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1980 C. No.1486

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Prof von Mehren : p. 11

Royal Courts of Justice,

Friday, 25th July, 1980

Before:

MR. JUSTICE LLOYD

BETWEEN:

DAVID CURTIS CRAIG AND OTHERS — Plaintiffs

- and -

NATIONAL INDEMNITY COMPANY
(a corporate body) — Defendant

AND BETWEEN: 1980 C. No.525

EUGENE RYAN AND OTHERS — Plaintiffs

- and -

NATIONAL INDEMNITY COMPANY
(a corporate body) — Defendant

(Transcript of the shorthand notes of Harry Counsell & Co., 61 Carey Street, London WC2 2JG; telephone: 242-9346)

MR. G.M. WALLER, Q.C. and MR. W.S.E. GETZ, Q.C., instructed by Messrs. Linklaters & Paines, appeared for the Plaintiffs.

MR. A.J. BATESON, Q.C. and MR. ANTONIO BUENO, instructed by by Messrs. Clifford-Turner, appeared on behalf of the Defendant.

J U D G M E N T

MR. JUSTICE LLOYD: This is an application to set aside the writs in two actions in which the Plaintiffs claim a declaration that they are entitled to avoid two quota share reinsurance treaties on the ground of non-disclosure. The Defendant, National Indemnity Company, to which I shall refer as "NICO", is an insurance company carrying on business in Omaha, Nebraska. Since July, 1971 NICO has acted as the "fronting company" for certain general aviation insurance business written by Omni Aviation Managers Inc., a company incorporated in California, and reinsured on the London market through Messrs. Chandler Hargreaves Whittall & Co. The two treaties with which I am concerned are Treaty VI and Treaty VII. Treaty VI covers the period July 1st, 1973 to December 31st, 1974, and Treaty VII January 1st, 1975 to December 31st, 1975. The treaties each contain an arbitration clause, providing for arbitration in accordance with the rules of the American Arbitration Association.

On 15th January, 1980, the Defendants claimed arbitration on the ground that the Plaintiffs had failed to settle losses due under Treaty VI and Treaty VII. On 21st January, 1980 they petitioned the Federal District Court in Nebraska for an order that the Plaintiffs "do proceed forthwith with the arbitration of all disputes between the parties." On 14th February the Plaintiffs filed a motion asking for extra time in which to file an answer. The court granted extra time on 18th February. The same day the Plaintiffs applied to the English Court for leave to serve the Defendants out of the jurisdiction. On or about the 20th February the Plaintiffs issued the writs in these proceedings. In addition to claiming a declaration that they are entitled to avoid the treaties,

they say that they have avoided and rescinded the treaties, and that they were void ab initio. They also claim reimbursmer of sums already paid under the treaties amounting, it is said, to about £11 million. On 28th February the Plaintiffs filed what are described as "protective petitions" in the State Court in Nebraska, in which they claim substantially the same relief as they claim in the English actions. On 19th March the Defendants issued these summonses under Order 12, Rule 8 to set aside the writs in the English proceedings. On 27th March the Plaintiffs filed motions in the Nebraska Court to stay the Defendant's petitions to compel arbitration. In their brief in support the Plaintiffs submitted first that the validity of the treaties is governed by English law and secondly that the Court should, in the exercise of its discretion, stay all further proceedings on the petition to compel arbitration, pending a decision by the English Court whether the dispute is properly the subject of arbitration. On 10th June Judge Shatz handed down judgment on the Plaintiff' motion to stay. He held that the question of "arbitrability" was governed by Federal law. He rejected the Plaintiffs' argument that the petition to compel arbitration should be stayed on the ground of forum non conveniens. But he has not finally disposed of the petition itself. This is apparent from the fact that he has called on the Plaintiffs to file an answer, which they have now done. However, Mr. Waller, who appears for the Plaintiffs, accepts that the petition is likely to go the same way as the motion. This seems to be a realistic assessment, since Judge Shatz, in the course of his judgment, said that the only issue remaining for decision was the appropriate situs for arbitration, for there is a further

dispute between the parties whether, if arbitration takes place at all, it should take place in Los Angeles, California, or Omaha, Nebraska.

