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CASE AND COMMENT

RUSSIAN THREATS OF FORCE AGAINST UKRAINE MAY CONSTITUTE DURESS IN ENGLISH CONTRACT LAW

IN *Law Debenture Trust Corporation v Ukraine* [2023] UKSC 11 ("*Ukraine*") the Law Debenture Trust Corporation, acting on behalf of the Russian Federation ("Russia"), sought repayment of debt owed to Russia by Ukraine, pursuant to Eurobonds issued in 2013 with a nominal value of $3 billion (the "Notes"), which fell due in 2015 but were not repaid. The Supreme Court allowed Ukraine's pleaded defence that the Notes are voidable for duress to the person to proceed to trial. However, the court struck out all Ukraine's other pleaded defences, including its argument that it lacked capacity to enter into the agreements pursuant to which the Notes were issued (and/or that its Minister of Finance lacked ostensible authority to issue the Notes), and held that the international law doctrine of countermeasures was not part of English law. The decision is remarkable for its acceptance that threats of force by a state may amount to illegitimate pressure for the purposes of duress in English private law, and for its analysis of when English courts may refer to international law in applying English law. It is also a rare example of a private contractual claim giving rise to fundamental questions of international law.

The nub of Ukraine's defence was the argument that Russian pressure (intended to prevent Ukraine joining the EU) forced it into a position whereby it had no other international sources of finance and therefore no choice but to issue the Notes to Russia. In particular, its plea of duress was based both on threats of military force on Ukrainian territory (which eventually occurred after the loan was made, with the invasion and annexation of Crimea in 2014), and economic pressure in the form of threatened sanctions and other trade restrictions. The Supreme Court drew a line between the two types of threat, reflecting the crucial

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requirement for actionable duress that the threat is "illegitimate". It held that the threats of military invasion could properly be categorised as duress to the person, since it "cannot make any difference in principle whether such pressure is exerted by a private individual or body, or by a state" (at [178]) and the threat need not be directed at the other contracting party. The causal test for duress to the person is more generous than for other forms of duress, with Lord Cross in the Privy Council in *Barton v Armstrong* [1976] A.C. 104 opining that "if A's threats were "a" reason for B's executing the deed he is entitled to relief even though he might well have entered into the contract if A had uttered no threats to induce him to do so". This test was easily satisfied in *Ukraine*, since "a government could hardly be indifferent to threats to the safety of its own citizens or the members of the armed forces, given its responsibilities towards them" (at [179]).

Ukraine contended that Russia threatened trade restrictions and other economic measures in breach of international agreements, and threatened force and destruction of Ukraine's security and territorial integrity in breach of the prohibition of the use of force and the obligation of non-intervention, which it argued were *ius cogens* norms under international law (at [151]; the court did not discuss this point, but it is far from clear that the principle of non-intervention is a *ius cogens* norm). As a matter of private law, the Supreme Court looked to its recent decision in *Pakistan International Airline Corp v Times Travel (UK) Ltd.* [2021] UKSC 40, in which the majority adopted an extremely restrictive approach to when so-called "lawful act duress" might render a contract voidable. There Lord Hodge emphasised (at [2]) the need for "morally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable" and noted that hitherto only two examples of threats of actions, not in themselves unlawful, have been held to amount to illegitimate pressure. In *Ukraine*, Lord Reed took the same view, observing that the threat of trade restrictions "has been part of the armoury of the state since classical times", including what he called "morally admirable" sanctions (at [152]–[153]). English law had never recognised such measures as constituting duress and they cannot be regarded as "inherently illegitimate or contrary to public policy" (at [153]).

Moreover, and in contrast to the Court of Appeal, the defence of duress was *not* a "foothold" in English law that would allow the court to refer to the treaties that would allegedly have been breached if the Russian threats were carried out – the *English law* defence does not require the court to decide whether the conduct alleged (or allegedly threatened) was in breach of international law, only whether it constitutes illegitimate pressure (at [159]–[168]). Whether the treaties have been breached would not alter

the position in English law, since international law is not the standard by which to judge the illegitimacy of the relevant conduct (at [164]).

Ukraine also argued that the Notes were issued in flagrant violation of fundamental rules of its constitutional law. Counsel compared the corporate state with a private domestic corporation to argue that both entities only have the powers to act as granted by their constitutions, but the court was not persuaded: "Ukraine is not created by the law of Ukraine but by international law … a foreign state is not a creature of its own domestic law" (at [29]–[32]). Its *recognition* as such by the executive does not convert the foreign state into a domestic corporation but rather, constitutes recognition by English law of a legal status bestowed by another legal system. Moreover, recognition that Ukraine has the fullest possible capacity of a state could not "possibly amount to an infringement of the principles of international comity", as suggested by Ukraine – on the contrary, such recognition reflects its sovereignty (at [33]).

