

Freedberg

US 170

ROBY v. CORPORATION OF LLOYD'S

1353

Cite as 996 F.2d 1353 (2nd Cir. 1993)

John S. ROBY; Susan B. Bolin; Amanda A. Bryan; Anne L. Bryan; Florence E. Bryan; John M. Bryan; Suzanne E. Bryan; Robert S. Clarke; Patrick J. Collins; Daniel F. Coughlin; Robert L. Cox; John D. Diver; Albert W. Dugan; Lee R. Ellenburg; Jules I. Epstein; Tillman R. Fesperman; Martha H. Fogelman; Robert F. Fogelman; Robert S. Forman; Leonard Friedman; Marvin Goodson; Andrew Grossman; Kathryn B. Hampton; Alton B. Harris; Michael C. Hartley; Carol M. Hathaway; Jerome E. Hickey; Alan J. Hunken; Dale A. Jenkins; Robert B. King; Richard J. Kissel; Raymond C. Lee; Janis L. MacMillam; J. Steven Marks; Mary L. Marks; James L. McCormick; Norman N. Mintz; Charles E. Morris; Alvin B. Moss; William B. Murray; Margaret W. Nichol; Rosemary H. Pasek; Joseph N. Pattison; Charles F. Robinson; John N. Robinson; Joe R. Roby; Herbert A. Rubin; Jacob A. Rubin; Robert W. Ruder; Constantine Salonitis; Arthur Schechner; Charles Schnaid; Louis B. Schoen; K. Dino Sirakides; Joel M. Spiro; Gilchrist B. Stockton, Jr.; William N. Stout; Kenneth M. Taylor; Marvel Wilson, Jr.; Henri L. Wedell; Charles L. Wellborn; William T. Zanoni; Roger Anderson; Charles G. Bentzin; Peter A. Benz; Thorton Cooke; Donald D. Decenso; Marco DiLaurenti; Lydia P. Dugan; Robert E. Eakin; Karole E. Glaser; Oliver R. Grace, Sr.; Jack D. Gray; A. Cary Harrison, III; Sidney Kahn; Audrey W. Katz; Robert P. Keith; Alan W. Kral; James E. Krause; Nancy Kurz; Paul W. McMullan; Henry A. Mitchell, Jr.; Katherine S. Nordhaus; Charles W. Olson; James J. O'Sullivan, Jr.; Libby B. Pohoryles; Anthony B. Soskin; Herman G. Sturman; Alyson Warner; Earl D. Whittemore; Herbert N. Zack; John H. Abeles; Albert B. Crutcher, Jr.; James S. Deely; Stephen E. Delaszio; David Dolgenos; Linda Tufts Hebbler; Roger W. House; Charles A. Janda; Jeanne Long; Charles A. Malkemus;

Andrew H. Marks; Allison Mercer; Martha Long Navarro; Gregory J. Saliko; Robert G. Sims; Frederick E. Smithline; James D. Tufts, II; James D. Tufts, III; Shirley R. Zaid; Wilson M. Zildjian, Plaintiffs-Appellants,

v.

CORPORATION OF LLOYD'S, also known as Society & Council of Lloyd's, doing business as Lloyd's of London; Council of Lloyd's; Committee of Lloyd's; Simon Arnold; Michael Cockell; David Coleridge; Peter Daniels; Henry Dobinson; John Greig; Richard Hazell; Anthony Hines; Gordon Hutton; Alan Jackson; Bryan Kellett; Murray Lawrence; Alan Lord; Stephen Merrett; Peter Miller; Colin Murray; Alan Parry; David Rowland; Michael Wade; Bankside Members Agency Ltd.; D.E. Biggs; BPC Members Agency Ltd.; C.L. Jackson; Fenchurch Underwriting Agencies Ltd.; C.A.G. Keeling; Gardner Mountain & Capel Cure Agencies Ltd.; J.G. Hogg; Gooda & Partners Ltd.; A.W. Gooda; Jardine Ltd.; D.R. Walker; J.H. Davies Underwriting Agency Ltd.; J.H. Davies; London Wall Members Agency Ltd.; Nelson Hurst & Marsh Agencies Ltd.; B.P. Marsh; Octavian Underwriting Ltd.; J.R.T. Church; PW Kininmonth Ltd.; R.W. Sturge Ltd.; C.E. Parnell; Secretan Underwriting Agencies Ltd.; A.D. Pilcher; Sedgewick Lloyd's Underwriting Agencies Ltd.; J.M. Gordon; Thos R. Miller & Son Underwriting Agents Ltd.; Peter Miller; Willis, Faber & Duman, Agencies Ltd.; J.N.W. Wooderson; Anton Managing Agency Ltd.; S.R. Merrett; AJ Archer & Co. Ltd.; A.J. Archer; Bankside Syndicates Ltd.; E.E. Patrick; Barder & Marsh; J.H. Barder; BCP Underwriting Agencies Ltd.; C.L. Jackson; Cater Allen Underwriting Agency Ltd.; B.F. Caudle Agencies Ltd.; B.F. Caudle; Charnam Underwriting Agencies Ltd.; J.R. Charnam; H.G. Chester & Co. Ltd.; R.J. Martin; Christopherson Heath Ltd.; R.E. Heath; Claremount Underwriting Agency Ltd.; J.W. Oakes; Cox, Newman & Harman Ltd.; D.E. Harman; Cuth-

