Neutral Citation Number: [2018] EWCA Civ 2026

Case No: A4/2017/1755

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT FINANCIAL LIST
Mr Justice Blair
[2017] EWHC 655 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/09/2018

Before:

LADY JUSTICE GLOSTER
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE SALES
and
LORD JUSTICE DAVID RICHARDS

- -

Between:

UKRAINE **(Represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine)**	**Appellant**
- and -	
THE LAW DEBENTURE TRUST CORPORATION P.L.C.	**Respondent**

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Bankim Thanki QC, Ben Jaffey QC and Simon Atrill (instructed by **Quinn Emanuel Urquhart & Sullivan (UK) LLP**) for the **Appellant**
Mark Howard QC and Oliver Jones (instructed by **Norton Rose Fulbright LLP**) for the **Respondent**

Hearing dates: 22-26 January 2018

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Approved Judgment

Lady Justice Gloster (Vice-President of the Court of Appeal, Civil Division), Lord Justice Sales and Lord Justice David Richards:

Introduction

1. This is the judgment of the Court to which all members of the court have contributed. The judgment contains a number of substantive sections, for each of which one member of the Court took primary responsibility: capacity, authority and ratification (David Richards LJ); duress, stay and counter-measures (Sales LJ); and affirmation and implied terms (Gloster LJ). Nonetheless, each member of the court has contributed to, and concurs in, the entire judgment.

2. The state of Ukraine (acting by its Minister of Finance acting upon the instructions of the Cabinet of Ministers of Ukraine) appeals against an order for summary judgment for the payment of US$3.075 billion plus interest made by Blair J on 29 March 2017. The appeal is brought with permission granted by the judge.

3. The claimant, and respondent to the appeal, is The Law Debenture Trust Corporation p.l.c. (Law Debenture) as the trustee of Notes with a nominal value of US$3 billion and carrying interest at 5% pa (the Notes). The Notes were constituted by a trust deed dated 24 December 2013 (the Trust Deed) to which the named parties were Law Debenture and Ukraine. The Trust Deed is expressed to be governed by English law, with the English courts having exclusive jurisdiction. By the terms of the Trust Deed, Ukraine waived sovereign immunity. The judge helpfully summarised the material terms of the Trust Deed and ancillary documents in his judgment at [36] – [41] which need not be repeated here. The documentation included an agency agreement between Ukraine, Law Debenture and Citibank, N.A., London Branch (Citibank) and others, pursuant to which Citibank would act as Principal Paying Agent and Registrar in respect of the Notes (the Agency Agreement). The Agency Agreement provided *inter alia* that Law Debenture might, by notice in writing to Ukraine, require Ukraine to pay all subsequent payments in respect of the Notes to or to the order of the Law Debenture and not to the Principal Paying Agent, once the Notes became due and payable.

4. The sole subscriber of the Notes was the Russian Federation (Russia), acting by its Ministry of Finance. The subscription monies of US$3 billion were received by Ukraine on 24 December 2013. Although the Notes were listed on the Irish stock exchange and were fully tradeable instruments, Russia has retained the Notes since their issue. Again, the judge helpfully summarised in his judgment at [9] – [18] the structure of the arrangement and the mechanics for the creation and issue of the Notes and for the payment of the subscription monies by Russia.

5. The interest on the Notes was payable biannually in arrears and, in the course of 2014-2015, Ukraine made three interest payments for the full amounts due on each occasion, totalling US$223,333,350. The principal amount of the Notes fell due for payment, together with the last instalment of interest, on 21 December 2015. Payment was not then made and Ukraine has since refused to make payment.

6. Law Debenture acts as trustee on behalf of the holder or holders of the Notes for the time being, and holds the benefit of the covenants, including the covenants to pay the principal of the Notes and interest, for such holder or holders. Russia has been the beneficial owner of the Notes at all times. Exercising powers conferred on it by the

Trust Deed, Russia gave on 16 February 2016 a direction to Law Debenture to take enforcement proceedings in respect of the Notes. The present proceedings were issued by Law Debenture on 17 February 2016, claiming US$3.075 billion (being the principal and the last instalment of interest due on 21 December 2015) and continuing interest.

7. Ukraine has not challenged the jurisdiction of the English courts to determine the claim against it, but it served a defence and resisted the application for summary judgment on a number of grounds.

8. There is an important political background to the defences raised by Ukraine. As summarised by the judge in his judgment at [4], Ukraine's case as to the background to the subscription of the Notes by Russia was as follows:

> 4. "Ukraine's case is that Russia applied massive, unlawful and illegitimate economic and political pressure to Ukraine in 2013 to deter the administration led by President Viktor Yanukovych from signing an Association Agreement with the European Union, which was to have been signed at the Vilnius Summit on 28 November 2013, and to accept Russian financial support instead. The Notes were to be the first tranche of that support."

9. Further background is given by the judge at [19] – [20]:

> "19. Ukraine's case is that the [Cabinet of Ministers of Ukraine's] decision on 21 November 2013 to suspend preparation for Ukraine's signing of the EU Association Agreement resulted in mass protests in the Ukrainian capital, Kyiv. Following President Yanukovych's decision not to sign at the Vilnius Summit on 28 November 2013, these protests grew significantly in size. President Yanukovych is reported to have fled Kyiv on 21 February 2014.
>
> 20. Shortly afterwards, Russia invaded Crimea. In addition to the invasion, Ukraine's case is that Russia has also fuelled and supported separatist elements in, interfered militarily in and succeeded in destabilising and causing huge destruction across eastern Ukraine."

10. In its defence, Ukraine alleges that the claim against it "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".

11. The defences relied on by Ukraine in opposition to the application for summary judgment were analysed by the judge in his judgment at [32] as falling under four heads. In addition, Ukraine submitted that, irrespective of its prospects of success, there were compelling reasons to proceed to trial because "the claim is in reality a tool of oppression which includes military occupation, destruction of property, the unlawful expropriation of assets, and terrible human cost" which should be the subject of a trial.

12. In a careful and detailed judgment, the judge concluded that Ukraine had no real prospect of success on any of the defences advanced by it and that no other grounds existed for a trial of the claim. He accordingly entered summary judgment against Ukraine pursuant to CPR 24.2.

13. The judge reached his conclusion purely on issues of law. His conclusion was that, even if the alleged facts were true, they provided no sustainable defence to the claim as a matter of English law, being the law which the parties including Ukraine had agreed should govern the Notes and Ukraine's obligations under them. No purpose would therefore be served by a trial that investigated the facts alleged by Ukraine and there were no other compelling reasons for a trial.

14. Likewise, on this appeal, but only for the purposes of the appeal, the facts alleged by Ukraine are assumed to be true. Further, as before the judge, no point is taken on the appeal (but again only for the purposes of the appeal) that the claimant is Law Debenture but some of the defences concern the alleged activities of Russia.

Grounds of appeal

15. The grounds of appeal reflect the defences argued by Ukraine before the judge, and it is convenient to refer to them by reference to the grounds of appeal. Each ground will be examined in detail in the relevant section of this judgment.

16. The first ground relates to the capacity of Ukraine to issue the Notes and to enter into the arrangements concerning the Notes and to the authority of those ministers and officials who purported to act on behalf of Ukraine in those matters. This ground contains two alternative grounds of defence. First, Ukraine lacked legal capacity to issue the Notes which are therefore void and unenforceable. This was a question to be judged by Ukrainian law and the expert evidence showed that, under Ukrainian law, Ukraine did not have the requisite capacity. Second, even if the state had legal capacity, those ministers and officials who purported to act on its behalf in agreeing the issue of the Notes and the surrounding contractual arrangements lacked, to the actual or presumed knowledge of Law Debenture, the authority to do so.

17. The second ground relates to a defence of duress. Ukraine alleges that the issue of the Notes was procured by unlawful and illegitimate threats made, and pressure exerted, by Russia, such as to vitiate the consent of Ukraine and to constitute duress as a matter of English law. Ukraine alleges that it exercised its right to avoid the issue of the Notes and the arrangements giving rise to its liabilities under the Notes. The judge concluded that Ukraine could not succeed on this defence because it was non-justiciable in a domestic English court, both because it involved adjudication by the court on transactions entered into by states on the plane of international law and because it would require interpretation by the court of treaties which have not been incorporated into English law. The case did not fall within any exception to the foreign act of state doctrine.

18. As an alternative to ground 2, Ukraine submits, under ground 3 that, if its defence of duress or any other defence is non-justiciable, the judge erred in not staying the proceedings and wrongly distinguished the decision of the House of Lords in *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888.

19. Ground 4 relates to Ukraine's case that there should be implied into the contractual arrangements governing the Notes a term that a holder of the Notes (in this case, Russia) would not prevent or hinder performance by Ukraine of its obligations under the Notes. The judge concluded that the legal structure of the Notes, involving tradeable securities, precluded the implication of such a term and that the proposed term would render the Notes unworkable and untradeable, thereby contradicting their express terms as to transfer.

20. Ground 5 arises only if Ukraine fails on the preceding grounds. It submits that if as a matter of English law it is otherwise liable to pay the sums due on the Notes, it is entitled to refuse payment as a legitimate counter-measure to the effect of Russian interference on its territorial integrity and economy. The right to take proportionate counter-measures is a recognised principle of public international law on which the English court is competent to rule. The judge rejected the submission, on the grounds 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.

21. Finally, under ground 6, Ukraine pursues its submission that in any event there are compelling reasons why the case should proceed to trial. The judge rejected the submission on the ground that the claim was for repayment of a debt instrument to which there was no justiciable defence and that it would not be right to allow the case to proceed to a full trial in such circumstances.

Law Debenture's position

22. As well as supporting the reasons given by the judge for his conclusions, Law Debenture has filed a respondent's notice, supporting the decision on some issues on additional grounds and taking issue with some parts of his reasoning that rejected, or may be read as rejecting, submissions made on its behalf. The matters raised include that the judge erred in deciding that, assuming a lack of authority on the part of the ministers and officials who caused Ukraine to agree to the issue and terms of the Notes, Law Debenture's case that Ukraine had ratified the Notes could not be determined on a summary judgment application. Law Debenture also submits that the judge similarly erred in not treating its case that, if the Notes were procured by duress, Ukraine affirmed the issue and terms of the Notes as suitable for determination on a summary judgment application. The points raised by the respondent's notice will be identified and considered in the relevant part of the judgment.

Ground 1: Capacity and authority

(1) Introduction

23. The issue of the Notes, judged by the documents made available by Ukraine to Law Debenture, Russia and the public and by the Trust Deed and agreements signed on behalf of Ukraine, had all the appearance of a valid act by Ukraine.

24. The very substantial prospectus, required because the Notes were to be securities publicly tradeable on the Irish Stock Exchange, was expressed to be issued by "Ukraine (Represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine)". The Trust Deed dated 24 December 2013, which contained Ukraine's payment and other covenants relating to the Notes in favour of

Law Debenture, was likewise signed by "Ukraine, Represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine". The same wording was used in the Agency Agreement dated 24 December 2013, appointing and setting out the rights and duties of the paying agents, the transfer agent and the registrar in respect of the Notes.

25. Between April 2000 and April 2013, Ukraine had issued tradeable bonds constituted by trust deeds with Law Debenture on 31 occasions, with an aggregate nominal value of over US$18.936 billion and smaller amounts in Euros, Swiss francs and Japanese yen. Although the precise form of words describing Ukraine as a party altered over time, the effect of each was that Ukraine was acting by the Minister of Finance with the authority or on the instructions of the Cabinet of Ministers of Ukraine (CMU). The ten last trust deeds, from 21 December 2010, all used precisely the form of words found in the Trust Deed dated 24 December 2013. It may be noted that Ukraine performed its obligations under all these trust deeds and it has not been at any time, so far as we are aware, suggested that any of them were not duly constituted obligations of Ukraine.

26. The form of words used since 21 December 2010 reflects the provisions of the Budget Code of Ukraine (Law of Ukraine dated 8 July 2010, No. 2456-VI, as amended) which, it is agreed, is one of the applicable laws governing budgetary and financial matters, including incurring external debt and the issue of loan notes by Ukraine.

27. Article 16 prescribes the authority required for external debt to be incurred on behalf of Ukraine. It is headed "Effectuation of State (or Local) Borrowing and Management of State (or Local) Debt" and article 16.1, so far as relevant to this point, provides as follows:

> "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."

28. The CMU passed, or purported to pass, a resolution (or decree) (No. 904) on 18 December 2013 authorising the issue of the Notes. The resolution, signed by the Prime Minister of Ukraine, was included in the documents 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."

29. The terms and conditions attached to the resolution, also made publicly available, specified the aggregate principal amount of the Notes, the denomination of each Note, the interest rate, the interest payment dates, the maturity date and the source of funds to service and repay the Notes. They also stated that "Terms and conditions of the placement of the Notes shall be specified by the prospectus".

30. It therefore appeared from the publicly available documents that the Notes were duly issued by the Minister of Finance, on the instructions of the CMU, with the conditions of the Notes duly determined by the CMU, all in accordance with article 16.1 of the Budget Code.

31. It is not disputed by Ukraine that, as a matter of fact, the Minister of Finance authorised the issue of the Notes and that the CMU determined their conditions by the resolution of 18 December 2013. Nor is it disputed that the individuals comprising the CMU and the individual holding office as Minister of Finance had been duly appointed.

32. Ukraine's case is that, in signing the Trust Deed and other documents and in purporting to pass the resolution, the Minister of Finance and the CMU respectively failed to comply with legal requirements essential to their validity. It is Ukraine's primary case that these failures resulted in a lack of capacity on the part of Ukraine to issue the Notes, with the result that their issue was void. Alternatively, if that is wrong, its case is that the Minister of Finance and the CMU lacked authority to issue the Notes and determine their terms, rendering the issue voidable at the instance of Ukraine, and that it has avoided the issue.

33. As regards the Minister of Finance, it is said that the borrowing effected by the issue of the Notes exceeded the limit in place for 2013. The first paragraph of article 16.1 of the Budget Code provides, so far as relevant, that "State borrowings shall be effectuated within 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".

34. The judge gave the following summary of Ukraine's case as regards the budget limit, based on the evidence of its expert on Ukrainian law, Professor Butler, in his judgment at [77]:

> "***Breach of Budget Law limit*** Ukraine was unable to borrow more from external sources (such as Russia) than the limits that were specified in its then-current Budget Law. Under Ukraine's Constitution, only the Verkhovna Rada [Parliament] has constitutional power and authority over the budgetary process

> in the form of the adoption of the budget law for a particular year. The Budget Code establishes a framework of laws including the Constitution that define this process. The annual Budget Law includes a fixed limit on the level of external borrowings that Ukraine may make that year, and only the Verkhovna Rada can amend such limit, and Ukraine has no power to borrow beyond it. Its CMU accordingly could not authorise any borrowing beyond the limit, nor could it issue debt beyond the limits. The Eurobonds exceeded the limit in the 2013 Budget Law. The Verkhovna Rada sought to increase it, but the approval was insufficient, and came only after the purported approval of the proposed borrowing by the CMU and the purported entry into of the relevant contractual documents, and was not of retrospective effect. As a result Ukraine had no capacity to enter into the Eurobonds."

35. As regards the validity of the resolution of the CMU, the judge summarised Ukraine's case, also at [77]:

> "***Breach of Constitutional principles in passing the Decree*** Ukraine's Constitution imposes further, separate restrictions on the means by which Ukraine may agree to assume such obligations. Approval is a matter for the CMU which is restricted not only by the Budget Law limits: it only has power to approve such borrowings in accordance with certain constitutional and administrative law principles and rules of conduct, including its own Procedural Rules. It must act rationally (or "sensibly" as it is put in the Ukrainian rules) and after taking into account relevant matters (there is a rough parallel with English administrative law principles rendering decisions ultra vires and void). In the present case, Professor Butler says there was a "flagrant" breach of those requirements in at least two respects:
>
> > (a) Before approving the proposed borrowing, in breach of a mandatory requirement, the Ministers of the CMU attending the critical meeting on 18 December 2013 were not provided with an obligatory "Expert Opinion" regarding the draft Decree No.904. The Expert Opinion when prepared identified the very breach of the 2013 Budget Law limits referred to above, but the CMU never came to know of the fundamental legal defect affecting the borrowing they had purported to approve.
> >
> > (b) Additionally, the CMU was not aware of and did not consider all of the material terms of the proposed borrowing, as came to be reflected in the contractual documents for the Eurobonds. The Eurobonds documents included provisions, never identified for the CMU, imposed by Russia, that were unusual and extraordinarily oppressive to Ukraine in their combined effect. Under Ukrainian law, the CMU was not permitted to delegate its power to the Minister for him to exercise in this way; it was the CMU's responsibility in law, and it abdicated its responsibility."

36. For the purposes of its summary judgment application and this appeal, Law Debenture does not challenge Professor Butler's evidence on Ukrainian law. For these purposes, it is accepted that the limit on external borrowing for 2013 was exceeded by the issue of the Notes and that Resolution No. 904 of the CMU was invalidated on the grounds identified by Professor Butler. Law Debenture therefore accepts, again for the purposes

only of the application and the appeal, 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. It does not accept that this deprived Ukraine of legal capacity to issue the Notes and it contends that the Minister of Finance had "usual or ostensible" authority to sign the Trust Deed and issue the Notes, with the result that Ukraine is bound by them.

