To be Argued by:
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New York Supreme Court
Appellate Division – First Department

THE SOCIETY OF LLOYD'S,

Plaintiff-Respondent,

– against –

LORRAINE GRAVES GRACE and OLIVER R. GRACE,

Defendants-Appellants.

BRIEF OF PLAINTIFF-RESPONDENT

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Plaintiff-Respondent Society of Lloyd's ("Lloyd's") respectfully submits this brief in opposition to the brief of Defendants-Appellants Lorraine Graves Grace and Oliver Grace (together, the "Graces")[1] seeking to reverse the judgment of the lower court giving recognition to the judgments entered against the Graces by an English court (the "Judgments").

PRELIMINARY STATEMENT

This appeal presents a simple question: whether final judgments entered by the English courts applying English law (as the parties had contractually designated), should be recognized and enforced under Article 53 of the CPLR, where the judgment debtors do not dispute that

- they were subject to the jurisdiction of the English courts;
- they had notice of the English proceedings and appeared, through their designated counsel, in those proceedings;
- they asserted various affirmative defenses to liability in that proceeding, which were rejected by the English court; and,
- the Judgments are final, conclusive and enforceable in England.

Under Article 53, foreign country judgments that are final, conclusive and enforceable where rendered are enforceable in New York courts as long as the parties were subject to the jurisdiction of the foreign country's courts, and the foreign judicial system has impartial tribunals with procedures "compatible with the requirements of due process of law." The trial court (Cahn, J.) correctly ruled that the Judgments meet these standards, and properly granted Lloyd's motion for summary judgment in lieu of complaint recognizing the Judgments.

England has long been recognized by American courts as a jurisdiction with impartial tribunals and procedures compatible with due process of law. The Judgments, which require the Graces to pay a premium for reinsurance coverage issued to them by Equitas Reinsurance Ltd. ("Equitas"), were obtained consistent with these procedures. While the Graces attack the English

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[1] The Brief of Defendants-Appellants is cited herein as "App. Br.".

proceedings as "summary proceedings" (App. Br. 4) that denied them an opportunity to present a meaningful defense to Lloyd's claim for the Equitas premium, the Judgments were entered only after a extensive litigation lasting twenty-two months.

During the course of that litigation, the Graces, through their attorneys, argued that their allegation that Lloyd's had fraudulently induced them to become members of Lloyd's, and underwrite insurance in the Lloyd's market, operated as an affirmative defense or set-off to their obligation to pay a premium for the reinsurance coverage provided by Equitas with respect to their insurance obligations. The Graces thus argued that judgment for the Equitas premiums should not be entered before they had an opportunity to adjudicate their fraud allegations. The Graces also challenged the enforceability of provisions in the Equitas reinsurance contract which foreclosed any challenge to the amount of the premium charged unless evidence of "manifest error" was presented. The adequacy of the Graces' defenses was carefully considered by the English court, which found, after extensive argument and briefing, that the Graces' defenses were insufficient as a matter of substantive English law.

Significantly, however, the English court did not deny the Graces any opportunity to prove their allegations of fraud; it simply ruled that the Graces' fraud allegations constituted an independent claim for damages, rather than a defense or set-off to their obligation to pay the Equitas premium, and therefore must be pursued separately. Following entry of the Judgments, several hundred Names, including a number of American Names, brought proceedings against Lloyd's alleging fraud in the inducement of their membership of Lloyd's and/or their underwriting of insurance policies, and a six month trial was held. Judgment is expected shortly. The Graces, despite their insistence that their fraud allegations have merit, chose not to participate as claimants in those proceedings.

The Graces have instead engaged in a transparent effort to relitigate, in opposition to recognition to the Judgments in this jurisdiction, the substantive issues already determined adversely to them in the English proceedings. The Graces first argue that the English court's rejection of their defenses somehow constitutes a deprivation of due process. However, a ruling

by a foreign court, after extensive litigation, that the defenses proffered by the defendant are insufficient as a matter of law does not mean that the foreign tribunal's procedures were not "compatible with the requirements of due process of law." The Graces' dissatisfaction with the outcome of the English proceedings does not transform a substantive ruling into a violation of due process.

Equally without merit is the Graces' assertion that the trial court abused its discretion in rejecting their argument that recognition of the Judgments is somehow contrary to the public policy of the United States and/or New York. The gravamen of the Graces' public policy challenge, like their due process challenge, is that the Judgments were entered without permitting them first to litigate their allegations of fraud against Lloyd's. In essence, the Graces argue that U.S. and New York public policy requires that English law recognize their fraud claims as affirmative defenses to payment of the Equitas premium. However, it is well-established that differences between the substantive law of the foreign jurisdiction and the substantive law of the local forum — even if they result in a different outcome — do not mean that enforcement of a foreign country judgment violates public policy.

This principle applies with even greater force in this case, because the Graces have twice been told by American courts, in two separate actions, that they were bound by their contractual agreement to litigate their claims against Lloyd's in the English courts pursuant to English law. In both cases, the Graces were unequivocally told that differences between English and American laws and procedures did not mean that the legal remedies available to them in England were inadequate. It would be utterly inconsistent with these rulings for the New York courts now to deny recognition to the Judgments on public policy grounds.

The Graces have been seeking to avoid their underwriting obligations for many years, repeatedly attempting to circumvent their contractual agreement to litigate in England. Now they seek to relitigate issues determined adversely to them by the courts of the contractually chosen forum. Enough is enough. The order of the trial court recognizing the Judgments should be affirmed.

STATEMENT OF UNDISPUTED FACTS

The Graces, for the "sake of brevity" (App. Br. 4) chose not to include a statement of undisputed facts in their brief even though the Rules of this Court require "a concise statement . . . of the facts which should be known to determine the questions involved." Rules of the First Department § 600.10(d)(iii). The Graces' omission in that regard is telling, because the material undisputed facts in this action — which are the only facts relevant on a motion for summary judgment — conclusively demonstrate that the Judgments are enforceable.[2]

As the trial court correctly found, based on the undisputed evidence before it, Lloyd's is not an insurer and does not insure risks. R.17.[3] Rather, pursuant to a succession of Parliamentary Acts (viz., the Lloyd's Acts 1871-1982), Lloyd's is charged with the duty and authority to regulate an international insurance market located in London, England. R.17.[4] The only providers of insurance in the Lloyd's market are underwriting members of Lloyd's, who are known as "Names." Lorraine Grace became a Name in 1979 (R.51 (Holden I Aff. ¶ 5)), and Oliver Grace became a Name in 1986. R.118 (Holden II Aff. ¶ 5). As Names, the Graces underwrote insurance in groups known as syndicates, but their obligation to pay claims on the policies they underwrote was personal and direct. R.51-52 (Holden I Aff. ¶ 6); R.118-19 (Holden II Aff. ¶ 6).