The current position in the American proceedings is therefore that the arbitration is likely to go ahead, and the arbitrators will determine all the issues between the parties, including the question whether the Plaintiffs are entitled to avoid the treaties for non-disclosure.

I now turn to the English proceedings. The first question is whether the case comes under any of the heads of Order XI Rule 1. The Plaintiffs say, first, that the contracts were made within the jurisdiction, or by or through an agent trading within the jurisdiction, namely Chandler Hargreaves Whittal & Co. Secondly they say the contracts are governed by English law.

Mr. Bateson argued that, though the slips underlying Treaties VI and VII were initialled in the usual way in London in accordance with the procedure of the London insurance market nevertheless this was not an ordinary case of reinsurance. It was not a case of an insurer coming to London to look for reinsurance, but of reinsurers going out to the United States to look for business to reinsure. Though the slips were initialled in London, the contracts did not come into existence until NICO accepted reinsurers' offer in the United States.

I am unable to accept Mr. Bateson's argument. It seems to me that the present case is, in all essential respects, the same as any other insurance or reinsurance placed on the London market. I hold that the contracts were made in London. It is therefore unnecessary to consider whether the contracts were made through an agent trading within the jurisdiction. It was

argued by Mr. Bateson that Chandler Hargreaves Whittall & Company were not NICO's agents but Omni's agents. If necessary, I would have held, contrary to Mr. Bateson's argument, that Chandler Hargreaves Whittall & Company were NICO's agents or that they acted on behalf of NICO and Omni jointly. But the point does not arise. Nor is it necessary to consider at this stage whether the contracts are governed by English law.

The next point is whether the Plaintiffs have a good arguable case on the merits. It is plain that they have. Indeed, the contrary was not argued.

The third, and to my mind most difficult point, is whether this is a proper case for service out. For unless it is a proper case I must refuse leave in accordance with Order XI, Rule 4 (2). I can well understand why the Plaintiffs wish to have the matter tried in London. But I have come to the conclusion that this is not a proper case for service out of the jurisdiction for the reasons which I shall now give.

In the first place the treaties undoubtedly contain arbitration clauses providing for arbitration in the United States. It is true that there is a dispute between the parties as to whether the agreed situs for the arbitration is California or Nebraska. This depends on whether the relevant arbitration wording is that contained in Treaty III or Treaty V. But that is a dispute which can and will be resolved in the fullness of time by Judge Shatz in the District Court of Nebraska, to whose jurisdiction the Plaintiffs have plainly submitted: see Henry v. Geoprosco International Ltd., 1976 2B, 726.

A more formidable objection is as follows: It is said that the arbitrators cannot effectively dispose of the matter, since the point on non-disclosure goes to their own jurisdiction.

If the arbitrators decide that the contracts are voidable for non-disclosure, and have been avoided, the effect of their award, it is said, will be that the contracts are avoided ab initio. This would mean that they never had jurisdiction to make their award in the first place. It is a fundamental ru of English law that an arbitrator cannot determine his own jurisdiction. That is why when the arbitration agreement is itself impeached, the courts will grant an injunction to stay the arbitration, even if the effect of impeaching the agreement would be to make it voidable, not void: see Ben & Company Ltd. v. Pakistan Edible Oil Corporation Ltd. per Lord Denning M.R., quoting Kitts v. Moore [1895] 1 QB. 253.

New York Convention Similarly no award of the arbitrators would be enforceable in England under Section 5 of the Arbitration Act 1975, since the central dispute as to non-disclosure is not "a difference capable of being settled by arbitration" within the definition of "arbitration agreement" contained in section 7 of the Act.

