Hilary Term
[2023] UKSC 11
On appeals from: [2018] EWCA Civ 2026

JUDGMENT

The Law Debenture Trust Corporation plc (Respondent) *v* Ukraine (represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine) (Appellant) The Law Debenture Trust Corporation plc (Appellant) *v* Ukraine (represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine) (Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Kitchin
Lord Carnwath

JUDGMENT GIVEN ON
15 March 2023

Heard on 9, 10, 11, 12 December 2019
and 11 November 2021

Law Debenture Trust
Mark Howard KC
Oliver Jones
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Ukraine
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Ben Jaffey KC
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LORD REED, LORD LLOYD-JONES AND LORD KITCHIN (with whom Lord Hodge agrees):

Introduction

1. The Law Debenture Trust Corporation plc ("the Trustee"), a company incorporated in England and Wales, is the trustee of Notes with a nominal value of US$ 3 billion, maturing on 21 December 2015, and carrying interest at 5% per annum through maturity ("the Notes"). The Notes were issued by Ukraine represented by its Minister of Finance, acting upon the instructions of the Cabinet of Ministers of Ukraine ("the CMU"), and constituted by a trust deed dated 24 December 2013, to which the parties were the Trustee and Ukraine ("the Trust Deed"). The Trust Deed is governed by the law of England and Wales, with the courts of England and Wales having exclusive jurisdiction (subject to the Trustee's right of election to arbitrate, which has not been exercised). The sole subscriber of the Notes was the Russian Federation. Although the Notes were tradeable, the Russian Federation has retained the Notes since their issue.

2. Ukraine's pleaded case is that the Notes are voidable (and have been avoided) for duress. Ukraine contends that the Russian Federation applied massive unlawful and illegitimate economic and political pressure, including threats to its territorial integrity and threats of the use of unlawful force, to Ukraine in 2013 to deter the administration led by President Yanukovych from signing an Association Agreement with the European Union ("the Association Agreement") and to induce acceptance of the Russian Federation's financial support instead, in the form of the Notes. Following the decision by Ukraine not to sign the Association Agreement, protests in Ukraine grew and ultimately President Yanukovych fled, reportedly on 21 February 2014. Shortly afterwards, the Russian Federation invaded Crimea and purported to annex it. Ukraine maintains that the Russian Federation has since supported separatist elements in eastern Ukraine and has interfered militarily and succeeded in destabilising and causing huge destruction across eastern Ukraine. The court has not been asked to consider events subsequent to the hearing of this appeal, which was concluded prior to Russia's invasion of Ukraine in February 2022.

3. The Trustee does not accept Ukraine's pleaded case in this regard. The Trustee maintains that in any event, even if Ukraine's account of what has occurred were accurate, it would be irrelevant to a debt obligation governed by English law, such as that which is the subject of the present appeal.

4. Ukraine also maintains that it 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 Minister of Finance in the absence of actual authority under Ukrainian law to do so. It contends that:

(1) Ukrainian law imposed a limit, in the Budget Law of 2013, in relation to Ukraine's external borrowing during 2013 and the issue of the Notes caused that limit to be exceeded.

(2) An expert opinion required for the CMU to deliberate validly was not provided to the Ministers of the CMU at the time when the borrowing was approved in the course of a meeting on 18 December 2013.

(3) The CMU invalidly delegated consideration of some material terms of the Notes to the Minister of Finance.

The Trustee does not challenge those factual allegations for the purposes of the summary judgment application which is the subject of the present appeal.

5. At first instance, Blair J considered that the court should proceed on the basis that the terms of the Notes were onerous and, for Ukraine, unusual, because there was an issue to be tried in this respect that could not be resolved on a summary judgment application: [2017] QB 1249. On appeal, the Court of Appeal (Sales and David Richards LJJ, Dame Elizabeth Gloster) held that they were not self-evidently abnormal so as to put the Trustee on enquiry and that there was no evidence that they would have appeared abnormal to market participants: [2019] QB 1121.

6. The Trustee maintains that such allegations do not assist Ukraine in establishing a defence to the claim because Ukraine, as a sovereign state, had unlimited contractual capacity and that, in any event, they are matters of authority rather than capacity. The Minister of Finance plainly had usual and/or ostensible authority to enter into the Notes, and the Trustee could not reasonably have been expected to be aware of the breaches alleged by Ukraine. Ukraine denies this.

7. Furthermore, the Trustee contends that Ukraine ratified the Notes. US$ 3 billion subscription money for the Notes was paid into Ukraine's central bank reserves in December 2013 and this sum was accepted and credited to the state budget. Thereafter, during the course of 2014-15:

(1) Ukraine made three payments under the Notes in the full amount of interest allegedly due on each occasion, totalling US$ 233,333,350.

(2) On 26 September 2014, Ukraine's Ministry of Finance publicly announced that "All state debt indicators as at the end of 2013 were within the limits defined by the [Budget Law of 2013]".

(3) In May 2015, the Ukrainian Parliament passed a law that, as a matter of Ukrainian law, authorised the CMU to impose a moratorium on some of Ukraine's debt obligations, including the Notes.

(4) In September 2015, Ukraine's CMU issued an Exchange Offer Memorandum inviting holders of its outstanding Eurobonds (including the Russian Federation as holder of the Notes) to exchange outstanding debt securities (including the Notes) for new securities on different terms. The Exchange Offer was not accepted by the Russian Federation.

(5) On 18 December 2015, Ukraine's CMU adopted a resolution imposing a moratorium on Ukraine's payment obligations under the Notes, effective 20 December 2015. Following its adoption, the moratorium was announced in a press release dated 18 December 2015, in which Ukraine expressly reserved its rights in relation to its payment obligations under the Notes. Ukraine had not reserved its rights before 17 December 2015.

8. The principal amount of the Notes and the last instalment of interest fell due for payment on 21 December 2015. However, no further payment was made and Ukraine has refused to make payment.

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

10. Ukraine filed a Defence on 27 May 2016 in which it disputed the validity and enforceability of the Notes on the grounds that:

(1) Ukraine lacked capacity to enter into the transaction as a matter of Ukrainian law.

(2) The Minister of Finance lacked the authority to enter into the transaction by which the Notes were issued.

(3) Ukraine was entitled to avoid the Notes for duress arising from unlawful threats made by the Russian Federation against Ukraine (including to its territorial integrity) and the application of unlawful trade measures and economic pressure by the Russian Federation before the transaction was entered into.

(4) The terms on which the Notes were issued included implied terms to the effect that, inter alia, they would not be enforceable in circumstances where the Russian Federation itself was preventing or hindering their performance.

(5) In light of the Russian Federation's alleged breach of its obligations to Ukraine not to use force against Ukraine and not to intervene internally in the affairs of Ukraine, Ukraine was entitled to rely on the public international law doctrine of countermeasures to decline to make payment.

11. On 28 July 2016 the Trustee applied for summary judgment:

(1) The Trustee denied that Ukraine lacked capacity to enter into the transaction.

(2) The Trustee contended that the Minister of Finance plainly had usual or ostensible authority, even if he did not have actual authority (which was not admitted, but which it was accepted could not be resolved on a summary judgment application).

(3) The Trustee denied that Ukraine's duress defence was arguable, contending that it lacked any domestic foothold and was not justiciable in any event.

(4) The Trustee denied that it was appropriate to imply the terms for which Ukraine contended.

(5) The Trustee denied that the doctrine of countermeasures could be relied on by Ukraine.

The Trustee also contended that, if the Minister of Finance lacked authority or if the Notes had been issued under duress, Ukraine had, respectively, ratified and affirmed

the contract by its subsequent conduct. Ukraine denied this and also submitted that there were other compelling reasons for the dispute to be subjected to a full public trial.

12. On 29 March 2017, Blair J upheld the Trustee's case on each of the five grounds set out above and held that there was no other compelling reason for a trial. He entered summary judgment against Ukraine. He also rejected Ukraine's case that, if its duress defence was non-justiciable, the claim should be stayed in circumstances where that defence could not be adjudicated. Blair J also concluded that the Trustee's application, in so far as it was based on ratification and affirmation, was not suitable for summary judgment. He granted the parties general and unconditional permission to appeal and imposed a stay of execution of the summary judgment pending the outcome of that appeal.

13. On 14 September 2018, the Court of Appeal:

(1) Allowed Ukraine's appeal from summary judgment in certain respects, on the grounds that it had an arguable and justiciable defence of duress and that it would have stayed the Trustee's claim even if that defence had not been justiciable;

(2) Upheld Blair J's conclusions that:

(a) Ukraine, as a sovereign state, had unlimited contractual capacity;

(b) Ukraine was bound by the usual or ostensible authority of the Minister of Finance;

(c) The implied terms for which Ukraine contended should not be implied;

(d) The doctrine of countermeasures was not available to Ukraine as an arguable defence; and

(e) There was no other compelling reason for a trial.

14. Also on 14 September 2018 the Court of Appeal granted permission to appeal as follows:

(1) The Trustee was granted permission to appeal to the Supreme Court on the issue of duress. The Trustee did not advance its case that summary judgment should be granted in respect of affirmation as a ground of appeal and its affirmation case forms no part of the Trustee's present appeal.

(2) Ukraine was granted permission to appeal to the Supreme Court on the issues of lack of capacity, want of authority and countermeasures. Ukraine did not seek permission to appeal in respect of its implied terms defence, and that defence forms no part of Ukraine's present appeal.

The Court of Appeal also refused Ukraine's application, made following receipt of the draft judgment of the Court of Appeal, to amend the draft judgment and to rely on further expert evidence on Ukrainian law that arose in connection with its case that the Minister of Finance lacked authority.

15. The issues arising on this appeal may be conveniently addressed in the following order:

(1) Did Ukraine have the capacity to issue the Notes or to enter into the relevant contracts?

(2) Were the Notes issued or the relevant contracts entered into without authority?

(3) What is the significance in the present proceedings of Ukraine's contention that the Trust Deed was signed and the Notes issued as a result of duress exerted by the Russian Federation?

(4) Is it open to Ukraine to maintain that non-payment of the sums due under the Notes is a lawful countermeasure?

1. Capacity

16. Ukraine submits that it had no capacity to issue the notes because of flagrant breaches of fundamental requirements of Ukrainian constitutional law governing the manner in which the government may bind Ukraine to contractual relations, which rendered the ensuing transaction a nullity as a matter of Ukrainian law. It submits that a state does not have unlimited capacity to contract in breach of its own constitutional law and that, if a state is denied a defence of lack of capacity under its constitutional law, the outcome of a claim may be determined solely by the venue in which the litigation is heard. It submits that such an approach would reflect an outdated conception of the nature of a state when entering into a commercial contract under municipal law and would impose that conception on all states irrespective of their constitutional arrangements. Furthermore, it would involve an absence of comity or respect to states that choose to limit the power of those holding office in the state from time to time. In Ukraine's submission the rule of law requires that powers are exercised by a state only insofar as they fall within the scope of its constitution.

17. Ukraine's capacity defence is based on two strands of Ukrainian law which, it maintains, constrained its contractual capacity. First, it was prohibited from borrowing more from external sources than the limits specified in the then-current Ukrainian Budget Law of 2013. It maintains that the purported bond issue exceeded the mandatory borrowing limit specified in the Budget Law of 2013. Secondly, it submits that Ukraine's Constitution imposes additional restrictions on the means by which Ukraine may agree to borrow money. The CMU only has power to approve borrowing in accordance with certain constitutional and administrative law principles and rules of conduct, including its own Procedural Rules. Relying on the evidence of its expert, Professor Butler, it submits that there were breaches of those requirements in at least two respects. In breach of mandatory requirements, the CMU was not provided with an obligatory expert opinion regarding the draft Decree. In addition, the CMU was not aware of and did not consider all the material terms of the proposed borrowing as was legally required. For the purposes of summary judgment, the Trustee did not dispute Ukraine's case that, as a matter of Ukrainian law, these would be breaches which would deprive Ukraine of contractual capacity with the result that the contractual arrangements were a nullity.

(1) Personality and capacity of states in international law

18. Ukraine is a sovereign state and as such it is a subject of international law and possesses legal personality in international law. Sir Robert Jennings and Sir Arthur Watts explain (Oppenheim's International Law, 9th Ed (1992, reprinted 2011), at pp 119-120) that states are the typical international persons in the sense that it is the rights, duties and powers normally possessed by states which are together regarded as constituting "international personality of the fullest kind" (p 120). A condition for the existence of a sovereign state is that there must be a sovereign government.

> "Sovereignty is supreme authority, which on the international plane means not legal authority over all other states but rather legal authority which is not in law dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country." (at p 122)

19. A subject of international law is a legal person in that it is capable of possessing rights and duties in international law. However, personality must be distinguished from capacity. The fact that an entity is clothed with personality in international law does not, of itself, say anything about which capacities it possesses. Professor D P O'Connell explains that if an entity is recognised as having the capacity which it claims to have

> "it means that a series of acts performed by the entity in question in the field of international affairs are allowed to be legal acts, and the entity is admitted to have the capacity to perform them. Capacity implies personality, but always it is capacity *to do those particular acts*. Therefore 'personality' as a term is only shorthand for the proposition that an entity is endowed by international law with legal capacity." (O'Connell, International Law, 2nd ed (1970), 81, original emphasis).

A sovereign state, by contrast with certain other subjects of international law, enjoys the fullest capacity afforded by international law. In the *Reparations for Injuries Suffered in the Service of the United Nations case* [1949] ICJ Rep 174 at p 178, the International Court of Justice ("ICJ") concluded that the United Nations is an international person capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims. Contrasting the capacities of the United Nations with those of a state, the ICJ observed:

> "It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. … *Whereas a State possesses the totality of international rights and duties recognised by international law*, the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." (at pp 179, 180, emphasis added)

(2) Personality and capacity of states in English law

20. While international law governs questions as to the personality and capacity of states on the international plane, it says nothing concerning the personality or capacity of states to act on the domestic plane. In the United Kingdom it has been established since the nineteenth century that questions of the personality and capacity of a foreign state to act within the municipal law of the United Kingdom depend on the attitude of the executive. If a body politic claiming to be a state is not recognised as such by His Majesty's Government, courts in this jurisdiction regard it as non-existent and deny efficacy to its institutions, law and activities (subject to possible exceptions in matters of a purely private nature). It does not exist as a legal person before the municipal courts. (See F A Mann, "The Judicial Recognition of an Unrecognised State", (1987) 36 ICLQ 348; Shaw, International Law, 9th ed (2021), pp 398-409.) By contrast, where the entity is recognised as a state by the executive, it is regarded as having the status of a legal person for the purposes of domestic law in this jurisdiction.

21. Dr Geoffrey Marston, in his magisterial survey of the development of the law on this subject, The Personality of the Foreign State in English Law (1997) 56 CLJ 374, explains that "it is executive recognition which creates capacity for a foreign State to act at the plane of English law" (at p 405). He explains that, whereas previously most states were monarchies which permitted a sovereign monarch to be recognised as having personality, it was the emergence of non-monarchical bodies politic in early nineteenth century litigation which was the factual trigger for the English courts' acknowledgment of foreign states as legal persons (p 415).

22. The issue was resolved in 1867 by the decision of the Court of Appeal in Chancery in *United States of America v Wagner* (1867) LR 2 Ch App 582. The United States of America sought to sue in its own name for an account and for recovery of movable property in this jurisdiction. The defendants filed a demurrer maintaining

that the plaintiff ought to be represented by either the President or some other individual member of the government. The Court of Appeal in Chancery overruled the defendants' demurrer, emphasising that by its terms the court was bound to take judicial notice of the existence and title of the United States of America as a sovereign power. Lord Chelmsford LC said (at p 587):

> "In a monarchy all the public rights and interests of the nation are vested in, and represented by, the monarch. In a republic they are the property of the state. When a foreign monarch sues in the Courts of this country it is not as the representative of his nation, but as the individual possessor of the rights which are the subject of the suit. Why should a republic be precluded from asserting in its own name, similar rights vested in it?"

Turner LJ said (at p 591):

> "The right of a foreign state which has been recognised by Her Majesty, whether it be a monarchy or a republic, to sue in the Courts of this country for public property belonging to the state, has not been, and cannot be, denied.

Lord Cairns LJ said (at pp 593-594):

> "The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the government of Her Majesty, it is the sovereign, and not the state, or the subjects of the sovereign, that is recognised. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other states, and by the Courts of other states, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the state itself, and not in any officer of the state. It is from the state that an ambassador is accredited, and it is with the state that the diplomatic intercourse is conducted."

23. Dr Marston observes that all three judges seem to have considered that, leaving aside the demurrer, a recognised non-monarchical state was a legal person at the plane of English law. He notes that *United States of America v Wagner* did not expressly determine that a state was a legal person in the eyes of English courts, but merely that, assuming that it was, it could sue in the name in which it was acknowledged by the United Kingdom executive. Nevertheless, the proposition that a recognised state, or at least a recognised non-monarchical state, was a legal person was thereafter unchallenged, and foreign republics regularly appeared in litigation (Marston at p 404). In the result, therefore:

> "The courts left to the executive the tasks of determining both the criteria of statehood and whether such criteria were fulfilled. Where the executive had decided to recognise a foreign body politic as a State the courts regarded it thereafter as a legal person, notwithstanding that in Page-Wood V-C's words, [in *Prioleau v United States of America and Andrew Johnson* (1866) LR 2 Eq 659, 665] it was 'not a physical but a metaphysical entity'. Executive recognition was therefore not only an acknowledgement of the foreign State's international legal personality but was constitutive of its domestic personality." (Marston, at pp 415-416)

24. A foreign state recognised as such by His Majesty's Government does not, however, thereby become a creature of domestic law in the United Kingdom. It is not a domestic corporation but is simply recognised by domestic law as having legal personality. Similarly, an international organisation which is given the capacities of a body corporate in the United Kingdom pursuant to the International Organisations Act 1968 is not a domestic corporation. It is simply recognised by domestic law in this jurisdiction as having legal personality. Dr Marston, referring to a debt incurred on the domestic plane by a foreign recognised state, observes:

> "In English law it seems that you are owed money by an international legal person which, in that capacity, is invisible in the eyes of English courts. On executive recognition, however, it becomes visible but its essence is still international. It gains the status of a legal person at the plane of English law but it does not become an English legal person." (at pp 416-417. See also p 410.)

Referring to the observation of Lord Templeman in *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, 165 that "the English courts can only identify and allow actions by individuals, sovereign states and corporate bodies", he concludes therefore (at p 417) that the position of a recognised foreign state is sui generis.

25. At first instance in the present case, Blair J observed (at para 113) that legal personality as a matter of English law flows from recognition and that capacity flows from legal personality. The first proposition is undoubtedly correct. However, the second proposition, which was endorsed by the Court of Appeal (at para 65), is in our view potentially misleading. As explained above, it is not possible to derive capacity to perform specific acts from personality alone. In fact, the converse is the case: it is the capacity to perform legal acts which necessarily requires the acknowledgement of personality in the legal system concerned. This certainly reflects the approach of the English courts to such issues. See, for example, *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 ("*the Tin Council case*") where Lord Oliver of Aylmerton considered (at p 504 G-H) that the status of a legal personality of the International Tin Council ("ITC"), separate from its members, was a necessary corollary of the unlimited capacities which were conferred by an Order in Council. Nevertheless, English law acknowledges not only the personality of a foreign sovereign state, which has been recognised as such, but also its full capacity. As a result, municipal law in this jurisdiction reaches the same result as international law. As the Court of Appeal observed in the present case (at para 73), were it otherwise there would be a strong case for re-examining the position in English law.