(2) Legal capacity

37. By reason of the acceptance for the purposes of the summary judgment application of Professor Butler's evidence, it is accepted for the purposes of this appeal that, as a matter of Ukrainian law, Ukraine lacked capacity to issue the Notes which are accordingly void under Ukrainian law. As the Notes are governed by English law, this does not affect their validity in the current proceedings unless the capacity of Ukraine to issue the Notes is, under English law, to be governed by those principles of Ukrainian law.

38. Ukraine accepts that it enjoys legal personality in English law, by reason of its recognition by Her Majesty's Government as a sovereign state, but it submits that questions of its capacity and powers are, under the principles of English conflict of laws, governed by Ukrainian law. If the constitution and other laws of Ukraine impose limits on its capacity and powers, those limits will be recognised and given effect in English law. It submits that its position is analogous to that of a corporation or public authority created under Ukrainian law. English law recognises such a corporation or public authority, by virtue of its status under Ukrainian law, as a separate legal person with the capacity and powers conferred on it under Ukrainian law. It submits that rule 175 in *Dicey, Morris & Collins on The Conflict of Laws* (15th ed. 2012) (Dicey) is applicable:

> "(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"

39. By applying the principles discussed by this court in *Macmillan Inc v Bishopsgate Investment Trust plc* [1996] 1 WLR 387 and *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, Ukrainian law can be identified as the most appropriate system of law to govern the issue of Ukraine's capacity and powers.

40. Ukraine submitted that, in keeping with this court's decision in *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549, questions of capacity are to be approached in a broad, internationalist spirit. If under the appropriate law, a limitation on powers, if breached, renders a transaction void, English law should give effect to that, rather than applying what may be a more restricted concept of *ultra vires* under English law.

41. Law Debenture submitted that, once a state is recognised as such by HMG, its capacity to borrow necessarily follows as a matter of English and international law. Such

capacity is unlimited, and any restriction imposed by the state's domestic law is relevant only to the authority of individual actors to bind the state.

42. It is Law Debenture's case that, although knowledge or notice of the breaches of the borrowing limits and constitutional principles assumed on this appeal to have occurred may be highly relevant if the issue is one of authority, it is irrelevant to capacity. If Ukraine was right in its submission that it lacked capacity to issue the Notes with the result that their issue was void irrespective of any knowledge or notice on the part of Law Debenture, this was, as the judge remarked, a "point of potential significance for the markets". It would mean that lenders to states in international debt markets would take the risk of some violation of domestic constitutional laws of the borrowing state making the transaction void, even though the lender was unaware of such violation and had no notice of it.

43. The judge noted that neither party had been able to cite any case law, from any country, in which the capacity of a state to borrow, or to enter into other forms of contract, had been raised or discussed.

44. The judge rejected Ukraine's case. He said at [113]: "legal personality as a matter of English law flows from such recognition [the recognition of a state for the purposes of suing and being sued], and capacity flows from legal personality".

45. In rejecting Ukraine's case that the correct analogue for a state was a foreign corporation, the judge observed that while rule 175 in *Dicey* applied to local authorities in foreign states as well as to companies, it does not apply to a foreign state. A state cannot be said to have a place of incorporation or a place of domicile. A state is a sovereign body that, unlike a corporation, is not created by its internal or domestic law. While Dicey states at para 30-021 that a corporation "exists as such only by virtue of its constitution" (and, we would add, by virtue of its registration or other domestic process of incorporation), a state exists independently of its domestic law or constitution.

46. While Law Debenture had argued that the better analogy was with a natural person, the judge rejected that approach also, holding that neither analogy provided a determinative answer. He pointed out that the courts have treated sovereign states as a distinct category, as when Lord Templeman said in *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114 at 165: "English courts can only identify and allow actions by individuals, sovereign states and corporate bodies".

47. Law Debenture relied before the judge on the so-called *Lotus* principle, that a state may do anything which is not specifically prohibited in international law, derived from the decision of the Permanent Court of International Justice in *Case of the SS Lotus (France v Turkey)* (1927) PCIJ Series A, No 10, p 4. This principle was endorsed by the Supreme Court in *R v Gul (Mohammed)* [2013] SC 64; [2014]AC 1260 at [57]. Law Debenture submitted that there was no rule of international law limiting a state's power to enter into financial transactions governed by English law, while Ukraine submitted that the *Lotus* principle is confined to relationships between states at the international level and is irrelevant to the capacity of a state at the domestic level.

48. While seeing some force in Ukraine's submission on this, the judge said at [129]:

> "However, as a matter of principle, the court considers that the Trustee's submissions are correct. Whether considering the nature of a state on the international plane, or the nature of a state for the purposes of entering into a loan contract governed by English law, the position is the same. Once a state is recognised as such, as a matter of international law it has unlimited capacity to borrow, and such capacity is recognised under English law. A state's capacity to borrow "rests in its sovereignty" (to use the phrase in the *Lotus* at p.19). The state's internal laws as to borrowing, dispositive though they may be in other contexts, cannot operate by way of a limit on the state's capacity, so as to enable the state, as is contended for in the present case, to treat the obligation to repay as void by reason of breach of such laws."

49. The limits set by Ukrainian law were relevant, if at all, to the authority of Ukraine's state actors to bind Ukraine, not to Ukraine's capacity to enter into transactions.

50. Law Debenture supports the judge's reasoning and conclusion.

51. Ukraine submits that the judge was wrong at [113] to hold that capacity flowed from the recognition of Ukraine as a legal person. They are distinct concepts. Personality is concerned with the standing of an entity, including a state, to sue and be sued in the English courts, which is "a quintessential question of the English court's control of its own procedures, and hence a question for the *lex fori*". Where English law is the *lex fori*, recognition of a state as a legal person is determined conclusively by a certificate from HMG. That is wholly separate from the capacity of the entity to contract, which is governed not by the *lex fori* but by the law of the entity's place of incorporation.

52. Ukraine says that, as a matter of analysis, a state is indistinguishable for these purposes from a foreign corporation. Ukraine does not exist in the abstract. It exists, i.e. has powers, only by virtue of its constitution and laws. The fact that a state can change its constitution is no different from the power of a corporation to change its constitution. The constitution of a state as it stands at any given time will, like the constitution of a corporation, determine its capacity at that time. It matters not that its constitution, and hence its capacity, may vary over time. Applying ordinary conflict of laws principles, English law will recognise the state's capacity as set out at the relevant time in its constitution.

53. We consider that the judge was right in the conclusion that he reached on Ukraine's capacity, although for reasons that differ to some extent from his.

54. The starting point is that a sovereign state, once recognised by HMG, has legal personality as a matter of English common law. Its position as a legal person in English law is *sui generis.* By identifying three types of person (individuals, sovereign states and corporations) in *Arab Monetary Fund v Hashim (No 2),* Lord Templeman very deliberately did not assimilate states with either individuals or corporations.

55. The modern law as regards the position of sovereign states in English law really began with the growth of republican forms of government in the 19th century. Before then,

most states were monarchies and there was no difficulty in recognising a sovereign monarch as having personality, although the practice was for court proceedings to be taken by or against their ambassadors. This technique also avoided the difficulty posed for English law by early republics, such as Venice or the Netherlands. The history was explored by the late Dr Geoffrey Marston in an illuminating article in the *Cambridge Law Journal*: Vol 56 (1997) p. 374.

56. This ceased to be sustainable in the 19th century, with the replacement of the Spanish empire in South America by independent republics, many of which raised loans in the City of London, and with the growth of trade and other relations with the United States. Any doubt was settled by the decision of the Court of Appeal in Chancery in *United States of America v Wagner* (1867) LR 2 Ch App 582. The issue was whether the United States could sue in its own name, the defendant arguing that, by analogy with monarchies, the plaintiff should be the President. In rejecting this submission, 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?"

57. Sir G. J. Turner 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."

58. At pp 593-94, Lord Cairns LJ, who described the United States as "a body politic", said:

> "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."

59. The importance of this case lies beyond what may have been a technical question as to whether a state could sue in its own name. The above-quoted passages and other passages in the judgments assume that the state is the owner of property and rights, from which it followed that it must be entitled to sue in its own name to recover the property and enforce its rights. But the ownership of property and rights itself assumes that the state has legal personality. Only a legal person can own property and rights. Further, the character in which such property and rights are owned as a matter of English law is unconstrained by any constitutional provisions which may apply within the state, whether it be a monarchy or a republic.

60. Additionally, the judgments in *United States v Wagner* are wholly inconsistent with any analogy with a corporation existing under the laws of the state in question. This is clearly the case with a monarchy, as described in the judgments, and there is no basis for a different treatment of a republic. On the contrary, the recognition of a republic and its consequences proceeds from the analogy of a monarchy.

61. This is not to say that only the monarch or republican state can sue. A monarchical state is very unlikely now to sue in the name of the monarch. It is now recognised that such a state exists, both as a matter of international law and English law, independently of its monarch. There was no change in the personality of Greece when its monarchy was abolished in 1975 nor in the personality of Spain when its monarchy was restored in the same year. Equally, a state may make contracts in the name of an authorised official who will be a proper claimant in proceedings to enforce the contract: *Yzquierdo v Clydebank Engineering and Shipbuilding Co Ltd* [1902] AC 524.

62. There is no analogy between the recognition of a state as a legal person in English law and the recognition of a foreign corporation. The recognition of a corporation created under the law of a state recognised by HMG derives from an acknowledgement of the sovereign power of that state. The classic statement of the basis of such recognition is that of Lord Wright giving the only reasoned judgment, with which the other members of the Appellate Committee agreed, in *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 at 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."

63. By contrast, the legal personality of a state in English law derives from its recognition as a state by HMG. It is clothed with legal personality by a process of English law based on recognition of its status as a sovereign state. It does not derive from a recognition of the state's own sovereign power to create legal persons. There is no analogy with the recognition of foreign corporations that could lead to its capacity and powers being governed in English law by its own domestic constitution and laws. As Dr Marston wrote in his article in the *Cambridge Law Journal* at p. 412:

> "In conclusion, it appears that although analogies with corporations might usefully be drawn in particular respects, a foreign State in English law is not a foreign corporation, or an English corporation, either sole or aggregate, or a "quasi-corporation", or even an English legal person of whatever kind."

64. When Dr Marston referred to a state not being "an English legal person of any kind", he was not of course saying that a recognised state does not have legal personality in English law but that it is not a creature of English law. Similarly, an international organisation given the capacities of a body corporate pursuant to the International Organisations Act 1968 has legal personality in English law but is not thereby constituted a domestic English corporation that is subject to English law and jurisdiction as regards its internal workings; see *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 478 and 505.

65. The consequence of legal personality in domestic law is that the person can do all those things for which legal personality is required. For example, it can own property, it can become subject to liabilities, it can enter into contracts and it can sue and be sued in its own name. These are, or are among, the attributes of personality in English law. The judge was right to say that capacity flows from personality.

66. Leaving aside sovereign states, the common law recognises only individuals and bodies corporate as legal persons. There are now only two ways in which a body corporate can be created, by charter granted by the Crown pursuant to its prerogative power or by (or pursuant to) statute. By either means, bodies may be incorporated for private, including commercial, purposes or for public purposes, although the prerogative power is now rarely, if ever, used to create purely commercial concerns. Statutory companies include private and public bodies created by specific statutes, such as the 19th Century railway companies and local and other public authorities. They also include companies registered pursuant to past and present Companies Acts.

67. The *ultra vires* doctrine, on which Ukraine relies, does not exist at common law. It is entirely the consequence of statutory limitations. Apart from individuals under a disability (minors and individuals lacking mental capacity), the common law imposes no limits to the capacity of legal persons. Nor, in the exercise of its purely prerogative powers, can the Crown limit the capacity of entities incorporated by royal charter, so as to render *ultra vires* any act of a chartered corporation.

68. The position at common law was agreed by all the judges of the Exchequer Chamber in *Riche v Ashbury Railway Carriage and Iron Co* (1874) LR 9 Ex 224. After referring to *Sutton's Hospital Case* (1612) 10 Co. Rep. 1; 77 ER 937, Blackburn J said at 263:

> "This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case. If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by sci. fa. in the name of the Crown to repeal the letters patent creating the corporation: see *Eastern Archipelago Co. v. Reg.* But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation. I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has."

69. This position has been restated on many occasions: see *Baroness Wenlock v River Dee Co* 36 Ch D 675n at 685n per Bowen LJ, *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 1 Ch 354 at 374-376 per Swinfen Eady J, *Bonanza Creek Gold Mining Co Ltd v The King* [1916] 1 AC 566 (PC), *Armour v Liverpool Corporation* [1939] Ch 422 at 434 per Simmonds J. The position was also fully stated in successive editions of *Buckley on the Companies Acts*, beginning with those edited by Buckley LJ. The current edition states simply at [1927]: "The powers of bodies corporate incorporated by charter are the same as those of an individual and are not limited by any provisions in the charter." A member of a chartered body may apply for an injunction to restrain the body from acting in breach of its charter and thereby risking the loss of its charter but that does not render its acts *ultra vires* and void.

70. The position is different as regards companies and other bodies corporate created by or pursuant to statute. By creating or authorising the creation of a corporation for defined purposes, a statute limits the capacity of the corporation to those purposes. Any act undertaken for other purposes is ultra vires and void, even if approved by all the corporators: *Hawkes v Eastern Counties Railway* (1855) 5 HLC 331 and *Ashbury Carriage Company v Riche* (1875) LR 7 HL 653. The same principles apply to local authorities and other public bodies created by statute or where their charter is granted pursuant to statute: *London County Council v Attorney General* [1902] AC 165 and *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1. Until the effective abolition of the *ultra vires* rule by what is now section 39 of the Companies Act 2006, the same principles applied to companies formed and registered under the Companies Acts.

71. It follows that English law imposes no restrictions on the capacity of those who have legal personality under English law, so as to render any act by them *ultra vires* and void, save as imposed by or pursuant to statute. There is no prerogative or statutory authority for limiting the capacity and powers enjoyed by a foreign state, which has legal personality in English law by virtue of its recognition as such by HMG. It follows

from the absence of any limits at common law that *as a matter of English law* the foreign state enjoys unlimited capacity. Where it enters into a contract governed by English law, a foreign state will not therefore lack capacity to make and perform the contract, irrespective of the provisions of its own domestic constitution and laws.

72. The judge accepted Law Debenture's submission based on the *Lotus* principle and concluded at [129] that "Once a state is recognised as such, as a matter of international law it has unlimited capacity to borrow, and such capacity is recognised under English law". The judge was, as we understand it, treating the capacity of a recognised state in English law as governed by its capacity in international law, an approach presumably justified by the long-established principle that customary international law forms part of the common law.

73. We, however, accept the objections to this approach submitted by Mr Thanki QC on behalf of Ukraine. International law establishes and defines the capacity of states to act on the international plane, but it says nothing about their capacity to act on a domestic plane. Legal capacity in domestic law is a matter for domestic law. English law does, however, produce the same result as public international law and, if it did not, there would be a strong case for re-examining the position in English law. The concept that a state's powers and capacities on the international plane are constrained by its own constitution and laws is alien to the principles of public international law. In discussing the conditions that must be satisfied for the existence of a state in international law, the editors of *Oppenheim's International Law* (9th ed. 1992, re-printed 2011) at pp 120-122 refer to sovereignty as "legal personality which is not in law dependent on any other earthly authority".

74. In this connection, the treatment of international organisations may be noted. Such organisations are established by treaty among their member states and possess legal personality in international law. To enable them to operate domestically within the United Kingdom, the International Organisations Act 1968 gives the Crown the power, by order in council, to confer on the organisation "the capacities of a body corporate". Such express provision would be unnecessary if all that was needed was recognition of the organisation's personality in English law, thereby *ipso facto* bringing with it the capacities that it enjoyed in international law. Instead, express provision is made for an organisation's capacity in English domestic law.

75. No similar statutory provision exists as regards a recognised foreign state because, in our view, as a consequence of the common law it enjoys unlimited capacity in those of its domestic operations as are governed by English law.

(3) Authority

76. We have earlier set out the grounds on which it is said by Ukraine that its Minister of Finance lacked authority of any type, whether actual or ostensible, to sign the Trust Deed and issue the Notes so as to bind Ukraine, and that, for the purposes of its summary judgment application and this appeal, Law Debenture accepts that the Minister of Finance lacked actual authority to do so. Law Debenture's case, which was accepted by the judge, is that the Minister of Finance had usual or ostensible authority for these purposes, so that Ukraine is bound by the issue of the Notes and by its obligations under the Trust Deed.

77. Before considering Law Debenture's case and the judgment, we consider it helpful to summarise some basic propositions as regards the authority of agents.

78. The law on this subject is authoritatively stated in two decisions of this court, *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 786 (*Freeman & Lockyer*) and *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549.

79. The relevant principles may be summarised as follows:

(1) There are two types of authority, actual and ostensible. Actual authority involves a true relationship of agency, whereas ostensible agency describes the situation where one person (the principal) is by their own acts, words or conduct estopped from denying the authority of another person (the agent) to bind the principal to the transaction to which the agent has purported to commit the principal.

(2) Actual authority may be express or implied.

(3) Express actual authority connotes the express conferring of authority by the principal on the agent to enter into a particular transaction or class of transactions.