These are formidable arguments. But in my view they founder on the decision of the Court of Appeal in Mackender v. Feldia [1967] 2 QB, 590. In that case there was an insurance policy with a clause in it which provided that all disputes arising under the policy should be subject to the exclusive jurisdiction of the Belgian Courts. Insurers sought to avoid the policy on the ground, inter alia, of non-disclosure. It was argued that the question of non-disclosure was not a dispu arising under the contract within the meaning of the jurisdict clause. That argument was rejected. Lord Denning said, at page 598:

> "I can well see that if the issue was whether there ever had been any contract at all, as for instance, if there was a plea of non est factum, then the

foreign jurisdiction clause might not apply at all. But here there was a contract, and when it was made it contained the foreign jurisdiction clause. Even if there was non-disclosure, nevertheless non-disclosure does not automatically avoid the contract. It only makes it voidable. It gives the insurers a right to elect. They can either avoid the contract or affirm it. If they avoid it, it is avoided in this sense, that the insurers are no longer bound by it. They can repudiate the contract and refuse to pay on it. But things already done are not undone. The contract is not avoided from the beginning but only from the moment of avoidance. In particular, the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure is 'a dispute arising under' the policy and remains within the clause: just as does a dispute as to whether one side or other was entitled to repudiate the contract: see Heyman v. Darwins Ltd."

Lord Justice Diplock, as he then was, said this, at page 603:

"Where English law is the proper law of a contract of insurance and so regulates the legally enforceable rights and duties of the parties arising under their agreement, among the incidents or legal characteristics in English law of a contract of insurance (which distinguishes it from most other contracts) is the right of the insurer, if he discovers that some material fact has not been disclosed to him by the assured during the negotiations for the contract, to elect either to continue to perform the contract and to require its continued performance by the assured, or to repudiate the contract, that is to say, to treat it as at an end so far as concerns any future performance. If he elects to repudiate the contract, consequential rights and duties as respects acts already done under the contract, such as premiums already paid or claims already met, are other incidents or legal characteristics of the contract under English law. Any disputed claim by an insurer to exercise all or any of these rights which arise upon discovering that there has been non-disclosure of a material fact is in my view clearly a dispute under the contract and falls within the foreign jurisdiction clause.

The fallacy in the argument to the contrary is that when what is said to be a 'voidable' contract is said to be 'avoided', that does not mean that the contract never existed but that it ceases to exist from the moment of avoidance, and that upon its ceasing there may then arise consequential rights in respect of things done in performance of it while it did exist which may have the effect of undoing those things as far as practicable. It is sometimes sought to assimilate the concept of avoidance of a voidable contract to the concept of non est factum which prevents a contract ever coming into existence at all. It is argued that innocent misrepresentation or, in the case of contracts of insurance, non-disclosure of material facts vitiates consent and makes the agreement of the party misled, no consent at all. But this is specious. What is really meant is that the party misled is

fact consent but would not have done so if he had known what he knows now. Fraud may raise other considerations into which it is not necessary to go.

Whether one of the legal incidents or characteristics of the contract of insurance in the present case is that the underwriters are entitled to repudiate for the non-disclosure of the particular facts which they alleged have not been disclosed must be determined by the proper law of the policy, which is Belgian law and not English law. So here again the Belgian courts, to which the parties have expressly agreed to submit this kind of dispute, is a forum conveniens."

It seems to me that in Mackender v. Feldia the Court of Appeal has decided at least two things. First, that a dispute whether insurers are entitled to avoid, or have avoided for non-disclosu is a dispute 'under' the contract; secondly, that the effect of non-disclosure, if established, is not to avoid the contract ab initio, so that it becomes as if it had never existed, but only that it ceases to exist from the moment of avoidance.

