

UKRAINE v RUSSIA IN THE ENGLISH COURTS – THE PUBLIC POLICY EXCEPTION TO THE FOREIGN ACT OF STATE DOCTRINE

Ukraine v Law Debenture Trust Corp plc [2018] EWCA Civ 2026

Introduction

In a judgment handed down on 14 September 2018 in *Ukraine v Law Debenture Trust Corp plc* [2018] EWCA Civ 2026, the English Court of Appeal held that the High Court had been wrong to grant Russia summary judgment on its claim against Ukraine for non-payment of US\$3 billion borrowed under Eurobonds. The Court of Appeal held that Ukraine's argument that the public policy exception to the Foreign Act of State Doctrine (arising out of alleged acts of unlawful pressure by Russia) could not be said to have no real prospects of success.

Background

Russia was the sole holder of Eurobond notes issued by Ukraine as regards US\$3 billion borrowed from Russia and constituted by a trust deed (governed by English law). Russia directed the claimant trustee to institute the instant proceedings seeking repayment. In its defence, Ukraine contended that Russia had applied unlawful economic and political pressure to deter Ukraine from signing an association agreement with the EU in favour of accepting financial support from Russia instead. Furthermore, Russia had imposed restrictive trade measures and had unlawfully threatened and used force against Ukraine by invading Crimea and supporting military action within east Ukraine.

In the course of resisting the claimant's summary judgment application, Ukraine contended, *inter alia*, that: (a) Ukraine did not have the requisite legal capacity to issue the Eurobond notes and to enter into the underlying contractual arrangements; (b) the issuance of the Eurobond notes had been procured by unlawful threats by Russia which amounted to duress for the purposes of English law; (c) the underlying contractual arrangements ought to contain implied terms that Russia would not prevent Ukraine from performing its contractual obligations.

At first instance, the High Court (Blair J) rejected Ukraine's arguments and granted the claimant summary judgment. Ukraine appealed to the Court of Appeal.

Decision

The Court of Appeal (Gloster LJ; Sales LJ; David Richards LJ) allowed the appeal in part.

The Court of Appeal rejected Ukraine's argument that it had lacked legal capacity to enter into the Eurobond notes' contractual arrangements. Once a foreign sovereign state had been recognised by the UK Government it had legal personality for the purposes of English common law which allowed that foreign sovereign state unlimited capacity. The foreign state's own domestic laws and constitutional arrangements did not alter its capacity as a matter of English common law. In any event, as a matter of Ukrainian law, the responsible Finance Minister was expressly authorised to borrow on behalf of the State of Ukraine subject to such conditions as might be decided by Ukraine's Cabinet of Ministers. Ukraine had not given the claimant notice of any alleged Ukrainian law breaches concerning the issuance of the Eurobond notes. The Court of Appeal held that Ukraine's Finance Minister / Cabinet of Ministers had had ostensible authority for the issuance of the Eurobond notes and, as such, Ukraine was bound by them.

The Court of Appeal allowed Ukraine's appeal on the issue of duress. English law will not enforce a contract that came into existence as a result of illegitimate pressure. Although, at face value, the Russian acts relied upon by Ukraine would be non-justiciable before the municipal courts because of the Foreign Act of State Doctrine, there was a public policy exception to that doctrine which applied in the instant case. Russia had submitted to the English jurisdiction by directing the claimant to institute the proceedings. The legal standards applicable to the determination of Ukraine's duress defence were not themselves inherently non-justiciable. The English courts were able to construe international law obligations. No suggestion had been raised by the UK Government that Ukraine's submissions gave rise to foreign policy difficulties. English public policy required that no State should be allowed to gain an advantage out of its violation of international norms. Thus, Ukraine's argument that the public policy exception to the Foreign Act of State Doctrine applied could not be said to have no real prospects of success such as to merit its summary dismissal.

The Court of Appeal held it was not appropriate to determine the issue of whether Ukraine's paying of the Eurobond notes constituted an affirmation under English law on a summary basis.

The Court of Appeal rejected Ukraine's arguments as to implied terms. There was no general rule of an implied term prohibiting one party from preventing the performance of another party into a contract. Implied terms could not be derived merely from the general circumstances of the relations between Russia and Ukraine at the time. Since Russia itself was not a counterparty to the underlying contractual agreements, the implied terms contended for by Ukraine would render the Eurobond notes unworkable. In any event, the Court of Appeal held, the implied terms contended for by Ukraine were unnecessary, vague and not obvious.

Concluding Remarks

The Court of Appeal contains important guidance on the Foreign Act of State Doctrine, following the significant decision of the Supreme Court in *Belhaj v Straw* [2017] UKSC 3. The decision reflects the possibility that States committing alleged international law wrongs may see an impact upon their activity in foreign domestic courts on related matters.