92-9032

To be Argued by:
JONATHAN C. THAU

United States Court of Appeals

for the

Second Circuit

JOHN S. ROBY, et al.,

Plaintiffs-Appellants,

—against—

THE CORPORATION OF LLOYD'S a/k/a THE SOCIETY AND COUNCIL OF LLOYD'S d/b/a LLOYD'S OF LONDON, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES THE MEMBERS' AGENTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (the "Convention") and the strong public policy favoring arbitration require enforcement of appellants' contractual commitments to arbitrate their disputes with the Members' Agents.

2. Whether appellants, who participated as insurers in a London-based international insurance market, can overcome the presumptive validity and strong public policy favoring enforcement of the forum selection clauses contained in appellants' agreements with the London-based Members' Agents.

STATEMENT OF THE CASE

A. Nature Of The Case

In this case, affluent Americans who voluntarily sought the commercial benefits of becoming insurance underwriters at the insurance underwriting facilities of Lloyd's in London, England seek to avoid the losses they apparently have suffered as insurers by claiming violations of the federal securities laws. Ignoring the valid, plainly-worded arbitration and forum selection clauses in the contractual agreements they entered into when joining the Lloyd's community, and the overwhelmingly English nature of this dispute, appellants seek to disavow not only their agreements, but also a treaty and compelling Supreme Court precedent mandating resolution of their claims in England. In a comprehensive opinion considering all appellants' arguments, the District Court properly

acknowledged these standards and enforced the arbitration and forum selection clauses by granting the Members' Agents' motion to dismiss the Consolidated Complaint.[1]

In its well-reasoned opinion, the District Court succinctly placed this dispute in context:

> It is undeniable that there exists a considerable American interest in affording investors the protections of our securities laws. However, that interest does not outweigh the strong American and transnational interest in maintaining the predictability and regularity of international commerce that is provided by agreements like those in question here, nor can it overcome plaintiffs' earlier agreement to be bound by English law and English dispute resolution.

(A 1523).[2]

Despite the international nature of the Lloyd's insurance market, and the international implications of their actions, appellants disingenuously characterize this case as a "domestic dispute" to which their dispute resolution clauses supposedly do not apply. If the Court were to accept this premise, the end result would be exactly what the arbitration and forum selection clauses were intended to prevent -- a chaotic environment in which insurers, like appellants, from all over the world could have their disputes resolved in different forums and under different laws, with the disastrous consequence of potentially

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[1] In the same opinion, the District Court also properly granted motions to dismiss brought by two other groups of defendants: (1) the Society of Lloyd's; and (2) the Managing Agents. Previously, the District Court dismissed the Consolidated Complaint as against the so-called Syndicate defendants on other grounds.

[2] For the Court's convenience, references to the Appendix on Appeal are denominated "A ___," and references to the Appellants' Brief on appeal are denominated "App.Br. ___."

inconsistent findings and judgments. Plainly, this action is a decidedly international dispute among parties from different countries, and involves an international insurance market that services policy holders, and underwriting members such as appellants, from every corner of the globe. The dispute resolution clauses were included in the Members' Agent's Agreements not (as appellants suggest) to "trick" these 109 individuals into waiving their rights under the federal securities laws, but as a necessary precondition to the orderly operation of the Lloyd's marketplace for its thousands of underwriting members and insured parties worldwide.

B. Factual Background And Proceedings Below

The insurance underwriting facility at Lloyd's in London is an institution unique in the commercial world, with a history that dates back 300 years. (A 84). The Lloyd's market provides insurance and reinsurance to individuals and businesses throughout the world. (A 84).

Specifically, the insurance is provided by the underwriting members of Lloyd's -- also termed "Names" -- each of whom receives his or her proportionate share of the premium on every risk underwritten for his or her account, and who must pay his or her share of any loss arising from those insurance contracts. (A 79-86). Worldwide, there are over 26,000 individual underwriters who participate in the Lloyd's market. (A 978). Nearly 80% of these underwriters are English citizens, and the remainder reside in approximately 80 other countries, including the United States. (A 852). All the 109 appellants here claim to be United States citizens who, unhappy with the results of their insurance underwriting

activities, now wish to avoid their obligations to pay claims to insured third-parties. (A 96-100). Although claiming that this dispute is of purely "domestic" origin and import, the fact is that appellants constitute merely 0.4% of all underwriting members of Lloyd's throughout the world.

The mechanics of the Lloyd's marketplace are such that, though underwriting for his or her separate and individual account, insurers, such as appellants here, are organized into syndicates. (A 96-100). Each syndicate is managed by a Managing Agent, and risks are underwritten by an individual known as the Active Underwriter. The ultimate goal is the issuance of insurance policies that insure risks from around the world. The Member's Agent, located in London, coordinates and administers the underwriting member's interest in underwriting affairs at Lloyd's. (A 93).

Consistent with the unique nature of the business of being an insurance member of Lloyd's, all prospective underwriters must meet defined financial criteria (commonly known as a "means" test) utilized to ensure that they have substantial personal resources to cover the potential underwriting obligations (e.g., insurance losses). (A 102). The prospective underwriter also must sign written acknowledgments of his or her awareness of the risks assumed by becoming a member of Lloyd's, and must travel from whatever corner of the world in which he or she resides to London to appear before a sub-committee of the Council (known as the Rota Committee) to verify that the financial criteria are met, that the risks are understood and acknowledged, and that the candidate is suitable to underwrite insurance as a member of Lloyd's. (A 102). All the appellants have met the

means test, and have travelled to London in support of their application to join the Lloyd's community. (A 102).

In addition to that screening process, an individual formally joins the Lloyd's market by executing a series of straight-forward contracts, deeds and undertakings. These include a Security and Trust Deed and a General Undertaking executed in favor of the Society of Lloyd's, a Members' Agent's Agreement between the underwriter and his or her Members' Agent, and a Managing Agent's Agreement between the underwriter and the Managing Agent for each of the syndicates in which the underwriter participates. (A 581, 606,1043). These plainly worded agreements and deeds are all in standard form for all underwriters regardless of their country of residence. (A 93-94). After the execution of these agreements, the prospective underwriter, if approved, becomes a member of Lloyd's. All the appellants here voluntarily executed these documents as a condition to joining the Lloyd's community, and do not dispute the validity of those executions. (A 74-150).

Although the Lloyd's community has functioned successfully for hundreds of years, as with any commercial enterprise, disputes can arise between the underwriting member on one hand, and the Society of Lloyd's, the Members' Agents, and/or the Managing Agents, on the other. To avoid disruption of this smooth functioning of Lloyd's, while at the same time allowing rights and obligations to be determined by due process of law, the Lloyd's community has developed a system whereby all members submit to a single governing law, and a single system of courts and arbitration. That single governing law understandably is English law, and the chosen forum is an arbitration tribunal, or court, in

England. (A 598). All individuals who wish to be underwriting members of Lloyd's explicitly do so on that basis.[3]

As a practical matter, absent such agreement, American citizens alone could invoke up to fifty different sets of laws, and other non-American, non-English underwriting members could invoke numerous others. For example, individuals from Toronto, Dusseldorf, or Madrid certainly might prefer, as appellants here do, to have his or her disputes resolved in his or her "home" jurisdiction. Yet, as a condition of membership, all are bound, just as appellants are here, to the underwriting facilities of Lloyd's in England, and equally must litigate or arbitrate any dispute they have with their Members' Agents in England. (A 598).

Specifically, 104 of the 109 appellants, who allegedly underwrote in 1990 and 1991, all voluntarily executed Members' Agent's Agreements, which clearly provide:

> 15.1 Any dispute, difference, question or claim relating to this Agreement which may arise between the Agent and the Name shall be referred at the request of either party to arbitration in London ...
>
> 18.2 Each of the parties hereby irrevocably submits for all purposes of and in connection with this Agreement to the exclusive jurisdiction of the courts of England.

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[3] Any prospective disputes, if not resolved through some sensible, uniform mechanism ultimately could disrupt the payment of valid claims to Lloyd's policy holders -- innocent third-parties -- who are located throughout the world.

(A 598). The other five appellants, who apparently did not underwrite in 1990 and 1991 but only in 1988 and/or 1989, voluntarily executed Agency Agreements that, at clauses 22 and 25, contain arbitration and forum selection clauses similarly stating that any dispute "which may arise between the [Members'] Agent and the Name" would be subject to resolution in England. (A 670).[4]

Taken together, these clauses plainly provide that all disputes between underwriting members, such as appellants here, and their Members' Agents are to be resolved in England, either in the courts of England if the arbitration clause has not been invoked, or before an arbitration tribunal, also in England, if either side chooses that route. There is no dispute that the Members' Agents have timely invoked the arbitration clause. Accordingly, as to the Members' Agents, the District Court plainly was correct in granting their motion to dismiss in favor of arbitration in England.

