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COURT OF APPEALS

STATE OF NEW YORK

PETROLEOS DE VENEZUELA A.A.,

Appellant,

-against-

MUFG UNION BANK, N.A.,

Respondent.

NO. 6

20 Eagle Street
Albany, New York
January 10, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
PRESIDING JUSTICE JOHN CURRAN

Appearances:

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Christy Wright
Official court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 number 6, *Petroleos de Venezuela v. MUFG Union Bank*.

3 MR. TIMOFEYEV: Chief Judge Wilson, and may it
4 please the court. I would like to reserve three minutes
5 for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MR. TIMOFEYEV: The question in this case is
8 whether the parties to debt issuance by foreign state-owned
9 entities under the control of an authoritarian regime may
10 circumvent the express constitutional restrictions on that
11 entity's authority to issue security by selecting a New
12 York law choice of law provision. The answer is no. Under
13 both the Uniform Commercial Code and New York's Common Law
14 Principles. UCC Section 8-110 mandates that the validity
15 of a security is governed by the law of the issuer's
16 jurisdiction. Here, that of Venezuela.

17 JUDGE CURRAN: Counselor? Counselor, I'd like to
18 start by asking you in terms of the validity issue, what
19 got my attention was the oral argument in front of the
20 district court, where I think it was Mr. Bliss was
21 representing your client at the time. And essentially, he
22 said at page 2216 of the record that, "So the effect of UCC
23 8-110 is to render irrelevant any New York law with respect
24 to the validity and ultimately the enforceability of the
25 2020 notes." In your reply brief, you also say this appeal

1 is not about whether the governing documents are
2 enforceable. It is only about what law will decide that
3 issue. So when you say validity and in the argument in
4 front of the district court, it included - - - Mr. Bliss
5 included issues pertaining to "It encompasses theories such
6 as apparent authority, ratification, estoppel, the ultra
7 vires statute". So everything having to do with
8 enforceability is swallowed up by the word validity
9 according to your argument, correct?

10 MR. TIMOFEYEV: No, Your Honor. Actually, we our
11 conception, our interpretation of validity is quite narrow.
12 So validity - - -

13 JUDGE CURRAN: But is that what is in your brief
14 and is that what was told to the district court, is my
15 question.

16 MR. TIMOFEYEV: This - - - this is our brief, and
17 I can't speak exactly about the district court. We may
18 have expressed it inartfully, but our position before this
19 court and before this before the Second Circuit is, the
20 term validity in Section 8-110 for the purposes of this
21 case is quite narrow. It encompasses a public issuer's
22 compliance with expressed constitutional procedural
23 requirements that are part of the issuance process and that
24 govern that public issues authority and power to issue
25 security. So in that sense it is different from

1 enforceability. The question of validity here goes to
2 whether a public issuer has authority to issue security in
3 the first place, and that encompasses such restrictions as
4 constitutional provisions.

5 JUDGE GARCIA: How about, hypothetically, if the
6 provision read any contract between these same parties that
7 affects national security? Would that go to the validity
8 of the issue? Or if you came in and you said, you know,
9 obviously this is a very important asset, this is our
10 national security at stake here?

11 MR. TIMOFEYEV: Your Honor, it - - - it's
12 different from this case. But let me - - -

13 JUDGE GARCIA: Hypothetically.

14 MR. TIMOFEYEV: It will depend on how the
15 constitutional provision is written. I would say that in
16 the - - - in the hypothetical Your Honor posed, I think
17 that would go to the question of enforceability, because
18 that would be - - - it may be - - -

19 JUDGE GARCIA: The same requirement. You need to
20 get approval by the public, you know, by the assembly if
21 the contract affects in any way national security.

22 MR. TIMOFEYEV: Your Honor, let me give you - - -
23 let me give you maybe one example, one example would be - -
24 -

25 JUDGE GARCIA: But no, let's - - - but could we

1 stay with my hypothetical? Would you say that is a
2 constitutional provision that affects the validity of the
3 security under your test?

4 MR. TIMOFEYEV: A provision that would say any
5 contract that - - - that affects national security is
6 invalid. That would be - - -

7 JUDGE GARCIA: Or says any contract that affects
8 national security requires the approval of the public
9 assembly?

10 MR. TIMOFEYEV: Your Honor, if it includes the
11 requirement of an approval of the National Assembly, that
12 would be a question of validity because that would be an
13 express procedural requirement.

14 JUDGE GARCIA: So no matter how vague the
15 standard, if it required National Assembly approval, it
16 would affect the validity of the security?

17 MR. TIMOFEYEV: Because that would - - - because
18 the procedural requirement of getting legislative approval
19 is not vague. It is very clear you have to go and actually
20 get that approval. What constitutes - - - what would
21 constitute a contract affecting national security is here a
22 national public interest contract, that can be determined
23 under the relevant law, here law of Venezuela. And we
24 actually - - - this is for - - - this would be for the - -
25 -

1 JUDGE GARCIA: There's no limiting principle on a
2 national security approval - - - a national assembly
3 approval - - - getting it wrong - - - national assembly
4 approval? Whatever you say needs national assembly
5 approval, as long as there's an argument it could affect
6 the validity of a security or the issue as authority, then
7 it's a constitutional provision that falls under the UCC?

8 MR. TIMOFEYEV: Your Honor, there is - - - there
9 is a question for under Venezuelan law, but that - - - and
10 that is for the for the Second Circuit and the federal
11 district court as to what - - - what limits the - - - how
12 the Venezuelan law defines a national public interest
13 contract. We actually - - - it's not an unlimited
14 definition. So our expert, in fact, indicated that there's
15 a qualitative definition. It's certain type of - - -
16 certain type of national contact - - - contracts that do
17 have a significant effect on the public policy. Here - - -

18 JUDGE GARCIA: And that seems to be an expert
19 opinion on the law. But wouldn't that be better, I mean, I
20 can see if that was a definition in the law, but now we
21 have to have people come in in a very vague term and assume
22 my national security term and opine that. So we have to
23 get underneath what we think national security means in
24 order to see if it affects the validity of the security.

25 MR. TIMOFEYEV: Your Honor, I don't think this

1 court actually has to grapple with that. I think the
2 question of Venezuelan law, not - - - not really before
3 this court. I think the question before this court is
4 whether the - - - the law that imposes a procedure
5 constitutes constitutional provision, that imposes an
6 express procedural requirement, such as getting a
7 legislative approval, whether that's a procedural
8 requirement that is encompassed within the scope of
9 validity under Section 8-110.

10 CHIEF JUDGE WILSON: I'm so sorry, sir - - -

11 JUDGE SINGAS: Shouldn't that have been something
12 that you discussed before you entered into the contract? I
13 mean, doesn't our case law basically say that choice of law
14 can override those issues? Sophisticated parties,
15 fantastic lawyers, made a choice of law decision, and now
16 years later, you say, nope, we couldn't have done that
17 because our - - - the National Assembly didn't approve
18 this.

19 MR. TIMOFEYEV: Your Honor, this case, this
20 court's case law in IRB and Ministers and Missionaries only
21 says that when a party should select a New York choice of
22 law and it's choice-of-law clause, it doesn't only select a
23 substantive law, it doesn't select the New York law choice-
24 of-law provisions unless it expressly does so. This case
25 is different for two reasons. One is, there is a provision

1 of the UCC Section 1-301 expressly says that there are
2 certain provisions such as Section 8-110, as to which the
3 parties cannot contract around. They cannot select their
4 own choice of law that will displace that provision. It's
5 a mandatory provision.