In the present case the language of the arbitration clause is even wider than the foreign jurisdiction clause in Mackender v. Feldia, since it covers "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof..." The arbitration clause is therefore clearly wide enough to cover the dispute as to non-disclosure. Mr. Waller insists that, even so, there is a difference between a foreign jurisdiction clause and an arbitration clause. For the foreign court can assert jurisdiction irrespective of consent, whereas an arbitrator's jurisdiction is always consensual. That would present a real difficulty in the present case if the effect of non-disclosure were that the contract never existed. But that is not so. Since a valid arbitration clause did indubitably exist until the Plaintiffs purported to avoid the contract, I can see no difficulty in the arbitrators appointed under the clause determining whether the Plaintiffs were

entitled to avoid the contract. ~~Mr. Waller~~ reiterated that arbitrators cannot determine their own jurisdiction. But they are not determining their own jurisdiction. Their jurisdiction derives from the agreement between the parties which admittedly existed until the Plaintiffs purported to avoid the contract.

I do not think that there is anything in the decision of the Court of Appeal in Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1978] 2 LR, 223 which is contrary to the view which I have just expressed. In that case the court was dealing with the effect of subsequent illegality, which, like fraud, raises different considerations. In the present case I am dealing with the right of the reinsurer to elect to treat the contract as at an end, which, ~~as Diplock, L.J. said in~~ (...) Mackender v. Feldia, is an incident of the contract itself, and similar, in that respect, to the right of a party to elect to treat a contract as having been repudiated in the course of its performance.

So far I have been considering the question of arbitrability as if English law applied. Mr. Waller argued strenuously that English law is the proper law of the contract, or at any rate the law by which I must determine the effect of non-disclosure. The main argument in favour of English law is that it is the place where the contract was made in accordance with the practice prevailing in the London insurance market. Although there may be factors which point in favour of United States law, they do not, submitted Mr. Waller, point in favour of the law of any particular State, whether it be California or Nebraska.

I do not think it is necessary for me to express any view

as to what law governs, and probably better that I should not. On the assumption that English law applies, I am clear that the parties have chosen to submit their disputes, including the dispute as to non-disclosure, to arbitration in accordance with the rules of the American Arbitration Association. That is a strong reason for refusing leave to serve the defendants o of the jurisdiction.

4. But there are other reasons as well. It seems to me that convenience points in favour of the disputes being determined in the United States rather than in England. The great bulk of the documents that are or may be relevant are in the United States, including all the documents relating to the underlying insurances. I would also conclude that the majority of the witnesses are in the United States, and in particular the witnesses from Omni. It is true that Mr. Quinn, ~~of Messrs. Chandler, Hargreaves, Whittall & Company~~ is in England, and he could not be compelled to go to the United States to give evidence if he is unwilling to go of his own accord. But I see no reason why his evidence should not be taken on commissio There is some disagreement in the evidence whether American courts have any power to issue letters rogatory in aid of proceedings before arbitrators. But I accept the evidence in Mr. Wald's supplemental affidavit that in practice this does not create any difficulty.

5. So it seems to me that there are strong reasons why I should exercise my discretion against granting leave in this case. But those reasons, strong as they are, would not prevail unless I were satisfied as to the efficacy of the remedies in the United States. As to that I have first the decision of Judge Shatz. But secondly, and to my mind of great importance,

I have the evidence of Professor Von Mehren of Harvard Law School, whose reputation in this field is, if I may say so, world-wide. In paragraph 28 of his affidavit Professor Von Mehren states his conclusion as follows:

> "I have concluded that the United States District Court for the district of Nebraska was correct in applying Federal law to the interpretation of the arbitration clauses, in determining that the clauses were separable from the underlying reinsurance contracts, and in holding that the question of misrepresentation in the inducement of the Treaties, and the remedies for any such misrepresentation, are questions within the scope of the arbitration clauses."

According to Professor Von Mehren's evidence, Judge Shatz's decision on the motion to stay has already established "the basis for an order compelling the reinsurers to submit to arbitration the disputes that have arisen under Treaties VI and VII." A final order will be made as soon as the court has determined the only remaining issue, namely, the appropriate situs for arbitration. Thereafter, unless reversed, that decision will be binding on the parties. But the Federal Court will retain jurisdiction; and once the arbitrators have made their award, that award can be confirmed by the court. The decision of the court would then be binding on all courts in the United States. So it is clear from Professor Von Mehren evidence that there is an effective remedy in the United States

Mr. Waller argued that the decision might still not be enforceable in this country. But I cannot see how that will arise in practice. If the Plaintiffs lose in the arbitration, they are hardly likely to mind if the award is unenforceable. If they win, it is inconceivable that an English court would listen to an argument in the mouth of the Defendants that the arbitrators never had jurisdiction. In any event, Mr Russell, as he then was, said of a similar argument in Mackender v. Feld

The Plaintiffs representation

I am content to wait and see.

