

ENGLISH HIGH COURT REJECTS UKRAINE’S DEFENCE OF RUSSIAN AGGRESSION IN US\$3 BILLION DEBT CLAIM

The Law Debenture Trust Corp plc v Ukraine [2017] EWHC 655 (Comm)

Introduction

By a judgment handed down on 29 March 2017 in *The Law Debenture Trust Corp plc v Ukraine [2017] EWHC 655 (Comm)*, the English Commercial Court granted summary judgment on a claim brought by The Law Debenture Trust Corporation (“the Claimant”) (at the behest of the Russian Ministry of Finance) against Ukraine for non-payment of \$3 billion borrowed from Russia under Eurobonds. Notwithstanding that Ukraine had advanced “powerful” contentions that its borrowing was the result of unlawful and illegitimate economic, political and military pressure from Russia that was aimed at deterring Ukraine from entering into an association agreement with the European Union, Blair J held that there was no justiciable defence to the debt claim.

Background

The Claimant was incorporated under English law and was the trustee of Eurobonds (“the Notes”) issued by Ukraine in respect of \$3 billion that Ukraine had borrowed from Russia. The sole holder of the Notes was Russia. As a result of non-payment, Russia directed the Claimant to commence the instant proceedings.

Ukraine’s Defence alleged that it had been subjected by Russia to “massive, unlawful and illegitimate economic and political pressure” to accept Russian’s financial support and that Russia’s actions were designed to deter Ukraine from entering into an association agreement with the European Union. Ukraine alleged that Russia had imposed unlawful trade restrictive measures, made “threats regarding the security of Ukraine’s status as a sovereign state” and, by an illegal use of force and military aggression, invaded Crimea and supported military actions in Ukrainian territory. Since acceding to the European Union was a fundamental national policy objective of Ukraine, Russia’s actions were characterised as frustrating the Ukrainian people’s will to participate in European integration processes. Ultimately, Ukraine argued, all of these matters

constituted duress which justified non-payment under the Notes. Ukraine also argued that the Eurobond transaction was void as a matter of Ukrainian law for lack of capacity.

The Claimant contended, *inter alia*, that the matter was an ordinary debt claim and that Ukraine's attempt to bring in public international law issues was wrong.

The Claimant applied for summary judgment on the grounds that Ukraine's various defences were non-justiciable and had no real prospects of succeeding at full trial.

Decision

The English Commercial Court (Blair J) granted summary judgment against Ukraine.

The background of the case demonstrated that this was not an "ordinary debt claim" as contended by the Claimant. There was much material that substantiated Ukraine's contentions regarding pressure imposed on it by Russia.

On the issue of capacity, Blair J held that Ukraine, as a sovereign state, had unlimited capacity to borrow. Ukraine's argument was that the Finance Minister had lacked authority under Ukrainian law to enter into the Eurobond transaction. However, Blair J held that it was not a case of lack of power but rather a case of power being exercised contrary to the law. As a matter of English law (which governed the Notes), the Finance Minister did not have "actual authority" but did have "usual authority" by virtue of his position.

On the issue of wrongful and illegitimate pressure, Blair J noted that Ukraine's case that it had been subjected to significant pressure from Russia was strong. However, as a result of the doctrine of foreign act of state, the English courts could not assess the trade restrictive measures on which Ukraine relied in its case. Municipal courts are not competent to adjudicate upon transaction entered into between states on the plane of international law and could not interpret international agreements that were not incorporated into English law. On a related point, Blair J held that threats of force by Russia did not come within the public policy exception to the foreign act of state doctrine.

Ukraine had argued that the Notes contained an implied term that if Russia hindered Ukraine's ability to perform its obligations then performance would not be required. Notwithstanding Ukraine's powerful case that Russia's actual military actions had hindered its ability to meet its obligations, the Eurobonds transaction was of a legal nature under a financial instrument. The scope for the

implication of terms into financial instruments was limited and, in the instant case, Blair J held that the term sought to be implied by Ukraine would cause the Notes to become “unworkable and untradeable”.

Ukraine had sought to rely on the public international law concept of “countermeasures” (whereby a State takes an unlawful action against another State in response to that other State’s internationally wrongful act in order to induce compliance with international obligations). Blair J rejected Ukraine’s reliance on countermeasures, holding that the English courts were not competent to rule on questions of countermeasures.

Blair J held that, notwithstanding Ukraine’s powerful arguments regarding oppression on the part of Russia, the claim was, ultimately, for repayment of debts and Ukraine’s defences were not justiciable before the English courts. There was therefore no compelling reason to allow the case to go forward to trial.

Concluding Remarks

This case is one of many cases that have arisen between Ukraine and Russia in the last few years in domestic and international courts as well as arbitral and criminal tribunals.

Blair J’s judgment is useful as an indication of the approach that the English courts are adopting to arguments concerning non-justiciability and/or the act of state doctrine following the important decision of the UK Supreme Court in *Belhaj v Straw* [2017] UKSC 3 in January 2017.