As a condition of their membership in Lloyd's, each of the Graces entered into agreements governing his or her membership of and underwriting in the Lloyd's market,

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2 Lloyd's does dispute the allegations of fraud submitted in the affidavit of their attorney on "information and belief." Those allegations are not even admissible, as they must be, on a motion for summary judgment.

3 See also R.51 (Affidavit of Philip Holden, dated August 14, 1998, in Support of Motion for Summary Judgment in Lieu of Complaint against Lorraine Grace ("Holden I Aff.") ¶ 4); R.117-18 (Affidavit of Philip Holden, dated August 14, 1998, in Support of Motion for Summary Judgment in Lieu of Complaint against Oliver Grace (R.118 ("Holden II Aff.") ¶ 4).

4 R.17. See also R.50-51 (Holden I Aff. ¶¶ 2-3); R.117-18 (Holden II Aff. ¶¶ 2-3).

including the General Undertaking, a simple two-page agreement. In the General Undertaking,

- the Graces each agreed to comply with the provisions of the Lloyd's Acts 1871-1982 and any bylaws or regulations promulgated by Lloyd's thereunder in connection with their membership of, or underwriting at, Lloyd's (R.51 & R.58 ¶ 1; R.118 & R.125 ¶ 1);

- the Graces each agreed to submit any disputes "arising out of or relating to" their membership or underwriting of insurance business in the Lloyd's market to English courts under English law (R.51 & R.58 ¶¶ 2.1, 2.2; R.118 & R.125 ¶¶ 2.1, 2.2); and,

- the Graces each agreed that any judgment entered against them by an English court would be binding and enforceable in the courts of another jurisdiction. Id.

As discussed further below, see infra at 7-8, the enforceability of the Graces' obligations under the General Undertaking, including the provisions designating that all disputes relating to their membership of or underwriting at Lloyd's would be resolved in England pursuant to English law (the "Choice Clauses"), has twice been affirmed by the federal courts. Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir.) (holding that public policies underlying the federal securities laws did not bar enforcement of agreement to litigate in England, and that English law and courts provided adequate, albeit not identical, remedies for underlying claims of fraud), cert. denied, 525 U.S. 943 (1998); Grace v. Corporation of Lloyd's, No. 96 Civ. 8334 (JGK), 1997 U.S. Dist. LEXIS 14994 (S.D.N.Y. Oct. 2, 1997) (rejecting claim that public policies of New York statutes and common law barred enforcement of contractual choice of English law and forum). Seven other federal appellate courts, including the Second Circuit, have upheld the enforceability of the Choice Clauses in the face of similar challenges by other U.S. Names.[5]

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5 Stamm v. Barclays Bank, 153 F.3d 30 (2d Cir. 1998); Lipcon v. Underwriters at Lloyd's, London, 114 F.3d 1285 (11th Cir. 1998), cert. denied, 525 U.S. 1093 (1999); Haynsworth v. Corporation of Lloyd's, 121 F.3d 956, 969 (5th Cir. 1997), cert. denied sub. nom. Haynswroth v. Lloyd's of London, 523 U.S. 1072, (1998); Allen v. Corporation of Lloyd's, 94 F.3d mandamus denied, 521 U.S. 1102 (1996); Shell v. R.W. Sturge Ltd., 55 F.3d 1227, 1231 (6th Cir. 1995); Bonny v. Society of Lloyd's, 3 F.3d 156, 161 (7th

Footnote continued

As the trial court correctly noted, underwriting at Lloyd's was profitable for most of Lloyd's long existence. R.22. However, in the late 1980s and early 1990s, Names in the Lloyd's market incurred aggregate underwriting losses of over $12 billion. As a result, a significant amount of intra-market litigation began to embroil the Lloyd's market. In order to resolve these disputes — which threatened the viability of the Lloyd's market and placed policyholders who had paid premiums to Names at risk of non-payment in respect of valid claims — Lloyd's devised the reconstruction and renewal ("R&R") plan. R.52 (Holden I Aff. ¶ 5); R.119-20 (Holden II Aff. ¶ 5).

Lloyd's R&R Plan had two components: (1) an offer of settlement was made to each Name with liabilities on pre-1993 underwriting obligations to end litigation and to assist them in meeting their underwriting liabilities, and (2) the provision of reinsurance otherwise unavailable to Names in respect of their pre-1993 underwriting obligations through Equitas, a company that was created solely to provide reinsurance to Names for such obligations. R.52 (Holden I Aff. ¶ 7); R.119 (Holden II Aff. ¶ 7). Pursuant to a bye-law promulgated by Lloyd's, each Name was required to purchase reinsurance from Equitas regardless of whether that Name also accepted Lloyd's offer of settlement. Id. Each Name was provided a settlement offer document describing the proposed transaction.[6]

In order to implement R&R, Lloyd's, pursuant to the regulatory authority granted to it by Parliament, appointed a substitute agent, AUA9, through which each Name became bound to

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Cir. 1993), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.) cert. denied, 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

6 Contrary to the Graces' assertion (App. Br. at 5 n.5), the Settlement Offer Document ("SOD") provided to the Graces makes clear that any Name who did not accept the settlement offer would retain the right to pursue, in the appropriate forum, any claims that he may have relating to his membership of or underwriting in the Lloyd's market. R.688-97 at R.722-30 (Updike Aff. Ex. 4, SOD at ch. 3).

make payment of the Equitas premium in accordance with the Equitas reinsurance contract, regardless of whether he accepted the settlement offer. The English courts subsequently held that Lloyd's was acting within its statutory authority, as set forth in the Lloyd's Acts 1871-1982, in implementing R&R.[7] In particular, the English courts have upheld the validity of each of the contractual provisions challenged by the Graces in this case, including the mandatory nature of the Equitas reinsurance contract,[9] the so-called "pay now, sue later" clause, which provided that claims of fraud against Lloyd's would not constitute an affirmative defense or set-off to the obligation to pay the Equitas premium,[10] and the "conclusive evidence clause," which provided that Names could only challenge the amount of the premium charged for Equitas' reinsurance of their underwriting obligations based on "manifest error." R.380-436 at R.424-27 (Fraser & Ors).

Less than five percent of Names (including the Graces) rejected Lloyd's offer of settlement, and a still smaller number refused to make payment of the Equitas premium. The R&R plan became effective on September 3, 1996, and thereafter each Name was required to pay the individual cost of reinsurance by payment of a premium to Equitas (the "Equitas premium"). R.52-53 (Holden I Aff. ¶¶ 7-8); R.118-19 (Holden II. Aff. ¶¶ 7-8). The right to recover payment of the Equitas premium was subsequently assigned by Equitas to Lloyd's.[11]

In October 1996, after R&R had been implemented, Lloyd's advised the Graces that, if payment was not made for the Equitas premium, Lloyd's would begin collection efforts. Despite

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7 R.53 (Holden I Aff. ¶ 10); R.120 (Holden II. Aff. ¶ 10 (both citing Society of Lloyd's v. Leighs, Lyon and Wilkinson [Court of Appeal July 31, 1997]).