For the reasons which I have given, I consider that the dispute between the parties ought to be resolved in America. I would take that view even if the American Court had not already assumed jurisdiction. I put it that way because of ~~Mr. Waller~~'s perfectly fair point, that the Defendants' summon to set aside service of the English proceedings was issued before the Plaintiffs' motion to stay in the American proceedi It was thus a matter of chance that Judge Shatz dealt with the matter before it could be dealt with here. Even if I had been giving my judgment first, I should, for the reasons given, have reached the same conclusion.

But ~~Mr. Waller~~ had one final argument. Even if the arbitration is to go ahead in the United States, nevertheless it would still be desirable that the matter should be litigate in England as well, in order that there should be a determinat of the non-disclosure point by an English court in accordance with English law so as to assist the arbitrators should they decid English law applies. There are three answers to that argument First, it is by no means clear that an English court would hol that English law applies. I have already said that I do not wish to express a view on that point, so I will say no more. Secondly, it is by no means clear that the arbitrators will hold that English law applies. Professor Von Mehren in his second affidavit has given strong reasons to suppose, contrary to the views expressed by Mr. Paul Bschorr, that the agreement are governed by American law, that is to say by the law of California or Nebraska. Thirdly, even assuming the arbitrator decide to apply English law, the proper way to prove English law is in the ordinary way by calling expert witnesses, not by an ad hoc decision of the court: see Camilla Cotton v.

Brannlex [1976] 2 LR 10 at page 15, where Lord Wilberforce said:

> "It is in principle undesirable that, when an issue of English law is raised, or raisable, in foreign proceedings, the English law to be applied should not be left to be proved in the normal manner by expert evidence in the foreign form. The alternative, of having it proved by an ad hoc judgment in contested proceedings here is likely to be lengthier, more expensive (they might involve appeals to the Court of Appeal or even this House) and less clear and helpful to the foreign Court. The issues (if any) of English law which might arise for consideration in Switzerland are in themselves simple enough even though capable of some debate, and entirely suitable for expert exposition with text books and authorities".

The argument I am dealing with here assumes that the arbitration in America will go ahead. That being so, the Plaintiffs would have to show a strong, perhaps very strong, juridical advantage in bringing the Defendants before the Court as well (a Court to which they owe no allegiance and which cannot be described as the "natural" forum to the exclusion, at any rate, of the American Courts), thereby compelling the Defendants to incur two sets of costs. In my judgment, the Plaintiffs have shown no such juridical advantage. Nor have they shown any personal advantage other than their natural, and perhaps flattering, desire to have the matter decided on the home ground.

For the reasons I have given, I would allow the Defendan application to set aside the writs in these two actions.

MR BATESON: My Lord, may I, in the light of your Lordship's decision, ask that the service of the writ be set aside and that my clients have the costs?

MR WALKER: I don't think I can resist that. May I ask for your Lordship's leave to appeal?

MR JUSTICE LLOYD: It would seem to be a suitable case for leave to appeal, Mr Bateson. Do you wish to oppose leave to appeal?

MR BATESON: I don't, my Lord. I am always in the difficulty, having advised the clients that if I come in second on the summons I will seek to take it further, of resisting anything my learned friend should say in the same position.

MR JUSTICE LLOYD: It seems to me to be plainly a case where you ought to have leave to appeal, but that is without prejudice to my confidence in my judgment.

