No. 10-___

IN THE

Supreme Court of the United States

RICHARD A. TROPP,
ON BEHALF OF HIMSELF AND ALL OTHERS
SIMILARLY SITUATED,

Petitioner,

v.

CORPORATION OF LLOYD'S,
ALSO KNOWN AS THE SOCIETY OF LLOYD'S,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Mark S. Davies
Rachel M. McKenzie
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th St., NW
Washington, DC 20005

Kevin K. Russell
Counsel of Record
GOLDSTEIN, HOWE &
RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@ghrfirm.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTIONS PRESENTED

1. Is the Uniform Foreign Money-Judgments Recognition Act, as applied by New York and other jurisdictions, consistent with the requirements of the Due Process Clause?
2. Under what circumstances is a forum selection clause in an international contract rendered unenforceable in federal court due to limitations on the availability of a remedy in the foreign forum selected?

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Cases

International Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard A. Tropp respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-5a) and the district court (Pet. App. 6a-54a) are unreported.

JURISDICTION

The court of appeals entered judgment on July 19, 2010. Pet. App. 1a. The court denied rehearing on November 12, 2010. Pet. App. 151a. On January 21, 2011, Justice Ginsburg extended the time for filing the petition through April 11, 2011. No. 10A721. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides, in relevant part:

> [N]or shall any person be . . . deprived of life, liberty, or property, without due process of law. . . .

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

New York's statute governing the recognition of foreign judgments, N.Y. C.P.L.R. §§ 5301 *et seq.*, provides in relevant part:

> **§ 5302. Applicability**
>
> This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.
>
> **§ 5303. Recognition and enforcement**
>
> Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.
>
> **§ 5304. Grounds for non-recognition**
>
> (a) No recognition. A foreign country judgment is not conclusive if:
>
> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> 2. the foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if: * * * *

4. the cause of action on which the judgment is based is repugnant to the public policy of this state; * * * * .

STATEMENT OF THE CASE

This case arises from a series of extraordinary actions taken in the United Kingdom in response to a financial scandal involving the insurance market Lloyd's of London. *See generally, e.g.*, Courtland H. Peterson, *Choice Of Law And Forum Clauses And The Recognition Of Foreign Country Judgments Revisited Through The Lloyd's Of London Cases*, 60 LA. L. REV. 1259 (2000); MARTIN MAYER, RISKY BUSINESS: THE COLLAPSE OF LLOYD'S OF LONDON (1995); ADAM RAPHAEL, ULTIMATE RISK (1994).

In the face of litigation seeking to hold Lloyd's responsible for billions of dollars in insurance losses, incurred as a result of an alleged Ponzi-like scheme in which Lloyd's participated, Lloyd's was permitted by the U.K. courts to force a market restructuring under which: (a) it required market participants (known as "Names") to purchase reinsurance from an entity Lloyd's created and controlled; (b) Names were required to immediately pay a reinsurance premium as calculated by Lloyd's, without any opportunity to contest the existence or extent of their liability for the reinsured debt; and (c) although nominally afforded a post-deprivation hearing, the Names were allowed to challenge their alleged liability, or Lloyd's' calculation of its amount, only if they could show Lloyd's had engaged in fraud.

Such a system would be unconstitutional if implemented in the United States, violating the Due Process Clause by precluding the defendant from having a fair opportunity to contest the allegation of liability. *See Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S.*

California, 508 U.S. 602, 626 (1993). This petition presents the questions whether a judgment obtained against an American Name under such a system overseas may be enforced by an American court, consistent with the Due Process Clause, and whether a forum selection clause purporting to require Names to adjudicate their claims against Lloyd's under this U.K. system is enforceable in federal court.