(4) Implied actual authority connotes circumstances, falling short of express words, in which the principal authorises the agent to enter into transactions of the type in question on the facts of the case.

(5) A common example of implied actual authority occurs when the principal appoints the agent to a position, such as chief executive of a company, which is generally understood to confer authority to enter into transactions of the type in question.

(6) Implied actual authority may also occur where, without being appointed to such a position, the agent enters into transactions as if he had been so appointed and the principal communicates its approval of the agent acting in this way: see *Freeman & Lockyer* at p.501 per Diplock LJ. This type of implied authority derives from a course of conduct by the agent, which with full knowledge is approved by the principal. It was by this type of authority that the defendant company was bound in *Hely-Hutchinson v Brayhead Ltd* and, in the view of Diplock LJ, could have been bound in *Freeman & Lockyer*.

(7) Ostensible authority may arise from any circumstances in which the principal holds the agent out as having authority to enter into the transaction in question on behalf of the principal.

(8) Circumstances giving rise to implied actual authority will generally also give rise to ostensible authority. "Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different": *Freeman & Lockyer* at p.502 per Diplock LJ. So, for example, a chief executive of a company will have both implied actual authority and ostensible authority to enter into transactions generally understood to be within the authority of a chief executive. However, if in a particular case the chief executive's authority is limited in a way of which the third party has no notice, for example by a requirement imposed by the board for prior board approval, the chief executive will not have implied actual authority but will have ostensible authority.

80. *Hely-Hutchinson v Brayhead Ltd* was a decision of the Court of Appeal, with an unusual constitution comprising Lord Denning MR, Lord Wilberforce and Lord Pearson. They dismissed the defendant company's appeal, each giving a concurring judgment. At p. 583 Lord Denning summarised some of the relevant principles:

> "I need not consider at length the law on the authority of an agent, actual, apparent, or ostensible. That has been done in the judgments of this court in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd*. It is shown that actual authority may be express or implied. It is *express* when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.
>
> 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 the limitation".

81. Accepting, as earlier mentioned, that neither the Minister of Finance nor the CMU had actual authority to issue the Notes, Law Debenture put its case to the judge in essentially two ways, which it categorised as "usual" authority and "ostensible" authority.

82. Law Debenture's case on "usual" authority was itself put in two ways. First, it submitted that the finance minister of any state has usual authority to commit the state to borrowings. The judge rejected this submission, holding at [160] that it "depends on the role of the Finance minister in the particular state and the particular borrowing". Law Debenture does not challenge this ruling.

83. The second way that Law Debenture put its case on "usual" authority was for the most part accepted by the judge:

> "160. Beginning with the Trustee's case as to usual authority, the court does not agree with the Trustee so far as it contends that a Finance Minister always has usual authority as regards state borrowing by reason of his or her office. This depends on the role of the Finance minister in the particular state and the particular borrowing.
>
> 161. However, there is, in the court's view, a clear answer so far as this borrowing by Ukraine was concerned. The Minister of Finance plainly had usual authority to enter into the transaction on behalf of Ukraine. The fact that the Minister of Finance was the signatory of all 31 previous debt issuances by Ukraine in which the Trustee had acted between 2000 and 2013 establishes such authority beyond doubt. As regards the Trustee, the Minister of Finance of Ukraine was a person whose position gave him usual authority to sign such issuances within the case law: *Bowstead & Reynolds on Agency* at §8-015".

He added at [163] that "the circumstances are sufficiently established by such prior practice".

84. As regards the budget law limits on borrowing and the non-compliance with the CMU procedures, the judge held that Law Debenture was not on notice of the lack of authority. He said at [164]: "the suggestion that the Trustee could have known of the breach of the Budget Law is very weak, and it is not contended that the Trustee could have known of the breaches of constitutional principles in passing Decree No. 904".

85. As regards the alternative case of "ostensible" authority, Law Debenture relied on Resolution No. 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 upon the instructions of the CMU as conferring ostensible authority on the Minister of Finance to take the steps necessary for the issue of the Notes, including signing the Trust Deed.

86. The judge accepted this alternative submission, stating at [167] that "Although, as Ukraine says, for the reasons given by Professor Butler, the CMU had no actual authority to hold out the Minister of Finance as Ukraine's representative in the transaction, it did have usual authority to do so as the state's cabinet".

87. The judge concluded at [169]: "If necessary, therefore, the Trustee's case of ostensible authority is also upheld, though the finding as to usual authority is sufficient".

88. Before turning to Ukraine's challenges on this appeal to the judge's decision on the Minister of Finance's authority to bind Ukraine to the Notes, we will comment on the case of "usual" authority made by Law Debenture and accepted by the judge.

89. Although "usual" authority is a useful description of authority derived from the office or position to which a person has been appointed, it is liable to cause confusion because

it straddles both implied actual authority and ostensible authority. As the discussions in earlier cases show, the "usual" authority of, say, a chief executive will often confer both implied and ostensible authority. Where the "usual" authority of a particular chief executive is limited in a way of which the third party has neither knowledge nor notice, the chief executive will not have implied actual authority but will have ostensible authority.

90. The status of "usual" authority is discussed in *Bowstead & Reynolds on Agency* (21st ed. 2018) at para 3-005 in some detail. We agree with the authors' conclusion that the law recognises only two basic notions of authority, actual and ostensible, that references to "usual" authority should be treated and interpreted with caution and that to treat "usual" authority as a separate foundation of authority is liable to cause confusion.

91. It follows from Law Debenture's acceptance, for the purposes of its application for summary judgment, that the Minister of Finance had no actual authority to issue the Notes that its case of usual authority was a sub-set of ostensible authority, rather than an alternative to ostensible authority. Mr Howard QC made this clear in the course of his submissions to us.

92. We have a further difficulty with the case of "usual" authority advanced by Law Debenture. As is clear from the authorities discussed above, usual authority derives from the office or position held by the agent. It has no place where the agent has express authority with regard to the type of transaction in question. To give a simple example, and leaving aside the statutory provisions now contained in section 40 of the Companies Act 2006, if the articles of association of a company confer on the chief executive authority to borrow on behalf of the company up to £1 million, it is neither necessary nor permissible for a lender to invoke the "usual" authority of a chief executive. If the borrowing is for £1 million or less, the chief executive has express authority to commit the company. If that express authority were subject to any further limitations, which were unknown to the lender and of which the lender had no notice (because, for example, they were not contained in a public document such as the articles of association but were imposed by a private instruction given by the board), the chief executive will not have actual authority but will have ostensible authority. That ostensible authority will not derive from the "usual" authority of a chief executive but from the authority expressly conferred by the articles. The authority will be ostensible because it is subject to a limitation of which the lender has no knowledge or notice. If the lending was for more than £1 million, it would be beyond the express authority of the chief executive contained in the articles of which, as a public document, the lender would have notice. That such borrowing would or might, but for the articles, be within the "usual" authority of a chief executive would be of no assistance to the lender. An agent cannot have an implied or an ostensible authority that conflicts with the terms of his express authority of which the lender has knowledge or notice.

93. In the present case, the authority to effect borrowings on behalf of Ukraine is expressly set out in the Budget Code. This is a public document and Law Debenture does not suggest that it did not have knowledge or notice of it. Article 16.1 is clear that the Minister of Finance is authorised to effect internal and external borrowings on behalf of Ukraine, on conditions determined by the CMU. If loan notes are issued in accordance with article 16, the Minister of Finance and the CMU will be exercising express powers conferred on them, and there will be no room or need for recourse to the "usual" authority of either ministers of finance in general or the Minister of Finance

of Ukraine in particular. If the Minister of Finance were to take steps to issue loan notes in circumstances where it was known (or, perhaps, should have been known) to the Trustee that the conditions had not been determined by the CMU, the Trustee would have knowledge or notice that he had acted beyond his authority. There would again be no room for recourse to his "usual" authority, as a basis for ostensible authority.

94. Article 16.1 expressly confines state borrowings to the limits determined in accordance with the Budget Law. Law Debenture does not suggest that it had neither knowledge nor notice of this general limitation on the borrowing powers of the government of Ukraine. We understood it to accept that, if it knew that an issue of loan notes would cause Ukraine's borrowings to exceed that limit, the issue would be voidable by Ukraine as having been made without authority. Equally, we understand Ukraine to accept (on the assumption that its case on capacity is rejected) that if Law Debenture neither knew nor had notice that an issue of loan notes caused Ukraine's borrowings to exceed the annual limit, the issue of loan notes would not be voidable on this ground. This underlines that the ostensible, as well as the actual, authority of the Minister of Finance and the CMU is to be derived from article 16, and not from some general notion of usual authority.

95. These issues were raised by the court in the course of submissions. Mr Howard re-affirmed that Law Debenture's case was based solely on the usual or ostensible authority as described above. Mr Thanki on behalf of Ukraine, while of course challenging many of the elements of Law Debenture's case, did not espouse a case that the issue of authority was to be determined by reference to the terms of article 16. He accepted that in theory a case of "usual" authority could be advanced but submitted that it failed in the circumstances of this case, or at least that there was an arguable case that it would fail at trial.

96. We are clear that the correct approach to the issue of authority in this case derives from the terms of article 16, in the way we have set out above. Nonetheless, given the submissions advanced by both parties, we consider it right to address those submissions on their own terms.

97. Law Debenture's case of "usual" authority has four principal elements. First, the individual who signed the Trust Deed as Minister of Finance had been validly appointed to that office and continued to hold it at the date of the Trust Deed. Second, the members of the CMU who determined (or purported to determine) the conditions of the Notes were all validly appointed members of the CMU. Third, Ukraine had issued tradeable bonds constituted by trust deeds with Law Debenture on 31 prior occasions and, in each case, signed or authorised by the Minister of Finance and in each case with the concurrence of the CMU. Fourth, Ukraine had acknowledged each of these prior issues of loan notes as creating valid obligations of Ukraine and had performed those obligations by the payment of interest and the redemption of notes at maturity. The same is true of the Notes in this case, until Ukraine's refusal in December 2015 to make payments on the Notes. Mr Howard emphasised that Law Debenture's case was not based simply on a course of prior dealing between these parties.

98. Mr Thanki submitted on behalf of Ukraine that "usual" authority derived only from the office or position to which the putative agent had been appointed. He instanced the cases of a solicitor or bank manager and submitted that, acting on expert evidence or in appropriate cases on its own knowledge, the court will reach a conclusion on what such

persons usually do on behalf of their principal. The focus is on the office, not a particular officeholder. The prior conduct of the holder(s) of that office was irrelevant. Reliance on past conduct would involve enquiring into past actual or ostensible authority, or ratification. It essentially becomes a case based on a course of dealing, which tells you nothing about the usual authority attached to the office in question. As the judge had held that there was no usual authority of a minister of finance in general, which was not challenged by Law Debenture, it followed that its case on usual authority must fail.

99. We do not accept this analysis. In many cases of implied and ostensible authority, the case will turn simply on the question of whether the transaction at issue falls within a category of transactions generally understood to be within the authority of a chief executive, solicitor, bank manager or other officeholder, as the case may be. But we see no reason in principle that if the holder of a particular office has acted in transactions of the relevant type, with the knowledge and active approval of the principal and in circumstances that demonstrate that the principal considers itself bound by such transactions, the officeholder for the time being should not have implied or ostensible authority to enter into such transactions.

100. To reiterate, Ukraine had since 2003 issued tradeable bonds constituted by trust deeds with Law Debenture on 31 occasions. In every case, the loan notes were stated, in one way or another, to be issued with the authority of the Minister of Finance and the CMU. In every case, Ukraine had accepted and performed the obligations under the loan notes. There is no suggestion that the Minister of Finance in question had not been duly appointed to that office, nor that the members of the CMU had not been duly appointed. In our judgment, this combination of circumstances is sufficient to establish that it is generally understood in the international debt markets that, based on the conduct of Ukraine, the Minister of Finance of Ukraine, if acting with the authority of the CMU, had by virtue of holding that office authority to issue loan notes such as the Notes in this case.

101. Even if that is the case, Ukraine submitted that on several grounds it does not assist Law Debenture in this case.

102. First, Mr Thanki submitted that a third party will not be able to rely on this type of ostensible authority if the terms of the transaction are onerous and, from the standpoint of the "principal", unusual. It does not appear from the judgment that this submission was made below in the context of authority. In the context of its case on duress, Ukraine submitted that three provisions of the Trust Deed were onerous and, for Ukraine, unusual. The provisions were: (i) the GDP ratio clause, whereby an early repayment of the Notes could be demanded if Ukraine's total state debt and state-guaranteed debt exceeded 60% of Ukraine's annual nominal gross domestic product; (ii) a cross-default clause, whereby early repayment could be demanded if Ukraine defaulted on any indebtedness in excess of $25 million; and (iii) the two-year term of the Notes. The judge held at [252] that this raised an issue for trial that could not be resolved on a summary judgment application and he therefore proceeded for the purpose of the application on the basis that the terms were onerous and unusual in those respects. Although this was developed before the judge in relation to the defence of duress, on this appeal Mr Thanki has relied on the judge's approach for his submission that these terms would deprive the Minister of Finance of any "usual" authority that he might otherwise have possessed.

103. For this submission, Mr Thanki relied on two authorities. In *Hopkins v TL Dallas Group Ltd* [2004] EWHC 1379 (Ch); [2005] 1 BCLC 543, the deputy managing director of the defendant companies signed highly disadvantageous letters of undertaking in favour of a company which assigned its claims to the claimant. Lightman J held that the deputy managing director, to the knowledge of the counterparty, signed the letters in fraud of the defendant companies for his own and/or another's benefit and purposes. It is not surprising in those circumstances that he held that the defendant companies were not bound as against the counterparty. At [94] Lightman J made the following statement of principle, which both parties before us accepted and we consider to be correct:

> "Where an agent is acting within the usual authority of a person in his position, the third party will normally not be expected to inquire as to the details of his authority unless the transaction is abnormal or there are other circumstances giving rise to suspicion. If there are suspicious circumstances or abnormalities, then the third party should 'make such enquiries as ought reasonably to be made' to ensure that the authority is sufficient to bind the principal."

104. An example of an abnormal transaction is found in the other case on which Mr Thanki relied, *Sea Emerald SA v Prominvestbank – Joint Stockpoint Commercial Industrial and Investment Bank* [2008] EWHC 1979 (Comm). The defendant bank was held not to be liable on a guarantee given in its name by the head of its main regional office. The grounds for this conclusion, so far as relevant, were that the guarantee was, by the standards of Ukrainian banks, for an abnormally large amount and there was no evidence that it was within the usual authority of such an officer to commit the bank to this level of guarantee.

105. While the judge accepted for present purposes that the terms on which Ukraine relies were onerous and, for Ukraine, unusual, none of them is a term that self-evidently stands out as abnormal so as to put Law Debenture on enquiry and there was no evidence that they would have appeared abnormal to those regularly trading in the sovereign debt market. We do not consider that Ukraine has raised an arguable defence based on the terms of the Notes.

106. Second, Ukraine submitted that ostensible authority depends on a representation or holding out by a person who has actual authority to make such representation. We have in substance already dealt with this point. We do not doubt the principle, but the Minister of Finance in question (like his predecessors) had been duly appointed, as had the members of the CMU. They were therefore validly clothed with all the ostensible authority associated with those positions.

107. Third, Ukraine submitted that, as regards ostensible authority, ministers and others purporting to act on behalf of a state or government are, on constitutional grounds, in a different position from commercial parties. Reliance was placed on the decision of the Privy Council in *Attorney-General for Ceylon v Silva* [1953] AC 461. The Principal Collector of Customs sold goods which he believed were unclaimed goods, purporting to do so under powers conferred by the Customs Ordinance. In fact, they were the property of the Crown. The plaintiff contracted with the Collector to buy the goods and he sued the Crown for damages for breach of contract in failing to deliver the goods. It was held that the Collector had no actual authority to bind the Crown in respect of the

sale, nor had he been held out as having authority to do so. Neither the Collector himself nor the Chief Secretary who approved the sale had actual authority to hold him out as authorised on behalf of the Crown. The Collector's authority was expressly limited to those sales to which the Ordinance applied, and they did not include sales of Crown property.

108. As Mr Thanki acknowledged, the reasoning in that case is not limited to the Crown but has a general application. The Privy Council cited and applied what Lord Atkinson had said in *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174 at 184:

> "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 limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised."

109. The harshness of the consequences to a purchaser at a sale held by the Collector was balanced and justified by the consideration that "to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorised acts nullify or extend the provisions of the Ordinance" (p.481).

110. We were referred also to *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm); [2007] 1 Lloyd's Rep 397. The relevant issue was whether the Minister of Finance of Zambia had actual or ostensible authority to enter into a settlement agreement on behalf of Zambia. Under the Constitution, the Minister's authority to do so was expressly subject to receipt of legal advice from the Attorney General. Andrew Smith J found as a fact that the Minister had received the Attorney General's advice and therefore had actual authority to enter into the agreement. He went on to consider the position if he had not so found and said that he would have held that the Minister did not have ostensible authority. He said at [451]:

> "Donegal's argument seems to be that the ostensible authority of Mr Kasonde derives from his usual authority as Minister of Finance, but this does not seem to me to answer an objection that his usual authority was restricted by the Constitution. This is not a case like *Robertson v Minister of Pensions* [1949] 1 KB 227, which Donegal cited in their submissions, where Denning J could say at (page 232) of a subject's dealings with a government department, "He does not know, and cannot be expected to know, of the limits of its authority". Here Donegal could be expected to know and…clearly did know of article 54 of the Constitution, and could properly be taken to be aware of its effect."

