illegitimate and I find that it was not approbated. In my judgment that pressure can properly be described as economic duress which is a concept recognised by English law and which, in the circumstances of the present case, vitiates the defendant's apparent consent to the agreement. In any event, I find that there was no consideration for the new agreement. The plaintiffs were already obliged to deliver the defendant's goods at the rates agreed under the terms of the original agreement. There was no consideration for the increased minimum charge of 440 pounds per trailer.

- Philip Davenport

11. Contract - Exemption Clause

In *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad* (1989) 86 ALR 375 the Australian High Court considered the construction of an exemption clause in a bill of lading.

The claimant sued the carrier for damages for non-delivery of a container load of prawns. The container was stolen shortly after it was discharged from the ship at Glebe Island terminal, Sydney.

The contract of carriage, the bill of lading, provided that the carrier was exempted from liability in respect of:

> ... any loss or damage to or in connection with goods arising or resulting at any time from ... any cause or event which the carrier could not avoid or the consequences of which the carrier could not prevent by the exercise of reasonable diligence.

The claimant argued that the main object of the contract of carriage was the delivery of goods to the owner at Sydney and that to construe this provision as exempting the carrier from liability for loss or damage for non-delivery would defeat the object. He argued that "loss or damage to or in connection with the goods" did not cover non-delivery.

The Court rejected the notion that an exemption clause should be construed so as not to apply to an event which defeats the main object of the contract and held that "loss ... in connection with goods" in this contract should be read as covering "loss caused by loss of goods".

The Court held that the word "carrier" as defined in the contract was not intended to include a subcontractor or agent of the carrier. Hence, the carrier could rely upon the exemption clause and avoid liability even though one of the carrier's own employees or a subcontractor could have prevented the loss.

- Philip Davenport

12. Contract Formation

Australian and New Zealand Banking Group Ltd v Frost Holdings Pty Ltd [1989] VR 695 is not directly related to the construction industry, but is relevant as it deals with the problem of contract formation. Problems with contract formation frequently arise in the construction industry, particularly in relation to the engagement of subcontractors.

Frost Holdings, a publisher, made a proposal to the *ANZ Bank* that reproductions be made of original paintings by Australian artists in the form of calendars to be sold by the Bank.

The publisher brought an action for damages against the *ANZ Bank* for repudiation of the agreement, which it asserted was entered into. The *ANZ Bank's* position was that the agreement was not legally binding or enforceable and was no more than an agreement in principle to proceed with further investigations and the development of a proposal and that the parties' respective rights and obligations were not defined or agreed with sufficient certainty or particularity to give rise to an enforceable contractual relationship between the parties. The publisher upgraded the proposed calendar format, which involved changes in size, quality and price. The *ANZ Bank* subsequently advised the publisher that it did not wish to proceed with the project.

The trial judge found that the parties made an enforceable agreement whereby the publisher would produce and supply to the Bank 50,000 good quality calendars at a cost of $8.80 each, or at a higher cost as would be reasonable in the event that the *Bank* stipulated a larger or better quality calendar. Damages were awarded. The *Bank* appealed.

The basic question in the appeal was whether the parties had entered into a binding and enforceable agreement for the sale of 50,000 calendars at the unit price of $8.80.

The Full Court of the Victorian Supreme Court found that the parties had not reached agreement upon the essential contractual terms of their bargain. They had not fixed the price per unit, nor agreed to matters of design, style, quality, size of paper, content of the calendar and the number of calendars to be supplied. It was held that these were not merely specifications but were matters which constituted the subject matter of the negotiations. Differences about these matters were not capable of resolution by implication.

In reaching this decision, support was found in the following judgments:

> *Thorby v Goldberg* [1964] 112 CLR 597, Sugarman J. at p 607:
>
> > "It is a first principle of the law of contracts that there can be no binding and enforceable obligation unless the terms of the bargain, or at least it essential or critical terms have been agreed upon. So, there is no concluded contract where an essential or critical term is expressly left to be settled by future agreement of the parties."
>
> *May and Butcher Ltd v R. (H.L.)* [1934] 2 KB 17 at p 21 where Viscount Dunedin said:
>
> > "To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it

> may leave something which still has to be determined, but then that determination must be determination which does not depend upon the agreement between the parties."

