RIX J: I am concerned with two identical actions between the same parties in each of which the defendant disputes the jurisdiction of the English court: in the first action on the ground of forum non conveniens, and in the second action under the terms of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (the convention). That convention was designed to extend to the member states of the European Free Trade Association the terms of the Brussels Convention of 27 September 1968, as amended upon the successive enlargements of the European Communities. The text of the convention is to be found set out, by virtue of s 1(3) of and Sch 1 to the Civil Jurisdiction and Judgments Act 1991, as Sch 3C to the Civil Jurisdiction and Judgments Act 1982. It took effect with the force of law in the United Kingdom from 1 May 1992, but Sweden only became a contracting state with effect from 1 January 1993.

The plaintiffs in each action are sixteen insurance or reinsurance companies, and one Lloyd's syndicate acting by a representative member, who have variously reinsured the defendant, F.X. N. (N.), in respect of the 1990 and 1991 policy years under successive contracts of bond and credit surplus treaty reinsurance. The 1990 contract involved the first to sixteenth plaintiffs (as well as one other company who is not party to these proceedings), and the 1991 contract involved the first to tenth and seventeenth plaintiffs. The plaintiffs are all engaged in insurance and reinsurance business in the London market, and N. was, before its bankruptcy, a Swedish insurance company which wrote, inter alia, bond and credit insurance and reinsurance, that is to say the insurance of financial guarantees, performance bonds, advance payment bonds and other forms of bonds and borrowing liabilities.

The 1990 contract, so far as it concerns these plaintiffs, is contained in a slip No CP6090S prepared by H. F. Insurance Broking Limited (H. F.), acting as brokers for and on behalf of N., and was for a signed line total of 17775% of the overall treaty. The 1991 contract is contained in a slip No CP6090T, also prepared by H. F., and was for a signed line total of 25775%. Both slips stated that the reinsurance covered 'risks domiciled in Europe' (in other words not exclusively Swedish risks), that the wording was to be agreed by leading underwriter only (that was T. I. plc, the first plaintiff), that accounts were to be quarterly, and that an intermediary clause naming H. F. was incorporated as part of the general conditions. An 'intermediary' on the London market is a broker with recognised status in the contract as the intermediary through whom the contract was negotiated and through whom all correspondence and usually, but not inevitably, all communications of any kind including accounting and

settlement communications are to be passed. No particular intermediary clause was in fact agreed under these contracts, but H. F.'s standard clause provided for 'all communications' to pass through them and that was in practice what happened. Although both slips contemplated that treaty wording would be agreed with the leading underwriter, no wording was in fact ever agreed. The contracts in question always remained those contained in the two slips which I have mentioned.

N. also placed further lines for the surplus treaty reinsurance with continental insurers. Indeed for the 1990 year 6571% was placed on the continent (and 17715% was unplaced) and for the 1991 year 6276% was placed on the continent (and 11765% was unplaced). The plaintiffs obviously realised there might be other markets participating or being asked to participate in the reinsurance, but were unaware which markets were involved, or to what extent, or on what terms.

On 4 September 1991 N. was declared bankrupt by the District Court of Stockholm and its affairs came to be put in the hands of three joint trustees or liquidators. The two actions with which I am concerned in these proceedings are both against N. in liquidation. Following its insolvency, N.'s affairs came to be investigated by the S. F. I. Board (the SFIB). The SFIB produced a report dated 8 November 1991 which was then passed for their comments to N.'s former board members and auditors as well as its former credit insurance manager, Ola Rosendahl, who was the author of the placing information on the basis of which the two contracts with the plaintiffs were broked by H. F.. Following the receipt of comments on the report, the SFIB then drew up a memorandum dated 13 December 1991, on the basis of which it rendered a 'decision' or 'judgment' dated 19 December 1991. These revealed a situation which the plaintiffs characterised as gross mismanagement of N.: serious failings by its board, the risking of insolvency, the granting of loan guarantees in amounts considerably in excess of the risk-bearing capital of the company without adequate reinsurance protection. The decision of the SFIB concluded that the conditions within N. had been so grave that the SFIB would have intervened, if they had known; that, as it was, their only sanction was to issue a grave admonition to N. and its board; and that the matter would be transferred to the Swedish public prosecutor to examine whether there had been any contraventions of the criminal or other codes. Among the criticisms revealed by the SFIB's memorandum was that individuals with leading positions in N., both on and outside its board, had business or other close relations with clients for whom N. had signed loan guarantees.

Following N.'s collapse and the SFIB's criticism, the plaintiffs were concerned that serious misrepresentations may have been made to them which would justify avoidance of the reinsurance contracts or at any rate

that claims by N. might have to be rejected. They therefore instructed, in collaboration with some of the foreign market reinsurers and co-ordinated by the in-house legal department of one of Sweden's leading insurance companies, Sk. International Insurance Corp, a small team of reinsurance experts led by Mr Goran E. (the E. team) to attend at N.'s offices to carry out a preliminary inspection of N.'s books and records. Meanwhile on 24 March 1992 Sweden's Official Receiver issued his report on N.'s insolvency. Again, a grave picture of mismanagement and dubious underwriting practices, especially in relation to the bond and credit business, was revealed. The plaintiffs allege that the documents inspected by the E. team support the criticisms made by the SFIB and the Official Receiver with greater detail and reveal heavy over-exposure, the writing of a single risk in excess of N.'s balance sheet worth upon the dubious security of unlimited shares, other risks accepted upon doubtful security, and unrealistic, missing or otherwise inadequate property valuations.

