

JUDGMENT : MR. JUSTICE COLMAN: Commercial Court. 19th September 2001.

In view of the delay which has occurred in the judgment in this matter becoming available and the need to provide the parties with an early response, I am delivering this judgment in the unconventional method of oral presentation.

Introduction

1. Two applications in two actions are before the court. Both applications go to the jurisdiction of the English courts, and both raise matters of general importance as to the effect of jurisdiction clauses and in the field of economic duress.
2. The two actions arise out of a Distributor Agreement dated 4th September 1998 ("the 1998 Agreement") entered into between IFR and Federal Trade ("Federal"). Under that agreement IFR granted to Federal the exclusive right, for the duration of the agreement, to purchase from IFR for resale in Italy specified radio, electronic and telecom equipment. The period of the agreement was two years (1st July 1998 to 30th June 2000). By its terms Federal, as distributor, was to maintain in Italy suitable premises and sufficient and suitably qualified staff and to use its best endeavours to promote to the utmost the sale and use of the products (clause 4(a)) and was at all times to give to IFR and to any of its officials or employees all reasonable and proper assistance in its power for the purpose of furthering the interests of IFR in Italy (clause 4(j)). The agreement also made provision for the submission by Federal to IFR of an annual estimated order schedule by 31st March each year and for IFR to notify Federal of an expected order schedule for the forthcoming year, the value of which would become the order target.
3. Clause 8(b) of the 1998 Agreement provided as follows:
"This Agreement supersedes and annuls all former agreements between the parties hereto relating to the distribution of the Products provided that any unfulfilled commitments arising out of concluded sales shall continue in effect."
4. Clause 9(a) of the 1998 Agreement, which is the law and jurisdiction clause, provided as follows:
"To the extent permitted by local law, the Agreement and each purchase order issued by the Distributor and accepted by the Company shall be construed and interpreted in accordance with the laws of England and subject to the jurisdiction of the English courts, without giving effect to the choice of law principles thereof, provided however, the United Nations Convention of Agreements for the International Sale of Goods shall in no way apply to the interpretation of this Agreement. If any provision of the Agreement contravenes any law, including the law of the place of performance, such provision shall be deemed not to be a part of this Agreement herein, and the remainder of this Agreement shall be valid and binding as though such provision were not herein included."
5. By a letter dated 13th March 2000 IFR gave formal notice to Federal that it would not enter into a new distributor agreement when the 1998 Agreement expired on 30th June 2000.
6. On 1st August 2000 Federal commenced proceedings in the Labour Division of the Court of Milan, claiming, *inter alia*, that the 1998 Agreement had never become binding due to Federal's lack of intention to replace an earlier agreement ("the Marconi Agreement"), to which I will have to refer, and which therefore continued in effect, and, in the alternative, claiming that, if the 1998 Agreement did become binding, it was an agency agreement and, under Italian law, Federal was entitled to compensation for termination of that agreement in the sum of Lira 1,036,000,000, then equivalent to £324,000. These proceedings were not served on IFR until 10th October 2000.
7. Meanwhile, on 15th September 2000, IFR demanded payment from Federal of £122,053.60, and US\$436,624.04, being the price of goods which it claimed to have sold and delivered to Federal under the terms of the 1998 Agreement. The letter suggested a meeting within seven days to try to resolve matters before IFR had to resort to legal proceedings.
8. On 4th October 2000 Federal commenced fresh proceedings in the Civil Court of Milan, by which it advanced identical claims to those in the Labour Division proceedings. It seems that the reason for these second proceedings was that it was thought that the Labour Division might not have jurisdiction in respect of claims for compensation for termination of agency agreements brought by companies as distinct from individuals. That matter remains unresolved.
9. On 7th November 2000 IFR commenced its claim for outstanding amounts totalling £427,791.25 in the Queen's Bench Division ("the Debt Action"). Service on Federal in Italy was effected on 5th December 2000.
10. Meanwhile, by 19th October 2000 IFR had received the papers in both Italian proceedings and on 18th December 2000 it commenced in the Commercial Court proceedings claiming a declaration that by reason of clause 9 of the 1998 Agreement and Article 17 of the Brussels Convention and the Civil Jurisdiction and Judgments Act 1982 the English courts had exclusive jurisdiction over any and all claims and disputes arising between the parties in connection with the 1998 Agreement, and all purchases and sales made pursuant thereto, including the subject matter of the Italian proceedings, and also an injunction restraining Federal from taking any further steps in the Italian proceedings. I refer to this action as "the Injunction Action".
11. On 6th February 2001 Federal filed an application to contest the jurisdiction of the English courts in the Debt Action. By consent orders the Debt Action was transferred to the Commercial Court and the substantive claim for an anti-suit injunction was ordered to be heard at the same time as Federal's application to contest English jurisdiction in the Debt Action.
12. Fundamental both to the claim for the anti-suit injunction and to the challenge to English jurisdiction in the Debt Action is the issue whether Federal is bound by the English jurisdiction clause in the 1998 Agreement.