By initiating this action in the federal courts in New York, appellants clearly have ignored their dispute resolution clauses. Appellants' Consolidated Complaint, alleging claims under the Securities Act of 1933 (the "1933 Act"), the Securities Exchange Act of 1934 (the "1934 Act"), and RICO, represents the culmination of numerous attempts to

[4] The Managing Agent's Agreement also contains arbitration and forum selection clauses, and the General Undertaking that the appellants also executed contains a forum selection clause (but not an arbitration clause) as to the Society of Lloyd's. Each of these clauses are substantively identical to the clauses contained in the Members' Agent's Agreements, quoted above. (A 612,1044).

present an adequate pleading in this action.[5] Specifically, appellants claim that the constituent members of the Lloyd's community engaged in a scheme to induce them to "invest" in Lloyd's syndicates during the period 1988 through 1991. (A 83). In this regard, appellants -- ignoring the clearly worded disclosure documents they received stating the risks of becoming an insurer -- have alleged that they were lead to believe that Lloyd's was a virtually risk-free investment when, according to their allegations, information that would have cast doubt on that belief was concealed from them. (A 83-87). Lloyd's does not, however, make public offerings of "securities" in the sense that appellants have described, but rather, invites affluent individuals from all over the world to become underwriting members at Lloyd's. (A 797).

All four groups of defendants named in the Consolidated Complaint filed motions to dismiss. (A 267,995,999,1038). All the motions were granted. (A 969,1445). In granting the Members' Agents' motion to dismiss, the District Court properly recognized

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[5] The sequence of events regarding the evolution of appellants' current pleading is as follows: (1) on October 21, 1991, appellants filed their original complaint in Roby, et al. v. The Society of Lloyd's, et al., 91 Civ. 7081 (MEL) ("Roby I"); (2) on November 4, 1991, appellants filed an amended complaint in Roby I ("Roby I Amended Complaint"); (3) on that same day, appellants filed a "Back-up" complaint, Roby, et al. v. The Society of Lloyd's, et al., 91 Civ. 9495 (MEL), ("Roby II"); (4) by letter dated November 21, 1991, appellants counsel sought to correct "inadvertent errors" to the Roby I Amended Complaint; (5) by letter dated November 26, 1991, appellants' counsel again sought to correct "inadvertent errors" to the Roby I Amended Complaint; (6) on December 31, 1991, appellants filed a new complaint, Anderson, et al. v. The Society of Lloyd's, et al., 91 Civ. 8428 (MEL) ("Anderson"); (7) on January 20, 1992, appellants filed the Consolidated Complaint, which apparently consolidated Roby I, the Roby I Amended Complaint (with appellants' later letter amendments), Roby II, and Anderson; (8) on June 17, 1992, appellants filed Abeles v. The Corporation of Lloyd's, 92 Civ. 4447 (MEL) ("Abeles"); (9) Abeles was subsequently amended to add parties; and (10) by Order dated August 31, 1992, Roby, Anderson and Abeles were consolidated.

that by bringing this action in the United States, appellants inappropriately have ignored their contractual undertakings to resolve any disputes arising between them and their Members' Agents through an arbitrator in London or, absent the invocation of the arbitration clause, to litigate such claims in the English Courts, as otherwise required by the separate forum selection clause.[6]

C. Other Court Decisions In Substantially Similar Cases

At least four other courts faced with claims analogous to those raised by appellants here recently have held that disputes between underwriting and other members of the Lloyd's community, including the Members' Agents, must be resolved in England. A discussion of these cases follows below.

Most recently, in a case involving issues and agreements identical to those present here, the Tenth Circuit Court of Appeals has upheld the applicability of the dispute resolution clauses contained in the Members' Agent's Agreements and held, as the District Court properly did here, that all disputes relating to the underwriting Members' relationship with Lloyd's must be resolved in England. In Riley v. Kingsley Underwriting Agencies, Ltd.,

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[6] Even if this Court were to determine that appellants' arbitration or forum selection clauses are unenforceable, there still would be pending a variety of grounds for dismissal that the District Court has not yet addressed. Specifically, the Members' Agents have filed a motion to dismiss asserting that: (1) appellants' claims under Section 12 of the 1933 Act and Section 10(b) of the 1934 Act are time-barred by the applicable statutes of limitation; (2) under Rule 12(b)(6), appellants have failed to state claims upon which relief can be granted under Section 15 of the 1933 Act and Section 20 of the 1934 Act; (3) appellants have failed to plead their claims sounding in fraud with the requisite particularity under Rule 9(b); and (4) under Rule 12(b)(6), appellants have failed to state claims upon which relief can be granted with respect to their RICO claims. (A 995).

969 F.2d 953 (10th Cir. 1992), an underwriting member of Lloyd's, such as appellants here, sued various affiliates of Lloyd's and his Members' Agents asserting claims under the federal and state securities laws, and state tort law. In opposition to plaintiff's motion for a preliminary injunction, defendants argued that appropriate enforcement of the forum selection and arbitration clauses executed by plaintiff deprived the district court of jurisdiction. Id. at 955-56.

The Tenth Circuit affirmed the district court's judgment dismissing the claims, holding that:

> A parochial refusal of the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantage ... [T]he dicey atmosphere of such a legal no-man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Id. at 959 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974). The Tenth Circuit, thus focusing on the strong public policy mandating enforcement of international dispute resolution agreements, upheld the arbitration and forum selection clauses between plaintiff and his Members' Agent. Just last week, on December 7, 1992, the United States Supreme Court denied Mr. Riley's petition for a writ of certiorari. See Riley, 1992 WL 306931 (December 7, 1992). Here, the District Court properly recognized the Riley decision as a "well-reasoned opinion [that] sets forth essentially the considerations that warrant dismissal of this complaint." (A 1502).

Similarly, in Bonny, et al. v. The Society of Lloyd's, et al., 784 F.Supp. 1350 (N.D.Ill. 1992), a federal district judge in Illinois granted a motion to dismiss based upon the forum selection clauses contained in the plaintiffs' agreements with Lloyd's and their Members' Agents.[7] In Bonny, as here, aggrieved underwriting members of Lloyd's sued, inter alia, the Society of Lloyd's and their Members' Agents, claiming violations of federal and state securities laws and RICO.[8] In granting Lloyd's and the Members' Agents' motion to dismiss, the district court held that forum selection clauses are afforded "special deference," and must specifically be enforced unless a challenging party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Id. at 1352. Finding that plaintiffs had not made such a showing, the court went on to hold, citing the United States Supreme Court's decisions in Bremen, Mitsubishi, Scherk, and Carnival Cruise Lines (all discussed below), that "the speculative nature of the harms the Bonnys might suffer cuts against them, not against Lloyd's. Moreover, it is hardly clear that such harms would be sufficient to overcome the forum selection clauses." Id. Here, the District Court properly noted the Bonny case as further support for dismissal of appellants' complaint. (A 1502).

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[7] At this time, plaintiffs' appeal to the Seventh Circuit Court of Appeals is sub judice.

[8] Interestingly, two of the appellants here, Alan J. Hunken and Robert B. King, both of Illinois, are named defendants in the Bonny action. Messrs. Hunken and King claim here to have been fraudulently induced by their Members' Agents into becoming underwriting members at Lloyd's. Plaintiffs in Bonny claim that Messrs. Hunken and King, ostensibly then wearing different hats, fraudulently lured them into becoming underwriting members of Lloyd's.

In Hirsch v. Oakeley Vaughan Underwriting, No. 89-2563, slip. op. (5th Cir. May 31, 1990) (A 441), the Fifth Circuit Court of Appeals similarly held that Texas was an improper venue for the prosecution of an action by a resident underwriting member of Lloyd's. Hence, the court dismissed plaintiff's claims under the doctrine of forum non conveniens. In this regard, the Fifth Circuit noted:

> English courts have a significant "local interest" in resolving the disputes internal to the operation of Lloyd's ... This lawsuit was at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation.

Id. at 7.

Finally, in an action brought by Canadian underwriting members of Lloyd's, who had signed agreements analogous to those signed by appellants here, an Ontario court recently required the underwriting members to honor their contracts, holding that:

> Courts have generally encouraged exclusive jurisdiction clauses because there is a certainty in such clauses that the reasonable expectations of the parties can be met by having the place of any dispute set out in the contract. Such clauses are intended to prevent preliminary disputes of the type before me for there is international unanimity that this fosters certainty in international commercial law.