I. Factual Background

A. Organization of Lloyd's Insurance Market

Respondent Lloyd's Corporation organizes and regulates insurance underwriting in London. Pet. App. 10a. Lloyd's does not itself issue insurance. Instead, individuals and corporations, called "Names," insure risks through ad-hoc syndicates in the Lloyd's market. Complaint ¶¶20-34. In exchange for a portion of the syndicate's profits, each Name is personally liable for his proportionate share of any losses, without limitation. Each Name has a "Members' Agent" who enrolls the Name in particular syndicates, which are run by "Managing Agents." Pet. App. 11a. The Managing Agents, in turn, elect Lloyd's governing council (usually electing Managing Agents to the council), which is given responsibility under U.K. law for regulating the market. *See id.* 10a n.4; Complaint ¶55, 79. Lloyd's thus controls the market, but is itself controlled by major market insiders.

In order to become a Name, investors must sign various contracts, including the "General Undertaking," which, among other things, provides that the Names agree to comply with current and

future Society bylaws. Pet. App. 13a. Names must also agree to a forum selection clause:

> [T]he courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's.

Pet. App. 32a-33a.

Traditionally, each syndicate underwrites insurance for one year, and then remains open for two additional years to resolve any claims. At the end of the third year, the syndicate is closed and profits or losses are calculated. Pet. App. 11a.

B. Origins Of The Lloyd's Crisis

In the 1970s and 1980s, some Lloyd's syndicates issued long-term insurance for, among other things, environmental liabilities. Complaint ¶123. Although the period of insurance coverage was only a year, the syndicate would remain liable indefinitely for any loss arising from that time period, even if it did not manifest for decades. Nonetheless, in order to close out syndicates in the traditional three-year time frame – allowing Names and their Agents to take their profits at that time – Managing Agents would purchase reinsurance for the remaining exposure. Pet. App. 11a-12a. During the 1980s through the middle 1990s, Managing Agents routinely reinsured long-tail liabilities with other syndicates, often with other syndicates run by the same Managing Agent without arm's-length negotiation of the premium. Complaint ¶50-59.

Asbestos and other environmental judgments in the United States eventually resulted in billions of dollars in losses covered by Lloyd's syndicates. Pet. App. 16a. However, because the losses accrued slowly at first, the scope of the syndicates' impending losses was not immediately publicly apparent. In the meantime, the toxic policies were being continually handed off from one syndicate to another, ticking time bombs that would eventually explode in the hands of whatever syndicate was unfortunate enough to be holding the policy when the scope of the liability became widely known. *Id.*

The management of Lloyd's was aware of the looming crisis long before the market. *See* Complaint ¶¶12, 53-59; Pet. App. 25a. Instead of disclosing what it knew, Lloyd's undertook a massive recruitment effort to bring in new Names (with whom to share the impending losses), many from the United States. Complaint ¶¶56-58. Lloyd's reduced its previously stringent means test to a point where middle class individuals could become Names by taking out a letter of credit against their retirement savings or the equity in their homes. *See id.* ¶¶12, 61. Meanwhile, Lloyd's insiders were extricating themselves from toxic syndicates, passing those inevitable losses along to the new crop of unsuspecting Names. *Id.* ¶¶12, 55-58.

C. Petitioner's Involvement With Lloyd's

At the time of his recruitment by Lloyd's in 1987, petitioner Richard Tropp was a long-time public servant, most recently working for the U.S. Agency for International Development. Pet. App. 12a. Although of modest means, he was able to use his

savings to secure a $160,000 letter of credit and become a Name under Lloyd's recently reduced means test. *Id.* 12a-13a.

Earlier in his career, Tropp had worked at the Environmental Protection Agency. As a consequence, he was only too aware of the risk of insuring environmental and other long-tail liabilities. He therefore repeatedly instructed Lloyd's and his Members' Agent – orally and in writing – that he would not consent to being placed in any syndicate that insured any such liability. Pet. App. 14a & n.17. Given his limited means, Tropp also took care to purchase through his Members' Agent stop-loss insurance that would pay any liability he might incur above a specified amount. *Id.* 14a.