6 Second, in this case, the governing documents
7 expressly stated that the parties select the choice of law
8 rules prescribed by New York General Obligation Law 5-1401.
9 And that section, Section 1401 says that the parties may
10 not contract around section UCC 1-301, which makes the
11 validity determination of the Section 8-110 mandatory. So
12 this is very different. It's a mandatory provision that
13 under New York law and under the contract at issue here,
14 the parties could not actually have contracted around by
15 selecting the own choice of law.

16 And the reason is because when the legislature
17 enacted the revised Section 8-110, it actually says that it
18 wanted to align its law with the prevailing law that the
19 law of a - - - the law of the place of an entity's
20 organization governs its power and authority to add to
21 issue security. It's a predicate question to whether or
22 not the contract of the security will be enforceable. And
23 as to that predicate question as to whether or not the
24 security itself is valid. New York Law says that it is the
25 place of an entity or organization that shall govern.



1 JUDGE CURRAN: And that's an issue that would be
2 resolved theoretically in Venezuela according to Venezuela
3 law, perhaps along the lines of what we would refer to as a
4 derivative action, perhaps between the only shareholder,
5 the - - - the Country of Venezuela, against the board of
6 directors or against the officers, the board of directors,
7 versus - - - all of that internal debate about whether or
8 not this security - - - securities are valid would happen
9 there among those parties.

10 But now we have parties that are completely
11 extraneous to the board of directors, the officers and the
12 shareholder that are now looking at this and say, wait a
13 second, we're supposed to go scour every provision of every
14 constitution and every nation in order to find out if this
15 - - - if this security is valid. What I was drilling down
16 to, counselor, before and you started to address it to as
17 you kept saying, that it's very narrow line of validity,
18 definition of validity.

19 I read your brief and I read the oral argument,
20 the district court to say it was much larger. So now if
21 you're going to take us down the path of narrow, how narrow
22 is it? Are you limiting which type of constitutional
23 provisions should be reviewed? Or are you saying that any
24 portion of a constitution must be reviewed? That's one
25 question. Secondarily, to tie it into, I'm not sure that

1 anyone's talked about in the briefs, but I can't figure why
2 8-202-a is not being discussed. The only other provision
3 in that section that talks about a constitution, it says
4 for certificated security, which I think all of these are,
5 you have to have a reference to the Constitution. And I've
6 looked at all these, the notes and everything else.
7 There's no reference to the Constitution anywhere in these
8 certificates.

9 So again, tell me how big a bucket validity is
10 since you want to take us down a narrow path and forgive me
11 for going on so long, I want to focus you on my concern
12 about this case. It seems to me like you're telling
13 commercial people they have to really look at every item
14 and every constitution. Is that what you're saying?

15 MR. TIMOFEYEV: Your Honor, no. I think we would
16 say that for in determining what is - - - what are the
17 constitutional provisions affecting validity, you only have
18 to look at which provisions impose procedural requirements
19 as part of the issuance process and then those procedural
20 requirements that govern and restrict the state-owned
21 entities or public entities, authority and power to issue a
22 security. And it's important to look at what happened in
23 this case, because I think it illustrates that the - - -

24 CHIEF JUDGE WILSON: Well, would any procedural
25 requirement satisfy your test, or does it have to be of a

1 certain nature? So suppose the procedural requirement was
2 two different forms of notice, something like that, and
3 that's in the constitution. Is that sufficient or are you
4 making a distinction between something that we might think
5 of as less important than National Assembly approval?

6 MR. TIMOFEYEV: Your Honor, I think - - - I
7 think, I mean, that would be a more difficult question.
8 But I think certainly a procedural requirement saying this
9 has to be authorized by the legislature, is a clear
10 requirement that goes to the issuance process.

11 CHIEF JUDGE WILSON: I'm trying to do the same
12 thing that Judge Egan is trying to do, which is to see how
13 - - - how, if you can, how narrow this is by parsing
14 through what the constraints are. So I take it one
15 constraint is it has to be in the Constitution? Yes, no?

16 MR. TIMOFEYEV: Yes, Your Honor. It has to b - -
17 -

18 CHIEF JUDGE WILSON: So if it's not in the
19 Constitution that doesn't bite on this.

20 MR. TIMOFEYEV: For the purpose of this case, it
21 has to be in the Constitution. We know this from Section
22 8-202.

23 CHIEF JUDGE WILSON: Okay.

24 MR. TIMOFEYEV: That you reference.

25 CHIEF JUDGE WILSON: Okay. It has to be

1 procedural.

2 MR. TIMOFEYEV: It has to be procedural.

3 CHIEF JUDGE WILSON: And procedural, at least for
4 the purpose of this case, approved by the National Assembly
5 is enough.

6 MR. TIMOFEYEV: We think that the - - - you can
7 define procedural for the purpose of this case as an
8 approval by governmental authority, whether by the
9 legislature or as the treatises on opinion issuance letters
10 indicate, a approval by the Interstate Commerce Commission
11 or required approval by the state Department of Public
12 Works. This would be - - - these are given as examples of
13 procedural requirements.

14 CHIEF JUDGE WILSON: So constitutional for a
15 governmental approval. We can narrow it that - - - that
16 much?

17 MR. TIMOFEYEV: Correct. Correct. That can be -
18 - - that can be easily narrowed for this case.

19 CHIEF JUDGE WILSON: And then it has to relate -
20 - - because of the UCC, it has to relate to the issuance of
21 securities?

22 MR. TIMOFEYEV: It has to relate to the - - -
23 even more narrow, Your Honor, to the to the state-owned
24 entities, authority and power to issue security.

25 CHIEF JUDGE WILSON: Okay.

1 MR. TIMOFEYEV: So it has - - -

2 CHIEF JUDGE WILSON: So if it doesn't meet every
3 one of those things then it's not what we're talking about?

4 MR. TIMOFEYEV: I think this court does not
5 really need to go beyond that. And we think that that
6 actually - - -

7 CHIEF JUDGE WILSON: You know, I'm not asking
8 whether we need to go beyond it. I'm asking if that's your
9 test. You're trying to convince us the test is narrow
10 enough that it's not going to cause a problem. And I want
11 to understand how narrow your test is.

12 MR. TIMOFEYEV: Your Honor, for the purpose of
13 resolving this case and answering the Second Circuit's
14 question, the test can be that narrow. And we meet this
15 test because Article 150 is exactly that type of a
16 provision that imposes an affirmative authorization,
17 affirmative approval requirement by the country's
18 legislature. It is part of the issuance process. Without
19 complying with that requirement, a state-owned entity like
20 PDVSA cannot issue a security. And that is because under
21 Venezuelan Law of Public Organization, PDVSA is required to
22 comply with all conditions and restrictions imposed by law,
23 including by the Constitution.

24 So it is akin to a corporate law that imposes
25 specific requirements on a - - - on a private company's

1 board of directors in terms of what approvals they need to
2 secure and give. And to answer Your Honor's question, the
3 - - - it's important to look at what happened here, where
4 the opinion letter that was issued as part of the issuance
5 process expressly examined whether or not this, the PDVSA,
6 the issue had the authority under Venezuelan Constitution
7 and statutes to issue this type of security. In addition,
8 there was a legal memorandum that expressly looked at
9 whether or not Article 150 required a legislative approval.