26. The decision of the House of Lords in *the Tin Council case* is illuminating in this regard. The creditors of the ITC sought to establish that the states which had established it were legally responsible for its debts as a matter of English law. Article 5 of the Order in Council provided that the ITC "shall have the legal capacities of a body corporate". One argument advanced in support of the view that the Order in Council had not conferred separate legal personality on the ITC was that the legislature was seeking to do no more by the Order in Council than to establish a framework under which the member states could trade in partnership under the collective name of the ITC. In particular, it was submitted, this was done by conferring on the unincorporated members in association certain capacities so as to enable them to function in the name of the ITC, with the result that it was not necessary to confer on the ITC a separate legal personality. Rejecting this submission, Lord Oliver, with whom Lord Keith of Kinkel, Lord Brandon of Oakbrook and Lord Griffiths agreed, observed:

> "But there are a number of difficulties in the way of the suggestion that article 5 did no more than confer capacities on the members. In the first place, the members were

> sovereign states recognised in English law and having already capacities as such, so that an Order in Council which conferred on them capacities (for instance, to contract, to hold property or to engage in litigation) served no useful purpose." (at p 503 C-D)

(See also the observations of Kerr LJ in the Court of Appeal in that case at [1989] Ch 72, p 147 E-H.) The passage from the speech of Lord Oliver makes clear that the capacities of a sovereign state recognised as such in English law include the power to contract, and that to confer the legal capacities of a body corporate upon a sovereign state would be a redundancy. Moreover, as Mr Howard KC points out on behalf of the Trustee, Lord Oliver observed elsewhere in his speech that the capacities conferred on international organisations by Article 5 of the Order in Council were "the widest capacities available to any artificial legal persona" (at p 502 B) and "the fullest possible legal capacities, including the capacity to contract in its own right" that can be conferred on a body (at p 504 G). If, therefore, it would not have served any purpose to confer these fullest possible legal capacities on the ITC's member states, that can only be because they already enjoyed these capacities, including the capacity to enter into contracts. In our view, this reasoning is compelling. Moreover, it forms part of the ratio decidendi of *the Tin Council case* and the Supreme Court has not been invited to depart from it.

27. Ukraine seeks to draw an analogy for present purposes between the status in English law of a foreign state and that of a foreign public body or corporation. Ukraine submits that the capacity of Ukraine to enter into a contract under municipal law should be determined by the application, directly or by analogy, of Dicey Rule 187 (Dicey, Morris and Collins on the Conflict of Laws, Vol. II, 16th ed (2022), Rule 187 p 1611, para 30R-020) which provides:

> "(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.
>
> (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

28. Ukraine submits, first, that the same reasons justify the application of Rule 187 to states as to foreign governmental entities and corporations. It submits that the justification for looking to the constitutional documents of a corporation is that the corporation exists as such only by virtue of its own constitution and it is those

documents which set the scope and limits of its powers. In the same way, it is submitted, under Ukrainian law Ukraine has no inherent capacity and it has only such powers as its Constitution and laws provide. Secondly, it is said that there is support for this analogy as a matter of authority. Thirdly, Ukraine submits that the principle underlying the recognition of foreign states as having legal personality before English courts is the comity of nations. However, treating Ukraine as possessing a capacity that it does not have under its own constitution is said to deprive Ukraine of constitutional safeguards.

29. The most fundamental objection to this submission on behalf of Ukraine is that the subordinate entities with which Ukraine seeks to draw an analogy are each created by a foreign system of national law. In *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682 Scrutton LJ observed with regard to foreign corporations (at p 691):

> "So in the case of artificial persons, the existence of such a person depends on the law of the country under whose law it is incorporated, recognized in other countries by international comity, though its incorporation is not in accordance with their law."

Courts in the United Kingdom recognise, as a matter of comity, the power of other sovereign states to create and exercise authority over entities subject to their jurisdiction. Similarly, in *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, Lord Wright explained (at p 297):

> "English courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. Thus in *Henriques v Dutch West India Co*, the Dutch company were permitted to sue in the King's Bench on evidence being given 'of the proper instruments whereby by the law of Holland they were effectually created a corporation there'. But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact."

In the same way, foreign local government bodies are creations of the law of the state in question and are therefore subject to that law of their creation. (See, generally, *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549 per Aikens LJ at para 48.) Moreover, the entity which was recognised in *Bumper Development Corpn v Comr of Police of the Metropolis* [1991] 1 WLR 1362 was created by the law of Tamil Nadu, the internal law of the state concerned. It is natural that in each case the law which has created the entity should be relevant to a determination of its capacity. By contrast, a foreign state does not derive its personality or its capacity from the sovereign power of a state to create legal persons. Ukraine itself is not created by the law of Ukraine but by international law and is treated as a legal person in municipal law within the United Kingdom by virtue of its recognition as such by the executive. There is, therefore, no reason why the capacity of a sovereign state should be defined by its internal law in the manner suggested by Ukraine.

30. We are unable to find any support for Ukraine's submission in the authorities on which it relies. The fact that in *King of Spain v Hullett* (1833) 7 Bli NS 359, 388; 5 ER 808, 818, the Lord Chancellor referred to the King of Spain suing as a "foreign corporation sole" does not advance Ukraine's case. Nor does the fact that in *Prioleau v United States* (1866) LR 2 Eq 659, 663, *United States of America v Wagner* at pp 588, 592, 594 and *Republic of Peru v Weguelin* (1875) LR 20 Eq 140, 141-142 a foreign state may have been compared to a corporation for the purposes of discovery. Indeed, in *United States of America v Wagner* the Lord Chancellor (at 588) expressly waived "the consideration of the correctness of the analogy which was supposed to exist between a corporation and a sovereign state".

31. Ukraine also relies on the recent decision of Marcus Smith J in *High Comr for Pakistan in the United Kingdom v Prince Muffakham Jah* [2019] EWHC 2551 (Ch); [2020] Ch 421, where the judge addressed the question which law governed the actual authority of the Nizam of Hyderabad in 1948. The judge considered that the Nizam was a personal and absolute ruler of Hyderabad and that no distinction was to be drawn between his personal capacity and his capacity as a ruler. He concluded that whether the question was framed as one of personal capacity, the delegation of authority by a principal to an agent or the authority of a ruler of a state, the same law was indicated: the law of the state where the principal was domiciled or resident or the law of the state the ruler ruled over (at paras 182-183). In our view, however, this does not cast any light on the present issue. In his private capacity, the Nizam was a subject of the law of the state. In his corporate capacity, he seems to have been acting as a governmental entity. No consideration seems to have been given to whether the Nizam was himself the personification of the state. In any event, whatever may have been the historical position in relation to absolute rulers, very different considerations now apply in the case of a sovereign state such as Ukraine.

32. We are, therefore, entirely persuaded that the analogy which Ukraine seeks to draw between a foreign state and a foreign corporation is a false analogy. A foreign state is not a creature of its own domestic law. In our view Dr Marston is correct in his analysis and his conclusion that a foreign state is for present purposes sui generis.

33. Furthermore, we are unable to accept that the recognition by courts in this jurisdiction of the fullest possible capacity of a foreign state could possibly amount to an infringement of principles of international comity. On the contrary, it seems to us that such recognition is a reflection of the sovereignty and independence of sovereign states and fully accords with and promotes the principle of comity.

34. We conclude, therefore, that a foreign state which is recognised as such by the executive in the United Kingdom is considered, for the purposes of municipal law within the United Kingdom, to be a legal person with full capacity. In particular, a recognised foreign state does not lack capacity to make and perform a contract governed by a system of municipal law, irrespective of the provisions of its own domestic constitution and laws. In the present case, it is not arguable that Ukraine lacked the capacity to issue the Notes in the eyes of English law. We turn, therefore, to the distinct question whether the state entities purporting to exercise that power on behalf of Ukraine had the authority to do so.

2. Authority

(1) Introduction

35. Ukraine contends that even if it had capacity to issue the Notes, the Minister of Finance who signed the Trust Deed to "effectuate" the borrowing did not have authority to do so. Here Ukraine points to the limit imposed by the Budget Law of 2013 upon its external borrowing. Ukraine says that the Minister's authority to implement state borrowings was circumscribed by the need to comply with this limit, and that the limit was breached by issuing the Notes. Moreover, Ukraine continues, the limit was published in publicly available legislation and the Trustee had notice of it. The limit of Ukraine's permissible borrowing for 2013 was about US$ 4.6 billion; it had already borrowed US$ 3 billion and borrowing a further US$ 3 billion from the Russian Federation would breach the limit by a considerable margin.

36. Ukraine also argues that the Minister of Finance was only permitted to implement any borrowing if it was validly authorised by the CMU, but the CMU failed to give valid authorisation for at least the two reasons to which we have referred in considering the issue of capacity: first, the relevant ministers of the CMU were not

provided with an obligatory expert opinion regarding the draft of the resolution necessary to issue the Notes; and secondly, the CMU was not aware of and did not consider all of the relevant terms of the proposed borrowing and instead sought to delegate responsibility for this consideration to the Minister, which it was not permitted to do. It is also said that these terms included clauses, never identified for the CMU, imposed by the Russian Federation, that were unusual and extraordinarily oppressive to Ukraine in their combined effect.

37. For the purposes of the summary judgment application and so also this appeal, the Trustee accepts that the limit on the external borrowing for 2013 was exceeded by the issue of the Notes and that the relevant resolution of the CMU purporting to authorise the issuance of the Notes was invalid on the grounds relied upon by Ukraine. The Trustee also accepts for these purposes that the Minister of Finance did not have actual authority on behalf of Ukraine to sign the Trust Deed or to procure the issue of the Notes. Nevertheless, it argues that the judge and the Court of Appeal were right to accept that the Minister of Finance had ostensible or usual authority to sign the Trust Deed and to procure the issue of the Notes with the result that Ukraine is bound by them.

(2) General principles

38. The general principles of agency relevant to this appeal may be summarised in the following way. The authority of an agent may be actual or apparent. Actual authority describes a legal relationship between principal and agent created by a consensual agreement to which they alone are parties, and pursuant to which the principal grants to the agent the right to enter into legal relations with third parties on the principal's behalf. To this agreement a third party contractor is a stranger: he may be totally ignorant of the existence of any authority on the part of the agent; but if the agent does enter into a contract pursuant to his actual authority, it creates contractual rights and liabilities as between the principal and the contractor: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502, per Diplock LJ. As we will explain further in a moment, actual authority may be express or implied.

39. Apparent or ostensible authority, on the other hand, describes a relationship between the principal and a contractor which arises from a representation made by the principal to the contractor that an agent has authority to enter on behalf of the principal into a contract within the scope of that apparent authority. The representation, if acted upon by the contractor, by entering into a contract with the agent, creates an estoppel, preventing the principal from asserting that he is not bound by the obligations which the contract imposes on him: *Freeman & Lockyer* at

503, per Diplock LJ. For the estoppel to operate the representation must be one upon which the contractor could and did reasonably rely. The doctrine protects a contractor who is entitled to assume that the person with whom he is dealing has the authority which he appears to have. But the principle cannot be relied upon by a contractor who is put on inquiry, by which we mean that the contractor fails to make the inquiries that a reasonable person would have made in all the circumstances to verify that the person with whom he is dealing does indeed have authority: *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30; [2020] 2 All ER 294 ("*PT Satria*"), paras 92 and 93.

40. The representation which forms the basis for ostensible authority may be made by conduct. In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717, Robert Goff LJ put it this way at 731 D-E:

> "The representation which creates ostensible authority may take a variety of forms; but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has."

41. Ostensible authority will often coincide with actual authority but sometimes will exceed it, as Lord Denning MR explained in *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 583:

> "Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority

> of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation."

42. The expression "usual authority" is generally used to refer to the authority of a person, the agent, to enter into transactions of a type that are ordinarily undertaken by a person appointed to a particular position. It is a term Blair J and the Court of Appeal used in this case. In our view it has the potential to mislead because it encompasses cases in which the agent has implied authority and cases in which the agent only has ostensible authority. The point is well demonstrated by the illustration given by Lord Denning MR in the passage of his judgment in *Hely-Hutchinson* which is recited in the immediately foregoing paragraph. A person, properly appointed by the board of a company as managing director, is invested with implied and ostensible authority to do all the things falling within the usual scope of that office. But the board may limit the managing director's authority. They may say he is not to order goods costing more than a certain sum without their sanction or that he is not to deal in goods of a particular kind. Now his actual authority, derived by implication from his appointment as managing director, is subject to the express limitation which has been placed upon it, but he still has ostensible authority to do all of the things a managing director in his position may usually do; and the company will be bound by his ostensible authority in his dealings with all those who do not know of (and are not put on inquiry as to) the limitation. Although in both cases, that is to say, where the director has actual (albeit implied) authority and ostensible authority, it may be said that the managing director is acting within the scope of his usual authority, it is more helpful and, as this illustration shows, it may be important, to be clear which is meant.

(3) Further background

43. It is necessary at this stage to say a little more about the background relevant to this aspect of the appeal. Ukraine has pleaded in its defence that during 2012 and 2013 it was reliant upon external borrowing in order to fund its public finances. Ukraine was able to raise a good deal of the external borrowing that it required through the international capital markets and, in particular, by issuing Eurobonds.

44. The Trustee's records show that it had acted as trustee in respect of 31 Eurobond issuances by Ukraine prior to the issuance of the Notes. The bonds were in each case constituted by trust deeds and Ukraine acted by the Minister of Finance, on the instructions or with the authority of the CMU. Ukraine has performed its obligations under all of these trust deeds and it has never been suggested that any of them were not duly constituted obligations of Ukraine.

45. The form of words used in each of these transactions reflected the provisions of the Budget Code of Ukraine (Law of 8 July 2010, No 2456-VI, as amended) (the "Budget Code"), which it is accepted was one of the laws governing Ukraine's borrowing, the incurring of external debt and the issuance of loan notes. Article 16.1 described the limits of Ukraine's permissible external debt and the authority required for that debt to be incurred. It provided, so far as relevant:

> "State borrowings shall be effectuated within the limits determined by the Law on the State Budget of Ukraine … in compliance with the maximum volume of State debt at the end of the budget period …
>
> The right to effectuate state internal and foreign borrowings shall belong to the State in the person of the member of the Cabinet of Ministers of Ukraine, responsible for the forming and realization of state financial and budgetary policy or the person performing the duties thereof (hereinafter - Minister of Finances of Ukraine) on behalf of the Cabinet of Ministers of Ukraine.
>
> The Cabinet of Ministers shall determine the conditions for the effectuation of the State borrowing, including the type, currency, and interest rate of the State borrowing."

46. In the second half of 2013 and in the circumstances we elaborate below in considering the defence of duress, Ukraine was unable to access international markets on terms that were economically viable and found itself at risk of defaulting on its sovereign debt obligations.

47. In October and November 2013 high level meetings took place between President Putin on behalf of the Russian Federation and President Yanukovych on behalf of Ukraine, in the course of which they agreed that the Russian Federation would lend Ukraine up to US$ 15 billion.

48. On 12 December 2013 the Minister of Finance of Ukraine and the Minister of Finance of the Russian Federation met to negotiate the terms of the borrowing. At that meeting or shortly afterwards it was agreed that, as a first tranche, Ukraine would borrow US$ 3 billion. At Ukraine's suggestion it was also agreed that the loan would be structured as a commercial Eurobond issue.

49. On 17 December 2013 President Putin and President Yanukovych publicly announced a package of economic and financial support for Ukraine by the Russian Federation, and that as part of this package the Russian Federation would subscribe for US$ 15 billion of Ukrainian sovereign debt.

50. On 18 December 2013 the CMU met and passed, or purported to pass, resolution (or decree) 904 authorising the issue of the Notes. The resolution, signed by the Prime Minister of Ukraine, was made publicly available in connection with the issue of the Notes. It provided:

> "For the purpose of fulfilment of Law of Ukraine 'On 2013 State Budget of Ukraine', the Cabinet of Ministers of Ukraine resolves:
>
> 1. To carry out external state borrowings by way of issue of the notes of 2013 external state borrowing ("the Notes").
>
> 2. To approve the Terms and Conditions of issue of the Notes of 2013 external state borrowing attached hereto.
>
> 3. For the Ministry of Finance: to carry out the issue of the Notes pursuant to the Terms and Conditions approved hereby; during the preparation of the Draft of the State Budget of Ukraine for the respective year, to envisage funds for the repayment and service of the Notes."

51. The terms and conditions attached to the resolution were also made publicly available. They set out the aggregate principal amount of the Notes, their denomination, the interest rate to be paid upon them, the interest payment dates and the source of the funds to service and repay them. They also provided, at clause 7, that: "Terms and conditions of the placement of the Notes shall be specified by the prospectus".

52. This resolution is of the greatest importance. On its face it constitutes a representation, in accordance with Article 16 of the Budget Code, that the CMU, as the relevant body, has resolved to carry out state borrowings by way of issue of the Notes, has approved the terms and conditions of that borrowing and has authorised the Minister of Finance to agree to the borrowing on behalf of Ukraine. But there are two further points here. The first is whether, on the assumption that Ukraine did not

have the power to enter into the further borrowing, the CMU nevertheless held out the Minister as having the necessary authority to "effectuate" the issue of the Notes and to agree to the borrowing on its behalf. We have no doubt that it did. The second, again of great importance, is whether the CMU had apparent authority to make that representation. Once again and for reasons to which we will come, we would answer that question in the affirmative.

53. On 19 December 2013 Ukraine's Parliament, the Verkhovna Rada, passed a law to increase the outstanding debt limits in the Budget Law of 2013. Mr Eugene Hyellyer, the Chairman of the Budget Committee of the Verkhovna Rada, announced in Parliament that the amendment was required "to get a loan from Russia in the amount of three billions".

54. On 20 December 2013 Ukraine issued a prospectus (the "Prospectus"), as is standard practice for the issuance of Eurobonds, and this set out the terms of the Notes and other information about Ukraine. It stated that the Notes were to be issued by Ukraine, represented by the Minister of Finance acting on the instructions of the CMU, and that they would mature on 20 December 2015 and would be redeemed at par on that date. It explained that the Notes were to be issued on the Irish Stock Exchange. It stated on its cover page that it had been approved by the Central Bank of Ireland as the competent authority under Directive 2003/71/EC, as amended. Inside it stated, under "Authorisation":

> "The issue of the Notes is duly authorised by the Instruction of the Cabinet of Ministers of Ukraine 'On Mandating the Execution of External State Borrowings in 2013' dated 16 January 2013, No 21-p and the Resolution of the Cabinet of Ministers of Ukraine 'On Carrying Out External State Borrowings in 2013' dated 18 December 2013, No 904."