Ash v. The Corporation of Lloyd's, No. 91-CQ-3603, slip op. at 14 (Ontario Ct. Nov. 15, 1991) (A 370) (emphasis supplied).[9]

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[9] We note that a contrary decision -- the only one of which we are aware -- was reached in Leslie v. Lloyd's of London, et al., C.A. No. H-90-1907 slip. op. (S.D.Tex. September 4, 1991) (A 467). Defendants' motion for reconsideration presently is sub judice. We note, however, that the Leslie court ignored the mandatory nature of the Convention. Leslie thus is not the product of careful analysis, and accordingly is not instructive here.

SUMMARY OF ARGUMENT

In support of their appeal, appellants again have raised five out of the nine arguments considered, and rejected, by the District Court. First, appellants attempt to avoid the proper standard for analyzing the applicability of their contracts by characterizing this case as a purely "domestic" one, to which the dispute resolution clauses supposedly do not apply as a matter of "public policy." As demonstrated at Point I(A) below, in such unquestionably international circumstances, the law, as mandated by the applicable United Nations Convention and the United States Supreme Court, clearly requires that arbitration clauses, like those implicated here, be enforced regardless of any supposed "public policy" considerations. Now that the arbitration clauses have been invoked, and the United Nations Convention thus implicated, no judge-made interpretation of purported "public policy" can be applied to override the dictates of a treaty adopted pursuant to Congress' constitutional authority. Accordingly, as to the Members' Agents, the District Court properly directed the parties to arbitration in the United Kingdom in accordance with the plain language of their agreements.[10]

With all current authority contrary to their positions, as their second argument (discussed at Point I(B)), appellants improperly maintain that a forty-year old Supreme

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[10] In addition, as a tactical matter presumably designed to garner the Court's sympathy, appellants also seek in their papers to frame the issues in this case as involving an apparent conflict between American and English law. As a result of this self-concocted conflict, appellants argue that United States "public policy" gives them a right to avoid their voluntary contractual obligations. In this context, it is worth remembering that appellants, far from being unsuspecting consumers, have entered into commercial transactions by becoming insurers at Lloyd's, and have demonstrated the financial ability both to meet the stringent Lloyd's "means test," and to engage in sophisticated litigation.

Court case explicitly overruled three years ago, a dissenting opinion, an article, and an amicus brief, provide authority for them to avoid the mandatory enforceability of the arbitration and forum selection clauses they have executed.

Third, appellants argue that because there is no exact equivalent to the federal securities laws and RICO statute under English law, England is not an adequate forum, and the forum selection clauses thus should not be enforced. Contrary to appellants' contention, as demonstrated at Point II(A), Supreme Court precedent makes clear that international forum selection clauses are presumed valid, and must be upheld absent some extraordinary showing of unfairness -- something plainly missing here. As the cases uniformly hold, the selected forum will be considered unacceptable only if the remedies provided in that forum are so clearly inadequate that the parties effectively will be deprived of their day in court. In this argument, appellants merely have focused on the question of whether under English law an aggrieved party can recover under the exact same legal theories that form the basis of the federal securities laws and RICO statute. Since identity of remedy is not required to uphold an international forum selection clause, however, such an analysis is neither pertinent nor useful here.[11] Moreover, as demonstrated at Point II(B), as the United

[11] Faced with both the Convention and Supreme Court precedent directly contrary to their positions, appellants, obviously hoping to garner the sympathy of the Court, devote considerable attention to stressing the financial losses they face as a result of their decisions to become insurance underwriters at Lloyd's. Realistically, however, although it is unfortunate that appellants chose to become insurance underwriters during a period in which substantial losses occurred, these losses plainly were a foreseeable risk of being an insurer in the world's largest international insurance marketplace. Under any circumstances, if appellants can demonstrate that their losses stemmed from misconduct by any of the appellees rather than the vagaries of insurance underwriting, appellants will have ample remedies available to redress their grievances in England.

States Supreme Court has stressed, when, as here, international dispute resolution clauses have been invoked, judicial policy-making must yield to the orderly disposition of international disputes.

In their fourth argument, appellants attempt to side-step their contracts by arguing that, by their terms, the arbitration and forum selection clauses contained in the 1987 Agency Agreement, and 1990 Members' Agent's Agreements, somehow do not cover this dispute. Further, appellants also argue that even if these agreements apply to the Members' Agents as business entities, the clauses do not apply to the Members' Agents' Chairs of the Board because the Chairs of the Board personally are not signatories to the agreements. As demonstrated at Point III below, the arbitration and forum selection clauses unquestionably govern this dispute because the clauses, which are contained in comprehensive contractual agreements, clearly were intended to apply to all claims arising out of appellants' relationship with the Members' Agents, and clearly encompass the Chairs of the Board.

Finally, although the District Court did not need to reach the issue, appellants argue that the court should not have suggested that the Consolidated Complaint be dismissed alternatively on grounds of forum non conveniens. As demonstrated at Point IV, the District Court properly noted that given the overwhelmingly English nature of this dispute, even if there were no forum selection or arbitration clauses compelling resolution of this dispute in England, the Consolidated Complaint nevertheless would need to be dismissed under the forum non conveniens doctrine. (A 1523).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY ENFORCED THE ARBITRATION CLAUSES CONTAINED IN APPELLANTS' AGREEMENTS

Courts uniformly have enforced arbitration agreements under the Convention, have viewed the Convention as an essential instrument of international dispute resolution, and have rejected the very kinds of attack upon it that appellants have launched in this case. The District Court thoughtfully considered and rejected all the arguments appellants have revived on appeal. (A 1495-1527). As demonstrated below, appellants cannot avoid the mandatory reach of the Convention, and cannot realistically contend that the Supreme Court's opinion in Wilko v. Swan, which explicitly was overruled in 1989, retains enough viability to permit them to avoid their plainly worded arbitration agreements.

A. The Convention Mandates Arbitration Of Appellants' Claims

Since appellants and the Members' Agents have entered into the Members' Agent's Agreements, which contain international arbitration provisions, and appellants now assert that the Members' Agents failed to fulfill their duties (which are specifically enumerated in the very same Members' Agent's Agreement) they owed the appellants, this dispute unquestionably falls within the scope of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and the Convention, 21 U.S.T. 2517; TIAS 6997, 330 U.N.T.S. 38 (1970) (codified at 9 U.S.C. §§ 201-208). The Convention, to which both the United States and the United Kingdom are signatories, provides:

> Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship ...

Convention Art. II(1)(emphasis supplied).

Appellants largely have ignored the applicable, compelling caselaw regarding the enforceability of arbitration agreements governed by the Convention. This Court recently reiterated these principles in David L. Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d 245 (2d Cir.), cert. denied, 112 S. Ct. 17 (1991), by stating that "[t]he United States, as a 'Contracting State,' has an obligation to enforce the Convention. ..." Id. at 250 (emphasis supplied). The Threlkeld court held that under the terms of the Convention, arbitration must be ordered so long as the parties to an international business transaction agreed to arbitrate, and the scope of the arbitration agreement encompasses the asserted claims. Id. at 249. Indeed, this Court specifically observed that "the judicial policy in favor of arbitration is even stronger in the context of international business transactions." Id. at 248 (citations omitted) (emphasis supplied).

In this regard, as a matter of sound public policy, the Threlkeld court held that:

> Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation. The parties may agree in advance as to how their disputes will be expeditiously and inexpensively resolved should their business relationship sour. ... Stability in international trading was the engine behind the Convention ...

Id. (citations omitted); see also McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032 (3rd Cir. 1974) ("there is nothing discretionary about Article II (3) of the Convention. It states that District Courts shall, at the request of the party to an arbitration agreement, refer the parties to arbitration" (emphasis in original)); Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982). There can be no doubt that all these requirements have been met here.

These courts all have followed the lead of the Supreme Court in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), which emphasized that:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Id. at 520, n.15. Because the Convention is a treaty, it is the highest law of the land. Accordingly, no subjective view of supposed "public policy" can trump its authority, nor can any statute -- whether "securities-related" or not -- outweigh its mandatory directives.

Underlying the Supreme Court's rationale is the recognition that for the Convention to be effective, the courts of every signatory country must work cooperatively to enforce it in every instance. See id.; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Each nation must subordinate its own particular interests (no matter how much each nation believes that its own laws are superior to those of the other signatory nations) in order that its citizens may benefit from the advantages of arbitration as a facilitator of international commerce. See generally id.