13. The only ground relied upon by Federal in support of its application to contest the jurisdiction, which was set out in the witness statement of its president Remo Toigo, was that the 1998 Agreement was voidable for economic duress. Consequently, Federal was not bound by the English law and jurisdiction clause.
14. The composite hearing of these two applications was listed for Tuesday 8th May 2001. However, on the afternoon of the previous Friday, Federal's solicitors served a second witness statement of Remo Toigo of 27 paragraphs, but which was not accompanied by any of the exhibits to which it referred. These were received by IFR's solicitors at 9.15 a.m. on the morning of the hearing. They run to 121 pages. The witness statement raised a completely new point. The substance of this point was that the 1998 Agreement was an agency agreement within the Commercial Agents Directive (Council Directive 86/653 EEC), and that Federal was a commercial agent entitled to be compensated upon termination of that agreement, even in accordance with its terms. The British statutory implementation of the Council Directive (the Commercial Agents (Council Directive) Regulations 1993-1993 SI No. 3053) included a provision (Regulation 1(2)) to the effect that the Regulations only applied to activities of commercial agents in Great Britain. Consequently, the effect of the law and jurisdiction clause, if enforceable, was said to derogate from the rights which Federal would have had if it had been entitled to be sued in the Italian courts, where it could have counter-claimed for compensation, as it had claimed for compensation in the Milan proceedings. It was therefore argued that the effect of Article 19 of the Directive was to render the jurisdiction clause void, invalid or unenforceable.
15. This last-minute attempt to raise a new issue based on new evidence was contrary to the rules under the CPR, highly disruptive of the applications, and placed the Court and those representing IFR in a difficult position. If the new point was shut out under the management powers of the court, the situation might well arise where, if the law and jurisdiction clause were held to be otherwise enforceable and jurisdiction were assumed, and an injunction granted against the Italian proceedings, IFR might encounter insuperable enforcement obstacles in Italy if they then re-opened the commercial agency issue in that jurisdiction.
16. After some discussion, it was decided to adjourn all argument on the commercial agency point at the cost of Federal, including whether Federal should be permitted to adduce in evidence Remo Toigo's further witness statement, and to proceed only with the argument that the 1998 Agreement was voidable for economic duress. That order was made on terms that Federal must apply to the Italian courts to stand out a further hearing in the Italian proceedings which was listed for 17th May, and that a formal statement of Federal's case on the Commercial Agents Regulations point should be served. In the event, the argument on the economic duress point was not completed in the time available and was adjourned until a further hearing could be fixed, which was to be 3rd August 2001. Counsel for Federal prepared a short statement of case dated 10th May 2001.
17. Following the adjournment, Miss Geraldine Andrews Q.C., on behalf of IFR, having had the opportunity further to research the commercial agency point, unearthed the Commercial Agents (Council Directive) (Amendment) Regulations 1998 (1998 SI No. 2868), which had the effect of amending the 1993 Regulations so as to make it possible for a party to rely in the English courts on the Directive if its agency activities were conducted in another member state and where the law of that state permitted agreement that the agency contract was governed by English law. The effect, therefore, was that in English proceedings the directive could be relied upon in respect of activities in another member state. It further emerged that Federal's Italian lawyers failed to apply to the Milan Court to have the matter stood out on 17th May, pending determination of the jurisdiction issues by this court. When these matters came to light, those representing both parties understandably asked for the matter to be restored before this court without waiting for the 3rd August hearing.
18. The matter therefore came back before me on 14th June, when it was ordered that the 3rd August date should be vacated and that, unless the court otherwise ordered, all further submissions on all issues would be in writing. The submissions of IFR were to be served by 12 noon on 18th June 2001, and any further submissions of Federal were to be served by noon on 26th June 2001. After considering the written submissions, the court would inform the parties if it wished to hear further oral submissions before preparing a judgment. It is to be noted that there was no application by counsel on behalf of Federal for permission to rely on Remo Toigo's second witness statement in spite of the breach of the condition imposed by the 8th May order. Entitlement of Federal to rely on that evidence, therefore, remained at large.
19. On the following day, Federal withdrew instructions from its solicitors and counsel and stated that it would be acting "in person".
20. On 18th June the written submissions of IFR were filed with the court. IFR's solicitors communicated direct with Federal and, through Italian lawyers, with Federal's Italian lawyer, Snr. Giorgio Calesella. Federal failed to respond in writing to the written submissions filed on behalf of IFR, and made no subsequent application to be permitted to adduce Snr. Toigo's second witness statement in evidence.
21. It is, therefore, now for me to determine the jurisdiction issue on the basis of oral argument and evidence from both sides on the economic duress issue and on the basis of IFR's counsel's written submissions in respect of Federal counsel's statement of case on the Commercial Agents Directive point. In view of the failure of Federal to comply with my 8th May order in respect of the Milan Court hearing, and of the failure of Federal to make any subsequent submissions in which they sought to explain why Snr. Toigo's evidence was put in so late, or to explain their conduct in ignoring this Court's condition and to justify being allowed at this stage to adduce Snr. Toigo's second witness statement in evidence, I have reached the conclusion that it would be unfair to IFR and inconsistent

with the orderly management of these applications if this evidence were now admitted. I therefore proceed without reference to it.

