Dispute Resolution

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DISPUTE RESOLUTION BULLETIN

Large complex claims and the role of managed mediation

With the new ICC Mediation Rules to be launched next month, followed by a year of mediation events organised by the ICC, HFW Partner Paul Wordley reflects on the managed mediation of a complex claim in which he was involved.

Introduction

For some time, mediation in the more traditional sense has been successfully used to deal with a variety of claims, including large complex claims involving a number of parties. However, for a number of reasons, mediation is not always possible where there are very many parties and the proceedings are spread over several jurisdictions. Nevertheless, with a pragmatic and practical approach and, more importantly, the willingness of all parties to make such a process work, a managed mediation over a period of time can be a successful tool in the resolution of complex disputes.

Background

The dispute involved a series of large, complex insurance claims in various parts of the world for a major client. This required the investigation, presentation, negotiation and settlement of over a dozen major claims and ascertainment of potential recoveries from the international reinsurance market. The claims were complex and subject to different local law and jurisdiction provisions. More importantly, as well as issues between the local insureds and the insurers, there were discrete claims of significant value between the insurers and the reinsurers. All of these matters had to be resolved in order to conclude the claim successfully.

With more than 40 parties involved, a process to resolve these claims could only work with genuine commitment, a following wind and some luck. The process agreed upon was that of a managed mediation over a period of time (eventually some 15 months) and a 10 day final formal mediation in a major capital city in Asia.

One of the main drivers for seeking a resolution by mediation was the fact that strict contractual interpretations and proceedings in various parts of the world, on some fairly unique insurance and reinsurance issues for the relevant jurisdictions, would inevitably have led to a number of preliminary issues being tried in the different jurisdictions, with a risk that the appellate process would add further time and uncertainty. It was conservatively estimated by all the parties that litigation could take around 10 years. Given that the claims had already been under investigation for a period of 3 to 5 years, it was understandable that the parties, each of whom was in a position to compromise, should make every effort to do so.

The mediation framework

As in most mediations, it was agreed by the legal advisers that the mediation framework should be contractually binding. Importantly, it was also agreed that the mediation agreement would include a timetable for identifying issues, presenting issues and articulating the various parties' positions on all the issues, both as to liability and quantum.

The parties also agreed to give the mediator (a retired High Court Judge from a common law jurisdiction) contractually binding powers to compel the production of information and documentation. While this is not usual in a mediation, in this case it was considered that it would be a necessary and appropriate discipline to ensure that the parties engaged on the issues. Perhaps not surprisingly, in the event, the agreement to give the mediator the power was enough and it was never used. Undoubtedly, it helped.

Mediation case management

Throughout the 15 month mediation, there were various occasions on which the mediator was invited to hold what were effectively case management conferences to ensure that the process remained on track and to maximise the likelihood of there being a consensual outcome at the end of the 10 day formal mediation when it took place.

These crisis moments, together with some real deadlocks on issues, were ultimately resolved through the leadership and guidance given by the mediator in conjunction with the various legal teams.

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It is fair to say that there were a number of occasions on which all the parties, or any one or more of them, could have walked away from the process. These crisis moments, together with some real deadlocks on issues, were ultimately resolved through the leadership and guidance given by the mediator in conjunction with the various legal teams.

The issues

Not only were there a large number of parties but, due to the nature and complexity of the underlying claims in various parts of the world, there were around 300 individual issues to be addressed. Throughout the mediation process, these issues were either resolved by the parties with the guidance of the mediator or put into the frame for engagement and dialogue in the formal 10 day mediation. Three months before that final formal mediation, any unresolved issues were reduced to position papers and opening statements. Several days of the 10 day mediation were then spent with the parties giving their opening mediation submissions and responses.

Location

Whilst most of the mediation case management conferences took place by telephone conference call, on several occasions there were physical meetings at various locations around the world, to suit the convenience of the parties.

Conclusion

This case is an example of how, with the appropriate subject matter and the willingness of the parties to achieve a consensual outcome, complex, costly and time-consuming litigation can be avoided for the benefit of all concerned.

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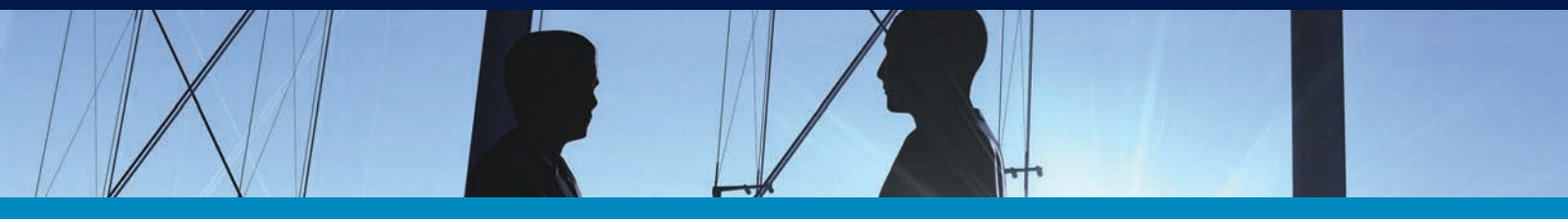

A closer look at economic duress

In recent years, the global business environment has been a turbulent one for those involved in international commerce. Against that background, the English courts have heard a number of cases involving claims of economic duress.