In response to these arguments, and in an obvious attempt to circumvent the mandatory nature of the Convention, appellants have argued that the arbitration clauses should be avoided because this case involves an allegedly "domestic distribution" of securities. (App.Br. 41-44). Simply stated, this case, involving an insurance marketplace centered in London that insures risks around the world, and defendants who all apparently are located in England, is not a "domestic" case. As stated by the District Court:

> [I]f anything, this case is closer to being entirely English than it is to being either international or a domestic American dispute. Plaintiffs went to England to become Members of a distinctively British entity, invested in syndicates operating out of London and entered numerous contracts all of which stated plainly that Lloyd's affairs and plaintiffs' investment would be administered in England and were subject exclusively to English law, English courts and English arbitration. Apparently all and certainly most defendants are British. The sole American elements are the nationality of the plaintiffs and their allegation that they were solicited in the United States. In light of the overwhelmingly British cast and subject matter, the location of some negotiations in the United States and the American Nationality of plaintiffs does not qualify the agreements as domestic Securities contracts.

(A 1517-18).

Moreover, Congress plainly could have adopted the Convention subject to the condition that it would not be enforced by American courts in cases where the federal securities laws are implicated. Clearly, Congress chose not to create subject matter exceptions to the Convention, but adopted it broadly to encompass all claims that parties from signatory nations agree to arbitrate. See Rhone Mediterraneed Compagnia de Assicurazoni e Riassicurazoni v. Lauro, 555 F.Supp. 481, 485 (D.V.I. 1982), aff'd, 712 F.2d 50 (3rd Cir. 1983). The only place the term "public policy" appears in the Convention is as

a possible ground to avoid enforcement after the award is made, under Article V(2)(b) of the Convention. Consistent with the clear language of the Convention, Mitsubishi makes clear that the only time for the courts to study "public policy" issues is at the award enforcement stage, not at the pre-hearing, contract enforcement stage, where this case stands. Mitsubishi, 473 U.S. at 638.

Appellants' suggestion that the Court should refuse to refer this matter to arbitration because of some sort of "presumed unfairness" in the proceeding defies common sense. (App.Br. 38-39). As a practical matter, a court cannot presume unfairness in a proceeding that has not yet taken place, and that is scheduled to take place under laws that provide the participants with a full panoply of remedies. Consistent with this notion, the "public policy" provision in Article V universally is regarded as a narrow exception, to be invoked only where an arbitration award sought to be enforced offends a signatory nation's fundamental policies.[12] Appellants have offered nothing that even approaches a violation

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[12] In this regard, the leading case interpreting the "public policy" exception to enforcement is Parson's & Whittmore Overseas Co. v RAKTA, 508 F.2d 969 (2d Cir. 1974). In Parson's, this Court upheld enforcement of an award under the terms of the Convention even though a party had failed to complete a construction project because its employees had been expelled from Egypt by the Egyptian government during the 1967 Arab-Israeli war. Specifically, the Court held that "enforcement of foreign arbitral awards may be denied ... only where enforcement would violate the forum state's most basic notions of morality and justice." Id. at 974 (emphasis supplied); see also Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973)(claims that arbitration award was contrary to United States public policy, and argument regarding lack of jurisdiction, raised in proceedings involving enforcement of award rendered in Curacao).

This principle was reiterated by this Court just three weeks ago in Iran Aircraft Industries, et al. v. AVCO Corp., 1992 U.S. App. LEXIS 31150 (2d Cir. November 24, 1992), in which this Court refused to enforce an arbitral award under Article V(1)(b) because, at the enforcement stage of the proceedings, this Court determined that the defendant had (continued...)

of the "most basic notions of morality and justice," as required to vitiate an award on public policy grounds, and at this pre-arbitration stage, one should not simply assume an ultimate violation into being. See Waterside Ocean Nav. Co. v. Int'l Nav., Ltd., 737 F.2d 152 (2d Cir. 1984); Fotochrome, Inc. v. Copal Co., Ltd., 517 F.2d 512, 516 (2d Cir. 1975).

In sum, by ignoring the mandatory nature of the Convention, appellants have applied the wrong standard to this case. Indeed, according to the Supreme Court, all doubts regarding the enforcement of arbitration clauses must be resolved in favor of arbitration. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). Therefore, based upon the mandatory nature of the Convention, the arbitration provisions in the Members' Agent's Agreements properly were enforced, and the District Court's opinion must be affirmed.

B. Supreme Court Precedent Mandates Arbitration Of Appellants' Securities Law Claims

In an attempt to support their outdated, hyper-narrow view of arbitration, appellants argue that their interpretation of the Supreme Court's decision in Wilko v. Swan, 346 U.S. 427 (1953) permits them to avoid arbitration of their claims. (App.Br. 32-41). In their contrived argument, appellants string together a discussion of an overruled Supreme Court opinion (Wilko), a theoretical discussion of the law contained in an article, a dissenting opinion, and an amicus brief. (App.Br. 32-41).

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[12](...continued)
been "denied the opportunity to be heard in a meaningful time or in a meaningful manner."

To appreciate fully appellants' parochial explanation of the law, the following historical background is necessary. In 1953, the Supreme Court's decision in Wilko created an exception to the Federal Arbitration Act ("FAA"). Wilko involved a dispute between a customer and securities broker concerning fraudulent misrepresentations allegedly made in violation of the 1933 Act. The Supreme Court held that the express right of action granted in the 1933 Act should be protected by recourse to a judicial forum regardless of arbitration clauses contained in brokerage contracts. Wilko, 346 U.S. at 430. This exception, like others in the law, was based primarily on then-existing judicial hostility toward arbitration.

Since Wilko, the Supreme Court has come full circle from its prior hostility toward arbitration. Between 1985 and 1989, the Supreme Court decided three landmark cases in which it expanded compulsory arbitration of all federal securities laws claims when a pre-dispute arbitration clause is contained in the parties' agreement. Today, the Supreme Court enthusiastically embraces arbitration as a favored method of dispute resolution.

Beginning in 1985, the Supreme Court decided Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), in which it held that pre-dispute arbitration agreements are valid and enforceable, and properly serve as a basis for securities brokers to compel arbitration of customers' claims under state law. In 1987, the Supreme Court extended the scope of claims for which brokers could compel arbitration to include disputes arising under the 1934 Act, as well as under RICO. In Shearson/American Express, Inc. v. McMahon, 820 U.S. 220 (1987), the Supreme Court particularly observed that a court's duty to compel arbitration is not lessened when statutory rights allegedly are involved. Thus, McMahon

created an inconsistency: the Supreme Court would enforce arbitration agreements under the 1934 Act, but not under the 1933 Act.

Finally, in 1989, the Supreme Court decided Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989), in which it permitted the compulsory arbitration of "domestic" claims under the 1933 Act, finding no relevant distinction as to compulsory arbitration between the 1933 Act and the 1934 Act. In this regard, the Supreme Court held:

> To the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current endorsement of the Federal Statutes favoring this method of resolving disputes.
>
> Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not essential features of the [1933 Act such that its provisions may be] construed to bar any waiver of these provisions.

Id. at 481.

In reaching its decision, the Supreme Court expressly stated that Wilko was incorrectly decided. Contrary to appellants' suggestion to this Court, as the District Court recognized, Wilko "has been flatly overruled," (A 1517) as it was found to be "inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions." Rodriguez, 490 U.S. at 484.[13]

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[13] With this new brand of reasoning, the wave of judicial decisions favoring arbitration (continued...)

Appellants' incredible conclusion that McMahon and Rodriguez create only "specific" exceptions to Wilko's absolute bar to the enforceability of pre-dispute arbitration clauses simply is not supported by even the most restrictive reading of those cases. In 1992, it is clear that even as to "domestic" disputes all claims under the 1933 Act, the 1934 Act, and RICO must be compelled into arbitration when, as here, parties explicitly agree to arbitrate their disputes. Accordingly, regardless of whatever "debate" appellants believe exists within the securities bar, as to this international dispute the fact is that under controlling caselaw this Court must order resolution of appellants' claims as to the Members' Agents via arbitration.