55. The Notes were issued on 24 December 2013. They were constituted by the Trust Deed to which, as we have said, the parties were Ukraine and the Trustee. The Trust Deed contained various representations and warranties by Ukraine as "Issuer":

> "2.5 Representations and Warranties
>
> The Issuer represents and warrants to the Trustee that:

> 2.5.1 the issuance of the Notes and the execution and delivery of this Trust Deed and the Agency Agreement and the performance by the Issuer of its obligations thereunder will not cause any violation of any law or regulation in or of Ukraine, and will not cause any violation of any agreement (or other obligation) to which the Issuer is a party or which is or may be binding upon it or any of its assets;
>
> 2.5.2 the Issuer has obtained all applicable consents, clearances, approvals, authorisations, orders, registrations and/or qualifications of or with any court, governmental agency or regulatory body and no other action or thing is required to be taken, fulfilled or done for the execution and delivery by the Issuer of this Trust Deed, the Agency Agreement and the Notes, the issue of the Notes and the carrying out of all transactions contemplated by this Trust Deed, the Agency Agreement and the Notes; and
>
> 2.5.3 the Notes, this Trust Deed and the Agency Agreement are its valid and binding obligations."

56. Again, on that day, the Minister of Finance provided to the Trustee certified copies of the instruction and resolution of the CMU authorising the issuance and pricing of the Notes on behalf of Ukraine.

57. The Trustee was also provided with a legal opinion by Lavrynovych & Partners, legal counsel to Ukraine. It expressed their view that Ukraine was authorised to execute the relevant formal documents and to issue the Notes, that Ukraine had the legal capacity and authority to undertake and perform its obligations under those documents and Notes, and that the performance by Ukraine of its obligations would not violate any applicable Ukrainian law.

58. Ukraine received the subscription moneys for the Notes in the sum of US$ 3 billion on 24 December 2013. Thereafter, and as we have described, it paid three instalments of interest on the Notes in 2014 and 2015 in the total sum of US$ 223,333,350, and it did so in accordance with the terms and conditions of the Notes and without any apparent reservation or objection.

59. In May 2015 the Ukrainian Parliament passed a law authorising the CMU to impose a moratorium on some of Ukraine's debts, including the Notes. Over the

following months and as we mentioned in the introduction to this judgment, Ukraine took various steps with a view to restructuring its debts. On 18 December 2015, after the Russian Federation refused to exchange its outstanding Eurobonds, including the Notes, for new securities, the CMU issued a decree, through the Prime Minister, implementing a suspension of payments on the Notes and other specified government debts.

(4) The decisions of the judge and the Court of Appeal

60. Blair J found that the Minister of Finance had usual and ostensible authority to enter into the transaction on behalf of Ukraine on two grounds. First, the Minister was the signatory of all of the 31 previous debt issuances by Ukraine in which the Trustee had acted between 2000 and 2013 and therefore, as regards the Trustee, he was a person whose position gave him usual authority to sign such issuances. Secondly, the Minister had ostensible authority arising from the combination of resolution 904 of the CMU, which purported to approve the borrowing and authorise him to issue the Notes, and the statement in the Prospectus that Ukraine was represented by the Minister acting on the instructions of the CMU. Although the CMU had no actual authority to hold out the Minister as Ukraine's representative in the transaction, it did have usual authority to do so as the state's cabinet.

61. The Court of Appeal agreed with the judge that the Minister of Finance had ostensible authority to enter into the transaction on behalf of Ukraine but preferred a rather different starting point. In its view, the authority to effect borrowings on behalf of Ukraine was expressly set out in the Budget Code, a public document, and it had not been suggested that the Trustee was unaware of it. Article 16.1 of that code was clear that the Minister of Finance was authorised to effect external borrowings on behalf of Ukraine on conditions determined by the CMU. If loan notes were issued in accordance with Article 16, the Minister of Finance and the CMU would be exercising express powers conferred upon them and there would be no room or need for recourse to the "usual authority" of either ministers of finance in general or the Minister of Finance in particular. The ostensible and any actual authority of the Minister of Finance and the CMU were to be derived from this provision, and not from some general notion of usual authority.

62. Nevertheless, the Court of Appeal felt constrained to address the issue of authority on the basis of the parties' submissions and here, in substance, it accepted the case advanced by the Trustee. In summary, Ukraine had since 2003 issued tradeable bonds constituted by trust deeds with the Trustee on 31 occasions. In all of these cases, the bonds were stated to be issued with the authority of the Minister of Finance and the concurrence of the CMU, and Ukraine had accepted and performed

its obligations under them, both in relation to the payment of interest and redemption. There was never any suggestion that the Minister of Finance or the members of the CMU had not been duly appointed. This combination of circumstances was, in the Court of Appeal's view, sufficient to establish that it was generally understood in the international debt markets that, based upon Ukraine's conduct, the Minister of Finance, if acting with the authority of the CMU, had ostensible authority to issue loan notes such as those the subject of these proceedings.

63. Ukraine contended before the Court of Appeal that these matters did not assist the Trustee in the context of this case, however. It argued, among other things, that a third party, here the Trustee, could not rely on this kind of ostensible authority if the terms of the transaction were onerous and, from the standpoint of the principal, unusual; that ostensible authority depended on a representation or holding out by a person who had actual authority to make that representation; that, as regards ostensible authority, ministers and others purporting to act on behalf of a state or government were on constitutional grounds in a different position from commercial parties; and that the Trustee was on notice of relevant limitations on the authority of the Minister of Finance and the CMU, and that these limitations had been exceeded. The Court of Appeal addressed all of these arguments and concluded that none availed Ukraine in the circumstances of this case. We will return to the reasoning of the Court of Appeal so far as necessary in addressing the submissions advanced by Ukraine on this further appeal.

64. It only remained for the Court of Appeal to address an alternative case advanced by the Trustee which the judge had also accepted, namely that the Minister of Finance was held out by the CMU as having authority to sign the documents necessary for the issuance of the Notes and that the CMU had usual authority to do so. Here the Trustee relied upon the statements in the Prospectus and elsewhere that the Minister of Finance was acting on the instructions of the CMU and with the full backing of the Ukrainian government. The Trustee argued that it was within the usual authority of the CMU, as the highest executive authority in Ukraine, to hold out the Minister of Finance as having authority to issue the Notes. The combination of the usual authority on behalf of the CMU and the ostensible authority of the Minister of Finance meant that Ukraine was estopped from denying that the Notes were validly issued.

65. The Court of Appeal rejected this alternative case on the basis that it was not possible to identify the usual authority of the CMU in the abstract and without regard to its actual authority under Ukrainian law. Article 16.1 of the Budget Code was clear that the issuance of external debt required, first, instructions as to terms from the CMU, and secondly, the necessary actions by the Minister of Finance to

implement the borrowing. The CMU had no authority to delegate to the Minister of Finance the decision as to the terms of the borrowing. Under Article 16.1, this was a matter for the CMU alone. It followed, the Court of Appeal continued, that the CMU could have no usual authority to clothe the Minister of Finance with any authority contrary to the express provisions of the Budget Code.

(5) This appeal - Ukraine's arguments in outline

66. Upon this further appeal, Ukraine emphasises at the outset that the Minister of Finance did not have actual authority to sign the contractual documents which "effectuated" the issuance of the Notes, and that was so for the reasons we have summarised in the introduction to this section (paras 35-37 above). Further, Ukraine continues, the Court of Appeal and the judge fell into error in accepting that the Minister had ostensible authority. In this connection Ukraine focuses on the qualified nature of the power conferred on the CMU and the Minister of Finance: namely, that the Minister had power to "effectuate" borrowing if it was within the limits set out in the Budget Law of 2013, and if the CMU had validly determined the conditions of the borrowing. It argues that, on the Court of Appeal's reasoning, the only issue was whether the Trustee was on notice of the breaches of Ukrainian law, specifically the Budget Law limits and here it fell into error for the following four reasons.

67. Ukraine contends, first, that any representation in the Budget Code was no more and no less than a statement of the actual authority of the Minister of Finance. It was, in effect, that the Minister would have power to "effectuate" borrowing provided that the Budget Law limits were not exceeded. This did not constitute a representation that those limits had been complied with. Indeed, the representation in the Budget Code concerning the extent of the Minister's power involved no representation about the factual circumstances at all.

68. Ukraine contends, secondly, that the effect of the reasoning of the Court of Appeal was to expand the powers of the Minister of Finance and Ukraine beyond their constitutional limits. This, says Ukraine, is because, on the Court of Appeal's findings, although the Minister of Finance had no power to bind Ukraine to the transaction, he has in fact done so. This was not possible or permissible.

69. The third submission advanced by Ukraine is that the Court of Appeal misunderstood the relevant Budget Law limit. This restricted the total new borrowing from external sources which Ukraine could "effectuate" in 2013. It was not permissible to take into account any capital repayments made in the course of the year. Therefore, since Ukraine had borrowed US$ 3 billion in 2013 by 30 September 2013, and published in the Prospectus that it had done so, borrowing a

further US$ 3 billion would inevitably breach the Budget Law limit, and this could have been ascertained.

70. Ukraine argues, fourthly, that even if the Budget Law limit were the aggregate of any borrowings and repayments made during 2013, it was fanciful to suppose that there had been sufficient repayments to avoid a breach of it by the issuance of the Notes.

71. Ukraine also contends that the Court of Appeal did not accept and was right not to accept that the Minister of Finance had usual or ostensible authority to issue the Notes on any other basis including, in particular, his appointment to his office; that the members of the CMU who decided or purported to decide the terms of the Notes were all validly appointed members of the CMU; the issuance by Ukraine of tradeable bonds constituted by trust deeds with the Trustee on 31 previous occasions, each of which was authorised by the Minister of Finance on terms approved by the CMU; and that Ukraine had recognised, respected and performed its obligations in respect of each of those earlier issues.

72. In this regard, Ukraine relies on the matters to which we have referred and also argues that usual authority cannot be derived from the previous Eurobond transactions since these were agreed on their own terms and there was no evidence that they involved a breach of Budget Law limits. By contrast, the terms of the transaction in issue were not only in breach of the Budget Law limits but also onerous and unusual. Further, it continues, any representation of authority inherent in the Minister's office was limited to the issue of Eurobonds on standard terms; and the CMU had no authority to hold the Minister of Finance out as a person who could "effectuate" the further borrowing in breach of the Budget Law limits.

73. Ukraine advances a further attack on the decision of the Court of Appeal. It argues that in light of the findings made by the judge, the Court of Appeal ought to have found that the Trustee was on notice that (or at least put on inquiry as to whether) the Minister of Finance did not have authority to sign the documents necessary for the issue of the Notes for two further reasons: first, the judge found that the transaction was on unusual and onerous terms; and secondly, the Trustee was on notice of the breach by the CMU of the non-delegation principle.

(6) Representation of authority

74. We must assume at this stage that the Minister of Finance did not have actual authority to procure the issuance of the Notes and so the critical question is whether

Ukraine nevertheless represented by conduct or in some other way that the Minister of Finance did have such authority. Here we have seen a difference between the approaches of the judge and the Court Appeal. The judge focused first, on the conduct of Ukraine in authorising the Minister of Finance to agree, on behalf of Ukraine, to each of the 31 previous debt issuances in which the Trustee had acted; and secondly, on resolution 904 of the CMU approving the borrowing and authorising the Minister of Finance to issue the Notes, and on the statement in the Prospectus that Ukraine was represented by the Minister of Finance acting on the instructions of the CMU.

75. The Court of Appeal, on the other hand, relied primarily on the terms of Article 16 of the Budget Code. Nevertheless, the Court of Appeal also held that the combination of circumstances relied upon by the Trustee was sufficient to establish that it was generally understood in international debt markets that, based on the conduct of Ukraine, the Minister of Finance, if acting with the authority of the CMU, had by virtue of holding that office authority to issue notes such as the Notes in this case. For the avoidance of doubt, we reject any suggestion by Ukraine that the Court of Appeal did not make such a finding.

76. We are of the view that it is not helpful to compartmentalise the relevant events and other elements of this part of the Trustee's case in the manner adopted by the judge or the Court of Appeal, and believe, in all the circumstances of this case, that the correct approach is to assess the activities of Ukraine as a whole and to ask whether, considered in that way, they constituted the relevant express or implied representation by Ukraine that the Minister of Finance had authority to issue the Notes for and on behalf of Ukraine on the basis that their terms had been approved by the CMU.

77. We have no doubt that they did. Indeed, and as we elaborate further below, it is a striking feature of this aspect of the case that the events leading to the issuance of the Notes took place over a relatively short period of time and involved the President of Ukraine, the Parliament of Ukraine, the CMU and the Minister of Finance, so demonstrating to the Trustee a co-ordinated and consistent approach by these various elements of the state of Ukraine to the borrowing in issue.

78. First and by way of background, in adopting Article 16 of the Budget Code, Ukraine, by its Parliament, authorised the Minister of Finance, as a member of the CMU, to effect internal and external borrowing on behalf of Ukraine, and authorised the CMU to decide and agree the terms of any such borrowing, in both cases subject, of course, to the express limitations and conditions set out in the article. What is more, in publishing Article 16, Ukraine represented that the Minister of Finance and

the CMU were so authorised, subject always to these limitations and conditions. That does not mean to say that any ostensible authority of the Minister of Finance was necessarily coextensive with his actual authority, however. A person, here the Trustee, would naturally expect the Minister of Finance to have authority to effect borrowing on behalf of Ukraine when the Minister was acting pursuant to an instruction from the CMU, unless that person was on notice of any matters which would have led a reasonable person to make inquiries as to whether the Minister and the CMU had the authority they appeared to have.

79. Secondly, the transaction giving rise to these proceedings was of a familiar nature to the parties and conformed to Ukraine's history of borrowing. By the time of the issuance of the Notes, the Trustee had acted as trustee on 31 issuances of Eurobonds by Ukraine. Moreover, those earlier issuances were very similar in structure and substance to the issuance the subject of these proceedings. In all of them, the Minister of Finance, representing the CMU, acted on behalf of Ukraine; and in ten of them, the Eurobonds were listed on the Irish Stock Exchange. Significantly, Ukraine considered itself bound by the terms and conditions of each of these 31 earlier issuances and did not at any time suggest that the Minister of Finance did not have the necessary authority to act in the way that he did. This is an important part of the background which would inevitably and properly inform the attitude of the Trustee to the proposed transaction and the Trustee's view as to its enforceability.

80. Thirdly, the specific events leading up to the issue of the Notes took place in the three month period from October to December 2013, and primarily in December of that year, and involved all levels of the Ukrainian state. On 17 December 2013 President Yanukovych and President Putin made the public pronouncement of their agreement. On 18 December 2013 the CMU met and passed resolution 904 purportedly authorising the issue of the Notes, which resolution was signed by the Prime Minister and made available to the Trustee. On 19 December 2013 Ukraine's Parliament passed a law increasing the state debt limits in the Budget Law of 2013 for the professed purpose of securing the loan from the Russian Federation. On 20 December 2013 Ukraine, represented by the Minister of Finance, purportedly acting on the instructions of the CMU, issued the Prospectus. On 24 December 2013 the Notes were constituted by the Trust Deed; the Russian Federation subscribed to the Notes; and the subscription moneys were received by Ukraine. At no stage did the President of Ukraine, the Prime Minister of Ukraine or any member of the Ukrainian Parliament or the CMU suggest that the Minister of Finance had no authority to proceed in the way that he did; nor did any of them attempt to intervene. To the contrary, their active and evident participation ensured that the Notes were issued and that the Russian Federation subscribed to them in the manner we have described.

81. That is enough to dispose of the first submission made to us on behalf of Ukraine. We are firmly of the view that, considered in this way and subject to what follows, the matters to which we have referred did constitute a representation by Ukraine that the CMU had authority to issue resolution 904 and that the Minister of Finance had authority to issue the Notes, acting on the instructions of the CMU, in just the same way that the Minister had in relation to the 31 previous issuances of Eurobonds.

(7) Expansion of powers in an unconstitutional manner

82. We turn now to Ukraine's argument that the effect of the decision of the Court of Appeal is nevertheless to expand the Minister of Finance and Ukraine's powers beyond their constitutional limits, and that this is impermissible.

83. Ukraine has developed this argument in the following way. It contends that although a state body may be bound by a representation to act in a particular way that is within its powers, if that representation is made by an employee who has actual or ostensible authority to do so, a state body will not be bound if the body itself has no power to act in that way. In this case no one could authorise the Minister of Finance to "effectuate" borrowings in excess of the Budget Law limit. This limit was imposed by statute and it could only be increased by the Ukrainian Parliament amending the relevant budget law, and then only prospectively. If this is not a restriction on the capacity of Ukraine (which it is not, as we have held) then, the submission continues, it is a restriction on the powers of the relevant state entities, the CMU and the Ministry of Finance, which the Minister of Finance could not exceed. Whether the Trustee knew of this or could reasonably have discovered it, is irrelevant.

84. We find ourselves unable to accept this submission. As a matter of English law, if the state, as principal, 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 him as an agent on the faith of that representation. So if, as we would hold, Ukraine, as principal, had the power to hold out and did in fact hold out the CMU and the Minister of Finance as having ostensible authority by reason of their appointment to agree the terms of borrowing and to issue the Notes on behalf of Ukraine, the Trustee was entitled to rely on the CMU and the Minister of Finance as having the authority it assumed them to have, subject of course to the issue of notice, to which we will come.

85. In reaching this conclusion we have given careful consideration to the decision of the Privy Council in *Attorney General for Ceylon v Silva* [1953] AC 461, upon which

Ukraine has placed particular reliance. The case concerned a quantity of goods which the Principal Collector of Customs mistakenly thought were unclaimed and which he purported to sell under a power conferred by the Customs Ordinance. The goods were in fact the property of the Crown and, on discovering his mistake, the Collector refused to deliver them. The purchaser thereupon sued the Crown for damages for breach of contract. The claim failed. The Board held that the provisions of the Ordinance did not extend to Crown property and the Collector had no authority to sell the goods; nor had it been shown that the Chief Secretary, who had authorised the sale, had any such authority.

86. The next and more relevant question to the issue presently before us in this appeal was whether the Collector or the Chief Secretary had ostensible authority, such as would bind the Crown, to agree the sale. But, as the Board rightly observed, this would require a representation by the principal as to the extent of the agent's authority. The Board continued (at p 479):

> "No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists."

87. Nothing done by the Collector or the Chief Secretary amounted to a holding out by the Crown that the Collector had the right to enter into the contract to sell the goods. Nor could it be said that the Collector had, by reason of his appointment to that office under the Customs Ordinance, ostensible authority on behalf of the Crown to represent to the public that goods advertised for sale under the Customs Ordinance were in fact saleable under that Ordinance. He had been held out by the Crown as having authority to enter on behalf of the Crown into sales of certain goods, but that authority was limited because it arose only under certain sections of the Customs Ordinance and only when those sections were applicable, and it did not extend to the sale of goods that belonged to the Crown.

88. This reasoning is unexceptionable. The Collector had only ever been held out as having limited authority to sell goods on behalf of the Crown. Indeed, as the Board went on to say, it amounts to the application of the general principle explained by Lord Atkinson in *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174, 184:

> "In other words, if the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorized."

89. Properly understood, therefore, *Attorney General for Ceylon v Silva* does not support the submission that a state body cannot be bound by an officer acting with ostensible authority.

