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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

> "Where the executive makes an express statement of recognition of a government or head of state the courts will speak with the same voice..."
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> Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela

Recognition and Act of State Rule

The Supreme Court was asked to consider two preliminary issues in a dispute, in the context of the Venezuelan presidency crisis, as to who could give instructions to the Bank of England in relation to gold reserves and assets held for the Central Bank of Venezuela; namely who was recognised as the President of Venezuela, Mr Maduro or Mr Guaidó? The Court confirmed the "one voice principle" which meant that the judiciary was bound to follow statements made by the UK government in relation to questions of the sovereign status of a state or government. The executive branch of government alone was competent to determine foreign policy. The Court concluded that the UK government had made executive statements that unambiguously and without qualification, recognised Mr Guaidó as interim President of Venezuela. This was binding on the English Courts. The Supreme Court also confirmed the Act of State Rule that English Courts will recognise and not question the lawfulness or validity of executive acts of a foreign state performed within that state's territory. The English Courts will not therefore question acts of Mr Guaidó in appointing various executive officers. However, the Venezuelan Court has declared Mr Guaidó's actions to be unlawful. The rules of private international law may require that such judgments be recognised or enforced by the English Courts and in those circumstances, the Act of State Rule will not apply. That issue was remitted to the Commercial Court for consideration.

Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela [2021] UKSC 57, 20 December 2021

Jurisdiction

A dispute between the Suriname flag carrier airline ("SLM") and an aircraft leasing company ("AELF") has highlighted the need to be mindful of the steps taken in proceedings, if the intention is to challenge the English Court's jurisdiction. SLM filed a defective acknowledgment of service ("AOS") out of time. SLM then appointed English solicitors who applied for an extension of time for SLM's defence and two weeks later to dispute the Court's jurisdiction, as well as filing a compliant AOS on 26 July. The Court found that SLM's errors in filing its AOS were not substantial, significant or serious and granted relief from sanctions, together with an extension of time for service of the AOS to 26 July. However, SLM's application to dispute the Court's jurisdiction was refused. SLM had submitted to the jurisdiction by applying for an extension of time to serve its defence, indicating in its first AOS that it intended to defend the claim (rather than challenge jurisdiction) and by indicating only belatedly that it intended to contest jurisdiction, without any prior reservation of its rights to do so. The Court also rejected SLM's objection to jurisdiction based on non-compliance with service requirements in the State Immunity Act 1978 s.12(1). SLM's submission to the jurisdiction amounted to an appearance in proceedings under s.12(3), which precluded SLM from relying on non-compliance with section 12(1).

Aelf MSN 242 LLC v De Surinaamse Luchtvaart Maatschappij NV DBA Surinam Airways [2021] EWHC 3482 (Comm), 21 December 2021

Limitation of Liability

The Court of Appeal has overturned a decision of the Admiralty Court that Stema Shipping (UK) Ltd ("Stema UK") could limit its liability as operator of a dumb barge. The claim arose out of damage to an undersea cable that occurred when the barge dragged her anchor during a storm. The Court concluded that Stema UK was not an operator or manager of the barge and was unable to limit its liability. Who was an 'operator' had to be considered at a higher level of abstraction. It should involve an element of management or control and more than just operating machinery or providing personnel to operate machinery. Otherwise many service providers would be able to limit liability, even though the *travaux préparatoires* of the Limitation Convention 1976 indicate that they were to be expressly excluded. Rather than being a second operator, Stema UK's actions were on behalf of and supervised by Stema A/S as operator or Splitt as owner. The crew were following checklists and instructions provided by Stema A/S, and all witnesses confirmed that the crew were operating the barge on behalf of Splitt as owner. There could, in theory, be more than one operator but a court should not readily reach this conclusion. The Court of Appeal also concluded that given its decision in relation to Stema UK's role as providing assistance to the operator, Stema UK could equally not be regarded as the manager of the barge.

Splitt Chartering APS and others v Saga Shipholding Norway AS and others [2021] EWCA Civ 1880, 15 December 2021

Arbitration

The Commercial Court considered a challenge to the Tribunal's jurisdiction, under section 67 of the Arbitration Act 1996, where the claimant had issued one notice to commence arbitration under two separate contracts for the sale of wheat. The Court found that although the notice referred to 'arbitration' in the singular, the final paragraph, which invited the defendant to consider consolidating the two disputes into one arbitration, was more important and made no sense unless the notice was commencing two arbitrations. The notice was effective to commence two arbitrations for the two disputes and the Tribunal had jurisdiction. The Court rejected further arguments from the defendant based on rectification of the notice and estoppel. However the claimant's case on estoppel was successful. The parties had entered into a 'Washout Agreement' following settlement discussions, in which it was agreed that if the defendant failed to pay USD 1.1 million, the claimant could continue the claim in arbitration. There was an implicit common understanding between the parties when the Washout Agreement was concluded that the notice was valid and/or that the arbitration had been properly commenced. The buyers relied on this understanding in entering into the Washout Agreement.

LLC Agronefteprodukt v Ameropa AG [2021] EWHC 3474 (Comm), 21 December 2021

Should you wish to discuss any of these cases in further detail, please speak with a member of our London dispute resolution team below, or your regular contact at Watson Farley & Williams:

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