

EXHIBIT 5

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CLERK OF DISTRICT COURT
DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Society of Lloyd's,) No. CV-02-0423-PHX-FJM
Plaintiff,) ORDER
vs.)
Emil Raymond Borgers, et al.,)
Defendants.)

The court has before it Plaintiff's motion for summary judgment (doc. 32), Defendants' response (doc. 40), and Plaintiff's reply (doc. 47). The court also has before it Defendants' motion under Rule 56(f) for more time to conduct discovery (doc. 39), and the Plaintiff's response (doc. 46). We heard oral argument on March 21, 2003, and we now rule.

I. Plaintiff's Motion for Summary Judgment

This is an action for recognition and enforcement of final judgments that Plaintiff obtained against each of the defendants in the courts of England.¹ Plaintiff argues that we

¹For a brief background description of Lloyd's and the circumstances that gave rise to the English judgments see Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 478-79 (7th Cir. 2000).

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1 should recognize and enforce the English judgments under the
2 principles of comity set forth in the Restatement. Defendants
3 contend that the judgments should not be recognized because the
4 English proceedings did not comport with due process and
5 because the underlying contracts violate Arizona's public
6 policy.

7 The parties agree that Arizona substantive law guides our
8 inquiry. Absent contrary authority, Arizona courts follow the
9 Restatement. Under the Restatement (Third) of Foreign
10 Relations Laws ("Restatement") § 401, a final judgment of a
11 foreign nation is presumptively entitled to recognition.²
12 Section 482 outlines eight possible defenses to recognition.³

13
14 ²Section 401(1) states: "Except as provided in § 402, a final judgment of
15 a court of a foreign state granting or denying recovery of a sum of money, . . .
is conclusive between the parties, and is entitled to recognition in courts in
the United States."

16 ³Section 482, entitled "Grounds for Nonrecognition of Foreign Judgments,"
17 provides:

18 (1) A court in the United States may not recognize a judgment of the
19 court of a foreign state if:

20 (a) the judgment was rendered under a judicial system that
21 does not provide impartial tribunals or procedures compatible
22 with due process of law; or

23 (b) the court that rendered the judgment did not have
24 jurisdiction over the defendant in accordance with the law of
the rendering state and with the rules set forth in § 421.

25 (2) A court in the United States need not recognize a judgment of
26 the court of a foreign state if:

27 (a) the court that rendered the judgment did not have
28 jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in
sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or
the judgment itself, is repugnant to the public policy of the
United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is
entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an
agreement between the parties to submit the controversy on
which the judgment is based to another forum.

1 Two of the defenses are mandatory, and, if established,
2 prohibit the court from recognizing the foreign judgment. The
3 other six defenses are permissive, and, even if fully
4 established, a court still has discretion to recognize a
5 foreign judgment. Restatement § 482; see also *Alberta Sec.*
6 *Comm'n v. Ryckman*, 30 P.3d 121 (Ariz. Ct. App. 2001) (applying
7 the Restatement in determining whether a foreign judgment was
8 entitled to recognition).

9 Defendants maintain that the proceedings in the English
10 courts did not comport with due process because they were
11 prevented from asserting any affirmative defenses. Under the
12 Restatement, however, a judgment is not entitled to recognition
13 only if it was rendered "under a system that does not provide
14 impartial tribunals or procedures compatible with due process
15 of law." Restatement § 482(1)(a) (emphasis added). We
16 emphasize the word that defeats the Defendants' argument. The
17 foreign judgments at issue were rendered by the Queen's Bench
18 Division of England's High Court (which corresponds to our
19 federal district courts) and affirmed by the Court of Appeal
20 (which corresponds to our federal courts of appeal). It is
21 beyond question that the English court system is a fair and
22 impartial forum that comports with general standards of due
23 process. See *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476-
24 77 (7th Cir. 2000) ("Any suggestion that the [English] system
25 of courts 'does not provide impartial tribunals or procedures
26 compatible with the requirements of due process of law' borders
27 on the risible."). Not surprisingly, Ninth Circuit case law
28 is clear on this point as well:

1 We are, of course, mindful that the [English] system
2 . . . is the very fount from which our system
3 developed; a system which has procedures and goals
4 which closely parallel our own. Surely it could not
5 be claimed that the English system is any other than
6 one whose "system of jurisprudence [is] likely to
7 secure an impartial administration of justice."