90. Ukraine has also sought to derive assistance from the English public law cases concerning the principle of legitimate expectation which has developed as part of administrative law to protect persons from gross unfairness of abuse of power by a public authority. We recognise that courts will enforce an expectation only if it is legitimate: *Rainbow Insurance Co Ltd v Financial Services Commission of Mauritius* [2015] UKPC 15, [2016] 1 BCLC 273 at [52]; and it is fundamental to legitimacy that it lies within the power of the relevant body to make the representation which has created the expectation, and to fulfil it. So, for example, nobody can have a legitimate expectation that he will be entitled to an ultra vires relaxation of a statutory requirement. That is of no assistance to Ukraine, however, for it did have the capacity and the power to enter into transactions such as those in issue in this appeal and to hold out the CMU and the Minister of Finance as having authority to act in the way that they did.

(8) The budget law limits

91. Here the critical question is whether the Trustee was put on inquiry as to whether the issue of the Notes would breach the external borrowing limits imposed by Ukrainian law. As the Court of Appeal explained at para 120, the external borrowing limit for 2013 was set by a combination of the Budget Code and the Budget Law of 2013. For the purposes of this appeal, we must also accept that relevant limits on external borrowings were set out in Annex 2 to the Budget Law, and that the Annex, including the limits, was an integral part of the law.

92. The Court of Appeal agreed with the judge that the Trustee was not put on inquiry as to any breach by Ukraine of the limits on external borrowing. Its reasoning involved three steps, only one of which (the first) was decided in favour of Ukraine. In that first step the Court of Appeal rejected the Trustee's submission that a foreign lender could not be expected to discover the limit on the external borrowing. It held

that it was enough that the relevant legislation was available and anyone lending to Ukraine was to be taken to know its effect. A foreign lender might need the services of a Ukrainian lawyer, but that was no different from a foreign lender dealing with a borrower in this jurisdiction.

93. The second step in the reasoning of the Court of Appeal concerned the size and nature of the external borrowing limit. Here the Court of Appeal rejected Ukraine's case that the Budget Law of 2013 set a limit on the total amount of new borrowing from external sources entered into by Ukraine in 2013, irrespective of whether any capital repayments of any of that borrowing were made in the course of that year. It recognised that it would have to accept this proposition for the purposes of the application if the evidence of Ukraine's expert, Professor Butler, were to that effect, but it did not accept that it was.

94. The Court of Appeal therefore proceeded, thirdly, to consider whether the Trustee was ever put on inquiry as to whether the issue of the Notes would breach the limit on external borrowings. Here it accepted that external borrowings, as at 30 September 2013, as stated in the Prospectus, were at a level which, if combined with the Notes, would exceed the limit. But nothing was said about the level of outstanding borrowings from external sources as at December 2013 and Ukraine could point to nothing which could reasonably be taken as putting the Trustee on inquiry of a breach of the limit on external borrowings if repayments of earlier borrowings could be taken into account.

95. On this further appeal, the Trustee challenges the first of these steps in the reasoning of the Court of Appeal and Ukraine challenges the second and the third. In our judgment, the Trustee's challenge is well made. The Court of Appeal was wrong to hold that the Trustee was to be taken to know of the existence and meaning of Annex 2 of the Budget Law of 2013 (and the limit on external borrowing it allegedly contains) on the basis that it did, namely that the legislation was publicly available. It is not suggested that the Trustee was aware of the alleged limit and there was no proper basis for imputing that knowledge to the Trustee. The question the court ought to have asked itself was whether a reasonable person in the position of the Trustee would have made inquiries which would have revealed the limit and, if they would, that the issue of the Notes would or might lead to a breach of it: *PT Satria* at paras 92 and 93.

96. If these questions had been asked, we have no doubt they would have been answered in the negative. The Trustee was entitled to assume that the Minister of Finance had the authority which he claimed to have. We start with the law governing state borrowing, the relevant aspects of which may be summarised as follows. Article

16 of the Budget Code provides that borrowings by the state shall be "effectuated" within the limits determined by the Law on the State Budget of Ukraine, in this case the Budget Law of 2013, in compliance with the maximum volume of state debt. Ukraine contends there are three such limits. The first, set out in Article 5 of the Budget Law, concerns the total volume of state debt at the end of the budget period, here the calendar year. It is not suggested the issuance of the Notes breached this limit. The second, set out in Article 1 of the Budget Law, concerns the maximum budget deficit. Again, it is not suggested that this limit was breached by the issuance of the Notes. The third and critical limit for our purposes concerns the maximum amount of external borrowings. This is said to be contained in Annex 2 of the Budget Law and to provide a maximum level of new borrowings that may be "effectuated" in the course of the year, irrespective of any capital repayment of any of these borrowings.

97. The suggestion that a reasonable person in the position of the Trustee would have been put on inquiry as to the existence of this third limit is, on the materials presently before the court, untenable. Indeed, and as we have seen, Ukraine's approach to the issuance of the Notes involved the President, the Parliament, the CMU and the Minister of Finance. At no stage was it suggested that Annex 2 of the Budget Law contained a relevant limit on external borrowing, still less a limit that might be breached by the issuance of the Notes.

98. To the contrary, the Ukrainian Parliament, which adopts the state budget by enacting the law on the State Budget for any year and in that way enjoys authority over the budgetary process, was of the view that the issuance of the Notes would not breach any budgetary limit in light of the increase effected by the Amendment Law, as reflected in the statement by Chairman of the Budget Committee, Mr Hyellyer, to which we have already referred (at para 53 above).

99. Similarly, the Prospectus, a public document which was provided to the Trustee, stated that all reasonable enquiries had been taken to ensure the accuracy of the information contained within it. But it made no reference to a specific limit on external borrowings in any year, whether derived from anything in Annex 2 of the Budget Law or anywhere else, and there is no suggestion that the issuance of the Notes might breach any such limit. By contrast, the Article 5 debt limit was identified in the Prospectus and an assessment was made of its compatibility with the proposed borrowing.

100. The opinion from Lavrynovych & Partners, provided to the Trustee as we have described (at para 57 above), is to like effect. It made no mention of the Annex 2 limit on external borrowing or its possible breach by the issuance of the Notes. To

the contrary, it assumed that resolution 904 had been adopted in accordance with the relevant procedural requirements and that the issuance of the Notes would fall, as at the year end, within the limits of the maximum amount of the state debt of Ukraine established by Article 5 of the Budget Law of 2013, as amended. So too the draft Trust Deed, provided to the Trustee before it entered into the transaction, contained, in clause 2.5, a warranty that the issuance of the Notes would not cause any violation of Ukrainian law.

101. These materials paint a compelling picture. Indeed, we accept the Trustee's submission that there is an unreality about Ukraine's position that a reasonable person in its position would have been put on inquiry as to the existence and potential breach of a specific limit on external borrowing when Ukraine itself was not aware of any such breach. It is also striking that on 24 September 2014, some nine months after the issuance of the Notes, the Ukrainian security service published a statement that it had instituted criminal proceedings against Ukraine's (by this time former) Minister of Finance on suspicion of various offences in connection with the issue of the Notes, including violations of the Budget Law of 2013. But shortly afterwards, on 26 September 2014, the Ministry of Finance issued a statement denying any violation and saying, among other things:

> "All state debt indicators as at the end of 2013, were within the limits defined by the Law of Ukraine 'On State Budget for 2013'."

This unequivocal affirmation by Ukraine of the legitimacy of the issuance of the Notes and compliance with internal law is consistent with the position Ukraine had adopted in late 2013.

102. That is enough to dispose of this aspect of the appeal. If the Trustee was not aware of the existence of the purported limit on external borrowing imposed by Annex 2 of the Budget Law of 2013 and, as we would hold, a reasonable person would not have been put on inquiry as to its existence or relevance to the issuance of the Notes, it is not necessary to consider the correctness of the Court of Appeal's reasoning in relation to the second step which concerns the nature of that limit; nor is it necessary to consider the correctness of the Court of Appeal's reasoning in relation to the third step which proceeds on the assumption that the Trustee was aware of that limit and is concerned with whether, on that basis, a reasonable person would have been put on inquiry as to its breach by the issuance of the Notes. Nevertheless, since we heard argument upon the points, we will express our views, albeit briefly.

103. So far as the second step is concerned, Ukraine contends that the evidence of its expert, Professor Butler, was clear as to the existence and nature of the limit on external borrowing contained in Annex 2. In his first report, Professor Butler describes the limit as a limit on the volume of borrowings that "Ukraine might effectuate through external borrowings" and in this way, so it is said, draws a contrast with the other limits in the legislation which were running totals. Ukraine argues that borrowings that were repaid were still "effectuated" and so contribute towards the total sums "effectuated" in the course of the year. Ukraine also submits that one can infer from the fact that Professor Butler did not consider whether any repayments had been made that he did not consider this to be necessary.

104. We are not persuaded by these submissions and have no doubt that the Court of Appeal was right to reject them. As the Trustee submits and we agree, Ukraine has never identified a rationale for a rule that would prevent borrowing by the state even where existing borrowing had been repaid in full, and in our view Professor Butler's first report provides an inadequate foundation for a conclusion that this is the effect of the legislation. The Court of Appeal was entitled to reject a belated application by Ukraine for permission to rely on a third report of Professor Butler addressed to this issue and, that being so, it would not have been appropriate to admit it or permit Ukraine to rely upon its contents on this further appeal.

105. As for the third step, Ukraine submits that, if the Court of Appeal was correct to proceed on the basis that, as a matter of Ukrainian law, Annex 2 imposed a limit on the external borrowing from time to time, taking into account capital repayments, it was fanciful to suppose that there could have been sufficient repayments to avoid a breach by the time the Notes were issued. Here Ukraine relies on the statement in the Prospectus that, as of 30 September 2013, it had borrowed US$ 3 billion from external sources during 2013, and submits that to create sufficient headroom for a further US$ 3 billion of borrowing, it would have had to repay a substantial sum it had only just borrowed. That, says Ukraine, was implausible.

106. The judge and the Court of Appeal rejected this submission and we are satisfied they were entitled to do so. We of course accept for this purpose that the issuance of the Notes did breach the limit, but the Prospectus indicated that Ukraine would need to make repayments of existing debt obligations and, as the Court of Appeal observed at para 123 nothing was said about the level of outstanding obligations as at December 2013. Ukraine could point to nothing which informed the Trustee that the external borrowing limit would or might be breached by the issuance of the Notes.

(9) The onerous and unusual terms

107. It is Ukraine's case that the transaction was on unusual and onerous terms, and that Blair J so found, and that in light of those terms and other highly unusual features of the transaction and surrounding circumstances, the Trustee was or ought to have been put on inquiry, and that such inquiry would or ought to have revealed that the Minister of Finance did not have authority to issue the Notes.

108. In this regard, Ukraine points, in particular, to three terms:

(1) the so called "No Set Off clause" which, it contends, prohibited it from claiming or exercising any right of set off in respect of its payment obligations under the Notes;

(2) the so called "GDP Ratio clause" which, it contends, permitted the Russian Federation to call an event of default and demand early repayment of the full principal and interest outstanding under the Notes upon any violation of a requirement that the total of Ukrainian state debt and state guaranteed debt must not exceed an amount equal to 60% of the annual gross domestic product of Ukraine; and

(3) the so called "Cross Default clause" which, it contends, once again permitted the Russian Federation to call an event of default and demand early repayment of the full principal and interest outstanding under the Notes, but in the case of this clause upon any default by Ukraine in repayment of relevant indebtedness, that is to say any indebtedness to any noteholder exceeding EUR 25 million.

109. Ukraine argues that the Court of Appeal was wrong to reject these submissions and that in doing so it made the following errors. First, the Court of Appeal thought these terms were not self-evidently abnormal. This, says Ukraine, was diametrically opposed to the finding of Blair J, on a question of fact, on a summary judgment application, and it was contrary to uncontested evidence before the court. Secondly, the Court of Appeal concluded, wrongly, that there was no evidence that the terms would have appeared abnormal to those trading in the sovereign debt market, when in fact there was evidence to this effect from, among others, those who negotiated the deal. Thirdly, the Court of Appeal ignored the wider circumstances in which the Notes were issued.

110. In considering Ukraine's submissions, we are prepared to assume that each of the three terms upon which it has placed particular reliance and to which we have referred has the meaning and effect for which it contends. Nevertheless, we are

wholly unpersuaded that the Court of Appeal fell into error. Indeed, a fundamental problem with Ukraine's submissions is their failure to identify any relevant connection between, on the one hand, these three terms and, on the other hand, the alleged lack of actual authority of the Minister of Finance to issue the Notes. Put another way, Ukraine has failed to explain and it is far from self-evident what it is about the terms relied upon or the broader nature of the transaction that ought to have alerted the Trustee to the Minister's actual lack of authority. That, in substance, is what the Court of Appeal held and we have no doubt that this was a conclusion to which the Court of Appeal was perfectly entitled to come.

(10) Breach of the non-delegation principle

111. Ukraine also contends that the Trustee was on notice of the fact that the CMU had not determined the conditions of borrowing, and that this amounted to notice of the lack of authority of the Minister of Finance by application of what has been termed the "non-delegation principle". Ukraine has developed this contention in the following way. It submits that the CMU had no authority to delegate to the Minister of Finance any decision as to the terms of the borrowing and yet that is precisely what resolution 904 purported to do, in that it approved the terms and conditions of the Notes "attached hereto" but only summarised six important terms and then observed that "Terms and conditions of the placement of the Notes shall be specified by the prospectus". Accordingly, resolution 904 was, on its face, incomplete in that it purported to delegate to the Minister of Finance the power to decide the full terms and conditions of the borrowing, and that was something the CMU had no power to do, as the Trustee knew or ought to have known.

112. Ukraine submits that this is not merely a formalistic point because the terms and conditions which were spelt out to the CMU did not include the terms which Blair J found were unusual and onerous, namely the No Set Off clause, the GDP Ratio clause and the Cross Default clause. Consequently, the CMU was not aware of and did not approve these terms, and this too should have put the Trustee on inquiry.

113. We are satisfied that there is nothing in these further points, and that is so for three related reasons which formed the basis of the Trustee's submissions in response. First, it cannot be inferred from resolution 904 that the CMU did purport to delegate any decision as to any of the terms of the Notes to the Minister of Finance. The Trustee accepts that the resolution refers to the Prospectus for some of the terms of the Notes, but that does not mean to say that the CMU had not seen and approved a draft of that Prospectus. Secondly, we do not accept that it would have been apparent to a reasonable person in the Trustee's position, whether from the terms of Article 16(1) of the Budget Code or for some other reason, that the

delegation of the particular terms not spelt out in resolution 904 would or might be a breach of Ukrainian law or deprive the Minister of the authority to issue the Notes. The judge made no finding to that effect; nor did the Court of Appeal. Thirdly, the CMU therefore had ostensible authority to issue resolution 904, and the Minister had ostensible authority to act on the resolution and proceed to issue the Notes on behalf of Ukraine.

(11) Reliance

114. Ukraine has also advanced an admirably succinct argument that the Trustee adduced no evidence that it relied on any representation by Ukraine, let alone the representation found by the Court of Appeal, namely that to be derived from the powers of the Minister of Finance and the CMU set out in the relevant Ukrainian legislation, in particular Article 16 of the Budget Code. It also argues that, although the Trustee obtained Ukrainian legal opinions for the purpose of and prior to contract, they did not address the specific defects on which Ukraine relies. They simply made an incorrect assumption that there was no defect in authority.

115. These submissions have no merit and we reject them. We have been referred to the evidence of the Trustee from which it is clear that, to the best of its understanding, Ukraine made no oral or written statements that called into question its capacity or authority to enter into the Notes; and that had the Trustee noticed anything in the documents or been told anything which did call these matters into question then the Trustee would not have participated in the transaction. The Trustee understood and had no reason to doubt that the Minister of Finance was authorised to make the statements he did and to "effectuate" the issuance of the Notes, and it was on this basis that the Trustee was content to proceed.

(12) Conclusion on ostensible authority

116. We are satisfied that the Minister of Finance did have ostensible authority to sign the Trust Deed and to issue the Notes on behalf of Ukraine, on the instructions of the CMU, and that the CMU had ostensible authority to pass resolution 904 authorising the Minister to proceed. The conclusion of the Court of Appeal on this issue was correct.

3. Duress

(1) Ukraine's pleaded allegations

117. Ukraine contends in its defence that the Notes, and the agreements pursuant to which they were issued, were procured by duress as understood in English law, and that its purported consent to them was vitiated by unlawful and illegitimate threats and pressure exerted by the Russian Federation, including illegal trade restrictive measures and threats to Ukraine's territorial integrity and independence. These measures and threats are said to have been intended to deter the administration led by President Yanukovych from signing the Association Agreement and to induce it to accept Russian financial support instead. On that basis, Ukraine contends that the Notes are voidable, and have been avoided, under English law, which is their governing law.

118. Considering its pleaded defence in greater detail, Ukraine claims in the first place that the poor state of its public finances rendered it vulnerable to Russian economic pressure. During 2012 and 2013, it was reliant on external borrowing in order to fund its public finances. In the period up to the end of 2012, it had borrowed some of the funds that it required from the International Monetary Fund ("IMF"), but that facility was terminated in December 2012. Until April 2013, it had also been able to raise a significant proportion of the external borrowing that it required through international capital markets. Key factors which determined the extent of its ability to borrow funds on the capital markets on economically viable terms at that time included the state of its relationship with the Russian Federation, which accounted for approximately a quarter of its export market, and the market perception that Ukraine was preparing to enter into the Association Agreement.

119. The trade measures taken by the Russian Federation which are said to have constituted duress are described in Ukraine's defence as follows:

> "18. The Russian Federation imposed trade restrictive measures and applied pressure to Ukraine including (without limitation) the following:
>
> 18.1. On or around 29 July 2013, immediately after President Putin had met with President Yanukovych, the Russian Federal Service for Surveillance on Consumer Rights Protection and Human Wellbeing (Rospotrebnadzor) imposed a ban on the import of confectionery products of a major Ukrainian chocolate manufacturer that had substantial annual exports to Russia (in 2012 worth around £350 million). The ban was purportedly justified on the basis that the confectionery was unsafe, but later the justification supposedly relied on was a purported breach

of Russian labelling requirements. Kazakhstan, Kyrgyzstan and Moldova - which all imported the same products - did not impose any similar ban or restrictive measures on those products.

18.2. During July 2013, the Russian Customs Service added about 40 Ukrainian companies to a list of 'high-risk' producers. This classification meant that the companies were suspected of providing unsatisfactory information to the Russian Customs Service in the past and so its exports had to be scrutinised meticulously before being permitted to cross the border. The practical effect of this was to block the exports of these goods from Ukraine to the Russian Federation.

18.3. On 14 August 2013, the Russian Customs Service extended the purported 'high risk' categorisation to all Ukrainian producers. The practical effect of this was to create a de facto trade ban on all Ukrainian exports to Russia.

18.4. Although the de facto trade ban was lifted around a week later, Russia continued thereafter to apply 'additional control procedures' to Ukrainian exports to Russia, severely inhibiting their passage. Further, in an interview given on 21 August 2013, Mr Sergei Glazyev, an Advisor to the President of the Russian Federation with responsibilities for the development of Eurasian integration, publicly stated that this de facto trade ban could be imposed on Ukraine on a permanent basis in the event that Ukraine entered into the Association Agreement with the EU (Mr Glazyev said 'if Ukraine signs the Association Agreement with the EU, the administration regime that has been temporarily introduced on the Russia-Ukraine border in order to verify the conformity of imported Ukrainian goods to the currently effective goods origin rules and the accuracy of declared customs value, may apply on a permanent basis.')

