

The logo consists of the letters 'M', 'F', and 'B' in a white, bold, sans-serif font, spaced out horizontally against a dark blue square background.

**“But I was forced into the deal...”**

**The UK’s Supreme Court provides guidance on when lawful act economic duress can, and cannot, be used to avoid a bad bargain**

### **Speed Read**

In its recent decision in the case of *Times Travel (UK) Ltd v Pakistan International Airlines Corporation*, the UK’s Supreme Court confirmed that the doctrine of “lawful act” economic duress exists (despite the views of some academic commentators) in the context of economic pressure being placed on a party to waive a claim. The case however clarified that lawful act economic duress could only be made out in a situation that goes beyond what the court called “*the rough and tumble of normal commercial bargaining*”. The take-home message is that lawful act economic duress will only be available as a defence in exceptional circumstances.

### **Why is this case relevant to shipping and international trade?**

Although this case arose in relation to arrangements between a travel agency and an airline, as lawyers advising clients in relation to various aspects of shipping and international trade, we are sometimes asked by clients to advise on whether they are bound to contracts in situations where they have been pressured into agreeing to something by a party in a dominant negotiating position.

In one case handled by this firm, a dispute arose during the loading of a cargo of iron ore fines. It was alleged that the cargo was unsafe to ship due to its moisture content, constituting a breach of contract by charterers. After significant delay and expense, it was decided that the only option was to remove the cargo from the ship. The charterers, whose cooperation was required to discharge the cargo, refused to do the necessary unless the owners agreed to waive any claim against them. The question arose as to whether the waiver was voidable and/or the vessel’s owners might be able to claim damages for economic duress.

Other clients of ours had a vessel on period charter and were proceeding in ballast to Brazil to load sugar. Because the brokers failed to draw-up the charterparty, it was ambiguous whether sugar was a permitted cargo. The vessel’s owners threatened to withdraw the vessel in the context of a rapidly rising market and so chartering in a substitute wasn’t an option. Our clients were therefore forced to reach a settlement mid-voyage, agreeing to pay an enhanced hire rate in return for permission to load sugar.



Indeed, one of the leading cases referred to in the Supreme Court’s decision (the *Cenk K<sup>1</sup>*) arose in a shipping context. That was a charterparty case in which the owners manoeuvred the charterers into a position where the latter had no realistic option other than to waive their claim (this is one of two outcomes identified in the Supreme Court’s judgment as having previously led to economic duress being successfully argued; the other being use of knowledge of criminal activity to obtain a benefit from another party).

We pause at this point to note that another example of “economic duress” arising in its wider definition is in relation to anti-corruption, where “duress” is a potential defence to avoiding liability under the UK’s Bribery Act 2010 when, for example, there has been a demand for a facilitation payment or other form of bribe. In such cases, the availability of the defence of duress is usually considered to be restricted to the traditional forms of duress (i.e. threats to life, limb or liberty). This is a different form of “economic duress” to that considered in this case, as is “unlawful act duress” (i.e. a threat to breach a contract or to commit a tort by one party in order to pressure the other, to the latter’s disadvantage).

### **The facts**

As neatly summarised by Lord Burrows JSC in the judgment, the Claimant, Times Travel (UK) Ltd, was a UK-based travel agent whose business almost entirely comprised of selling tickets for flights to and from Pakistan on planes owned by the Defendant, Pakistan International Airlines Corporation (PIAC), the national airline of Pakistan. It was accepted by both sides that PIAC wielded considerable commercial bargaining power as the only airline operating direct flights between the UK and Pakistan.

Disputes arose between various travel agents and PIAC in relation to non-payment of commission for ticket sales. PIAC threatened to end their contractual relationship with Times Travel (as it was legally entitled to do) unless Times Travel entered into a new agreement under which PIAC was released from all claims that Times Travel might have had for commission due under the previous contract. Times Travel begrudgingly agreed to this and subsequently sought to rescind (i.e. cancel) the new agreement on the grounds of duress, which would allow it to claim the commission.

At first instance, the judge held that Times Travel was entitled to rescind the new agreement for economic duress. This decision was, however, overturned by the Court of Appeal. The Court of Appeal found that, as the relevant threat (i.e. to end contractual relations) was lawful, economic duress could only be established if PIAC’s demand (i.e. that Times Travel gave up its claim for commission) had been made in bad faith, in the sense that PIAC did not genuinely believe that it had a defence to Times Travel’s claim for outstanding commission. The first instance judge had found that PIAC genuinely did believe that it had a defence and the Court of Appeal therefore held that lawful act economic duress had not been established. Times Travel appealed the decision to the Supreme Court.

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<sup>1</sup> *Progress Bulk Carriers Ltd v Tube City IMS LLC* (The Cenk Kaptanoglu) [2012] EWHC 273 (Comm).



## The Supreme Court's decision

The Supreme Court found that there were three elements of lawful act economic duress:-

1. There must be an illegitimate threat;
2. The illegitimate threat must have caused the threatened party to enter into the contract; and
3. The threatened party must have had no reasonable alternative to giving in to the threat.

Requirements 2 and 3 above were not in dispute. The Supreme Court therefore had to consider whether PIAC's threat to end contractual relations with Times Travel was illegitimate.

The Supreme Court held that, where a threat is lawful, illegitimacy is determined by focusing on the justification of the demand. In this regard, a demand motivated by commercial self-interest was, in general, considered justified. The court found that lawful act economic duress is concerned with identifying the exceptional cases where a lawful demand, motivated by commercial self-interest, is nevertheless unjustified.

The Supreme Court held that there was no lawful act economic duress in the present case because PIAC's threatened act (i.e. to end contractual relations with Times Travel) was not coupled with a bad faith demand. A demand is made in bad faith in circumstances where the threatening party does not genuinely believe that it has a defence (and there is no defence) to the claim being waived. This was not the case on the facts before the Court and Times Travel's appeal was consequently dismissed.

## Comments

At 58 pages, the Supreme Court's decision is a heavy read, but it provides authoritative guidance on the narrow circumstances in which lawful act economic duress might be successfully argued. In short, and in accordance with the general approach of the English courts when considering commercial matters, the Supreme Court confirmed that there is no doctrine of good faith in contracting or of imbalance of bargaining power. It is only when the actions of the party with the upper-hand cross over into the realm of unconscionable conduct that the courts will interfere with the outcome of contractual negotiations. The court also commented that it understood that other jurisdictions are similarly cautious about declaring commercial behaviour illegitimate. The approach is similarly consistent with the English courts' approach that it is for Parliament, and not for them, to regulate inequality of bargaining power where a person is trading in a way that is not otherwise against the law and acknowledged that this has led to piecemeal solutions in individual cases that have come before the courts.



The bottom line is that some days one party has the dominant negotiating position and some days it is the other party (see, for example, the two cases that we have handled that are described above: one for a vessel's owners and one for charterers). Parties should be very wary, except in exceptional circumstances, of agreeing to a bad bargain in the face of commercial pressure in the hope that the court will later declare it invalid; the test for lawful act economic duress has a high bar.

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