

Supreme Court Allows Ukraine to Defend Claim Under Eurobonds on the Ground of Duress

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Introduction

In *The Law Debenture Trust Corporation plc v Ukraine (acting upon the instructions of the Cabinet of Ministers of Ukraine)* [2023] UKSC 11, the Supreme Court (“SC”) considered, for the first time, the issue of duress caused by trade sanctions and threats of force against a state. The SC held that trade sanctions, which are “*important aspects of statecraft in the modern world*”, are not inherently illegitimate but that threats to the safety of a state’s citizens, military or property can constitute duress.

The Facts

The Law Debenture Trust Corporation plc (the “Trustee”) is a company incorporated in England and Wales, and was the trustee of notes with a nominal value of US\$3 billion (the “Notes”). The Notes were issued by Ukraine represented by its Minister of Finance (the “MoF”), acting upon the instructions of the Cabinet of Ministers of Ukraine (“the CMU”), and constituted by a trust deed between Ukraine and the Trustee, which was governed by English law. Russia was the sole subscriber of the Notes.

Ukraine’s pleaded case was that the Notes were voidable (and have been avoided) for duress. Ukraine argued that Russia had applied unlawful and illegitimate economic and political pressure, including threats to its territorial integrity and threats of the use of unlawful force, to deter Ukraine from signing an Association Agreement with the European Union in 2013 (the “Association Agreement”) and to induce acceptance of Russia’s financial support instead, in the form of the Notes.

Ukraine also argued that it had lacked capacity to enter into the Trust Deed and issue the Notes and that the Trust Deed was signed and the Notes were issued by the MoF in the absence of actual authority under Ukrainian law.

The principal amount of the Notes and the last instalment of interest was due on 21 December 2015; however, Ukraine refused to make payment.

On 17 February 2016, the Trustee, acting on the instruction of and for the benefit of Russia (as sole noteholder), issued proceedings against Ukraine in the English High Court claiming US\$ 3.075 billion plus interest and legal costs.

On 27 May 2016, Ukraine filed a Defence in which it disputed the validity and enforceability of the Notes on the grounds that, *inter alia*:

- Ukraine lacked capacity to enter into the transaction as a matter of Ukrainian law (the “Capacity Argument”).
- The MoF lacked the authority to enter into the transaction by which the Notes were issued (the “Authority Argument”).
- Ukraine was entitled to avoid the Notes for duress arising from unlawful threats made by Russia against Ukraine, and the application of unlawful trade measures and economic pressure by Russia (the “Duress Arguments”).
- Russia’s breach of its obligations to Ukraine not to use force against Ukraine and not to intervene internally in the affairs of Ukraine entitled Ukraine to rely on the public international law doctrine of “countermeasures” to decline to make payment (the “Countermeasures Argument”).

The Trustee contested each of Ukraine’s abovementioned arguments and, on 28 July 2016, applied for summary judgment. On 29 March 2017, Blair J found in favour of the Trustee and entered summary judgment against Ukraine.¹ On 14 September 2018, the Court of Appeal (“CoA”) considered that Ukraine had an arguable and justiciable defence of duress, and allowed Ukraine’s appeal from summary judgment in this limited respect.² The CoA also granted the Trustee permission to appeal to the SC on the issue of duress, and Ukraine was granted permission to appeal on the issues of capacity, authority and countermeasures.

¹ [2017] QB 1249.

² [2019] QB 1121.

The Judgment

The Capacity Argument

Ukraine argued that it had no capacity to issue the Notes because of flagrant breaches of Ukrainian constitutional law governing the manner in which the government could bind Ukraine to contractual relations, which had rendered the ensuing transaction a nullity as a matter of Ukrainian law. Ukraine also alleged that it did not have unlimited capacity to contract in breach of its own constitutional law.

The SC held that it was unarguable that Ukraine lacked the capacity to issue the Notes under English law, as a foreign state which is recognised as such by the UK executive is considered, for the purposes of English law, to be a legal person with full capacity. Further, the SC found that Ukraine did not lack capacity to make and perform a contract governed by English law, irrespective of its own domestic constitution and laws.

The Authority Argument

Ukraine submitted that the MoF who had signed the Trust Deed to effectuate the borrowing did not have authority to do so. Here Ukraine pointed to the limit imposed by the Budget Law of 2013 upon its external borrowing and argued that the MoF's authority to implement state borrowings was circumscribed by the need to comply with this limit, and this limit was breached by issuing the Notes. Ukraine also alleged that the MoF was only permitted to implement any borrowing if it was validly authorised by the CMU but that the CMU had failed to give valid authorisation.

The SC held that the MoF had ostensible (apparent) authority to enter into the Trust Deed and to issue the Notes (on behalf of Ukraine) and that the CMU had ostensible authority to pass a resolution authorising the MoF to proceed with the transaction. In particular, the SC found that the events leading up to the issuance of the Notes, which had involved the President of Ukraine, Prime Minister of Ukraine, Ukrainian Parliament, CMU and the MoF, demonstrated to the Trustee a coordinated and consistent approach to Ukraine's borrowing. The SC considered that if a State represents that a person has authority to act on its behalf, it will be bound by the acts of that person with respect to anyone dealing with them as an agent on the faith of that representation.

