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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICHARD A. TROPP,

Plaintiff, 07 Civ. 414 (NRB)

v. **ECF CASE**

THE CORPORATION OF LLOYD'S, aka the Society of Lloyd's

Defendant.

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**PLAINTIFF'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF SUMMARY JUDGMENT MOTION
AND IN OPPOSITION TO LLOYD'S MOTION TO DISMISS**

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Preliminary Statement

Lloyd's[1] utter success in getting issue preclusion in the UK system of all of plaintiff's defenses against Lloyd's' claim, then claim preclusion of all his UK rights in counterclaim by statutory immunity, demonstrates that a US defendant in Lloyd's R&R claims has, in reality, no rights or remedies whatever in litigating in the UK with Lloyd's. By Lloyd's own proactive pursuit of this success after it had repeatedly assured US courts that such UK remedies unquestionably existed, Lloyd's has not only denied plaintiff real access to the process of justice, but also has run a judicial "bait 'n switch"[2] against all American courts to whom it had made those representations.

Lloyd's established that in defense in the UK system, plaintiff could not present evidence of "manifest error" to show Lloyd's claim was wrong. Lloyd's then established that its unique UK statutory immunity covered not only claims for damages against it, but all the equitable remedies of accounting and specific performance sought by plaintiff.[3] Lloyd's now has to live with the consequences of its success. Its foreclosure of all UK remedies to plaintiff has cost it the ability to enter its UK Judgment in New York and permits US Courts to set aside the choice of venue and of law clauses of the General Undertaking ("Choice Clauses").

There are two undisputable basic facts concerning Lloyd's UK judgment against plaintiff, which are shown by his UK court record:

1. Plaintiff proffered evidence of highly particularized issues to support why he should not be liable for the Judgment, and exhausted his remedies first in defense and then in counterclaim at every level of UK court.

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[1] All definitions used in plaintiff's moving memorandum will be continued herein.

[2] Exactly as the U.S. Supreme Court used the expression "bait and switch" in *Reich v. Collins,* 513 U.S. 106 (1994) at 112 (referring to the State of Georgia's judicial process) in characterizing the preclusion to a defendant of post judgment remedies as well, after the earlier preclusion of his remedies in defense, when the original defendant Reich and Federal courts had relied on original plaintiff Collins' having held out that "clear and certain" post judgment remedy would be available instead to fulfill due process requirements.

[3] Whereas in US due process doctrine, "immunity from damages does not ordinarily bar equitable relief as well". *Wood v Strickland*, 420 U.S. 308, 314-15, n. 6 (1975) [action against a school board].

2. All UK Courts held that no remedy existed that permitted substantive hearing and "arguability" either in defense or in counterclaim of that evidence, because in defense a Lloyd's corporate by-law which carries statutory authority in UK law, and in counterclaim a unique UK immunity statute, barred all remedies solely when Lloyd's in particular was plaintiff.

The question presented on plaintiff's motion for a partial summary judgment declaring that Lloyd's may not enter the UK judgment in New York is whether, on these undisputed facts, plaintiff has been denied due process under either New York's Recognition of Foreign Judgments Statute (CPLR §5304(a)(1) or CPLR §5304(b)(4)) ("Recognition Statute") or the Fifth Amendment of the U.S. Constitution ("Fifth Amendment"). This issue does not require this Court to revisit whether the UK courts incorrectly applied English law, the straw man Lloyd's throws up. The issue is whether the UK procedure comports with minimal due process required under the law of the US forum in which the UK Judgment is sought to be entered and enforced against plaintiff.

Plaintiff submits that, under the standards expressed by US courts in the line of US Lloyd's cases which both parties cite, the UK courts' failure to make available to him any remedy plaintiff sought, which prevented consideration of plaintiff's evidence, fails to provide minimum due process. These are the same UK remedies Lloyd's had assured US courts were available post judgment to US names when Lloyd's urged the US Courts to enforce other UK judgments. But in this case Lloyd's argued to the UK Courts that these same remedies were barred under its relevant By-Law (when plaintiff was trying to get "arguability" of his defenses) and statute (of his counterclaims). This deprivation of all remedies constitutes a denial of due process under the Recognition Statute and the Fifth Amendment, and warrants non-enforcement of the Choice Clauses and denial of Lloyd's motion to dismiss[4].