Tropp's first year, 1988, proceeded normally, which led Tropp to agree to participate in syndicates the following year. "In April, 1990, however, things began to unravel." Pet. App. 14a. After having placed Tropp in a number of syndicates for the year, his Members' Agent returned Tropp's check for stop-loss insurance, claiming that it was no longer available. This, in fact, was a lie. The directors of the company that acted as Tropp's Members' Agent – all Lloyd's insiders with their own syndicate investments – had purchased stop-loss insurance for that year for themselves. *Id.* 14a-15a.

Tropp immediately attempted to stop any further underwriting. He called his Members' Agent and orally resigned from Lloyd's for the following year. Pet. App. 15a. Even though the oral resignation was tendered eight months before – and followed up with a written resignation more than four months before – the end of 1990, Tropp's Members' Agent refused, on

Lloyd's' behalf, to accept it, falsely stating that Lloyd's required a resignation in writing at least six months in advance. Tropp was then placed in syndicates for 1991 without the protection of stop-loss insurance. *Id.* 15a-16a.

To make matters worse, Tropp had been placed in numerous syndicates exposed to precisely the long-tail environmental risks he had specifically told Lloyd's and his Members' Agent he would not consent to underwrite. Those syndicates quickly began running up huge losses. A forensic accountant later determined that "98-99% of Tropp's alleged losses stemmed from his being placed in syndicates which, *ultra vires* of his entering prohibition, were exposed to environmental risks." Pet. App. 17a.

D. Reconstruction And Renewal

By 1991, the scope of the crises became public. The toxic syndicates stopped reinsuring and were held open, leaving the Names personally liable for billions of dollars of claims into the foreseeable future. *See* Pet. App. 16a. Many Names were financially ruined; some committed suicide. *See* Raphael, *supra*, at 7-8; Julian Barnes, *The Deficit Millionaires*, THE NEW YORKER (Sept. 20, 1993).

Others sued Lloyd's and their Members and Managing Agents. In response, Lloyd's developed a plan -- called "Reconstruction and Renewal" or "R&R" – to stabilize the market, extract itself and its agents from liability for what they had done, and allow Lloyd's to represent to investors that it had cleared its balance sheet of the liabilities. Pet. App. 18a-19a & n.33; Complaint ¶84.

First, Lloyd's created an entity called "Equitas" to reinsure all of the open syndicates from 1992 and earlier. Lloyd's then calculated a reinsurance premium, purportedly based on a calculation of each Name's current and projected future losses. Finally, Lloyd's paid Equitas a small portion of the calculated premium (pennies on the dollar) in exchange for an assignment of the right to collect (and keep for itself) the full face value of the premium from the Names. Pet. App. 18a-19a; Complaint ¶¶89, 146.

The R&R Contract effectively prevented participating Names from contesting their liability for the prior syndicate losses or the calculation of their reinsurance premium. A so-called "pay now, sue later" provision required participating Names to immediately pay the Equitas premium without any right to a setoff based on any debt Lloyd's might owe them (*e.g.*, stop-loss insurance). Pet. App. 22a. Simultaneously, a "conclusive evidence" clause provided that Lloyd's assertion about the proper amount of the Equitas premium was conclusive evidence of the extent of the debt, absent a showing of "manifest error," *id.*, construed to include only mathematical errors or other similar mistakes, but excluding any challenge that required investigation beyond the face of the calculations, *id.* 130a-132a.

Lloyd's tendered Names individualized settlement offers, providing that in exchange for waiving any right to sue Lloyd's or its agents for their misconduct relating to the crisis, the Names would be given credits against their Equitas premium. Pet. App. 19a.

Although many Names accepted the settlement offers, Tropp did not. He continued to believe that he

was not legally responsible for the massive losses incurred in his name during the year after he tendered his resignation, or for any of the environmental syndicates entered into against his express instructions to Lloyd's and his Members' Agent. In addition, Tropp objected that the environmental syndicates were not actually issuing insurance as defined by U.K. law – instead, they were simply passing on known, inevitable losses in violation of the terms of his original contracts with Lloyd's and English insurance law. Complaint ¶¶117-123.

