela.

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[1] "Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela [2021] U.K.SC 57.

[2] This case is discussed in our previous blog here.

[3] *Deutsche Bank AG (London Branch) v Central Bank of Venezuela* [2022] EWHC 2040 (Comm).

[4] [2023] EWCA Civ 742 at para. 32.

[5] *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54.

[6] [2023] EWCA Civ 742, para. 63.

[7] [2021] U.K.SC 57, para. 170.

[8] [2023] EWCA Civ 742 at paras. 70, 89.

[9] [2023] EWCA Civ 742 at para. 100.

[10] Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA & Ors [1993] QB 54, 68.