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[4] Plaintiff's claim for an accounting, which would be reached if the Choice Clauses are not enforceable, is not an attempt to re-litigate what happened in the UK. Rather it is his effort to actually litigate for the first time on the merits his evidence that he is not liable for what Lloyd's claims and that Lloyd's is actually liable to plaintiff. Where plaintiff calls a point of UK law to this Court's attention (Memo of Law at 22), that is only to present analysis of the UK substantive law under which Lloyd's succeeded in precluding his UK remedies in defence, to

I. THE CHOICE PROVISIONS IN THE UNDERTAKING DO NOT REQUIRE DISMISSAL OF THE COMPLAINT.

A. Enforceability Of A Foreign Judgment Has Nothing To Do With the Contractual Choice Clauses.

The most recent Lloyd's case in this district cited by both parties, *Lloyd's v. Edelman*, 2005 WL 639412 (S.D.N.Y. 2005) well illustrates how the Choice Clauses simply have nothing to do with whether a judgment obtained in the UK may be enforced in New York. The *Edelman* court recognized in the first page of its opinion that Edelman had signed the General Undertaking with the UK Choice Clauses. *Id*. at *1. However, when the *Edelman* court discussed enforcement of the UK judgment against Edelman in New York, the Choice Clauses are never mentioned. Rather, the Court analyzes, under the Recognition Act, the process under which the judgment against Edelman was obtained. In that analysis, the *Edelman* Court relied heavily on the existence in England of remedies in a separate action after Lloyd's had established its claim for the "Equitas Premium" [Edelman's R&R liability], *id.* at *5-6. Not until plaintiff's UK case has it become crystal clear that those remedies do not exist. All fourteen federal and state courts cited to by the *Edelman* court, *id.* at 4 follow the same analysis, ignore the Choice Clauses, and permit enforcement of UK judgments because of the supposed existence of such adequate alternative post-judgment other remedies in the UK, which plaintiff's UK process record has shown do not exist.[5]

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show this Court how the UK system has applied UK law -- such as the law of contract -- differently in the class of Lloyd's' R&R cases from all others, and have denied the rights and protections in that law (including the common and statutory law of misrepresentation, which US courts expressly have assumed to be available to all US defendants in the UK) uniquely to this class of defendants, by contrast to all other cases under that same body of law.

[5] Just as choice clauses in maritime cases do not preclude the ancilliary relief of maritime attachment in other jurisdictions (*Polar Shipping v. Oriental Shipping Corp.* 680 F.2d 627 (9th Cir. 1982); *Hendricks v. Bank of America, 408 F.3d 1127 (9th Cir. 2004) Consub Delaware LLC v. Schahin Engenharia Limitada,* 476 F.Supp.2d 305 (S.D.N.Y. 2007), the choice clauses should not preclude a declaration to enjoin judgments obtained without minimum due process.

B. The Choice Clauses Should Not Be Enforced, In Any Event, Because Of The Lack Of Due Process The UK Courts Give To Lloyd's Names

For the same reasons that the Judgment is not enforceable, the contractual Choice Clauses should not be enforced.[6] Enforceability of the Choice Clauses requires evaluation of the type of hearing that a US citizen would receive in the UK. The Second Circuit lead Lloyd's case sets forth the analysis of when to enforce the Choice Clauses:

> The Supreme Court certainly has indicated that forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character. *See, e.g. The Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916. …
>
> This presumption of validity may be overcome, however, by a clear showing that the clauses are "'unreasonable' under the circumstances." *The Bremen,* 407 U.S. at 10, 92 S.Ct. at 1913. The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching, 499 U.S. at---, 111 S.C. at 1528; 407 U.S. at 12-13, 92 S. Ct. at 1914; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum, 407 U.S. at 18, 92 S. Ct. at 1917; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, 499 U.S. at ----, 111 S.Ct. at 1528; or (4) if the clauses contravene a strong public policy of the forum state, 407 U.S. at 15, 92 S.Ct. at 1916.

Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1362-1363 (2d Cir. 1993). *See Stamm v. Barclays Bank of New York*, 960 F. Supp. 724, 729 (S.D.N.Y.1997) *aff'd*. 153 F.3d 30 (2d Cir. 1998).