As a result the plaintiffs have concluded that there is clear evidence of material misrepresentation and non-disclosure by N. in relation to the conclusion of the 1990 and 1991 contracts, and have accordingly sought to avoid both contracts by letters sent on their behalf by their solicitors dated 14 July 1992. The plaintiffs point to the placing information contained in N.'s letter of 27 November 1989, as updated briefly for the following year's contract by N.'s letter of 18 October 1990, to indicate, as they submit, the disparity between what they were told and the results of the investigations of N.'s affairs following its insolvency. For instance, the following passage in the letter of 27 November 1989 is relied upon:

'We judge the bankers way and if offered security is not enough we either reject or ask for additional security. When property is taken as security an independent market evaluation is done. Shares taken as security must be noted on the stock exchange. We will not normally exceed the following limits without asking for additional security:

Property 85% of market value

Shares 70% of market value

First charge 75% of value.'

The plaintiffs contrast N.'s placing information, asserting its careful, objective and controlled approach to bond and credit insurance underwriting, its assessment of risks, its observance of limits and the obtaining of security, with the state of affairs subsequently revealed.

Accordingly, on 29 September 1992 the plaintiffs sought and obtained ex parte an order for the issue and service out of the jurisdiction of a writ against N., and on 1 October 1992 that writ was issued and on 6 October

it was served on N.'s liquidators in Sweden. Ex parte leave was obtained under RSC Ord 11, r 1(1)(d) on the three grounds that the contracts had been made within the jurisdiction, that they were made by or through an agent (H. F.) trading or residing within the jurisdiction and that the contracts were by implication governed by English law. This action was designated as 1992 Folio No 2772, and I refer to it as the 'first action'. In due course the plaintiffs issued their points of claim and N. issued its summons under RSC Ord 12, r 8 dated 29 December 1992 to set aside the writ and its service. The writ and points of claim claimed the following relief: declarations that the plaintiffs were entitled to avoid and had validly avoided the two contracts; an order for the repayment of all claims paid by the plaintiffs under the two contracts less premiums received; and/or an order for the taking of an account in respect of all claims paid less premiums received under the two contracts.

On 4 January 1993 N.'s evidence in support of its summons came forward in the form of the first affidavit of Mr T W Brentnall, a partner in the firm of Messrs Elborne Mitchell, N.'s London solicitors. That affidavit made clear that the grounds in support of N.'s application were that the contracts were governed by Swedish law and that Sweden is the natural and only appropriate jurisdiction.

On 1 January 1993 the convention took effect in relation to Sweden, and on 17 February 1993 the plaintiffs accordingly issued another writ against N. in a second action, 1993 Folio No 267, on the basis that, without prejudice to their submission that they are entitled to uphold the validity of their writ in the first action, nevertheless, seeing that that writ had been challenged, they would seek an alternative basis of jurisdiction in England under the terms of the convention itself. The writ and points of claim in the second action are identical to those in the first action.

The writ in the second action was served on Mr Rolf Abjornsson, one of N.'s liquidators, on 19 February 1993. For these purposes the plaintiffs relied on art 5(1) of the convention, as follows:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question...'

The 'obligation in question', submitted Mr Toulson QC on behalf of the plaintiffs, was the duty of N. to make a fair presentation of the risk and to disclose all material matters; the place of performance for that obligation was London.

Immediately following service of the writ in the second action, N. itself on 22 February 1993 issued proceedings in the District Court of Stockholm against the plaintiffs, and served those proceedings on the plaintiffs on 23 February 1993. Separate summonses appear to have been issued and served against each plaintiff (Actions Nos T4-265-93 to T4-281-93). A translation of a representative summons in those proceedings indicates that the claim in them is the reverse of the English actions, namely 'to establish that the Reinsurer lacked the right to revoke the reinsurance contracts for 1990 and 1991 and the reinsurance contracts for 1990 and 1991 are valid'.

No financial claims (other than for litigation costs) appear to be made in the Swedish summons. There is a reference under the heading of '1. Background... 1.4 Losses' to claims made against N. and the potential therefore of claims against the plaintiffs under the reinsurance contracts. However, the summons states:

'Only after all reinsured guarantees have been concluded can a final list of the claims against the Reinsurer be made.'

However, as already stated, no financial claims under the reinsurance contracts appear to be made at present in the Swedish proceedings. Nevertheless, the Swedish summons ends with the following paragraph on 'forum':

'The Lugano Convention... Article 5, point 1, states that in the case of contractual disputes, the court in the location where the contractual obligation referred to in the dispute should be discharged is the proper venue. In this case, the question is fulfilment of payment obligations under reinsurance contracts. Payment obligations should be discharged by the creditor, in this case N..'

It appears, therefore, that jurisdiction in Sweden over the plaintiffs has been claimed on the grounds that the 'obligation in question' in proceedings seeking to establish the validity of the contracts is the obligation to pay claims. I do not know what the current status of the Swedish proceedings is, or whether the plaintiffs have challenged jurisdiction in Sweden on grounds other than art 21 of the convention. The latter does appear from the affidavits before me to have been invoked. Article 21 provides:

'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established,

any court other than the court first seised shall decline jurisdiction in favour of that court.'

Following the issue of the second English action and the Swedish proceedings, the return date fixed for N.'s summons in the first action was adjourned to enable the parties to file further evidence and to bring on N.'s challenge to the jurisdiction of the English court in both actions at the same time. On 24 March 1993 N. issued its summons in challenge to the English court's jurisdiction in the second action, supported by a further affidavit of Mr Brentnall dated 25 March 1993. In that affidavit Mr Brentnall sought to make three points. First, he deployed evidence to the effect that service on N.'s liquidators in Sweden was defective: this was no doubt to lay the ground for a submission that in any event N.'s Swedish proceedings took precedence over the plaintiffs' second action. That point, however, has now been abandoned. It is now accepted by N. that, subject to the challenge made to the second action as a whole, N. was effectively served with process of the plaintiffs' second action before the Swedish court was seised of N.'s Swedish proceedings against the plaintiffs.

Secondly, it was submitted in Mr Brentnall's affidavit that art 11 of the convention was the principal article governing the matter and destroyed the plaintiffs' second action. Article 11 provides:

'Without prejudice to the provisions of the third paragraph of Article 10, an insurer may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled, irrespective of whether he is the policy-holder, the insured or a beneficiary...'