8 The Department of Treasury of the United Kingdom is now responsible for supervising the regulation of Lloyd's.

9 R.224-82 (Society of Lloyd's v. Leighs et al.); R.332-59 (Society of Lloyd's v. Lyons et al.).

10 R.283-31 (Society of Lloyd's v. Wilkinson et al.); R.332-59 (Society of Lloyd's v. Lyons et al.).

11 R.53 (Holden I Aff. ¶ 9); R.119 (Holden II Aff. ¶ 9).

the fact that the Richards district court had already ruled that the Graces' contractual choice of forum and law did not violate public policy, the Graces sought to enjoin payment of their Equitas premium in a New York court, asserting New York common-law and statutory claims against Lloyd's based on allegations relating, in part, to the mandatory nature of the Equitas contract and the appointment of AUA9. R.1940-2107 at R.1942-82 (Affidavit of Stephanie J. Goldstein ("Goldstein Aff.") Ex. 1 (attaching Complaint)).[12] The Graces also claimed in that action, as they do again here, that they should not be required to make payment of their Equitas premium until their allegations of fraud against Lloyd's — which were virtually identical to those asserted by the Graces in Richards in 1994 — were litigated. The court, however, held that the Graces were bound by the Choice Clause to pursue their fraud claims against Lloyd's, as well as their challenges to the Equitas reinsurance contract, in England, and dismissed the Graces' action. Grace v. Corporation of Lloyd's, No. 96 Civ. 8334 (JGK), 1997 U.S. Dist. LEXIS 14994 (S.D.N.Y. Oct. 2, 1997).[13]

Thereafter, the Graces continued to refuse to make payment of the Equitas premium, and Lloyd's commenced proceedings against them (and other Names) in the High Court of Justice,

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12 E.g., R.1944-45, Complaint ¶ 15 (alleging that "Lloyd's has, and presently is, engaged in a scheme to defraud New York residents generally, and plaintiffs specifically . . . in connection with a scheme to transfer plaintiffs' assets and obligations without their consents to separate insurance company other than Lloyd's."); R.1945, Complaint ¶ 17 (alleging that Lloyd's "failed to disclose material information in connection with . . . the collection of funds from plaintiffs for alleged losses which either cannot be documented, or for which Lloyd's and its agents refuse to document); and (d) the transfer without plaintiffs' consents of their assets and obligations to a separate insurance company other than Lloyd's"); R.1969, Complaint ¶ 118 (alleging that "in late December 1995, Lloyd's required all Agents to sign, on behalf of Names including plaintiffs, agreements requiring liabilities for the years 1992 and earlier to be reinsured into Equitas with a premium due from Names to be determined solely by Lloyd's without documentation."); R.1969, Complaint ¶ 119 ("Lloyd's has demanded . . . additional premiums from plaintiffs for Equitas reinsurance without providing any information to plaintiffs regarding the basis for this demand.").

13 The Fourth Circuit had previously held that challenges to any aspect of the R&R plan, including the terms of the Equitas reinsurance contract, were subject to the Choice Clause and had to be litigated in England pursuant to English law. Allen v. Corporation of Lloyd's, 94 F.3d 923, 929 (4th Cir. 1996), mandamus denied, 521 U.S. 1102 (1996).

Queen's Bench Division, in England seeking payment of their respective Equitas premiums plus unpaid interest thereon (the "English actions"). R.54 (Holden I Aff. ¶ 11); R.121 (Holden II Aff. ¶ 11). On May 8, 1997, Lloyd's notified each of the Graces of the commencement of the English actions by serving a writ of summons on solicitors nominated by them as their agents for service of process. R.54 (Holden I Aff. ¶ 11); R.121 (Holden II Aff. ¶ 11). Each of the Graces served an acknowledgment of service, through their solicitors of record, notifying Lloyd's that they intended to contest Lloyd's claim. Id.

The Graces' characterization of the English proceedings as "summary" (App. Br. at 4), is entirely inaccurate. In the English action, the Names (including the Graces) raised a number of substantive defenses to prevent Lloyd's from recovering the outstanding Equitas premium from non-accepting Names. These substantive defenses, which are virtually identical to those the Graces assert here as a basis for non-recognition of the Judgments, included:

- that Lloyd's lacked the regulatory authority under the Lloyd's Acts 1871-1982 to mandate that each Name, including the Graces, become a party to the Equitas reinsurance contract.

- that Names could, despite the terms of Clause 5.5 of the Equitas reinsurance contract (i.e., the "pay now, sue later" clause), assert a claim of fraud as a set-off or defense to the obligation to make payment of the Equitas premium.

- that Names could, despite the terms of Clause 5.10 of the Equitas reinsurance contract (i.e., the "conclusive evidence" clause), obtain discovery of records in Lloyd's possession regarding the basis of the calculation of the amount of the Equitas premium due without demonstrating "manifest error."

After a series of hearings taking place over twenty-two months, involving extensive briefing and oral argument by the parties, the English trial and appellate courts considered each

of these defenses and rejected them.[14] Having ruled against the Names (including the Graces) on the defenses to their obligation to pay the Equitas premium, the English court entered a judgment in favor of Lloyd's against Lorraine Grace for UK£206,685.37 and against Oliver Grace for UK£269,293.70 (the "Judgments"). See R.54-55 (Holden I Aff. ¶ 13 & Exh. PH7 (attaching certified copy of the Judgment against Lorraine Grace); R.121-22, (Holden II Aff. ¶ 13 & Exh. PH7 (attaching certified copy of the Judgment against Oliver Grace).

A three judge panel of the United Kingdom Court of Appeal heard argument on the application for leave to appeal by Names, including the Graces, from June 15-19, 1998. Leave to appeal was denied on July 31, 1998, although the Court also discussed the merits of the Names' arguments on appeal and found them lacking. R.54-55 (Holden I Aff. ¶ 13); R.122 (Holden II. Aff. ¶ 13). Consequently, each of the Judgments is final, conclusive, and fully enforceable in England (id.), and the Judgments have been accruing interest at a rate of eight percent (8%) per annum since the date of Judgment. Id. The Graces have not satisfied their judgment debt. R.55 (Holden I Aff. ¶ 14; R.122 (Holden II Aff. ¶ 14).