Plaintiff has proven the third grounds for showing that the Choice Clauses are "unreasonable": UK Lloyd's law is fundamentally unfair in depriving plaintiff of all the remedies he sought since the UK system would not consider his evidence under the UK Courts' new interpretation (a) of the "conclusive evidence" clause of the R&R Contract–("Conclusive Evidence Clause") in defense and (b) Lloyd's immunity in Lloyd's Act 1982 § 14, ("Lloyd's Immunity") as to all causes of action and remedies, not just a suit for damages, in counterclaim.

[6] Plaintiff does not expect this Court to replace UK Law with US law in its entirety. Rather, this Court should apply UK law to the extent possible consistent with due process, e.g. permit plaintiff to submit evidence of "manifest error" in the calculation of what he owes and to limit Lloyd's immunity to claims for damage but permit plaintiff's claims for specific performance.

The Second Circuit in the *Roby* decision emphasized the importance of "Adequate Remedies," 996 F.2d at 1365, in finding that the Choice Clauses were reasonable. Unlike *Roby*, plaintiff did not assert intentional fraud claims and nor seek to void his contracts with Lloyd's. He asserted, but was shut out from, claims for specific performance and of conscious avoidance of misrepresentation by Lloyd's. The latter two sets of claims the *Roby* Court believed were available in the UK, 996 F.2d at 1365:

> In any event, the available remedies are adequate and the potential recoveries substantial. This is particularly true given the low scienter requirements under English misrepresentation law

Plaintiff asserted counterclaims that relied upon Lloyd's misrepresentations only to find out that the Lloyd's Immunity barred them as well.

The Second Circuit also emphasized that as an adequate alternative remedy to claims against Lloyd's itself, claims could be asserted against "Members' and Managing Agents" *Id.* It is not disputed by Lloyd's that the proceeds of any such claims are simply taken and converted by Lloyd's and held for the next 70 years[7], which makes such claims against his agents instead of Lloyd's worthless as redress. Memo of Law, p. 19 fn 20.[8]

As a result, under the Choice Clauses, plaintiff is unable to assert any remedy that permits a UK Court to consider, on the merits, evidence that he, in fact, does not owe anything or that Lloyd's had already seized plaintiff's funds held by his agents to cover his liability.[9] The absence of any remedy makes enforcement of the Choice Clauses simply "unreasonable."

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[7] Nominally to cover his R&R liability, if the cash went from Lloyd's to Equitas' insurance claims reserves.

[8] If Lloyd's gives any of the money to Equitas rather than converting it, it appears that Lloyd's takes the proceeds of claims against agents not to secure solely the obligations of the particular name, but Equitas' obligations in general. Taking of one name's assets to secure obligations of other names violates what Lloyd's in its Memo of Law recognizes is a basic tenet of the Society - no name is supposed to be made liable for losses of another name. Memo of Law, p. 4.

[9] Lloyd's says that plaintiff had an opportunity to be heard if he only had joined the Jaffray case. (Memo of Law at 12-13). As shown below, the Jaffray case sought rescission based on a claim of alleged but unevidenced conspiracy at the Lloyd's central level 15 years before the matters relied on in plaintitf's defenses and counterclaims, and never submitted evidence disaggregated to the syndicate level of the Jaffray plaintiffs' particular syndicates. Plaintiff, by contrast, wanted accounting and specific performance (expressly, not rescission), presented a case based on his

II. THE NEW YORK FOREIGN JUDGMENT RECOGNITION ACT BARS ENFORCEMENT OF THE JUDGMENT.

A. The UK Judicial System For Lloyd's Cases Does Not Provide Procedures Compatible With The Requirements Of Due Process Of Law.