However, this point has also been abandoned by N., for it is recognised that art 11, like the whole of Section 3 of Title II of the convention (arts 7 to 12A, dealing with 'Jurisdiction in matters relating to insurance'), does not apply to reinsurance. Articles 7 to 12 of the convention reproduce the same numbered provisions of the Brussels Convention, as amended by the Convention of Accession signed at Luxembourg on 9 October 1978, when the United Kingdom acceded to the Brussels Convention. The 1978 convention was the work of a working party under the chairmanship of Professor Dr Peter Schlosser, whose report was submitted to the governments of the member states together with the draft convention and was published with the 1978 convention on 5 March 1979 in the Official Journal of the European Community (see OJ 1979 C59 p 71). The Schlosser Report states (at p 117, para 151):

'Reinsurance contracts cannot be equated with insurance contracts. Accordingly, Articles 7 to 12 do not apply to reinsurance contracts.'

O'Malley and Layton European Civil Practice (1989) comment (at para 18.07):

'This interpretation cannot be derived from the express words of the Convention, but it is sensible and accords with the overall purpose of this section of the Convention, not least because considerations of inequality of bargaining power generally have no place in re-insurance.' …

Thirdly, Mr Brentnall's affidavit submitted that it was not art 5(1) but art 2 of the convention that governed the second action. Article 2 of course sets out the basic rule of the convention:

'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.'

To that basic rule, art 5 is an exception. Mr Brentnall had two points to make about the plaintiffs' reliance on art 5(1). The first was that the 'obligation in question' was not the duty to make a fair presentation, but the obligation to pay claims. He stated:

'The relevant obligation which arises under these contracts and which the reinsurers seek to avoid is the obligation to pay claims.'

The place of performance of that obligation, he further submitted, was governed by the proper law of the contracts, namely Swedish law, and that under Swedish law the place of performance for payment of claims was the place of business of the creditor, namely in Sweden. The second point was that in any event, and even if the relevant obligation was the obligation to make a fair presentation of the risk, such an obligation was not an 'obligation' for the purposes of art 5(1). This latter submission was not further developed in Mr Brentnall's affidavit but I shall in due course refer to the submissions of Mr Gee QC on behalf of N. in that regard.

It is against this background that I approach the issues which have been argued before me in respect of the plaintiffs' claim for leave (in respect of the first action) or as of right (in respect of the second action) to issue and serve English proceedings on N. in Sweden out of the jurisdiction. Of course, if leave in respect of the first action were to be upheld, the second action would presumably be discontinued.

The first action: forum non conveniens

It is accepted on behalf of N. that the two contracts were made in England, by and through an agent residing within England, and that, albeit it is disputed that the contracts are governed by English law, there is therefore jurisdiction within Ord 11, r 1(d)(i) and (ii) for the

issue and service of the writ in the first action out of the jurisdiction on N. in Sweden. It is said, however, that England is not the appropriate forum, and that Sweden is, and that this is so whether or not the proper law of the contracts is English or Swedish; if necessary, however, N. would contend that the proper law is Swedish. On behalf of the plaintiffs, however, the reliance on English proper law is an important part of their submission that the appropriate forum is in England. It is common ground that the principles that I must apply are to be derived from Spiliada Maritime Corp v Cansulex Ltd, The Spiliada [1986] 3 All ER 843 esp at 857-859, [1987] AC 460 esp at 480-482 per Lord Goff of Chieveley. The burden is upon the plaintiffs to show that England is clearly the appropriate forum for the trial of the action as being the forum in which the case can suitably be tried for the interests of all the parties and for the ends of justice.

…In my judgment these factors do not outweigh the strong presumption that reinsurance written on the London market is written on the basis of an implied or imputed English proper law. Although these reinsurances contemplated that N. would put forward treaty wording, H. F. did not do so at any time before N.'s insolvency and no agreed treaty wording is in fact relied upon. There is a dispute about whether H. F. at a later date showed to T. I. a proposed treaty wording containing a Swedish law and arbitration clause or whether such a clause would have been acceptable in any event. If it mattered, such a dispute could hardly be resolved at this stage on affidavit; but in my view it does not matter, since by then T. I. had, following N.'s insolvency, cancelled the reinsurances. I recognise that this case is in at least one respect not as strong as the situation in Vesta v Butcher [1989] 1 All ER 402, [1989] AC 852, where the English reinsurance covered 90% of the primary risk, with a balance of 10% presumably resting with the primary insurers. Nevertheless, in the absence of the plaintiffs being put on notice of the terms on which other markets were contracting, the London reinsurances ultimately have to be regarded on their own terms, and the intermediary clause is itself a strong pointer that all aspects of the contracts would be dealt with through H. F. in London. It will be recalled that H. F.'s intermediary clause was of a wide kind, and in practice all accounting matters including payment of premiums and claims were dealt with through them in London, and I infer that that is what the parties must be regarded as contemplating would happen from the outset. In all the circumstances it is my judgment that the reinsurances in question were governed by English law.

Nevertheless, I am not persuaded, and of course the burden of persuasion is upon the plaintiffs, that England is the clearly appropriate forum for the parties' dispute. It seems to me that Mr Gee is right to say that the real focus of the dispute raised by the plaintiffs' writ is not so much as to the

materiality of what was or was not said in N.'s placement information, but as to the conduct of N.'s business affairs in Sweden. This case therefore is in its own way not unlike Amin Rasheed Shipping Corp v Kuwait Insurance Co [1983] 2 All ER 884, [1984] AC 50. In that case a Kuwaiti insurance company had insured a Liberian company whose business was carried on from Dubai in respect of a small cargo vessel under a policy whose form was based upon the Lloyd's standard form of marine policy but gave Kuwait as the place of issue and provided for claims to be payable there. Bingham J ([1982] 1 WLR 961 at 970) had held that the proper law of the policy was Kuwaiti law, but that even if he had held that it was English law he would still have exercised his discretion under Ord 11, r 4(2) against leave. The House of Lords disagreed as to the proper law, which in their view was English law, but even so upheld the alternative ground of decision that Kuwait was the appropriate forum. In that case too there were issues of English law to be decided, but the dispute was primarily one of fact: was the vessel engaged in smuggling when she was seized by the Saudi Arabian authorities, and if so was the loss excluded under the Institute War and Strike Clauses as being due to 'arrest, restraint or detainment... by reason of infringement of any customs regulations'. Lord Diplock said ([1983] 2 All ER 884 at 892-893, [1984] AC 50 at 67-68):