The economic duress point: submissions.

22. Before investigating the circumstances in which the 1998 Agreement was entered into, it is necessary to consider the pre-existing distributor agreement to which Federal was party. This was the Marconi Agreement entered into on 21st April 1997. Similarly to the 1998 Agreement, it provided for the terms upon which Marconi Instruments Limited ("Marconi") would sell electronic equipment to Federal for exclusive on-sale in Italy. The duties of Marconi were similar to those of IFR under the 1998 Agreement, and those of Federal were also similar to those under the latter agreement.
23. The Marconi Agreement was to remain in force for three years from 1st April 1997. Its automatic termination date was, therefore, 31st March 2000. It was expressed to be read and had effect according to English law, and as a contract made in England it provided that all disputes arising in connection with it were to be settled by ICC Arbitration in London.
24. According to the evidence of Remo Toigo, President of Federal, it entered into the Marconi Agreement because it was interested in expanding the range of companies it represented in Europe in the highly technical sector of electronic systems control and measuring equipment. There are in this specialised market only a very limited number of manufacturers, customers and intermediaries such as Federal. Marconi was a world leader in the field, with immense resources. In order to impress Marconi with its commitment and expertise and the adequacy of its customer base, Federal was obliged to carry out a considerable "sowing" operation by way of sales promotion, including visits to customers throughout Italy, advertising, and demonstrations with equipment at trade fairs. It was therefore necessary for Federal to incur considerable investment in equipment and great promotional expense to get the business started. Sales development was naturally slow in the early stages.
25. In February 1998 Marconi was sold by GEC to FIR Systems Inc, which was incorporated in Kansas, United States. As from 2nd March 1998 Marconi changed its name to IFR Limited, and proceeded to continue to perform the Marconi Agreement. A letter informing Federal of these matters sent in March 1998 stated:
"All contracts, orders, agreements and other liabilities, obligations and benefits entered into by or accruing to Marconi Instruments Limited remain valid and in full force and effect, no formal documented change of name for outstanding orders and contracts, agreements is required."
26. There was thus no change in Federal's supplier, save that its name had changed. References to the absence of a novation agreement in the evidence of Snr. Toigo and in the claims documents in the Italian proceedings are therefore irrelevant.
27. In the late summer of 1998, IFR insisted that it should enter into a new agreement with Federal to replace the Marconi Agreement, which still had until March 2000 to run. It is said by Snr. Toigo that Federal had made a very large investment in promoting Marconi equipment, but had as yet achieved little return on their investment. The proposed new agreement had a number of important differences from the Marconi Agreement.
28. Firstly, it covered the promotion and sale of equipment not covered by the Marconi Agreement, notably Automatic Test Equipment. For this purpose, Federal would have to employ an additional technician and sales engineer within a month of August 1998 and would have to spend approximately Lira 150 million (about £47,000) on demonstration equipment and spares. Secondly, the Marconi Agreement covered all Marconi's products, whereas the 1998 Agreement divided the market by reserving part of its products for distribution by another company called MPG.
29. The 1998 Agreement, according to Snr. Toigo, was prepared by IFR unilaterally and its terms could not be negotiated. I set out part of his evidence on this new agreement.
*"Federal had no alternative but to enter into the new agreement. I do not say this simply because of the disproportionate size and economic force between the two parties to the contract, which is evident. The original agreement was an important opportunity for Federal. By the summer of 1998 it represented the largest area of Federal's business and had consumed very considerable financial outlay.
Federal had no opportunity to sue on the original agreement as opposed to enter into the new agreement. As President of Federal, I was unable to effect any changes to the text of the new agreement imposed by IFR. I was unable to consider Federal's position save for the overriding need to preserve some form of agreement to allow Federal to reap some benefit from its very considerable investment over the previous fifteen months. At the time I protested to IFR but these protests fell on deaf ears. There was no alternative course open to Federal. Certainly, Federal could not sue on the original agreement without the risk of becoming embroiled in expensive litigation against an international manufacturer who, as IFR emphasised, had a global sales presence in over 100 countries. I sought no independent advice ..."*
30. It is argued on behalf of Federal that it was placed in the position where it had no practical alternative but to enter into the 1998 Agreement in order to avoid substantial losses, which it could not in practice recover by litigation because of its lack of the financial resources necessary to take on a multi-national corporation. Mr. Timothy Hill, on behalf of Federal, relies on the twin facts that IFR was threatening to break the Marconi Agreement if Federal would not enter into a new agreement and the impracticality of Federal litigating to preserve that agreement. The threatened breaches of contract amounted to a repudiation of the Marconi Agreement.