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MR. JUSTICE LLOYD: This is an application to set aside the writs in two actions in which the Plaintiffs claim a declaration that they are entitled to avoid two quota share reinsurance treaties on the ground of non-disclosure. The Defendant, National Indemnity Company, to which I shall refer as "NICO", is an insurance company carrying on business in Omaha, Nebraska. Since July, 1971 NICO has acted as the "fronting company" for certain general aviation insurance business written by Omni Aviation Managers Inc., a company incorporated in California, and reinsured on the London market through Messrs. Chandler Hargreaves Whittall & Co. The two treaties with which I am concerned are Treaty VI and Treaty VII. Treaty VI covers the period July 1st, 1973 to December 31st, 1974, and Treaty VII January 1st, 1975 to December 31st, 1975. The treaties each contain an arbitration clause, providing for arbitration in accordance with the rules of the American Arbitration Association.

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In the first place the treaties undoubtedly contain arbitration clauses providing for arbitration in the United States. It is true that there is a dispute between the parties as to whether the agreed situs for the arbitration is California or Nebraska. This depends on whether the relevant arbitration wording is that contained in Treaty III or Treaty 7. But that is a dispute which can and will be resolved in the fullness of time by Judge Shatz in the District Court of Nebraska, to whose jurisdiction the Plaintiffs have plainly submitted: see Henry v. Geoprosco International Ltd., 1976 2B, 726.

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These are formidable arguments. But in my view they founder on the decision of the Court of Appeal in Mackender v. Feldia [1967] 2 QB, 590. In that case there was an insurance policy with a clause in it which provided that all disputes arising under the policy should be subject to the exclusive jurisdiction of the Belgian Courts. Insurers sought to avoid the policy on the ground, inter alia, of non-disclosure. It was argued that the question of non-disclosure was not a dispu arising under the contract within the meaning of the jurisdict clause. That argument was rejected. Lord Denning said, at page 598:

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The fallacy in the argument to the contrary is that when what is said to be a 'voidable' contract is said to be 'avoided', that does not mean that the contract never existed but that it ceases to exist from the moment of avoidance, and that upon its ceasing there may then arise consequential rights in respect of things done in performance of it while it did exist which may have the effect of undoing those things as far as practicable. It is sometimes sought to assimilate the concept of avoidance of a voidable contract to the concept of non est factum which prevents a contract ever coming into existence at all. It is argued that innocent misrepresentation or, in the case of contracts of insurance, non-disclosure of material facts vitiates consent and makes the agreement of the party misled, no consent at all. This is specious. What is really meant is that the party did in

fact consent but would not have done so if he had known what he knows now. Fraud may raise other considerations into which it is not necessary to go.

Whether one of the legal incidents or characteristics of the contract of insurance in the present case is that the underwriters are entitled to repudiate for the non-disclosure of the particular facts which they alleged have not been disclosed must be determined by the proper law of the policy, which is Belgian law and not English law. So here again the Belgian courts, to which the parties have expressly agreed to submit this kind of dispute, is a forum conveniens."

It seems to me that in Mackender v. Feldia the Court of Appeal has decided at least two things. First, that a dispute whether insurers are entitled to avoid, or have avoided for non-disclosu is a dispute 'under' the contract; secondly, that the effect of non-disclosure, if established, is not to avoid the contract ab initio, so that it becomes as if it had never existed, but only that it ceases to exist from the moment of avoidance.

In the present case the language of the arbitration clause is even wider than the foreign jurisdiction clause in Mackender v. Feldia, since it covers "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof..." The arbitration clause is therefore clearly wide enough to cover the dispute as to non-disclosure. Mr. Waller insists that, even so, there is a difference between a foreign juridsiction clause and an arbitration clause. For the foreign court can assert jurisdiction irrespective of consent, whereas an arbitrator's jurisdiction is always consensual. That would present a real difficulty in the present case if the effect of non-disclosure were that the contract never existed. But that is not so. Since a valid arbitration clause did indubitably exist until the Plaintiffs purported to avoid the contract, I can see no difficulty in the arbitrators appointed under the clause determining whether the Plaintiffs were

entitled to avoid the contract. ~~Mr. Waller~~ reiterated that arbitrators cannot determine their own jurisdiction. But they are not determining their own jurisdiction. Their jurisdiction derives from the agreement between the parties which admittedly existed until the Plaintiffs purported to avoid the contract.