'…True it is that either directly through a choice of forum clause in commercial contracts or indirectly through an English arbitration clause, the Commercial Court in London is much resorted to by foreign nationals for resolution of disputes; and true it is that its judges have acquired unrivalled expertise in such matters, including marine insurance where that insurance is governed by English law. The latter fact no doubt accounts for the popularity of the court with foreign litigants, but their submission to its jurisdiction in the case of contracts which contain such clauses is voluntary and not, as in the instant case, sought to be forced on an unwilling defendant in the exercise by an English court of what can be classified only as an exorbitant jurisdiction which it does not recognise as possessed by foreign courts.'

Lord Wilberforce said ([1983] 2 All ER 884 at 896, [1984] AC 50 at 72):

'The intention must be to impose on the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted on a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense. It is not appropriate, in my opinion, to embark on a comparison of the procedures, or methods, or reputation or standing of the courts of one country as compared with those of another (cf [Aratra

Potato Co Ltd v Egyptian Navigation Co, The El Amria [1981] 2 Lloyd's Rep 119 at 126] per Brandon LJ).'

It seems to me that that decision and those observations are apposite to this case. Here too the proper law of the contracts is, in my view, English law, and there will be English legal issues to be decided; but the main burden of the dispute is a factual one with its centre in Sweden, in connection with which Swedish factual and expert witnesses will have to be called.

Here too the submission that the Swedish courts are unfamiliar or less familiar than the Commercial Court in London with respect to the hearing of reinsurance disputes in general or reinsurance disputes under English law in particular is not an appropriate submission. I am in any event confident both that the Swedish court is far better placed than this court to hear and determine issues as to the business practices of a Swedish insurance company, and also that it is not unused to applying foreign law, if indeed the principles of English law regarding the fair presentation of a risk are materially different from those of Sweden. I therefore set aside the writ and all subsequent proceedings in the first action.

The second action: art 5(1) of the Lugano Convention

The basic philosophy concerning jurisdiction in the convention is of course that a person should be sued in the courts of the state in which that person is domiciled. This philosophy is expressed in art 2. It is therefore accepted by the plaintiffs that if after 1 January 1993 they wished to sue N., they must do so in Sweden -- unless they can bring themselves within the exception to be found in art 5(1). …

The plaintiffs say that the obligation in question, which was to be performed in London, was the obligation to make a fair presentation of the risk; alternatively, if N. is right to say that the obligation in question which the plaintiffs by their action are seeking to avoid is the payment of claims, then that obligation too fell for performance in London.

…The competing submissions make it necessary to look at the relevant authorities in greater detail. In the De Bloos case de Bloos, a Belgian company, commenced proceedings in Belgium against Bouyer, a French company, claiming that their exclusive distributorship agreement had been repudiated by Bouyer, an order for the dissolution of the agreement, and damages. De Bloos relied upon art 5(1) of the Brussels Convention, but Bouyer said that it must be sued in France. It appears that de Bloos's complaint was that Bouyer had broken its agreement to grant to de Bloos exclusive rights to distribute Bouyer's products in Belgium, Luxembourg and Zaore. Presumably, but it is not quite clear, Bouyer had supplied

other distributors or customers in Belgium. The Belgian court of first instance found that the place where the products under the agreement were to be delivered was at Bouyer's office in France, and therefore declined jurisdiction on the ground that performance under the agreement was to be made in France and not in Belgium. The Belgian Cour d'Appel referred the case to the Court of Justice, asking for these purposes what the relevant 'obligation' in art 5(1) was: whether it was any obligation under the contract, or only the 'obligation in dispute or forming the basis of the legal proceedings', and if the latter, whether it was the original obligation (namely the obligation not to sell to others in the territories agreed upon) or the obligation to pay damages or compensation. The following paragraphs from the judgment of the court are relevant ([1976] ECR 1497 at 1508-1509 (paras 8-16)): …

10. …Article 5(1) of the Convention cannot be interpreted as referring to any obligation whatsoever arising under the contract in question.

11. On the contrary, the word "obligation" in the article refers to the contractual obligation forming the basis of the legal proceedings...

13. It follows that for the purposes of determining the place of performance within the meaning of Article 5, quoted above, the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based.

14. In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in Article 5(1) is still that which arises under the contract and the non-performance of which is relied upon to support such claims.

15. For these reasons, the answer to the first question must be that, in disputes in which the grantee of an exclusive sales concession charges the grantor with having infringed the exclusive concession, the word "obligation" contained in Article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters refers to the obligation forming the basis of the legal proceedings, namely the contractual obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application.

16. In disputes concerning the consequences of the infringement by the grantor of a contract conferring an exclusive concession, such as the payment of damages or the dissolution of the contract, the obligation to which reference must be made for the purposes of applying Article 5(1) of the Convention is that which the contract imposes on the grantor and the

non-performance of which is relied upon by the grantee in support of the application for damages or for the dissolution of the contract.'

After some uncertainty caused by the decision of the Court of Justice in the context of contracts of employment in Ivenel v Schwab Case 133/81 [1982] ECR 1891, the basic rule in De Bloos was confirmed in the case of contracts other than contracts of employment by the judgment of the Court of Justice in Shenavai v Kreischer Case 266/85 [1987] ECR 239 at 255-256 (paras 16-19):

'16. In that connection it should first be observed that contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts … by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements. It is on account of those particularities that the court of the place in which the characteristic obligation of such contracts is to be performed is considered best suited to resolving the disputes to which one or more obligations under such contracts may give rise.