10 Now, in our - - - and this - - - this opinion and
11 the memorandum were prepared by pro - - - by a Caracas
12 office of a prominent international law firm. In our view
13 the legal memorandum which concluded that Article 150 was
14 not, did not actually apply to this transaction, was
15 woefully deficient. It was simply erroneous. These are
16 issues of Venezuelan law, which I'm happy to - - - I'm
17 happy to describe, but they also go beyond the
18 certification question. But it is clear that in this
19 particular transaction, the parties looked at the issues of
20 Venezuela. No one actually - - - no legal opinion here
21 said because the contract selects New York in its choice of
22 law clause, Venezuelan issues are irrelevant. That was not
23 the position of the parties.

24 In any kind of legal opinion issuance for a
25 sovereign debt transaction, the legal opinion will always

1 look at the law of issues jurisdiction and what kind of
2 permissions or what kind of requirements are imposed there.
3 So defining validity here as requiring compliance with
4 Constitutional procedural approvals for state-owned
5 entities issuance of security is not going to create
6 additional burden.

7 JUDGE CURRAN: I'm sorry to interrupt you yet
8 again, but this is, I mean, I'm very concerned with how big
9 a bucket, as I call it, is validity. And you now, for the
10 - - - to my knowledge and maybe you'll correct me if I'm
11 wrong, please do. But you're making this argument that
12 it's a procedural provision of the Constitution. I never
13 saw the word procedural in your brief or in the arguments
14 before the district court, respectfully. So now I'm trying
15 to figure out, okay, I thought your argument was that
16 validity will be narrowed to a defect involving a
17 constitutional provision. Am I correct on that? That it's
18 a - - - that it's got to be - - - invalidity has to be a
19 defect under 8-202(b) involving a constitutional provision.
20 Is that - - - is that how you want us to define that
21 narrow, by tying it to the statute?

22 MR. TIMOFEYEV: Yes, Your Honor. It can be
23 defect in a violation of a procedural constitutional
24 requirement that - - -

25 JUDGE CURRAN: Why do you need the word

1 procedural?

2 MR. TIMOFEYEV: So the word - - -

3 JUDGE CURRAN: Because this is the first time
4 I've heard it.

5 MR. TIMOFEYEV: It, it's actually the word
6 procedural is, if Your Honor looks at the article by
7 Professor Carl Bjerre, who is the editor-in-chief of the
8 Hawkland treatise on the UCC, he expressly says that
9 Article 150 is a type of a procedural requirement that is
10 at the heart of the notion of validity. So, and - - - and
11 we think that actually that makes sense, because if this
12 court looks at Section 8-202-

13 CHIEF JUDGE WILSON: And you were limiting it
14 further in response to my question, I think, which was that
15 it would have to be a procedural obligation - - - approval
16 requirement from a governmental entity.

17 MR. TIMOFEYEV: Yes, Your Honor.

18 CHIEF JUDGE WILSON: Okay.

19 MR. TIMOFEYEV: I think - - - I think that is - -
20 - and that - - - and that actually that corresponds to the
21 notion of what is required for a public entity as opposed
22 to a purely private company to issue securities. Because
23 if you look at the treatises by Glazer and FitzGibbon, by
24 John Ford, by the 1979 Association of the New York Bar,
25 that actually speaks that for a public entity, you have to

1 look at whether the required approvals by the appropriate
2 state authorities or governmental entities have been
3 actually secured.

4 CHIEF JUDGE WILSON: You were going to - - - you
5 can finish your thought, but you mentioned you wanted to
6 get to the common law argument. I'd want to hear about
7 that at some point.

8 MR. TIMOFEYEV: Yes, Your Honor. I'm happy to
9 address that. Just to add one additional answer, because I
10 haven't answered your honest question about 8-202. If this
11 court looks at 8-202, it expressly references Colorado - -
12 - case involving Colorado constitutional provision that
13 impose two requirements. One is a certain debt limit for
14 municipalities before they could issue debt. And secondly,
15 it provided - - - included the provision that
16 municipalities could issue that exceed - - - that exceeded
17 that requirement, provided they actually put that question
18 to the voters and obtained voter approval at the
19 referendum. So again, that is - - - these are paradigmatic
20 examples of what constitutes validity. It is compliance
21 with the constitutional procedural provision that imposes a
22 certain type of approval authorization requirement.

23 JUDGE CURRAN: In the Colorado case, the more
24 recent of the two that I recall, the defense that was
25 interjected was rejected by the intermediate court and the

1 supreme court agreed that the town municipality could not
2 invoke that provision. The point being is that not every
3 constitutional provision, as I understand it, can be
4 involved here. And also in that case, there was reference
5 to the Constitution, as I recall, in the certificate,
6 because remember, that case is from the 1890s. We didn't
7 have Article 8 until the 40s - - - the 1940s, 50s or so.

8 And that, you know, the 40s to the 70s was all -
9 - - if you read Hawkman and you read the uniform laws anno,
10 you know, annotated ALI, they talk about the development of
11 how we go from certificated securities that reference
12 constitutions and other things to uncertificated securities
13 that don't. So getting back to 202-a when you - - - this
14 is not a noncertificated security but if it was, it would
15 have - - - the constitutional provision would have to be
16 one pursuant to which the security was issued. So when
17 it's not either mentioned in the certificate and it's not
18 pursuant to the consti - - - it's - - - the security is not
19 issued pursuant to the Constitution, I'm not even sure we
20 get to the question of invalidity here. It just doesn't
21 apply, right?

22 MR. TIMOFEYEV: Your Honor, I think the
23 Constitutional provisions, they don't first of all, they
24 don't have to specifically reference securities. For
25 instance, the Colorado constitutional provision just

1 imposed the debt limit or requirement of voter approval for
2 debt issued - - - for debt issuance. It didn't express the
3 reference security. And I think that makes sense because
4 constitutional provisions are often written in broad terms.
5 So again, as Professor Bjerre explains, it doesn't make
6 logical sense to require that only constitutional
7 provisions that specifically speak about security are
8 encompassed by the notion of validity. There is no textual
9 basis in section 8-110 and Section 8-202 for that.

10 And section 8-202, I think, is a strong
11 indication because it references constitutional provisions
12 as a defect that will actually go to the issue of validity.
13 So I think like that - - - I think that is indication that
14 Section 8-110 and the notion of validity does encompass
15 compliance with the constitutional provisions, particularly
16 the procedural constitutional provisions that require
17 governmental approval, which is easy to comply with. And
18 that in this case was - - - was well known. It was
19 discussed in the legal opinions. It was something that, in
20 fact, the parties analyzed quite, quite in detail. So
21 there is no unfair surprise in that.

22 Your Honor, to the choice of law provisions we
23 have, we have four arguments, and I'm happy to elaborate on
24 any of them. I think firstly, the - - - there is a
25 principle that the corporation's power and authority to

1 enter into a contract is governed by the law of a
2 corporation's jurisdiction. Secondly, we think the
3 grouping of contexts analysis requires application of
4 Venezuelan law because there is a question of the interest
5 of Venezuela, which embodied in this constitutional
6 separation of powers requirement.