I do not think that there is anything in the decision of the Court of Appeal in Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [1975] 2 LR, 223 which is contrary to the view which I have just expressed. In that case the court was dealing with the effect of subsequent illegality, which, like fraud, raises different considerations. In the present case I am dealing with the right of the reinsurer to elect to treat the contract as at an end, which, ~~as Diplock, L.J. said in~~ (...) Mackender v. Feldia, is an incident of the contract itself, and similar, in that respect, to the right of a party to elect to treat a contract as having been repudiated in the course of its performance.

So far I have been considering the question of arbitrability as if English law applied. Mr. Waller argued strenuously that English law is the proper law of the contract, or at any rate the law by which I must determine the effect of non-disclosure. The main argument in favour of English law is that it is the place where the contract was made in accordance with the practice prevailing in the London insurance market. Although there may be factors which point in favour of United States law, they do not, submitted Mr. Waller, point in favour of the law of any particular State, whether it be California or Nebraska.

I do not think it is necessary for me to express any view

as to what law governs, and probably better that I should not. On the assumption that English law applies, I am clear that the parties have chosen to submit their disputes, including the dispute as to non-disclosure, to arbitration in accordance with the rules of the American Arbitration Association. That is a strong reason for refusing leave to serve the Defendants o of the jurisdiction.

4. But there are other reasons as well. It seems to me that convenience points in favour of the disputes being determined in the United States rather than in England. The great bulk of the documents that are or may be relevant are in the United States, including all the documents relating to the underlying insurances. I would also conclude that the majority of the witnesses are in the United States, and in particular the witnesses from Cmpi. It is true that Mr. Quinn, ~~of Messrs. Chandler, Hargreaves, Whittall & Company~~ is in England, and he could not be compelled to go to the United States to give evidence if he is unwilling to go of his own accord. But I see no reason why his evidence should not be taken on commissio There is some disagreement in the evidence whether American courts have any power to issue letters rogatory in aid of proceedings before arbitrators. But I accept the evidence in Mr. Wald's supplemental affidavit that in practice this does not create any difficulty.

5. So it seems to me that there are strong reasons why I should exercise my discretion against granting leave in this case. But those reasons, strong as they are, would not prevail unless I were satisfied as to the efficacy of the remedies in the United States. As to that I have first the decision of Judge Shatz. But secondly, and to my mind of great importance,

I have the evidence of Professor Von Mehren of Harvard Law School, whose reputation in this field is, if I may say so, world-wide. In paragraph 28 of his affidavit Professor Von Mehren states his conclusion as follows:

> "I have concluded that the United States District Court for the district of Nebraska was correct in applying Federal law to the interpretation of the arbitration clauses, in determining that the clauses were separable from the underlying reinsurance contracts, and in holding that the question of misrepresentation in the inducement of the Treaties, and the remedies for any such misrepresentation, are questions within the scope of the arbitration clauses."

According to Professor Von Mehren's evidence, Judge Shatz's decision on the motion to stay has already established "the basis for an order compelling the reinsurers to submit to arbitration the disputes that have arisen under Treaties VI and VII." A final order will be made as soon as the court has determined the only remaining issue, namely, the appropriate situs for arbitration. Thereafter, unless reversed, that decision will be binding on the parties. But the Federal Court will retain jurisdiction; and once the arbitrators have made their award, that award can be confirmed by the court. The decision of the court would then be binding on all courts in the United States. So it is clear from Professor Von Mehren evidence that there is an effective remedy in the United States

Mr. Waller argued that the decision might still not be enforceable in this country. But I cannot see how that will arise in practice. If the Plaintiffs lose in the arbitration, they are hardly likely to mind if the award is unenforceable. If they win, it is inconceivable that an English court would listen to an argument in the mouth of the Defendants that the arbitrators never had jurisdiction. In any event, Mr. Russell, as he then was, said of a similar argument in Mackender v. Feld

The Plaintiffs representation

I am content to wait and see.