17. Where no such particularities exist, it is neither necessary nor appropriate to identify the obligation which characterizes the contract and to centralize at the place of performance thereof jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract. The variety and multiplicity of contracts as a whole are such that the above criterion might in those other cases create uncertainty as to jurisdiction, whereas it is precisely such uncertainty which the Convention is designed to reduce.

18. On the other hand, no such uncertainty exists for most contracts if regard is had solely to the contractual obligation whose performance is sought in the judicial proceedings. The place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it, and it is this connecting factor which explains why, in contractual matters, it is the court of the place of performance of the obligation which has jurisdiction.

19. Admittedly, the above rule does not afford a solution in the particular case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings commenced by the plaintiff. However, in such a case the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim accessorium sequitur principale; in other words, where various obligations are at issue, it will be the principal obligation which

will determine its jurisdiction. That complication does not, however, arise in the case referred to in the question raised by the Landgericht Kaiserslautern.'

The distinction between contracts of employment and other contracts has now been confirmed by a change in the wording of art 5(1) of the Brussels Convention to that now to be found in art 5(1) of the Lugano Convention. …

In Kalfelis v Bankhaus Schrvder, Mnchmeyer, Hengst & Co Case 189/87 [1988] ECR 5565 at 5585-5586 (paras 19-20), in the context of an issue arising out of art 5(3) of the Brussels Convention, the Court of Justice said:

'19. With respect to the second part of the question, it must be observed, as already indicated above, that the "special jurisdictions" enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively. It must therefore be recognized that a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.

20. Whilst it is true that disadvantages arise from different aspects of the same dispute being adjudicated upon by different courts, it must be pointed out, on the one hand, that a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant and, on the other, that Article 22 of the Convention allows the first court seised, in certain circumstances, to hear the case in its entirety provided that there is a connection between the actions brought before the different courts.'

In Barclays Bank plc v Glasgow City Council [1994] 4 All ER 865, [1993] QB 429 Hirst J had to consider a claim for restitution arising out of the aftermath of the decision in Hazell v Hammersmith and Fulham London BC [1991] 1 All ER 545, [1992] 2 AC 1 that interest swap agreements were ultra vires the local authority concerned and therefore void ab initio. Barclays Bank sued Glasgow City Council in England, relying, inter alia, upon art 5(1) for founding jurisdiction in England for an action which would otherwise have had to have been pursued in Scotland. It was common ground that the place of performance of the obligation in question (that is to make restitution), if it existed, was England. The issue turned rather on the words 'in matters relating to a contract'…

The issues in that case primarily concern the place of restitutionary claims within the context of art 5, and in particular the ambit of the words 'in

matters relating to a contract'. Those precise issues are not the issues before me, although it is of course possible that the judgment of the Court of Justice will in due course contain remarks which are relevant to this case: in particular, if restitutionary claims were to be held to be within art 5(1), it would follow that the word 'obligation' must have a meaning which is wider than 'contractual obligation'. How much wider, however, could well even on that hypothesis remain an open question. In the circumstances it seems to me right that I should proceed to a decision without awaiting any such assistance as the judgment of the Court of Justice in that case might afford me.

What guidance do these authorities give me in the present case? It seems to me that the following principles and conclusions can be derived from the decisions cited above. First, that concepts such as 'in matters relating to a contract' and 'the obligation question' have to be interpreted and applied not simply on the basis of national law, but with a view principally to the scheme and purposes of the convention. Secondly, that because art 5(1) is a derogation from the underlying philosophy that jurisdiction is vested in the courts of the state where the defendant is domiciled, it must as such be interpreted restrictively (see Kalfelis [1988] ECR 5565 at 5585 (para 19)). Thirdly, that because the concept of 'matters relating to a contract' may extend beyond contracts stricto sensu to at any rate consensual relationships partaking of the same nature as a contract, the concept of 'obligation' may correspondingly have to be interpreted on a somewhat extended basis (see Peters [1983] ECR 987 at 1002 (para 13)). Fourthly, that, despite my third principle, the language of the judgments cited above repeatedly regard the 'obligation in question' as a contractual obligation: see again Peters [1983] ECR 987 at 1002 (para 13), but also De Bloos [1976] ECR 1497 at 1508 (paras 11, 13 and 15), Shenavai [1987] ECR 239 at 256 (para 18), Arcado [1988] ECR 1539 at 1555 (para 13), Union Transport plc [1992] 1 All ER 161 at 165, [1992] 1 WLR 15 at 19, and Barclays Bank plc v Glasgow City Council [1994] 4 All ER 865 at 876, [1993] QB 429 at 439. Fifthly, that regard must at all times be had to the particular obligation upon which the plaintiff's action is based and the non-performance of which is relied upon to support the plaintiff's claims (De Bloos), and if there is more than one such obligation, the principal such obligation (Shenavai and Union Transport plc), rather than to the remedies which are claimed as flowing from that obligation and its non-performance (De Bloos [1976] ECR 1497 at 1509 (para 16) and Arcado). Sixthly, and as a corollary to the last point, that the connecting factor which justifies the vesting of jurisdiction in the courts of a state other than the state of the defendant's domicile is that the obligation in question was to be performed in that former state (Shenavai [1987] ECR 239 at 256 (para 18)).