111. These and other authorities are discussed in *Bowstead & Reynolds on Agency* at 8-042. *Attorney General for Ceylon v Silva* is described as a clear case, given the express statement of the Collector's powers in the Ordinance. *Donegal* demonstrates that "Apparent authority in a Crown agent, even a Minister of Finance, cannot be established in the face of a constitutional restriction on powers, unless infraction of the restriction was not apparent". The last part of that sentence has been added in the current edition,

with Blair J's decision in this case given as authority. *Bowstead* goes on to say that "Subject to these important reservations, however, it may be possible to establish apparent authority in the normal way".

112. In our judgment, Ukraine is unable to derive from these authorities a general principle applicable to the assumed facts of this case that no ostensible authority could be derived from the "usual" authority of the Minister of Finance and the CMU, merely because they were public officials acting on behalf of a state. In other words, Ukraine cannot rely on its status as a state to rebut ostensible authority in these circumstances.

113. The final ground relied on by Ukraine is that Law Debenture was on notice of the limitations on the authority of the Minister of Finance and the CMU and of the facts that (it is assumed for present purposes) meant that such limitations were breached, thereby depriving them not only of actual authority but also of ostensible authority. Again, we are here referring to ostensible authority as that derived from their "usual" authority, not Law Debenture's alternative submission labelled "ostensible authority" that was also accepted by the judge.

114. This ground is common both to our preferred way of analysing this issue and to the approach advanced by Law Debenture and accepted by the judge. In our view, the ostensible authority of the Minister of Finance and the CMU is derived from their actual powers as set out in the relevant Ukrainian legislation. If Law Debenture was not on notice of any breach that deprived those ministers of actual authority, they had ostensible authority as regards the issue of the Notes and Ukraine is bound by them, subject of course to any other defences. Likewise, as we understand it, Law Debenture accepts that if there is an arguable case that Law Debenture knew or should have known of any breach of those limitations, Ukraine should have leave to defend on the grounds of lack of authority.

115. We have earlier set out those paragraphs of the judgment below in which the judge set out these breaches. Two breaches are relevant only to the CMU, while the breach of Ukraine's external borrowing limit applies to both the CMU and the Minister of Finance.

116. The judge dealt with this at [149] as being points that "do not raise conflicts of fact which require to be resolved by the trial process":

> "(iv) Given the exercise that Mr Pasichnyk of the CMU Secretariat carried out by which he became aware that the borrowings would exceed the budget limit, the suggestion that the Trustee could have known of the breach is very weak. Such knowledge could not have come from the Prospectus, which only gave the figures up to the end of September 2013.
>
> (v) It is not contended that the Trustee could have known of the breaches of constitutional principles in passing Decree No. 904, and it obviously could not."

117. The judge repeated these points at [164], and said that "This is not a case in which the Trustee was on notice of the lack of authority".

118. As regards the breaches of the constitutional principles, it remains the case that Ukraine does not suggest that Law Debenture could have known or had notice of those breaches.

119. The focus is therefore on the breach of the external borrowing limit.

120. According to the expert evidence on Ukrainian law, not challenged on this application and appeal, the borrowing limit is set by a combination of the Budget Code of 2010 and the annual Budget Law for 2013. Article 16.1 contains provisions that limit the amount of external borrowings that Ukraine can make to the limit set for each year by the relevant annual budget law, being in this case the Law on the State Budget of Ukraine for 2013 (the 2013 Budget Law). The limits on external borrowings in 2013 were set out in annex 2 to the 2013 Budget Law and the relevant limit was stated as UAH 36.540 billion (equivalent to approximately US$4.6 billion). The annexes to the 2013 Budget Law and the limits contained in them are an integral part of that Law.

121. Mr Howard took us through the somewhat tortuous process by which the limit for external borrowings for 2013 was to be identified and submitted that a foreign lender could not be expected to discover this limit. Accordingly, Law Debenture cannot be taken to have been on notice of it. While accepting that the trail through the legislation is not straightforward, an experience by no means confined to Ukrainian legislation, we do not accept the legal consequence advanced by Law Debenture. The relevant legislation was publicly available and anyone lending to Ukraine is taken to know of its effect. Clearly a foreign lender is likely to need the services of a Ukrainian lawyer, but that is no different from a foreign lender dealing with the UK Government or other UK borrower. Moreover, the figures in the 2013 Budget Law were stated in the prospectus, albeit not in terms which made it clear that they were legal limits.

122. Ukraine submitted that the effect of the budget legislation is that the 2013 Budget Law set a limit on total external borrowing in 2013, rather than a limit on the aggregate outstanding amount of external borrowing from time to time in 2013. In other words, if Ukraine is right, repayment during 2013 of any loans advanced in 2013, for example by taking out a loan at a lower interest rate to replace one at a higher rate, would be ignored. Although on the face of it this would be a surprising borrowing limit, it would of course have to be accepted for present purposes if Professor Butler's evidence was to that effect. However, nowhere does Professor Butler say that is the effect of the 2013 Budget Law. Instead, he states that annex 2 to that Law "sets out in detail how the maximum volume of the annual State budget deficit is to be financed and the limits applicable thereto". In analysing whether there was a breach of the external borrowing limit, Professor Butler took as his starting point not the aggregate amount of external borrowings made during 2013 before 18, 20 or 24 December 2013, but the actual amount of external borrowings as of those dates.

123. The significance of this feature is that external borrowings as at 30 September 2013 (as stated in the prospectus) were at a level which, if aggregated with the Notes, would exceed the external borrowing limit for 2013. However, nothing was said about the level of outstanding borrowings as at December 2013, and the judge concluded, and we agree, that Ukraine can point to nothing which informed, or could reasonably be taken as informing, Law Debenture that the external borrowing limit would be breached by the issue of the Notes. The evidence of Mr Pasichnyk, the head of the division for budget and tax policy within the secretariat of the CMU, was that he analysed the proposed Notes on 18/19 December 2013. With the benefit of the figures for Ukraine's

borrowing up to the end of November 2013, he concluded that the issue of the Notes would breach the external borrowing limit and so stated in a report on 19 December 2013. Neither the report nor its findings were made available to Law Debenture, nor were the borrowing figures as at the end of November 2013 available to it.

124. More significant than Mr Pasichnyk's internal report, Ukraine issued a statement on 26 September 2014 concerning Ukraine's external borrowings in 2013. It stated that "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". If Ukraine was itself asserting in September 2014 that all external borrowing in 2013 was within budget limits, it is impossible to see the basis on which it is said that Law Debenture should have known on or before 24 December 2013 that the external borrowing limit was exceeded by the issue of the Notes. Moreover, in its response to the ratification claim advanced by Law Debenture, Ukraine relies on its own ignorance of the breach of the borrowing limit until, it says, it received legal advice to that effect in 2016.

125. We accordingly agree with the judge's conclusion that Law Debenture was not put on notice of any of the breaches of Ukrainian law on which Ukraine relies and that it does not have in law a defence that the Minister of Finance and the CMU lacked ostensible authority to issue the Notes. We reach this conclusion whether the case is put on the basis of "usual" ostensible authority advanced by Law Debenture or, as we prefer, the basis explained earlier in this section of our judgment.

126. This conclusion is sufficient to establish the necessary ostensible authority for the issue of the Notes. Law Debenture had an alternative, secondary argument based on what it termed "ostensible" authority, which the judge also accepted.

127. This alternative case is that the Minister of Finance was held out by the CMU as having authority to sign the documents necessary for the issue of the Notes and that the CMU itself had ostensible authority to do so. Reliance is placed on the statements contained 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. Law Debenture submitted 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. This combination of usual authority on the part of the CMU and the consequent ostensible authority of the Minister of Finance means that Ukraine is estopped from denying that the Notes were validly issued.

128. The judge accepted this submission at [167]:

> "Although, as Ukraine says, for the reasons given by Professor Butler, the Cabinet of Ministers of Ukraine had no actual authority to hold out the Minister of Finance as Ukraine's representative in the transaction, it did have usual authority to do so as the state's cabinet. The same approach was taken as regards the Minister of Justice of Mongolia in the *Hong Kong and South China Ltd* case [2004] 2 Lloyd's Rep 198, paras 123-126 at [125] – [126]."

129. We are unable to accept this submission and consider that the judge was wrong to accept it.

130. There can be no question of identifying the "usual" authority of the CMU in the abstract, without regard to its actual authority under the applicable Ukrainian laws. Article 16.1 of the Budget Code is clear that the issue of external debt requires, first, instructions as to terms from the CMU and, second, the necessary actions on the part of the Minister of Finance to implement the borrowing. Under article 16.1, the CMU has no authority to delegate to the Minister of Finance the decision as to the terms of the borrowing, which by virtue of article 16.1 is a matter exclusively for the CMU. In these circumstances, the CMU can have no "usual" authority to clothe the Minister of Finance with an authority which is contrary to the express provisions of the Budget Code. This was the point made by Andrew Smith J in the passage from *Donegal International Ltd v Zambia* cited above. As he said at [451]:

> "Donegal's argument seems to be that the ostensible authority of Mr Kasonde derives from his usual authority as Minister of Finance, but this does not seem to me to answer an objection that his usual authority was restricted by the Constitution."

131. Reliance on *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm); [2004] 2 Lloyd's Rep 198 (*Marubeni)* is misplaced. The relevant issue in that case was whether the Minister of Finance of Mongolia had authority to issue a guarantee of a Mongolian company's liabilities under a purchase contract with the claimant. The guarantee was by its terms governed by English law and contained an English High Court jurisdiction clause. At the trial of the action, Cresswell J held that the Minister of Finance had actual authority to issue the guarantee and that it had been issued with the necessary approval of the cabinet. Alternatively, Cresswell J held that, by reason of a letter signed by the Deputy Minister of Justice stating that the Minister of Finance had the requisite authority to sign the guarantee, the Minister of Finance had ostensible authority to do so. He held that a ministry of justice in a foreign country would be expected to have authority to issue legal opinions on behalf of the foreign government in such matters and went on to say that the Minister and Deputy Minister of Justice had "actual or apparent authority to issue opinion letters". We will come back to that statement but, for the present purposes, the important point is that there was no suggestion that it was contrary to the express provisions of Mongolian law for the Deputy Minister of Justice to issue opinion letters as to the authority of other Ministers in external transactions. In those circumstances, Cresswell J was correct to say that it was within the Deputy Minister's actual authority, i.e. his implied actual authority, there being no evidence of express authority to issue opinion letters. This contrasts with the position of the CMU under the Budget Code.

132. The person holding out an "agent" so as to give them ostensible authority must have actual (express or implied) authority to do so on behalf of the principal, or ostensible authority derived from someone with actual authority. Ostensible authority is not otherwise sufficient. If, when stating that the Deputy Minister of Justice of Mongolia had "apparent authority to issue opinion letters", Cresswell J was meaning to refer to ostensible authority, as opposed to implied actual authority, we consider he was wrong.

133. For the reasons given earlier, we conclude that Ukraine was bound by the ostensible authority of the Minister of Finance and the CMU.

(4) Ratification

134. Law Debenture submitted to the judge that, if it was wrong on the question of the authority of the Minister of Finance, the issue of the Notes was ratified by subsequent acts of Ukraine. The judge dealt briefly with this issue, holding that, if contrary to his conclusion on authority it had arisen for decision, it was not appropriate for decision on a summary judgment application. In its respondent's notice, Law Debenture seeks to uphold the judge's order for summary judgment on the additional ground of ratification.

135. The acts on which Law Debenture relies are: the acceptance of the proceeds of US$3 billion from the issue of the Notes into its central bank reserves; the inclusion of the Notes in a table of outstanding debt in a prospectus published in February 2014 for a further note issue without any suggestion that it was unauthorised; the making of interest payments on three occasions in 2014-15 amounting to US$223 million without reservation or protest; and the inclusion of the Notes in an exchange offer required by the International Monetary Fund and made by Ukraine in September 2015. These were listed in Law Debenture's skeleton argument for this appeal. At the hearing, Law Debenture additionally relied on the statement issued by the Ministry of Finance on 26 September 2014 that the issue of the Notes had not violated Ukrainian law, the adoption by the Ukrainian Parliament in May 2015 of the Moratorium Law and a resolution of the Parliament in September 2015 relating to Ukraine's borrowing and the IMF programme. Law Debenture accepts for the purposes of this appeal that it cannot rely on anything done or said on or after 18 December 2015 when Ukraine reserved its rights as regards the validity of the issue of the Notes.

136. These were all acts undertaken by organs of the Ukraine state with knowledge of the transaction said to have been made without authority (the issue of the Notes and the execution of the Trust Deed and associated agreements). That is, Law Debenture submits, sufficient knowledge to mean that by these acts Ukraine ratified the issue of the Notes. It was unnecessary for there to be knowledge of the original lack of authority or its legal consequences. It was enough that Ukraine knew that the Minister of Finance had entered into the Trust Deed, the mode of sale and the terms of the Notes. In any event, whatever the state of Ukraine's actual knowledge of the breaches now alleged by it, it had at all times the means of discovering them.

137. Law Debenture relied on two authorities at first instance (*ING Re (UK) Ltd v R&V Versicherung AG* [2006] EWHC 1544 (Comm); [2006] 2 All ER (Comm) 870, and *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm); [2005] 2 Lloyd's Rep 35) both of which adopted in whole or in part the law as stated in successive editions of *Bowstead and Reynolds on Agency*:

> "In order that a person may be held to have ratified an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify the act and take the risk whatever the circumstances may have been. But knowledge of the legal effect may be imputed to him, and it is not necessary that he should have notice of collateral circumstances affecting the nature of the act."

138. In the *ING* case, Toulson J said at [153]:

> "If a principal knows the essentials of what happened as between the agent and the third party (in this case, that the agent entered into a quota share treaty on behalf of the principal with the third party), I find it difficult to see as a matter of justice and principle why that should not be sufficient knowledge for the purposes of ratification of the agent's conduct vis-à-vis the third party. In most cases the principal will know or be in a position to find out very quickly whether the agent acted without authority, and that may account for the absence of direct authority on that issue."

139. At [155], Toulson J said: "If the principal knows what the agent has done, but does not know that the agent lacked authority to do it because of a lack of adequate records or internal organisation, I do not see why in justice that should operate to the detriment of the third party".

140. Ukraine submits that the issue of the Notes was not ratified, on a number of grounds.

141. First, in the case of a non-natural person such as a state, ratification requires a person with authority to ratify the relevant act on behalf of the principal. None of the acts relied on by Ukraine were performed by a person with authority to ratify the issue of the Notes. If ostensible authority is relied on, it must be traced back to a source of actual authority.

142. Second, Ukraine submits that there was no unequivocal conduct, such that it can only be objectively explained by an intention to ratify. Ukraine submits that the acts relied on by Law Debenture must be assessed against the circumstances at the time. By reason of Russia's military and other hostile actions, Ukraine was facing an existential threat which prevented it from making a free and positive choice to ratify the issue of the Notes.

143. Third, the knowledge required of Ukraine to ratify the issue of the Notes depends on the particular circumstances of the case: *SEB Trygg* at [133] per Gloster J. Ukraine must be shown to have "full knowledge of all the material circumstances in which the act was done". While a party may be deemed to know the true construction or legal effect of a contractual document that it has signed, the principle does not extend so as to deem Ukraine to have known, at the time of the alleged acts of ratification, the facts surrounding the issue of the Notes or the resulting invalidity under Ukrainian law. No-one is identified by Law Debenture as having the requisite knowledge.

144. Fourth, ratification must be free from duress, as to which Ukraine submits that it has at least an arguable case on the facts.

145. As mentioned earlier the judge dealt briefly with the question of ratification. Unlike other issues, he did not set out at length the parties' submissions but dealt with the submissions and his conclusions as follows:

> "170. The Trustee's alternative case is that Ukraine ratified the agreements. This question is also governed by English law as the putative proper law of the contract. The Trustee relies primarily

> on the making of interest payments, the terms of the Moratorium Law, and references to the Notes in official, public documents as outstanding debt obligations of Ukraine.
>
> 171. Ukraine does not dispute as a matter of fact the matters relied on by the Trustee. However, it contends that as a result of Russian aggression in Crimea and eastern Ukraine, Ukrainian officials were not able to give free or adequate consideration to the Eurobonds. Further, from 17 December 2015 onwards, Ukraine had already reserved all its rights. For these and other reasons, Ukraine contends that the legal requirements are not met and that the Trustee cannot establish ratification under English law. It further submits that this issue is unsuitable for summary determination.
>
> 172. The court agrees with this submission. In order to assess the Trustee's case it would be necessary to conduct a "mini-trial" examining the various acts and statements relied upon by the Trustee. That would be a major exercise and is neither permissible nor possible on a summary judgment application.
>
> 173. Further, Ukraine's case is that it was unable freely to consider the legal position as regards the bonds because of the military steps being taken by Russia in Crimea and eastern Ukraine. There can be no question of dealing with ratification on a summary basis against that background. If the Trustee is not able to rule out lack of authority as a matter of law, it cannot rely on ratification at this stage in the proceedings."