But even setting those objections aside, Tropp had investigated the calculation of his Equitas premium and discovered that Lloyd's had failed to give him credit for the proceeds of the stop-loss insurance he had managed to purchase in 1989 and the profits he had earned on his non-environmental syndicates, both of which his Members' Agent had turned over to Lloyd's at its direction. In addition, Lloyd's failed to account for assets held by his syndicates that should have been credited pro-rata to the Names. Complaint ¶¶126-133.

Lloyd's, however, invoked a bylaw to appoint a "substitute agent" to consent to the R&R Contract on Tropp's behalf. Pet. App. 20a. Although ordinary Members' Agents are subject to the control of their clients, and owed a fiduciary duty to the Names, *id.* 11a, Lloyd's' substitute agent (called "AUA9") operated wholly under Lloyd's control and made no effort to consult with, much less represent the interests of, the Names it was purportedly representing before agreeing to R&R on their behalves en masse, *see id.* 20a; Complaint ¶¶87-88.

E. First Wave Of U.S. Litigation

When the scandal became public, many American Names filed suit against Lloyd's in the United States. The federal courts uniformly dismissed the suits on the basis of the Lloyd's forum selection clause, accepting Lloyd's' representation that the American Names would have a wide range of remedies available to them in the U.K., including causes of action for rescission,[1] negligence,[2] breach of contract,[3] deceit or misrepresentation,[4] breach of fiduciary duty,[5] and restitution.[6]

F. Litigation In The U.K.

Meanwhile, back in England, Lloyd's was aggressively pursuing collection actions against

---

[1] *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 161 (7th Cir. 1993); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F.3d 923, 929 (4th Cir. 1996); *Haynsworth v. The Corporation*, 121 F.3d 956, 969 (5th Cir. 1997).

[2] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[3] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[4] *Shell*, 55 F.3d at 1231 (accepting representation in affidavit by Lloyd's' Barrister asserting availability of remedies for "misrepresentation (whether innocent, negligent or fraudulent)"); *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[5] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

[6] *Shell*, 55 F.3d at 1231; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 969.

Names. Within a year of R&R's implementation, the U.K. courts had upheld the lawfulness of the basic scheme, including Lloyd's' right to bind non-consenting Names to the R&R Contract. *See Soc'y of Lloyd's v. Leighs*, [1997] C.L.C. 1398 (C.A.);[7] *see also Soc'y of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.).[8] Lloyd's then proceeded to convince the U.K. courts that most of the remedies American courts believed were available in England did not apply against Lloyd's.

First, the U.K. courts held that under a provision of the Lloyd's Act of 1982, Lloyd's was immune from all damages claims, absent proof that it had acted in bad faith amounting to fraud. *See, e.g., Price v. Soc'y of Lloyd's*, [2000] Lloyd's Rep. IR 453 (Q.B.)[9] (in light of Lloyd's Act immunity, no tort liability unless the "breach of duty [was] tainted by fraud or in some material respect dishonest. Mere negligence is not enough...."); *Ashmore v. Corp. of Lloyd's*, [1992] 2 Lloyd's Rep. 620 (Q.B.)[10] (Lloyd's immunity applies to contract claims). This precluded Names from asserting claims of negligence, breach of fiduciary duty, and negligent or statutory misrepresentation, all of which Lloyd's told the U.S. courts were available.

Second, although Lloyd's Act immunity barred only damages, non-damages claims against Lloyd's

---

[7] *Available at* 1997 WL 1104500.

[8] *Available at* 1998 WL 1034675.

[9] *Available at* 1999 WL 33232626.