I turn therefore to apply these principles and conclusions to the instant case. I consider first of all the concept of 'matters relating to a contract'. Mr Gee did not, I think, expressly submit that the case with which I am concerned falls outside these words, but he did so by implication by relying on Monro v Bognor UDC [1915] 3 KB 167, [1914-15] All ER Rep 523. In that case it was held that an arbitration clause covering disputes 'upon or in relation to or in connection with the contract' did not cover a claim for damages for fraudulent misrepresentation and for a declaration that the contract be rescinded. …

In my judgment, the plaintiffs' claim to avoid the contracts falls within the words 'in matters relating to a contract', and none the less so because a claim in restitution is included in their writ as a claim consequent upon the declaration which the writ seeks as to the successful avoidance of the contracts. I say that for two reasons. First, the claim in restitution is secondary to the claim to avoid the contracts on the ground of non-disclosure and misrepresentation; it is not the principal obligation in question, and indeed the plaintiffs did not rely on it as such; it is rather a remedy to which the plaintiffs may be entitled if first they can establish that they have validly avoided the contracts (see Shenavai and Arcado). Therefore, whether claims in restitution fall within or outside art 5(1) is not directly in issue or relevant. Secondly and in any event, however, I would myself have been inclined to regard a claim in restitution arising out of the avoidance of a contract as being a claim 'in matters relating to a contract' (cf for instance Government of Gibraltar v Kenney [1956] 3 All ER 22, [1956] 2 QB 410). I recognise, however, that in an obiter passage in Barclays Bank plc v Glasgow City Council [1994] 4 All ER 865 at 876-877, [1993] QB 429 at 440 Hirst J doubted whether --

'quasi-contractual claims, even where a contract is involved, are properly to be treated as falling per se within art 5(1), having regard both to the general considerations I have already advanced in my analysis of the cases such as the Peters case and also because it is difficult to locate a place of performance for a quasi-contractual obligation.'

In that passage, however, it seems to me that Hirst J was probably asking himself not whether quasi-contractual claims arising out of contractual relationships could come within the concept of 'in matters relating to a contract', but rather the different question whether a quasi-contractual obligation could suffice to found jurisdiction within art 5(1) as the 'obligation in question'.

I therefore turn to the concept of the 'obligation in question', for it was on this that Mr Gee principally relied, making the submission that only a contractual obligation would suffice to found jurisdiction. On this ground, it seems to me that the passage which I have just cited from

the judgment of Hirst J in Barclays Bank plc v Glasgow City Council, as well as the earlier passage I cited from his judgment, do support N.. Indeed, it is a refrain running throughout the cases both in the Court of Justice and here in England that the obligation in question is a contractual one. I hesitate, however, to say that the refrain is that the obligation must be a contractual one, for that question was not in issue in most of the cases to which I have referred. However, in two only of those cases the issue did arise, albeit rather obliquely. In Peters the question was whether a consensual relationship akin to contract but assumed not to be in fact contractual fell within the words 'in matters relating to a contract'. It was held that it did, and the reasoning involved the consideration that because membership of an association reproduced 'close links of the same kind as those which are created between the parties to a contract' therefore the obligations between such members or between a member and the association, for instance to pay contributions, may be 'regarded as contractual' (see [1983] ECR 987 at 1002 (para 13)). In other words, 'contract' in art 5(1) should be understood in a somewhat expanded sense, so as to embrace at least consensual relationships closely akin to contract, and there is then no difficulty in regarding obligations arising within such a relationship as contractual in an equally somewhat expanded sense. The assumption, but not the reasoning, appears to be that the obligation, in the expanded sense, must be contractual, but the issue rather related to the different concept of 'matters relating to a contract' and the decision involved the premise that an obligation which was not in fact contractual could nevertheless be regarded as such for the purposes of the article. It could be said, therefore, that the Peters case has something, in theory at any rate, for both sides of the argument. The other case in which the width of the expression 'obligation' did arise, albeit again rather obliquely, was of course Barclays Bank plc v Glasgow City Council. There, as in Peters, the issue debated was as to the width of the concept 'in matters relating to a contract' (see [1994] 4 All ER 865 at 870, [1993] QB 429 at 433). Nevertheless, Hirst J approached that issue in part by reference to his conclusion that the cases of Peters, Arcado, De Bloos and Union Transport all suggested that what was needed was a contract giving rise to contractual obligations or at any rate consensual relations akin to contract giving rise to comparable obligations and that even a contract leading to a quasi-contractual obligation was not enough (see [1994] 4 All ER 865 at 876-877, [1993] QB 429 at 439-440). This case therefore supports Mr Gee, but has now been referred by the Court of Appeal to the Court of Justice.

At the end of the day, however, even Mr Gee was inclined to accept that a claim which turned on the continuing obligation of good faith after the conclusion of an insurance contract could properly be said to

involve an 'obligation' which was contractual for the purposes of art 5(1), even though as a matter of English law it arises only as an independent obligation imposed by law and one that does not sound in damages as a term of the contract (see The Good Luck [1989] 3 All ER 628 at 658-660, [1990] 1 QB 818 at 886-888). It is necessary, therefore, to consider the obligations relied upon by Mr Toulson to see whether they should similarly be regarded as contractual in a legitimately extended sense of that term.

Mr Toulson's essential submission was that the pre-contractual duty concerned, whether it be described as a duty of good faith, a duty of disclosure, or a duty to make a fair presentation of the risk, is not only properly called an 'obligation' (Glasgow Assurance Corp v William Symondson & Co [1911] 16 Com Cas 109 at 121 and The Good Luck [1989] 3 All ER 628 at 659, [1990] 1 QB 818 at 888) but in the latter case is called an 'incident of the contract of insurance' (see [1989] 3 All ER 628 at 660, [1990] 1 QB 818 at 889). If no contract is ever entered into, there is no obligation. The obligation only arises at the moment of contract. However, I do not think that is correct. In The Good Luck the language of 'incident of the contract' is primarily directed to the post-contractual duty. Moreover, it may be that a breach of the pre-contractual duty will have no legal consequences if no contract is ever entered into: but that is not the same as saying that the duty does not exist before the contract. On the contrary, the judgment in The Good Luck [1989] 3 All ER 628 at 659-660, [1990] 1 QB 818 at 887-888 speaks of the duty as being 'pre-contractual' and as arising at the 'pre-contract stage'. The Marine Insurance Act 1906, s 18(1), says:

'... the assured must disclose to the insurer, before the contract is concluded, every material circumstance...'