7 Third, there is a fundamental public policy
8 exception that points to the application of Venezuelan law,
9 and we think those again be given the importance of a
10 checks and balances embodied by Article 150 Venezuelan
11 interests predominate here. And fourthly - - -

12 JUDGE GARCIA: If we-

13 MR. TIMOFEYEV: - - - there are choices of law-

14 JUDGE GARCIA: I'm sorry. If we agree with you
15 on the UCC point, do we need to reach those other issues?

16 MR. TIMOFEYEV: Your Honor, I - - - I do not
17 believe that this court has to reach any - - - any choice
18 of law issues if it agrees - - - if it agrees with us on
19 the UCC. I mean, certainly there - - - it can. It has
20 discretion to do so in answering certification, but we do
21 not believe so. And there is also the - - - the principle
22 of contractual illegality, which I think again points to
23 the application of Venezuelan law because the illegal acts
24 occurred in - - - in Venezuela.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. HURWITZ: Good afternoon, Your Honors. If it
2 please the court, Jonathan Hurwitz for the respondents.
3 I'd like to turn directly to the question of the
4 uncertainty that's created by the rule that the PDVSA
5 parties are urging. And this goes to the question that was
6 the subject of a lot of questions from the court about - -
7 -

8 JUDGE GARCIA: So Counsel, what would your
9 limiting principle be for validity of the security?

10 MR. HURWITZ: Sure. I think the - - - our
11 understanding of validity, which is consistent with we
12 think the legislative history, it's consistent with
13 Hawkland, is that the focus of validity is the internal
14 corporate governance. It's the decision-making power
15 within the - - - within a corporation when you're dealing
16 with a corporate issuer such as Venezuela, so that it ties
17 directly to the internal affairs doctrine that's, you know,
18 well established in this state's laws. That, it seems to
19 us, is the focus. And it's not just us saying that there
20 is - - - there is - - - we've cited, for example, Professor
21 Halpern has an article that we quote and cite in our brief
22 that makes exactly that point.

23 JUDGE GARCIA: So if you had a constitutional
24 provision that said, you know, no public - - - public
25 corporation can issue a security without approval of the

1 majority of their board and the public assembly, that would
2 not qualify under your definition?

3 MR. HURWITZ: If - - - if it's the - - - if it's
4 internal to the corporation, so it requires board approval
5 - - -

6 JUDGE GARCIA: Just part - - -

7 MR. HURWITZ: - - - then that's - - - that's
8 fine. That goes to validity.

9 JUDGE GARCIA: But what if - - - if you - - -
10 wouldn't then apply the part that required public assembly
11 - - - national assembly approval?

12 MR. HURWITZ: I think the part that goes to
13 national assembly approval is fundamentally not about
14 whether or not PDVSA made a decision to issue these
15 securities - - -

16 JUDGE GARCIA: What if it said no public entity
17 can issue a valid security without the approval of the
18 National Assembly and it was in the Constitution?

19 MR. HURWITZ: That's a clearly a closer case.
20 And I want to explain why it's a closer case. But - - -
21 but to answer your question directly, I would say that that
22 is still not sort of internal decision of the corporation.
23 It's, do they need regulatory approval or don't they need
24 regulatory approval. And so the claim here is made that
25 it's - - - that the decision by PDVSA was illegal because

1 it didn't receive approval from the National Assembly, and
2 that is external to the corporation.

3 CHIEF JUDGE WILSON: Let me take Judge Gar - - -
4 let me take Judge Garcia's hypothetical one more step by
5 chopping off the end of it. What if the Constitution of
6 Venezuela says no public entity can issue securities?
7 That's external.

8 MR. HURWITZ: Again, it's a - - - it's a closer
9 call. It's not - - - it's not our case. I mean, the fact
10 that there may be - - -

11 CHIEF JUDGE WILSON: Yeah, I know.

12 MR. HURWITZ: - - - close questions doesn't mean
13 we don't have two distinct concepts.

14 JUDGE RIVERA: What makes it closer in these two
15 where you said that's closer? Is it because it's so
16 obvious on its face that the intent is that there is no
17 validity, they are no - - - initio without the approval?
18 Is that what makes it a close case?

19 MR. HURWITZ: What I would say is what - - - what
20 the core issue here is when you're dealing with a corporate
21 issuer, I'm not talking about a municipality or a
22 government agency, but with a corporate issuer, the - - -
23 the core issue is the internal decision making. Did the
24 issuer actually decide to do the thing that it's doing, not
25 is that illegal or not approved.

1 JUDGE RIVERA: Yeah, but that - - - that skips
2 completely whether or not they had any authority to do that
3 issuance?

4 MR. HURWITZ: Well, I think - - -

5 JUDGE RIVERA: That - - - that is the point, is
6 it not?

7 MR. HURWITZ: I don't think so because this state
8 has long ago said ultra vires defenses are not recognized,
9 that you cannot - - - a corporation cannot go out into the
10 world, enter into contracts, and then say, oh, you know,
11 we're sorry, that's not enforceable because we didn't have
12 the authority to do that.

13 JUDGE CANNATARO: So there is no question in your
14 mind that these securities would be valid under an
15 application of the New York law? Is that PDVSA's position?

16 MR. HURWITZ: Absolutely.

17 JUDGE CANNATARO: What is - - - what is the New
18 York law that governs this validity analysis?

19 MR. HURWITZ: Well, so once you get - - - if I
20 understand the question and I'm not - - -

21 JUDGE CANNATARO: How would you analyze this same
22 question under New York law, I mean, whether or not the
23 securities are valid in the first instance?

24 MR. HURWITZ: The securities here were
25 unquestionably approved by the PDVSA board. They were

1 approved - - - they were executed by people who were
2 unquestionably authorized agent of the corporation. That
3 renders them valid. I don't - - -

4 JUDGE CANNATARO: And that's all our law
5 requires. New York law requires nothing more than that.

6 MR. HURWITZ: And that's what Judge Failla held,
7 that once - - - if you look at New York law, there's no
8 dispute that under New York law, these are valid and
9 enforceable securities.

10 JUDGE CURRAN: At the district court level, I
11 read the argument. The other side basically said the only
12 issue is invalidity under Venezuela law. Otherwise the
13 ballgame is over.

14 MR. HURWITZ: I think that is what they said.

15 JUDGE CURRAN: And this would be - - - under New
16 York law, this would be a clear question of contract law.
17 You - - - Counsel, what I'm getting a little worried about
18 is, as I read some of the commentary, these securities are
19 akin but are not like negotiable instruments because these
20 types of securities carry more baggage or luggage, whatever
21 the expression is. But it is a little like a negotiable
22 instrument in this situation because, for example, let's
23 assume these notes have been resold, the holder in due
24 course concept, which is exactly addressed in 202(a) under
25 Article 8.

1 MR. HURWITZ: Right.

2 JUDGE CURRAN: So here, how is it that anybody is
3 going to know what to look at in the constitution?

4 MR. HURWITZ: I think that's - - - that's - - -

5 JUDGE CURRAN: That's what I'm really worried
6 about is we may create a rule or be asked to create a rule
7 that says inva - - - invalidity is this huge bucket of
8 everything and you got to go fish, so to speak, in the
9 Constitution.

10 MR. HURWITZ: I think that's - - - that's exactly
11 the problem, Your Honor. These are - - - these are
12 tradable securities. They can't be traded. They do trade.
13 There's a trading price. You can go look it up.