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14 R.224-82, Society of Lloyd's v. Dennis Hugh Fitzgerald Leigh and others (High Court of Justice February 20, 1997) (ruling, as a matter of English law, that Lloyd's acted within its regulatory authority in implementing R&R and in appointing a substitute agent to bind Names to the Equitas reinsurance contract); R.283-331, Society of Lloyd's v. Wilkinson (High Court of Justice Apr. 23, 1997) (ruling, as a matter of English law, that Names, under the pay now, sue later clause, could not assert their fraud claims as a defense or set-off to payment of the Equitas premium); R.232-59 Society of Lloyd's v. Lyons, Leighs & Wilkinson (Court of Appeal July 31, 1997) (affirming rulings of low court that, as a matter of English law, (i) Lloyd's acted within its regulatory authority in implementing R&R and in appointing a substitute agent to bind non-accepting Names to the Equitas reinsurance contract, and (ii) Names could not assert fraud as a defense to payment of the Equitas premium); R.360-79 Society of Lloyd's v. Fraser & Ors. (High Court of Justice March 4, 1998) (ruling, as a matter of English law, on evidence that must be submitted by Lloyd's under the conclusive evidence clause and standard for Names challenging clause); R.380-436 Society of Lloyd's v. Fraser & Ors. (Court of Appeal 31 July 1998) (repeating its prior rulings and ruling on validity of conclusive evidence clause as a matter of English law).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE JUDGMENTS ARE ENFORCEABLE IN NEW YORK

Article 53 of the N.Y. Civil Practice Law and Rules sets forth the only prerequisites to recognition of foreign country money judgments. Under the Act, a judgment entered by a foreign court cannot be recognized, and subsequently enforced, in New York unless:

(1) the foreign country judgment "is final, conclusive, and enforceable where rendered" (CPLR § 5302);

(2) the foreign country judgment grants recovery of a sum of money (id. § 5303);

(3) the foreign court had personal jurisdiction over the defendant (id. § 5304(a)(2)); and,

(4) the foreign country judgment was rendered by a system with impartial tribunals and with procedures "compatible with the requirements of due process of law" (id. § 5304(a)(1)).

The Graces do not dispute that the first three of the four conditions have been satisfied here, and instead argue that only the fourth condition has not been met, notwithstanding their notice of and participation in the English action. Their challenge, as the trial court properly ruled, has no merit.[15]

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15 The Graces' appellate papers are replete with references to a ruling by a federal district court in Illinois recognizing judgments against Illinois Names obtained by Lloyd's in England for payment of the Equitas premium, Society of Lloyd's v. Ashenden, No. 985335, 1999 U.S. Dist. LEXIS 6575 (N.D. Ill.) Apr. 22, 1999). See App. Br. 7-8, 12-13, 19, 22, 25. While the trial court noted those proceedings by repeating aspects of the ruling in its opinion, the trial court reached a "similar decision" in recognizing the Judgments against the Graces, albeit for different reasons. Lloyd's will thus not, for purposes of this appeal adjudicate issues in a separate federal court proceeding in Illinois to which the Graces are not parties. Nor is there any basis in the Graces' effort to claim "error" in the rulings of the Ashenden court as a basis to appeal from the trial court's order.

A. The Trial Court Correctly Held That The Judgments Were Rendered Pursuant to Procedures Compatible With Due Process

The English courts are part of a judicial system long acknowledged by courts in New York as one that is fair and impartial. Notably, in a case brought by the Graces against Lloyd's, the court rejected the suggestion that English courts were an improper forum in which to adjudicate their claims against Lloyd's. Richards v. Lloyd's of London, 135 F.3d 1289, 1293 (9th Cir.) (en banc), cert. denied, 525 U.S. 943 (1998). The United States Court of Appeals for the Second Circuit reached the same conclusion in cases brought by other U.S. Names against Lloyd's. Stamm v. Barclay's Bank, 153 F.3d 30, 33 (2d Cir. 1998); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.), cert. denied, 510 U.S. 945 (1993).

English courts are also routinely recognized by U.S. courts as adequately protecting Americans' due process rights. As one court has stated:

> In affording the English judgment the effect that we have, we are of course, mindful that the system which rendered it is the very format from which our system developed; a system which has procedures and goals which closely parallel our own. Surely it could not be claimed that the English system is any other than one whose "system of jurisprudence [is] likely to secure an impartial administration of justice between the citizens of its own country and those of other countries."

Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 166 (E.D. Pa. 1970) (quoting Hilton v. Guyot, 159 U.S. 113, 202 (1895)), aff'd, 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). See also Colonial Bank v. Worms, 550 F. Supp. 55, 58 (S.D.N.Y. 1982) ("English procedure comports with our standards of due process.") (citation omitted); In re Buchanan, 146 N.Y. 264, 271 (1895) ("The phrase 'due process of law,' used in the constitution, comes to us from our English ancestors."); William Stockler & Co. v. Heller, 189 A.D.2d 601, 602, 591 N.Y.S.2d 837, 838 (1st Dep't 1993) (affirming summary judgment in lieu of complaint enforcing English judgment despite defendant's assertion that English judgment was unenforceable because, inter alia, defendant "could not get due process in England"); Citadel Management, Inc. v. Hertzog, 182 Misc.2d 902, 904, 703 N.Y.S.2d 670, 671

(Queens County 1999) ("the English courts have traditionally been viewed as in compliance with our standards of due process under a system which provides impartial tribunals.").

Because England's procedures are akin to our own, any challenge based on alleged procedural unfairness must be "construed especially narrowly," Canadian Imperial Bank of Commerce v. Saxony Carpet Co., 899 F. Supp. 1248, 1252 (S.D.N.Y. 1995), aff'd, 104 F.3d 352 (2d Cir. 1996). We are unaware of any case where a court in this country has refused to recognize a judgment rendered by an English court on the ground that English courts either are not impartial or do not have procedures compatible with due process of law. Nor do the Graces cite any such cases.

The dearth of precedent is not surprising, since the hallmark of procedural due process, is that the defendants receive notice and an opportunity to be heard. E.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford then an opportunity to present their objections"); Colonial Bank v. Worms, 550 F. Supp. 55, 58 (S.D.N.Y. 1982) (finding no denial of due process where defendant had notice and an opportunity to be heard). The cases cited by the Graces confirm that due process, in the context of recognizing foreign country judgments, requires notice and an opportunity to be heard that enables the defendant to present defenses to the claims being asserted, not an advantageous outcome on the merits of those defenses.[16] Here, of course, it is undisputed that the Graces had notice of the English action, appointed counsel

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16 For example, in Griffin v. Griffin, 327 U.S. 220, (1946), the Supreme Court of the United States denied recognition to a foreign state's judgment on due process grounds. In so doing, the Court made clear that the reason for its decision was the failure to provide the defendant ample notice of the proceedings, thus precluding him from presenting any substantive defenses thereto. Id. at 234. See also Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (denying enforcement to an adoption decree because defendant was given no notice of the proceedings where the decree was entered); Stewart v. Stewart, 28 A.D.2d 1106, 284 N.Y.S.2d 409 (1st Dep't 1967) (no due process where a judgment was rendered "without notice to the appellant" which deprived appellant of "opportunity to raise any defenses.").

who represented their interests, and argued the legal sufficiency of their defenses to payment of the Equitas premium. These defenses were rejected as a matter of substantive English law.