31. He further submits that, the 1998 Agreement having been procured by economic duress, Federal avoided it by its commencement of the proceedings in the Labour Division of the Milan Court in July 2000.
32. On behalf of IFR it is submitted by Geraldine Andrews Q.C. that, on the authority of *The "Evia Luck"* [1992] 2AC 152, the question whether economic pressure constituted duress of such a kind as to entitle the innocent party to avoid the contract is to be determined by reference to the proper law of the contract. In order to justify avoidance of a contract, the economic pressure must be such as to be called illegitimate. On the evidence, Federal's will was not overborne, nor was it forced to enter into the 1998 Agreement other than voluntarily. In doing so it was motivated by the economic considerations to which Snr. Toigo referred, namely that Federal had already invested heavily in sales promotion under the Marconi Agreement and it wanted to recoup some or all of this expenditure by continuing as distributor under a new agreement.
33. IFR also relies on the fact that Federal never attempted to insist on its clear contractual rights under the Marconi Agreement by declining to agree to replace it until it had run its full term to 31st March 2000. It is argued that if IFR had unilaterally terminated the Marconi Agreement, Federal could have enforced its full legal rights by claiming damages in an arbitration.
34. Federal counters this submission by arguing that it lacked the financial resources to take on a wealthy organisation, such as IFR, in a protracted claim. Due to the unequal financial position of the parties, it was impracticable for Federal to stand on its legal rights.
35. IFR also draws attention to a letter dated 14th March 2000 from Federal in response to IFR's expressed intention not to renew the 1998 Agreement when it automatically expired in June 2000. The letter is directed to preserving Federal's position as distributor of IFR's products. While it expressly accepts that by reference to clause 7(a) it was open to IFR not to renew the 1998 Agreement, it invites IFR to reconsider its decision in the light of specific reference to its sales performance since the start of the current financial year (April 1999). It is argued that this letter strongly suggests that the 1998 Agreement was validly entered into without any suggestion of economic duress. Further, it amounts to an affirmation of the 1998 Agreement, which precludes subsequent avoidance.

The economic duress point: analysis.

36. Federal's challenge to the law and jurisdiction clause and, indeed, IFR's response, proceeded on the assumption (i) that, if Federal was caused to enter in the 1998 Agreement by economic duress, that agreement was rendered voidable; and (ii) if it were effectively avoided, the law and jurisdiction clause could be relied upon neither to found English jurisdiction in the Debt Action, nor to provide the basis for an anti-suit injunction in the Injunction Action.
37. There are, however, embedded in these assumptions two basic steps which need to be considered. (1) If the 1998 Agreement is voidable and has been avoided, has the law and jurisdiction clause also been avoided? (2) If the answer to that question is No, is the effect of economic duress to render a contract void or merely voidable?
38. As to the impact of voidability of the matrix contract on its law and jurisdiction clause, the starting point must be the analogous position that arises in relation to an arbitration clause. Ever since the seminal decision of the House of Lords in *Heyman v. Darwins Ltd* [1942] AC 356, the English courts have been working out the concept of the separability of arbitration agreements. Provided that the scope of the words of the clause is sufficiently wide, it is now well-settled that the issue whether the matrix contract was induced by fraud or misrepresentation is within the jurisdiction of the arbitrator: see *Ashville Investments Ltd v. Elmer Contractors Ltd* [1989] 1QB 488. So also is the issue whether a voidable contract has been rescinded or avoided: see *Ashville Investments supra*, and the issue whether the matrix contract was illegal and void *ab initio*: see *Harbour Assurance Co (U.K.) Ltd v. Kanza General International Insurance Co Ltd* [1993] QB 701. However, where the issue is the more fundamental one, whether any matrix contract was ever entered into in the first place, for example, on the grounds of absence of consensus or mistake or in a case of *non est factum*, no amount of scope in the jurisdiction expressed in an arbitration clause is capable of conferring jurisdiction on arbitrators, for, *ex hypothesi*, neither the matrix contract nor the agreement to arbitrate have ever been entered into.
39. Thus, in the field of arbitration agreements the principle of separability insulates such agreements from the consequences of the voidability of the matrix contract, but not from the consequences of the non-existence of the matrix contract. Whereas the latter effect is an obvious logical consequence, the former effect can, at least in cases of voidability *ab initio* or illegality so as to render the matrix contract void *ab initio*, justifiably be described as the exact opposite of the apparent logical consequence. Thus, if a party is induced to enter into the matrix contract by a fraudulent misrepresentation, he has equally been induced by that misrepresentation to enter into the agreement to arbitrate: had there been no inducement, he would never have entered into either agreement. Yet it is not open to him to avoid the agreement to arbitrate. That he is precluded from doing so, although a consequence of what is called the doctrine of separability, is, in my judgment, an emanation of a unique principle, namely that as a matter of a policy of the law it is so desirable that the agreement as to how a dispute should be resolved should be preserved that it should remain enforceable and effective even if the matrix contract is voidable.
40. If that analysis is correct, the question arises whether the principle which applies to arbitration agreements should apply to jurisdiction clauses. Is there any relevant difference between an agreement to refer one's future disputes to arbitration and an agreement to refer such disputes to a particular court? Both agreements have the same purpose in the context of the matrix contract. So the question has to be whether the policy of the law reflects some intrinsic characteristic of arbitration as distinct from other forms of dispute resolution. Although, with a single exception, the cases in dispute have been confined to consideration of the separability of agreements to

arbitrate, there would seem to be no reason in principle why as a matter of a policy of the law it should be more desirable to preserve an arbitration agreement than to preserve a jurisdiction agreement.