1. The *Jaffray* Case Did Not Provide Plaintiff With Any Remedy

Lloyd's claims (Memo of Law at 12-13) that plaintiff is not the first plaintiff to assert post-judgment claims, and could have joined *Lloyd's v. Jaffray*, 2000 WL 1629463 (Queen's Bench, Nov. 3, 2000) *aff'd* 2002 WL 1654876 (Court of Appeal, July 26, 2002). Lloyd's is mixing apples and oranges. None of plaintiff's claims were asserted in *Jaffray,* which alleged actual fraud in the original inducement of Names to join or stay in Lloyd's, which Plaintiff never relied on. All of plaintiff's claims arose from the time of R&R in 1996 and later, years after the claims asserted in *Jaffray.* The *Jaffray* Names sought to avoid their contracts with Lloyd's; Plaintiff seeks to <u>enforce</u> his contract with Lloyd's, which Lloyd's seeks to escape. The Jaffray Names claimed that Lloyd's failed by omission in its duty to regulate their agents in the market, and to warn them of known liability arising from acts by their agents; Plaintiff alleges positive wrongful acts by Lloyd's management itself 15 years after the matters considered in Jaffray, not any mere omission by Lloyd's, including not from failure to warn him of problems arising from acts by his agents. Thus, Lloyd's reference to the *Jaffray* case is a "red herring", a complete *non sequitur* in law and fact.

2. Lloyd's UK R&R Cases Show That The UK System Lacks Due Process When Applied To R&R Defendants As A Class

Plaintiff does not seek to prevent enforcement of the UK Judgment simply because he, alone, was denied due process. Rather, he points out how the thousands of Lloyd's cases constitute a sub-system of the UK judicial system, creating in reality a separate parallel "system" of justice, singularly different in law and procedure from the normal UK judicial system whose

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syndicate-specific disaggregated evidence on the numbers, and the substantive matters in his case arise the time of R&R and after, continuing into the present.

fairness US courts have envisioned when observing that the "United States courts…have inherited major portions of their judicial traditions" *British Midland Airways Ltd. v. Int'l Travel, Inc.,* 497 F2d. 869, 871 (9th Cir.1974).[10]

Lloyd's quotes the Seventh Circuit in *Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) for the proposition that an attack on the UK system of courts "borders on the risible." 233 F3d at 476. (Memo of Law at 13). Lloyd's omits reference to the same opinion's finding that if there were no remedy available for a name to attack the Equitas premium, that <u>would</u> be "doubtless a deprivation of their property without due process of law." 233 F.3d at 480. Yet, plaintiff has shown there is in reality no UK remedy for him -- or any other Name -- to be able to actually defend against a Lloyd's R&R claim, which carries preclusive statutory authority in UK law. If one were to apply Judge Posner's standards in A*shenden*, plaintiff's UK process record has shown a judicial system that permits deprivation of property without due process.

Lloyd's recognizes that the class of Lloyd's Names' UK R&R cases could well constitute a sub-system of a judicial system that would warrant non-enforcement in the US against a US defendant if, as a class, those UK cases had lacked due process. Lloyd's argued that in *Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002), the Court found that the UK courts had "applied typical English law" to the R&R transactions. (Memo of Law at 15). Lloyd's refuses to comment upon plaintiff's proof that, in his case, "typical" English law was absolutely <u>not</u> applied. Quite to the contrary, the "typical" law of "conclusive evidence" clauses in contract was dramatically expanded to preclude plaintiff from having his evidence considered on whether Lloyd's claim was in "manifest error".[11] See UK Court of Appeal judgment affirming summary

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[10] For recognition that a country may have more than one national "system" of justice, see *Parisi v. Davidson*, 405 U.S. 34, 41 (1970) (describing the civilian and military courts as "two separate judicial systems" to which notions of comity differently apply, depending on their respective fairness of procedure); *Sedivy v. Richardson*, 485 F.2d 1115, 1116 (3d Cir. 1973).

[11] The *Turner* Court specifically discussed the "conclusive evidence" clause as "not an unusual type of clause." 303 F.3d at 331. The *Turner* Court is correct; what is unusual and remedy-precluding was the interpretation of that

judgment, Tropp Dec. Ex. AF, ¶¶14-20**.** Similarly, the Lloyd's Immunity was expanded, for the first time, to shield Lloyd's management from equitable remedies even as to Lloyd's acts done in its merely private capacity, as opposed to in its statutory regulatory "public functions" which the immunity had been enacted to protect. Court of Appeals affirming dismissal of plaintiff's counterclaims ("CA Counterclaim Dismissal"), Tropp. Dec. Ex. AH, ¶¶21-26**.**[12] Thus, what may have been the law that was applied to the *Turner* names years before plaintiff was far different from the law applied to plaintiff -- and would be to all other names.