The Graces' reliance on the United States Supreme Court's holdings in United States v. James Daniel Good Real Property, 510 U.S. 43 (1993), and Matthews v. Eldridge, 424 U.S. 319 (1976), does not support their assertion that they were denied due process because they did not have a "meaningful pre-deprivation hearing" prior to entry of the Judgments. App. Br. 12. The only due process issue addressed in those cases is whether, consistent with the Due Process Clause of either the Fifth or Fourteenth Amendment, a governmental body may deprive a person of his property rights without a hearing, making those cases inapposite by their terms.[17] Nothing in these cases — even assuming *arguendo* that they apply in cases where, as here, a private entity rather than a governmental actor is involved — supports the proposition that a foreign tribunal's rejection of a judgment debtor's defense as a matter of law means that a pre-deprivation hearing was not "meaningful," let alone that the foreign tribunal was one without procedures "compatible with due process of law" which is all Article 53 of the CPLR requires. CPLR 5304(a)(1). The Graces' real complaint about the English proceeding is not that it was not meaningful, but that it came out the wrong way.

As the trial court correctly held, the Graces' rights to due process were satisfied because they had an opportunity to present a defense to the claims against them in the English proceedings:

> The defendants herein have not been denied of their due process rights, even though they may well eventually be able to prove their fraud claims.

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17 See James Daniel, 510 U.S. at 46 (addressing whether the government could seize real property under the Due Process Clause of the Fourteenth Amendment ex parte); Matthews, 424 U.S. at 333-35 (addressing whether a hearing was necessary under the Due Process Clause of the Fifth Amendment prior to initial termination of disability benefits) See also Connecticut v. Doehr, 501 U.S. 1, 14-15 (1991) (addressing whether the state government could attach property prior to any hearing under the Due Process Clause).

> First, it is undisputed that the Graces were notified of the English proceedings . . . and that the Graces participated in those proceedings before judgment was rendered. Therefore, the court is not persuaded that the "pay now, sue later" and "conclusive evidence" clauses are the functional equivalent of a cognovit, in which an obligor consents in advance to a creditor's obtaining a judgment without notice to the obligor or a hearing.

R.38. The trial court recognized that the Judgments had been entered only after the Graces' defenses had been considered and rejected by the English court:

> The gravamen of the Graces' argument is that they are being required to pay the judgment prior to litigating their challenge to the judgment in a subsequent action. . . . However, the Graces knowingly and willingly agreed . . . to litigate their claims against Lloyd's in the English courts, under English law. Now, the English courts have determined that the "pay now, sue later" and "conclusive evidence" clauses were validly enacted by Lloyd's and that those clauses bar the Names from litigating their claims against Lloyd's before litigating their Equitas premium.

R.39. Due process requires nothing more.

B. The Graces' Due Process Challenge Is a Collateral Attack on the Substantive Rulings Underlying the Judgments

It is axiomatic that parties resisting recognition of foreign country judgments may not relitigate the substantive rulings underlying the judgments. E.g., S.C. Chimexim, S.A. v. Velco Enters. Ltd., 36 F. Supp.2d 206, 215 (S.D.N.Y. 1999) (refusing to reconsider a defense to enforcement of a contract that was raised and rejected); Canadian Imperial Bank, 899 F. Supp. at 1254 ("Defendant may not now raise an affirmative defense involving the merits of the original action. . . ."); Porisini v. Petricca, 90 A.D.2d 949, 950, 456 N.Y.S.2d 888, 890 (4th Dep't 1982) ("these allegations also attempt to challenge the merits of the action and are issues which are foreclosed to the recognition court once jurisdiction is found"); New Central Jute Mills Co. v. City Trade & Indus. Ltd., 65 Misc. 2d 653, 655, 318 N.Y.S.2d 980, 983 (N.Y. County 1971) ("once parties have agreed to submit their controversy to a foreign [tribunal] and to be bound by foreign law, they cannot relitigate their claims or defenses in domestic litigation"). Yet this is precisely what the Graces seek to do, in the guise of asserting a deprivation of due process.

1. The Graces' Challenge to the "Pay Now, Sue Later" Clause Seeks to Relitigate the Merits

In the English action, the Graces (and other Names) claimed "that they ha[d] a counterclaim against Lloyd's for fraud which they were [entitled] to set-off against its claim" for the Equitas premium which would "operate by way of defense" to the claim for the premium. R.318. In complaining that they were "precluded by clause 5.5 — the 'pay now, sue later' provision of the Equitas reinsurance contract — from asserting a defense of fraud" against Lloyd's (App. Br. 14), the Graces effectively concede that their "due process" challenge is a collateral attack on the English court's substantive ruling that this provision was valid and enforceable as a matter of English contract law.[18]

The question of whether clause 5.5 precluded a defense of fraud in the inducement to payment of the Equitas premium was extensively litigated in the English court, with the Graces presenting to the English court the very same allegations of fraud proffered to the trial court in resisting recognition of the Judgments. R.283-331 at R.318-19 (Wilkinson, setting forth arguments made by the Names as to why clause 5.5 did not preclude Names from asserting fraud claims as set off to payment of Equitas premium); compare R.1674-76 (Updike Aff. Ex. 9 (Freeman Aff. ¶ 3) with R.185-223 at R.188-211 (Updike Aff. ¶¶ 7-54).

Although the Graces repeatedly assert that the English court made findings of fraud (App. Br. 6, 9, 21), the English court did not rule on the underlying merits of these fraud allegations because it found, as a matter of English substantive law, that even if the Graces could ultimately

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18 Clause 5.5 provides that "[e]ach Name shall be obliged to and shall pay his Name's Premium in all respects free and clear from any set off, counterclaim or other deduction on any account whatsoever, including in each case, without prejudice to the generality of the foregoing in respect of any claim." This provision was described in the Settlement Offer Document ("SOD") provided to Names as being "broadly equivalent to the pay now, sue later provision in the current form of the Managing Agents Agreement" (R.688-97 at R.962, Updike Aff. Ex. 4, SOD, App. 5, ¶ 1.19), which states in pertinent part, as does the one in the SOD, that "any payment requested by the Agent . . . shall be made by the Name free and clear from any set-off, counterclaim or other deduction on any account whatsoever . . ." R.1989-2044 at R.2019 (Goldstein Aff. Ex. 4 ¶ 7.1(d)).

prove that they had been fraudulently induced to underwrite at Lloyd's, such fraud would not operate to void the Graces' obligations to pay a premium in consideration of the reinsurance cover issued by Equitas. R.283-331 at R.322, R.328 (Wilkinson at 42, 46); see also id. at R.327 ("The debt arose from the reinsurance contract under which Equitas was entitled to receive payment on the premium as reinsurer of the Names."). The English court thus granted Lloyd's summary judgment on its claim for the Equitas premium, although it recognized that the Names' underlying fraud allegations if ultimately proven could provide an independent basis for monetary relief from Lloyd's:

> It is as open to a Name to claim and recover such damages in the face of clause 5.5 as it would be without it. All that he is prevented from doing is declining to satisfy the premium debt until his claim for damages has been determined and then setting off the damages against the premium due. In no sense can that be described as excluding or restricting the remedy by way of damages for fraudulent misrepresentation.