41. The one exception is the decision of the Court of Appeal in *Mackender v. Feldia AG*. [1967] 2QB 590. That was the case of an insurance policy expressed to be governed by Belgian law and including a term that any disputes arising under it would be subject to the exclusive jurisdiction of the Belgian courts. The English underwriters claimed in the English courts declarations that the policy (made in London) was void as contrary to public policy or that it was voidable because the assured had failed to disclose that the jewellery insured was to be smuggled into Italy. The issue before the court was whether leave should be granted to the underwriters to serve English proceedings outside the jurisdiction (in Belgium), in the face of the Belgian jurisdiction clause. Lord Denning M.R. said at pages 598 to 599:

"I can well see that if the issue was whether there ever had been any contract at all, as, for instance, if there was a plea of non est factum, then the foreign jurisdiction clause might not apply at all. But here there was a contract, and when it was made, it contained the foreign jurisdiction clause. Even if there was non-disclosure, nevertheless non-disclosure does not automatically avoid the contract. It only makes it voidable. It gives the insurers a right to elect. They can either avoid the contract or affirm it. If they avoid it, it is avoided in this sense, that the insurers are no longer bound by it They can repudiate the contract and refuse to pay on it. But things already done are not undone. The contract is not avoided from the beginning but only from the moment of avoidance. In particular, the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure is 'a dispute arising under' the policy and remains within the clause: just as does a dispute as to whether one side or other was entitled to repudiate the contract: see Heyman v. Darwins Ltd.
42. It seems to me that Mr. MacCrimmon's argument (to the effect that non-disclosure strikes out the whole contract) is not well founded. The foreign jurisdiction clause is a positive agreement by the underwriters that the policy is governed exclusively by Belgian law. Any dispute under it is to be exclusively subject to Belgian jurisdiction. That clause still stands and is a strong ground why discretion should be exercised against leave to serve out of the jurisdiction.
43. As to illegality, I would only say this: the underwriters were clearly innocent. The diamond merchants may have had an unlawful intention to smuggle goods into a friendly foreign country. But their illegality would not affect the formation of the contract. It would only make it unenforceable. It would mean that they could not recover on the policy. This dispute again comes within the foreign jurisdiction clause."
44. Diplock L.J. approached the analysis in a similar way at pages 602-603.

"A claim that a contract is void for illegality does not raise any issue as to whether or not the parties in fact agreed to the terms of the policy, including those in the foreign jurisdiction clause. It concedes that they did, but asserts that their agreement gave rise to no legally enforceable rights or duties. It thus raises no dispute about the consensus ad idem of the parties as to the exclusive jurisdiction of the Belgian courts. But the alternative claim of the underwriters to avoid the contract for non-disclosure of a material fact, it has been ably argued on their behalf, does raise the question as to whether there was a contract at all, and thus the question whether there was any agreement that Belgian law should be the proper law of the contract. This question, it is argued, is to be determined not by Belgian law, but by a putative objective proper law, a concept which I find confusing, but which is said in this case to be English law. Furthermore, it is contended that such a question, by whatever law it is to be determined, is not a dispute arising under the policy within the meaning of the foreign jurisdiction clause.

This argument, I think, is misconceived. It is based upon an imprecise use of the phrase 'avoid the contract'. Where acts done in England, in this case the oral negotiations between the assured's broker and the underwriters, the initialling of the slip and the signing of the policy, are alleged not to have resulted in an agreement at all (i.e. where there is a plea of non est factum) and the question is whether there was any real consensus ad idem, it may well be that this question has to be determined by English law and not by the law which would have been agreed by them as the proper law of the contract if they had reached an agreement. But that is not the position when underwriters seek to repudiate a contract upon discovering that material facts were not disclosed to them by their assured before the policy was entered into."
45. Having regard to this authority and as a matter of principle, I conclude that there is no conceptual basis for distinguishing the policy applicable to the effect of the jurisdiction agreement from that applicable to an arbitration agreement, and that in English law the same principle of separability therefore applies to a jurisdiction clause as to an arbitration clause.
46. It follows that if in this present case the wording of the jurisdiction clause is in terms wide enough to cover the issue whether the contract was caused to be entered into by economic duress, that issue must be determined in the English courts unless the consequence of economic duress in English law is to render the contract void *ab initio* as distinct from merely voidable. Although on these applications it has been conceded by Mr. Hill on behalf of Federal that the effect would be to render the contract voidable, it is right that I should consider this point because it has not been argued on behalf of IFR that, as I have concluded, the jurisdiction clause could apply even if the contract were voidable.
47. There is authority of great weight to the effect that economic duress renders a contract voidable as distinct from void. Thus in *The Universe Sentinel* [1983] 1AC 366, Lord Diplock observed at page 385:

"The use of economic duress to induce another person to part with property or money is not a tort per se. The form the duress takes may or may not be tortious. The remedy to which economic duress gives rise is not an action for damages

but an action for restitution of property or money exacted under such duress, and the avoidance of any contract that had been induced by it. Where the particular form taken by the economic duress used is itself a tort, the restitutional remedy for money had and received by the defendant to the plaintiff's use is one which the plaintiff is entitled to pursue as an alternative remedy for an action for damages in tort."