18.5. In October 2013, the Lithuanian Foreign Minister, Linas Linkevicius, indicated that Russia had threatened to

> suspend gas supply to Ukraine should Ukraine proceed to sign the Association Agreement.
>
> 18.6. In November 2013, Russia introduced new customs procedures. On 4 November 2013, Russian customs officials stated publicly that at least 300 trucks exporting goods from Ukraine were lined up at the border.
>
> 18.7. On 26 November 2013, President Yanukovych reportedly told his Lithuanian counterpart by phone that President Putin had threatened to procure Russian banks to bankrupt factories in eastern Ukraine if Ukraine signed the Association Agreement."

120. These measures are said to have been "illegitimate and/or unlawful" for two reasons. First, it is said that they "were spurious and not applied for bona fide reasons and/or applied for an ulterior purpose, with the intention of applying pressure to Ukraine". Secondly, it is said that they were breaches of a number of international agreements: the General Agreement on Tariffs and Trade (1994) ("GATT"), the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (1995), the Free Trade Agreement between Member States of the Commonwealth of Independent States (2011) ("the Free Trade Agreement"), the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation (1997) ("the Friendship, Cooperation and Partnership Agreement"), and the Budapest Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (1994) ("the Budapest Memorandum").

121. Ukraine also alleges that representatives of the Russian Federation made threats of further action in the event that Ukraine entered into the Association Agreement:

> "20.1. On 18 August 2013, at a time when Russia had imposed the de facto trade ban on Ukrainian exports pleaded at paragraph 18.3 above, Mr Glazyev stated: 'We are preparing to toughen customs administration in case Ukraine takes this suicidal step and signs the association agreement with the EU'.

20.2. On 21 August 2013, Mr Glazyev said that Russia could annul the CIS Free Trade Area Agreement (to which Ukraine had acceded in 2011) and cancel joint projects in a number of industries if Ukraine signed the Association Agreement with the EU.

20.3. On 22 August 2013, President Putin suggested that if Ukraine concluded the Association Agreement with the EU 'the member states of the [Eurasian] Customs Union will have to consider protective measures [against imports from Ukraine].'

20.4. On 23 August 2013, Deputy Prime Minister Dmitri Rogozin announced the possibility that Russia would cease to co-operate with Ukraine in the production of the An-124 Ruslan transport aircraft.

20.5. On 9 September 2013, Russian Prime Minister Dmitry Medvedev warned that Ukraine would be barred from entry into the Eurasian Customs Union if it entered into the Association Agreement: 'I don't want there to be any illusions ... Practically, for our Ukrainian partners, entry into the Customs Union will be closed'.

20.6. On 19 September 2013, President Putin warned Ukraine that Russia would retaliate with protectionist measures if Ukraine entered into the Association Agreement: 'We would somehow have to stand by our market, introduce protectionist measures. We are saying this openly in advance'.

20.7. Speaking at a conference in the city of Yalta, Crimea, on 22 September 2013, Mr Glazyev:

> 20.7.1. Threatened that the tariffs and trade checks that Russia would impose if Ukraine entered into the Association Agreement could cost Ukraine billions of dollars and result in a default in its obligations to creditors. 'Who will pay for Ukraine's default, which will become inevitable?' Mr Glazyev asked. 'One has

to be ready to pay for that.' Saying that a default would cost Ukraine '25 or even 35 billion euros', he asked: 'Would Europe take responsibility for that?'

20.7.2. Asserted spuriously that by signing the Association Agreement with the EU, the Ukrainian government would violate the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation. He threatened that if Ukraine signed the Association Agreement, Russia could no longer guarantee Ukraine's status as a State and could possibly intervene if pro-Russian regions of the country appealed directly to Moscow.

20.8. On 23 September 2013, Mr Glazyev threatened that Russia would support a partitioning of Ukraine if it signed the Association Agreement in two months' time. Mr Glazyev stated that Ukraine's Russian-speaking minority might break up the country in protest at such a decision, and stated wrongly that Russia would be legally entitled to support them.

20.9. On 1 November 2013, Mr Glazyev again stated spuriously that if Ukraine signed the Association Agreement, that would be a breach of the 1997 Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, and that if the Association Agreement were signed 'we will have to start over [discussion of] all matters from the very beginning, including the issues of borders [between Ukraine and the Russian Federation]'."

122. These actions are said to have been "illegitimate and/or unlawful" for two reasons. First, it is said that "the Russian Federation's public statements in offering to support the partitioning of Ukraine" were (1) "a threat of the use of force, directly or indirectly, contrary to customary international law which rule has the status of ius cogens [that is to say, a peremptory norm from which no derogation is permitted] and/or article 2(4) of the UN Charter", and (2) "a breach of the Russian Federation's duty under customary international law to refrain from intervention in the internal affairs of a sovereign State, namely Ukraine, which duty has the status of ius cogens".

In the event, customary international law did not feature in Ukraine's submissions, and need not be considered further. Secondly, it is said that "the Russian Federation's public statements in threatening further trade restrictive measures were each threats of action that, if taken, would have been illegitimate and/or unlawful, and in breach of" GATT, the Free Trade Agreement, the Friendship, Cooperation and Partnership Agreement, and the Budapest Memorandum.

123. These actions are said to have had a significant effect on Ukraine's economy during 2013, and to have significantly affected Ukraine's ability to access international capital markets from the summer of 2013 onwards. The context is said to have been one in which Ukraine was unable to raise significant funds by borrowing on the domestic market, and in which it was due to repay around US$ 1.6 billion to the IMF by the end of November 2013, and to repay, or roll over at an increased interest rate, bank borrowings of US$ 750 million.

124. Ukraine claims that, as a consequence of the foregoing, during meetings in October and November 2013 the Russian Federation and Ukraine agreed that Ukraine would not sign the Association Agreement, that the Russian Federation would take steps to remove the restrictions on trade with Ukraine that it had imposed during 2013, that the Russian Federation would lend Ukraine up to US$ 15 billion, and that the Russian gas company, Gazprom, would sell Ukraine's national gas company, Naftogaz, natural gas at a discounted rate. It is said that, in the circumstances summarised at paras 118 to 123 above, Ukraine had no practical choice but to accept these terms, and only did so as a result of the duress applied to it by the Russian Federation summarised in those paragraphs. Ukraine contends that it was in pursuance of the agreement reached during those meetings that the Notes were subsequently issued.

(2) The Trustee's position

125. For the purposes of its application for summary judgment (but not otherwise), the Trustee does not dispute the facts relied on by Ukraine. Nor does it dispute that the resultant pressure upon Ukraine caused it to enter into the contractual documentation and issue the Notes, or that the Trustee had notice of the pressure applied. The only point relied upon by the Trustee for present purposes is that Ukraine's defence does not amount to a relevant defence of duress under English law.

126. In summary, that is because, in the first place, the international obligations relied upon do not form part of English law, and cannot form the basis of a defence of "unlawful act" duress under English law. Nor is the breach of international

obligations sufficient to establish a case of "lawful act" duress, as explained by this court (subsequently to the decisions below, and to the initial hearing of this appeal) in *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2021] UKSC 40; [2023] AC 101 ("*Times Travel*"). As the Trustee put it, adopting an imprecise metaphor coined by Cranston J in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), paras 54 and 60, and employed in *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359, para 43, there is no "domestic foothold" for the application of international law: that is to say, this is not a situation where it is necessary to determine an issue of international law for the vindication of a public or private law right or obligation under English law.

127. In addition, the Trustee argued below that even if there were a domestic foothold for the determination of questions of international law, an English court could not in any event determine those questions, since it would be required to denounce the conduct of a foreign state as unlawful on the plane of international law. That is normally beyond the competence of the court under the doctrine of foreign act of state, as explained in authorities such as *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 ("*Buttes Gas*"), 931-938 and *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964 ("*Belhaj v Straw*"). The Trustee accepted that there are authorities which support the view that the existence of a clearly established breach of international law can give rise to an exception to that doctrine, but submitted that those cases concern conduct that has been uniformly condemned by the international community and acknowledged by both parties to the proceedings, so as not to be in dispute at all: see *Oppenheimer v Cattermole* [1976] AC 249 and *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 ("*Kuwait Airways*"). In the Trustee's submission, there is no parallel between those cases and the present case.

128. Before this court, the Trustee stated that it did not seek to put justiciability in issue in this sense (ie the foreign act of state doctrine), as distinct from the question whether there was a domestic foothold for the application of international law. In practice, however, its submissions tended at times to elide the two questions. We shall therefore consider them both.

(3) The treatment of duress in the judgments below

129. As we have explained, the Trustee sought summary judgment on its claim. Blair J granted that application, finding that all of Ukraine's defences, including the defence of duress, lacked any real prospect of success. That conclusion was reached on the basis that Ukraine's case as to trade restrictive measures fell within the scope of the doctrine of foreign act of state, as explained in *Belhaj v Straw* (more

specifically, within the scope of the third rule described by Lord Neuberger at para 123), and was therefore non-justiciable. Ukraine's case as to threats of the use of force did not change that analysis. Although violence to the person, or threats of such violence, had long been recognised in English law as a paradigm form of duress, entitling the victim to avoid a contract entered into as a result, the alleged threats of the use of force by the Russian Federation against Ukraine fell within the foreign act of state doctrine. On the authorities, those acts were non-justiciable, and fell outside the public policy exception discussed in *Belhaj v Straw*. They could not give rise to a defence of duress in English law. Since the issue was not arguably justiciable, the enforceability of the contract could not be precluded by a permanent stay.

130. The Court of Appeal approached the issues in a different order, and ultimately reached a different conclusion. It began by considering whether there was a "domestic foothold" - that is to say, a justiciable question of English law - which required or permitted the court to embark upon an examination of Ukraine's case that the Russian Federation made threats against it which were unlawful as a matter of international law or otherwise illegitimate. It found at paras 157-159 that there was such a foothold, relying on Steyn LJ's dictum in *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 718-719, that the exertion of pressure by lawful means did not prevent the operation of the doctrine of economic duress: the critical inquiry was not whether the conduct was lawful but whether it was "morally or socially unacceptable". It considered that international law provided a standard for the application of that test, stating at para 160:

> "It is true that Russia and Ukraine are sovereign states, which means that the test for what might count as morally or socially unacceptable in the context in which they interact with each other is not the usual one appropriate to relations between private parties. But the authorities make it clear that the English law doctrine of duress does not turn on breach of domestic law as the criterion of illegitimate pressure. The notion of illegitimate pressure is wider than that. Although moral and social standards are more attenuated in the relations between states on the international plane than is the case in a purely domestic commercial context, international law sets out reasonably determinate standards of conduct applicable between states on the international plane. In our view, there is no reason why the law of duress should not treat these as providing an appropriate test of illegitimate pressure in the present case."

131. The court then turned to the question whether, despite there being a domestic foothold for determining whether the Russian Federation had failed to comply with its obligations towards Ukraine under international law, Ukraine's plea of duress should nevertheless be treated as non-justiciable. In that regard, the court focused on the alleged threats of the use of force to violate Ukraine's territorial integrity, on the basis that that was the strongest aspect of Ukraine's defence. It accepted that the third rule of the foreign act of state doctrine, as explained by Lord Neuberger in *Belhaj v Straw* at para 123, was prima facie applicable. However, it considered that the public policy exception to the rule, identified by Lord Neuberger in that case, also applied, so that Ukraine was entitled to rely on the threats of the use of force allegedly made by the Russian Federation.

132. In that regard, the court made six points: first, that since the Russian Federation had chosen to structure its loan relationship with Ukraine according to the domestic law of England and had chosen the English courts as the forum, the argument that the English courts should exercise self-restraint was significantly weaker and the argument for applying the public policy exception correspondingly stronger; secondly, that in so far as the foreign act of state doctrine reflected a principle of respect for comity between states, it was relevant that comity supported Ukraine's wish that the court should determine the issue as well as the Russian Federation's wish that it should not; thirdly, that the Russian Federation, by arranging for the Trustee to bring its claim before the English courts, had indicated its wish that the courts should determine it, including the determination of any defences available to Ukraine; fourthly, that there was nothing inherently non-justiciable about the duress defence, since the courts could determine the obligations of states under international law when they were relevant to an issue in domestic law; fifthly, that there was no scope for the concern that the courts should not cut across the responsibility of the Government for international affairs, since ministers had made it clear that the United Kingdom regarded the activities of the Russian Federation in seizing the Crimea and assisting military action by insurgents in eastern Ukraine as being in violation of ius cogens norms of international law; and sixthly, that the alleged threats were of a breach of a rule of international law with the status of ius cogens, and that Lord Neuberger had stated in *Belhaj v Straw*, para 168, that any treatment which amounted to a breach of ius cogens would almost certainly fall within the public policy exception.

133. Having decided that Ukraine had an arguable defence of duress based on the Russian Federation's threatened use of force, the court considered that the other parts of Ukraine's case should not be struck out as being unarguable. In the court's view, those further matters should be in issue for exploration at trial, both as independent aspects of the defence of duress and as relevant background to allow

the whole pattern of alleged threatening behaviour by the Russian Federation to be assessed in its full context.

134. The court also expressed the view that, if the defence of duress had not been justiciable, it would have been appropriate to stay the proceedings. In its view, the Russian Federation could only fairly seek to enforce its contractual rights if Ukraine was able to defend itself by reference to any defence in respect of which there was a domestic foothold, as there was in respect of the defence of duress.

(4) Should Ukraine's case of duress proceed to trial?

(i) Introduction: the English law of duress

135. Since the proper law of the contract between the parties is English law, it is English law which must determine whether the contract may be affected by duress; what constitutes duress for this purpose; what impact such duress must have exercised upon the formation of the contract; and what remedial action is available to the innocent party: *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [1992] 2 AC 152 ("*Dimskal Shipping*"), 168.

136. As Lord Cross of Chelsea explained in *Barton v Armstrong* [1976] AC 104, 118, the scope of the common law doctrine of duress was traditionally very limited. It was originally confined to threats to life or limb, and only later developed so as to encompass threats to property, and, more recently, economic pressure. However, at a comparatively early date equity began to grant relief in cases where a disposition had been procured by the exercise of pressure which the Chancellor considered to be illegitimate, although it did not amount to common law duress. There was a parallel development in the field of dispositions induced by fraud. At common law, the only remedy was an action for deceit, but equity in the same period in which it was building up the doctrine of undue influence also came to entertain proceedings to set aside dispositions which had been obtained by fraud. As Lord Cross observed, there were obvious analogies between duress, undue influence and fraud (p 118):

> "In each case - to quote the words of Holmes J in *Fairbanks* v *Snow* (1887) 13 NE 596, 598 – 'the party has been subjected to an improper motive for action.'"

137. Lord Wilberforce and Lord Simon of Glaisdale developed this point in their dissenting opinion in *Barton v Armstrong* at p 121, in terms which were to prove influential:

> "in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained - advice, persuasion, influence, inducement, representation, commercial pressure - the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress - threat to life and limb - and it has arrived at the modern generalisation expressed by Holmes J - 'subjected to an improper motive for action': *Fairbanks v Snow* (1887) 13 NE Reporter 596, 598."

138. In *Barton v Armstrong* itself, the illegitimate pressure used by one contracting party to secure the other party's consent was a threat to murder him: a paradigm example of duress of the person. At the time when the case was decided, however, courts were beginning to accept that economic pressure could also, in some situations, vitiate consent, even if the pressure resulted from the threat of action which was not in itself unlawful. That development in the law was authoritatively established by the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366 ("*Universe Tankships*"), 383-384. There, Lord Diplock explained that the rationale for this development of the common law was "similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress" (p 384).

139. The resultant position was summarised by Lord Goff of Chieveley in *Dimskal Shipping* at p 165:

> "it is now accepted that economic pressure may be sufficient to amount to duress … provided at least that the

> economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract …"

140. Although the courts expressed the relevant test as being whether the pressure was of a kind which the law characterises as "illegitimate", the meaning of that term in this context was not as clear as one might wish. Plainly, "illegitimate" was not synonymous with "unlawful". For example, the pressure imposed in *Universe Tankships* and *Dimskal Shipping* was lawful but was nevertheless described as illegitimate. Some judges inferred from the analogy drawn with equitable doctrines in *Barton v Armstrong, Universe Tankships* and *Dimskal Shipping* that pressure would be illegitimate if it amounted to unconscionable conduct. Examples are given in Lord Hodge's judgment in *Times Travel* at paras 21-22. Others favoured a broader approach. In an influential dictum on which the Court of Appeal relied in the present case, Steyn LJ expressed the view that "the critical inquiry is …whether the conduct … is morally or socially unacceptable": *CTN Cash and Carry Ltd v Gallaher Ltd* at p 719. That was treated as meaning that judges could apply a broad test based on their view of the moral or social acceptability of the conduct in question (including, in the view of some judges, whether a party had acted in breach of a supposed duty of good faith in contracting). In the present case, the Court of Appeal followed that broad approach.

141. The primary significance of this court's decision in *Times Travel* was its rejection of that broad standard of whether conduct was "morally or socially unacceptable", and its renewed emphasis on the link between duress and equitable doctrines, particularly the concept of unconscionability. Lord Hodge explained at para 2, in a judgment with which the majority of the court agreed, that behaviour which would be judged in equity to render the enforcement of a contract unconscionable is treated as illegitimate pressure to enter into the contract in the context of the common law doctrine of duress. In a remark which echoed Holmes J's reference to an improper motive for action, cited in *Barton v Armstrong* (paras 136 and 137 above), Lord Hodge stated at para 22 that the standard of impropriety "is the high standard of unconscionability". He added at para 23:

> "Unconscionability is not an overarching criterion to be applied across the board without regard to context. Were it so, judges would become arbiters of what is morally and socially acceptable. Equity takes account of the factual and legal context of a case and has identified specific contexts which call for judicial intervention to protect the weaker party."

In that regard, reference was made to the body of case law concerned with the equitable doctrines of undue influence and unconscionable bargains.

142. Following the approach laid down at the highest level from *Barton v Armstrong* to *Times Travel*, the first question which arises where a party's consent to a contract has been influenced by pressure exerted by the other party is whether the pressure is of a kind which English law regards as an illegitimate reason for entering into a contract. Duress of the person and duress of goods are clear examples of illegitimate pressure. Economic pressure, on the other hand, is not necessarily illegitimate, particularly where the threatened conduct is lawful. As Lord Hodge noted in *Times Travel* (para 4), the situations in which the courts have treated pressure arising from threats of actions which are not in themselves unlawful under English law are very limited. Only two situations have been identified. The first is where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant's close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution. The second is where the defendant, having exposed himself to a civil claim by the claimant, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive his claim. Lord Hodge acknowledged that the boundaries of the doctrine of lawful act duress are not fixed, but warned that the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities (para 3).