14 JUDGE GARCIA: Would a good faith holder in the
15 secondary market will be able to collect or would they
16 still be prohibited because of the validity of the issuer?

17 MR. HURWITZ: Well, I think - - - I think - - -
18 our position is you only get to 8-202 if there's a - - - if
19 there's a-if the securities invalid. Once the securities
20 are determined to be invalid under 8-110, then you look to
21 8-202, and you look to questions about the - - - the good
22 faith of the buyer. The problem there, of course, with the
23 tradable security is which buyer do you look at and is it -
24 - - can it really be the case that each share or each bond
25 has a different level of enforceability depending on - - -



1 JUDGE CURRAN: Well, Counsel, as I understand, if
2 we accept the appellant's argument, it's - - - they're void
3 ab initio.

4 MR. HURWITZ: That is correct, Your Honor.

5 JUDGE CURRAN: It's as though they never existed.

6 MR. HURWITZ: Correct.

7 JUDGE CURRAN: So nobody would be able to collect
8 on these. And it's not so much about enforcing it, it's
9 about being able to execute on the collateral pursuant to
10 the guarantee. And so that would - - - so if you're a
11 holder in due course, even down the road of one of these
12 securities, you're out of luck if we sustain this argument
13 on invalidity.

14 MR. HURWITZ: Yeah, I'm not - - - I'm not sure
15 that's - - - that's right. I think if you sustain the
16 argument that - - - that if you were to hold and there's a
17 there's an important caveat here that I want to - - - I
18 want to have a moment to get to. If you were to - - - if
19 the court were to determine that the securities are invalid
20 under 8-110, then you go through the analysis under 8-202,
21 which takes account of are you - - - are you a good faith
22 purchaser for value and has there been substantial
23 compliance and all of the other things that 8-202
24 considers.

25 JUDGE CANNATARO: But if those factors are



1 present. They are enforceable, notwithstanding their
2 invalidity.

3 MR. HURWITZ: Correct.

4 JUDGE CANNATARO: Isn't that what 8-202 says?

5 MR. HURWITZ: That's exactly what 8-202 says.

6 JUDGE GARCIA: Would that apply to the collateral
7 as well? So I'm a secondary holder, right? It's a
8 Constitutional provision. I'm a secondary holder. I
9 bought this from somebody else who had the bond. Now can I
10 collect and enforce the guarantee?

11 MR. HURWITZ: That's - - - that's the problem
12 with an overbroad reading of 8-110 is you - - -

13 CHIEF JUDGE WILSON: Well, I want - - - I want to
14 ask you something about the pledge agreement specifically.
15 So the questions that we're being asked by the Second
16 Circuit ask about what law controls the governing
17 documents. The governing documents are what's defined in
18 the agreements as the transaction documents. Transaction
19 documents are the indenture, and they're the notes. But
20 they're also the pledge agreement.

21 MR. HURWITZ: Right.

22 CHIEF JUDGE WILSON: The pledge agreement is
23 between a Delaware corporation and assets held in the
24 United States. And at least, as I heard, counsel's
25 description of what he was calling a narrow rule that he

1 wants as to validity, it wouldn't apply to the pledge
2 agreement at all. That's still going to be governed by New
3 York law. And if the - - - what is the - - - and let me
4 spin it out a little bit more. There is certainly a view
5 of this set of agreements that says that part of the risk
6 of Venezuela's default, we call it that or the or the
7 agreement notes being invalid, was addressed by the pledge
8 agreement choosing New York law, locating assets in the
9 United States as to which New York law would govern.

10 So I'm not sure, even if we - - - it looks to me
11 like the transaction, at least there's an argument, that
12 the transaction is structured to have accounted for this
13 very thing.

14 MR. HURWITZ: The transaction was structured
15 exactly to be a New York transaction, and it was structured
16 by PDVSA. PDVSA chose to come to New York.

17 CHIEF JUDGE WILSON: No, no. I mean, something a
18 little different than that, which is that even - - -
19 there's an understanding that the notes might have been
20 determined to be invalid. And I think there's even, I may
21 have misread it, but I think there's a provision in the
22 pledge agreement that says if PDVSA even challenges the
23 validity of the notes, then you, the trustee, can liquidate
24 the collateral?

25 MR. HURWITZ: I don't recall that, but it's

1 entirely possible.

2 CHIEF JUDGE WILSON: Okay.

3 MR. HURWITZ: I mean, I don't - - - I don't think
4 - - - look, the let me address what I think is the
5 question.

6 JUDGE GARCIA: But can I just stick with that on
7 the pledge agreement. Is the pledge agreement, is signed
8 by the holding company, the Venezuelan company, right?

9 MR. HURWITZ: Yes. Yes, it is.

10 JUDGE GARCIA: Would the pledge agreement be
11 effective without that signature? Could the Delaware
12 company enter this agreement without the signature of the
13 Venezuelan company?

14 MR. HURWITZ: Well, the Delaware company is a - -
15 - is a wholly owned subsidiary of PDVSA, the Venezuelan
16 company. And - - -

17 JUDGE GARCIA: So internally, right?

18 MR. HURWITZ: Right. I'm sure that the - - - the
19 trustee and the collateral agent and the - - - the other
20 parties would have wanted to be sure that PDVSA agrees to
21 the terms of the pledge agreement, given its relationship
22 to the notes. So I think - - - I'm sure it was important
23 to the counterparties that PDVSA be a signatory to that
24 document.

25 JUDGE GARCIA: But it could also be Delaware - -

1 - that Delaware company's rule, laws, that say they have to
2 get approval by the parent company to enter into this
3 pledge agreement, right?

4 MR. HURWITZ: Yeah, the, I mean, all of these
5 questions highlight the enormous uncertainties that are
6 created by the claim being made here. And I do think it's
7 important to emphasize those. I mean, the counterparty - -
8 - PDVSA came to New York. This is a New York transaction,
9 as Judge Failla found. They agreed to - - - to the
10 application of New York law. They got unqualified opinions
11 from a very prominent international law firm as to both New
12 York and Venezuelan law. They got express representations
13 in the governing documents.

14 JUDGE RIVERA: But let me ask you a different - -
15 - let me ask you a different kind of question.

16 MR. HURWITZ: Sure.

17 JUDGE RIVERA: So I just want to sort of circle
18 back to some of these questions about what would be the
19 closer question, depending on the language in the
20 constitution. What is it? Because you're talking about
21 the resources, the natural resources of a country, the
22 people's resources. What would the people of Venezuela
23 have to have done to avoid what - - - what counsel is
24 claiming is the corrupt act? What - - - the theft of their
25 resources, what could they have done?