3. Plaintiff Was Denied A Hearing Of His Evidence Because No Remedy Existed To Permit The UK Court To Consider It.

Lloyd's emphasizes that plaintiff presented his evidence to each level of court in the UK.[13] (Memo of Law at 15-16) What Lloyd's misses is that proffer of evidence is meaningless if there is no remedy that permits a court to consider the evidence on its merits. The Choice Clauses are unreasonable because Lloyd's' unique law was construed by the UK courts to preclude him from in effect all remedies (whether in defense or in counterclaim), with the result that the courts would not consider the merits of the evidence. Whether the elimination of all remedies is characterized as substantive or procedural, UK law makes no difference, because Plaintiff never had his day in court to prove he was not liable for the UK Judgment against him, much less to recover.

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clause in plaintiff's case to prevent him from having his evidence in defense of error in Lloyd's' claim considered by the Court. *Turner* relied on *Ashenden*, 233 F3d at 478-82, which as shown above argues for finding the UK Judgment unenforceable.

[12] Lloyd's Memo of Law at 18 mischaracterizes the CA decision affirming dismissal of plaintiff's counterclaims, Ex. AH to the Tropp Declaration. Lloyd's claims that plaintiff sought damages and, thus, his remedies were barred by Lloyd's Immunity. In fact the CA recognized that plaintiff did not seek damages, but an accounting and specific performance based on its results. (*Id.* ¶23). However, the Court held that since the result of an accounting and consequent specific performance could be to award money, the Court would treat the accounting remedy as constructively one for damages and bar it under Lloyd's Immunity.

[13] Lloyd's mischaractizes plaintiff as a "non-accepting Name" with respect to R&R. From 1996 through 2002, plaintiff understood from Lloyd's, based on Lloyd's' Chief Executive's word and repeated written as well as oral confirmation of it from Lloyd's' Financial Recovery Department, that he had an Individual Settlement Agreement with Lloyd's (different from the standard R&R settlement, on Lloyd's' pre-R&R "full and final" settlement template). Plaintiff relied on Lloyd's' multiple representations that they considered him internally to be a settled name, and forebore from bringing his own claims as he was waiting for the final settlement papers promised by Lloyd's, which never came. *See* Tropp Dec. ¶¶.

4. Plaintiff Is Not Relitigating What Happened In The UK.

Lloyd's mischaracterizes plaintiff's case as an improper attempt to relitigate his UK case. (Memo of Law at 17-19). It is not. Because of what happened in the UK, plaintiff claims the UK Judgment should not be enforced. Lloyd's focuses on some, but not all, of plaintiff's claims that were foreclosed in the UK and argues that those claims had no merit. While plaintiff disputes Lloyd's argument (see his reply declaration), the merit or not of plaintiff's claims is not the point. Lloyd's does not deny that the basis for rejection of the claims by the UK Courts was not their lack of merit, which in fact the UK courts never reached, but rather because the UK Courts could not consider them because of their interpretation of the R&R Conclusive Evidence Clause and of Lloyd's Immunity.

Lloyd's does not deny the merits of plaintiff's defenses that the liability alleged against him was materially not from true "insurance" within the meaning of UK law, nor that it was overwhelmingly from sham self-"reinsurance" rather than from arms' length risk transfer which would constitute real "reinsurance", nor inter alia that Lloyd's seized profit distributions from his profit-making syndicates (and other assets of his held in trust by his agents) but converted them rather than putting them into insurance claims reserves on his account to reduce the R&R liability Lloyd's alleged against him. Nor does Lloyd's deny that it was in contemporaneous possession of knowledge of all of the above by the time of R&R, which would make Lloyd's' R&R claim a false claim.

Instead, Lloyd's attacks plaintiff's basic defense – that his alleged losses arose from liabilities wrongfully imposed on him by Lloyd's in R&R -- by denying that the evidence says what plaintiff claims. (*See* Demery Declaration at ¶¶40-43). As plaintiff points out in his reply declaration (¶15-24), Lloyd's misreads the evidence. The key point, however, is that the Appeals Court in affirming the dismissal of plaintiff's counterclaims as to the wrongful liabilities did so

on the basis of the immunity, and never reached the merits of his claims. (CA Counterclaim Dismissal, ¶¶20-26.)