143. A second question which arises, if the pressure is of a kind which is regarded as illegitimate, is whether it has affected the party's consent to the contract in such a way as to render the contract voidable. That issue – the test of causation in duress – has not been the subject of detailed argument on this appeal, and this is not, therefore, the occasion on which to address it. On the authorities, however, it is another issue which depends on the nature of the pressure in question. So far as duress of the person is concerned, it was held in *Barton v Armstrong,* on the basis of an analogy with fraud, that the victim of the duress does not have to establish that he would not have made the agreement but for the threats. On the contrary, it is for the party who made the threats to establish, if he can, that they contributed nothing to the victim's decision to sign: pp 118-120. Far from the illegitimate pressure having to be shown to be *the* reason, or the *predominant* reason, or the *clinching* reason for the victim's decision to enter into the contract, the victim will succeed unless the pressure is shown to have played no part in his decision.

144. In relation to economic pressure, on the other hand, it was said in *Dimskal Shipping* that there may be duress where "the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the

plaintiff to enter into the relevant contract": p 165. More recently, it was said in *Times Travel* that the victim must also have had no reasonable alternative to giving into the threat or pressure: para 79. As was noted (ibid), the latter does not appear to be a requirement of duress of goods: *Astley v Reynolds* (1731) 2 Str 915.

(ii) Ukraine's case of duress: general remarks

145. Ukraine's allegations in relation to duress are presented on the basis that there was a concerted campaign on the part of the Russian Federation to dissuade Ukraine from entering into the Association Agreement. However, the allegations are of distinct kinds of pressure which are treated differently by the English law of duress. Taking the allegations at their highest (as they have to be, for the purpose of determining the Trustee's application for summary judgment), the first category comprises various forms of economic pressure: the imposition of restrictions on trade, and the threat of further restrictions; threats to procure Russian banks to commence insolvency proceedings against Ukrainian businesses; and threats to cancel joint projects, or otherwise withdraw from cooperation in a number of industries (paras 119 and 121 above). This conduct is said to have been "illegitimate and/or unlawful" in two respects. First, it is said to have been carried out not for bona fide reasons but in order to apply pressure to Ukraine (para 120 above). Secondly, it is alleged to have been in breach of unincorporated international law (paras 120 and 122 above).

146. The second category comprises express or implicit threats of the use of force to destroy Ukraine's security and its territorial integrity (para 121 above). This conduct is said to have been "illegitimate and/or unlawful" in that it was in breach of international law, including ius cogens (para 122 above).

147. In argument, counsel for Ukraine maintained that Ukraine's case on duress was based on the fact of the threats, that is to say on the nature of the acts which were threatened, rather than on their treatment under international law. On that basis, counsel characterised Ukraine's case in relation to the threatened use of force as being based on duress of the person and of goods. Although counsel for the Trustee understandably emphasised that Ukraine's case had not been pleaded in that way, the characterisation of this aspect of its case as one of duress of the person and of goods can be regarded as a change in the legal analysis of the facts pleaded rather than a different case on the facts. Defective pleadings which can be cured by amendment are not necessarily struck out without affording the pleader the opportunity to cure the deficiency, and the court has a wide ambit of discretion in this regard. The same principle also applies in the context of an application for summary judgment. In the present case, any trial of the action remains some

considerable way off. We are also mindful that the law of duress has been the subject of significant clarification during the course of these proceedings. With all these factors in mind, we are prepared to consider Ukraine's case based on alleged duress of the person and of goods. Any prejudice to the Trustee arising from Ukraine's change of tack, and its failure to argue its case on the same basis in the courts below, is capable of being addressed in costs.

148. As has been explained (paras 142-144 above), the two categories of conduct alleged - economic pressure, and threats of the use of force - raise distinct issues under the English law of duress. As we have explained, economic pressure has been held to be illegitimate only in limited circumstances of the kind discussed in *Times Travel,* whereas duress of the person or of goods has always been considered illegitimate. Furthermore, the necessary causal relationship between the pressure imposed and the party's consent to the agreement differs according to the nature of the duress in question. Accordingly, while keeping in view Ukraine's reliance upon the combined effect of the various threats alleged, it is necessary in the first place to consider the different types of pressure separately in order to address the question whether they are illegitimate under English law. In doing so, we shall also address any relevant questions of justiciability. Once it has been determined which of the alleged forms of pressure may be illegitimate, and whether they raise issues which are justiciable under English law, it is then possible to determine how issues arising in relation to the causal impact of the combined threats should be addressed.

(iii) Ukraine's case based on economic pressure

149. The English courts do not appear ever to have considered a case of alleged duress arising from the imposition of trade restrictions by one state upon another, allegedly in breach of international law. Nor has this court been referred to any relevant precedent in the law of any other country.

150. Considering first the demand of the Russian Federation, it is alleged to have been that Ukraine should not sign the Association Agreement with the EU, but should instead accept the financial support of the Russian Federation. That demand is alleged by Ukraine to have been motivated by political considerations. It was, Ukraine avers, "aimed at frustrating the will of the Ukrainian people to participate in the process of European integration", and encouraging Ukraine instead to join the Eurasian Customs Union formed among the Russian Federation, Kazakhstan and Belarus. In general, the fact a demand by a state is motivated by its political interests cannot render it illegitimate in the eyes of English law. It is inevitable that the demands made by states, even in commercial contexts, will commonly if not invariably be influenced by their political interests. In particular, the Russian

Federation's pursuit of its strategic interests in keeping Ukraine within its sphere of influence cannot be regarded as being inherently illegitimate under English law.

151. The acts allegedly carried out or threatened by the Russian Federation in order to impose economic pressure on Ukraine were, to recap: a ban on the import into the Russian Federation of confectionery produced by a Ukrainian manufacturer, ostensibly on the ground of consumer safety or non-conformity with labelling requirements; the classification of about 40 Ukrainian companies as high-risk producers, resulting in checks that their exports to the Russian Federation conformed with Russian customs requirements; for one week, an extension of similar checks to all Ukrainian exports to the Russian Federation; the threat of the imposition of similar checks on a permanent basis if Ukraine entered into the Association Agreement; the threatened suspension of gas supplies; the introduction of new customs procedures; the threat that Russian banks might foreclose on bankrupt factories in eastern Ukraine; the threatened annulment of a free trade agreement; the threat that Ukraine would be excluded from the Eurasian Customs Union; the threatened cancellation of joint projects in a number of industries; and the threatened introduction of measures to protect Russian producers. The questions which arise are (1) whether the pressure imposed by those acts was inherently illegitimate or unacceptable for the purposes of the English law of duress, and, if not, (2) whether the pressure imposed by those acts was rendered illegitimate or unacceptable for the purposes of the English law of duress by virtue of their being (allegedly) in breach of unincorporated international law.

152. In relation to the first of those questions, the imposition or threat of trade restrictions in order to exert pressure upon other states, and thereby achieve political objectives, has been part of the armoury of the state since classical times. It was a familiar aspect of state practice during the period when English commercial law and equity were developing in the eighteenth and nineteenth centuries: for example, during the American War of Independence, the Napoleonic Wars and the War of 1812. Trade sanctions, embargoes and protectionism more widely remain normal and important aspects of statecraft in the modern world. There is, for example, a section of the UK Government's website devoted to the trade sanctions, embargoes and other trade restrictions imposed by this country on other countries (73 countries are currently listed). As it explains, the UK uses sanctions to fulfil a range of purposes, including supporting foreign policy and national security objectives, as well as maintaining international peace and security, and preventing terrorism. Other countries do likewise. In particular, the trade restrictions alleged to have been adopted or threatened by the Russian Federation are another example of the use of such measures by a sovereign state in the pursuit of its interests.

153. There is no trace, as far as the court has been made aware, of the pressure imposed by such measures ever having been treated in English law as constituting duress. That is so, notwithstanding their long history, and the amplitude of case law concerned with state practice, including restrictions on trade, in other contexts. That appears to us to be unsurprising. Measures of this kind, whether imposed by the UK or by other countries, cannot sensibly be regarded as being, as a category, inherently illegitimate or contrary to public policy. Indeed, they are often imposed for reasons which are widely regarded as morally admirable, such as to encourage other countries to alter objectionable practices (for example, sanctions are currently imposed by the UK for the purpose of encouraging the Russian Federation to cease actions which destabilise Ukraine, including actions which undermine or threaten its territorial integrity, sovereignty or independence). That remains the position even if the measures have the effect of exerting pressure on a targeted state to enter into an agreement which it would not otherwise have concluded. That is not infrequently the purpose of such measures.

154. Nor can warnings or threats of the possibility of restrictions on the importation of Ukrainian goods into the territories of the Russian Federation or the Eurasian Customs Union, or of the cancellation of joint projects in a number of industries, be characterised as duress of goods. There is not, for example, a pleaded case of threats to destroy or damage property, or to seize or detain goods contrary to Russian domestic law or at all. Refusing to accept Ukrainian goods into Russian sovereign territory, or persuading other members of the Eurasian Customs Union to do likewise, is a different matter.

155. The alleged threat that Russian banks might foreclose on Ukrainian creditors is not alleged to involve anything more than the exercise of contractual rights. It is difficult to envisage circumstances, and none are alleged, in which the exercise of pre-existing contractual rights might constitute duress: see, for example, *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87, 94. The discussion in *Times Travel* certainly gives no support to such a contention.

156. The remaining question is whether trade restrictions which would not otherwise constitute duress under English law may nevertheless do so by reason only of their constituting a breach of unincorporated international law: in this case, a breach of a variety of treaties to which the Russian Federation and Ukraine are contracting parties.

157. The starting point is that, subject to certain qualifications, “international law and domestic law operate in independent spheres”: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 55. Accordingly, as

Lord Neuberger stated in *Belhaj v Straw,* in a judgment with which the majority of the court agreed, "international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts" (para 123). On the contrary, the general rule is that stated by Lord Oliver in *the Tin Council case* at pp 499-500:

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law… Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court … because, as a source of rights and obligations, it is irrelevant."

It follows that, unless there is some relevant exception to that rule, English courts cannot decide whether the Russian Federation has acted, or threatened to act, in breach of its international treaty obligations towards Ukraine.

158. The supposed exception, in the view of the Court of Appeal, was that domestic law provided a "foothold" for the application of international law. Before considering that question, it is important at the outset not to be misled by the imprecise metaphor of a "foothold". It is simply a way of referring to a situation where it is necessary to decide a question of international law in order to determine a question of domestic law. At times, Ukraine's submissions risked conveying the impression that the relevant question was whether the defence of duress had a foothold in domestic law. But that question does not arise, and does not even make sense. The defence of duress does not need a foothold in English law. As we have explained, the defence arises under English law, under conditions which are defined by English law. That is not in dispute. As we have explained, the metaphor of a foothold is used in respect of international law, and describes a situation in which it is necessary for the English court to decide a question of international law in order to determine a question of English law.

159. A domestic foothold for international law has been found to exist in a number of situations: where a provision of international law has been incorporated by

legislation into domestic law (eg *Salomon v Customs and Excise Comrs* [1967] 2 QB 116); where a rule of customary international law forms part of the common law (eg *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719; [2019] QB 1075); where parties have entered into a contractual agreement to apply rules of international law (eg *Philippson v Imperial Airways Ltd* [1939] AC 332); where a party attempts to justify a defamatory allegation that a person has acted in breach of international law (eg *Buttes Gas*); and, more controversially, where an administrative decision-maker has relied on an interpretation of international law, and his interpretation is challenged (*R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839; cf *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] AC 756). The present case does not fall within any of those categories. Accordingly, the position under international law would only be relevant to a question arising under domestic law in the present case if there was some other rule - a rule of the English law of duress - which required the court, in the circumstances with which this case is concerned, to decide whether conduct which was alleged to constitute illegitimate pressure was in breach of international law.

160. The Court of Appeal considered that there was such a rule. In its view, the question whether the Russian Federation's conduct towards Ukraine was lawful under international law was relevant, under the English law of duress, to deciding whether the pressure imposed by that conduct was "illegitimate". That was the supposed foothold. In adopting that view, the Court of Appeal relied, as we have explained, on Steyn LJ's dictum in *CTN Cash and Carry Ltd v Gallaher Ltd* that the critical inquiry, in a case of alleged duress, is whether the conduct complained of is "morally or socially unacceptable". International law was treated by the Court of Appeal as providing a guide to what is morally or socially unacceptable, as a matter of domestic English law, in the conduct of states towards one another.

161. The problem with that approach is that this court has rejected a broad test of moral or social acceptability as the touchstone of duress under English law, as explained earlier, and has instead adopted a much stricter approach: see paras 141-142 above. In *Times Travel,* Lord Hodge cited with approval at paras 28-29 Professor Jack Beatson's statement in *The Use and Abuse of Unjust Enrichment* (1991), p 130 that "judges should not, as a general rule, be the arbiters of what is socially unacceptable and attach legal consequences to such conduct", and a similar statement by the editors of *Anson's Law of Contract,* 31st ed (2020). Accordingly, even assuming that international law could be treated as a guide to the moral or social acceptability of conduct by states towards one another, that is not the relevant test.

162. There appears to us in any event to be no principled basis for treating international law as a guide to the illegitimacy of conduct under the English law of duress. The Court of Appeal cited no authority in support of its approach, and none has been cited to this court. There is no evident reason to suppose that English law contains such a rule, and a number of reasons for concluding that it does not.

163. In the first place, such a rule would be contrary to the approach adopted by the House of Lords in *Dimskal Shipping.* It was argued in that case that, in deciding whether conduct which took place in Sweden constituted duress under English law, regard should be paid to the law of Sweden. The argument was rejected. Lord Goff stated at p 169:

> "the dispute relates to a contract whose proper law is English law, and the relevant incidents of which are therefore governed by English law. Some cogent reason has to be produced why in such a case the English courts should not simply apply the principles of English law in deciding whether or not the relevant conduct constitutes duress capable of rendering the contract voidable…"

It is to be noted that the objection was one of principle. It would be equally strong whether the position under Swedish law was debatable or clear beyond argument. Similarly, in the present case, it is English law, not international law, which provides the yardstick of legitimacy, whether the alleged breach of international law is arguable or manifest. The point is that non-domestic law, whether national as in *Dimskal Shipping,* or international as in the present case, does not provide the relevant standard. That is not to deny that international law may be relevant in some cases to an assessment of public policy, although not determinative of the issue; but we have already explained that trade restrictions of the kind in question in the present case cannot be regarded as contrary to English public policy: para 153 above.

164. Furthermore, were a breach of international law to constitute illegitimacy for the purpose of the law of duress, then international treaties would become the source of rights and duties in domestic law, and their adjudication would be the function of domestic courts, contrary to the principles explained at para 157 above. We have explained at para 153 above why trade restrictions cannot be regarded as inherently constituting illegitimate pressure for the purposes of the law of duress. For the reasons explained in para 157 above, an allegation that they have been imposed in breach of obligations under international law does not alter the position on the plane of domestic law. An analogy can be drawn with the position in *the Tin Council case*, where the House of Lords held that, even if there were a rule of

international law that the member states of the International Tin Council were responsible for its debts, no cognisance could be taken of such a rule by domestic courts (at pp 480-481 per Lord Templeman and 510-512 per Lord Oliver). As Lord Oliver stated at p 512:

> "It is argued, however, that if one supposes, for example, that [the relevant treaty] contained an express declaration that the member states agreed to underwrite all the liabilities of the ITC, it would be absurd that no cognisance of such a provision should be taken by a domestic court. For my part, I do not think so and, indeed, this is an excellent example of the operation of the non-justiciability principle."

It is again clear from this dictum that the objection is one of principle, which applies however plain the position may be under international law.

165. Counsel for Ukraine submitted that the Court of Appeal's treatment of international law as a guide to relevant standards of behaviour between states, so as to elucidate what might constitute "illegitimate" pressure in that context, was analogous to the use of professional standards in the context of claims for professional negligence. It no more incorporated international law into domestic law, counsel submitted, than the practice in professional negligence cases incorporates professional standards of conduct into the law. We reject this argument for two reasons.

166. First, as has been explained, it was decided in *Times Travel* that whether pressure is illegitimate is not determined by applying what judges might regard as acceptable standards of behaviour, whether as between private individuals or bodies or as between states. The view taken by the majority in that case was that the relevant standard is one of unconscionability, drawing on the case law through which that concept has developed in the English law of equity.

167. Secondly, there is no true analogy with practice in professional negligence cases. In that context, the applicable rules of English law, such as the *Bolam* principle (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582), establish the relevance of accepted professional standards of conduct to the legal standard of reasonable care. There are no rules in the context of duress requiring the court to consider the obligations imposed by international treaties. As we have explained, if a breach of an unincorporated treaty were treated as a breach of the standard of legitimacy in the context of duress, then the treaty would be determinative of

whether one party to an English contract was entitled to enforce it against the other. The treaty would thus become "the source of domestic rights or duties", contrary to *Belhaj v Straw,* para 123, and would have to be interpreted and adjudicated upon by domestic courts, contrary to *the Tin Council case*, pp 499-500. Properly understood, the decision as to whether the pressure imposed on a party to enter into a contract is illegitimate for the purposes of the law of duress, or whether (looking at the same question from a different angle) it is unconscionable for the other party to enforce the contract, is a judgment of a domestic character, made by the court by drawing on standards rooted in English law, as explained at paras 141-142 above.

168. This is also consistent with the way in which Ukraine has presented its case to this court. As we have explained, Ukraine's case on duress is based on the fact of the alleged threats, as counsel was at pains to emphasise. The essence of its case is that the pressure imposed by those threats vitiated its consent to the agreements pursuant to which the Notes were issued. Accordingly, if the issue were to go to trial, the question would be whether, applying the standards of English law, the facts established constitute duress. It is not necessary for Ukraine to demonstrate that the conduct of the Russian Federation was unlawful in international law. The critical question is whether it imposed pressure on Ukraine to enter into the relevant agreements which was illegitimate according to English law. It is therefore unnecessary to resort to international law to evaluate the existence or nature of the threats, or to assess the impact they may have had on the formation of the relevant contract, or, as we have explained, to determine whether they imposed illegitimate pressure. If the conduct complained of also constituted a breach of international law, that is incidental.

169. That conclusion makes it unnecessary to consider the doctrine of foreign act of state in this context, since that doctrine would only become potentially applicable if, in the first place, it was necessary for the court to determine the lawfulness under international law (or, conceivably, Russian law) of the Russian Federation's acts or threatened acts imposing economic pressure on Ukraine.

170. We therefore conclude that Ukraine's averments of economic duress are not in themselves capable of establishing its defence.

(iv) Ukraine's case based on threats of the use of force

171. Ukraine complains in its pleadings about statements allegedly made by Mr Glazyev, an adviser to the President of the Russian Federation. He is alleged to have said on 22 September 2013 that if Ukraine signed the Association Agreement, Russia could no longer guarantee Ukraine's status as a state and could possibly intervene if

pro-Russian regions of the country appealed directly to Moscow. He is alleged to have said the following day that Russia would support a partitioning of Ukraine if it signed the Association Agreement; that Ukraine's Russian-speaking minority might break up the country in protest at such a decision; and that Russia would be legally entitled to support them. He is also alleged to have said on 1 November 2013 that if Ukraine signed the Association Agreement, the issue of borders between Ukraine and the Russian Federation would have to be discussed.