48. In *The Evia Luck* [1992] 2AC 168 Lord Goff made numerous references to a contract caused by economic duress being voidable or to the remedy of the innocent party being to avoid the contract. For example, at pages 165F to 166 he observed:

"We are here concerned with a case of economic duress. It was at one time thought that, at common law, the only form of duress which would entitle a party to avoid a contract on that ground was duress of the person. The origin for this view lay in the decision of the Court of Exchequer in *Skeate v. Beale* (1841) 11 Ad. & El. 983. However, since the decisions of Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293, of Mocatta J. in *North Ocean Shipping Co. Ltd v. Hyundai Construction Co. Ltd* [1979] Q.B.705, and of the Judicial Committee of the Privy Council in *Pao on v. Lau Yiu Long* [1980] A.C. 614, that limitation has been discarded; and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract (see *Barton v. Armstrong* [1976] A.C. 104, 121, per Lord Wilberforce and Lord Simon of Glaisdale (referred to with approval in *Pao On v. Lau Yiu Long* [1980] A.C. 614, 635, per Lord Scarman) and *Crescendo Management Pty. Ltd. V. Westpac Banking Corporation* (1988) 19 N.S.W.L.R. 40, 46 per McHugh J.A.). It is sometimes suggested that the plaintiff's will must have been coerced so as to vitiate his consent. This approach has been the subject of criticism: see Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp. 113-117; and the notes by Professor Atiyah in (1982) 98 L.Q.R. 197-202, and by Professor Birks in [1990] 3 L.M.C.L.Q. 342-351. I myself, like McHugh J.A., doubt whether it is helpful in this context to speak of the plaintiff's will having been coerced."

Further references are to be found at pages 167E and 168B and 169C. Lord Lowry expressed a similar view at page 171.

49. Although, it would at least in theory be possible for a doctrine of duress whether physical or otherwise to be developed in the criminal law which differed materially from that of the law of contract, it is instructive to note that in the earlier case of *DPP v. Lynch* [1975] A.C. 653, the House of Lords, in analysing the basis of a defence of duress to a charge of aiding and abetting murder, proceeded on the basis that duress does not negative intent or render involuntary conduct thereby induced: see Lord Morris of Borth-y-Gest at page 670F and 675E-F, and Lord Wilberforce at page 680 A-C, including his observation that duress does not destroy the will to enter into the contract but prevents the law from accepting what has happened as a contract valid in law. At page 695 A-C Lord Simon of Glaisdale said this:

"I hope indeed to have demonstrated that duress is not inconsistent with act and will, the will being deflected not destroyed; so that the intention conflicts with the wish. The actor under duress has performed an act which is capable of full legal effect: if he is to have relief it should be discretionary. Translated into terms of the criminal law, he is guilty of the crime, but he may at discretion be relieved against its potential penal consequences when it comes to sentencing.

Similarly with duress in the English law of contract. Duress again deflects, without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volui on his side. The contrast is with non est factum. The contract procured by duress is therefore not void: it is voidable – at the discretion of the party subject to duress."

50. However, in *Pao On v. Lan Yiu Long* 7 [1980] A.C. 614 the Judicial Committee of the Privy Council on appeal from the Court of Appeal of Hong Kong had to consider the substance and effect of economic duress. In giving the judgment of the Committee, Lord Scarman observed at page 635:

"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor 'which could in law be regarded as a coercion of his will so as to vitiate his consent.' This conception is in line with what was said in this Board's decision in *Barton v. Armstrong* [1976] A.C. 104, 121 by Lord Wilberforce and Lord Simon of Glaisdale – observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v. Horner* [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not."

At page 636 he further stated:

"Recently two English judges have recognised that commercial pressure may constitute duress the pressure of which can render a contract voidable: Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293 and Mocatta J. in *North Ocean Shipping Co. Ltd. V. Hyundai Construction Co. Ltd.* [1979] Q.B. 705. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordships' view, there is nothing contrary to a principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a

coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act."