bert, Heath Underwriting Ltd.; J.W. Pryke; JH Davies Underwriting Agency Ltd.; J.H. Davies; Devonshire Underwriting Agency Ltd.; P.W.G. Suttle; NT Evennett & Partners Ltd.; N.T. Evennett; Feltrim UA Ltd.; P.F. Fagan; Gooda Walker Ltd.; A.W. Gooda; Gresham UA Ltd.; T.G. Green; Johnson Greene Ltd., Marine/Aviation Syndicates Div.; G.R.P.N. Valentine; J.R.L. Youell; Hexad Partnership; Marquees of Downshire; G.W. Hutton & Co. Ltd.; G.W. Hutton; BPD Kellett & Co. Ltd.; BPD Kellett; London Wall Managing Agencies; R.H. Warrender; London River Underwriting Management Ltd.; J.M. Poland; Merrett Syndicates Ltd.; J.R. Robson; Murray Lawrence & Partners Ltd.; W.N.M. Lawrence; D.M. Holman; Octavian Syndicate Management Ltd.; D.E. Coleridge; R.M. Pateman; R.M. Pateman Underwriting Agencies Ltd.; Peter Pepper Ltd.; P.L. Pepper; John Poland Ltd.; T.M. Bradley; RD Underwriting Agencies Ltd.; J.M. Donner; C.W. Rome Underwriting Agencies Ltd.; C.W. Rome; Rose, Thompson, Young Ltd.; L.R. Sawyer Ltd.; FLP Secretan & Co. Ltd.; A.D. Pilcher; Street Ltd.; C.K. Murray; Sturge Marine Syndicate Management Ltd.; B.E. Bengley; Wellington Underwriting Agencies Ltd.; J.O. Prentice; Wendover Underwriting Agency Ltd.; A.D. Shead; Alexander Howden & Beck Ltd.; P.M. Graham; D.T. Carey; Cater Allen Members Agency; D.J. White; Children Underwriting Agencies Ltd.; N.A. Lewis; Harrison Brothers (U/A) Ltd.; D.B.K. Harrison; Jardine (Lloyd's Underwriting Agents) 1990 Ltd.; Kingsley Underwriting Agencies Ltd.; R.C. Kingsley; R.C. Hallam; Lime Street Underwriting Agencies Ltd.; RAF MacMillan & Co.; M.A. Brecknell; RAF MacMillan; Mocatta Dashwood Members Agents Ltd.; F. Dashwood; Murray Lawrence Members Agency; W.N.M. Lawrence; P.W. Kininmonth; Rose Thomson Young (Underwriting) Ltd.; D.H.H. Meacock; Scott Underwriting Agencies Ltd.; G.W. Scott; Vanguard Underwriting Agencies, Ltd.; T.J. Pepper; KC Webb (Underwriting) Ltd.; J.G.

Hogg; Aragorn Agencies Ltd.; A.J.W.F. Wallace; Austin Caudle (U/A) Ltd.; B.F. Caudle; Guest Barnes (Underwriting Agencies) Ltd.; Birrell Smith Underwriting Agencies Ltd.; Cater Allen Syndicate Management Ltd.; Edward & Payne (Underwriting Agencies) Ltd.; C.H.A. Skey; Janson Green Ltd.; Wetherell Non-Marine Division; G.R.P.N. Valentine; J.M.W.P. Wetherell; B.P.D. Kellett; RJ Kiln & Co. Ltd.; KPH Underwriting Agencies Ltd.; D.G. King; Mark Loveday Underwriting Agencies Ltd.; Merrett Underwriting Agency Management Ltd.; Newgreen Underwriting Agencies Ltd.; J.R.T. Church; Oxford Syndicate Management Ltd.; Roberts & Hiscox Ltd.; R.R.S. Hiscox; RD Robertson Underwriting Agency Ltd.; L.R. Sawyer; Three Quays Underwriting Management Ltd.; Robert Keville; Philip Wroughton; J.B. Marshall; Cuthbert Heath Members Agency Ltd.; D. Hazelwood; Donner Underwriting Agencies Ltd.; J.G. Curtis; Kiln Members Agency Ltd.; D.L. Dann; W.S. Strathalmond; Scott Caudle Hilsum Ltd.; J.D. Scott; Cassidy Davis Underwriting Ltd.; D.A. Pease; Cutler Underwriting Agencies Ltd.; D.E. Dowlen; Gravett & Tilling (Underwriting Agencies) Ltd.; M.A. Gravett; Holmes Hayday (Underwriting Agencies) Ltd.; T.J. Hayday; Knightstone (Managing Agency) Ltd.; G. Cooper; Mander Thomas & Cooper (Underwriting Agents) Ltd.; C.J. Mander; MFK Underwriting Agency Ltd.; M.C. Watkins; MIS Underwriting Agency Ltd.; RHM Outhwaite (Underwriting Agencies) Ltd.; Lord Havers; Stewart & Hughman Ltd.; D.C. Craig; Venton Underwriting Agencies Ltd.; R.N. Alwen; Wren Syndicate Management Ltd.; N.C. Haydon; Syndicates-2, 10, 15, 17, 28, 31, 33, 37, 40, 47, 48, 51, 52, 53, 62, 65, 79, 80, 97, 102, 103, 104, 105, 108, 109, 112, 122, 123, 138, 144, 153, 156, 162, 164, 179, 182, 183, 185, 190, 197, 203, 204, 205, 206, 207, 209, 210, 212, 216, 218, 219, 225, 227, 228, 229, 234, 235, 253, 254, 255, 256, 257, 264, 270, 271, 272, 282, 288, 290, 293, 295, 296, 298, 299, 304, 305, 309, 310, 314, 317, 318, 319, 321, 322, 323, 329, 330, 331, 332, 340,