R.283-331 at R.328 (Wilkinson at 46); id. at R.322 ("Clause 5.5 does not exclude or limit liability for fraud or on any other basis. Its effect is and only is to insulate, as a matter of procedure, claims for the premium from counterclaims or set-offs asserted by the reinsured.") The Court of Appeal affirmed this holding:

> The Court of Appeal specifically considered and rejected the argument that clause 5.5 was a protective clause. They pointed out that it did not in any respect affect the liability of the Society to those who were alleging fraud against it. It solely provided a mechanism for the recovery of the reinsurance premiums necessary to the carrying out of the R&R scheme without undue delay.

R.375-79 at R.402 (Society of Lloyd's v. Fraser & Ors. at 23).

In light of these rulings, the court below correctly recognized that the Graces "still have viable remedies in the English courts. The courts of this country have repeatedly held that English law is adequate to discourage fraud and misrepresentation, and the English courts can provide [the Graces] with a sufficient remedy should fraud be proven." R.39 (citations omitted). The Graces in fact had twice before, in the Richards and Grace cases, been told to adjudicate

their claims against Lloyd's in England, including by the Grace court, which rejected the Graces' claim that "Wilkinson cast doubt on their ability to have their fraud claims heard in England." 1997 U.S. Dist. LEXIS at *24 n.6. Indeed, the Graces concede that many of their co-defendants in the English action are currently proceeding with their fraud claims against Lloyd's in England. App. Br. 21; R.1674-76 (Freeman Aff. ¶ 4 attached as Ex. 9 to Updike Aff.). The Graces' only explanation for their failure to join in these proceedings is the preposterous assertion that their reluctance to pursue their claims is "procedural rather than substantive." App. Br. 21. Yet the only "procedural" burden cited by the Graces is the fact that under English procedural law, the prevailing party in a litigation is entitled to recover its legal fees, which is no objection, even without a forum selection clause, to litigating claims in England. E.g., Kilvert v. Tambrands Inc., 906 F. Supp. 790, 796-97 (S.D.N.Y. 1995). This requirement is completely irrelevant to the question of due process, and utterly inconsistent with their insistence that it is a "virtual certainty" that they were defrauded by Lloyd's. App. Br. 11, 17, 37, 40.

If the New York courts were to deny recognition to the Judgments after the English courts upheld the "pay now, sue later" provision in the Equitas reinsurance contract, it would effectively overrule the substantive decision of the English court that the Graces' fraud allegations against Lloyd's — whatever their merits — were neither an affirmative defense nor a set-off to Lloyd's claim against them for payment of the Equitas premium. R.283-331 at R.328 (Wilkinson at 46). It would also effectively overrule the New York federal court's ruling in the Grace case that the Grace's defenses to the Equitas premium were governed by English law.

2. The Attack on the "Conclusive Evidence" Clause Is an Effort to Reopen the Judgment

The Graces also contend that they were denied due process because they were not given a "meaningful pre-deprivation hearing" to challenge the calculation of the Equitas premium. Once again, however, the Graces' "due process" challenge is really an attempt to relitigate a substantive ruling of the English court, namely; in this case, the ruling that Clause 5.10 of the Equitas reinsurance contract (the "Conclusive Evidence Clause"), which required Names to

demonstrate "manifest error" in the calculation of their Equitas premium in order to challenge the amount due was valid and enforceable as a matter of substantive English law.[19] The validity of the Conclusive Evidence Clause was unsuccessfully challenged by the Graces in England, where the Names argued — as the Graces do again here — that "they were entitled to inspect and check the accuracy of the records in the possession of [Lloyd's] and the figures derived from them." R.375-436 at R.425 (Fraser & Ors. at 46); see also id. R.360-74, at R.360 (Fraser & Ors. at 1). The English appellate court rejected the Graces' argument because it "involved a contradiction of both the express wording and clear intention of Clause 5.10" (id.), and went on to note that

> it is understandable that those who already have a deep distrust and suspicion of the Society and its various agencies should be suspicious and ready to find fault with the figures which have been produced pursuant to clause 5.10. But such matters do not provide arguable defenses. The O.14 summonses having been properly supported by affidavits sworn on behalf of the Society, it was incumbent upon the Defendants to show by affidavit that there was some ground for giving leave to defend on quantum and ordering a trial of some issue of quantum. No issue has been raised which is sufficient to justify going behind the figures produced under clause 5.10 nor have the Applicants succeeded in making out a case of manifest error in those figures.

Id. at R.427 (Fraser & Ors at 48).

Thus, by asserting a due process challenge to recognition of the Judgments on the grounds that they should be able to take discovery in respect of the calculation of their Equitas

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19 Consistent with Clause 5.10, Lloyd's produced records and calculations in the English proceedings of the Equitas premium due from each of the non-accepting Names. R.360-74 at R.361. The Names were then unable to demonstrate "manifest error" in those calculations. Although the Graces insinuate that the amount of their Equitas premiums have no basis, the English court made the following factual findings after a hearing: (i) the Graces' respective Equitas premiums were derived following the most extensive reserving project ever undertaken in the insurance industry; (ii) the reserving project was approved not only by the British Department of Trade and Industry (then the regulatory body overseeing the Lloyd's market), but also by insurance regulators in the United States; and (iii) the Names' agents in the Lloyd's market had input in this process with respect to each Name who had appointed them as their agent. R.224-82 at R.226-28, R.256-61 (Dennis Hugh Fitzgerald at 3-5, 33-38); R.363.

premium, the Graces seek to have this Court invalidate a contractual provision that was expressly held to be valid and enforceable in the English action. There is no basis for this Court to second guess the English court's ruling. The Graces' own failure to demonstrate "manifest error" can not now be used as a sword by the Graces to attack the Judgments.

The Graces' contention that they were deprived of a lack of a post-deprivation hearing is irrelevant in light of their full hearing in England on the propriety of the conclusive evidence clause as well as the factual submissions in that regard already submitted to, and determined by, the English court.