146. We agree with the judge that ratification raises issues that are not suitable for summary determination.

147. First, it is far from clear that the test of knowledge of all material circumstances on which Law Debenture relies applies to the actual or imputed knowledge of Ukraine. This raises issues of law and fact, as to the scope of the test and as to what Ukraine knew or ought to have known at the time of each act of alleged ratification.

148. Second, the borrowing limits were set by the Ukrainian Parliament. It seems to us to be right, and it is at least strongly arguable, that only the Parliament had the authority to ratify borrowing in excess of the limits. Whether the Moratorium Law and resolution adopted by the Parliament in May and September 2015 was capable under Ukrainian Law of constituting such ratification was not, so far as we are aware, explored in the evidence or in submissions to the judge.

149. Third, if (as we hold below), Ukraine's defence of duress is justiciable, there can be no legal bar to examining the matters relied on by Ukraine as barring the claim of ratification. In any event, as the judge held, whether those matters deprived Ukraine of the free will required for ratification is not a proper subject for summary judgment.

150. We therefore conclude that, if we had held in favour of Ukraine on the question of authority, we would not give summary judgment in favour of Law Debenture on the basis of its case of ratification.

Ground 2: Duress

151. As summarised above, Ukraine maintains that it entered into the Notes by reason of duress exerted by Russia. On Ukraine's case the circumstances in which the Notes were entered into include the wider question of the steps which Russia took in late 2013 to dissuade Ukraine from entering into the Association Agreement with the EU. In effect, according to Ukraine, there was a carrot and a stick which were put into use in combination. Ukraine needed to borrow money. It hoped by entering into the Association Agreement to gain access to the European capital markets for that. Russia was unhappy with Ukraine entering into the Association Agreement and becoming close with the EU. Therefore, as well as making the threats which are the foundation of Ukraine's case in duress to dissuade it from entering into the Association Agreement, Russia sought to persuade Ukraine not to do so by agreeing to lend it US$15 billion to help with its public finances. The US$3 billion loaned by Russia to Ukraine under the Notes was the first tranche of this funding.

152. It should be emphasised that Law Debenture's claim at the direction of Russia is based purely upon the Notes. Russia has not brought an alternative restitutionary or unjust enrichment claim to recover the US$3 billion which was paid to Ukraine, should it transpire that the Notes are vulnerable to being avoided as a contract on grounds of duress. We were not given an explanation for this and there has been no exploration in the argument before us of what defences might be available to Ukraine in respect of such a claim. One of the benefits for Russia under the Notes (via the rights enjoyed by Law Debenture as trustee in relation to the Notes) is that they contain a no set off clause, which would not be applicable if the Notes are avoided by reason of duress and Russia sued under the law of unjust enrichment.

153. It should also be emphasised that there would be fora in which the dispute between Russia and Ukraine could be ventilated, including both its commercial and its international law aspects, if both states agreed to confer jurisdiction on them. They could agree to submit their dispute to an arbitral tribunal or they could both give consent for their dispute to be determined by the International Court of Justice ("ICJ"). It is because of the absence of agreement regarding submission of their dispute to another tribunal or court with jurisdiction to deal with all aspects of it that the English courts have to decide whether summary judgment should be given on the current claim by Law Debenture. In the course of the hearing, Ukraine offered to undertake to agree to refer the present dispute to the ICJ. There was no indication that Russia would be willing to do this. Therefore, we have no option but to grapple with the issues which arise in the proceedings as brought by Law Debenture in the Commercial Court.

154. A convenient starting point in relation to the issue of duress is the judgment of Lord Neuberger of Abbotsbury PSC and Lord Sumption and Lord Hodge JJSC in *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359, in their general treatment of the concept of non-justiciability at [41]-[43]. The subject matter of that case is very different from the present case, but the observations in it have wider significance. At [41] the President and Justices said:

"41. There is a number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits. Some of them, such as state immunity, confer immunity from jurisdiction. Some, such as the act of state doctrine, confer immunity from liability on certain persons in respect of certain acts. Some, such as the rule against the enforcement of foreign penal, revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land (now circumscribed by statute and by the Brussels Regulation and the Lugano Convention) are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states. Properly speaking, the term non-justiciability refers to something different. It refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter. Such cases generally fall into one of two categories.

42. The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament. The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, *Buttes Gas and Oil Co v Hammer (No. 3)* [1982] AC 888, 935–937 is the leading case in this category, although the boundaries of the category of "transactions" of states which will engage the doctrine now are a good deal less clear today than they seemed to be 40 years ago. The second is based on the constitutional limits of the court's competence as against that of Parliament: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321. The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: *Hamilton v Al Fayed* [2001] 1 AC 395.

43. The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes;

> transactions not intended by the participants to affect their legal relations; and issues of international law which engage no private right of the claimant or reviewable question of public law. Some issues might well be non-justiciable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). As Cranston J put it in the latter case, at para 60, there is no "domestic foothold". But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it: *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter. As Lord Bingham of Cornhill observed in *R (Gentle) v Prime Minister* [2008] AC 1356, para 8, there are
>
> > 'issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it. The defendants accept that if the claimants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude.'"

155. In the light of these observations, and taking paras. [43] and [42] in reverse order, three issues arise in relation to Ukraine's duress defence under ground 2:

i) Issue (1): Is there a domestic foothold - that is to say, a basis in legal analysis under English law - which requires or permits the court to embark upon an examination of Ukraine's case that Russia made threats against it which were unlawful as a matter of international law or otherwise illegitimate?

ii) Issue (2): If there is a domestic foothold, is the issue nonetheless beyond the competence of the English courts to resolve? And

iii) Issue (3): If there is a domestic foothold but the issue is beyond the competence of the English courts to resolve, should the court grant an unlimited stay of proceedings or strike out Law Debenture's claim (which is a claim to vindicate Russia's rights as lender under the Notes), because as a result its claim under the Notes cannot fairly be tried?

156. If there is no domestic foothold for the claims by Ukraine that Russia has breached or threatened to breach norms of international law or other international standards of behaviour, then there would be no proper basis for granting a stay of proceedings or striking out Law Debenture's claim under the Notes. That is because there would then be no relevant defence under English law which is required to be tried fairly, such that the proceedings should be stayed or struck out by reason of that not being possible to achieve.

157. So far as the English law of duress is concerned, both sides proceeded on the basis that Cooke J accurately stated the law in *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm); [2012] 2 All ER (Comm) 855, at [21]—[35]. For a defence of duress to a contract claim to succeed, it is necessary to show that illegitimate pressure was applied and that this pressure caused the pressurised party to enter into the contract which he seeks to avoid: [23]. Cooke J relied in particular on the statements of principle by Steyn LJ in this court in *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 at 718-719. Cooke J accurately summarised the effect of this case as follows at [30]:

> "This is Court of Appeal authority for the proposition that the exertion of pressure by "lawful means" does not prevent the operation of the doctrine of economic duress. Whilst the particular examples in earlier cases, to which reference is made in the passage quoted above, do not take the matter much further, Steyn LJ refers to "the critical enquiry" as being "not whether the conduct is lawful but whether it is morally or socially unacceptable". He said in terms that that was the enquiry in which the court was engaged, although the Court should not set its sights too high and it might be a relatively rare care in which "lawful act duress" could be established, particularly in a commercial context."

158. The question of causation is in issue in these proceedings, but cannot be resolved for the purposes of summary judgment. However, Law Debenture contends that Ukraine is unable to show that it was subject to illegitimate pressure, because to do so would require examination of the conduct of Russia on the international plane, which is something an English court will not embark upon. Mr Howard primary argument for Law Debenture was that this feature of the case meant that there was no proper domestic foothold for the purposes of issue (1) above. In the alternative, he says that even if there is a domestic foothold the analysis required would take the court into areas which are beyond its competence to resolve: issue (2) above.

159. In our judgment, Ukraine succeeds in showing there is a domestic foothold for the purposes of issue (1) in relation to the issue of illegitimate pressure. English law provides that a contract made as a result of illegitimate pressure will not be enforceable. Ukraine appeals to this substantive doctrine of duress in English law in its defence to Law Debenture's claim on the Notes. It is common ground that, for the purposes of the application for summary judgment (although Law Debenture reserves full argument on the point for trial), any relevant duress arguably exerted by Russia may be taken to affect the contractual rights relied upon by Law Debenture and hence would provide Ukraine with an arguable defence against Law Debenture in suing on the Notes. In our view, given the relevant concession for the purposes of the summary judgment

application, Ukraine is entitled to seek to rely on this doctrine of domestic law in its defence for the purposes of resisting that application and, having done so, the court has to examine that defence to see if it is made out. This provides a sufficient foothold in English law at the stage of issue (1).

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.

161. Mr Howard submitted that a domestic court has no authority to rule upon whether a foreign state has violated its obligations under international law and that this is a matter so remote from the court's competence that it could not be said that allegations of such violation could give rise to any issue in domestic law. We disagree. In our view, this submission confuses issue (1) and issue (2), and is appropriately addressed in the context of issue (2). In relation to issue (1), the submission is contrary to authority.

162. In the *Buttes Gas* case, the claimants sued the first defendant for defamation in relation to statements made by him to the effect that the claimants had conspired with the ruler of Sharjah for Sharjah to make unjustified territorial claims in respect of an oil-field in the Persian Gulf and then award oil concessions in respect of it to the claimants, thereby cheating the first defendant's company, the second defendant, out of an oil concession in respect of the same field granted by a neighbouring state, Umm al Qaiwain, which also laid claim to it. The pleaded defences were justification and fair comment. The defendants also counterclaimed for damages for alleged conspiracy between the claimants and the ruler of Sharjah and others to cheat and defraud them, relying on the same pleaded allegations as for their defences of justification and fair comment. The issues raised covered a range of matters, including competing claims to the oil-field by a range of states and the conduct of international relations by the United Kingdom government in pursuit of its strategic interests. The House of Lords held that the domestic courts should abstain from deciding the issues raised for reasons of non-justiciability related to issue (2) above, and that all proceedings on the claim and on the counterclaim should be stayed as a result. Thus, far from saying that the defence of justification could not be raised at all (on the grounds of an absence of a domestic foothold under issue (1)), so that the claim in defamation must inevitably succeed, the House of Lords regarded the appropriate outcome as being that that claim should be stayed. As Lord Wilberforce said, after noting that the defendants' plea of justification could not be entertained by the court, "to allow [the claimants' libel action] to proceed but deny [the defendants] the opportunity to justify would seem unjust …" (p. 938E-F). Lord Wilberforce made this point although as it transpired the House of Lords did not have to decide that issue, because the claimants had offered to submit to a stay of their libel claim if the counterclaim were stayed, and the House of Lords held them to that offer.

163. Further, the formulation of principle by the Supreme Court in the *Shergill v Khaira* case at [43], set out above, expressly indicates that there may be a relevant foothold in domestic law in relation to issue (1) in a case involving issues of international law. This is contrary to the suggestion by Mr Howard that the mere fact that an issue of international law is raised by Ukraine in support of its defence in the present case shows that there is no domestic foothold. In fact, the domestic courts in England and Wales are quite often prepared to rule on issues of international law which are implicated by some relevant plea of domestic law: see, e.g., *Re H* [1998] AC 72, 87D-G, and *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143E-G (reference to the United Kingdom's international obligations in order to resolve issues of statutory construction); *R v Lyons* [2002] UKHL 44, [13], *AG v Guardian Newspapers (No. 2)* [1990] 1 AC 109, 238 and *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (reference to unincorporated treaty obligations as relevant to the development of the common law); *R v Secretary of State for the Home Department, ex p. Launder* [1997] 1 WLR 839, HL, at 866-867, and *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326, 341-342, 367, 375-376 (unincorporated treaty obligations relevant to pleas of legitimate expectation in domestic public law; see also *R v (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, [43]-[47] per Lord Bingham and [62]-[68] per Lord Brown of Eaton-under-Heywood, who accepted that interpretation of such obligations by a domestic court could be embarked upon in an appropriate case); *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 and *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719 (whether a rule of customary international law exists and whether it has been adopted into the common law); and *Kuwait Airways Corporation v Iraqi Airways Co. (Nos. 4 and 5)* [2002] 2 AC 883 and *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964 (issues of international law relevant to determination of tort claims). This was recognised by the Supreme Court in *Serdar Mohammed v Ministry of Defence* [2017] UKSC 1; [2017] AC 649, [58] (Lord Mance JSC) and [79] (Lord Sumption JSC).

164. We turn, then, to issue (2). Despite there being a domestic foothold for reference to Russia's obligations under international law in relation to Ukraine, is there some supervening reason why Ukraine's plea of duress, invoking as it does alleged breaches of those obligations, should not be treated as justiciable by the domestic court? For the purposes of Ukraine's resistance to summary judgment being entered against it, the judge found there is a sufficient factual foundation for Ukraine's allegation of duress by reference to an alleged threat to use force against it and its territorial integrity if it did not repudiate the draft EU Association Agreement and enter into the Notes instead: [308(i)-(iv)]. This finding, so far as it is relevant for the purposes of Law Debenture's claim for summary judgment, has not been put in issue on this appeal. (It should be noted that Law Debenture and Russia deny the allegation and, if summary judgment is refused and the case proceeds to trial, would presumably seek to meet the allegation on the evidence called at trial).

165. It is common ground that the use of force by one state against another and also the threat of use of force by one state against another are in violation of a general norm of international law with the status of *ius cogens* (this is provided that no issue of self-defence arises, and none is raised here). The norm finds expression in Article 2(4) of the Charter of the United Nations, as follows:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

166. In addition to alleged violation of this *ius cogens* norm of international law, Ukraine relies on the alleged threats by Russia to violate Ukraine's territorial integrity as being contrary to Russia's obligations under the Budapest Memorandum on Security Assurances 1994 (the agreement pursuant to which Ukraine gave up nuclear weapons on its territory and hence relinquished a potentially important means of defending itself). Ukraine also relies on the imposition of restrictive trade measures by Russia against Ukraine in 2013 allegedly in violation of various treaty obligations governing trade between them under the Budapest Memorandum, the General Agreement on Tariffs and Trade 1994, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation 1997, and the Free Trade Agreement between Member States of the Commonwealth of the Independent States 2011, and further threats allegedly made by Russia to impose unlawful trading restrictions to damage Ukraine's economy.

167. In the hearing before us and, it seems, at the hearing before the judge there was little separate debate about these further matters. The strongest aspect of Ukraine's case is in relation to the alleged breach of *ius cogens* by Russia, so the main focus has been on that. In relation to these further matters it suffices to say that if Ukraine establishes that it has an arguable defence of duress by reference to alleged breach of *ius cogens* – as we consider it does, for the reasons set out below – there is no part of Ukraine's case in relation to these further matters which we were persuaded should be struck out as being unarguable either on the facts or on the law. On the contrary, in our judgment it is desirable that these further matters pleaded by Ukraine should be in issue for exploration at trial with the benefit of full findings of fact, both as independent aspects of the defence of duress and also as relevant factual background to allow the whole pattern of alleged threatening behaviour by Russia to be assessed in its full context.

168. Reverting to the primary aspect of Ukraine's duress defence, focusing on *ius cogens*, there is force in Mr Howard's submission that the court should grapple with the question of justiciability in relation to issue (2) at this stage, rather than leaving it to be explored at trial. That is because, on his argument, a major part of the reason why Ukraine's duress defence is non-justiciable is because it would be wrong for a domestic court to become involved in scrutinising such foreign acts of state, concerning matters of high policy of other nations, such as would inevitably be involved if the present case proceeds to trial.

169. The leading authority in relation to issue (2) is *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964. The relevant claim concerned a Libyan citizen and his Moroccan wife who were detained overseas by officials in China, Malaysia and Thailand and then removed by US officials to Libya, where they were detained and claimed they had been tortured. The claimants alleged that ministers and officials of the United Kingdom government had participated in their unlawful removal to Libya and sued them for false imprisonment, trespass to the person, conspiracy to injure, misfeasance in public office and negligence. The defendants relied on a defence of foreign act of state. The defence was held not to apply in the circumstances of the cases in issue. The Supreme Court

identified three different rules regarding non-justiciability in English courts of foreign acts of state (see [35]-[44] per Lord Mance JSC; [120]-[124] per Lord Neuberger of Abbotsbury PSC, with whom Baroness Hale of Richmond DPSC, Lord Clarke of Stone-Cum-Ebony JSC and Lord Wilson JSC agreed; and see also [227] per Lord Sumption JSC, with whom Lord Hughes JSC agreed). It was the third rule which was relevant in that case, as in this.

170. That rule is set out by Lord Neuberger at [123]:

> "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. Thus, the courts of this country will not interpret or question dealings between sovereign states; "Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory": per Lord Pearson in *Nissan v Attorney General* [1970] AC 179, 237. *Nissan* was a case concerned with Crown act of state, which is, of course, a different doctrine and is considered in *Mohammed (Serdar) v Ministry of Defence*; *Rahmatullah v Ministry of Defence [2017] AC 649*, 787, but the remark is none the less equally apposite to the foreign act of state doctrine. Similarly, 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. It is also part of this third rule that 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. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels: see *Shergill v Khaira* [2015] AC 359, paras 40, 42."