342, 349, 350, 362, 363, 366, 370, 375, 376, 397, 382, 384, 386, 387, 388, 396, 397, 401, 404, 406, 417, 418, 421, 428, 435, 437, 439, 445, 448, 454, 456, 457, 463, 469, 471, 483, 484, 488, 490, 498, 500, 503, 505, 506, 508, 509, 510, 512, 527, 529, 530, 535, 536, 540, 542, 544, 545, 546, 552, 554, 557, 560, 561, 566, 570, 573, 575, 577, 582, 584, 588, 601, 602, 603, 604, 609, 613, 623, 625, 633, 635, 636, 648, 657, 658, 660, 661, 662, 674, 685, 694, 697, 702, 711, 718, 724, 726, 727, 732, 733, 735, 740, 741, 744, 745, 760, 764, 780, 782, 785, 787, 794, 799, 800, 803, 807, 808, 816, 820, 824, 831, 833, 836, 839, 843, 847, 850, 851, 860, 861, 866, 868, 872, 877, 887, 892, 896, 901, 904, 907, 913, 919, 920, 923, 925, 926, 929, 932, 939, 942, 947, 950, 955, 957, 958, 959, 960, 963, 965, 979, 980, 982, 989, 994, 998, 1001, 1002, 1003, 1005, 1006, 1007, 1009, 1011, 1014, 1019, 1021, 1023, 1025, 1027, 1028, 1034, 1035, 1036, 1038, 1041, 1046, 1048, 1049, 1052, 1058, 1066, 1067, 1068, 1069, 1079, 1083, 1084, 1085, 1086, 1087, 1091, 1093, 1095, 1096, 1097, 1098, 1101, 1102, 1104, 1105, 1112, 1114, 1117, 1118, 1122, 1125, 1129, 1137, 1139, 1141, 1143, 1144, 1145, 1148, 1151, 1152, 1153, 1156, 1158, 1162, 1163, 1171, 1173, 1176, 1179, 1181, 1182, 1184, at Lloyd's of London, Defendants-Appellees.

No. 870, Docket 92-9032.

United States Court of Appeals,  
Second Circuit.

Argued Feb. 5, 1993.

Decided June 2, 1993.

Investors in English insurance syndicates brought securities and RICO action against syndicates and agents associated with the syndicates. The United States District Court for the Southern District of New York, Morris E. Lasker, J., dismissed action, 796 F.Supp. 103, and investors appealed. The Court of Appeals, Meskill, Chief Judge, held that: (1) forum selection and arbitration clauses in agreements executed by the investors applied to defendants, and (2) public policy codified in antiwaiver provisions of the

securities laws did not render forum selection and arbitration clauses unenforceable.

Affirmed.

1. Contracts  $\Rightarrow$ 127(4)

Exchanges  $\Rightarrow$ 11(11.1)

Assuming Lloyd's insurance syndicates were legal entities, syndicates were entitled to benefits of forum selection and choice of law clauses in general undertaking entered into by investors in the syndicates and Lloyd's.

2. Principal and Agent  $\Rightarrow$ 101(1)

Investors in Lloyd's insurance syndicates were bound by managing agent's agreements, which defined rights and obligations of managing agent of syndicate and syndicate's investors, and contained choice of forum, arbitration and choice of law clauses, although investors never signed the agreements; investors signed agreements authorizing their agents to enter into managing agent's agreements on their behalf, and underwrote insurance while subject to provision prohibiting them from underwriting insurance other than pursuant to standard agreements.

3. Contracts  $\Rightarrow$ 187(1)

Exchanges  $\Rightarrow$ 11(11.1)

Individual chairs of members' and managing agents of Lloyd's insurance syndicates were entitled to rely on contract clauses incorporated into their employers' agreements in securities action brought by investors in the syndicates; although chairs were neither signatories to nor third-party beneficiaries of any agreement with the investors, their liability arose out of same misconduct charged against the agents, who were covered by the agreements.

4. Arbitration  $\Rightarrow$ 7.3

Employees or disclosed agents of entity that is party to arbitration agreement are protected by that agreement.

5. Contracts  $\Rightarrow$ 127(4)

Forum selection clauses in agreements entered into by investors in Lloyd's insurance syndicates, calling for application of En-

glish law in English forum, applied to investors' actions against managers, representatives or regulator of the syndicates, although investors raised securities claims that were not recognized under English law.

#### 6. Contracts $\Rightarrow$ 127(4)

##### Exchanges $\Rightarrow$ 11(11.1)

Arbitration and forum selection clauses in agreements entered into by investors in Lloyd's insurance syndicates, calling for application of English law in English forum, were not limited to disputes arising under contract, but included investors' federal securities claims; clauses referred to dispute "relating to" the agreements, and agreements were not limited to conduct of business but also covered raising of capital.

#### 7. Contracts $\Rightarrow$ 127(4)

##### Exchanges $\Rightarrow$ 11(11.1)

Public policy codified in antiwaiver provisions of the securities laws did not render unenforceable forum selection and arbitration clauses, calling for application of English law in English forum, in agreements entered into by investors in Lloyd's insurance syndicates, absent showing by investors that available remedies in England were insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure. Securities Act of 1933, § 14, as amended, 15 U.S.C.A. § 77n; Securities Exchange Act of 1934, § 29(a), as amended, 15 U.S.C.A. § 78cc(a).

#### 8. Contracts $\Rightarrow$ 127(4)

##### Exchanges $\Rightarrow$ 11(11.1)

Unavailability of treble damages under Racketeer Influenced and Corrupt Organizations Act (RICO) did not make forum selection and arbitration clauses, calling for application of English law in English forum, unenforceable in agreements entered into by investors in Lloyd's insurance syndicates; investors had adequate potential remedies in England, and there were significant disincentives to deter English issuers from unfairly exploiting American investors. 18 U.S.C.A. § 1961 et seq.

Dale A. Schreiber, New York City (Minna Schrag, Steven B. Feigenbaum, Adrienne B. Koch, Proskauer Rose Goetz & Mendelsohn, New York City, of counsel), for appellants.

Taylor R. Briggs, New York City (Sheila H. Marshall, LeBoeuf, Lamb, Leiby & MacRae, New York City, of counsel), for appellees The Society, Corp., Committee and Council of Lloyd's and their individual Internal Members.

Jonathan C. Thau, New York City (Thomas W. Wilson, Nicholas J. Conca, Fred N. Knopf, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, of counsel), for appellees The Members' Agents.

