

GOING FOR GOLD



Written by KATE HOLLAND

Latest ruling from English Court of Appeal in tug of war over Venezuelan gold reserves



Deutsche Bank AG v Central Bank of Venezuela & Ors [2023] EWCA Civ 742 is the latest instalment in the UK battle between two rival boards of Venezuela's Central bank (the Central Bank) for control of Venezuela's gold reserves and for authority to represent the Central Bank in related arbitration in London. With Venezuela's 2018 election resulting in political turmoil over who is its legitimate President, the UK Supreme Court ruled in 2021 that the English courts must 'speak with one voice' with the UK Government, regarding who it recognises. The disputes over the gold are still ongoing and have already produced a series of court judgments on preliminary issues and the effect of the UK Government's changing recognition.

The Venezuelan presidential crisis

Challenge to the 2018 presidential election: the rival Presidents

After the death of Hugo Chávez in 2013, Nicolás Maduro became the President of Venezuela. In the next round of elections in 2018, Maduro claimed to have been re-elected as President for a second term. He swore himself in as President in January 2019.

Venezuela's National Assembly challenged the validity of the election process and result. It declared Maduro an usurper and

English courts clarify recognition and justiciability issues in Venezuelan gold disputes

→ The English Court of Appeal has issued the latest of a string of judgments in relation to two legal disputes over who should have control of Venezuela's overseas gold reserves.



that the position of President was vacant. In January 2019, the National Assembly declared Juan Guaidó as the interim President under the terms of the constitution, until re-elections could be held.

International support was divided between the two rival Presidents, with the US, UK, Australia and Canada supporting Guaidó, and Russia and China supporting Maduro. The US issued sanctions to cut off the Maduro administration's access to Venezuela's overseas assets.

On 4 February 2019, the UK Government issued a statement that it recognised Guaidó as the constitutional interim President of Venezuela. It described Maduro as a kleptocrat and his administration as an oppressive and illegitimate regime.

Removal of Guaidó as interim President in December 2022

During the following years of political stalemate, Guaidó failed to oust Maduro from power. Guaidó's support within Venezuela began to wane. In December 2022, the National Assembly voted to dismiss Guaidó and abolished the role of interim President. Elections are due to be held in 2024.

On 12 January 2023, the UK Government announced that it respected the National Assembly's vote removing Guaidó as interim President, effective 5 January 2023, adding that it continues not to accept Maduro's administration as legitimate.

The rival boards of the Venezuelan Central Bank

Appointment of the Maduro Board

In June 2018, Maduro appointed Mr Ortega to head the board of the Central Bank (the **Maduro Board**).

Transition Statute and appointment of the Guaidó Board

On 5 February 2019, the National Assembly passed a number of laws with the aim of taking control of Venezuela's overseas assets and giving the interim President the power to appoint ad hoc boards for public bodies (the **Transition Statute**).

Under the terms of the Transition Statute, Guaidó made a series of decrees and appointments. He



declared Maduro's appointment of Mr Ortega to the board of the Central Bank as null and void. He appointed an ad hoc board for the Central Bank, and appointed Mr Hernández as its head (the **Guaidó Board**). He authorised the Guaidó Board to represent the Central Bank abroad in management of foreign-held gold reserves.

Judgments of the Venezuelan Supreme Tribunal of Justice

The Supreme Tribunal of Justice (the **STJ**) is Venezuela's highest court. Between April 2019 and May 2020, the Maduro-elected constitutional chamber of the STJ issued a number of judgments declaring the Maduro Board of the Central Bank to be valid, and declaring the Transition Statute, Guaidó's decrees and the

appointment of the Guaidó Board null and void (the **STJ rulings**).

Disputes in the UK for control of Venezuelan gold

In the UK, the two rival boards of the Central Bank became involved in two legal disputes over Venezuela's gold reserves held by Deutsche Bank and the Bank of England.

Deutsche Bank arbitration

The first legal dispute concerned a \$120 million USD gold swap contract. Deutsche Bank was obliged to pay the proceeds of the gold swap contract to the Central Bank. The contract was governed by English law and required disputes to be referred to arbitration in London.

After Deutsche Bank received conflicting instructions from the

Maduro Board and the Guaidó Board over payment of the proceeds, it referred the matter to arbitration.

Aside from the dispute over which of the two boards was authorised to give the instructions for payment of the gold under the contract, there was a further issue of which board was authorised to represent the Central Bank in the arbitration.

Bank of England litigation

In December 2018, the Maduro Board asked for the return of Venezuela's nearly \$2 billion USD gold reserves held by the Bank of England. The Bank of England received conflicting instructions from the Guaidó Board, who asked the UK Government to ensure that the gold was not returned. The Bank of England refused the Maduro Board's request to return the gold.