171. Lord Neuberger went on to give an account of the basis and scope of the third rule at [144]-[147], [151] and [153]-[157]. In view of the importance of Lord Neuberger's observations, we set them out in full here:

> "144. There is no doubt as to the existence of the third rule in relation to property and property rights. Where the Doctrine applies, it serves to defeat what would otherwise be a perfectly valid private law claim, and, where it does not apply, the court is not required to make any finding which is binding on a foreign state. Accordingly, it seems to me that there is force in the argument that, bearing in mind the importance which both the common law and the Human Rights Convention attach to the right of access to the courts, judges should not be enthusiastic in declining to determine a claim under the third rule. On the other hand, even following the growth of judicial review and the enactment of the Human Rights Act 1998, judges should be wary

of accepting an invitation to determine an issue which is, on analysis, not appropriate for judicial assessment.

145. I believe that this is reflected in observations of Lord Pearson in *Nissan v Attorney General* [1970] AC 179. Immediately after the passage quoted in para 123 above, he said, at p 237:

> "Apart from these obvious examples, an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court of law (municipal not international): if a subject alleges that the governmental act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court."

A little later, he explained that where the Doctrine applied:

> "the court does not come to any decision as to the … rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it."

And added that: "This is a very unusual situation and strong evidence is required to prove that it exists in a particular case."

146. In *Yukos v Rosneft* [2014] QB 458, para 66 Rix LJ suggested that "Lord Wilberforce's principle of 'non-justiciability' … has to a large extent subsumed [the act of state Doctrine] as the paradigm restatement of that principle". If the foreign act of state principle is treated as including what I have called the first and second rules, then I do not agree. The third rule is based on judicial self-restraint and is, at least in part, concerned with arrangements between states and is not limited to acts within the territory of the state in question, whereas the first and second rules are of a more hard-edged nature and are almost always concerned with acts of a single state, normally within its own territory.

147. Having said that, I accept that it will not always be easy to decide whether a particular claim is potentially subject to the second or third rule. The third rule may be engaged by unilateral sovereign acts (e g annexation of another state) but, in practice, it almost always only will apply to actions involving more than one state (as indeed does annexation). However, the fact that more than one sovereign state is involved in an action does not by any means justify the view that the third rule, rather than the second, is potentially engaged. The fact that the executives of two different states are involved in a particular action does not, in my view at any rate, automatically mean that the third rule is engaged. In my view, the third rule will normally involve some

sort of comparatively formal, relatively high level arrangement, but, bearing in mind the nature of the third rule, it would be unwise to be too prescriptive about its ambit.

…

151. The third rule is based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving, as discussed by Lord Mance JSC in paras 40–45 and by Lord Sumption JSC in paras 234–239 and 244. It is purely based on common law, and therefore has no international law basis, although, as discussed below, its application (unsurprisingly) can be heavily influenced by international law.

…

Limits and exceptions to the Doctrine: public policy

153. It is well established that the first rule, namely that the effect of a foreign state's legislation within the territory of that state will not be questioned, is subject to an exception that such legislation will not be recognised if it is inconsistent with what are currently regarded as fundamental principles of public policy—see *Oppenheimer v Cattermole* [1976] AC 249, 277–278, per Lord Cross of Chelsea. This exception also applies where the legislation in question is a serious violation of international law—see *Kuwait Airways Corpn v Iraqi Airways Co (Nos. 4 and 5)* [2002] 2 AC 883, 1081, para 29, per Lord Nicholls of Birkenhead.

154. The circumstances in which this exception to the Doctrine should apply appear to me to depend ultimately on domestic law considerations, although generally accepted norms of international law are plainly capable of playing a decisive role. In his opinion in *Kuwait Airways*, p 1081, paras 28–29, Lord Nicholls emphasised "the need to recognise and adhere to standards of conduct set by international law" and held that recognition of the "fundamental breach of international law" manifested by the Iraqi decree in that case "would be manifestly contrary to the public policy of English law", like the Nazi German confiscatory decree in *Oppenheimer*. However, there is nothing in what Lord Nicholls said which suggests that it is only breaches of international law norms which would justify disapplication of the Doctrine. On the contrary: his reference to "the public policy of English law" supports the notion that the issue is ultimately to be judged by domestic rule of law considerations.

155. The point is also apparent from the opinion of Lord Hope of Craighead. At p 1109, para 139, he said that "the public policy exception" is not limited to cases where "there is a grave

> infringement of human rights", but is "founded upon the public policy of this country"—plainly a domestic standard.
>
> 156. The exception to the Doctrine based on public policy has only been considered by the courts in relation to the first of the four rules set out above. However, I cannot see grounds for saying that it does not apply similarly to the second rule, executive acts within the territory of the state concerned.
>
> 157. As to the third rule, dealings between states, (as well as the fourth rule—if it exists) it appears to me that in many types of case this exception may be applicable, but in some it may not. In the course of its judgment in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76 the Court of Appeal effectively suggested that the exception could be applied to the third rule. In paras 32 and 33, they said that "the English court will not adjudicate upon the legality of a foreign state's transactions in the sphere of international relations in the exercise of sovereign authority", but that this was subject to exceptions, as *Oppenheimer* and *Kuwait Airways* demonstrated. The court was accordingly prepared to hold that the detention of a UK citizen in Guantanamo Bay "subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal" was unlawful, despite his detention being an act of state on the part of the US—see paras 64, 66 and 107. (It is fair to add that, although expressed as if it involved transactions in the field of international relations, it is arguable that the issue before the Court of Appeal in *Abbasi* was not in fact concerned with the third rule, but the second)."

172. At [165], Lord Neuberger held that it is inherent in the nature of the third rule that it may apply to actions outside the territory of the state concerned. At [167]-[168] Lord Neuberger held that the acts complained of by the claimants did not fall within the third rule and also that, if the third rule did apply, the public policy exception would apply so as to deprive it of effect:

> "167. In my view, at least on the evidence available so far, and in agreement with Lord Mance and Lord Sumption JJSC, the acts complained of by Mr Belhaj and Mrs Boudchar [the claimants] do not fall within the third rule. There is no suggestion that there was some sort of formal or high-level agreement or treaty between any of the states involved which governed the co-operation between the executives of the various countries concerned. As already mentioned, the mere fact that officials of more than one country co-operate to carry out an operation does not mean that the third rule can be invoked if that operation is said to give rise to a claim in domestic law. It would be positively inimical to the rule of law if it were otherwise.

> 168. Having said that, even if the third rule otherwise applied, I would still hold that this was a case where, assuming that the claimants were detained, kidnapped and tortured as they allege, the public policy exception would apply. In that connection, Lord Sumption JSC's impressive analysis of the relevant international law is important in the present context because I consider that any treatment which amounts to a breach of *jus cogens* or peremptory norms would almost always fall within the public policy exception. However, as explained above, because the Doctrine is domestic in nature, and in agreement with Lord Mance and Lord Sumption JJSC, I do not consider that it is necessary for a claimant to establish that the treatment of which he complains crosses the international law hurdle before he can defeat a contention that the third rule applies."

173. In our view, it is clear that the third rule has prima facie application in the present case. The acts by Russia upon which Ukraine seeks to rely for the purposes of its defence of duress were acts of high policy by Russia in the sphere of international relations in the exercise of sovereign authority: see *Belhaj* at [157]. The question, then, is whether the public policy exception identified by Lord Neuberger applies, so that Ukraine is entitled to rely on the threats made by Russia.

174. In our judgment, Ukraine succeeds in its argument that the public policy exception applies. In that regard, six points should be made which have cumulative effect.

175. 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 by 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* and *Abbasi*. Although we do not go so far as to say that the third rule cannot apply where the relevant state has chosen to submit to the jurisdiction of the English court, this is a factor which in our view makes the argument for self-restraint by the English court significantly weaker and correspondingly makes it easier to identify aspects of public policy in favour of the court deciding the issues before it according to their substantive merits. A similar point was made by this court in the context of enforcement against a state of an arbitration award resulting from an arbitration agreement contained in an unincorporated treaty: *Republic of Ecuador v Occidental Exploration and Production Co.* [2005] EWCA Civ 1116; [2006] QB 432, at [47]; and the force of this is greater in the present context, where the relevant relationship has been structured according to the domestic law of England and a specific choice of English jurisdiction has been made.

176. Secondly, insofar as the foreign act of state doctrine reflects to some degree a principle of respect by the domestic court for comity between states, it is relevant that in the present case comity points in both directions. Russia is a friendly state which wishes

the court to exercise self-restraint, so as not to determine a matter which is relevant to the claim which Law Debenture brings on Russia's behalf. Ukraine is a friendly state which wishes the court to determine that matter, as a matter of justice between the parties, as part of its consideration of the merits of the claim which Law Debenture brings on Russia's behalf.

177. Thirdly, there is an aspect of comity between states which positively points in favour of the English court proceeding to determine Law Debenture's claim on Russia's behalf, including by scrutiny of Ukraine's defence of duress. This is because the only way in which Russia can benefit in relation to the claim in contract under the Notes is by directing Law Debenture to sue in the English court, and if the English court does not proceed to determine that claim on its merits (including by scrutiny of Ukraine's defence of duress) the result would be that the court would stay the claim: see the discussion of issue (3) below. Russia, by arranging for Law Debenture to bring this contractual claim, has indicated clearly to the court that it wishes the court to proceed to determine it according to the merits, including by dealing with any defences which the court finds are arguably available to Ukraine as a domestic foothold. If Russia's preference is that the court should not make a determination of the issues of international law raised by Ukraine as part of its defence of duress, the solution is in Russia's own hands: it could cause Law Debenture to withdraw the contract claim or agree to a stay of that claim. Thus the public policy reasons underlying the third rule of the foreign act of state doctrine can be met in that way. Conversely, as a matter of basic justice, it does not seem to us that Russia can expect to seek to have this contract claim vindicated in an English court without that court proceeding to scrutinise the defence of duress which is arguably available to Ukraine. The fact that Russia presses the court to determine the contract claim knowing that such a defence arises in relation to it again weakens the argument for self-restraint by the court and correspondingly makes it easier for the court to identify public policy reasons why an exception to the third rule should apply. Indeed, in our view the need to do justice between the parties to the present claim and between Russia and Ukraine in a private law dispute between them is itself a reason of public policy why in this case the public policy exception should be found to apply.

178. Fourthly, there is nothing inherently non-justiciable or unmanageable in the legal standards which the English court would be called on to apply in determining whether Ukraine's duress defence is made out. English courts are well capable of construing treaty obligations and general obligations of states under international law and assessing their application: see the authorities above in this section of the judgment. This is not a case of an absence of "judicial or manageable standards by which to judge" the relevant issues, to use the language of Lord Wilberforce in *Buttes Gas* [1982] AC 888 at p. 938B. Ukraine's case is based on alleged threats to violate international treaties and obligations. There is no inherent insuperable difficulty in the court considering the evidence in relation to any threats made and assessing whether they were lawful or not according to the standards set out in those treaties and in the general norms of international law containing those obligations. The willingness of an English court to examine the position in international law where that is relevant to some issue in domestic law, even in respect of acts of the highest state policy such as in relation to war or the prosecution of armed conflict, is illustrated by the *Kuwait Airways*, *Belhaj* and *Serdar Mohammed* cases cited above.

179. Fifthly, there is no scope in this case for another aspect of public policy which underlies the third rule of foreign act of state, namely the constitutional concern that in a matter relating to the conduct of the United Kingdom's foreign affairs the courts should be astute not to usurp or cut across the proper role of the executive government, which has the primary responsibility for carrying on those affairs: see *Shergill v Khaira* at [42], set out above; also *Buttes Gas* [1982] AC 888 at p. 938A. In the present case, there have been statements by Ministers making clear that the United Kingdom regards the activities of Russia in seizing the Crimea and assisting military action by insurgents in Eastern Ukraine against the Ukrainian government as being in clear violation of Russia's obligations under international law, including in particular its obligations under the norm of *ius cogens* reflected in Article 2(4) of the UN Charter. The United Kingdom also gives effect in its law to EU sanctions imposed in response to such violation. These are matters which reflect in substance the alleged threats by Russia on which Ukraine seeks to rely in these proceedings, and it is not suggested that the United Kingdom government's attitude could be expected to be any different in relation to those alleged threats. Further, the United Kingdom government is on notice of the present proceedings and has had a full opportunity to intervene to draw to the court's attention any difficulty which their due resolution by the court might cause in the conduct of the foreign affairs of the United Kingdom. It has not sought to intervene or to suggest that any such difficulties might arise if the court accedes to Ukraine's submissions.

180. Sixthly, 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: see *Belhaj* at [155], set out above. In our judgment, there is an especially strong public policy in this country that no country should be able to take advantage of its own violation of norms of *ius cogens*. This was adverted to by Lord Neuberger in *Belhaj* at [168], set out above, albeit in the context of the particular claims in issue in that case. However, it is significant that Lord Neuberger did not confine his reasoning to the particular norms relevant in that case, but stated the position more widely by reference to the category of *ius cogens* itself. 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.

181. For these reasons, we consider that Ukraine succeeds in rebutting Law Debenture's arguments under issue (2). 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.

Ground 3: Stay

182. This means that in our view the issue of a stay of proceedings does not arise. However, since it was argued out before us we will set out our views in relation to it. If we were wrong in our conclusion on issue (2) above, our view is that the just conclusion in this case would be to order a stay of the proceedings. In so far as the judge came to a different view, we consider that he was wrong to do so.

183. Our reasons in relation to this part of the case largely reflect the discussion in relation to issue (2) above. The basic point is that Russia, through Law Debenture, is positively seeking to enforce contractual rights in private law against Ukraine. In our view, it can only fairly seek to do so if Ukraine is afforded a fair opportunity to defend itself by reference to any defence in respect of which there is a domestic foothold. As we have held above, there is a domestic foothold for Ukraine's defence of duress. It would be unjust to permit Law Debenture and Russia to proceed to seek to make good the contract claim without Ukraine being able to defend itself by raising its defence of duress at trial. Although Mr Howard is right to point out that the House of Lords did not decide the point regarding the stay of the libel claim ordered in *Buttes Gas,* it is clear that Lord Wilberforce was expressing his considered view at [1982] AC 888, 938E-F, referred to above, when he said that it would be unjust to allow the claimants to proceed with their claim in circumstances where the defence of justification could not be ventilated by reason of the application of the doctrine of foreign act of state. All the other Law Lords agreed with his speech.

184. Similarly, in our view the indication by the Supreme Court in *Shergill v Khaira* at [42], set out above, that if a claim cannot fairly be tried because of non-justiciability within the sense of our issue (2) this may make it necessary to strike out an otherwise justiciable claim, points in favour of granting a stay in the present case. So does *Hamilton v Al Fayed* [2001] 1 AC 395, to which the Supreme Court referred.

185. There is a further reason why this is the just approach in this case. As noted above, there are other fora in which Russia could choose to litigate Ukraine's allegations against it of violation and threatened violation of international law. In particular, if both Ukraine and Russia agree, the ICJ can acquire jurisdiction to go into all relevant disputes between them arising under international law. At the hearing before us, Ukraine undertook to accept the jurisdiction of the ICJ in relation to the issues of alleged breach of international law by Russia as raised in its defence. Therefore, a possible way forward, if Russia wishes the contract claim to proceed in a manner which does not involve determination by the English court of the relevant points of international law but still allows for fair resolution of the contract claim, would be for Russia likewise to agree to accept the jurisdiction of the ICJ in relation to those matters and for this action to be stayed pending resolution of the disputed issues of international law. Russia, however, despite instructions being sought from it, gave no indication that it was willing to proceed in this way, even if the court ruled against it under issue (2) above.

186. That leaves the English court as the only available forum to determine these points of international law, if their determination is required as part of the examination of the defence of duress. This feature of the case also underlines that, if ground (3) arises, the just outcome is that the court should order a stay of the contract claim on the Notes. Russia is the party who has declined to have recourse to an alternative means of resolution of the international law issues which arise under Ukraine's defence of duress, so it is fair that it should take any risk of the English court not being able to determine those issues under issue (2).

Ground 5: Countermeasures

187. In case it fails in its other defences, Ukraine seeks to rely on a further defence grounded in international law. It maintains that even if the Notes are binding upon it as a matter of English law, nonetheless it is entitled by virtue of the international law doctrine of

counter-measures to refuse to pay the sums due under the bond. It is convenient to deal with this defence at this point in the argument. Very little time was taken up at the hearing on this part of Ukraine's case, and for good reason.

188. The counter-measures doctrine in international law stipulates that in certain circumstances a state may retaliate against action in breach of international law taken by another state, by taking action itself in response which under other conditions would be a breach of international law. It is a doctrine related to ideas of self-help and self-defence.

189. In our judgment, the counter-measures doctrine does not assist Ukraine in this case, because of the lack of any relevant foothold in domestic law. Ukraine's submission based on the doctrine arises only if the court has determined that it has no available defence under domestic law. The doctrine operates only at the level of international law and in the absence of a domestic foothold the English court has no proper role in examining it or in pronouncing upon the merits of the arguments put forward by Ukraine under this heading.