172. Ukraine avers that these statements amounted to a threat by the Russian Federation of the use of force. That is an issue which is best determined at trial, when what exactly was said, what authority the speaker possessed, and how what was said should be construed in the context of the surrounding circumstances, can be considered. The only question which needs to be decided at the present stage, in this regard, is whether the statements alleged to have been made are capable of amounting to such a threat; and we consider that they are.

173. Although Ukraine's pleadings focus upon the implications of such a threat under international law, Ukraine relied in argument upon the inherent nature of the conduct which is implied by such threats. As we have explained at para 147 above, that appears to us to be a matter which the court can properly take into account.

174. The use of force by the Russian Federation in support of pro-Russian groups seeking to break up Ukraine would almost inevitably involve the use of violence against Ukrainian armed forces, which could be expected to defend their country, and against Ukrainian civilians. That would be a reasonable inference in the light of experience of the subsequent Russian intervention in Crimea and eastern Ukraine during 2014, on which Ukraine relies in its pleadings. More than 9,000 people are said to have lost their lives in the conflict, and 21,000 are said to have been injured.

175. United Kingdom courts have not previously had to consider whether threats to the safety of a state's citizens, or to the safety of members of its armed forces, can constitute duress of the person. We consider that in principle they can.

176. It has long been established that a threat to the person may amount to duress. Such threats, unless justified (eg where made in self-defence), have always been treated as illegitimate. The threat need not be directed at the contracting party. It will suffice, for example, if the threat is directed against the contracting party's family (*Singh v Redford* [2018] EWHC 2390 (Ch), para 88; see also *Williams v Bayley* (1866) LR 1 HL 200, *Kaufman v Gerson* [1904] 1 KB 591), or its employees (*Royal Boskalis Westminster NV v Mountain* [1999] QB 674, 689; *Gulf Azov Shipping Co Ltd v Idisi* [2001] EWCA Civ 505; [2001] 2 All ER (Comm) 673).

177. A threat to the person need not be unlawful under English law in order to constitute duress. For example, in the *Royal Boskalis Westminster* case, the court did not find it necessary to consider whether the conduct in question (committed by the Iraqi authorities in Iraq) constituted a tort under English law (see p 730). It has been accepted in criminal law that a threat by A to kill herself unless B commits an offence is capable of constituting duress (*R v Martin* [1989] 1 All ER 652; (1989) 88 Cr App R 343). The same conclusion would in our view be reached in a civil context if A threatened to kill herself unless B consented to a contract. Even in a situation where the person making the threat is legally entitled to use force against the person threatened (for example, in the exercise of powers to maintain order or discipline), the making of a demand backed up by such a threat could nevertheless be a form of pressure which English law would regard as illegitimate. One might, for example, envisage a situation in the past in which a ship's commanding officer was entitled to impose flogging on a crew member who had committed a disciplinary offence, and threatened to do so unless the crew member assigned to the officer his right to prize money. Such a threat would be regarded as illegitimate pressure, even if the violence might be lawfully inflicted.

178. If pressure to enter into a contract is illegitimate, it cannot make any difference in principle whether it is exerted by a private individual or body, or by a state. For example, the *Royal Boskalis Westminster* case concerned a threat by the government of Iraq to use a large number of the plaintiffs' employees as "human shields": a threat which was described by Phillips LJ as "about as cogent and unconscionable a form of duress as one can imagine" (p 730). Equally if, for example, State A threatened to assassinate the Prime Minister of State B unless State B signed an agreement, that could constitute duress as understood in English law.

179. The authorities cited in para 176 above demonstrate the capacity of threats against one person to constitute illegitimate pressure upon another person where there is a family or contractual relationship between those persons, but they do not suggest that such a relationship is essential. In principle, the relevant question is whether the threat of physical violence imposed illegitimate pressure upon the person at whom the threat was directed to comply with the demands of the person making the threat. In the particular case of threats directed against a state, a government could hardly be indifferent to threats to the safety of its own citizens or the members of its armed forces, given its responsibilities towards them. 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.

180. If, for example, the situation envisaged in para 178 above were varied so that the threat made by State A was not that State B's Prime Minister would be assassinated, but that its cities would be subjected to missile attacks and air strikes,

the effect on the resulting agreement could be expected to be the same. In each case, the pressure exerted could well amount to duress as understood in English law.

181. In response, the Trustee pointed out that, under the contract whose validity is in dispute, the Russian Federation paid Ukraine US$ 3 billion through the issuance of the Notes. Ukraine now seeks to exploit the doctrine of duress, the Trustee submitted, in order to avoid its liability to repay the US$ 3 billion, as it contracted to do, when the time for repayment arrived. The Trustee submitted that it is hard to see what is unfair, let alone unconscionable, about treating Ukraine as bound by its obligation to give money back.

182. In reply, Ukraine submitted that the terms of the Notes were onerous and, for Ukraine, unusual, and that that was accepted by the judge and the Court of Appeal. That was disputed by the Trustee, which pointed out that the terms in question were never triggered in any event. These are not issues which this court need resolve for present purposes. The fundamental point is that a contract which was entered into as a result of duress can be set aside. It is not necessary to establish that the contract is in addition disadvantageous to the victim of the duress (although, if the contract conferred a benefit on the victim, an obligation to make restitution might arise). It is also fundamental that duress is assessed as at the time when the impugned contract was entered into. It is immaterial to the existence of duress whether the terms of the contract were subsequently enforced.

183. It is unnecessary to consider in comparable detail Ukraine's contention that the threatened use of force also constituted duress of goods. The submission proceeds on the basis that the use of force by the Russian Federation in support of pro-Russian groups seeking to break up Ukraine would almost inevitably result in the destruction of, or damage to, property in Ukraine, including property belonging to the state. In consequence, a threat to use force is in substance a threat to destroy or damage property. That contention appears to us to be relevant to establish a case of duress. Essentially the same considerations apply as in the case of duress to the person, mutatis mutandis. The central question is whether the threatened use of force, in so far as it involved a threat to Ukrainian property, imposed what English law regards as illegitimate pressure upon Ukraine to enter into the relevant agreement. That question can only be determined after trial.

(v) Justiciability

184. Given our acceptance that Ukraine's allegations concerning the threatened use of force are relevant to support its defence of duress, the question arises

whether the doctrine of foreign act of state applies, so as to render the issue non-justiciable. In our view it does not.

185. In *Belhaj v Straw*, Lord Neuberger (with whose reasoning the majority of the court agreed) distinguished four possible domestic rules concerning acts of foreign states:

> (1) "The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state" (at para 121). Lord Neuberger considered this rule to be well established (para 125).
>
> (2) "The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state" (para 122). Lord Neuberger left open some aspects of the ambit of such a rule (at paras 136-143), but those matters have since been clarified in *Deutsche Bank AG London Branch v Receivers Appointed by the Court* [2021] UKSC 57; [2023] AC 156 ("*Maduro v Guaidó*"), para 135.
>
> (3) "The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it" (para 123).
>
> (4) "A possible fourth rule was described by Rix LJ in a judgment on behalf of the Court of Appeal in *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855; [2014] QB 458, para 65, as being that 'the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office'" (para 124).

186. Ukraine's allegations about the Russian Federation's threatened use of force fall outside the scope of the first and second rules, since those rules are concerned with acts of a state which take effect within its own territory, whereas the threats in question were allegedly of violence by the Russian Federation towards persons and

property within the territory of Ukraine. We need therefore consider only Lord Neuberger's third and fourth rules.

187. As Lord Neuberger explained at para 123 of his judgment, the third rule applies to "issues which are inappropriate for the courts of the United Kingdom to resolve because they involve *a challenge to the lawfulness of the act of a foreign state* which is of such a nature that a municipal judge cannot or ought not rule on it" (emphasis added). He went on to say (ibid) that "the courts of this country will not, as a matter of judicial policy, determine *the legality of acts of a foreign government* in the conduct of foreign affairs" (emphasis added).

188. The same point was made by Lord Sumption in the same case. He stated at para 234 the general rule "that the English courts will not adjudicate on *the lawfulness of the extraterritorial acts of foreign states* in their dealings with other states or the subjects of other states" (emphasis added). He explained (ibid):

> "This is because once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject the sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country. ... If a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like. This is not for reasons peculiar to armed conflict, which is no more than an ill-defined extreme of inter-state relations. The rule is altogether more general …"

However, that statement was subject to an important qualification, which he explained at para 240:

> "The act of state doctrine does not apply … simply by reason of the fact that the subject matter may incidentally disclose that a state has acted unlawfully. It applies only where the invalidity or unlawfulness of the state's

> sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it."

(See also *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International* (1990) 493 US 400, 406 and *Maduro v Guaidó* at paras 151-152.)

189. In the present case, following the line of authorities from *Dimskal Shipping* to *Times Travel,* whether the contract into which Ukraine entered is liable to be set aside on the ground of duress depends on an assessment, under English law, of whether the pressure imposed by the relevant threats was an illegitimate reason for Ukraine's entering into the contract. Duress of the person or of goods is illegitimate pressure in itself. The resolution of the plea of duress founded on the threat of force does not, therefore, require a ruling on the legality or validity of the alleged conduct of the Russian Federation under international law. To employ Lord Sumption's words in *Belhaj v Straw* (para 240), the invalidity or unlawfulness of the Russian Federation's acts under international law is not part of the subject matter of the action. Nor does any question arise as to the validity or lawfulness of the Russian Federation's conduct under English municipal law. A question does arise as to whether the Russian Federation's alleged threats to the safety of the people of Ukraine and their property renders the Notes issued under the Trust Deed voidable under English law by reason of duress. However, there can be no objection to the English courts' determining that question, where the Russian Federation has arranged that the Trust Deed is governed by English law and that the English courts have jurisdiction to determine any questions arising.

190. In *Belhaj v Straw,* Lord Sumption gave an illustration from immigration law (para 241):

> "Where an English court makes findings in a deportation case about, say, the use of torture in a foreign jurisdiction it is not concerned with its lawfulness or unlawfulness, either under the law of the foreign jurisdiction or in international law. It is simply applying its own standards to an exercise of its own jurisdiction."

That illustration is analogous to the present case. If the English courts were to accept jurisdiction over the pleaded defence of duress, that would necessarily involve an application of the standards of English law to such facts as might be established, but it would not require them to rule on the lawfulness of a foreign act of state.

191. In short, the act of state doctrine is not engaged by the defence of duress now put forward by Ukraine because that defence does not place in issue the validity of any foreign sovereign act. Having reached that conclusion, it is unnecessary to consider Ukraine's submissions concerning two exceptions or limitations to the act of state doctrine which might have applied if the doctrine had been engaged: first, the exception which applies where judicial abstention would conflict with fundamental principles of public policy of the domestic forum; and secondly, a commercial exception which is said to apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character. These issues do not arise in the light of the conclusions to which we have come.

192. It remains to consider Lord Neuberger's possible fourth rule (para 185(4) above). Lord Neuberger accepted that such a rule has no clear basis in any judicial decisions in this jurisdiction, although on one reading the Court of Appeal in *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24; [2014] 1 WLR 872 seems to have accepted its existence (*Belhaj v Straw* para 132). Lord Neuberger observed (at para 149):

> "If a member of the executive was to say formally to a court that the judicial determination of an issue raised in certain legal proceedings could embarrass the Government's relations with another state, I do not consider that the court could be bound to refuse to determine that issue. That would involve the executive dictating to the judiciary, which would be quite unacceptable at least in the absence of clear legislative sanction. However, there is a more powerful argument for saying that such a statement should be a factor which the court should be entitled to take into account when deciding whether to refuse to determine an issue."

He considered that some indirect support for such an argument could be found in *In re Westinghouse Electric Corpn Uranium Contract Litigation MDL Docket No 235 (Nos 1 & 2)* [1978] AC 547, 616-617, 639-640, and in *Adams v Adams* [1971] P 188, 198. Similarly, also in *Belhaj v Straw*, Lord Mance stated at para 105 that he would not exclude the relevance to justiciability of a clear governmental indication as to real and likely damage to United Kingdom foreign policy or security interests.

193. The possible existence of such a principle of non-justiciability in the field of foreign relations is a matter of controversy. In the present case, however, there has been no statement to the court on behalf of the executive drawing attention to any

embarrassment to the executive in the conduct of foreign relations or any damage to United Kingdom foreign policy or security interests which is likely to result from the judicial determination of the defence of duress. As a result, there is no scope for the application here of such a principle of non-justiciability.

(5) Conclusions in relation to duress

194. For these reasons we conclude that Ukraine's defence of duress, so far as based on the threats of the use of physical violence towards Ukraine's armed forces and civilians, and the threats of damage to, or destruction of, Ukrainian property, which were allegedly implicit in the threats allegedly made by Mr Glazyev on behalf of the Russian Federation, cannot be determined without a trial. On that ground alone, the Trustee is not entitled to summary judgment.

195. On the other hand, the economic pressure alleged by Ukraine is not illegitimate under English law and is therefore not in itself sufficient to establish duress, for the reasons explained above.

196. That is not, however, to say that the allegations of economic pressure are irrelevant. Ukraine's pleaded case is that the economic pressure and the threats of physical violence together compelled them to enter into the agreement in question. Since only the latter threats are capable of constituting duress, it will be necessary to consider *their* causal impact upon Ukraine's decision to enter into the agreement. As was explained at para 143 above, the relevant question, so far as the alleged threats of violence to the person are concerned, will be whether those threats were *a* reason (not *the* reason, or the predominant reason, or the clinching reason) for Ukraine's decision. The onus will be on the Trustee to establish that those threats contributed nothing to Ukraine's decision. The alleged economic pressure, and threats of further economic pressure, are relevant as forming part of a combined strategy with the alleged threats of violence, or at least as part of the factual context in which those threats are alleged to have been made. If they accentuated the impact of the threats of violence, that is a factor which strengthens, not weakens, Ukraine's case. As Lord Cross observed, giving the majority judgment in *Barton v Armstrong,* p 120, "if one man threatens another with unpleasant consequences if he does not act in a particular way, he must take the risk that the impact of his threats may be accentuated by extraneous circumstances for which he is not in fact responsible": a fortiori, if he is indeed responsible for those circumstances. It should not, therefore, be thought that it will be enough for the Trustee to establish that economic pressure, or threats of economic pressure, were the principal reason for Ukraine's decision.

197. Ukraine will have to amend its pleadings so as to focus more clearly than at present its case of duress of the person and of goods, based on the Russian Federation's alleged threats of the use of force. Its averments of fact in respect of the alleged trade restrictions are also material, as we have explained. On the other hand, its averments in respect of alleged breaches of international law, whether in respect of trade restrictions or threats of the use of force, introduce issues which are not material to the defence of duress, and on which it is unnecessary and inappropriate for the court to make any determination. Those averments ought not, therefore, to go forward for trial.

4. Countermeasures

198. Ukraine submits, in the alternative to its case on duress, that non-payment of the sums due under the Notes is a lawful countermeasure available to Ukraine. It submits that if, contrary to its primary case, the contracts are valid, Ukraine is nevertheless entitled to respond to internationally wrongful actions on the part of the Russian Federation with a proportionate countermeasure directed towards the Russian Federation by non-performance of an obligation of Ukraine otherwise due, with a view to inducing the Russian Federation to desist from its internationally wrongful conduct. The conduct on the part of the Russian Federation on which Ukraine relies in this regard includes the invasion and annexation of Crimea. As a result, Ukraine submits that it is entitled to respond by non-payment under the Notes and that this affords an arguable defence to the present proceedings because contractual obligations under English law should not apply to the extent necessary to give effect to a lawful countermeasure in customary international law.

199. Blair J rejected the submission on the ground that counter-measures are not justiciable by the English court and that this part of Ukraine's case is in substance the same as its case on duress and must fail for the same reasons. The Court of Appeal dismissed this ground summarily, holding that the doctrine of countermeasures cannot assist Ukraine in this case because of the lack of any relevant foothold in domestic law. In its view, the doctrine operates only at the level of international law and, in the absence of a domestic foothold, courts in this jurisdiction have no proper role in examining it or in pronouncing upon the merits of the arguments put forward by Ukraine under this heading.

200. Before us, Mr Ben Jaffey KC on behalf of Ukraine submits that the countermeasures defence has effect in domestic law in the present case to preclude any claim for breach of contract. He submits that this is not a case in which there is no relevant domestic right for the court to determine and that, unlike other cases which may be thinly-veiled attempts to procure the court to opine on controversial

matters of international law through a claim for judicial review, the present case is firmly grounded in the validity and enforceability of an English law contract, voluntarily submitted to the English court for adjudication by the parties. He calls on the court to recognise a common law defence to a claim for breach of contract which is founded on the public international law right to take proportionate countermeasures. In support of this submission he relies on the recent decision of the Court of Appeal in *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075.

201. Judge Crawford described countermeasures in the following way

> "Countermeasures constitute one of the most distinctive aspects of international law when compared to domestic legal systems. In essence, the term refers to the possibility for a state to resort to 'private justice' when its demands for cessation of an illegal conduct and/or adequate reparation are not met by the wrongdoer. The wronged state may then respond by taking measures aimed at inducing the wrongdoing state to comply with its obligations of cessation and reparation, and which would in principle violate its duties to the latter state, but the wrongfulness of which is precluded due to their character as countermeasures." (Crawford, Brownlie's Principles of Public International Law, 9th ed (2019), p 572)

In the *Gabčíkovo-Nagymaros Project case (Hungary/Slovakia)* [1997] ICJ Rep 7 at para 83, the International Court of Justice accepted that countermeasures might justify otherwise unlawful conduct. However, in order to be justifiable a countermeasure must meet certain conditions (See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits Judgment)* [1986] ICJ Rep 14, para 249; *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, Decision of 9 December 1978,* UN Reports of International Arbitral Awards (RIAA), Vol XVIII, pp 417-493; 54 ILR 303, paras 80-96.) In the *Gabčíkovo-Nagymaros Project case* (at paras 83-87) the ICJ emphasized that, first, a lawful countermeasure must be "taken in response to a previous international wrongful act of another State and must be directed against that State". Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. Thirdly, the effects of a countermeasure must be commensurate with the injury suffered taking account of the rights in question. Fourthly, having concluded that the diversion of the River Danube by Czechoslovakia was not a lawful countermeasure because it was not proportionate, the ICJ considered that it was not

necessary to rule on whether a further condition of lawfulness of countermeasures was satisfied, namely "that its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and that the measure must therefore be reversible".

202. Countermeasures in international law are addressed in detail in the International Law Commission's Draft Articles on State Responsibility, 2001, Articles 22, 49-54. The commentary to the Draft Articles emphasizes the need to ensure that there are adequate safeguards against abuse which the Draft Articles seek to achieve in a variety of ways.

