Commercial pressure exists wherever one party to a commercial transaction is in a stronger bargaining position than the other party and claims for economic duress are relatively rare. In most cases, a party faced with a 'take it or leave it' attitude, or an unwarranted, unreasonable demand for an increase in the contract sum, can source the subject matter of the contract from elsewhere and, if appropriate, sue the other party for damages for breach of contract.

However, there will be instances where one party to a contract has no other practical option but to agree to unreasonable new terms being imposed upon it. Where illegitimate pressure has been put upon it to do so, a claim for economic duress will arise.

We consider the basics of:

- What amounts to economic duress and what is required to prove it;
- Whether a lawful act can amount to economic duress;
- The remedies available; and
- What parties can do to protect themselves.

What is economic duress?

Economic duress in contract occurs, for example, where a party to a contract (A) threatens to cancel the contract unless the other party (B) agrees to their demands and B has no other practical option but to agree to the new terms of the contract. However, the pressure brought to bear by A has to be more than the usual rough and tumble of commercial negotiating and bargaining.
What do you need to prove for a successful economic duress claim?

The necessary ingredients for a successful economic duress claim are:

- pressure which is illegitimate i.e. there is no commercial or similar justification. The pressure will often take the form of a threat;
- the pressure must be a significant cause inducing the innocent party to enter into the contract i.e. **but for** the duress it would not have entered into the contract; and
- the practical effect of the pressure is that there is compulsion on, or a lack of practical choice or realistic alternative for, the innocent party.

If these ingredients are established then the innocent party is entitled to avoid the resulting contract so long as it has not subsequently been affirmed.

What is illegitimate pressure?

There is no absolute test to distinguish illegitimate pressure from the rough and tumble of the pressures of normal commercial bargaining. It is generally accepted that a (past or threatened) breach of contract, or a threat to commit an unlawful act, crime or tort can amount, prima facie, to illegitimate pressure. Whether the particular threat or pressure does actually amount to illegitimate economic pressure is highly context and case specific.

In determining whether there has been illegitimate pressure, the courts take into account a range of factors including whether:

- there has been an actual or threatened breach of contract;
- the party exerting the pressure has acted in good or bad faith;
- the innocent party had any realistic practical alternative but to submit to the pressure - if it did it will seldom obtain relief;
- the innocent party protested at the time; and
- the innocent party affirmed and sought to rely on the contract.

This is not an exhaustive list of factors and none on their own are determinative of the outcome.

Case law makes it clear that not every threat to break a contract is illegitimate in the sense required - the threat must be made in support of a demand that is illegitimate and there must be no reasonable alternative but to agree to the demand.
So, for example, economic duress was found where party A refused to pay sums properly due under a contract, knowing that party B was in desperate financial straits. A offered to pay a reduced amount only in full and final settlement on the basis that if the reduced sum was not accepted, then it would pay nothing. Although B accepted the reduced sum, as it had no alternative but to do so, given its financial position, a successful claim was subsequently made against A for the balance.

Economic duress has also been found where party A threatened, without any legal justification, to terminate an existing contract unless the other party, B, agreed (within a few days) to increase the contract price by 10%. B would have lost an extremely lucrative contract with a third party had termination occurred and so agreed, under protest, to the demand.

However, a refusal, in breach of contract, to supply goods unless some extra consideration was supplied by the buyer will not amount to economic duress where alternative supplies are readily available elsewhere in the market. In such cases, the innocent party has a realistic alternative but to submit to the duress: it can source elsewhere and then claim damages for breach of contract subsequently.

Can the threat to commit an otherwise lawful act amount to economic duress?

Yes, in circumstances where it is morally or socially unacceptable. However, this is likely to be very rare in a commercial context. Threatening to carry out something within a party’s rights will not normally amount to duress - so a party that relies on its contractual rights to drive a hard bargain is not guilty of economic duress on that basis alone. A threat to commit what would otherwise be a lawful act may be improper if coupled with a demand that goes substantially beyond what is normal or legitimate in commercial arrangements, such as where the threat is tantamount to blackmail.

What remedy is there where a contract has been entered into under economic duress?

The courts will not come to the aid of a party that has simply entered into a bad bargain in what might be challenging economic conditions but, where economic duress is proved, the primary remedy is rescission of the contract and/or damages. The contract is voidable, i.e. terminable at the election of the innocent party.
What can a party suffering economic duress do to protect itself?

Where a contracting party has no alternative but to bow to an illegitimate threat and enter into a contract (or agree to a variation of an existing contract), in order to put itself in the best position to claim economic duress, the innocent party should:

- if time permits and it is possible, obtain evidence that the contract could not be fulfilled elsewhere;
- although failure to do so may not be fatal, make it clear in writing that it is acting under protest and reserve its rights; and
- seek to avoid the contract as soon as is possible to avoid losing the right to do so. The right could be lost, for example, by the innocent party trying to enforce any of the contract's terms once the pressure has been lifted.

And the party in the driving seat?

Although claims for economic duress remain infrequent, a party seeking to drive a hard bargain from a position of strength must be careful not to overstep the line between rigorous commercial negotiations transacted for its own commercial interests and illegitimate economic pressure. This can be difficult in the context of global commercial negotiations where companies and individuals may have contrasting business cultures.

To manoeuvre the other contracting party into a position in which it has no realistic alternative but to agree may seem good for business in the short term but won’t necessarily be so in the long term if the contract is susceptible to being avoided.
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