Affirmation

190. It is convenient at this point to deal with the affirmation issue raised by Law Debenture in its respondent's notice. Law Debenture says that even if Ukraine's defence of duress is justiciable, Ukraine has engaged in acts which amount to affirmation of the Notes after it was free of the duress alleged and prior to any purported act of avoidance. Blair J declined to consider this argument on a summary basis, essentially for the same reasons as he declined to consider Law Debenture's case on ratification. He dealt with the issue at [254] to [256] as follows:

> "(2) Affirmation"
>
> 254. It is convenient to consider affirmation first. The Trustee's case is that the conduct of Ukraine subsequent to its entry into the transaction (including representations to the IMF in September 2016) would be interpreted by a reasonable observer as confirming its view that it was bound by the transaction, and would therefore as a matter of English law constitute affirmation of the transaction such that it cannot now purport to rescind it on grounds of duress.
>
> 255. Ukraine's case is that it had no knowledge of its English law right to rescind on grounds of duress until March 2016. It says that following the transaction, Russia intensified the pressure. It says that there was no unequivocal manifestation of affirmation by Ukraine, and that from December 2015 Ukraine had expressly reserved its rights.
>
> 256. In the court's view, the position is the same as that as regards ratification—see above. In agreement with Ukraine, affirmation is unsuitable for summary determination. In order to assess the Trustee's case it would be necessary to conduct a "mini-trial" examining the various acts and statements relied

> upon by the Trustee, and Ukraine's reservations. That would be a major exercise and is neither permissible nor possible on a summary judgment application.
>
> 257. Further, Ukraine's case concerns military steps taken by Russia in Crimea and eastern Ukraine. There can be no question of dealing with affirmation on a summary basis against that background. If the Trustee is not able to rule out non-justiciability as a matter of law, it cannot rely on affirmation at this stage in the proceedings."

191. Before us Mr Howard, on behalf of Law Debenture, relied upon the same conduct on the part of Ukraine to support its case of affirmation as it had in the context of ratification. He submitted that the undisputed conduct of Ukraine subsequent to its entry into the agreements, over almost the entire two-year period of the Notes, would be interpreted by a reasonable observer as confirming its view that it was bound by those transactions and would therefore constitute affirmation such that Ukraine could not now purport to rescind them. We have summarised that conduct above in the section of this judgment dealing with ratification. Similarly, for the purposes of this appeal, Law Debenture limited its case to those acts of Ukraine prior to its reservation of rights in December 2015, a few days before the Notes reached maturity.

192. Mr Howard accepted before this court that (in the context of affirmation) it must be shown that Ukraine had knowledge not only of the duress, but also of its legal rights. He also accepted that it was not sufficient merely to show that a reasonable person in Ukraine's position would have had knowledge of its legal rights. However, by reference to a detailed analysis of the evidence and the chronology, he submitted that, on Ukraine's own case and evidence, Ukraine (a) knew that there had been duress[1]; (b) knew that as a matter of Ukrainian law this would give rise to a right to avoid the Notes; (c) had English legal advisers readily available to it, who also knew that there had been duress and, had they turned their mind to the question, would also have known that under English law Ukraine had a right to avoid the Notes. Thus, he submitted, the only reason that Ukraine did not (arguably) have actual knowledge of a legal right to rescind under English law was that it deliberately chose not to ask its English lawyers to report to it on that question. Accordingly, he contended that, if Ukraine's case on duress was to be believed, it had simply wilfully shut its eyes to what should have been (on its case) entirely obvious: see *Baden v Société Générale* [1993] 1 WLR 509 at 575, applied in *Insurance Corp of the Channel Islands v Royal Hotel Ltd* [1998] Lloyd's Rep LP 151. In these circumstances, Ukraine had sufficient knowledge of its legal rights to constitute affirmation.

193. Mr Howard also challenged the judge's conclusion that affirmation could not be dealt with on a summary basis against the background of "military steps taken by Russia in Crimea and eastern Ukraine" at [257], which amounted to an acceptance by the judge of Ukraine's argument that there was a triable issue as to whether there was continuing duress that prevented any affirmation from being effective. Although Law Debenture accepted the proposition that affirmation must take place "after the illegitimate pressure has ceased to operate on [the mind of the innocent party]" (see *Universe Tankships v*

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[1] This contention was made without prejudice to Law Debenture's non-acceptance of Ukraine's factual case on duress.

I.T.W.F [1983] 1 AC 366 at 384 per Lord Diplock), Mr Howard contended that there was no realistic prospect of Ukraine establishing that it did not protest because of any alleged continuing pressure by Russia. He pointed to evidence that Ukraine had indeed protested against Russia's alleged conduct, and had sought to bring proceedings against Russia in various fora, since February 2014, e.g.:

i) On 13 March 2014, Ukraine commenced a claim against Russia in the European Court of Human Rights concerning events leading up to and following the assumption of control by Russia over the Crimean peninsula from March 2014 and subsequent developments in Eastern Ukraine up to the beginning of September 2014.

ii) On 24 March 2014, Ukraine obtained a resolution from the United Nations General Assembly calling on States not to recognise any alteration in the status of Crimea.

iii) In a further claim in the ECtHR on 26 November 2014, Ukraine extended its allegations against Russia concerning Crimea and Eastern Ukraine into the post-September 2014 period.

iv) On 21 October 2015, Ukraine filed a WTO request for a panel in response to Russian trade measures from 2013, contending that these constituted a violation of GATT and the Agreement on Technical Barriers to Trade 1994.

v) On 9 December 2015, the then Ukrainian Prime Minister, Arseniy Yatsenyuk, said, in relation to the Notes, that "we are ready to litigate with Russia, we are fully armed".

194. Mr Howard also referred to the fact that Ukraine had passed the Moratorium Law in May 2015 and had issued the Exchange Offer Memorandum in September 2015, inviting certain of its creditors (including Russia in respect of the Notes) to agree to a reduction in the value of its debts, rather than be subject to the moratorium. Such matters, submitted by Mr Howard, clearly indicated that Ukraine was not subject to any continuing duress, and that, as a consequence, it was impossible for Ukraine to say that it did not protest because of continuing pressure imposed by Russia.

195. Despite Mr Howard's forceful arguments, we see no reason to disturb the judge's conclusion on this issue. We consider that, at the least, and even accepting that Ukraine's conduct in paying the Notes could amount to affirmation, a trial on the evidence would be required in order to determine: (a) whether Ukraine had the requisite knowledge of its alleged right to avoid the contract under English law; and (b) whether there was continuing duress and as to its effect. Such matters are not suitable for determination on a summary judgment application. Consequently, we reject Law Debenture's arguments on this issue.

Ground 4: Implied terms

The implied terms alleged by Ukraine

196. Ukraine submitted that the judge was wrong to reject its case that Ukraine's obligation to make repayment was subject to implied terms to the effect that such repayment would

not be due, or would not be demanded by Law Debenture, if Russia (the sole Noteholder) had taken deliberate or unlawful steps to seek to prevent or hinder Ukraine from making that repayment. The precise terms which Ukraine contended were to be implied into the Trust Deed and the Agency Agreement, were:

i) a term that the Notes would not be repayable if the Trustee or Russia "deliberately and/or unlawfully deprived Ukraine of the economic benefit of the loan …and/or frustrated the economic purpose of the loan";[2]

ii) a term such that there would be no need for repayment if the Trustee or Russia "make it impossible or impracticable for Ukraine to comply with its obligations…or deliberately and/or unlawfully and/or unreasonably interfered with or took steps to prevent, hinder or delay its ability to do so";[3]

iii) a term that the Notes would not be repayable if Russia "was in breach of its obligations towards Ukraine under public international law not to use force against Ukraine and/or not to intervene internally in the affairs of Ukraine";[4] and

iv) a term that the Notes would not be repayable if Russia engaged in the conduct set out in (iii) above, and "this had been a significant cause of loss to Ukraine and/or had deprived Ukraine of the economic benefit of the loan".[5]

The judge's conclusion on implied terms

197. In summary, Blair J concluded that the legal test for the implication of terms was not satisfied and held that Ukraine's case to the contrary had no real prospect of success; see [356]. Having set out the court's "discussion" at [344] to [355], he summarised his "conclusion" at [356] as follows:

> "The court's conclusion is as follows:
>
> i) Ukraine correctly draws attention to the general principle that a term may be readily implied into a contract that a party will not seek to prevent performance.
>
> ii) Further, it can powerfully contend that military action by Russia in Crimea and eastern Ukraine has the economic effect of severely impeding the state's ability to meet its obligations under the Notes (it specifies the adverse effects on tax revenues).
>
> iii) Further, it is not in dispute that the Trustee acts on Russia's directions in this matter, and that Russia will be the beneficiary of repayment under the Notes so long as it retains them.

[2] Defence ¶85.1.

[3] Defence ¶85.2.

[4] Defence ¶93.1.

[5] Defence ¶93.2.

iv) However, it is at this point that the legal nature of the transaction becomes decisive. For the reasons just given, the general principle that a term is necessarily implied in a contract that neither party will prevent the other party from performing it is inapt where the subject matter of the contract is transferable financial instruments such as the Notes because transferees or potential transferees have to be able to ascertain the nature of the obligation they are acquiring (or considering acquiring) from within the four corners of the relevant contracts.

v) The fact that Russia may have intended to retain the Notes does not impinge on their transferability. The fact that Russia has not transferred the Notes is not legally relevant, because the question of the implication of terms has to be decided at the time of contracting, and not ex post (see the *Marks and Spencer case* at [21], *supra*).

vi) The ambit of an implied term of this kind has to be defined by reference to the contract, and cannot be used to expand it: see *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17]:

"… any implied term of co-operation or prevention from performance can only be given shape in the light of the express terms which set out the obligations of the parties …. A duty to co-operate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself."

vii) In any case, on established principles as to implication, the proposed terms which Ukraine seeks to imply into the Trust Deed even in their minimal form would render the Notes unworkable and untradeable, and would thereby contradict their express terms. The Notes, in form and substance transferable, would effectively cease to be transferable.

viii) The proposed terms are unnecessary to give business efficacy to the contract, which is effective without such terms, and are not capable of clear expression, and as pleaded (and even in the minimal form proposed in written submissions) are uncertain.

ix) Additional to the above, the proposed terms relating to breaches of principles of international law are too uncertain to

> be incorporated by implication, and raise matters which for reasons set out above are non-justiciable.
>
> x) The legal test for the implication of terms is accordingly not satisfied, and references to the duty of good faith and/or the duty of cooperation do not alter that conclusion.
>
> xi) The court accepts the Trustee's submissions in these respects, and Ukraine's case to the contrary has no real prospect of success."

Ukraine's submissions

198. In relation to this part of the case, Mr Thanki relied exclusively upon Ukraine's written arguments. His submissions can be summarised as follows.

Ground 4(a) (as set out in Ukraine's Grounds of Appeal); implied terms arising if Russia prevented or hindered performance

The relevance of the tradeable nature of the Notes

199. Ukraine contended that, although the judge had been correct to accept Ukraine's case that, in general, a term may readily be implied into a contract that a party will not seek to prevent performance by the counterparty; and that the authorities supported the implication of such a term into a bilateral lending arrangement; he had been wrong to hold that the interposition of the trustee structure distinguished the present case, and that the implication of such a standard term would be "inapt" in this context and would contradict the transferable nature of the Notes.

200. In support of this contention, Mr Thanki submitted as follows:

i) The judge appeared to consider that the relevant principle was limited to where the party impeding performance was a party to the contract being enforced: [353]. The judge saw no basis for treating the Noteholders "effectively … as a party to the Trust Deed". However, Ukraine did not suggest that the Noteholders be treated "as a party". Rather, Ukraine's position was that the general principle identified above was not limited to cases in which the obstruction of performance came from the counterparty to the contractual obligation whose performance was being prevented. That was illustrated by *F&C Alternative Investments Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch); [2012] Ch 613 at [267]-[268] per Sales J. The principle was that, in a tripartite contract, there is an implied term that A will not prevent performance by B of a contractual obligation to C. In the case of a trustee structure, where the trustee's role was ministerial, the same principle ought to apply: Law Debenture (A) should be prevented from enforcing the contractual obligation of Ukraine (B) to make payment at the behest of a Noteholder (C) who has sought to prevent or hinder performance of that obligation. The same underlying principle applied in both the bilateral and the tripartite (or multi-party) context.

ii) Secondly, in considering the relevance of the Notes being tradeable, the judge misunderstood and/or misapplied *BNY Mellon Corporate Trustee Services Ltd*

v LBG Capital [2016] UKSC 29; [2016] Bus LR 725. In that case, Lord Neuberger stated at [30] that "very considerable circumspection" was appropriate before taking into account the content of documents other than the contract or Trust Deed constituting negotiable instruments.

iii) However, in the present case the judge was wrong to conclude that a hypothetical purchaser could not have known the terms on which it could purchase the Notes from information that was readily available and which was admissible as an aid to construction. That was because:

a) The commercial purpose of the Notes was (at least purportedly) to provide economic support to Ukraine.

b) Unlike in *In re Sigma Finance Corp* [2009] UKSC 2; [2010] 1 All ER 571, there was only one "type" of obligation that was the subject of the Notes: an obligation to pay the Notes.

c) Also unlike *Sigma*, the sole subscriber to the Notes was, and (the evidence showed) was always intended to be, Russia alone; there was no question of some Noteholders being unaware of the substance of the arrangement. In economic substance, the arrangement was a bilateral arrangement.

d) Law Debenture knew the above: it knew that the terms were negotiated directly between Russia and Ukraine, and it knew the contents of the Prospectus and the terms of the Notes. If anyone in the market had thought about it, they would have known these matters as well.

e) The Trustee and any hypothetical purchaser would also have known that, in the two-year term of the Notes, it was unrealistic to expect any commercial party to purchase the Notes given the low coupon.

f) If any hypothetical purchaser had subsequently wished to purchase the Notes, it would have been a sophisticated investor (as in *BNY Mellon*) and would have known that all relevant information about the Notes could have been found in the Prospectus, including that it highlighted that one of the major risk factors attaching to the Notes was the relationship between Ukraine and Russia. Such an investor would also have known that from February 2014 onwards Russia had invaded and illegally annexed Crimea and was interfering militarily in eastern Ukraine and that, if Russia were to take such action, it would jeopardise Ukraine's ability to repay the Notes.

iv) The suggested implied terms would not render the Notes untradeable. The implied terms were of very limited scope: they related to a narrow range of action (since only military force or economic warfare would be likely to have the effect of preventing or hindering performance) by a specific, known party (Russia). It was very unlikely that the context above would ever arise in a more orthodox commercial Note structure. Moreover, if anyone were to purchase Russia's Notes, that third party would not be able to enforce the Notes because

performance had already been prevented or obstructed by Russia as the transferors.

Necessity to give commercial or practical coherence

v) The judge also concluded that the proposed terms were unnecessary to give business efficacy to the contract, because the contract was "effective without such terms": [356(viii)]. However, that was based on a misunderstanding of the meaning of the business efficacy test. In *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Lts* [2015] UKSC 72; [2016] AC 742 at [21] Lord Neuberger PSC suggested that "a more helpful" way of expressing Lord Simon's requirement would be that the term would only be implied if "without the term, the contract would lack commercial or practical coherence".

vi) That expression of the test was of importance in this case: if the test were whether the contract could be "effective" without it, the implied term against preventing performance would never arise. The real question was whether the result was a commercially coherent result - whether it was necessary or obvious in that sense. Just as in the case of a bilateral loan arrangement, such an implied term was necessary and obvious.

Clarity and certainty

vii) The judge was wrong to find that the proposed terms were not capable of clear expression and were "uncertain": [356(viii)]. It was unclear why he reached that conclusion. The short point was that the minimum content of the term to be implied – that Russia could not procure the enforcement of the contractual obligation of repayment where Russia was deliberately preventing or materially hindering performance – was one that reflected the formulation as expressed in other cases (save for being adapted to the tripartite context).

Inconsistency with the "no set-off" clause

viii) Law Debenture's argument in its Respondent's Notice that the implied terms were inconsistent with the "no set-off" clause was also wrong. The "no set-off" clause prevented Ukraine from using some extraneous debt or damages claim as a defence to payment on the Notes. The implied terms prevented Law Debenture, at Russia's behest, from enforcing Ukraine's obligations if Russia had prevented or hindered their performance in the first place, irrespective of the quantum of damage inflicted.

Ground 4(b) (as set out in Ukraine's Grounds of Appeal): implied term that no enforcement while in breach of public international law

201. As to Ground 4(b), Mr Thanki submitted the judge did not address Ukraine's case that there was an implied term that could be summarised as follows: in its narrower form, such repayment would not be due if the nature of the prevention or hindrance of performance arose from conduct that amounted to a (justiciable) breach of public international law. In its wider form, the implied term did not depend on performance having been prevented or hindered – it arose simply from the breach of public international law, irrespective of its impact on Ukraine's ability to repay.