3. The Graces' "Waiver" Argument Is Yet Another Effort to Relitigate the Substantive Rulings Underlying the Judgments

The Graces suggest that, in finding that the Graces' "knowingly and willingly" agreed to resolve their disputes with Lloyd's in the English courts (App. Br. 26, citing R.39), the trial court implicitly, and improperly, held that the Graces had waived their due process rights by signing the General Undertaking. Id. This argument is a straw man. The trial court did not hold, either explicitly or implicitly, that the Graces waived their right to notice and an opportunity to be heard. Rather, the trial court correctly noted the Graces' agreement to be bound by English law in the context of finding that they could not now relitigate the English court's substantive rulings that, under English law, the Conclusive Evidence and Pay Now, Sue Later Clauses are valid and enforceable. R.39. The trial court properly rejected the Graces' argument that clauses 5.5 and 5.10 of the Equitas reinsurance contract functioned like a "cognovit note," pursuant to which an obligor consents to entry of a judgment in favor of his creditor without notice of the proceeding. R.38.

Likewise, the Graces' argument that, under New York law, the Equitas reinsurance contract is a "contract of adhesion" (App. Br. 28) and not a "legal contract" (id. at 29) — and therefore cannot be the basis of any finding that they "waived" due process — must be rejected as yet another impermissible attempt to relitigate issues determined adversely to them in the English proceeding. The Graces challenged the mandatory nature of the Equitas reinsurance

contract, including the appointment of substitute agents for purposes of entering into that contract, in the English proceedings.[20] The question of whether Lloyd's had the regulatory authority under the Lloyd's Acts 1871-1982 to mandate that each Name, including the Graces, become a party to the Equitas reinsurance contract through appointment of a substitute agent was raised in the English action as a substantive defense to the non-accepting Names' obligation to make payment in respect of the Equitas premium. R.224-331 at R.228 (The Society of Lloyd's v. Dennis Hugh Fitzgerald Leigh et al. at 5 ("[t]he fundamental issue between the parties to the proceedings [was] whether Lloyd's was entitled to impose the Equitas reinsurance contract on non-accepting names.")); R.281 ("AUA9 was validly appointed"). The English court rejected the Graces' argument, and found that Lloyd's appointment of AUA9 was authorized by Lloyd's Acts 1987-1982,[21] which the Graces agreed in the General Undertaking to abide by in connection with their membership of and underwriting at Lloyd's.

II. THE TRIAL COURT CORRECTLY RULED THAT ENFORCEMENT OF THE JUDGMENTS IS NOT CONTRARY TO PUBLIC POLICY

Article 53 provides that a court has discretion, even where all conditions to recognition have been met, to deny recognition of a foreign country judgment where doing so would violate

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20 The Graces suggest that they were unaware that a substitute agent would be appointed to bind them to the Equitas reinsurance contract. However, the SOD, which they rely upon for that supposition explicitly states in describing the Equitas contract that "[t]he parties to the contract include Equitas Reinsurance, the Substitute Agent both on its own behalf and its capacity as substitute managing agent for each Name on each syndicate year of account to be reinsured . . . ." R.959 (emphasis added).

21 As the English court detailed, Lloyd's authority to appoint such an agent was specifically set forth in the Lloyd's Act 1982 Sch. 2, § 18 (Updike Aff. Ex. 8), and a bye-law implementing that provision was enacted in 1983. R.228-33, Fraser & Ors. at 5; (Holden Aff. I Ex. 4 (Points of Claim ¶¶ 4-6 & Ex. 1; R.139-76 at R.139-40 R.72-101 at R.72-73 (Holden Aff. II Ex. 4 (Points of Claim ¶¶ 4-6 & Ex. 1). When the Graces executed the 1986 General Undertaking, they agreed to "comply with the provisions of Lloyd's Act 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council . . . pursuant to such legislative authority . . ." General Undertaking ¶ 1. The Council's direction that AUA9 execute the Equitas reinsurance contract was one such direction of the Council of Lloyd's. See also R.332-59 at R.334-35 (Lyons, Leighs & Wilkinson at 3-4 (describing Lloyd's regulatory authority to appoint substitute agent)).

the public policy of the state. CPLR 5304(b)(4). The trial court properly exercised its discretion in finding that enforcement of the Judgments would not violate the public policy of the United States or this State. R.40-43.

The Graces have provided this Court absolutely no basis upon which to find that the trial court abused its discretion. As the trial court correctly held, "the public policy exception to the doctrine of comity is usually invoked only in the rare instance 'where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'" R.41 (quoting Greschler v. Greshler, 51 N.Y.2d 368, 377, 434 N.Y.S.2d 194 (1980)). The high standard for avoiding recognition of foreign judgments is not satisfied by exalting the primacy of local law over that of any foreign court, even in the absence of a contractual choice of foreign law. E.g., Intercontinental Hotels Corp. (Puerto Rico) v. Golden, 15 N.Y.2d 9, 254 N.Y.S.2d 527 (1964) (enforcing judgment of Puerto Rican courts based on gambling debts that would have been void under New York law).

On appeal, the Graces do not quarrel with the high standard imposed by the trial court for assessing a public policy challenge. Instead, the Graces simply repeat their mantra that they should have been permitted to prove their fraud allegations against Lloyd's before entry of the Judgments. Not only does this argument constitute an attempt to relitigate the issues determined adversely to them in the English proceeding, it also constitutes a collateral attack on the rulings of the Ninth Circuit in Richards, and the New York District Court in Grace.

A. The Application of English Law to the Parties' Disputes Is Not Contrary to Public Policy

As the trial court found, the Graces long ago agreed "willingly and knowingly" that English law would exclusively govern any disputes between they had with Lloyd's, and that the only courts that would resolve such disputes would be those in England. R.42. Even in the absence of forum selection and choice of law agreements, it does not contravene New York public policy to recognize a judgment based on foreign law which differs significantly from the law of New York. For example, in Intercontinental Hotels Corp., the New York Court of

Appeals enforced a judgment rendered by a Puerto Rican court for the payment of gambling debts that would have been void as against public policy under New York law, emphasizing that:

> Worthy though such [public policy] considerations be, they apply only to transactions governed by our domestic law. This court gave thought to such arguments recently and rejected them as an insufficient basis for projecting domestic philosophies of law to decision making in actions based on transactions governed by the law of another State.