> "First, …, it concerns only non-forcible countermeasures (article 50(1)(a)). Secondly, countermeasures are limited by the requirement that they are directed at the responsible State and not at third parties (article 49(1) & (2)). Thirdly, since countermeasures are intended as instrumental – in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment – they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (articles 49(2), (3), 53). Fourthly, countermeasures must be proportionate (article 51). Fifthly, they must not involve any departure from certain basic obligations (article 50(1)), in particular those under peremptory norms of general international law." (Crawford, The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries (2002), p 283)

203. We set to one side the possible obstacles in the path of Ukraine's submissions arising from the fact that countermeasures are limited to the non-performance of international obligations of the state taking the countermeasures and that they may only be adopted against a state which is the author of the internationally wrongful act. (See, generally, Crawford's Commentary at p 169.) In that regard, we note that we are concerned with tradeable notes and the performance of a contract governed by English law and that the obligation in contract is not owed to the Russian Federation but to an English corporation which is administering a trust of which the Russian Federation is the current beneficiary. We also set to one side the temporary character of lawful countermeasures which must be as far as possible reversible in their effects in terms of future legal relations between the two states concerned. We turn, instead, to a more fundamental objection to Ukraine's case on countermeasures.

204. Ukraine's submission that the common law should give effect to the rules of public international law governing countermeasures between states cannot be accepted. Perhaps the most resounding statement that customary international law is adopted by the common law as part of the law of England is that of Blackstone:

> "… [T]he law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."

(Blackstone, Commentaries on the Laws of England, Fourth Book, Fifth Chapter, p 67). This view has had supporters both judicial (for example, Lord Denning MR in *Trendtex Trading Corpn Ltd v Central Bank of Nigeria* [1977] QB 529) and academic (for example, Hersch Lauterpacht, "Is International Law a Part of the Law of England?" (1939) Transactions of the Grotius Society Vol 25, pp 51-88.; Sir Robert Jennings and Sir Arthur Watts in Oppenheim's International Law, 9th Ed, (1992), pp 56-57). However, the application by courts in this jurisdiction of rules of international law is clearly restricted by domestic constitutional principles, including principles of non-justiciability. Moreover, it is not possible to make sweeping deductions from broad statements of principle. The relationship between customary international law and the common law in this jurisdiction is far more complex. (See the judgment of the Divisional Court in *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin) at para 166**.**) It seems preferable, therefore, to regard customary international law not as automatically a part of the common law but as a source of the common law on which courts in this jurisdiction may draw as appropriate. (See *R v Jones (Margaret)* [2007] 1 AC 136 per Lord Bingham at para 11; Crawford, Brownlie's Principles of International Law, 9th Ed (2019), pp 58-67.) As part of this process they will have to consider whether there may exist any impediments or bars to giving effect to customary international law as a result of domestic constitutional principles. Moreover, as Lord Mance pointed out in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 (at para 149), it appears that judges in this jurisdiction may face a policy issue as to whether to recognise and enforce a rule of customary international law. However, given the generally beneficent character of customary international law, the presumption should be in favour of its application. As Lord Mance observed in *Keyu* (at para 150):

> "Speaking generally, in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and

> common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration."

205. The reliance by Ukraine on the decision of the Court of Appeal in *Freedom and Justice Party* is therefore misplaced. That decision provides no support for the automatic adoption of rules of international law into domestic law in the United Kingdom in all circumstances. On the contrary, it highlights the complexity of the relationship of international law and municipal law within the United Kingdom. In that case the Court of Appeal held that there was a common law rule according immunity to members of special missions accepted by the United Kingdom. However, it did so in circumstances where there was a rule of customary international law requiring the grant of immunity in such circumstances and where there was no positive rule of municipal law, based on constitutional principle, statute law or common law, that it should not give effect to the rule of international law. The case for giving effect to customary international law was, therefore, all the more compelling because a failure to give effect to that rule would have resulted in the United Kingdom being in breach of its international obligations.

206. *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282 is much closer to the present case. There, an international organisation (AOI) had been set up in 1975 by treaty between Egypt and the Gulf states, to create an Arab arms manufacturing industry. The treaty provided that the AOI should have juridical personality and should not be subject to the law of any of the Member States. Following the signing of a peace treaty between Egypt and Israel in 1979, the Gulf states declared that AOI would be liquidated. Egypt refused to accept the validity of the declaration and purported, by the issue of domestic laws, to continue its existence as an exclusively Egyptian organisation. In proceedings before the English courts to enforce an award made in an international arbitration following cancellation of a joint venture agreement between Westland and AOI, one issue which arose was whether, in the circumstances of the conduct of the three Gulf states, there was any principle of justifiable response or necessity in public international law which would have justified Egypt in passing the relevant legislation. Colman J correctly rejected the submission in the following terms:

> “The problem about issue (ii) is that it involves considering (a) whether the conduct of the three Gulf states was such as to amount to a wrongful repudiation of the treaty and (b) whether in so far as Law No 30 imposed a control regime for AOI which differed from that in the treaty, it represented a justifiable response in public international law. Because of the principles of non-justiciability, an

> English court can decide neither issue (a) nor issue (b). Such issues can be decided only by reference to public international law, by a public international law forum and not by an English municipal court, for both issues necessarily involve the determination of whether foreign sovereign states are acting consistently or inconsistently with the rules of public international law. It is thus unnecessary to investigate what impact this part of the case has on these proceedings." (at p 311)

207. Whether or not Ukraine had a right in international law to take legitimate countermeasures against the Russian Federation on the international plane, such a right cannot assist Ukraine in these proceedings. The principles of international law governing the rights of states to take countermeasures are, pre-eminently, rules addressed to the conduct of states amongst themselves on the international plane. They are in general not justiciable before courts in this jurisdiction for two reasons. First, English law does not recognise a defence reflecting the availability of countermeasures on the international plane. The parties selected English law as the law governing their contracts and the exclusive jurisdiction of the English courts and the asserted defence has no foothold in domestic law. (See *R (Al-Haq) v. Secretary of State for Foreign and Commonwealth Affairs* per Pill LJ at paras 44 and 45; per Cranston J at paras 53-55). Ukraine's case on countermeasures is, quite simply, irrelevant to the determination of the rights and duties arising in English law in relation to the Notes. To employ the terminology of Lord Mance in *Keyu*, there is here no applicable rule of common law which the courts themselves can sensibly adapt to reflect customary international law. That in itself is a complete answer to Ukraine's plea founded on countermeasures. Secondly, the subject matter of such inter-state disputes is inherently unsuitable for adjudication by courts in this jurisdiction. If the availability of countermeasures at the level of international law were accepted as giving rise to a defence in domestic law, national courts would become the arbiter of inter-state disputes governed by international law which is not their function. They would be required to rule on the legality of conduct of states on the international plane and whether it constituted an internationally wrongful act. In the present case, Ukraine accepts that, according to its case, at trial a court in this jurisdiction would not be bound by the views of the executive in the United Kingdom but would be required to make its own assessment on the basis of evidence led as to the legality in international law of Russia's invasion and annexation of Crimea. In addition, it would be required to assess the proportionality of the response, taking account of the gravity of the internationally wrongful act and the rights in question. Accordingly, at trial, the court would have to assess the impact of Russia's conduct, including its effect on the productive economic capacity of Ukraine. In our view, Ukraine's case on countermeasures falls prima facie within the principle of non-justiciability of inter-state disputes identified by Lord Wilberforce in *Buttes Gas,* pp

931-938. We acknowledge that this second objection may, in certain circumstances, be subject to exceptions founded on the public policy of the domestic forum. (See *Kuwait Airways, Belhaj v Straw* and the judgment of the Court of Appeal in the present proceedings.) This is a matter on which it has not been necessary to express a concluded view on this appeal. (See para 191 above.) However, the first objection is in our view an insuperable obstacle to the importation into domestic law within the United Kingdom of the international law principles of countermeasures for which Ukraine contends.

208. Accordingly, we conclude that in these proceedings Ukraine has no arguable defence based on any right it may have in international law to take countermeasures on the international plane.

5. Conclusions

209. For the foregoing reasons, we conclude that the Trustee is not entitled to summary judgment. Ukraine should be permitted to defend the claim on the ground of duress, to the extent identified in this judgment (ie to the extent - and only to the extent - that it is based on duress of the person or of goods resulting from the alleged threatened use of force), subject to the amendment of its pleadings so as to clarify that that (and that alone) is the basis of its defence of duress. The Trustee's appeal is therefore dismissed, although for different reasons from those of the Court of Appeal.

210. We also conclude that Ukraine has no arguable case that it lacked capacity to issue the Notes or to enter into the relevant contracts; or that the Notes were issued, or the relevant contracts entered into, without authority; or that it is entitled to withhold payment of the sums due under the Notes as a lawful countermeasure. Ukraine's appeal is therefore dismissed.

LORD CARNWATH (dissenting in part):

Overview

211. Save in respect of the issues of duress and countermeasures, I respectfully agree with the majority that the defence should be struck out for the reasons they give. I agree that the defence of duress is arguable and should proceed to trial, but on a broader basis than that favoured by the majority. Contrary to their view, I consider that the countermeasures defence should also be permitted to proceed.

Background

212. To set the scene, I start with Ukraine's summary of its case (as at 26 May 2016), taken from the Annex to Blair J's judgment:

> "This claim is explicitly brought for the benefit of and upon the instruction of the Russian Federation. The claim forms part of a broader strategy of unlawful and illegitimate economic, political and military aggression by the Russian Federation against Ukraine and its people aimed at frustrating the will of the Ukrainian people to participate in the process of European integration. As part of that strategy, the Russian Federation applied massive, unlawful and illegitimate economic and political pressure to Ukraine in 2013 to deter the administration led by Viktor Yanukovych from signing an Association Agreement with the European Union, and to accept Russian financial support instead. The Trust Deed and Agency Agreement that are the subject of this action were the fruit of that pressure. When Mr Yanukovych was removed from power following popular protests sparked by his administration's decision, procured by the Russian Federation, not to proceed with the Association Agreement, the Russian Federation responded with a campaign of unlawful aggression that has included the illegal invasion and occupation of sovereign Ukrainian territory, namely the Crimean peninsula, and military and other interference and unlawful use of force in eastern Ukraine. These Russian actions have killed thousands of Ukrainian citizens, injured tens of thousands, displaced millions, inflicted severe damage to Ukraine's economy and infrastructure and resulted in Russian seizure of Ukrainian state assets, which damage is measured in many billions of dollars.
>
> …
>
> So far as… the contractual arrangements have any effect, they were procured by duress and Ukraine's purported consent to them was vitiated by unlawful and illegitimate threats and pressure exerted by the Russian Federation,

> including illegal trade restrictive measures and threats to Ukraine's territorial integrity and independence.
>
> The Russian Federation's subsequent illegal invasion and unlawful occupation of the Crimean peninsula and intervention in the eastern regions of Ukrainian territory had the effect of depriving Ukraine of the entire purported economic benefit of the transaction which the Russian Federation now seeks to enforce through its instruction of the Trustee in these proceedings.
>
> The Court should dismiss the claim, or decline to grant the Russian Federation the relief it seeks through the Trustee, or stay the claim unless and until the Russian Federation complies with its obligations under public international law."

For present purposes we have to assume that these allegations of fact were correct. We are not at this stage asked by the pleadings to have regard to subsequent events, but we cannot realistically ignore them. They certainly do nothing to diminish the force of the pleaded defence. It is clear that this is no ordinary English contract dispute.

213. The judge (paras 374-377) held that the issues so raised were non-justiciable in the domestic courts under the foreign act of state doctrine within the "third rule", as explained in this court in *Belhaj v Straw* [2017] AC 964 (in particular per Lord Neuberger PSC at para 123). The Court of Appeal disagreed (paras 173-181). While accepting that the acts of Russia on which Ukraine relied were "acts of high policy… in the sphere of international relations", within the scope of the third rule, the court held that Ukraine could rely on the "public policy exception", as explained by Lord Neuberger (paras 153ff), and exemplified by cases such as *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883. On this issue I agree with the Court of Appeal, substantially for the reasons they give.

214. I note in particular the emphasis given by the court to the nature of the transaction, and of the proceedings, in which international and domestic law inevitably interact:

> "First, instead of dealing with Ukraine pursuant to a treaty governed solely by international law, Russia chose to

> structure its loan relationship with Ukraine in the form of a Eurobond, with an English choice of law clause and a clause choosing the English court as the forum. The strong willingness of English courts to apply rule of law standards to do substantive justice between parties to a contract governed by English law is well known. At the point of contracting, Russia chose to submit any claim by Law Debenture to the jurisdiction of the English court and hence has taken the risk with its eyes open that the court would apply the English law of duress as a substantive matter. This is a materially different context from one in which a third state has its actions called into question in litigation between two different parties, such as in *Belhaj*….” (para 175)

215. I would go further. As the majority judgment of this court explains, a sovereign state derives its very existence and legal authority from international law, and it possesses “the totality of international rights and duties recognised by international law” (para 19 above). There is no reason why it should be able to discard those attributes when it engages directly in domestic law transactions or litigation, as in this case. International and domestic law inevitably interact. As a willing party to such transactions, the state cannot complain if the process is informed by the legal standards inherent in its international status.

216. The Court of Appeal (para 179) noted the recognition by the UK government that the activities of Russia in seizing the Crimea and assisting military action by insurgents in Eastern Ukraine were in clear violation of Russia's obligations under international law, including “the norm of ius cogens reflected in article 2(4) of the UN Charter” (prohibition of threat or use of force). They commented (para 180):

> “…, the public policy exception to the third rule is founded upon English public policy and is not restricted to cases of grave infringement of human rights… In our view, this is because domestic public policy here is informed by public policy inherent in international law when it identifies norms as peremptory norms with the character of ius cogens. Identification of norms as having that character indicates the strong international public policy which exists to ensure that they are respected and given effect. Domestic public policy recognises and gives similar effect to that strong public policy. There is no norm more fundamental to the

> system of international law and the principle of the rule of law than that set out in article 2(4) of the UN Charter."

They concluded that Ukraine has "a good arguable case that the public policy exception has effect in this case so as to disapply the third rule of foreign act of state on which Law Debenture seeks to rely" (para 181). I agree.

Duress

217. Against this background I turn to consider the majority's treatment of Ukraine's case on duress. Two points stand out: first, the division between economic and physical threats, and secondly the treatment of illegality. The judgment proceeds on the basis that, although the case is presented as a single concerted campaign involving both economic pressure and threats of force, those two elements must be treated as separate categories for the purpose of the English law of duress. The first is dismissed as no different in kind from trade restrictions and other such measures which have been an accepted part of inter-state practice since classical times. It cannot, it is said, support a defence of duress in itself, although it may be relevant as forming part of a combined strategy with the alleged threats of violence, or at least as part of the factual context in which those threats are alleged to have been made. Its illegality or otherwise under international law is treated as non-justiciable, and in any event irrelevant to the principles of common law duress as now authoritatively stated in the *Times Travel* case. By contrast the threats of force are accepted as raising an arguable defence under established common law principles, but one to which issues of illegality under international law would again be irrelevant.

218. The result is that the defence based on threats of physical violence to persons or goods is allowed to proceed, but the pleadings are to be amended: first, to "focus more clearly than at present" on its case of duress of the person and of goods; and, secondly, to delete any allegations of breach of international law as being immaterial to the defence of duress.

219. In my respectful view, this suggested reformulation of Ukraine's case is unnecessary, and unjustified by legal principle. I see no reason why it should be appropriate to separate the two forms of threat, and to treat the first as no more than the background to the other, when they were in fact, and are claimed to have been, parts of a single concerted course of action.

220. More importantly, for the reasons already discussed, it seems to me both unrealistic and unnecessary to exclude any allegation of illegality on the international

plane. That approach seems to be derived from the court's exposition of the principles of common law duress in the *Times Travel* case. The context was of course entirely different. It is true, as the majority judgment says (para 161), that the court has moved to a stricter approach than the "broad test of moral or social acceptability" derived by the Court of Appeal from earlier authority. However, that leaves open the question as to what constitutes an "illegitimate" demand in the present context of a transaction between two sovereign states. The *Dimskal Shipping* case, cited by the majority (para 163) throws no light on that issue, since the circumstances were quite different; in particular it related to a relationship between private parties. I find it hard to see why, in judging on the domestic plane whether the conduct of one sovereign state to another is "illegitimate" for the purposes of the law of duress, the court should treat as wholly irrelevant the legal standards which govern their international relationship.

221. Accordingly, in agreement with the Court of Appeal, I would have allowed the defence of duress to proceed as pleaded.

Countermeasures

222. As the majority judgment explains, Ukraine submits that, even if the contracts are valid, non-payment of the sums due under the Notes is a lawful countermeasure, by way of response to internationally wrongful actions on the part of the Russian Federation. It is unable to point to any previous authority in the context of the domestic law of contract. It asks us rather to recognise a new form of common law defence founded on international law, and appropriate to the special character of this case.

223. At a practical level this line of defence may seem better adapted than duress to the merits of the current dispute. The defence of duress, even if successful, leaves open the issue of how, if at all, Ukraine is to account for the money it undoubtedly received under the void contract. Whatever the answer to that question, a defence of countermeasures would enable it to justify retention of the money at least while the alleged illegality continues.

224. The relevant principles are explained in the majority judgment. For my purposes it is sufficient to refer to the summary in the International Law Commission's Draft Articles (quoted by the majority – para 202):

> "First, …, it concerns only non-forcible countermeasures (article 50(1)(a)). Secondly, countermeasures are limited by

> the requirement that they are directed at the responsible State and not at third parties (article 49(1) & (2)). Thirdly, since countermeasures are intended as instrumental – in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment – they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (articles 49(2),(3),53). Fourthly, countermeasures must be proportionate (article 51). Fifthly, they must not involve any departure from certain basic obligations (article 50(1)), in particular those under peremptory norms of general international law."

225. Those criteria appear to be satisfied. First, no force is involved in the withholding of payment. Secondly, although a third party (Law Debenture) is nominally involved, the claim is "explicitly brought for the benefit of and upon the instruction of the Russian Federation" (para 212 above). It is not suggested that any other party has a relevant interest. Thirdly, the countermeasures are "reversible" at any time, simply by payment. Fourthly, (although this may be an issue for trial), it is difficult to see why the withholding of $3bn is other than proportionate to the scale of damage alleged in the pleading. Fifthly withholding of payment involves no departure from the "peremptory norms" of international law.

226. The authorities cited by the majority (para 204), dating back to Blackstone in the 18th C, show that common law judges have not been afraid to use principles of international law to develop the common law where appropriate. The reasons given by the majority for not following that lead in the present context seem with respect unconvincing. It is said, rightly, that the relevant principles are "addressed to the conduct of states among themselves on the international plane". But it is not explained why those principles should not be applied when those same states choose to conduct their affairs within the framework of domestic law. It is said that there is currently no applicable rule of common law which can be adapted for the purpose, but that begs the question why an appropriate rule cannot be fashioned by reference to a clearly established principle of international law, as the common law has been able to do in the past.

227. Finally it is said that the subject matter is inherently unsuitable for adjudication by a domestic court, under the principles stated by Lord Wilberforce in *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888. However, as is recognised earlier in the majority judgment (para 127), those principles may be departed from in an exceptional case, such as in response to a clearly established breach of

international law, uniformly condemned by the international community. Ukraine submits that the extraordinary circumstances of this case justify such an exception. I see no reason why it should be prevented at this stage from seeking to make good that case at trial. Reference is made to the judgment of Colman J in *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282, but his comments were admittedly obiter, and the relevant state party (Egypt) was not directly involved in the transaction or the litigation.

Conclusion

228. For these reasons I would have allowed the defence to proceed to trial, as currently pleaded, on the issues both of duress and countermeasures.