The Duress Arguments

Ukraine's allegations in relation to duress were presented on the basis that there was a concerted campaign by Russia to dissuade Ukraine from entering into the Association Agreement and to instead accept its financial support. However, the allegations were of two distinct kinds of pressure—economic pressure (i.e., economic duress) and threats of the use of force (i.e., duress of the person and of goods).

Economic Duress

This first category of pressure comprised: (i) the imposition of restrictions on trade, and the threat of further restrictions; (ii) threats to procure Russian banks to commence insolvency proceedings against Ukrainian businesses; and (iii) threats to cancel joint projects or otherwise withdraw cooperation in a number of industries. Ukraine alleged that this conduct was “illegitimate and/or unlawful” in two respects. First, it was carried out not for *bona fide* reasons but in order to apply pressure to Ukraine. Second, it was in breach of unincorporated international law (i.e., in breach of several treaties to which Russia and Ukraine were contracting parties).

The SC found as follows:

- The imposition or threat of trade sanctions does not inherently constitute illegitimate pressure for the purposes of the law of duress. This is so even if the restrictions have the effect of exerting pressure on a targeted State to enter into an agreement which it would not otherwise have concluded.
- The alleged threat that Russian banks might foreclose on Ukrainian creditors does not involve anything more than the exercise of pre-existing contractual rights, and cannot constitute duress.
- The English courts cannot decide whether Russia had acted, or had threatened to act, in breach of its international treaty obligations towards Ukraine; breach of international law cannot constitute illegitimacy for the purpose of duress.
- The relevant standard for economic duress is whether the actions complained of are unconscionable, drawing on equitable standards rooted in English law.

All in all, the SC held that the economic pressure alleged by Ukraine was not illegitimate under English law, and was therefore not in itself sufficient to establish duress.

Duress of the Person or of Goods

The second category of pressure comprised express or implicit threats of the use of force to destroy Ukraine’s security and its territorial integrity. In particular, Ukraine alleged that Mr Glazyev (an adviser to the President of Russia) had stated in late 2013 that if Ukraine signed the Association Agreement: (i) Russia could no longer guarantee Ukraine’s status as a state and may possibly intervene if pro-Russian regions of Ukraine appealed to Moscow; (ii) Russia would support a partitioning of Ukraine; (iii) Ukraine’s Russian-speaking minority might break up Ukraine in protest, and Russia would be legally entitled to support them; and (iv) the issue of borders between Ukraine and Russia would need to be discussed.

Ukraine averred that these statements amounted to a threat by Russia of the use of force. The SC considered that the threatened use of force by Russia would almost inevitably involve the use of violence against Ukrainian armed forces and citizens. The SC held that in the “*case of threats directed against a state, a government could hardly be indifferent to threats to the safety of its own citizens and members of its armed forces [and if] it yielded to the pressure imposed by such threats, any resultant agreement could in principle be susceptible under English law to avoidance on the ground of duress*”.

Ukraine also contended that the threatened use of force by Russia would almost inevitably result in the destruction of, or damage to, Ukrainian state property (i.e., Russia’s threatened use of force also constituted duress of goods).

Overall, the SC considered that Ukraine’s defence of duress based on the threats of the use of physical violence towards Ukraine’s armed forces and civilians and the threats of damage to Ukrainian property could not be determined without a trial. On that ground alone, the SC found that the Trustee was not entitled to summary judgment.

The Countermeasures Argument

Counsel for Ukraine had submitted, in the alternative to its case on duress, that non-payment of the sums due under the Notes was a lawful countermeasure available to Ukraine in light of the internationally wrongful actions of Russia (i.e., the invasion and annexation of Crimea). The SC rejected this submission because English law does not recognise a defence reflecting the availability of countermeasures on the international plane, and the subject matter of inter-state disputes is inherently unsuitable for adjudication by the English courts.

Commentary

The Supreme Court has confirmed that a foreign State which is recognised as such by the UK executive, has the status of a legal person with full capacity under English law. Further, if a state represents that an individual has authority to act of its behalf, it will be bound by the acts of that person with respect to anyone dealing with them as an agent on the faith of that representation.

Notably, in what appears to be the first case to consider the issue of duress caused by sanctions or threats of force against a state, the Supreme Court has found that:

- the imposition or threat of trade sanctions cannot sensibly be regarded as inherently illegitimate (i.e., cannot constitute duress in English law); and

- threats of force against a State, in so far as they involve threats to a state's citizens, military or property, can constitute duress of the person or of goods.

Interestingly, the Supreme Court also rejected an alternative submission made by counsel for Ukraine which had effectively asked the court to recognise a novel common law defence to a claim for breach of contract founded on the public international law right to take proportionate countermeasures.

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