As to his claims[14] that Lloyd's does argue, those arguments miss the rationale why the UK Courts rejected the claims. For example, Lloyd's first says that plaintiff misinterpreted his Statement of Reinsurance by "double counting" a £269,893 credit for his individual share of his syndicates' assets that were paid to Equitas. Lloyd's has refused to produce the internal accounts of its individual calculation of his R&R liability which would document that it had ever credited those assets, his money, to reduce his alleged liability . *See* Tropp Reply Dec. ¶34-37. The UK Court did not determine whether or not plaintiff received the credit for these assets because it was bound by its interpretation of the Conclusive Evidence Clause to accept whatever Lloyd's claimed was the amount of his liability, merely on allegation; the court never reached the merits. Summary Judgment, Tropp. Dec. Ex. AD at ¶22.

Lloyd's repeats several times that plaintiff may well have claims against his members' and managing agents. (*e.g.* Memo of Law at 20). Even Lloyd's recognizes (*Id* at fn. 20) that any recovery from an agent goes to Lloyd's to hold in effect forever purportedly to satisfy his outstanding underwriting obligations (see above). The "remedy" of recovering contribution from agents to cover what Lloyd's itself took is, in practice, illusory.

Having itself advocated in the UK the broad scope of both the R&R Conclusive Evidence Clause and of its statutory Immunity to preclude first plaintiff's defenses and then his claims,

[14] Lloyd's chart in its Memo of Law at 9-10 incorrectly characterizes plaintiff's claims in multiple ways, as to all of which Lloyd's knows better. Plaintiff never asserted that the R&R assignment from Equitas did not give Lloyd's standing; but to the contrary, relied on the assignment to assert a defense and a claim against Lloyd's. Plaintiff never claimed that Lloyd's lacked the authority to appoint a substitute agent; but that Lloyd's had in fact not done so, because his "Substitute Agent" AUA9 was only a paper dummy with no capacity to act as his agent, under UK law standards of what any "agent" or an "underwriting agent" in particular is required to be able to do to protect its principal's interests. Plaintiff made no negligence claim against Lloyd's, nor any other claim of omission (what Lloyd's calls "mere inactivity" as opposed to positive acts), including of failure to supervise. Finally, plaintiff's settlement with Lloyd's, on which Lloyd's induced him to rely in forbearing to bring his own claims, was repeatedly documented in confirmations by Lloyd's itself -- before Lloyd's reneged on it by suing him, and without pre-action notice of repudiation *E.g.* Ex.s L & M to the Tropp Declaration.

proactively itself making null what Lloyd's had represented to US courts about the availability of adequate alternative remedy in the UK, Lloyd's cannot now escape the consequences of its success. Having precluded plaintiff from all those remedies it had said would be available in the UK, Lloyd's cannot now enter its UK Judgment in New York, and has opened the door to a US court to set aside the Choice Clauses because plaintiff never had his day in court.

B. Lloyd's Cause Of Action Is Repugnant To New York Public Policy

Lloyd's conclusorily states that New York contract law and UK Lloyd's law are the same (Memo of Law at 20), as it has done in the whole line of US Lloyd's cases.. Lloyd's ignores the preclusive effect, in each case with statutory force, of the Conclusive Evidence Clause and Lloyd's Immunity in UK law. Tropp Dec. ¶¶95-107. Lloyd's never addresses the fact that its cause of action required UK Courts to enter judgment for whatever amount it merely alleged, without plaintiff having the right to contest liability or the amount of damages either before or after judgment. Plaintiff submits that New York has no analogous cause of action in contract, and that a foreign cause of action which requires entry of judgment for a plaintiff without the opportunity for the defendant to contest either liability or damages is repugnant to New York public policy.