Appellants also claim that they will be treated unfairly in an arbitration proceeding against the Members' Agents in England because, under the Members' Agent's Agreements, Lloyd's, a co-defendant here, would select the arbitrator. (App.Br. 38). Under English law, like American law, arbitrators must be impartial. See The Arbitration Act of 1950 §10. (A 1018-37). Here, Lloyd's is itself a party to this proceeding with appellants, although not a party to the arbitration agreement -- and ultimately, arbitration hearing -- with the Members' Agents. Under any circumstances, as appellants well know, Lloyd's has indicated that it will decline to exercise its power to appoint the arbitrator in the event that

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[13](...continued)
affected numerous areas of securities litigation. Indeed, this Court acknowledged the Supreme Court's trilogy, even before the ink on the Rodriguez decision was dry, by reversing one of its own contrary rulings from only one year prior. Specifically, this Court's decision in Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047 (2d Cir. 1989), rejecting prior law to the contrary, held that arbitration is an appropriate forum for disputes between securities brokers and their former employees.

the parties to the arbitration cannot agree on one. With such a declination, the matter necessarily will be referred to the English High Court of Justice, or a judge thereof, for the appointment of an arbitrator pursuant to the powers granted by §10 of the Arbitration Act of 1950. (A 1020-21). The High Court clearly will appoint an impartial, well-qualified individual as an arbitrator. Accordingly, appellants can offer no legitimate prospect of bias in any future arbitration proceeding.

Next, appellants argue that the "integrity safe-guards" of an SRO-sponsored arbitration proceeding subject to SEC oversight are not present here. (App.Br. 38). In this regard, simply because the Supreme Court may have found comfort in the fact that in domestic "SRO-sponsored" securities arbitrations the SEC reviews the code of arbitration procedures, the existence of such oversight hardly can be described as a prerequisite for the enforcement of an arbitration agreement. See McMahon, 820 U.S. at 220; and Rodriguez, 490 U.S. at 477. Fundamentally, arbitration in the United States is not inherently better than arbitration in England. As demonstrated above, arbitrations in England, like in the United States, are governed by guidelines designed to promote fundamental fairness. (A 1018-37).

Relatedly, appellants argue that arbitration in England would eliminate American "public scrutiny," which they contend, albeit without any authority, is somehow essential to the fair resolution of their claims. (App.Br. 39-40). Indeed, appellants' argument plainly ignores the fact that most arbitration proceedings in the United States are private proceedings. As this Court is aware, arbitration proceedings in the United States generally

(and in SRO-sponsored securities arbitrations in particular) are not open to the public, arbitrators generally are not required to provide any opinion with their awards, and arbitration awards generally are not published.

In sum, appellants' contention that Wilko somehow permits them to escape the mandatory nature of their arbitration agreements with the Members' Agents is misplaced. Wilko explicitly was overruled by Rodriguez, and its reasoning, based upon discredited judicial hostility to arbitration, can no longer be applied. Thus, since no subject-matter exceptions to arbitration of purported federal securities law claims currently are recognized by the Supreme Court, this Court should uphold the District Court's dismissal of appellants' claims.

POINT II

COMPELLING UNITED STATES SUPREME COURT PRECEDENT AND PUBLIC POLICY REQUIRE ENFORCEMENT OF THE FORUM SELECTION CLAUSES

In addition to the arbitration provisions, which must be enforced pursuant to the Convention, the Members' Agent's Agreements all contain valid and enforceable forum selection clauses. As the District Court properly found, absent a request for arbitration, the forum selection clauses independently would require appellants' claims as to the Members' Agents to be resolved in the United Kingdom. (A 1505). As demonstrated below, appellants fail to acknowledge that forum selection clauses, such as those at issue here, are presumptively valid, and must be enforced unless appellants can demonstrate that enforcement would effectively deprive them of their day in court.

A. Forum Selection Clauses Are Presumptively Valid

In their zeal to argue that the forum selection clauses at issue here would deprive them of their rights under the federal securities laws and RICO, appellants have neglected to examine the critical threshold step in any analysis regarding the applicability of forum selection clauses. The District Court correctly noted these standards, and properly adhered to them. (A 1502-05).

The Supreme Court has held that forum selection clauses, such as those at issue here, are presumed valid unless the party seeking to avoid enforcement can meet the heavy burden of showing that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). It is incumbent upon parties seeking to escape the operation of forum selection clauses, such as appellants here, "to show that trial in the contractual forum would be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." Id. at 18.[14]

Appellants seek to circumvent these standards by suggesting that since none of the forum selection (or arbitration) clauses in the Members' Agent's Agreements were

[14] The reasons for such a stringent standard are manifest from the Supreme Court's recognition that forum selection clauses, such as those at issue here, provide the necessary unified system of dispute resolution that is vital to the operation of an international business, such as the insurance underwriting facilities at Lloyd's. See, e.g., Scherk, 417 U.S. at 518. Lloyd's' business operations across international borders into the United States would "hardly be encouraged if, notwithstanding solemn contracts, [American Courts] insist on a parochial concept that all disputes must be resolved under our laws and in our courts." Bremen, 407 U.S. at 9.

"freely negotiated," these plainly-worded clauses should be disregarded. (App.Br. 13). In this regard, appellants, in availing themselves of the privilege of becoming insurance underwriters at Lloyd's, have entered into commercial (and not consumer) transactions with appellees. As a practical matter, appellants all were affluent individuals who had the means and interest to become insurers. (A 102). As such, they are presumed to have understood the nature and substance of the agreements they executed.

The Supreme Court already has analyzed and rejected as completely misguided the argument appellants assert. Just last year, in Carnival Cruise Lines v. Shute, 111 S.Ct. 1522 (1991), the Supreme Court re-affirmed the presumed validity of forum selection clauses by holding that forum selection clauses, whether specifically negotiated or not, are to be enforced according to their terms. The forum selection clause at issue in Carnival Cruise Lines was printed in fine print on the back of a cruise ship ticket, clearly a form contract not subject to negotiation. Although the passengers could not freely negotiate the terms of the ticket, the Supreme Court nevertheless confirmed the applicability of the forum selection clause, finding that the clause at issue was entirely reasonable. In this regard, the Court stated:

> Common sense dictates that tickets of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.

Id. at 1527; see also Foster v. Chesapeak Insurance Co., Ltd., 933 F.2d 1207, 1219 (3d Cir. 1991) ("that there may not have been actual negotiations over the [forum selection] clause does not affect its validity").

Even before Carnival Cruise Lines this Court had held that the mere absence of negotiation over the terms of contracts, such as those at issue here, does not render a forum selection clause unenforceable. See Karl Koch Erecting Co., Inc. v. New York Convention Center Development Corp., 838 F.2d 656, 659 (2d Cir. 1988). As a practical matter, with over 26,000 underwriting members worldwide, it would be entirely unreasonable for Lloyd's to "negotiate" separately with each prospective underwriting member the terms of the forum clauses in the Members' Agent's Agreements.

Hence, since appellants have failed to overcome the presumptive validity of the forum selection clauses, those provisions properly were enforced, and this case thus properly was dismissed as to the Members' Agents.

B. Appellants Have Not Met The Applicable Standard

Appellants can overcome the presumptive validity of the forum selection clauses only if they unequivocally demonstrate that application of these clauses would effectively deny them any remedies. As set forth below, this certainly is not a case where appellants have subjected themselves to the barbaric laws of an uncivilized country. Rather, this is a case where appellants have a host of remedies available to them in England, the country where the insurance activities at issue were centered, and a country whose jurisprudential history has formed the basis for our own laws. Indeed, as the District Court noted, "[t]he sophistication and fairness of English courts cannot seriously be disputed, and has repeatedly been recognized by American courts." (A 1522).

1. Appellants' Remedies In England Need Not Be Identical To Those Available In The United States

Although appellants do not explicitly describe it as such, they essentially suggest that the remedies in England must be identical to those available under the federal securities laws and RICO in order for the forum selection clause to be enforceable. (App.Br. 44-46). Appellants' interpretation (or misinterpretation) of the law "would make a mockery of the policy behind enforcing these clauses." Karlberg European Transpa, Inc. v. J.K. - Joseph Kratz Vertriebsgesellscheft MBH, 618 F.Supp. 344, 348 (N.D. Ill. 1985).

Although appellants devote numerous pages of their oversized brief to a comparison of the remedies available in the United States versus those available in England, the Supreme Court has never engaged in such an analysis. (App.Br. 45-52). Rather, under applicable Supreme Court decisions, the District Court was required to determine only whether, assuming the case was transferred to England, appellants would be deprived of their day in court. Indeed, in Mitsubishi, the Supreme Court enforced a clause requiring arbitration of an antitrust claim in Japan "even assuming that a contrary result would be forthcoming in a domestic context." Mitsubishi 473 U.S. at 623; see also Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (in forum non conveniens context, "unfavorable change in the law" between the plaintiffs' chosen forum and the alternative forum will preclude transfer of the case to a foreign forum only if "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all ...").[15]

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[15] The Piper standard has been extended to apply to statutory remedies -- such as those (continued...)

In Riley, a case involving facts almost identical to those at issue here, the Tenth Circuit also correctly applied this standard pertaining to the enforceability of forum selection clauses:

> Riley suggests that enforcement of the choice of forum and law provisions is unreasonable because he effectively will be deprived of his day in court. The basis underlying this contention is his perception that recovery will be more difficult under English law than under American law. Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in federal district court. The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair.