William A. Meehan, New York City (Daniel M. Bianca, Leo W. Fraser, III, Jeff Imeri, Karen Wallace, Mendes & Mount, New York City, of counsel), for appellees The "Managing Agent Defendants".

Charles A. Gilman, New York City (Robert A. Alessi, Marcy A. Siskind, Cahill Gordon & Reindel, New York City, of counsel), for appellees The So-Called "Syndicate Defendants".

Before: MESKILL, Chief Judge,  
FEINBERG and WINTER, Circuit Judges.

MESKILL, Chief Judge:

Appellants, all American citizens or residents, are more than one hundred "Names" in the Corporation of Lloyd's (Lloyd's). Loosely speaking, Names are investors in Lloyd's syndicates, the entities that nominally underwrite insurance risk. For convenience we will refer to the syndicates as entities; although this is a disputed issue on appeal, we affirm on a different basis and therefore need not resolve this issue. Appellant Names (Roby Names) alleged in their consolidated complaint that they have suffered severe financial loss as a result of appellees' violations of the Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (the Securities Act), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll (the Securities Exchange Act), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. (RICO). This opinion, however, addresses only the Roby Names' contention on appeal that their disputes with

Lloyd's and Lloyd's entities should be litigated in the United States despite a host of contract clauses that appear to bind them to arbitrate in England under English law. The district court held that those contract clauses must be enforced and therefore dismissed the Roby Names' complaint for improper venue. The Roby Names contend that the district court erred because (1) the clauses by their very terms do not protect certain defendants and do not cover the substance of appellants' complaints, and (2) the clauses are unenforceable because they effectively waive compliance with the United States securities laws, contrary to the anti-waiver provisions of those laws and the public policy reflected by them. To understand why we disagree with the Roby Names' arguments it is necessary to understand the structure and operations of Lloyd's, which we discuss in some detail.

#### BACKGROUND

Lloyd's is not a company; it is a market somewhat analogous to the New York Stock Exchange. Lloyd's' governing bodies, the Council and Committee of Lloyd's, promulgate regulations and enforce compliance therewith. There are over 300 syndicates competing within Lloyd's for underwriting business, each managed by an entity called a Managing Agent. Each Managing Agent is responsible for its own syndicate's financial well-being; it tries to attract capital and underwriting business. Managing Agents owe a contractual duty to Names to manage their syndicates with reasonable care and skill. Capital comes from Names, who are represented in their dealings with Lloyd's by Members' Agents (also entities). Members' Agents are obliged to act in the sole interest of their principal Names. By agreement, the Members' Agents stand in a fiduciary relationship to their Names. Lloyd's brokers broker underwriting risk to the syndicates by negotiating with the syndicates' Active Underwriters, individuals appointed by the syndicates' Managing Agents. Brokers, Managing Agents, and Members' Agents all com-

pete with their peers in their respective areas.

While eighty percent of Lloyd's 26,000 Names are English, about 2,500, representing more than \$1 billion in capital, are American. The Roby Names were solicited in the United States by various Lloyd's entities and representatives. Except for a brief meeting in London—a mandatory formality—the entire process by which the Roby Names became Names took place in the United States. In order to become a Name, an individual had to pass a "means test." The Roby Names assert that in 1988, by which time they had all become Names, this test required prospective Names to maintain a net worth of approximately \$170,000. By contrast, Lloyd's claims that Names were required to demonstrate that they were "accredited investors" under Regulation D, 17 C.F.R. § 230.501(a) (1992), so that any sale of securities to them would be exempt from the registration requirements of the Securities Act. See 15 U.S.C. § 77d(2); 17 C.F.R. § 230.506(b) (1992). While there is evidence that this requirement was established after 1988, Lloyd's has not pointed to any proof that the requirement was in effect prior to 1988. Nevertheless, the Securities and Exchange Commission (SEC) has never insisted that Lloyd's or Lloyd's entities register securities.

Upon becoming a Name, an individual selects from a list of syndicates—with the aid of only very limited financial information—and decides how much he wishes to invest in each one. In making these decisions, Names rely to a great extent on the advice of their Members' Agents. The profits that Names earn are in proportion to their capital contributions, and Names bear unlimited liability for their proportionate losses in each syndicate they join. Their liability is several, not joint; no Name is ever responsible for the losses of those fellow Names who comprise the syndicate.

Names are required to enter directly into two agreements and indirectly into two others.<sup>1</sup> The "General Undertaking" is between a Name and the Lloyd's' governing bodies

1. A slightly different structure existed prior to 1990, but the differences are irrelevant for pur-

poses of this appeal and affect at most only five of the 109 appellants.

and contains choice of forum (England) and choice of law (English) clauses. This undertaking does not contain an arbitration clause. The "Members' Agent's Agreement" is between a Name and his Members' Agent and also contains choice of forum (England), arbitration and choice of law (English) clauses. The Members' Agent's Agreements specifically authorize the Members' Agents to enter into a third agreement on behalf of the Names, called the "Managing Agent's Agreement." This agreement, not signed by the Names themselves, and apparently often not even signed by the Managing Agents, defines the rights and obligations of the Managing Agent of a syndicate and that syndicate's Names, and also contains choice of forum (England), arbitration and choice of law (English) clauses. In turn, the Managing Agent's Agreement authorizes the Managing Agents to enter, on behalf of themselves, the Names and the Members' Agents, into a "Syndicate and Arbitration Agreement" which requires disputes related to the affairs of the particular syndicate to be arbitrated in London.

In their consolidated complaint the Roby Names allege violations of sections 12(1) and 12(2) of the Securities Act, 15 U.S.C. § 77i (1), (2), and section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b). In addition, they allege "controlling person" liability under section 15 of the Securities Act, 15 U.S.C. § 77o, and section 20 of the Securities Exchange Act, 15 U.S.C. § 78t. Finally, using these securities law violations as predicate acts, the Roby Names allege several violations of RICO. Each cause of action names as defendants a different combination of the following parties: Lloyd's, Lloyd's governing bodies, certain Managing and Members' Agents, certain individual members of these entities (the Chairs), and certain syndicates.