[10] *Available at* 1992 WL 895819.

were held precluded on other grounds. For example, even though Lloyd's had told American courts that rescission was an available remedy, it successfully argued the exact opposite to U.K. courts on the ground that rescission would adversely affect the interests of third parties. *See, e.g., Leighs*, [1997] C.L.C. at 1405 (rescission unavailable even if contract was induced by fraud). U.K. courts further held that Lloyd's owed Names no relevant contractual, common law, or statutory duties of due care to comply with the laws governing its operations, to regulate the market, to supervise Lloyd's agents, or even to avoid acting in bad faith. *See Ashmore v. Corp. of Lloyd's*, [1992] 2 Lloyd's Rep. 620 (Q.B.); *Soc'y of Lloyd's v. Clementson*, [1995] C.L.C. 117;[11] *R. v. Lloyd's of London ex parte Briggs*, [1993] 1 Lloyd's Rep. 176.[12]

II. Tropp's Litigation With Lloyd's

A. U.K. Litigation

1. Lloyd's' Suit Against Tropp

In 2002, Lloyd's sued Tropp in England seeking to recover alleged underwriting liabilities and the Equitas Premium. Pet. App. 24a.

Tropp, proceeding pro se, raised two kinds of defenses. First, he argued that he was not legally responsible for many of the losses reinsured through Equitas, including losses from long-tail syndicates and those incurred after he tendered his resignation.

---

[11] *Available at* 1994 WL 1062152.

[12] *Available at* 1993 WL 965866.

Second, Tropp challenged the amount of his alleged liability on the ground that it did not account for a number of assets (including his stop-loss insurance proceeds and other syndicate profits) that should have been setoff against his liabilities. Pet. App. 24a-25a.

The U.K. trial court refused to consider either Tropp's "wrongful liability" or his "missing assets" claims, pointing to the "pay now, sue later" and "conclusive evidence" clauses of the R&R Contract. Pet. App. 132a-136a.[13] Any such disputes, the court held, would have to be raised in a separate "counterclaim" lawsuit. *Id.* 134a-135a. An appellate court denied Tropp permission to appeal, agreeing with the trial court that none of Tropp's claims met the "manifest error" exception to the "conclusive evidence" clause and, thus, provided no basis for defense to Lloyd's suit. Pet. App. 103a-106a.

2. Tropp's Suit In Counterclaim

Unlike most American Names who lost collection actions in the U.K., Tropp attempted to exhaust his U.K. remedies, filing a counterclaim that reiterated his wrongful liability and missing assets defenses.

In November 2004, the trial court granted Lloyd's motion to strike the counterclaim for failure to state a claim. Pet. App. 78a-94a.

The court first held that Lloyd's was immune from damages for anything short of fraud. Pet. App.

---

[13] The court also noted that prior decisions had upheld Lloyd's' authority to appoint a substitute agent to consent to the R&R Contract on behalf of the Names. Pet. App. 124a.

86a-87a. Moreover, even if Tropp could prove fraud, the court held, he could not be relieved of liability under his syndicates. "Names cannot rescind their underwriting commitments even if they were induced as a result of negligent or fraudulent misrepresentations since to do so would affect third parties." Pet. App. 85a.

These holdings precluded the vast majority of Tropp's arguments, including his claim that Lloyd's wrongly (but not necessarily fraudulently) failed to credit him his "missing assets"; that he could not be held to account for the losses incurred after he resigned; and that he was not liable for the losses of the long-tail syndicates he expressly told Lloyd's he would not consent to join.

That left one remaining claim that arguably sounded in fraud – Tropp's insistence that Lloyd's "brought the losses of the relevant syndicates into the Equitas scheme, knowing that the business was not proper reinsurance to close." Pet. App. 89a. But with respect to this objection, the court held that his claims of conscious avoidance could not constitute an "adequately pleaded case in fraud." *Id.*

An appellate court denied Tropp permission to appeal, rebuffing Tropp's attempts to show that his claims fell outside the scope of the Lloyd's immunity. Pet. App. 69a-71a. Moreover, although Lloyd's' claim against Tropp was for breach of contract, the court held that Tropp could not raise contract claims against Lloyd's. "There is," the court explained, "no claim in contract against the Society, there can only be a claim in fraud based upon dishonesty." *Id.* at 70a.