Riley, 969 F.2d at 958.[16]

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[15](...continued)
articulated in the Consolidated Complaint -- as well as common law remedies. See Howe v. Goldcorp Investments, Ltd., 946 F.2d 944 (1st Cir. 1991) (action alleging violations of Section 10(b) of the 1934 Act was transferred to Canada despite the fact that Canadian law only afforded the plaintiffs remedies that were "somewhat similar" to those afforded under the federal securities laws); Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138 (5th Cir. 1989) (case in which RICO claims were alleged was transferred from Louisiana District Court to Bermuda even though Bermuda did not recognize the plaintiffs' RICO claims); AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 158 (2d Cir. 1984) (forum selection clause specifying Dutch jurisdiction enforced although it was unlikely that a Dutch court would enforce American securities laws).

[16] See also Interamerican Trade Corp. v. Companhia Fabricadora De Pecas, 973 F.2d 487, 489 (6th Cir. 1992) (forum selection clause upheld even though the chosen forum, Brazil, did not afford plaintiffs a jury trial, would not permit trial by depositions, and would force plaintiff to deposit $2.2 million as security); Paper Express Ltd. v. Pfanhuch Maschinen, 972 F.2d 753, 758 (7th Cir. 1992) (plaintiffs' assertion that it would be far more expensive to litigate in the chosen forum, Germany, was insufficient to invalidate the subject forum selection clause).

Additionally, a federal district court in Pennsylvania, in concluding that the assertion of federal securities and RICO claims does not preclude transfer of a case to England, stated:

> A change of forum may not deprive plaintiffs of their day in Court, but there is no requirement that plaintiffs must have the opportunity to recover substantially identical relief in the alternative forum. The possibility that a change of forum will result in application of less favorable substantive law does not receive conclusive or substantive weight in a forum non conveniens inquiry. [citation omitted] Whether or not England has statutes comparable to the Securities Exchange Act or RICO, England will provide a remedy for the non-statutory claims of fraud, negligence of officers and directors, breach of fiduciary duty and breach of contract. The parties expressly provided for the application of English law and the non-exclusive jurisdiction of English courts in the forum-selection clause of the subscription agreement. Therefore, being required to litigate in England leaves the party with a remedy that they contemplated; they are not without a meaningful remedy.

Winex, Ltd. v. Paine, 1990 WL 121483 (E.D. Pa. 1990); see also Medoil Corp. v. Citicorp, 729 F.Supp. 1456 (S.D.N.Y. 1990) (forum selection clause held enforceable unless plaintiff could demonstrate that the chosen forum was "so difficult or inconvenient a forum that [plaintiff] essentially will be deprived of its day in court").

In sum, as compelling Supreme Court precedent makes clear, to defeat the operation of the forum selection clauses at issue here, appellants must demonstrate that transfer of this case to England would be so grossly unfair that they effectively would be deprived of their day in court. Since appellants will have a host of remedies available to them under English law, they simply cannot meet this standard. Hence, the District Court

properly dismissed the Consolidated Complaint as to the Members' Agents on forum selection grounds.

2. Appellants Will Have Numerous Remedies Available To Them In England

As to the Members' Agents, appellants will have a panoply of remedies available to them in England which, if there is any merit to their factual allegations, will give them a more than fair opportunity to seek redress of any losses they may have incurred.[17] These remedies are discussed at length in the affidavit of Adrian Walter Hamilton, Q.C., submitted by the Members' Agents to the District Court in support of their motion to dismiss the Consolidated Complaint. (A 1346-1409). The Hamilton Affidavit sets forth the legal theories under English tort, contract and statutory law that would be available to appellants in pursuing their grievances against the Members' Agents. Under the standard that must be applied here, the availability of these remedies alone is enough to overcome any effort by appellants to defeat the presumptive validity of the forum selection clauses.[18]

Apparently recognizing that they do have a variety of remedies against the Members' Agents, appellants principally argue that English law does not impose a duty of

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[17] Indeed, England may afford even more favorable remedies than those available in the United States. In this regard, if appellants successfully pursue their claims in England, the normal order is that the losing party pays most of the winning party's fees, a remedy not available here (unless the appellants prevail on their RICO claims).

[18] Initially, appellants mistakenly argue that the Members' Agents are afforded immunities from suit under English law. In this regard, none of the immunities purportedly afforded Lloyd's under the Lloyd's Act 1982 apply to the Members' Agents, nor do the Members' Agents have any other relevant immunities under English law. (A 1217).

disclosure upon the Members' Agents. (App.Br. 48). In this regard, the gravamen of appellants' claims is the purported non-disclosure of material information about the nature of the syndicates in which they participated. (App.Br. 45) Appellants allege that, because English law supposedly does not impose a duty of disclosure upon the Members' Agents, as do the federal securities laws, English law is inadequate to redress appellants' claims. (App.Br. 48). Because of the contractual relationship between the Members' Agents and appellants, however, English law does indeed impose a duty upon the Members' Agents to make full and fair disclosure to allow the underwriting members to make informed decisions concerning their participation in the various syndicates. (A 1355).

Under English law, by virtue of the Members' Agent's Agreements executed between appellants and their respective Members' Agents, appellants and the Members' Agents entered into a principal and agent relationship. As such, under English law, the Members' Agents owe duties of disclosure to appellants, their principals. (A 1355-57). Any material failure on the part of the Members' Agents to fulfill those duties is actionable under English law. (A 1355-57).

Additionally , the Members' Agent's Agreements themselves spell out the broad array of duties and obligations imposed upon the Members' Agents in representing appellants' interests at Lloyd's. These duties include those of skill, care, diligence, as well as certain fiduciary obligations. (A 589-91). Additionally, a Members' Agent has certain duties of disclosure to any underwriting member it represents, including disclosure of any information in its possession relating to "any syndicate which the Agent has advised the

Name to join or which the Name and the Agent have agreed that the Name should join, which could reasonably be expected to influence the Name in deciding whether to become or remain a member of, or to increase or reduce its participation in any such Syndicate and use its reasonable endeavors to obtain any such information." (A 590). This duty of disclosure concerning the syndicates in which any underwriter participates clearly constitutes the crux of appellants' claims here.

Further testament to the fact that more than adequate remedies exist under the laws of England is that there currently are several actions brought by groups of Lloyd's underwriters against their Members' Agents pending in the English High Court.[19] The underwriters in these actions have asserted that their Members' Agents made misrepresentations and failed to disclose required facts as to the risks involved in particular syndicates, allegations plainly similar to those that appellants advance here. Examples of the broad array of allegations that may be asserted against the Members' Agents in England were fully documented before the District Court, and clearly appear in the record. (A 1354-68).

[19] Indeed, as of the time the Members' Agents submitted their motion papers to Judge Lasker, three of the appellants in this action (Albert Dugan, Lydia Dugan and A. Cary Harrison) had advanced claims in the English High Court of Justice. We respectfully ask the Court to take judicial notice of the fact that since that time an additional 26 appellants have decided to hedge their bets by commencing proceedings in England.

In addition to the claims noted above, under English law, even appellants concede that the following claims and remedies also would be available to them as against the Members' Agents:

1. Tort of deceit;

2. Tort of negligent misrepresentation;

3. Claims under Section 2(1) of the Misrepresentation Act 1967;

4. Claims under Section 2(2) of the Misrepresentation Act 1967; and

5. Omissions of fact -- pre-contractual omissions of material fact are actionable under English law.

(A 1360-68).

Appellants nevertheless complain that if "forced" to honor their agreements to litigate/arbitrate their claims in England, they would be required under English law to prove that they relied on the alleged misrepresentations, and that the alleged misrepresentations caused them to incur losses. (App.Br. 49-50). To obtain redress for their grievances, appellants certainly will be required to prove the entirely reasonable elements of reliance and loss causation if their claims against the Members' Agents are litigated or arbitrated in England. There is nothing inherently unreasonable or unfair, however, about a requirement of reliance, a concept that certainly lies at the heart of American jurisprudence. Indeed, if appellants' factual allegations have any merit, they should have no hesitation in pursuing their claims in a forum, such as an arbitration tribunal or court in England, that not only will afford them an opportunity to redress their purported

losses, but also will provide them with an enhanced opportunity to obtain reimbursement for their attorneys' fees.