202. In support of this argument, Mr Thanki submitted:

i) In relation to the wider implied term, on entering into an agreement which could only take effect by the continuance of an existing state of circumstances, Russia (via Law Debenture) made an implied engagement that it would do nothing to put an end to that state of circumstances. In the present case, those circumstances were first, the absence of armed conflict between Russia and Ukraine; second, they were that Ukraine was comprised of each of the regions that it comprised in 2013, and that Ukraine – and not Russia – was in control of (and collecting revenue from) the administration of those areas.

ii) In this context Mr Thanki relied upon the following statement of Cockburn CJ in *Stirling v Maitland* (1864) 5 B&S 841, 852 (approved in *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 717, 730 and 741):

> "I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."

iii) Mr Thanki also relied upon the analysis adopted (in the context of frustration) by Russell J in *Re Badische* [1921] 2 Ch 331, 380:

> "In my opinion, the parties contracted on the footing that peace would continue to exist between the country of the contracting parties and the country of the source of supply, and that the source of supply would remain open; and (subject to two other points) a term should be implied providing for the dissolution of the contract in the event of war breaking out between those two countries, whereby the source of supply became blocked for an indefinite period of time. That is a term which should be implied so as to give to the contracts the effect which the contracting parties must as business men be deemed to have intended."

iv) Mr Thanki submitted that, in the present case, the argument in favour of such an implied term was stronger than in *Badische*, since in the present case the implied term arose in relation to the use of force by the sole Noteholder itself. The fact that *Badische* implied a term as set out above suggested that such a term was not too uncertain.

v) Ukraine also relied on an analogy with the developing law in respect of the implication of an obligation to act in good faith and, in particular, upon the comment of Leggatt J in *Yam Seng Pte v International Trade Corp* [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 1321 at [138] that:

> "In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A

> key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable".

vi) Mr Thanki submitted that, in the present context, those "*standards of commercial dealing*" would include matters that would impact on states, which would include an obligation not to breach international public law. He referred to the fact that, in this context, good faith also constituted a general principle of international law. Thus, article 2(2) of the UN Charter emphasised that all members "shall fulfil in good faith the obligations assumed by them" while the International Court of Justice emphasised in the *Nuclear Tests Case* (New Zealand v. France) that:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith": ICJ Reports 1974, p.457, at [49].

Law Debenture's arguments on implied terms

203. Mr Howard, on behalf of Law Debenture, largely supported the judge's analysis in relation to implied terms. He argued that the judge was right to conclude that, in a contract of the nature of that at issue in this case, Ukraine had no prospect of establishing the existence of the terms for which it contends. In support of this contention, he submitted, in summary, as follows:

i) The starting or default position was that no terms were to be implied into a contract. The more detailed and apparently complete the contract, the stronger that presumption was; see *The Interpretation of Contracts, 6th Edition*, Sir Kim Lewison at 6.04; and per Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] Bus LR 1316, at [17].

ii) As stated by Lord Neuberger PSC in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72; [2016] AC 742, at [15], there were two types of contractual implied term. The first was a term which was implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arose because, unless such a term was expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposed certain terms into certain classes of relationship. The type of alleged implied term with which the present case was concerned was the former type of implied term – not the latter.

iii) The suggested terms were unnecessary; the Agreements worked perfectly well without them. Ukraine was simply obliged to comply with its repayment obligations. The judge was right to conclude that the implied terms would render the Notes unworkable and untradeable and would therefore conflict with their express terms. The implied terms suggested by Ukraine were anathema to the commercial purpose of the Agreements.

iv) The judge was right to conclude that the terms were not capable of clear expression and are hopelessly vague and uncertain. They were fanciful.

v) The implied terms were not so obvious as to go without saying and indeed not obvious at all. If anyone had considered the suggested implied terms appropriate, they would have included them expressly. It was even less plausible that a subsequent purchaser of the Notes would have considered the alleged terms so obvious as to go without saying.

vi) Although Ukraine contended that its proposed implied terms were consistent with the "Risk Factors" relating to Ukraine-Russia relations highlighted in the Prospectus, and indeed the wider factual relationship between the two States, in fact the opposite was true. The Prospectus explained that if the "Risk Factors" eventuated, that might have a material adverse effect on Ukraine's capacity to perform its obligations under the Notes. Ukraine's proposed implied terms would mean that – in the event that Ukraine was unable to pay because of the conduct of Russia – Ukraine would have no obligation to pay at all, and thus would not be in breach of the Notes.

vii) The suggested terms introduced concepts of unlawfulness under public international law into the Agreements. In addition to the matters set out above, the Agreements were expressly governed by English law. The proposed implied terms were inconsistent with that express term.

viii) The suggested terms were inconsistent with the "No Set-Off" Clause.

Discussion and determination in relation to implied terms

204. In our judgment, the judge was right to conclude that the legal test for the implication of terms was not satisfied and accordingly we would reject Ukraine's arguments both under Ground 4(a) and under Ground 4(b). Our reasons may be briefly stated as follows.

205. The starting point for the court's consideration as to whether to imply terms into a contract is usefully summarised by Sir Thomas Bingham M.R. in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] E.M.L.R. 472 at 481:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have themselves expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power . . .
>
> The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for

> the court then to fashion a term which can reflect the merits of the situation as they then appear. Tempting, but wrong . . .
>
> And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred."

In other words, the court must proceed with caution. And, as has now been conclusively determined by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72; [2016] AC 742 at [21] – [31], the exercise of implication of terms is not to be classified as part of the exercise of interpretation, or construction, of the terms of a contract; it is a separate exercise.

206. The correct approach to the implication of terms as a matter of law was not substantively in dispute between the parties. The latest position is authoratively stated by Lord Neuberger (with whom Lord Sumption, Lord Hodge, and Lord Clarke of Stone-cum-Ebony JJSC agreed) in *Marks and Spencer plc, supra* at [16] – [21]. Effectively, the test is that articulated by Lord Simon of Glaisdale (speaking for the majority) in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it goes without saying; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.";

but subject to the following six comments made by Lord Neuberger in *Marks and Spencer plc* at [21], viz:

> "First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as

> Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is vital to formulate the question to be posed by [him] with the utmost care, to quote from Lewison, *The Interpretation of Contracts* 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of absolute necessity, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

207. Although in various different contexts the courts have been willing to imply into a contract a term prohibiting one party from "*preventing*" the performance of another (see e.g. *Mackay* v *Dick* (1881) 6 App Cas 251), we accept Mr Howard's submission that there is no general rule that such a term will be implied. Where there is some agreed precondition for performance that a party to a contract needs the other party's assistance to satisfy, an implied duty not to prevent performance of the condition by failing to provide assistance might follow (see, for example, *Swallowfalls Ltd v Monaco Yachting and Technologies SAM* [2014] EWCA Civ 186; [2014] 2 Lloyd's Rep. 50, at [30]-[35] per Longmore LJ). But there is no general rule. The implication of such a term, and, perhaps more importantly, its scope, will depend on the contract under consideration, and in particular its express terms. As Cooke J stated in *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [18]:

> "….. It is self-evident that any implied term of co-operation or prevention from performance can only be given shape in the light of the express terms which set out the obligations of the parties - see *Mona Oil Equipment & Supply Co. Limited* v *Rhodesia Railways* [1949] 2 AER 1014 at 1018, *Luxor* v *Cooper* [1941] AC 108 and *Mackav* v *Dick* (1881) 6 App Cas 251. A duty to co-operate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself"

We agree with this statement. The absence of any general rule, and the need to look at the terms of the particular contract in question, is a point which was also made by this court in *CEL Group Ltd v Nedloyd Lines UK Ltd* [2003] EWCA Civ 1716; [2004] 1 Lloyds Rep. 381, per Hale LJ at [15] and per Waller LJ at [28].

208. Adopting the approach of the Supreme Court in *Marks and Spencer plc*, and that of Cooke J in *James E McCabe Ltd*, as quoted above, it is impossible in our judgment to conclude that "the necessities of the contract," or indeed any other applicable criteria for the implication of terms, require or support the imposition of the implied terms alleged by Ukraine.

209. First, and perhaps most importantly, the structure of Ukraine's debt obligations took the form of tradeable Eurobonds traded on the Irish Stock Exchange. In this context it is irrelevant, in our view, that Russia remained the holder of the Notes or even that it was anticipated that it was very likely that it would continue to do so. The character of the Notes as tradeable financial instruments gives rise to certain consequences which, in our view, are strong counter-indicators against the implication of Ukraine's suggested terms.

    i) First, it is obvious that any implied terms have to be derived from the contractual documentation which would be available to subsequent holders of the Notes, as well as to the initial holder or holders, rather than from the background or matrix of facts specific to the circumstances in which the initial holder or holders purchased the Notes; see in this context *BNY Mellon Corporate Trustee v LBG Capital* [2016] UKSC 29; [2016] Bus LR 725, where the Supreme Court was concerned with the proper interpretation of certain "enhanced capital" loan notes issued by Lloyds, which were constituted by a trust deed. A question arose as to whether the Exchange Offer Memorandum and a letter from the issuer which accompanied it should be taken into account in construing the trust deed and the terms and conditions of the notes. Lord Neuberger noted that the extent to which other documents were to be taken into account was fact-dependent, but observed at [30] that "very considerable circumspection is appropriate before the contents of such other documents are taken into account"; and at [33] that it was necessary to look at what might have been in the minds not only of initial purchasers of the notes, but also of potential subsequent purchasers: Similarly, in *In re Sigma Finance Corp* [2009] UKSC 2; [2010] 1 All ER 571, Lord Collins JSC (with whom Lord Hope and Lord Mance JJSC agreed), observed that where a trust document secured the interests of a number of different creditors, the background or matrix of facts could only be relevant in the most generalised way; in that type of case, the express wording of the instrument was paramount and "The instrument must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the debtor's business"; see [36]–[37]. In *Metlife Seguros de Retiro SA v JP Morgan Chase Bank* [2016] EWCA Civ 1248, the Court of Appeal applied the reasoning in *In re Sigma* to tradeable loan notes, even though those notes had not been traded and were held by the sole purchaser to maturity: [46]. Although these cases were dealing with the interpretation of the relevant contracts, rather than implication of terms, similar principles apply. Thus, the notion that terms could be implied from the general circumstances surrounding Russia/Ukraine state relations at the time of the execution of the relevant

agreements, relieving Ukraine from its payment obligations if the original Noteholder in the future conducted itself in a particular way in its international relations with Ukraine, so as to be binding on subsequent Noteholders, would be wholly contrary to such principles.

ii) Next, Russia as initial subscriber to the Notes was not a counterparty to the Trust Deed or to the Agency Agreement, notwithstanding that Law Debenture held the benefit of the Trust Deed upon trust for Noteholders and that, under the terms and conditions of the Notes, Noteholders were entitled to the benefit of, were bound by and were deemed to have notice of, all the provisions of the Trust Deed and the Agency Agreement. Likewise, future holders of the Notes would neither be counterparties nor would have been present at the time the agreements were entered into. This is another reason why, in our view, it would be wholly inappropriate to import Ukraine's suggested implied terms into the Trust Deed or the Agency Agreement. Ukraine sought to rely on the decision in *F&C Alternative Investments Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch); [2012] Ch 613 (which concerned a tripartite contract where Sales J held, on the particular terms of the contract, there was an implied term that A would not prevent performance by B of a contractual obligation to C). By analogy, Ukraine argued that, in the case of a trustee structure, where the trustee's role was ministerial, the same principle ought to apply: the Trustee (A) should be prevented from enforcing the contractual obligation of Ukraine (B) to make payment at the behest of a Noteholder (C) who had sought to prevent or hinder performance of that obligation. But the analogy is not helpful. *F&C Alternative Investments Ltd* concerned a tripartite contract, where all of the counterparties were present when the contract was agreed and assented to its terms. However, as Mr Howard submitted, tradeable instruments are different, in that the holders of the instrument are not counterparties to the agreements, and future holders of the instruments will neither be counterparties nor will have been present at the time the agreements were entered into. It thus appears to us to be contrary to principle, and indeed to common sense, to imply into a Eurobond transaction between Ukraine, as issuer, and Law Debenture, as trustee, terms which relate to the relationship between Ukraine and Russia, which is a matter exterior to the contract as formulated.

iii) Finally under this head, the implication of Ukraine's suggested terms would, as the judge held, effectively render the Notes unworkable and untradeable and would, therefore, conflict with their express terms. As Mr Howard submitted, if Ukraine were right, any future purchaser would have to agree to accept a payment obligation that was conditional on the foreign policy and conduct of Russia in relation to Ukraine, as to which it had no insight, over which it had no control and which might be susceptible to various conclusions as to responsibility or culpability. No sensible person would agree to such an obligation as an express term, let alone as one that was not apparent on the face of the Agreements and was presented in the vague terms proposed by Ukraine. We accept Mr Howard's submission that the implied terms suggested by Ukraine are incompatible with the commercial purpose of the Agreements.

210. Secondly, we agree with the judge that the suggested implied terms are unnecessary. The Agreements work perfectly well without the suggested terms; they do not "lack

commercial or practical coherence" without the inclusion of such terms. Nor do we consider that the judge's conclusion represents a misunderstanding of the business efficacy test as explained by Lord Neuberger in *Marks and Spencer plc* at [21], as quoted above, as Mr Thanki submitted. The question is not whether the implied terms create a commercially coherent result but rather whether the terms are so necessary or obvious that, without such terms, the contract would lack commercial or practical coherence. Despite the attempts by Ukraine to re-characterise the arrangement as a bilateral loan, or a tri-partite agreement, the court must look at the terms of the actual contracts entered into. The Agreements were contracts between Ukraine and Law Debenture relating to the issue and terms of tradeable financial instruments. Given this reality, the suggested terms are not necessary for business efficacy.

211. Ukraine's obligations are clear. It is simply obliged to comply with its repayment obligations under the Agreements. As Mr Howard submitted, there is no express or implied agreement about co-operating or maintaining any identified state of affairs (whether the absence of armed conflict, invasion or anything else) as a precondition of Ukraine repaying the amount it borrowed under the Notes. In this context, we do not accept Mr Thanki's attempt to rely by way of an analogy on the case of *Re Badische* [1921] 2 Ch 331. On proper analysis, *Re Badische* was a frustration case involving trade between German and English businesses, which was prohibited and illegal, in circumstances where England and Germany were at war. Ukraine has never contended that the Agreements have been frustrated and accordingly the case is of no assistance.

212. Third, we agree with the judge that the terms are not capable of clear expression and are too vague and uncertain to be imported into the Agreements as implied terms. Thus, for example, we accept Mr Howard's submission that it is not clear what the parties would have understood by "the economic benefit of the loan" or "frustrated the economic purpose" of the loan (alleged implied term (i)), or that it was "impossible or impracticable" for Ukraine to comply with its obligations, or that the Trustee or Russia had "unreasonably interfered" with Ukraine's ability to repay or had acted so as to "prevent, hinder or delay its ability to do so" (alleged implied term (ii)). Alleged implied term (iii) leaves the relationship between the matters referred to and the performance by Ukraine of its obligations completely unspecified. Alleged implied term (iv) suffers from similar uncertainty as alleged implied term (i).

213. Fourth, although the judge did not expressly mention this point, the proposed implied terms do not satisfy the criteria of obviousness as articulated by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings supra*. It is hard to imagine that – had Law Debenture or Russia been asked about these terms at the time of the Agreements – either of them would have agreed to their inclusion as express terms, especially in the vague and uncertain form in which they are framed by Ukraine. The reality is that, in a contract of this complexity, if any party had considered the suggested implied terms appropriate, it would have included them expressly in the written terms of the Agreements. It is even less plausible that a subsequent purchaser of the Notes would have considered these terms so obvious as to go without saying.

214. Fifth, Ukraine contended that its proposed implied terms were consistent with the "Risk Factors" relating to Ukraine-Russia relations highlighted in the Prospectus, and that this provided a further justification for the implication of such terms. We disagree. Even if it were relevant to have regard to these provisions, far from suggesting that, in the event Ukraine was unable to pay because of the conduct of Russia, Ukraine would be *relieved*

from its obligations to pay under the Notes, and thus would not be in breach, the Risk Factors, referred to in the Prospectus by reference to the wider relationship, were addressing the question of whether Ukraine would *default* under the Notes, i.e. in other words identifying the risk of it being *unable to repay in accordance with its subsisting obligations* as a result of Russia's conduct. Thus, these provisions provide no support for Ukraine's case on implied terms.

215. For all the above reasons, which to a considerable extent overlap with those of the judge, we accept Law Debenture's submissions and conclude that Ukraine's case in relation to implied terms has no real prospect of success. For completeness we add that, given that the legal tests for the implication of terms are not satisfied, recourse to submissions about the existence of a general duty of good faith or the duty of co-operation cannot alter that conclusion.

216. We have not in the circumstances considered it necessary to address Law Debenture's argument, as contained in its Respondent's Notice, that Ukraine's attempt to characterise its implied terms as establishing pre-conditions to the engagement of its payment obligation, was a deliberate attempt to circumvent the No Set-Off Clause (at clause 3(c) of the Terms and Conditions), and therefore illegitimate, as being contrary to the "cardinal rule that no term can be implied into a contract if it contradicts an express term…": see [28] of *Marks & Spencer supra.*

217. Accordingly we would dismiss Ukraine's appeal in relation to the judge's decision in respect of implied terms.

Disposition

218. For the reasons set out above, we hold that Ukraine's appeal succeeds to the extent set out in this judgment but is otherwise dismissed. We were not persuaded that the judge erred in relation to ground 6 (other compelling reasons for a trial); but in any event, by reason of our decision that the appeal succeeds on other grounds, this ground does not arise. We invite the parties to provide the court with an appropriate form of order to reflect our judgment. We are grateful to counsel, solicitors and the parties for the helpful and comprehensive arguments provided to the court in this case and for the facility of an electronic bundle.