Finally, although the court in Lloyd's' collection suit had told Tropp to raise his "missing assets" set-off claim in counterclaim, the court in his counterclaim appeal held that "[t]here are, in fact, no causes of action arising from the law of set off." Pet. App. 71a. And because Tropp could not assert the basis of his set-off claims – *e.g.*, breach of contract or other common law or statutory duty to credit his missing assets – absent a showing of fraud, he had no basis for challenging Lloyd's calculation of his alleged debt. *Id.*

B. U.S. Litigation

Tropp now faced a judgment for nearly $900,000 and the prospect that over the next eighty years he could be called upon to pay even more if Equitas' funding proved inadequate to pay the reinsured liabilities.[14] Having tried to obtain a hearing on his claims and defenses in the U.K. courts, but been rebuffed at every turn, he turned to the courts of this country.

1. District Court

Tropp filed a putative class action in the Southern District of New York, seeking: (1) declaratory and injunctive relief precluding recognition of the U.K. judgment in New York; and (2) "an accounting of all transactions between himself and Lloyd's." Pet. App. 6a.

---

[14] *See* Complaint ¶86 (explaining "Lloyd's reserved the right to collect from its Members who settled and paid their Equitas Premium any shortfall if the Equitas reserves were insufficient").

Lloyd's moved to dismiss, relying on its forum selection clause and arguing that the U.K. judgment met the requirements for recognition in New York.

Forum Selection Clause. The district court held that foreign forum selection clauses are unenforceable in federal court:

> (1) if their incorporation into the agreement was the result of fraud or overreaching; (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; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state.

Pet. App. 33a (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15, 18 (1972); *Roby v. Society of Lloyd's*, 996 F.2d 1353,1363 (2d Cir. 1993)).

The court rejected Tropp's reliance on the third "unavailable remedies" factor because, it held, a forum selection clause must be enforced unless the designated forum "denies all remedies whatsoever." Pet. App. 35a. In this case, the court held, Tropp was not denied all relief because U.K. law permits suits against Lloyd's for fraud. Pet. App. 38a-39a.[15] The court did not dispute, however, that as a practical

---

[15] Although Lloyd's had argued that Tropp also had remedies available against his agents, *but see infra*, at 38-39, the district court did not base its decision on that disputed assertion. Pet. App. 39a-40a.

matter, this was no remedy at all for plaintiffs whose injuries were the result of unlawful conduct having nothing to do with fraud (*e.g.*, Lloyd's failure to credit Names for stop-loss insurance proceeds).

Recognition of U.K. Judgment. The court also dismissed Tropp's challenge to the enforceability of the U.K. judgment. Pet. App. 41a-52a.

"The question of whether a foreign judgment is enforceable," the court held, "is a matter of state law," Pet. App. 41a, governed by New York's enactment of the Uniform Foreign Money-Judgments Recognition Act (Recognition Act), N.Y. C.P.L.R. §§ 5301 *et seq.* That statute provides that foreign judgments are ordinarily enforceable in the state, unless one of several exceptions is met. Among other things, a judgment is not enforceable if "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." *Id.* § 5304(a)(1). In addition, a court may deny enforcement if "the cause of action on which the judgment is based is repugnant to the public policy" of New York. *Id.* § 5304(b)(4).

The district court concluded that Tropp could make neither showing. First, the court held that "the proper inquiry under the Recognition Act is whether the judgment in question was obtained from a *system* that affords due process of law," Pet. App. 44a (emphasis in original), precluding any challenge based on the unfairness of the procedures applied to a class of cases (*e.g.*, suits regarding the Lloyd's R&R) or any particular case (*e.g.*, Tropp's). And there was no question that England's legal system was fair. *Id.* The court also opined that in any event, Tropp received due process because he was afforded an

opportunity to be heard and received decisions on his claims (albeit decisions concluding that his claims could not be considered). While the substance of English law may have made those legal proceedings pointless, "due process under the Recognition Act is concerned only with *procedural* due process, not *substantive* due process." Pet. App. 48a (emphasis in original).