The cases cited by Lloyd's either omit any discussion of the Conclusive Evidence Clause or Lloyd's Immunity, or rely upon the purported existence of other remedies that names could pursue to satisfy their claims. For example, in *Lloyd's v. Grace*, 278 A.D.2d 169, 718 N.Y.S.2d 327 (1st Dept. 2000), the First Department found that Lloyd's cause of action was acceptable because "defendants have effective and viable remedies in the English courts", in particular, the court thought, in misrepresentation. *Id.* at 328. Here plaintiff has shown that there are no such other remedies. In *Lloyd's v. Edelman,* 2005 WL 639412 (S.D.N.Y. 2005), the Court specifically relied on the same quoted language from *Grace* as to the propriety of Lloyd's cause of action. The absence of UK remedies undermines that holding as well. Finally in *Lloyd's v.*

Siemon-Netto, 457 F.3d 94 (D.C. Cir. 2005), the Court relied on the fact that the defendant there, unlike plaintiff here, did not show how UK contract law was different from Washington, D.C. contract law. None of Lloyd's cases come close to dealing with the dramatically different cause of action that Lloyd's' R&R claim has been established in plaintiff's UK case to be, which deprived plaintiff of any chance of proving that he was not liable to Lloyd's. Thus, this Court has the discretion to find the UK cause of action underlying the UK Judgment to be an unfamiliar one which is contrary to New York public policy.

An example of this repugnancy, in light of the statutory preclusive effect of the R&R Conclusive Evidence Clause and the Lloyd's Immunity, is the refusal of UK courts to give plaintiff the protections of UK insurance law either in defense or as the basis for his counterclaims. Lloyd's itself characterizes plaintiff to this Court as "conducting insurance business" in Lloyd's within the meaning of UK insurance statutes, represents the R&R Contract to this court as one of "reinsurance", and asserts authority in UK law over him, with respect to this R&R claim, under those insurance statutes (Demery Dec. ¶¶ 2, 5; Lloyd's' Rule 56.1 Statement ¶¶ 2, 3(b) 5(a); Tropp declaration ¶ 63).

A key component of UK insurance law is the doctrine of *uberrimae fidae*, "utmost good faith", recently applied by the House of Lords not only to the original insurance contract but also to a continuing duty of honest full disclosure in the individual claim in the lead case *Manifest Shipping v Uni-Polaris & Ors* [2001] UKHL 1. New York State public policy underlying insurance law and the business done under it rests on the same foundation of a duty of *uberrimae fidae*, "utmost good faith" *Allendale Mut. Ins. Co. v Excess Ins. Co. Ltd.*, 992 F.Supp. 278, 282-283 (SDNY 1998).

Plaintiff pleaded first defenses and then counterclaims in reliance on the protections in the UK law of insurance and reinsurance, but the UK courts precluded him from all rights both to defend and to claim under it. In UK law Lloyd's can claim against plaintiff in reliance on his

entering agreements with Lloyd's as having been governed by the UK law of insurance, but he cannot defend or claim against Lloyd's in reliance on an underwriter's rights and remedies *under that same contract* as governed by ***that same precise body of law*,** the principles of which are well recognized in New York. This non-mutuality of rights and remedies under the UK insurance law, which Lloyd's has pleaded here governs the contract on which it relies in its claim, is repugnant to NY State's public policy on causes of action in contract governed by NY's law of insurance.

III. IF RECOGNITION ACT DOES NOT BAR ENFORCEMENT OF THE JUDGMENT, THE DUE PROCESS CLAUSE OF THE US CONSTITUTION BARS ITS ENFORCEMENT.

Lloyd's characterization of plaintiff's constitutional argument as "frivolous" (Memo of Law at 21) ignores basic constitutional rights to have evidence heard, absent some policy such as statute of limitations or statute of frauds.[15] *Kapps v. Wing,* 404 F.3d 105, 121 (2d Cir. 2005).[16] Lloyd's claims that the UK system as a whole is compatible with due process and that its cause of action is not repugnant to New York policy. Assuming both were correct, the Court still is left with the undisputed facts that plaintiff had no remedy in the UK and his evidence was in substance not considered by the UK Courts. Minimal due process requires a party to have some remedy to have a court substantively consider whether or not the party is liable for a debt and the proper amount of the debt before the debt is converted into a judgment, or in a foreign forum to have real post-judgment remedies. *D.H. Overmyer v. Frick Co.,* 405 U.S. 174, 180 (1972);

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[15] The constitutional standard at the heart of due process is the opportunity to be heard on the merits. *Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971). Absence of opportunity also violates standards set by the Supreme Court for comity in enforcement actions in *Hilton v. Guyot*, 159 U.S. 113, 205 (1895), "it is the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party."