For the reasons which I have given, I consider that the dispute between the parties ought to be resolved in America. I would take that view even if the American Court had not already assumed jurisdiction. I put it that way because of ~~Mr. Waller~~'s perfectly fair point, that the Defendants' summon to set aside service of the English proceedings was issued before the Plaintiffs' motion to stay in the American proceedi It was thus a matter of chance that Judge Shatz dealt with the matter before it could be dealt with here. Even if I had been giving my judgment first, I should, for the reasons given, have reached the same conclusion.

But ~~Mr. Waller~~ had one final argument. Even if the arbitration is to go ahead in the United States, nevertheless it would still be desirable that the matter should be litigate in England as well, in order that there should be a determinat of the non-disclosure point by an English court in accordance with English law so as to assist the arbitrators should they decid English law applies. There are three answers to that argument First, it is by no means clear that an English court would hol that English law applies. I have already said that I do not wish to express a view on that point, so I will say no more. Secondly, it is by no means clear that the arbitrators will hold that English law applies. Professor Von Mehren in his second affidavit has given strong reasons to suppose, contrary to the views expressed by Mr. Paul Eschorr, that the agreement are governed by American law, that is to say by the law of California or Nebraska. Thirdly, even assuming the arbitrator decide to apply English law, the proper way to prove English law is in the ordinary way by calling expert evidence, not by an ad hoc decision of the court: see Camilla Cotton v.

Brannlex [1976] 2 LR 10 at page 15, where Lord Wilberforce said:

> "It is in principle undesirable that, when an issue of English law is raised, or raisable, in foreign proceedings, the English law to be applied should not be left to be proved in the normal manner by expert evidence in the foreign form. The alternative, of having it proved by an ad hoc judgment in contested proceedings here is likely to be lengthier, more expensive (they might involve appeals to the Court of Appeal or even this House) and less clear and helpful to the foreign Court. The issues (if any) of English law which might arise for consideration in Switzerland are in themselves simple enough even though capable of some debate, and entirely suitable for expert exposition with text books and authorities".

The argument I am dealing with here assumes that the arbitration in America will go ahead. That being so, the Plaintiffs would have to show a strong, perhaps very strong, juridical advantage in bringing the Defendants before the Court as well (a Court to which they owe no allegiance and which cannot be described as the "natural" forum to the exclusion, at any rate, of the American Courts), thereby compelling the Defendants to incur two sets of costs. In my judgment, the Plaintiffs have shown no such juridical advantage. Nor have they shown any personal advantage other than their natural, and perhaps flattering, desire to have the matter decided on the home ground.

For the reasons I have given, I would allow the Defendan application to set aside the writs in these two actions.

MR BATESON: My Lord, may I, in the light of your Lordship's decision, ask that the service of the writ be set aside and that my clients have the costs?

MR WALLER: I don't think I can resist that. May I ask for your Lordship's leave to appeal?

MR JUSTICE LLOYD: It would seem to be a suitable case for leave to appeal, Mr Bateson. Do you wish to oppose leave to appeal?

MR BATESON: I don't, my Lord. I am always in the difficulty, having advised the clients that if I come in second on the summons I will seek to take it further, of resisting anything my learned friend should say in the same position.

MR JUSTICE LLOYD: It seems to me to be plainly a case where you ought to have leave to appeal, but that is without prejudice to m confidence in my judgment.

MR. BUENO: My Lord, I have an application to make. My learned leader is a little bashful. This was a matter which came befor your Lordship in Chambers. Would your Lordship certify that the matter was fit on both sides for two counsel?

MR. JUSTICE LLOYD: I think Mr. Bateson must be surprised indeed to find himself described as bashful. It is a suitable case for two counsel; it must be in fact. Indeed, you have two counsel, Mr. Waller.

MR. WALLER: Absolutely. I was not about to get up to oppose.