The Full Court stated that the present situation was distinguished from a contract made by parties leaving an essential term to be agreed upon by them, and if they failed to agree, where the disputed term is to be determined by a third party or by arbitration.

The Full Court also stated that the law does not permit a court to imply a term into a bargain between parties for the purposes of making their bargain an enforceable contract.

- John Tyrril

13. Contract Formation - Battle of Forms - Attempt to Incorporate Lump Sum Contract E5b in a Subcontract

As an example of the problem of subcontract formation in the construction industry mentioned above in the comment on *Australian and New Zealand Banking Group Ltd v Frost Holdings Ltd*, the relevant facts and findings in *White Industries Pty Ltd v Piling Contractors Pty Ltd* (1986) 7 BCLRS 172 are set out below in some detail.

White Industries entered into an agreement with Dravo Corporation for the construction of an aluminium smelter and ancillary facilities at Tomago. In December, 1981, Piling Contractors was invited by White Industries to submit quotations as a subcontractor for the driving of sheet and steel piles for the erection of cofferdams at the smelter site. White Industries provided Piling Contractors with specifications and bore logs.

Piling Contractor's quotation included a statement that the offer was based "upon the attached general working conditions and the following". Attached was a document headed "Piling Contractors Pty Limited General Working Conditions", cl 13(c) of which provided as follows:

> "(c) The general condition [sic] of subcontract shall be as per the standard, unedited M.B.A. Edition 5b with our quotation and general working conditions taking precedence."

After a number of communications between the parties, Piling Contractors submitted a revised quotation.

On 22 February, 1982, White Industries sent a telex to Piling Contractors accepting Piling Contractor's offer subject to certain terms. On 23 February, 1982, Piling Contractors replied to this telex confirming that it was prepared to discuss a proposed equipment charge, as required by White Industries in its telex, and confirming that the other terms were acceptable.

Piling Contractors entered the site in March, 1982 and commenced work with the knowledge and assent of White Industries. Work continued until the latter part of April, 1982 when it ceased following difficulties experienced by Piling Contractors in driving piles. Piling Contractors claimed that these difficulties related to ground conditions not properly disclosed. Differences developed between the parties as to what, if any, compensation should be allowed to Piling Contractors.

After work had been in progress for two to three weeks, White Industries had sent a "formal order" to Piling Contractors. This order contained the words: "the above work is to be carried out subject to the terms and conditions printed on the reverse." Paragraph 1(b) of these terms was as follows:

> "(b) Any conditions of contract or sale attached to or embodied in the Sub-Contractor's quotation are deemed to be withdrawn in favour of the conditions incorporated herein."

This document was never signed by Piling Contractors, which claimed that it was inconsistent with the agreement already established between the parties.

It was common ground that the reference to cl. 13(c) of Piling Contractor's General Working Conditions was to Lump Sum Contract Edition 5b issued by the RAIA and MBFA. Clause 32 of that contract provided for reference to arbitration of disputes between the proprietor and the builder.

Upon the assumption that cl. 32 constituted a term and condition of the subcontract between White Industries and Piling Contractors, Piling Contractors gave notice to White Industries on 30 March, 1983 that a dispute existed between them with regard to the subcontract and required that the dispute be resolved by arbitration under cl. 32 of Edition 5b.

Master Allen in the Supreme Court of New South Wales held that the contract between the parties was concluded by Piling Contractor's letter of 23 February, 1982, although the parties contemplated that a formal document would be executed. Accordingly, the terms and conditions on the reverse of White Industries' form constituted no part of the contractual arrangements between the parties.

Master Allen further held that cl. 13 of Piling Contractors' General Working Conditions formed part of the contractual arrangements between the parties, with the effect of incorporating cl. 32 of Edition 5b. Master Allen also held that cl. 32 constituted a submission to arbitration within the meaning of the Arbitration Act 1902 (NSW). Finally, Master Allen held that there was no discretionary basis on which a stay of proceedings should be refused.

White Industries appealed from this decision.

In the appeal, Carruthurs J. held:

1. The "battle of forms", to use the expression of Lord Denning in *Butler Machine Tool Co. Ltd v Excell-o Corporation (England) Ltd* (1979) 1 WLR 401 at 404, was completed by *Piling Contractor's* letter of 23 February, 1982. Albeit, that if it were necessary to use a diesel hammer because another machine was inadequate, the cost of such hammer was to be the subject of negotiation. The parties had reached agreement upon all the essential