1 MR. HURWITZ: Well, it - - - to - - - let me just
2 start by saying, Citgo, of course, is a Delaware
3 corporation. It does no business in Venezuela. It doesn't
4 own any of Venezuela's natural resources. What they could
5 have done is, number one, the government had every ability
6 to prevent this transaction from happening. Not only the
7 Maduro government, which was recognized by the United
8 States at the time. The National Assembly could have said,
9 as they did not, this is an illegal contract. This is an
10 illegal transaction. It requires National Assembly
11 approval. It hasn't gotten it. We will treat it as void.
12 They said none of those things. Had they done that,
13 there's no question that the exchange office - - -

14 JUDGE RIVERA: I mean, post - - - post - - -

15 MR. HURWITZ: - - - would've have failed.

16 JUDGE RIVERA: I'm sorry. Post the entry of the
17 agreement? You mean - - -

18 MR. HURWITZ: Pre the entry of the - - -

19 JUDGE RIVERA: - - - they could have disowned
20 the agreement; is that what you're saying?

21 MR. HURWITZ: What I'm saying - - -

22 JUDGE RIVERA: Disavowed it, excused me.

23 MR. HURWITZ: What I'm saying is there was a - -
24 - in September 2016 before the agreement, before the
25 transaction closed, the National Assembly issued a

1 resolution. They criticized the government. They
2 criticized mismanagement at PDVSA. They criticized the
3 transaction. But as Judge Failla found, they did not say
4 as they could have, this transaction is illegal. It's
5 void. It falls under Article 150 of the Constitution. It
6 requires National Assembly approval. And they said none of
7 those things.

8 JUDGE RIVERA: And they need to say that because
9 what?

10 MR. HURWITZ: Well, they're - - -

11 JUDGE RIVERA: If it's already in the
12 Constitution?

13 MR. HURWITZ: Right. Well, there are two - - -
14 well, there are two possibilities. One is they - - - they
15 believed correctly in our view, that this transaction,
16 because it involved PDVSA, not the government, but PDVSA,
17 that under - - - under binding - - - a binding decision of
18 the high court of Venezuela, they could have concluded that
19 they did not - - - they could not credibly say or
20 accurately say that the law was that National Assembly
21 approval was required. That was certainly the decision by
22 Hogan Lovells, the law firm for PDVSA.

23 The other possibility, we don't know which of
24 these is true, but the other possibility is, they chose for
25 political reasons to try to have it both ways. They wanted

1 to be on record criticizing the transaction, but they did
2 not want to blow up the transaction. The reason they would
3 not have wanted to blow up the transaction is because at
4 the time PDVSA was on the verge of defaulting on something
5 like \$7 billion of debt in enforceable in New York courts
6 to largely either US or international investors.

7 Those investors, had there been a default on the
8 existing notes would have gone into court in New York,
9 would have sought to attach PDVSA assets in the United
10 States, of which the principal one is Citgo. So Citgo was
11 - - - was on the chopping block, not because of what was
12 done in this transaction. It was on the chopping block
13 because of what had been done years and years earlier. And
14 it was already on the chopping block as of 2016 when this -
15 - - when this transaction happened.

16 JUDGE SINGAS: So fundamentally, you're basically
17 presuming the authority of the contract, right? Because to
18 my mind, there's no way that New York law could answer the
19 question, is this a valid contract? Because we have no New
20 York law that would assess Venezuelan constitutionality,
21 right?

22 MR. HURWITZ: I guess what I say is, as a matter
23 of - - - as a matter of New York law, New York does not
24 recognize a claim that we the corporation, yes, we issued
25 shares, we signed all these papers, but we did not have

1 authority to do that. That that is the - - - that is an
2 ultra vires defense that this state, both as a matter of
3 common law and as a matter of statute under BCL 203 has
4 long since abandoned, as far as we know, every other state
5 in the country.

6 JUDGE SINGAS: So is this IRB Brazil?

7 MR. HURWITZ: This is IRB Brazil. This is
8 Ministers and Missionaries with those cases. And those
9 cases are, you know, important both for the specific
10 holding and also for the broader principle that in the
11 context of commercial agreements, it's incredibly important
12 to New York that people be allowed to enter into
13 enforceable agreements to apply New York law.

14 JUDGE GARCIA: Did IRB Brazil, was that a UCC
15 case?

16 MR. HURWITZ: IRB was not a UCC case, and I'm not
17 suggesting. But it's a - - - it's a case that recognizes
18 important New York public policies that are directly
19 germane to how the UCC and in particular these provisions
20 should be interpreted. It's a - - - it's a case that says
21 that - - - and with both IRB and Ministers say once the
22 parties agree on the application of New York law, there is
23 - - - there is no room for consideration of conflict of
24 laws, principles - - -

25 JUDGE GARCIA: Unless - - -



1 MR. HURWITZ: - - - and that goes to the common
2 law issues.

3 JUDGE GARCIA: But unless they specifically
4 incorporate New York Conflicts Law, I think, is what it
5 says. You can - - - you can do that if you want.

6 MR. HURWITZ: You could do that.

7 JUDGE GARCIA: Isn't there argument that's what
8 you did here?

9 MR. HURWITZ: Yeah. I think for purposes of - -
10 - of the UCC, you know, if - - - if the court were to
11 decide, and this is the caveat that I mentioned earlier
12 that I wanted to get to, if the court were to decide that
13 this is a validity issue, we don't think it is. But if the
14 court were to decide this is a validity issue, then yes, we
15 acknowledge that that overrides the agreement because there
16 is a carve-out as there would have had to be in any event
17 to the agreement. The caveat I want to get to is that in
18 that case, the next step is a consideration of Venezuelan
19 law, because the UCC allows you to decide on New York law
20 as long as Venezuelan law approves it. So you would get
21 back to the federal courts about what Venezuelan law
22 requires.

23 JUDGE CANNATARO: That would not be us, though,
24 right?

25 MR. HURWITZ: I - - - I - - - we're not - - - I

1 don't think either of the parties, none of the - - -

2 JUDGE CANNATARO: Thank you.

3 MR. HURWITZ: - - - questions asked this court
4 to decide on Venezuelan law. I think both of us would be
5 happy to talk about it, probably more than you'd be willing
6 to hear about it. I want to say - - - I want to, if I may,
7 I'd like to say one other thing. And I'm happy to answer
8 any other questions, particularly about the common law
9 issues. In fact, let me let me say two things. One is - -
10 - one is a policy issue, as this court has recognized, it's
11 - - - it's foundational to - - - certainly consistent with
12 this court's recognition of policies. I don't say that the
13 court has said this, but it's foundational to the market
14 for foreign debt in New York that parties be allowed to
15 enter into binding agreements to apply New York law.

16 Investors do not want to be bound by the law of
17 the issuer's jurisdiction, both because the law may well be
18 uncertain. It's far from it's not as developed. There may
19 be questions as here about what it means and what's
20 required in a way that there would likely not be under a
21 much more - - - the more developed New York system. And
22 also because investors do not want to be in a position that
23 they are at risk of opportunistic efforts by the issuer or
24 by the government to recharacterize their own law
25 retroactively, which we believe is what has happened here.

1 CHIEF JUDGE WILSON: Those risks can be priced or
2 secured, right?

3 MR. HURWITZ: Exactly, correct. Which gets me to
4 my next point, which is from the perspective of the issuer.
5 It's a bad result if there's uncertainty, because for the
6 issuer, that uncertainty increases the cost of debt and
7 decreases the availability of debt. So issuers
8 predominantly developing countries, state-owned enterprises
9 in developing countries, will have a harder time getting
10 credit in New York and will have to pay more to get credit
11 in New York precisely because of that uncertainty. That's
12 exactly correct.

13 I'm happy to address the common law issues. I
14 think we've addressed them clearly in our brief. I mean,
15 most of the common law issues are resolved by looking at
16 the Ministers case, which tells you you shouldn't be - - -
17 once the parties agree on an enforceable New York choice of
18 law provision and by hypothesis, if we get past the UCC,
19 that's the case here. Ministers says there's no room for
20 discussion of conflicts of laws. I'm happy to address the
21 other common law issues if the court has questions, but
22 otherwise we're happy to rely on what we said in our
23 papers.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. HURWITZ: Thank you, Your Honors.