51. It is to be observed that in the passage from Lord Goff in *The Evia Luck* supra, which I have already cited, he doubted whether it was "helpful" to speak of the plaintiff's will having been coerced, presumably so as to vitiate consent.
52. Although, therefore, the authorities do contain references to the coercion of the innocent party's will so as to vitiate his consent, the weight of authority binding in this court is to the effect that economic duress leads to the contract being voidable and not void *ab initio*. If the references to consent being vitiated are to be understood as being to the absence of an intention to contract, they are, in my view, wrong in principle. If, however, they are to be understood as indicating no more than that the consent having been obtained by means unacceptable to the court the contract thereby concluded can be set aside upon the application of the innocent party, that is to say avoided *ab initio*, those references are consistent with the weight of authority, including *DPP v. Lynch* supra.
53. For these reasons I conclude that even if the 1998 Agreement was caused to be entered into by economic duress and is, as both parties have accepted, therefore voidable at the suit of Federal, the parties to it are nevertheless bound by the law and jurisdiction clause.
54. In view of this conclusion, it is unnecessary that I should deal at length or in any detail with the submission that Federal was induced to enter into the 1998 Agreement by economic duress. It is sufficient to say that I am not persuaded that the facts set out in the evidence of Remo Toigo do amount to economic duress. Above all, there is no evidence of any explicit threat by IFR to repudiate the Marconi Agreement, if Federal refused to accept the 1998 Agreement. This appears to have been Snr. Toigo's fear, but as matters never got to that point, it is to be assumed that no such threat was ever made. So the position was that Federal concluded that it was in its best economic interests not to force the issue but to take the benefit of the slightly longer period of the 1998 Agreement. Its decision was without legal advice because it deliberately abstained from obtaining it. There is no very explicit evidence of it having attempted to negotiate the terms of the new contract. All Snr. Toigo says is that he protested to IFR, but these protests fell on deaf ears. He does not give any more details about what he said or wrote or what the response was.
55. Federal is at pains to emphasise its inequality of bargaining power by comparison with IFR, but that in itself takes it nowhere. It is not the policy of English law to assist those who, for economic reasons, have been forced to enter into unprofitable contracts with more powerful organisations unless they have been subjected to impermissible pressure to do so, and had no practical means of enforcing their rights or avoiding entering into the agreement in question. Federal has not satisfied me that IFR's conduct imposed impermissible pressure on it, nor that it had no practicable means of forcing the Marconi Agreement. Its plea of lack of resources sounds distinctly implausible in view of its pursuit of proceedings against IFR in Milan.
56. Accordingly, even if I had concluded that it was relevant to the application of the jurisdiction clause to consider whether the 1998 Agreement had been induced by economic duress, I should have concluded that it had not been so induced. Even if it were, the 1998 Agreement would remain in being until avoided. However, Federal clearly represented, at the latest by its letter of 14th March 2000, that it was treating the 1998 Agreement as binding, and implicitly that the Marconi Agreement had been discharged by that agreement. That letter must have been received about two weeks before what would have been the termination date of the Marconi Agreement. IFR was therefore entitled to rely on Federal's position as represented and continue after 31st March 2000 to supply it with equipment under the 1998 Agreement. Had Federal in its 14th March 2000 letter taken the point that the 1998 Agreement was void *ab initio* and that the Marconi Agreement was still in force, IFR would have had the opportunity of treating the whole distributorship relationship as terminated two weeks later, and must have a strong case that it would have done so. For this reason, IFR would, on the face of it, appear to have an extremely strong case for asserting that Federal is estopped from now taking the exact opposite position to that which it took in the 14th March letter. As this point has not been argued on behalf of IFR, I express no concluded view on it.

The commercial agency point.

57. It was submitted by Mr. Hill on behalf of Federal, before he was disinstructed, that although the 1998 Agreement is in form drafted as a distribution agreement providing for the sale of equipment by IFR to Federal and its resale by Federal to customers, in substance that agreement operated as an agency agreement so as to constitute Federal a commercial agent within Article 1(2) of the Council Directive, which reads as follows:
"For the purposes of this Directive, 'commercial agent' shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of the principal."
58. On that basis, Federal would be entitled to compensation upon termination of the agency by reason of Article 17 of the Directive, provided that the Directive had been implemented in the law applicable to the dispute. Article 17 provides:
 - "1. Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.
 2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that: he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal

continues to derive substantial benefits from the business with such customers; and the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

(b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;

(c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages."

59. In essence, it is argued that, whatever the 1998 Agreement formally provided, it was performed as if it were an agency agreement in as much as Federal secured sales of products and was remunerated for such sales, first during the Marconi Agreement period and then after signing the 1998 Agreement, by being paid what was in effect commission calculated by reference to the difference between IFR's standard retail price for the equipment and a discounted price.
60. It is argued that by reason of Article 19 of the Directive the parties to an agency agreement may not derogate from Article 17 to the detriment of the commercial agent before the agency contract expires. Because the British Statutory Instrument confined the applicability of the Directive to conduct in Britain, the law and jurisdiction clause was a derogation of Federal's rights and was unenforceable. Article 19 provides as follows:
"The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires."
61. By a letter to the court dated 12th June 2001 Mr. Hill, in asking for a hearing so that he could explain his failure to draw the court's attention to the Amendment Regulations and to give information about Federal's failure to comply with the condition as to standing out the Milan proceedings, advanced the argument that at the time when the 1998 Agreement was entered into the Amendment Regulations were not yet in force, and, accordingly, the law and jurisdiction clause was unenforceable as a derogation and because local law, presumably Italian law, did not permit it to have effect.
62. It had further been submitted by Mr. Hill in his statement of case that (1) the 1998 Agreement was a sham entered into merely as a matter of form to avoid the effect of the Directive, it being the common understanding that the true agreement would be an agency agreement, not in accordance with the terms of the 1998 Agreement; (2) IFR was estopped by convention or by representation from denying that the true agreement was an agency agreement.
63. Having failed to support most of these submissions by any evidence, Snr. Toigo's second witness statement having been excluded, they are largely unsustainable. I refer in particular to the allegation that the Marconi and 1998 Agreements were not performed as distributor agreements and that the true agreement was an agency. The sham agreement argument and the estoppel arguments equally have no evidential foundation.