By order dated June 12, 1992, Judge Lasker dismissed the complaint against the "syndicate defendants," finding that they had no separate existence and therefore could not be sued as entities. 796 F.Supp. 103. By subsequent order dated August 18, 1992, the judge found that the interlocking set of agreements bound the Roby Names to arbitrate or liti-

gate their disputes in London and dismissed the complaint in its entirety for improper venue. A judgment dated August 25, 1992 was entered to this effect. The Roby Names appeal from the June 12th order and the August 25th judgment.

## DISCUSSION

The Roby Names maintain that their investments in Lloyd's syndicates constitute "securities" under the securities laws. We decline to rule on this question today, noting only that we have received little guidance from the SEC on this issue. Instead, we will assume for purposes of this appeal that the Roby Names' consolidated complaint states cognizable claims under the securities laws. For the sake of precision, we note that the assumed sale of a security occurs not when an individual becomes a Name, but instead when a Name *pledges capital* to a syndicate. Nevertheless, we understand the Roby Names to argue that the *solicitation* of individuals to become Names is in fact part of the overall process of soliciting them to pledge capital (i.e., to buy "securities").

The Roby Names present us with two basic arguments as to why these suits should be litigated in the United States: (1) the contract clauses, by their terms, apply neither to the substance of their claims nor to certain defendants; and (2) the clauses are unenforceable due to the public policy codified in the securities laws. We find neither of these arguments persuasive.

### I. Scope of the Contract Clauses

#### A. Parties Covered

We believe every defendant in this action, in the words of Judge Lasker, is either "protected directly by the [contract] clauses or [is an] intended beneficiar[y] entitled to enforce them." *Roby v. The Corporation of Lloyd's*, 824 F.Supp. 336, 342 (S.D.N.Y.1992, as amended). We reject, therefore, the Roby Names' arguments that neither the syndicates, the Managing Agents nor the individual Chairs of the Managing and Members' Agents may assert the protection of these clauses.

1. *Syndicates*

[1] Judge Lasker dismissed the Roby Names' action against the syndicates on the ground that they had no entity existence. Although the Roby Names dispute this legal determination, we need not decide the issue because we may of course affirm the judgment of the district court on any basis that has support in the record. See *I. Meyer Pincus & Assocs. v. Oppenheimer & Co.*, 936 F.2d 759, 761 (2d Cir.1991). Consequently, even if we assume the syndicates do have entity existence, we would affirm their dismissal on the basis of improper venue.

Paragraph 2.2 of the General Undertaking states, in pertinent part:

Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the [Name's] membership of, and/or underwriting of insurance business at, Lloyd's.

Paragraph 2.1 is equally broad and provides for the application of English law. The syndicates are third-party beneficiaries of this agreement. As Professor Corbin has said, a third party will have an enforceable right "if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract." 4 Arthur L. Corbin, *Corbin on Contracts* § 776, at 18 (3d ed. 1967). Here, the syndicates have a pecuniary interest in the certainty and consistency of litigating in one nation's courts under one nation's laws. The extremely broad language of the General Undertaking should make it clear that Lloyd's' intent was to benefit all Lloyd's entities, particularly because potential actions against Lloyd's itself are limited in nature and the broad language of paragraphs 2.1 and 2.2 otherwise would be sorely over broad. Moreover, paragraph 1, which is the only other substantive provision in the General Undertaking, requires Names to abide by the provisions of any other contract authorized by the Council (including, e.g., the Members' Agent's Agreement). We believe this indicates that the General Un-

dertaking was meant to govern the Names' general obligations within the entire Lloyd's community.

As a fallback position, the Roby Names rightly observe that Judge Lasker refused to issue an order confirming that his decision dismissing the action against the other defendants for improper venue applied equally to the syndicate defendants. However, the judge offered no explanation for his refusal and we believe he was simply exercising cautious restraint rather than definitively ruling that the improper venue decision did not apply to the syndicates. Because we believe the reasoning of the venue decision is equally applicable to the syndicate defendants, we hold that the syndicates, if they are entities, are also entitled to the benefits of the forum selection and choice of law clauses.

The General Undertaking contains no arbitration clause, and therefore we do not decide today whether the Roby Names are bound to arbitrate with the syndicates. Whether the Syndicate and Arbitration Agreement or some other agreement may be interpreted to require the Roby Names to arbitrate is a question that should be decided under English law in an English court pursuant to the General Undertaking.

2. *Managing Agents*

[2] The Roby Names contend that they are not bound by the Managing Agent's Agreements because neither they nor the Managing Agents ever signed them. However, the parties clearly assented to be bound by the Managing Agent's Agreements. First, the Roby Names signed the Members' Agent's Agreements which authorize their Members' Agents to enter into Managing Agent's Agreements on their behalf. Second, they signed the General Undertaking which requires them to abide by all of Lloyd's bylaws. Bylaw 8 prohibits any Name from underwriting insurance at Lloyd's other than pursuant to the standard agreements. By underwriting insurance, the Roby Names have demonstrated their intent to be bound by the Managing Agent's Agreements. Similarly, the Managing Agents, by acting in their capacity in accordance with the web of standard agreements, clearly have

demonstrated their intent to abide by the provisions of the Managing Agent's Agreements.

### 3. Individual Chairs

[3] The Roby Names next contend that the individual Chairs of the Members' and Managing Agents are neither signatories to nor third-party beneficiaries of any agreement with the Roby Names and therefore that they must litigate in federal court. We agree with the district court, however, that the individual Chairs are entitled to rely on the contract clauses incorporated into their employers' agreements.