[16] Lloyd's argues that since the Recognition Act prohibits recognition of certain judgments, it cannot be applied contrary to the principles of due process. (Memo of Law at 21). This argument misreads the Recognition Act. CPLR §5303 mandates recognition and enforcement of money judgments that meet the requirements of the other sections of the Recognition Act. Thus, a judgment in violation of due process could still be mandated.

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).[17] The right to a meaningful hearing, for the individual in the individual case, constitutionally is basic. *Richards v. Jefferson County, Alabama,* 517 U.S. 793, 797 fn. 4 (1996) ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings…a state may not consistently with the Fourteenth Amendment enforce a judgment against a party…without a hearing or an opportunity to be heard."); *Boddie v. Connecticut***,** 401 U.S. 371 377-378 (1971); *Goss v. Lopez,* 419 U.S. 565, 579 (1976); *Ciambriello v. County of Nassau*, 292 F.3d 307, 322 (2nd Cir. 2002) ("We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'")[18] If plaintiff were the <u>only</u> party subjected to a "Star Chamber" proceeding, US due process standards would be violated, even though the system as a whole otherwise comported with an equivalent of fair procedure and the claim was a standard contract claim.

IV. TROPP'S PARTIAL SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THERE IS NO DISPUTE THAT THE LACK OF A UK REMEDY PREVENTED THE UK COURTS FROM CONSIDERING PLAINTIFF'S ISSUES, CLAIMS, AND EVIDENCE OF NON-LIABILITY

There is no dispute that plaintiff submitted his evidence repeatedly to the UK Courts (Memo of Law at 15-16). Lloyd's appears to argue that the UK Courts refusal to substantively consider plaintiff's evidence is a question of law. (Memo of Law at 22). Assuming that the UK

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[17] Lloyd's' claim that "virtually identical arguments" were rejected by other US Lloyd's cases is wrong. In *Lloyd's v. Blackwell*, (S.D. Cal. 2003), Ex. 3 to Memo of Law, the only due process discussion is in the context of the Recognition Act. In *Lloyd's v. Reinhart*, 402 F3d 982, 991 (10th Cir. 2005), the Court noted that Names in the UK had the opportunity to present evidence of manifest error, unlike plaintiff here. The facts of *Reinhart* were materially different and the Court never reached the question of constitutionality under the Fifth Amendment. Finally, in *Lloyd's v. Ashenden*, 233 F3d 473 (7th Cir. 2000), the Court stated that under facts analogous to those experienced by plaintiff, there would be a deprivation of due process.

[18] Plaintiff's loss of due process is especially pernicious because his lack of remedy in the UK not only is about money, loss of his home, and the imposition of a lifelong "debt" indenture as opposed to a one-time payment, but much worse, has deprived him of opportunity for "name-clearing" of stigmatizing attaint to his good name and reputation. "For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential' *Wisconsin v. Constantineau,* 400 U.S. 433, 437, 91 S.Ct. 507, 510" *The Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701 (1972). Plaintiff's loss of good name is no different if from Lloyd's attacks, which succeeded in reliance on UK law with preclusive state statutory force which UK courts enforced by state action, than from the attack of any US government entity.

Court's refusal to substantively consider the evidence is a question of law, then the Court can review the UK decisions (Tropp Dec. Ex. AF and AH) and determine if plaintiff is correct. Determination of questions of foreign law need not prevent summary judgment. *Bassis v. Universal Line, SA*, 436 F.2d 64, 68 (2d Cir. 1970); *Kashfi v. Phibro-Salomon, Inc*. 628 F. Supp. 727, 737 (S.D.N.Y. 1986). If, as a matter of law, plaintiff had no remedy available in the UK and the lack of remedy was a systemic defect in the UK judicial system or as a result of the cause of action sued upon, then plaintiff is entitled to summary judgment that the Recognition Act prevents enforcement of the UK Judgment. If plaintiff simply had no remedy in the UK, then the due process clause of the Fifth Amendment precludes enforcement of the UK Judgment.

Conclusion

One cannot "relitigate" what a foreign forum did not permit to be "litigated" in the first place, by preclusion in that forum's law at every step. Partial summary judgment should be entered declaring that the UK Judgment may not be recognized in New York and Lloyd's motion to dismiss should be denied in its entirety.

Dated: New York, New York
June 18, 2007

Yours, etc.

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