The Maduro Board then commenced litigation against the Bank of England in the High Court, claiming it was in breach of its obligation to accept the Maduro Board's instructions.

Preliminary issues in the English courts – recognition and justiciability

The Maduro Board's challenge in both the Deutsche Bank arbitration and the Bank of England litigation (the **Disputes**) was based on the grounds that Guaidó was not entitled to make appointments to the board of the Central Bank, and therefore the Guaidó Board had no lawful authority to give instructions to Deutsche Bank or the Bank of England, or to represent the Central Bank in the arbitration.

This challenge led to two preliminary issues common to both Disputes being heard together in the courts:

1. **Recognition issue** – whether the UK recognised Mr Guaidó as the President of Venezuela.

This question involved the application of the “one voice” doctrine of English constitutional law. Under this doctrine, the courts and the executive must speak with one voice. If the UK Government recognises a foreign state, government or head of state, then the courts must also recognise it.

2. **Justiciability issue** – whether the Maduro Board’s challenge to the validity of the appointment of the Guaidó Board was an issue which was justiciable in the English courts.

This question involved the “**foreign acts of state**” doctrine of English law. Under this doctrine, English courts cannot adjudicate on the legality of the legislative or executive acts of a recognised foreign state, government or head of state which take place within that state. The courts must recognise and give effect to those foreign acts without inquiry.

Maduro Board’s argument

The Maduro Board argued that the Guaidó Board appointments

were unlawful under Venezuelan law, given that the STJ rulings had declared that the National Assembly’s Transition Statute and Guaidó’s decrees and appointments under that statute were null and void. On that basis, it argued that the Guaidó Board had no lawful authority to give instructions or represent the Central Bank.

Guaidó Board’s argument

The Guaidó Board argued that as the constitutional interim President, Guaidó was entitled under the Transition Statute to appoint the Guaidó Board. Therefore, the Guaidó Board had authority.

It argued that the validity of the Transition Statute and Guaidó’s decrees and appointments was beyond challenge in the English courts. At the time of appointing the Guaidó Board, Guaidó was recognised by the UK Government as the President of Venezuela, and therefore his appointments were foreign acts of state under English constitutional law. Being foreign acts of state, they are non-justiciable in the courts, and the courts must give effect to the appointments without inquiry.

English court decisions

The various facets of these preliminary issues went all the way up to the Supreme Court, back down to the High Court, and then back up

again to the Court of Appeal. At each instance the courts found in favour of the Guaidó Board.¹

Matters became further complicated at the most recent Court of Appeal proceedings by the UK Government’s recognition in December 2022 of the removal of Guaidó as interim President.

The upshot of this series of judgments on the preliminary matters can be summarised as follows:²

- The English courts must speak with one voice with the UK Government regarding who is the President of Venezuela.
- The UK Government recognised Guaidó as the interim President by virtue of its statement on 4 February 2019.
- Since Guaidó was recognised by the UK Government as the President at the time of his decrees and appointing of the Guaidó Board, his acts are the acts of a foreign state. Therefore, under the foreign acts of state doctrine, the courts cannot inquire into the validity of those appointments. They are non-justiciable and the courts must regard them as valid and effective without inquiry.
- Under the one voice doctrine, the STJ rulings nullifying Guaidó’s acts and appointments cannot be recognised by the English courts, because the basis of their reasoning depends on a view that

1 See *Deutsche Bank AG London Branch v Receivers Appointed By the Court & Ors* [2020] EWHC 1721; *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2020] EWCA Civ 1249; *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57; and *Deutsche Bank AG (London Branch) v Central Bank Of Venezuela* [2022] EWHC 2040.

2 *Deutsche Bank AG v Central Bank of Venezuela & Ors* [2023] EWCA Civ 742 at [95]–[100].

Guaidó was not the President, which contradicts the UK Government's view that he was.

- The UK Government ceased to recognise Guaidó as the President of Venezuela effective 5 January 2023 onwards. The statement ceasing to recognise him was forward-looking and not retroactive in effect.
- How the courts apply the one voice doctrine will depend on the facts of each case. On the facts of this case, the doctrine does not operate retroactively. The courts' previous rulings on the preliminary issues of recognition

and justiciability are not altered by the fact that the UK Government no longer recognises Mr Guaidó as the President. Mr Guaidó was recognised as President by the UK Government at the time he appointed the Guaidó Board, and this is the material time.

Conclusion

The matter will now be remitted back to the High Court to determine the future course of the Deutsche Bank arbitration and Bank of England litigation over the gold reserves, in light of the fact that Guaidó is no longer recognised as the President of Venezuela.

About the author

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