Most recently, in *Lupofresh Ltd v Sapporo Breweries Ltd (25 July 2013)*, the Court of Appeal was presented with a case involving the sale of hops by a Japanese company (Sapporo) to an English company (Lupofresh) under several contracts. Lupofresh claimed that various renegotiations of the contracts had been induced by economic duress.

The dispute eventually fell to be decided under Japanese law. Although not required to consider the claim for the purposes of its judgment, the Court of Appeal referred to economic duress as "an emerging doctrine, the bounds of which can by no means be regarded as yet settled". This article looks at this emerging doctrine in more detail.

What is economic duress?

Economic duress occurs when one party puts illegitimate economic pressure on another party to either enter into a contractual agreement or make a payment.

There are two key elements in establishing a claim for economic duress:

- First, the economic pressure applied by the defendant must be illegitimate. This may be in the form of a crime, a tortious action, a breach of contract, or in some limited cases lawful but unethical behaviour (*Progress Bulk Carriers v Tube City (17 February 2012)*).
- Second, the claimant must establish that, *but for* the illegitimate economic pressure, the claimant would not have entered into the contract or made the relevant payment.

Recent cases have suggested a widening in the scope of "economic pressure." The position now appears to be that when a party behaves unethically, such as by performing an act in bad faith, this may constitute economic duress, even if the threatened action was otherwise entirely within a party's contractual rights (*Progress Bulk Carriers*).

The court may also find that one party has put illegitimate pressure on another party when it threatens to do something illegitimate, such as break a contract. An example of this came in *Kolmar Group AG v Traxpo Enterprises PVT Ltd (1 February 2010)*. Traxpo had contracted to sell methanol to Kolmar but refused to deliver unless Kolmar agreed to a substantial price increase. Kolmar reluctantly submitted to this demand because of potential liabilities to its own customers, potential liability for deadfreight to the owners of the vessel it had chartered, and because of accumulating demurrage at the port where the vessel chartered to carry the methanol was waiting to load. Kolmar subsequently brought a successful claim for economic duress against Traxpo.

When does "pressure" become economic duress?

The courts look at four main factors in determining this question:

- Did the victim of the alleged coercion protest?
- Was an alternative course open to the victim, including an adequate legal remedy?
- Did the victim receive independent advice?
- What steps were taken by the victim to avoid the contract?

Remedies and factors to consider

A claim based on economic duress will not lead to an action for damages but for restitution of property or money extracted under such duress and the avoidance of any contract that has been induced by it.

Parties concerned that they may be being subjected to economic duress by a counterparty should instruct lawyers at an early stage to ensure that they respond appropriately. For example, in *Kolmar v Traxpo*, the court took into account that Kolmar had protested repeatedly and had brought a claim against Traxpo at the first opportunity.

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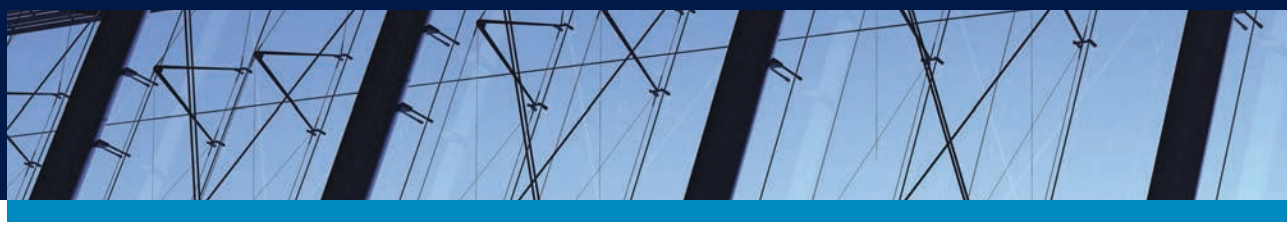

Importantly, if a party is arguing that a particular contract is voidable for economic duress, it must ensure that it does not affirm that contract by acting in a manner consistent with treating it as continuing.

As the courts decide more claims for economic duress, this emerging legal doctrine will become more clearly defined and reliable. Commercial parties facing undue pressures from their contractual counterparties in these economically challenging times should consider seeking protection from it.

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Conferences & Events

Bridging cultures in International Arbitration

Tokyo
14 November 2013
Panellist: Chanaka Kumarasinghe

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