1 JUDGE RIVERA: Counsel, I'm sure you have much
2 you want to respond to, but could you respond to this last
3 point about this adverse effect regarding the ability to
4 deal with debt?

5 MR. TIMOFEYEV: Yes, Your Honor, I would be happy
6 to start with that. We don't think that those concerns are
7 well taken with respect for several reasons. First of all,
8 in every sovereign debt transaction, there will be legal
9 opinion and these legal opinions will look at whether or
10 not the issuing entity had the power and authority to issue
11 security under the law that jurisdiction.

12 JUDGE CURRAN: But here you say the legal
13 opinions were wrong.

14 MR. TIMOFEYEV: They were wrong. And that was -
15 - - and this is a very specific, peculiar case because this
16 is a case where an authoritarian executive, which the U.S.
17 Government later refused to recognize - - - they
18 recognized, actually decided to disregard the
19 constitutional requirements and constitutional prerogatives
20 of a democratically elected legislature of this country, so
21 which the U.S. recognizes now as the only legitimate
22 government entity in Venezuela. So this is a very specific
23 case in which the executive of a foreign country actually
24 decided to press ahead with the transaction, even though
25 the constitutional restrictions forbid, prohibited that

1 transaction without the legislative authorization.

2 And in this case, also the other - - - the - - -
3 in terms of retroactivity, I don't think that's really a
4 valid concern because this court and the courts of the
5 United States do not have to recognize a self-serving
6 assurance of a foreign government that it's retroactive
7 repudiation of debt is valid. This is what the Second
8 Circuit held in the Allied Bank case. And the Supreme
9 Court in Animal Science said that courts of the US are not
10 bound to accept representations of foreign states on those
11 matters. The - - - also I think if - - -

12 JUDGE TROUTMAN: How - - - so - - - again, how
13 does validity and Article 150 come into play here?

14 MR. TIMOFEYEV: So Article 150 is a procedural
15 requirement that said that if a state-owned entity, and
16 PDVSA is a state-owned entity that's part of Venezuelan
17 public administration, if it has - - - if it wants to go
18 ahead with the issuance of security in a national contract
19 of public interest, it has to obtain a legislative
20 authorization. It's an affirmative legislative
21 authorization requirement.

22 JUDGE TROUTMAN: And the internal corporate
23 ability to act, how does that impact?

24 MR. TIMOFEYEV: So that's why we actually think
25 that the - - - the other side's interpretation of validity,

1 which is limited to the internal - - - internal processes
2 and approvals that the internal company does not work for a
3 public entity like this, because for two reasons. One is
4 Section 8-202 expressly says constitutional provisions go
5 to validity. And we know from the commentary that one
6 example of constitutional provisions which limit debts.
7 Secondly, if you look at the treatises like the Glazer and
8 FitzGibbon and the other treatises on the opinion letter
9 practice, they specifically differentiate between purely
10 private entities and public entities, public regulated
11 entities.

12 And they say that for regulated entities the
13 satisfaction of a governmental approval and obtaining of
14 governmental permits is an issue that goes to validity.
15 And that makes sense because a public entity cannot - - -
16 actually has no power to go and issue a security without
17 obtaining the required governmental approval. In that
18 sense, it is functionally indistinguishable from a
19 requirement of a board approval for a private entity.

20 JUDGE CURRAN: Counselor, real quick, just don't
21 lose your train of thought. But is it undisputed here that
22 this is a public entity? I thought it was sort of a public
23 entity once removed, so to speak. That it's - - - that
24 it's not a public entity under Venezuelan law. It's sort
25 of once removed, as I called it. Is it undisputed it's a

1 public entity and that's why - - -

2 MR. TIMOFEYEV: Your Honor, I think what - - -
3 what cannot be disputed here reasonably is that this is - -
4 - PDVSA is a corporation that's organized under Venezuelan
5 corporate law, but it is also part of what is called in
6 Venezuela, the law of public administration. It is a
7 decentralized public administration entity. What is not
8 subject to dispute, it is subject both to corporate law of
9 Venezuela and it is subject to the law of public
10 administration of Venezuela, which requires compliance with
11 all legal requirements, including constitutional
12 requirements like Article 150. There is no precise analog
13 in the United States. Amtrak may be as - - - as a
14 federally chartered company may be closest, but it's not
15 exactly. It is - - - PDVSA is a directly state-owned
16 entity. In fact, Constitution of Venezuela mandates a
17 hundred percent ownership of PDVSA by Venezuelan government
18 because of the importance of oil industry to Venezuela.

19 JUDGE CANNATARO: Counsel, quick turn. I'm
20 sorry, but your light is on, and everyone wants to get a
21 question in. You started your argument at the beginning of
22 your appearance by talking about the distinction between
23 validity and enforceability, and that conversation popped
24 up with your adversary again. Do you agree with, endorse
25 the - - - the colloquy with Justice Curran regarding the



1 enforceability to secondary purchasers, good faith
2 purchasers for value? Regardless of the validity, would
3 you say that these securities would still be enforceable as
4 to that class of purchaser?

5 MR. TIMOFEYEV: Your Honor, the article - - - the
6 - - - the substantive defenses of Article 8-202 are not
7 just - - - not implicated in - - - at least in the
8 certified questions. I mean, they have not yet been
9 briefed or discussed.

10 JUDGE CANNATARO: You don't want to prejudice
11 some other argument.

12 MR. TIMOFEYEV: I don't want to prejudice. But I
13 think - - - I think the right answer would be, if I were to
14 guess, is that you look to the Venezuelan law to determine
15 the validity, whether security is valid to begin with,
16 because that's really what - - -

17 JUDGE CANNATARO: Well, then would you - - -
18 would you agree that validity and enforceability are not
19 coextensive, that those are different concepts?

20 MR. TIMOFEYEV: They're different concepts.
21 There are two differences. You can look - - - once you
22 determine whether a security is valid to begin with under
23 Article 8-110, it doesn't say that the defenses - - - it
24 doesn't necessarily say that defenses under Article 8-202
25 will not apply to secondary purchasers. I mean, 8-202

1 expressly contemplates there may be securities which are
2 invalid because of a constitutional defect, because of
3 noncompliance of constitutional provision. But if you meet
4 certain requirements, bona fide purchase, lack of, you
5 know, lack of notice, substantial compliance and secondary
6 purchaser, you nevertheless may not be able to - - - the
7 defense of invalidity may not be a complete defense. So
8 that's one issue.

9 The second is what is important is, is if you
10 look at the Hawkland treaties, if you look at actually the
11 - - - the Hawkland treaties, which now criticizes expressly
12 the district court decision here and says district court
13 got it wrong, it - - - and the article by Professor Bjerre
14 who - - - who is the treatises chief editor, they explain
15 laws of enforceability are typically general laws. Like
16 for instance a law of usury will be a law of general
17 enforceability. No one, certainly not we, not anyone else,
18 is intimating that to determine validity, a lawyer has to
19 scour all constitutional legal provisions to look, identify
20 those laws which may provide for defensive enforceability.
21 You only look to have - - - have to look at the narrow
22 scope of constitutional procedural requirements and
23 imposing affirmative approval.