In the alternative, Ukraine argued that non-payment of the sums due under the Notes constitutes a lawful countermeasure in response to Russia's internationally wrongful actions (at [198]), thereby calling on the court to recognise a common law defence based on the international law of countermeasures. The court rejected this argument on the basis that (1) the obligations under the contract are owed to an English corporation administering a trust of which Russia is a *beneficiary*; and (2) countermeasures are "pre-eminently … addressed to the conduct of states amongst themselves on the international plane" and are therefore not justiciable. English law does not recognise the doctrine of countermeasures and there is "no applicable rule of common law which the courts themselves can sensibly adapt to reflect customary international law" (at [207]), and moreover such a defence would require English courts to arbitrate interstate disputes governed by international law.

The Supreme Court's decision is generally to be welcomed. On the defence of duress, it may seem striking that economic measures are generally not considered illegitimate pressure, even though (as the court acknowledged) states apply such measures precisely to coerce another. Nonetheless this reflects the extremely limited circumstances in which "lawful act duress" is regarded as illegitimate in private law. The court's decision also reflects the position in treaty and customary international law: Article 52 of the Vienna Convention on the Law of Treaties, which renders a treaty void if has been procured by the threat or use of force, is understood as excluding economic force/coercion, despite considerable concerns from Third World and communist states. (In the end, states agreed a non-binding Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, in which they "[s]olemnly condem[ed] the threat or use of pressure in any form, whether military, political or economic, by any States in order to coerce

another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent".)

The question whether the defence of duress provides a "foothold" in English law for reference to international law is more difficult: the majority's reasoning appears to be that English private law concerns itself only with *legitimacy* and thus no reference to international law is required. This suggests that, because English law does not require illegality for the defence of duress, breaches of international law are immaterial. Yet if *economic* threats constitute threats to breach international law, then surely they must be relevant to determining legitimacy for the purposes of English law? At the very least flagrant illegality at international law must be considered a prima facie ground of illegitimacy. As Lord Carnwath pointed out in his dissent, it is "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" (at [220]). Applying international law could help to distinguish between the more prosaic economic pressure applied by states as part of their political discourse and those that go beyond this and arguably constitute coercion. If this is accepted, then the defence of duress would become the domestic foothold for reference to international law. The court is concerned about creating rights and obligations in English law from unincorporated treaties but, as the judgment emphasises, the defence is governed by English law. International law would merely assist in determining what constitutes illegitimate pressure. The court noted that there is no principled reason to distinguish between violence by an individual or private body or state, and yet – because Ukraine only mentions but does not argue the point – it declined to decide whether the customary international law prohibition on the use of force was part of English law. Although this is an interstate norm that would not normally be applicable in English courts (it is distinct from the crime of aggression and would not therefore amount to asking the court to incorporate an international crime, which it has declined to do in the past: *R. v Jones and others* [2006] UKHL 16), it is surely at least relevant to application of the English law defence of duress. It seems somewhat artificial to reason from a principle of violent coercion among individuals in contract law, rather than from international law prohibitions.

On state capacity, the court must be right that international law determines the powers of a state to enter treaties. What is interesting is that the court openly acknowledges that Ukraine is "not created by the law of Ukraine but by international law" (at [29]) and English law *recognises* the legal personality of the state as established under international law: while it is true that under the British Constitution it is for the executive to recognise foreign states, the court's reasoning reflects a more monist approach as

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compared to the view that a foreign state is given personality in English law. It is also hardly surprising that the court concluded that countermeasures could not form part of English common law: these are clearly designed to operate as a self-help remedy on the international plane. However, it is worth noting that courts do adopt interstate rules for application in the common law (like state immunity) and it is not clear that there always needs to be a pre-existing common law rule that can be adapted to reflect customary international law (which the court appeared at one point to suggest). Moreover, international law does contain standards for countermeasures; the difficulty is that these standards require judgment (what is proportionate, for example), and it is understandable that the court would want to avoid having to make such assessments.

There is one final private law conundrum. Since Ukraine's defence that the Notes are voidable for duress to the person has been allowed to proceed to trial, this prompts the question of the appropriate remedy. The Supreme Court judgment at paragraph [8] states: "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." This implies, though it is not spelt out in the judgment, that Ukraine is resisting repaying that principal amount. Now it is unusual in the extreme for someone to plead, "You put a gun to my head and forced me to borrow money from you". If Ukraine succeeds in its plea that the Notes were procured by duress to the person and should be rescinded, that would require *restitutio in integrum*. It is hard to see how a borrower can rescind a loan yet retain the capital sum that was lent.

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