In Bell v Lever Bros Ltd [1932] AC 161 at 227, [1931] All ER Rep 1 at 32 Lord Atkin said of contracts uberrimae fidei:

'In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made...'

In truth, the right to avoid a contract, whether for non-disclosure in contracts of uberrimae fidei, or for positive misrepresentation in any kind of contract, does not depend on contract at all, but seems to rest on underlying principles of equity: see Banque Financihre de la Citi SA v Westgate Insurance Co Ltd [1989] 2 All ER 952 at 991-997 esp 995-996, [1990] 1 QB 665 at 773-781 esp 779, where Slade LJ, giving the judgment of the Court of Appeal, said:

'In Merchants' and Manufacturers' Insurance Co Ltd v Hunt [1941] 1 All ER 123 at 136, [1941] 1 KB 295 at 318 Luxmoore LJ (with whom

Scott LJ agreed on this point (see [1941] 1 All ER 123 at 128, [1941] 1 KB 295 at 312)) said: "Whatever may be the decision with regard to non-disclosure, as to which I say nothing, I am satisfied that in a case of positive misrepresentation the right to avoid a contract, whether of insurance or not, depends not on any implied term of the contract, but arises by reason of the jurisdiction originally exercised by the Courts of Equity to prevent imposition."'

Though Luxmoore and Scott LJJ found it unnecessary to decide this further point, we think that the right to avoid a contract uberrimae fidei in the case of non-disclosure must be founded on the same jurisdiction. Moreover, if there be negligence or fraud in the misrepresentation, then the right is not merely one to avoid a contract, but gives rise to a cause of action in tort.

In my judgment these considerations militate against regarding the obligation upon which the plaintiffs rely in this action as being within the term 'obligation in question' in art 5(1), and that is so whether or not that term is limited more or less strictly to contractual obligations. A pre-contractual duty of disclosure is akin to a duty not even innocently to misrepresent: in either case a resulting contract can be avoided. If the former duty is to be regarded as an 'obligation' for the purposes of art 5(1), then there is no reason why the latter duty should not be regarded similarly. And if that be the position, then why should negligent or fraudulent misrepresentation ultimately be regarded differently, at any rate if they were relied on primarily to avoid a contract? If the question were merely whether claims arising from non-disclosures or misrepresentations were in 'matters relating to a contract', I could readily accept that they should be so regarded. The question, however, is whether such obligations which arise before contract and in the circumstances of the formation of contract are apposite to be the subject matter of an article which provides an exceptional jurisdiction based upon the connecting link of the place of performance in matters relating to contract. At the end of the day I believe this to be the critical factor. Article 5(1) is concerned with the place where contracts are to be performed, not with the place where contracts are made. It may well be, and it does not arise for decision here, that, in the context of the performance or non-performance of a contract, the critical obligation in question could be an obligation which might not be a strictly contractual or promissory obligation, for example the continuing post-contractual obligation of good faith in an insurance contract. The Jenard Report on the Brussels Convention (OJ 1979 C59 p 1 at pp 23-24) states that art 5(1) represents a compromise between various national laws and in particular between those which recognise the jurisdiction of the forum solutionis and those which also recognise the jurisdiction of the courts for the place 'where the obligation arose'. There was concern that to accept the latter

might, by indirect means, sanction the jurisdiction of the forum of the plaintiff. In my judgment, it would infringe this distinction to hold that an obligation to avoid misrepresentations or non-disclosures in the making of a contract is an obligation which founds jurisdiction at the place of performance. After all, such an obligation gives no right to contractual performance at all or to damages in lieu. The only remedy for its breach is the right to avoid the contract, or, in the case of negligence or deceit, a right to damages in tort and not in contract.

On the basis, therefore, that the obligation in question, as the plaintiffs contend, is the obligation to make a fair presentation of the risk, I hold that the plaintiffs have failed to bring themselves within art 5(1) of the convention.

The plaintiffs, however, have an alternative case…The plaintiffs' suit is founded on the obligation to make a fair presentation of the risk. In Sweden, N.'s suit appears to be the mirror-image of the plaintiffs' suit, namely an action to uphold the validity of the contract against the challenge presented by the plaintiffs based upon the alleged failure to make a fair presentation of the risk. The suit in Sweden might have been a straightforward suit to enforce the payment of claims under the reinsurance contracts, but it seems to me that it is not. But whatever may be the position in Sweden, and I certainly must not be taken to be deciding anything here which is ultimately a matter for the Swedish court to consider and rule upon, the plaintiffs' suit here is not, in my judgment, based upon any question as to the performance or non-performance of an obligation to pay claims. To hold otherwise would, it seems to me, be to revert to the test which was rejected in De Bloos and limited in Shenavai to contracts of employment, namely a test by which the characteristic obligation of a contract was to be identified as the obligation in question -- as distinct from the correct test under which the obligation 'forming the basis of the legal proceedings' has to be identified (see De Bloos [1976] ECR 1497 at 1508 (para 11)).

For these reasons, I hold that the plaintiffs' second action, which seeks to found jurisdiction in England under the terms of art 5(1) of the convention, must be set aside. An irony of this litigation is that, if I am right in thinking that claims are payable under these two contracts in London, then any suit by N. against the plaintiffs for the payment of claims, whether viewed under art 2 or under art 5(1), would itself have to be based in England. Nevertheless, what I have had to consider is whether the plaintiffs can found jurisdiction in England for their action, and in my view they cannot.