24 And that's what the district court misunderstood.
25 It rea - - - it was concerned, legitimately perhaps, about

1 not expanding validity so broadly as to swallow the
2 entirety of corporate law, the entire notion of
3 enforceability defenses. But as a result, it actually
4 misinterpreted validity to the exclusion of these
5 constitutional provisions unless they expressly address
6 security. But that is - - - just cannot be reconciled with
7 the examples given in the official comments of
8 constitutional provisions that do not expressly address
9 security. And there is no logic why only such provisions
10 would be encompassing validity, and there is certainly no
11 textual support.

12 Just a few other points, too, that I think would
13 help this court. In terms of the ultra vires, Section 203
14 defense, as we are going to brief, there is a distinction
15 because it does - - - Section 203 does eliminate to ultra
16 vires defense, but only if the initial action was otherwise
17 lawful. So it otherwise had to be - - - it had to be legal
18 to begin with. Here is one example. If PDVSA entered into
19 a hotel building contract and then tried to argue this was
20 ultra vires because our corporate purpose is only oil
21 extraction. Section 203 would not recognize that defense.
22 But here PDVSA has express authority to issue securities is
23 just that it issued securities that are invalid because it
24 did not comply with the we've constitutional required
25 procedural prerequisite. So Section 203 is really not - -

1 - not a bar here.

2 In terms of - - - in terms of the sum of you
3 know, in terms of the National Assembly September 2015 - -
4 - 16 resolution, it is absolutely incorrect that the
5 National Assembly kind of left anything unclear. It
6 expressly criticized the transaction. It said it rejects
7 the pledge of Citgo - - - pledge of a controlling share of
8 Citgo. It summoned the chairman of PDVSA to explain the
9 transaction. And what also certainly what cannot be
10 subject to dispute is it did not authorize that
11 transaction. And the Article 150 does not say that a
12 transaction PDVSA can issue security, but the legislature
13 can actually reject that transaction. It requires prior
14 approval.

15 JUDGE GARCIA: Counsel, I'm sorry to interrupt
16 you, but we've been going on. If we agree with you on this
17 definition of validity of a security, hindsight, this deal
18 would not have happened. And that just may be the way it
19 should be, or the interest rate would have been fifty
20 percent or whatever. And you may be at a user defense.
21 But so we're changing the dynamics here. This deal
22 happened because you had this type of provision. A very
23 good law firm didn't think this was a violation. They gave
24 an opinion letter. Going forward, very good law firms are
25 now going to look at the constitution and look at broader

1 provisions and say hedge at least may or may not. This may
2 be a national security violation. This may be whatever
3 they have in there resulting in either these deals don't
4 get done or their priced considerably more expensively in
5 terms of an interest rate, right?

6 MR. TIMOFEYEV: Your Honor, I think - - - I think
7 in this case, so - - - so as a factual matter, a lot of
8 financial analysts have at the time commented that, in
9 fact, this deal was legally suspect and likely invalid
10 because National Assembly did not authorize it under
11 Article 150. It was - - - it was absolutely known. I
12 mean, there was - - - they - - - and they expressly warned
13 that, in fact, this transaction is a risky transaction.
14 Again, this is a speculation from the hindsight, but one
15 possibility is that the risk was priced into this
16 transaction. Under this debt swap- - -

17 JUDGE GARCIA: What was the interest rate? I'm
18 just curious. What was the rate? The interest rate?

19 MR. TIMOFEYEV: So I don't remember the rate, but
20 one - - - one number - - - but one number is that those - -
21 - those bondholders that exchanged the 2017 notes for the -
22 - - for the new ones would actually obtain something
23 analogous to like a fifty percent premium in terms of
24 payments.

25 JUDGE GARCIA: Because there was an increase in

1 the principle.

2 MR. TIMOFEYEV: Plus it was the only - - - it was
3 the first time that there was a PDVSA debt offering which
4 actually pledged controlling interest in Citgo. The 2017
5 notes were - - - were unsecured. So essentially they would
6 just get back - - - get back in line behind any other
7 creditor, including currently any other credit against the
8 Venezuelan state itself.

9 JUDGE GARCIA: Yeah.

10 MR. TIMOFEYEV: So there was - - - the risk was
11 known. The risk was priced into the transaction. In terms
12 of legal opinions if - - - if similar situation occurs, and
13 there is a legal opinion that looks at particular
14 authorizations, again, it may conclude there is some
15 uncertainty, but it would signal that uncertainty and that
16 can be priced into the transaction. If there is any - - -
17 and if there is any concern about equity in this case,
18 there was certainly a defense of unjust enrichment, which
19 is available under both New York law and also under
20 Venezuelan law. So it is not that even if - - - even if
21 this is the question of validity, which we think it
22 absolutely is, and even if we prevail in the federal court
23 under Venezuelan law, which is not a given, although I - -
24 - we think we will, even then there is a defense of unjust
25 enrichment that will not allow an unjust result. And in

1 terms of policy consequences - - -

2 JUDGE CURRAN: Counsel, I'm sorry. On that
3 point, we're way beyond time, but the ball game is the
4 collateral. I don't think you can get to the collateral on
5 an unjust enrichment theory, correct?

6 MR. TIMOFEYEV: Your Honor you may not, but the
7 collateral was there to make sure that you will - - - you
8 will be made whole. So in a sense, if you're actually
9 being made whole as a result of a payment and as a result,
10 you know, because you get the remedy for the unjust
11 enrichment and you get paid, there is really I don't think
12 you have an equitable right to say, well, no, I in fact, I,
13 I want Citgo because the reason I entered into this
14 transaction and participated and that's because I wanted to
15 get control of Citgo once you default.

16 JUDGE CURRAN: If it's collectible.

17 MR. TIMOFEYEV: If it is - - -

18 JUDGE CURRAN: As an unsecured debt?

19 MR. TIMOFEYEV: And also, I mean, the innuendo
20 there is currently there is - - - there is a parallel
21 litigation involving creditors of PDVSA in Venezuela where
22 in fact, the federal district court in Delaware will be
23 conducting a court sanctioned auction of Citgo and of Citgo
24 assets. So it is actually quite possible that, in fact, by
25 the time this case returns, you know, this case is before

1 the federal court and federal court has to address
2 questions of Venezuelan law. It is uncertain exactly, you
3 know, what would happen - - - what would happen there.
4 Just one last point on, you know, consequences. If there's
5 any systemic risk, there is actually a systemic risk that
6 foreign sovereigns will, in fact, enact laws that prohibit
7 state-owned entities from selecting New York law if they
8 think that the choice of law clause in the contract
9 selecting New York law will then be used to evade
10 governmental and constitutional restrictions on those state
11 entities authorities.

12 So if there is a - - - first of all, we don't
13 think that parties to sovereign debt transactions really
14 will shy away from selecting the law of New York,
15 especially because New York has a sophisticated judiciary
16 and a sophisticated commercial law. There are reasons why
17 the parties come here. But even if there is such a risk,
18 the risk is much greater that foreign - - - foreign
19 governments will be concerned about the effects of
20 selecting a New York choice of law and having that override
21 Constitutional restrictions on the issuing power of their
22 governmental, state-owned corporations.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. TIMOFEYEV: Thank you, Your Honor.

25 (Court is adjourned)



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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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