[4] Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement. See, e.g., *Scher v. Bear Stearns & Co.*, 723 F.Supp. 211, 216-17 (S.D.N.Y.1989); *Brener v. Becker Paribas, Inc.*, 628 F.Supp. 442, 451 (S.D.N.Y.1985); *Nesslage v. York Securities, Inc.*, 826 F.2d 231, 233-34 (8th Cir.1987). The Roby Names argue that, unlike those cases, the complaints against the individual Chairs are distinct from those against their employers. They contend that the Chairs have not been sued for acts carried out on behalf of the Members' and Managing Agents (Agents) or in violation of the Agents' contractual obligations to the Roby Names. Instead, they have been sued as "controlling persons" under the securities laws.

We believe that this is a distinction without a legal difference. The complaints against the individual Chairs are completely dependent on the complaints against the Agents. Whether the individual Chairs are disclosed agents or controlling persons, their liability arises out of the same misconduct charged against the Agents. If the scope of the Agents' agreements includes the Agents' misconduct, it necessarily includes the Chairs' derivative misconduct. Moreover, we believe that the parties fully intended to protect the individual Chairs to the extent they are charged with misconduct within the scope of the agreements. If it were otherwise, it would be too easy to circumvent the agreements by naming individuals as defen-

dants instead of the entity Agents themselves.

### B. Disputes Covered

"[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). The Roby Names contend essentially that the forum selection and arbitration clauses apply only to disputes arising from the conduct of the defendants as managers, representatives or regulators. Because this conduct can occur only after the "securities" have been sold, the Roby Names claim that they did not agree to arbitration of, or English jurisdiction over, complaints pertaining to the sale of those "securities." They present two basic arguments: (1) because the choice of law clauses require the application of English law, the Roby Names' United States statutory claims cannot possibly be covered under the agreements, and (2) resolution of their claims does not require the construction of the agreements because the Roby Names have not alleged any breach of contract, and the language of the arbitration and forum selection clauses is not broad enough to cover their claims. We reject both arguments.

#### 1. Application of English Law

[5] It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. See *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir.), cert. denied, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 315 (1983). In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts



must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.

## 2. Scope of the Agreements

[6] Of course, the Roby Names are quite right that if the *substance* of their claims, stripped of their labels, does not fall within the scope of the clauses, the clauses cannot apply. However, they must make this argument in the face of strong public policy in favor of forum selection and arbitration clauses. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972). Indeed, an order to arbitrate "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-53, 4 L.Ed.2d 1409 (1960).

There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses. The Managing and Members' Agent's Agreements speak, with respect to the arbitration clauses, in terms of "dispute(s), difference(s), question(s) or claim(s) relating to" the agreements and, with respect to the forum selection clauses, in terms of submission for "all purposes of and in connection with" the agreements (emphasis added). In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 720 (2d Cir.1982), we held that a forum selection clause that applied to "causes of action arising directly or indirectly from [the agreement]" covered federal antitrust actions. Similarly, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270, *reh'g denied*, 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974), held that controversies and claims "arising out of" a contract for the sale of a business covered securities violations related to that sale. *Id.* 417 U.S. at 519-20, 94 S.Ct. at 2457. We find

no substantive difference in the present context between the phrases "relating to," "in connection with" or "arising from." We therefore reject the Roby Names' contention that only allegations of contractual violations fall within the scope of the clauses.

In the instant case the conduct surrounding the underwriting activities at Lloyd's is integrally related to the sale of Lloyd's "securities" because the "security" is essentially equivalent to the underwriting of risk or the pledging of capital. In order to underwrite risk, a Name is required by Lloyd's' bylaws to enter into the Managing and Members' Agent's Agreements. He may not underwrite risk otherwise; that is, he may not "buy the security" otherwise. Misconduct with respect to the sale of these "securities" necessarily "relates to" these required agreements.

It is perhaps even more persuasive that the agreements are in fact not limited to the conduct of business but also cover the raising of capital. Thus, for instance, the agreements contain certain disclosure requirements. In addition, they establish certain duties of the Agents with respect to the Name and because the agreements are entered into *prior* to the underwriting of risk, these duties are owed with respect to the raising of capital. We believe the agreements are clearly intended to, and in fact do, govern the relationships between Agents and Names with respect to the purchase and sale of Lloyd's "securities." Because the gist of the Roby Names' allegations relates to the sale of those "securities," we hold that their claims "relate to" the Agent's Agreements.

Similarly, and even more forcefully, the broad language of the forum selection clause of the General Undertaking covers the Roby Names' claims at least against Lloyd's' governing bodies. Those claims are undoubtedly related to the Roby Names' "membership of, and/or underwriting of insurance business at, Lloyd's."

## II. Application of the Securities Laws

[7] The Roby Names argue that the public policy codified in the antiwaiver provisions of the securities laws renders unenforceable any agreement that effectively eliminates

compliance with those laws. The Securities Act provides that "[a]ny ... stipulation ... binding any person acquiring any security to waive compliance with any provision of this subchapter ... shall be void." 15 U.S.C. § 77n. Similarly, the Securities Exchange Act states, "[a]ny ... stipulation ... binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder ... shall be void." 15 U.S.C. § 78cc(a). According to the undisputed testimony of a British attorney, neither an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law. From this, the Roby Names conclude that the contract clauses work to waive compliance with the securities laws and therefore are void.

We note at the outset that *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), has been squarely overruled. See *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989); see also *Shearson/American Express v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185, *reh'g denied*, 483 U.S. 1055, 108 S.Ct. 31, 97 L.Ed.2d 819 (1987) (asserting that the assumptions underlying *Wilko* are no longer valid). *Wilko* held that an agreement to arbitrate future controversies was void under the antiwaiver provision of the Securities Act. We do not doubt that judicial hostility to arbitration has receded dramatically since 1953 and that the arbitral forum is perfectly competent to protect litigants' substantive rights. In the words of the *Mitsubishi* Court, quoted by both the *Rodriguez* and *McMahon* Courts, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S.

