The conduct of commercial transactions in every business are subject to codes of conduct - whether written or not - that have evolved as a consequence of acceptable practices - whether having evolved from conduct that is ethical and/or moral and/or simply practical in the circumstances of any particular trade. The shipping industry is no exception. However there are legal principles, or boundaries, which ensure that one contracting party does not unfairly take advantage of the other. One of these principles is economic duress; it exercises itself to force another party to enter into an agreement, the victim of such conduct may subsequently apply to have the contract rescinded. However, when does the conduct of one party cross the line from acceptable behaviour to duress and, in particular, how is the dividing line determined when one party to a commercial negotiation, while acting lawfully, takes advantage of the circumstances it has created to improve its position? Is that party's conduct illegitimate such that a subsequent agreement is void? In Progress Bulk Carriers Ltd v Tube City IMS LLC (The "Cenik Kaptoluglu") [1] the English High Court had to consider this question: was an agreement concluded under duress if the conduct of one party amounted to "illegitimate pressure" when there had been a prior repudiatory breach by that party?

Elements of Economic Duress

Economic duress is a complicated and difficult area of the law. The difficulty lies in distinguishing conduct that is strictly commercial, on the one hand, from threats, on the other, that can constitute illegitimate pressure. Economic pressure can amount to duress provided it can be characterised as illegitimate (Hayton v Cremer [1959] 1 LLR 620) but is pressure "illegitimate" only if it was unlawful and, of course, that it can be shown the innocent party would never have entered into that agreement "but for" that illegitimate pressure.

The Facts

On 2 April 2009, Progress Bulk Carriers, as disponent owners, and the claimant, Tube City, as charterers, agreed to charter the vessel "The Cenik Kaptoluglu" ("Cenik K") on an amended Gencon form for carriage of shredded scrap from the Mississippi River to China. The agreed laycan was 15 – 21 April 2009. The identity of the vessel was of a vital importance to the receivers.

On the 7 April owners fixed the vessel to another party without informing charterers. The charterparty did not contain any right of substitution. When charterers became aware of the situation they did not accept owners' repudiatory conduct thus keeping the contract alive even though the "Cenik K" could no longer perform the charter. Instead, and given owners accepted their contract had been repudiated, charterers relied on owners' assurances that they would provide them with another vessel with a 27 - 30 April laycan and compensate them for their losses.

Eventually owners offered "Agaia" with an ETA 7 – 8 of May. The receivers were prepared to agree with an extended shipment date of 15 May but only on condition that the purchase price of the cargo was reduced by US$8 pm.

Subsequently arbitration was started and the majority decided that charterers' agreement, under protest, to waive all their rights against owners for damages arising from their repudiation, had been procured by economic duress even though owners' conduct was not, of itself, illegal or criminal. They also decided there had been no failure to mitigate by charterers (as owners had argued), and that the charterers had been "increasingly driven into a corner" from which they could not escape[2].

Owners appealed under s. 69 Arbitration Act 1996 in an attempt to set aside the arbitrators' decision.

The Law

The question of law posed on appeal was whether the owners' conduct, as found by the arbitrators, amounted to "the illegitimate pressure" required to establish economic duress in law. After reviewing the authorities the judge concluded it was clear that illegitimate pressure "can be constituted by conduct which is not in itself unlawful, although it will be an unusual case where that is so, particularly in the commercial context. It is also clear that a past unlawful act, as well as a threat of a future unlawful act can, in appropriate circumstances, amount to illegitimate pressure".

Cookie J also referred to:

- the Privy Council decision in To Pao On v Luy Yu Long[3] in which it was said that economic duress required "... coercion of will, which related to the law had moved it to act otherwise and was not in itself unlawful, although it will be an unusual case where that is so, particularly in the commercial context. It is also clear that a past unlawful act, as well as a threat of a future unlawful act can, in appropriate circumstances, amount to illegitimate pressure".

- DSQD Subsea v Petroleum Geo Services[4] in which it was established that to assess "illegitimate pressure" in the context of economic duress various factors must be taken into consideration:

1. whether there has been an actual or threatened breach of contract;
2. whether the person alleged to have exerted the pressure has acted in good or bad faith;
3. whether the victim had any realistic practical alternative but to submit to the pressure;
4. whether the victim protested at the time and whether he affirmed and sought to rely on the contract.[5]

Owners' appeal was dismissed.
Therefore, when negotiating an agreement a party who attempts to take advantage of a difficult position in order to settle a matter in his favour should be careful not to take an approach which could constitute illegitimate pressure which forces the other party to agree to those terms.

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