The application of the convention to the first action

There remains for mention a form of postscript which only arose as a matter of concern after oral submissions had been concluded, when I inquired of Mr Gee and Mr Toulson by what exact process and as of what time the provisions of the convention were given the force of law in England vis- -vis parties domiciled in Sweden. It appears that the following is the position. The United Kingdom ratified the convention on 5 February 1992 and pursuant to art 61(4) of the convention itself it followed that the convention took 'effect... in relation to' the United Kingdom on 1 May 1992. In the meantime, and subject to the making of an instrument bringing the statute into effect, the convention was inserted into the Civil Jurisdiction and Judgments Act 1982 by means of the Civil Jurisdiction and Judgments Act 1991 (see s 1(1) of the 1991 Act and s 3A of the 1982 Act). Section 3A of the 1982 Act gives the convention the force of law in the United Kingdom. The 1991 Act, and hence s 3A of the 1982 Act, was brought into effect on 1 May 1992, the same day as the United Kingdom's ratification took effect under art 61(4), by means of the Civil Jurisdiction and Judgments Act 1991 (Commencement) Order 1992, SI 1992 No 745, made under s 5(3) of the 1991 Act. At this time Sweden had not yet ratified the convention. Sweden ratified the convention on 9 October 1992, and so under art 61(4) the convention took effect in relation to Sweden on 1 January 1993. It followed that under s 1(3) of the 1982 Act (as amended by the 1991 Act) Sweden became a 'Lugano Contracting State' as from that date, 1 January 1993. Pursuant to ex parte leave granted on 25 September 1992, the first action was commenced by writ on 1 October 1992, after the convention had the force of law in England, but before Sweden's ratification and before the convention took effect in relation to Sweden and thus before Sweden became a 'Contracting State' for the purposes of the 1982 Act. The summons to set aside service in the first action is dated 29 December 1992. It says nothing about the convention. A question arises therefore, whether, following 1 January 1993, this court, which has been obliged to give to the convention the force of law in England since 1 May 1992, is obliged to treat Sweden as a 'Contracting State' in relation to the first action, although it was not a 'Contracting State' at the date of issue or service of the writ in that action, or at the date of the summons challenging English jurisdiction, or at the date when ex parte leave to bring the action was obtained.

Many provisions of the convention are written in terms of the act of being 'sued'. Thus, art 2 states that persons domiciled in a 'Contracting State' (ie N., but only after 1 January 1993) 'shall... be sued' in the courts of that state. Article 5(1) provides that a person domiciled in a contracting state 'may... be sued' in the courts for the place of performance of the obligation in question. These provisions would seem to suggest that the critical time for determining whether the convention applies to

proceedings as involving suit against persons domiciled in a contracting state is the time when suit is begun. Whether that means upon issue or upon service of the writ would make no difference on the facts of this case, but see on this subject Dresser UK Ltd v Falcongate Freight Management Ltd, The Duke of Yare [1992] 2 All ER 450, [1992] QB 502, where it was held that for the purpose of the concept under arts 21 to 23 of the Brussels Convention of the court being 'seised' of proceedings, the relevant time is that of service of proceedings, not of their issue.

Other provisions of the convention, however, suggest that for the purpose of giving effect to the jurisdictional requirements of the convention, the critical time may be later than the time when suit is begun. Thus the first paragraph of art 20 provides:

'Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention.'

The hypothesis 'is sued... and does not enter an appearance' suggests that a point of time later than the time of suit is looked at. For the purpose of the first action, the court's jurisdiction, subject to any challenge, was derived from RSC Ord 11, r 1 and not from the convention; but, in the absence of such an appearance as accepts jurisdiction, the court is obliged to decline jurisdiction unless its jurisdiction can be derived from the convention. Article 21, moreover, refers to the concept of the jurisdiction of a court being 'established': that again seems to point to a time later than the commencement of suit and indeed later than the time when the court is seised of the proceedings.

Article 54, one of the 'Transitional Provisions' of the convention, provides by its first paragraph that:

'The provisions of this Convention shall apply only to legal proceedings instituted... after its entry into force in the State of origin...'

This provision emphasises the time of the commencement of suit, but by reference to the date when the convention enters into force in the state of origin of the proceedings (in the present case, in England), rather than in the state where the defendant is domiciled. It could be argued that the provision points both ways: it suggests that the convention applies to the first action, because it was instituted after 1 May 1992; but by emphasising the date of the institution of proceedings it raises the question whether it can apply for relevant purposes to proceedings against a party domiciled at that time in a state which was not a contracting state.

In written submissions addressed to me since the conclusion of the oral hearing, counsel for both the plaintiffs and N. have referred me to the provisions of the Acts and of the convention which I have cited above. On the part of the plaintiffs it has been contended that the critical time for considering whether Sweden is a 'Contracting State' is the time at which leave to issue the proceedings was granted (see eg ISC Technologies Ltd v Guerin [1992] 2 Lloyd's Rep 430 at 434) and that any other approach would lead to retrospective effect being given to the convention. On the part of N. it has been contended that as long as N.'s challenge to the jurisdiction of the English courts is still under adjudication so that there is no appearance by N. in England other than for the purposes of contesting the jurisdiction, the English court is obliged to take into account the fact that N. is domiciled in what is now a contracting state, both for the purposes of the convention and as a matter of the general approach of English law to the merely provisional nature of an ex parte order for leave to issue and serve proceedings out of the jurisdiction (see eg WEA Records Ltd v Visions Channel 4 Ltd [1983] 2 All ER 589 at 593-594, [1983] 1 WLR 721 at 727).

…Even if the convention did apply to the first action, it would merely have the same effect, to set aside those proceedings, in the light of my decision on the second action. Moreover these new issues on the convention have not been fully argued before me, indeed I have heard no oral submissions on them at all. Neither party has requested a further hearing, and I have not thought it right to put them to the expense of one. Still further, the issues are in one sense of importance, since they concern the application of the convention, and therefore no decision should be made without full argument; while on the other hand, since they concern the transitional application of the convention, it may be highly unlikely that they will ever arise again. For these reasons, while recording the parties' submissions, for which I am grateful, I consider it appropriate to say nothing further about them.

In the result, I set aside all proceedings in both actions.

DISPOSITION:

Actions dismissed.