Regardless of whether English law might require appellants to sustain an arguably higher burden of proof than that required under Section 12 of the 1933 Act, as appellants complain, such would be completely irrelevant to the central question concerning the enforcement of the forum selection clauses at issue here -- whether appellants can demonstrate that they would be effectively deprived of their day in court if forced to litigate/arbitrate in England. In light of the broad range of remedies, and more generous statutes of limitation available to them under English law,[20] appellants simply cannot meet that stringent burden.

In sum, appellants not only have failed to apply the proper standard for evaluating the enforcement of the forum selection clauses at issue here, but utterly have failed to present any showing to overcome the forum selection clause's presumptive validity. Hence, the District Court properly enforced the forum selection clause contained in the Members' Agent's Agreements.

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[20] A critical issue upon which appellants did not comment is that the statutes of limitation applicable to the claims available to appellants under English law are considerably longer than the limitations periods that would apply under the federal securities laws. The limitation period for any claims for breach of contract or breach of duty of care is six years. (A 1358). Barrister Hamilton confirmed that based upon the accrual dates of the statutes of limitation under English law, those limitations periods have not yet expired. (A 1360). The Members' Agents contend here that appellants' claims under the federal securities laws are time-barred. (A 995-97). Thus, the remedies realistically available to appellants in England actually appear to be broader than those available in the United States.

POINT III

THE ARBITRATION AND FORUM SELECTION CLAUSES UNQUESTIONABLY GOVERN THIS DISPUTE

Appellants, who apparently have little faith in their other arguments, then adopt a fallback position by arguing that the arbitration and forum selection clauses do not apply to this dispute. (App.Br. 52-58). Significantly, appellants do not claim to have been defrauded into executing (affixing their signatures on) the Members' Agents' Agreements. (App.Br. 55). Thus, it is uncontroverted that appellants validly and freely executed the Members' Agent's Agreements containing the arbitration and forum selection clauses. As demonstrated below, the arbitration and forum selection clauses unquestionably apply to appellants' claims because the subject-matter of this dispute is contemplated under the broad terms of the agreements.

Appellants also argue, as they did to the District Court, that the arbitration and forum selection clauses do not apply to the individually-named Members' Agents' Chairs of the Board because they personally were not signatories to the agreements containing the clauses. (App.Br. 61). In this regard, whether they are considered agents of the Members' Agents, or third-party beneficiaries of the Members' Agent's Agreements, the Chairs of the Board have every right to independently enforce the arbitration and forum selection clauses and compel resolution of appellants' claims against them in England.

A. By Their Terms, The Arbitration And Forum Selection Clauses Unquestionably Apply To Appellants' Claims

Appellants first contend that the arbitration and forum selection clauses contained in the Members' Agent's Agreements do not, by their terms, apply to this dispute. (App.Br. 52-57). As demonstrated below, however, there is no doubt that the agreements form the basis, and dictate the terms and conditions, of the parties' relationship. Appellants' hyper-attenuated construction of the arbitration and forum selection clauses, which is no more than an exercise in semantics, cannot avoid the fact that this dispute goes to the heart of appellants' relationship with the Members' Agents, and the allegations in the Consolidated Complaint, although presented as involving alleged breaches of the federal securities laws, truly entail a claimed breach by the Members' Agents of their contractually enumerated duties. Accordingly, since the Members' Agent's Agreements provide for arbitration as a uniform method of dispute resolution, arbitration of appellants' claims must be compelled.

Appellants simply ignore the fact that when analyzing whether a dispute falls within the scope of an arbitration agreement, the court must look to the factual allegations, and not the labels attached to claims for relief. As a practical matter, under appellants' approach, any plaintiff could avoid arbitration of his or her claim merely by labeling such a claim as "arising under" the federal securities laws or RICO. Were this the state of the law, the Supreme Court never could have enforced the arbitration or forum selection clauses in cases like Bremen, Scherk, Moses H. Cone, Mitsubishi, McMahon, and Rodriquez.

In order to enforce any or all of the arbitration and/or forum selection clauses at issue, the Court first must determine that the subject matter of this dispute is one contemplated under the terms of the clauses. In order to address this question, and illustrate how appellants' claims clearly are governed by the Members' Agent's Agreements, it is necessary first to consider the nature of the relationship between appellants, as insurers at Lloyd's, and their Members' Agents, and second, to illustrate how appellants' claims clearly fall within the agreements.

As members of Lloyd's, appellants clearly are insurers of risks. (A 96). In this capacity, appellants underwrite many different risks, in each case becoming parties to the contracts of insurance with the insureds. (A 96-98). Since the internationally diverse insurers do not themselves directly participate in the business of active underwriting, it becomes necessary for the insurers to authorize Members' Agents to enter into insurance agreements on their behalf. (A 93-94). Thus, the insurers and the Members' Agents execute comprehensive agreements that are designed to govern their entire relationship, including dispute resolution.

The broad range of services to be provided by the Members' Agents are set out in Clause 4 of the Members' Agent's Agreement, and include: (1) advising the underwriter as to the syndicates in which he should participate and as to the amounts of his overall premium limit; (2) reviewing and reporting to the underwriter as appropriate on the performance of the contracted syndicates; (3) advising the underwriter generally of all aspects of the business and the underwriter' affairs at Lloyd's. (A 587-88). Moreover, the

duties of the Members' Agent are set out in Clause 6, in particular in Clause 6.2, which includes duties of care and skill, fiduciary duties, and the duty to disclose to the underwriting members all information relative to the syndicates in which the underwriting members participate. (A 589-91). Even a cursory review of the contractual provisions, and the broad duties imposed upon Members' Agents, clearly reveals that appellants' claims are fully encompassed within their contractual relationship with the Members' Agents. (A 74-150).

Consequently, all appellants' claims involve the contractual relations among the parties as to the Members' Agent's Agreements, as well as the Members' Agents' performance under those agreements, and each claim reasonably involves an interpretation of those agreements. Thus, since the Members' Agent's Agreements explicitly provide that "any dispute, difference, question or claim relating to this Agreement which may arise between the Agent and the Name shall be referred at the request of either party to arbitration in London," (A 598), appellants cannot avoid arbitration of their claims simply by arguing that their claims, as self-servingly labeled by them, do not explicitly "relate to" the agreements. As demonstrated above, appellants' claims, which directly attack the level of care provided to them by their Members' Agents, absolutely "relate to" their agreements, and arbitration of appellants' claims thus properly was compelled.

Numerous courts have recognized that parties, like appellants here, should not be permitted to avoid enforcement of arbitration and forum selection clauses merely by engaging in semantic arguments to the effect that their claims arise "outside" the scope of the agreement. For example, in Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3rd Cir.), cert. denied, 464 U.S. 938 (1983), the Third Circuit held that "[i]f forum

selection clauses are to be enforced as a matter of public policy, that same public policy requires that they not be defeated by artful pleading of claims ..." Id. at 203.

Other courts also have enforced "general" forum selection clauses so as to bring within a clause's coverage claims not only arising out of the parties' contract, but also claims purportedly arising from the parties' relationship. See, e.g., Scherk, 417 U.S. at 508; Bremen, 407 U.S. at 2; Bense v. Interstate Battery System, 683 F.2d 718, 720 (2d Cir. 1982); Hoes of America, Inc. v. Hoes, 493 F.Supp. 1205, 1206 (C.D. Ill. 1979). In addition, as is common in cases similar to this one, the issue of alleged fraud under the federal securities laws is inextricably tied in with the other issues presented. See Robert Lawrence Co. v. Devenshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959).

There is no need, however, to belabor the linguistic niceties of the arbitration clause's terms. Several years ago, Justice Brennan for the Supreme Court reiterated the well-developed judicial principle that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone, 460 U.S. at 24-25 (emphasis supplied).

B. Appellants' Arbitration And Forum Selection Clauses Apply To The Members' Agents' Chairs Of The Board

Appellants also argue that the arbitration and forum selection clauses do not apply to the Members' Agents' Chairs of the Board, who individually are named as

defendants, because the Chairs of the Board themselves are not signatories to the agreements. (App.Br. 61-63). Significantly, in their lengthy Consolidated Complaint, appellants do not allege any personal wrongdoing by any of these individuals, and merely name them as defendants by virtue of their status. (A 93-94). Accordingly, it appears that appellants have named the Chairs of the Members' Agents as defendants as a tactical maneuver in an effort to circumvent the arbitration and forum selection clauses.

In the first instance, it is doubtful whether the District Court could impose personal jurisdiction over the Chairs of the Members' Agents, since they live and work in, or around, London, and because there is nothing in the record to suggest that they personally transacted business in New York. In this regard, the Members' Agents have reserved their rights to raise lack of personal jurisdiction over the Chairs. By agreement between the parties, and with the consent of the District Court, briefing of this issue had been held in abeyance pending the resolution of the motions to dismiss based upon the forum selection and arbitration clauses. (A 278-82).