15 N.Y.2d at 14, 254 N.Y.S.2d at 533 (citations omitted). See also Hunt v. BP Exploration Co. Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980) ("Enforcement of a judgment of a foreign court based on the law of the foreign jurisdiction does not offend the public policy of the forum simply because the body of foreign law upon which the judgment is based is different from the law of the forum or because the foreign law is more favorable to the judgment creditor than the law of the forum would have been had the original suit been brought at the forum.") (quoting Toronto Dominion Bank v. Hall, 367 F. Supp. 1009, 1016 (E.D. Ark. 1973)).[22]

The Graces, having *agreed to* English law to govern their disputes with Lloyd's, cannot now argue that the purported differences between English and American law make recognition of the Judgments contrary to public policy. As the trial court pointedly noted, the fact that the Graces may have found it "preferable" to litigate their fraud claims in advance of payment of the Judgments "does not mean that a different method is violative of public policy." R.41-42. Nor

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22 The Graces' citation to cases denying recognition to English libel judgments on public policy grounds is misplaced. App. Br. at 33 (citing Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995), aff'd, 159 F.3d 636 (D.C. Cir. 1998); Abdullah v. Sheridan Square Press, Inc., No. 93 Civ. 2515 (LSS), 1994 WL 419847 (S.D.N.Y. May 4, 1994); Bachchan v India Abroad Publications Inc., 154 Misc. 2d 228, 585 N.Y.S.2d 661 (N.Y. County 1992)). The judgments at issue in those cases were denied recognition on public policy grounds solely because the claims upon which they were based were irreconcilable with First Amendment guarantees that do not exist under English law. There is no issue of constitutional dimension implicated in any way in this recognition proceeding. Rather, the Judgments are based on Lloyd's claim for payment by the Graces of a reinsurance premium, a routine commercial matter. Significantly, the Matsusevich court explicitly recognized this distinction. 877 F. Supp. at 3 (citing Ackermann v. Levine, 788 F.2d 830, 842 (2d Cir. 1986)).

are the differences between New York and English law as significant as the Graces suggest. Indeed, under New York law, it is not uncommon for parties to be required to pay underlying contractual obligations, despite allegations of fraud in the inducement, prior to resolution of such allegations. E.g., First Commercial Bank v. Gotham Originals, Inc., 64 N.Y.2d 287, 295, 486 N.Y.S.2d 715, 719 (1985); Barclay Knitwear Co. v. Kingswear Enters. Ltd., 141 A.D.2d 241, 245, 533 N.Y.S.2d 724, 726 (1st Dep't 1988).

B. The Graces' Public Policy Challenge Is Precluded by the Federal Court Judgments Against Them

The courts in Richards and Grace expressly held that the Graces were bound by the Choice Clause to litigate any and all disputes with Lloyd's in England, pursuant to English law, regardless of whether the rights and remedies offered by English law were identical to, or different from, those available under federal or state statutes and common law. Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir.) (en banc) (enforcing Choice Clause and dismissing federal and state securities claims), cert. denied, 525 U.S. 943 (1998); Grace v. Corporation of Lloyd's, No. 96 Civ. 8334 (JGK), 1997 U.S. Dist. LEXIS 14994 at *8 (S.D.N.Y. Oct. 2, 1997) (enforcing Choice Clause to dismiss statutory and common law claims asserted under New York law).

Significantly, in Richards, the Ninth Circuit Court of Appeals, sitting en banc, rejected the Graces' contention that enforcement of the Choice Clause to dismiss federal and state securities claims violated a strong public policy of the United States in light of the anti-waiver provisions of the federal securities laws. 135 F.3d at 1231. In Grace v. Lloyd's, the Graces again challenged the enforceability of the Choice Clause, this time with respect to claims asserted under New York securities and consumer protection statutes, and sought to enjoin Lloyd's from requiring them to pay the Equitas premium before they had litigated their fraud

allegations against Lloyds.[23] While noting that the Graces had not expressly raised a public policy objection in the case before it, the Grace court noted, with approval, that a public policy challenge to the Choice Clause had been previously rejected by the Second Circuit. Grace, 1997 U.S. Dist. LEXIS at *7 (citing Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993)).

Without even mentioning their participation in Richards and Grace, the Graces make these very same arguments rejected in Richards and Grace — specifically citing the anti-waiver provisions of the federal securities laws, and the views of the New York Attorney General concerning New York public policy— as a basis for non-recognition of the Judgments. App. Br. 36-39. Richards and Grace, which are final, conclusive, and binding on the Graces, preclude the Graces from raising a public policy objection to enforcement of foreign judgments rendered by a contractually chosen forum pursuant to contractually chosen law. The Graces' public policy defense is nothing less than an impermissible collateral attack on the federal judgments against them.

The public policy exception to enforcement of the judgments is a discretionary one. CPLR 5304(b)(4). The Graces have provided this Court with no basis whatsoever for finding that the trial court abused its discretion in recognizing the Judgments and rejecting their public policy arguments. Nor could they possibly do so. The Judgments were rendered by a forum agreed to by the parties, and that selection of forum by the Graces has twice been upheld in accordance with the Supreme Court's controlling decision in M/S Bremen v. Zapata Off-Shore

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23 Roby's rejection of the "public policy" objection to the application of English law pursuant to the Choice Clause was recently reaffirmed by the Second Circuit. Stamm v. Barclays Bank, 153 F.3d 30, 33 (2d Cir. 1998). Six other federal appellate courts have likewise rejected Names claims that public policy of the United States precludes litigation of their claims against Lloyd's in England. See supra n. 5.

Co., 407 U.S. 1 (1972).[24] It would be completely contrary to the strong policy, as articulated in Bremen, that "all disputes [do not have to] be resolved under our laws and in our courts" to reject now the recognition of a foreign country's judgment on public policy grounds because of the supposition that the result may have been different had the matter been adjudicated in this country's courts.

The Graces are currently benefiting from the reinsurance provided to them by Equitas, as any of their insurance obligations incurred in the Lloyd's market prior to 1993 are being satisfied by Equitas. R.283-331 at R.310-11 (Wilkinson at 28-2). They should not be able to enjoy that benefit without paying for it.

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24 The courts of this state likewise hold Bremen to be controlling as to the issue of enforceability of forum selection and choice of law provisions. Brooke Group Ltd. v. JCH Syndicate 488, 87 N.Y.2d 530, 534, 640 N.Y.S.2d 479, 482 (1996); Micro Balanced Prods. Corp. v. Hlavin Indus. Ltd., 238 A.D.2d 284, 285, 667 N.Y.S.2d 1, 2-3 (1st Dep't 1997); British W. Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg, 172 A.D.2d 234, 234, 567 N.Y.S.2d 731, 732 (1st Dep't 1991).

CONCLUSION

The statutory criteria for recognition and enforcement of foreign country judgments is clear. Those criteria, as the trial court properly concluded, do not allow the Graces to defend an enforcement proceeding by relitigating substantive issues that have been conclusively determined by the courts of England and the courts of this country. For all of the foregoing reasons, Lloyd's respectfully requests that this Court affirm the decision of the trial court that recognized the Judgments duly entered by the courts of England.

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