8 In re Hashim, 213 F.3d 1159, 1172 (9th Cir. 2000) (citations
9 omitted).

10 Defendants do not attempt to impugn the English legal
11 system as a whole, but rather focus their argument on the
12 alleged unfairness of the particular proceedings giving rise
13 to these English judgments. The Restatement, however, allows
14 consideration only of the legal "system" when deciding whether
15 to afford recognition to a foreign judgment. We also note
16 that, even if we were to adopt the Defendants' approach and
17 focus on the particular foreign judgment rather than the system
18 as a whole, the Seventh Circuit has held that the English
19 proceedings resulting in these judgments comported with basic
20 standards of fairness and what it called the "international
21 concept of due process." Ashenden, 233 F.3d at 481.

22 Defendants also maintain that the contracts giving rise to
23 the English judgments are contrary to Arizona's public policy
24 because they are confessed judgments and unconscionable.
25 Defendants again misconstrue the Restatement defense. Section
26 482(2)(d) permits a court, at its discretion, to elect not to
27 recognize a foreign judgment if "the cause of action on which
28 the judgment was based . . . is repugnant to the public
policy." Restatement § 482(2)(d) (emphasis added).
Plaintiff's cause of action in the English courts was for
breach of contract. A cause of action for breach of contract

1 cannot be said to be repugnant to Arizona's public policy.
2 Instead, Defendants' arguments go to the merits of the breach
3 of contract claim litigated in the English courts.

4 Finally, we note two things. First, Defendants have
5 contractually agreed to resolve disputes arising from their
6 contracts with Plaintiff in the English courts and under
7 English law. The Ninth Circuit has enforced these forum
8 selection and choice of law provisions. *Richards v. Lloyd's*
9 *of London*, 135 F.3d 1289, 1297 (9th Cir. 1998) (en banc). It
10 follows, that any judgment obtained in an English court as a
11 result of these contract provisions would be entitled to
12 recognition and enforcement. Defendants' arguments against
13 recognition attempt to lay before this court the merits of a
14 claim that we would not have been able to hear in the first
15 instance because of contractual choice provisions. We are also
16 mindful that the Restatement, in the context of recognition of
17 foreign judgments, implicitly recognizes the policy favoring
18 forum selection provisions. Restatement § 482(2)(f). Second,
19 we recognize that every district and appellate court to be
20 faced with this same issue has recognized the English
21 judgments. We further note that many of the arguments that
22 Defendants raise here were also raised and rejected in these
23 other proceedings.

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25 ¹*Soc'y of Lloyd's v. Blackwall, et al.*, No. 02CV48-J (AJB), slip op. (S.D.
26 Cal. Feb. 16, 2002); *Soc'y of Lloyd's v. Bachert, et al.*, No. 2:02-CV-204TC, slip
27 op. (D. Utah Nov. 12, 2002); *Soc'y of Lloyd's v. Reinhardt, et al.*, No. 02-264,
28 slip op. (D.N.M. Sept. 30, 2002); *Soc'y of Lloyd's v. Rosenberg*, No. 02-1195,
slip op. (E.D. Pa. Aug. 3, 2002).

²*Soc'y of Lloyd's v. Turner*, 303 F.3d 125 (5th Cir. 2002); *Soc'y of Lloyd's*
v. Ashenden, 233 F.3d 473 (7th Cir. 2000).

1 We conclude that no genuine issue of material fact exists
2 and that Plaintiff is entitled to judgment as a matter of law.
3 Plaintiff's motion for summary judgment is granted.

4 **II. Defendants' Rule 56(f) Motion**


5 Defendants request an order under Rule 56(f) deferring a
6 ruling on the Plaintiff's motion for summary judgment and
7 granting them additional time to conduct discovery. Defendants
8 wish to conduct discovery about (1) the underlying premium
9 liability, (2) the terms of their agent agreement, and (3)
10 Plaintiff's contractual intent in entering into the General
11 Undertaking. None of these matters are material to the narrow
12 legal issue before the court. Defendants' motion for more time
13 to conduct discovery is denied.

14 Accordingly,

15 IT IS ORDERED granting Plaintiff's motion for summary
16 judgment (doc. 32).

17 IT IS FURTHER ORDERED denying Defendants' motion under
18 Rule 56(f) for more time to conduct discovery (doc. 39).

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20 DATED this 26 day of March, 2003.

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23 Frederick J. Marcone
24 United States District Judge
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