2. The analysis is no different for the arbitration clauses. Indeed, an arbitration clause is merely a specialized type of forum selection clause. See *Scherk*, 417 U.S. at 519, 94 S.Ct. at 2457. We might have referred to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517 (United States entered on December

at 628, 105 S.Ct. at 3354. If the Roby Names objected merely to the choice of an arbitral rather than a judicial forum, we would reject their claim immediately, citing *Rodriguez* and *McMahon*. However, the Roby Names argue that they have been forced to forgo the substantive protections afforded by the securities laws, not simply the judicial forum. We therefore do not believe that *Rodriguez* and *McMahon* are controlling and must look elsewhere to determine whether parties may contract away their substantive rights under the securities laws.

The Tenth Circuit recently addressed this exact issue in a similar context in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992). Relying primarily on four Supreme Court precedents, *Carnival Cruise Lines v. Shute*, — U.S. —, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); *Mitsubishi*, 473 U.S. 614, 105 S.Ct. 3346; *Scherk*, 417 U.S. 506, 94 S.Ct. 2449; *The Bremen*, 407 U.S. 1, 92 S.Ct. 1907, the *Riley* Court concluded that "[w]hen an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect." 969 F.2d at 957; see also *Bonny v. Society of Lloyd's*, 784 F.Supp. 1350, 1353 (N.D.Ill.1992) (drawing the same conclusion). While we agree with the ultimate result in *Riley*, we are reluctant to interpret the Supreme Court's precedent quite so broadly.

#### A. Presumption of Validity

The Supreme Court certainly has indicated that forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character. See, e.g., *The Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916.<sup>2</sup> In *The Bremen*, the

29, 1970), reprinted in 9 U.S.C. §§ 201-08 (the Treaty), for further support with respect to the arbitration clauses; however, because we are not entirely persuaded that the Treaty applies in the securities context, we prefer to rest our decision on different grounds. Because we understand the Roby Names to complain primarily that the United States securities laws will not be applied

rum in which suit is brought." 407 U.S. at 15, 92 S.Ct. at 1916. By including antiwaiver provisions in the securities laws, Congress made clear its intention that the public policies incorporated into those laws should not be thwarted.

The framers of the securities laws were concerned principally with reversing the common law rule favoring "caveat emptor." See, e.g., *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1025 n. 51 (D.C.Cir.1978), cert. denied, 439 U.S. 1071, 99 S.Ct. 841, 59 L.Ed.2d 37 (1979). To this end, the securities laws are aimed at prospectively protecting American investors from injury by demanding "full and fair disclosure" from issuers. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-28, 95 S.Ct. 1917, 1921, 44 L.Ed.2d 539, reh'g denied, 423 U.S. 884, 96 S.Ct. 157, 46 L.Ed.2d 114 (1975). Private actions exist under the securities laws not because Congress had an overwhelming desire to shift losses after the fact, but rather because private actions provide a potent means of deterring the exploitation of American investors. See, e.g., *Randall v. Loftsgaarden*, 478 U.S. 647, 664, 106 S.Ct. 3143, 3153, 92 L.Ed.2d 525 (1985); *Abrahamson v. Fleschner*, 568 F.2d 862, 872 (2d Cir. 1977), cert. denied, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978). We believe therefore that the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors.

In this sense, the securities laws somewhat resemble the antitrust laws at issue in *Mitsubishi*. The *Mitsubishi* Court enforced a clause providing that all disputes arising under a contract between a Puerto Rican corporation and a Japanese corporation be submitted for arbitration by the Japan Commercial Arbitration Association. The Court recog-

nized that private actions under the Sherman Act, 15 U.S.C. § 1 *et seq.*, play a "central role" in promoting the national interest in a competitive economy. 473 U.S. at 634-35, 105 S.Ct. at 3357-58. Like private actions in the securities context, private actions under the Sherman Act serve primarily a deterrent purpose. *Id.* at 635, 105 S.Ct. at 3358. Nevertheless, the *Mitsubishi* Court held that a Japanese arbitration panel, applying *United States antitrust law*, adequately would further the deterrent purpose of the Sherman Act, despite the panel's lack of allegiance to United States interests. *Id.* at 636-37, 105 S.Ct. at 3358-59. The Court indicated quite clearly in dicta, however, that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n. 19, 105 S.Ct. at 3359 n. 19.<sup>1</sup>

We are concerned in the present case that the Roby Names' contract clauses may operate "in tandem" as a prospective waiver of the statutory remedies for securities violations, thereby circumventing the strong and expansive public policy in deterring such violations. We are cognizant of the important reasons for enforcing such clauses in Lloyd's agreements. Lloyd's is a British concern which raises capital in over 80 nations. Its operations are clearly international in scope. There can be no doubt that the contract clauses mitigate the uncertainty regarding choice of law and forum inherent in the multinational affairs of Lloyd's. Comity also weighs in favor of enforcing the clauses. Yet we do not believe that a United States court can in good conscience enforce clauses that subvert a strong national policy, particularly one that for over fifty years has served as

3. *Scherk*, decided eleven years before *Mitsubishi*, is not to the contrary. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270, reh'g denied, 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974). Although the *Scherk* Court enforced an arbitration clause which contained a choice of law provision (Illinois law), the focus of the opinion is almost exclusively on the validity of the arbitration provision. Nowhere in the opinion is it suggested that a choice of law clause invariably trumps the public policies underlying

the securities laws. In any event, Illinois law is certainly adequate to protect the substantive rights of Alberto-Culver, the American company that allegedly was defrauded in its purchase of Scherck, a German company. Indeed, viewed practically, the complaint was essentially a breach of contract action masquerading as a statutory misrepresentation claim. The Court could confidently rely on Illinois law to protect any public policy of the United States implicated in that action.

the foundation for the United States financial markets and business community. In this case, the victims of Lloyd's' alleged securities violations are hundreds of individual American investors, most of whom were actively solicited in the United States by Lloyd's representatives. We believe that if the Roby Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection and arbitration clauses as against public policy. For the reasons set forth in section C below, however, we conclude that the Roby Names have failed to make such a showing.