In short, based upon the allegations (or lack thereof) in the Consolidated Complaint, it does not appear that appellants would have any reasonable prospect of pursuing claims against the Chairs here in the United States even if there were no arbitration or forum selection clauses. As demonstrated below, however, the Chairs of the Members' Agents have every right to enforce independently the arbitration and forum selection clauses, and compel the resolution of appellants' claims against them in England.

In properly holding that the arbitration and forum selection clauses apply to the Chairs of the Members' Agents, as a threshold matter, the District Court noted that the issue of whether the Chairs of the Members' Agents may enforce the arbitration clause is itself a question relating to appellants' membership in Lloyd's, and thus, must resolved in England. (A 1507-08). Turning to the substantive issue of whether the Chairs are entitled to enforce the arbitration and forum selection clauses, the District Court properly held:

> The violations that the Chairs are alleged to have committed are not independent of those alleged to have been committed by the Agents themselves, and all arise out of the Chairs' performance of their duties as employees or officers of entities with whom plaintiffs contracted. Accordingly, even if the Chairs are not parties to the operative agreements (a premise which is in doubt), they benefit from them as much as their employers. See Scher v. Bear Stearns & Co., 723 F.Supp. 211, 217 (S.D.N.Y. 1989); Brener v. Becker Paribas, Inc., 628 F.Supp. 442, 451 (S.D.N.Y. 1985).

(A 1510).

Appellants simply are incorrect when they argue that as "non-parties" to agreements, the Chairs of the Members' Agents cannot personally invoke the arbitration clause in the Members' Agent's Agreement. None of the cases upon which appellants rely in making these arguments involve directors' or officers' attempts to invoke arbitration or forum selection clauses. Instead, appellants' cases involve attempts to enforce arbitration or forum selection clauses by outsiders who are unaffiliated with the primary entity seeking to enforce the arbitration or forum selection clauses. See Moruzzi v. Dynamics Corp. of America, 443 F.Supp. 332 (S.D.N.Y. 1977) (arbitration clause that applied to disputes between union and employer could not be invoked to arbitrate dispute between an

individual employee and the employer), and McPheeters v. McGinn, Smith & Co., 953 F.2d 771 (2d Cir. 1992) (independent brokerage firm seeking to be covered by customer's agreement with clearing broker, an unaffiliated entity). Moreover, as a practical matter, plaintiffs cannot avoid the consequences of an agreement to arbitrate by naming non-signatory parties as defendants in their complaint, as adoption of such a rule effectively would nullify the effect of arbitration agreements. See Arnold v. Arnold Corp., 920 F.2d 1269, 1282 (6th Cir. 1990).[21]

In sum, appellants cannot avoid arbitration of their claims through the strategic ploy of naming the Chairs of the Board as individual defendants. As a practical matter, even if personal jurisdiction could be obtained over the Chairs, splitting the claims against the Chairs would give rise to a complete duplication of effort by the District Court, and the arbitration tribunal that would hear appellants' claims against the Members' Agents, as entities, in England.

[21] Courts also have utilized a third-party beneficiary theory to uphold applicability of forum selection clauses to non-signatory defendants. Cinema Laser Technology, Inc. v. Hampson, 1991 WL 90913 (D.N.J. 1991); see also Ahn v. Rooney, Pace, Inc., 724 F.Supp. 368, 371 (S.D.N.Y. 1985). Although the Chairs of the Board technically are non-signatories to the Members' Agent's Agreement, this poses no impediment to their enforcement of the forum selection clauses contained in those agreements. Clinton v. Janger, 583 F.Supp. 284, 289-90 (D.C. Ill. 1984).

POINT IV

BECAUSE OF THE STRONG RELATIONSHIP OF THIS DISPUTE TO ENGLAND, EVEN ABSENT THE FORUM CLAUSES THIS ACTION WOULD NEED TO BE DISMISSED UNDER THE DOCTRINE OF FORUM NON CONVENIENS

Having found in favor of the appellees on the enforceability of the arbitration and forum selection clauses, the District Court did not need to determine whether the Consolidated Complaint should be dismissed based upon forum non conveniens, a ground upon which the Members' Agents also moved to dismiss the Consolidated Complaint. The District Court did state, however, that "[t]he overwhelmingly English nature of this dispute likely would warrant dismissal of the action on forum non conveniens grounds." (A 1523).

Fundamentally, there is no question that England is an adequate alternative forum in which appellants may litigate their claims. The Hamilton Affidavit makes clear that appellants will have a host of remedies available in England to seek redress of any losses they sustained. (A 1346-68). Moreover, the various private and public interests the Court must evaluate in determining whether to affirm the District Court's dismissal of the action under the doctrine of forum non conveniens weigh heavily in favor of dismissal and transfer of this case to England.

Although appellants persist in arguing that England must afford identical remedies to be considered an adequate alternative forum (App.Br. 63), this simply is not the state of the law. The issue is not whether England will recognize the federal securities laws

and RICO, but whether English law would afford appellants a reasonable opportunity to litigate their claims. See, e.g., Piper, 454 U.S. at 235.

The public and private interest factors militating in favor of dismissal of this matter under forum non conveniens are overwhelming. With respect to the public interest factors, the local interest in protecting appellants -- most of whom do not even reside in the Southern District of New York, and some of whom live as far away as Alaska -- simply cannot outweigh the local interest of England in litigating claims involving Lloyd's and its constituent members. See Syndicate 420 at Lloyd's London v. Early American Insurance Co., 796 F.2d 821 (5th Cir. 1986) (a coverage dispute involving a certain Syndicate at Lloyd's was dismissed and transferred to England on forum non conveniens grounds).[22]

As described above, in Hirsch, the Fifth Circuit affirmed the dismissal of a case virtually identical to this one on forum non conveniens grounds. Recognizing the strong English interest in resolving disputes aimed at the internal operation of Lloyd's, the Fifth Circuit held that since the contracts at issue were "executed in London and designated to be performed in England," and that Mr. Hirsch, like appellants here, "traveled to England

[22] This matter also does not, as appellants suggest, involved the "integrity" of American capital markets. (App.Br. 65). Contrary to appellants' mischaracterization of this matter as involving a domestic distribution of securities, as noted above, appellants were among thousands of affluent individuals (who passed the stringent Lloyd's "means" test) from all over the world who became insurance underwriters at Lloyd's. Appellants' voluntary decision to become underwriting members of Lloyd's can hardly be considered a domestic distribution of securities.

for purposes of the transaction," the "logistical scale" of public and private interests thus tipped strongly toward England. (A 446).

This case is far more compelling for forum non conveniens dismissal than Hirsch because here more than 1200 individuals and entities (all from England) have been named as defendants. Appellants, however, are scattered throughout the United States, and have no compelling nexus to New York. Appellants would experience a relatively minimal burden by having their claims adjudicated in England, as they contractually had agreed to do. In this regard, only seven of the 109 plaintiffs reside in New York, and nearly one-third have come to New York from distances as far as Texas, or farther. (A 151-58). Indeed, if appellants from distances as far as Anchorage can band together to hire counsel in New York, they can just as easily join forces and select competent counsel to represent them in London.

In sum, the public and private interest factors examined above plainly militate in favor of dismissal of this matter under the doctrine of forum non conveniens. Litigation of this matter in New York would be so gravely difficult and inconvenient for the Members' Agents, and the other named defendants, that dismissal of this case would be required even if there were no dispute resolution clauses independently compelling that result.

CONCLUSION

When the appellants traveled from their homes scattered throughout the United States to London in furtherance to their application for membership at the underwriting facilities of Lloyd's they presumably did so for one common reason: they hoped that the potential rewards of becoming insurance underwriters would outweigh the obvious risks. Although appellants unfortunately chose to engage in insurance underwriting activities at a time when major losses occurred in various parts of the world, appellants hardly can claim surprise that disputes as to these underwriting activities -- underwriting activities that unquestionably are centered in London -- would be resolved in the agreed-upon, central location of London. If appellants have any factual bases for their grievances against the Members' Agents, they will have ample opportunities to redress those grievances in the location they had agreed to at the inception of their underwriting activities. As Judge Lasker correctly found, under the Convention, and applicable Supreme Court decisions, the appellants simply offer no basis for avoiding the plainly-worded arbitration and forum selection clauses in their agreements with the Members' Agents, and the District Court's decision dismissing their Consolidated Complaint against the Members' Agents should be

affirmed in all respects.

Dated: New York, New York
December 16, 1992

Respectfully Submitted,

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