Analysis

64. There can be no doubt that the 1998 Agreement is in form not a commercial agency agreement for the purposes of the Directive. It has been held that a Court of Appeal in *AMB Imballagi Plastics SRL v. Pacflex Ltd.* (Times Law Reports 8th July 1999) that a person who buys and sells as principal is outside the definition of a commercial agent in Article 1(2) of the Directive. Where, as under the Marconi and 1998 Agreements, the person in question has no authority to create priority of contract on his transactions between the appointor and the third party purchaser, he is not a commercial agent.
65. Accordingly, on the face of it, both agreements clearly fell outside the Directive, and the submission that the law and jurisdiction clause is unenforceable by reason of Article 19 must fail.
66. I have not considered Snr. Toigo's explanation for why Federal claims that these were sham agreements, that is to say agreements which were expressly agreed by the parties not to be enforceable according to their terms. I would only say that in view of what Snr. Toigo has said in his last witness statement and what was written in the 14th March 2000 letter from Federal to IFR, it would seem that the attempt to portray these agreements as an unenforceable façade is absurd.
67. Even if it were possible for Federal to establish that in truth there was a commercial agency agreement, the derogation argument is confronted by at least one insurmountable problem. The duty to indemnify the agent arises under Article 17 "after termination of the agency contract". The duty not to derogate from the Article 17 duty operates under Article 19 "before the agency contract expires". The Commercial Agents (Council Directive) (Amendment) Regulations 1998 came into effect on 16th December 1998. The amended form of Regulation 1 required application by a court or tribunal of the Directive in the circumstances described, including the case where the agency agreement is expressed to be governed by English law, but where the parties could have agreed the law of another member State of the EU. The effect is to enable an English court to apply to an English law commercial agency contract the terms of the Directive even if another member state's law could be applicable, for example, where the agent is carrying on business in another member state. The powers of the English court so to apply the Directive are therefore not confined to agency contracts which are entered into on or after 16th December 1998, but extend to proceedings which came before the court on or after that date, even if they relate to a contract already existing on that date. Accordingly, even if the English law and jurisdiction clause

would have prevented enforcement of Article 17 against IFR up to that date, it then ceased to do so and any derogation had therefore ceased by the time when on 30th June 2000 the 1998 Agreement had expired. When the duty under Article 17 arose, there was, therefore, no bar to recovery of an indemnity by IFR in the English courts.

68. I therefore conclude that Article 19 cannot support the submission that this Court should not enforce the English law and jurisdiction clause, even if, contrary to my earlier conclusion, this was a commercial agency and not a distributorship agreement.

Conclusion

69. It follows that in respect of the Debt Action the English courts have jurisdiction by reason of the English jurisdiction clause and the operation of Article 17 of the Brussels Convention. This Article displaces the general rule that jurisdiction is retained by the court of the Defendant's domicile under Article 2. Accordingly, Federal's claim for a declaration that the English courts have no jurisdiction in that action will be dismissed.
70. In the Injunction Action the English court has jurisdiction to grant an anti-suit injunction restraining Federal from pursuing the Italian proceedings. In doing so, Federal is acting in breach of the English jurisdiction clause. The English courts do enforce such clauses unless there is strong cause for not doing so: see *The Angelic Grace* [1995] 1 Lloyd's Rep. 87.
71. In this case there is no strong cause for withholding enforcement by injunction. IFR is entitled to pursue the Debt Action in the English courts, and it is obviously desirable that if, as it insists, Federal has cross-claims for compensation, they should be determined and set off in the same proceedings. Otherwise, there would be a risk of inconsistent findings in the English and Italian courts.
72. Furthermore, the manner in which Federal has conducted these proceedings strongly suggests that it will take any point which it sees as necessary to delay and indeed disrupt the proceedings. Its conduct, which I have already described, in attempting without explanation, to inject substantial evidence at the very last minute which was completely inconsistent with its earlier stated position, followed by its disobedience to this court's order, and then its total disengagement from the proceedings, including its own application, at the very lowest gives rise to a strong suspicion of a calculated strategy aimed at trying eventually to persuade the Milan courts that the English court had failed to give it a fair hearing and, therefore, yet further delay the resolution of all matters in issue. This adds weight to the exercise of my discretion in favour of an injunction.
73. An injunction will therefore be granted restraining Federal from taking any further steps in the Italian proceedings, except for the purpose of discontinuing them.
74. I shall hear the parties on the question of costs on the occasion when this judgment is handed down. Not having been handed down but having been given orally, I will now hear any submissions there may be on the question of costs.

MISS G. ANDREWS, Q.C. appeared on behalf of the Claimant.
MR. TIMOTHY HILL appeared on behalf of the Defendant.