### C. Availability of Adequate Remedies

We are satisfied not only that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in this case the policies of ensuring full and fair disclosure and deterring the exploitation of United States investors have not been subverted. We address the fraud and misrepresentation claims first.

#### 1. Fraud and Misrepresentation

English common law provides remedies for knowing or reckless deceit, negligent misrepresentation, and even innocent misrepresentation. Affidavit of Anthony Colman ¶ 20. Moreover, the Misrepresentation Act of 1967 provides some additional statutory remedies. *Id.* While the Roby Names might have been able to sue "controlling persons" under the United States securities laws and establish liability without proving reliance, it certainly is not unfair for English law to require proof of actual misconduct and reliance. Furthermore we are skeptical that "controlling person" liability could be established against many of the defendants here. For instance, we question whether the Lloyd's' governing bodies have "control" over other Lloyd's entities in the sense intended under the securities laws. See, e.g., 17 C.F.R. § 230.405 (1992) (defining "control"); *Harrison v. Dean Witter Reynolds*, 974 F.2d 873, 881 (7th Cir. 1992).

In any event, the available remedies are adequate and the potential recoveries substantial. This is particularly true given the low scienter requirements under English Misrepresentation law (e.g., negligence, "innocence"). Moreover, together with the contractual obligations imposing certain fiduciary and similar duties on Members' and Managing Agents, we believe that the available remedies and potential damages recoveries suffice to deter deception of American investors.

In this context we also note that many of the so-called "misrepresentations" the Roby Names allege are really complaints about the conduct of Lloyd's' affairs rather than complaints about fraudulent reporting. Thus, for instance, while it may be true that the defendants kept insufficient reserves and permitted "questionable accounting practices," failure to convey this information to the Roby Names is more a violation of the letter of the securities laws than their spirit, because the complaints really address Lloyd's' misconduct after securities are sold. We do not believe that these complaints implicate the public policy of the securities laws.

Finally, although, as the Roby Names observe, section 14 of the Lloyd's Act of 1982 exempts the Corporation of Lloyd's (and its officers and employees) from liability, no other entity within Lloyd's is exempt. Moreover, even the Corporation of Lloyd's is not exempt for acts "done in bad faith." Furthermore, as a self-regulating organization, we cannot say that Lloyd's' own bylaws will not insure the honesty and forthrightness that American investors deserve and expect. We conclude that the Roby Names have adequate remedies in England to vindicate their statutory fraud and misrepresentation claims.

#### 2. Disclosure

We turn now to address whether adequate remedies are available to deter issuers from issuing securities without disclosing sufficient information to permit investors to make informed decisions. We believe that this policy concern is somewhat diluted in this case because the SEC consistently has exempted Lloyd's from the registration requirements of the securities laws. Apparently the SEC has

decided that Lloyd's' means test meets the requirements of Regulation D. We are extremely reluctant to dispute the SEC's apparent judgment that the Roby Names are sophisticated enough that they do not need the disclosure protections of the securities laws.

In any event, English law in this case provides Lloyd's entities with an adequate inducement to disclose material information to American investors: failure to do so gives rise to liability for breach of contract. For instance, the Members' Agent's Agreement requires each Members' Agent "promptly" to provide Names with a host of information, and to

disclose ... in good time any information in its possession relating to any of the Contracted Syndicates, or to any syndicate which the Agent has advised the Name to 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 his participation in, any such syndicate, and use its reasonable endeavours to obtain any such information.

(emphasis added). Similarly, paragraph 4.2(i) of the Managing Agent's Agreement requires Managing Agents to disclose "in good time" relevant information to the Name or his Members' Agent. The Roby Names, therefore, certainly can allege breach of contract claims under English law. In addition, under their contract Members' Agents owe certain fiduciary duties to Names which provide a further basis for suit.

While we do not doubt that the United States securities laws would provide the Roby Names with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements, we are convinced that there are ample and just remedies under English law. Moreover, we cannot say that the policies underlying our securities laws will be offended by the application of English law. In this case, the Roby Names have entered into contracts that require substantial disclosure by both the Members' and Managing Agents. The specter of liability for breach of contract should act as an adequate deterrent to the exploitation of American investors. The well developed English law of fraud and misrepresenta-

tion likewise adequately requires that the disclosure be "fair."

### III. Application of RICO

[8] That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the Roby Names' contract clauses must be enforced. As we have explained, the Roby Names have adequate potential remedies in England and there are significant disincentives to deter English issuers from unfairly exploiting American investors. Although the remedies and disincentives might be magnified by the application of RICO, we cannot say that application of English law would subvert the policies underlying that statute.

### CONCLUSION

For the foregoing reasons we hold that the Roby Names' contract clauses cover the scope of, and the parties named in, the complaint and that the Roby Names have remedies under English law adequate not only to vindicate their substantive rights but also to protect the public policies established by the United States securities laws.

The judgment and order of the district court are affirmed.



**TWIN PEAKS PRODUCTIONS,  
INC., Plaintiff-Appellee-  
Cross-Appellant,**

v.

**PUBLICATIONS INTERNATIONAL,  
LTD., Louis N. Weber, Scott Knickel-  
bine, and Penguin USA, Inc., Defen-  
dants-Appellants-Cross-Appellees.**

Nos. 919, 1392, Dockets 92-7933, 92-7985.

United States Court of Appeals,  
Second Circuit.

Argued March 1, 1993.

Decided June 7, 1993.

As Amended July 6, 1993.

Owner of trademark and copyrighted television series sued book author and pub-