Likewise, the court held that the test for repugnancy to public policy must be conducted at such a high level of generality that Tropp could not possibly meet it: "the cause of action underlying Lloyd's judgments against the Names is simple breach of contract, and causes of action for breach of contract do not violate the public policy of New York." Pet. App. 51a (citing *Soc'y of Lloyd's v. Grace*, 718 N.Y.S.2d 327, 328 (App. Div. 2000)).

Due Process Challenge. Finally, the court rejected Tropp's assertion that "if the Recognition Act does not bar enforcement of the English judgment, then the Recognition Act as applied to his case is unconstitutional under the Due Process Clause." Pet. App. 53a.

2. Court of Appeals

The Second Circuit affirmed. It first upheld the district court's forum selection clause holding, relying on *Roby v. Soc'y of Lloyd's*, 992 F.2d 1353 (2d Cir. 1993), which had previously concluded that U.K. law provided Names adequate securities fraud remedies to justify enforcement of the Lloyd's forum selection clause. Pet. App. 2a-3a. The court acknowledged that since *Roby* was decided in 1993, "some of the claims against Lloyd's" that it had believed were

available, "are now precluded" by subsequent U.K. decisions. *Id.* 3a. But the court nonetheless held to its view that "Lloyd's forum selection clauses (of which this is one) are valid because U.K. remedies are available." *Id.*

With respect to recognition of the U.K. judgment, the Second Circuit agreed with the district court that under New York law, the only "relevant inquiry" is the "overall fairness of England's legal 'system,' which is beyond dispute." Pet. App. 4a (quoting *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 160 (N.Y. 2003)). It likewise rejected any claim that recognition would violate the public policy of New York, relying on a prior decision from an intermediate New York appellate court. Pet. App. 4a-5a (citing *Grace*, 718 N.Y.S.2d at 328).

Finally, the court addressed one aspect of Tropp's federal due process challenge (rejecting the rest without discussion). The court acknowledged Tropp's argument that by enforcing the "pay now, sue later" and "conclusive evidence" clauses to which Tropp had never consented, the U.K. courts had effectively allowed Lloyd's to be the sole judge of the existence and extent of the liability owed to itself. Pet. App. 5a. Such a system, Tropp argued, was akin to the one declared unconstitutional in *Tumey v. Ohio*, 273 U.S. 510 (1927), in which a mayor adjudicated misdemeanor charges while receiving a portion of the resulting fines to supplement his salary. The Second Circuit found the analogy unconvincing because "the U.K. courts themselves had no financial interest in the outcome of Tropp's cases." Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

Increasingly, American citizens and businesses are subject to suit in foreign courts under laws and procedures that may be fundamentally incompatible with our basic notions of due process or other constitutional values. In this case, for example, Tropp was subject to a system under which he was effectively precluded from challenging Lloyd's' assertion of financially ruinous liability, a system that would be held unconstitutional if implemented in the United States under this Court's decisions in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), and *Tumey v. State of Ohio*, 273 U.S. 510 (1927).

This case presents the Court an opportunity to provide much needed guidance on the constraints the Due Process Clause imposes on states' authority to enforce an otherwise unconstitutional judgment simply because it was obtained abroad. The case also presents the related question of when federal courts may provide a backup forum for the resolution of international disputes, despite a forum selection clause, when there are severe limitations on the claimant's right to present the legal and factual basis for his claims in the foreign forum.

I. Certiorari Is Warranted To Decide What Limitations The Due Process Clause Imposes On The Recognition Of Foreign Judgments.

By themselves, foreign judgments have no effect in the United States; the defendant's property is extracted only by virtue of the judgment's recognition

and enforcement by our courts. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 163 (1895). The resulting deprivation of property by the state is subject to the restrictions of the Due Process Clauses of the Fifth and Fourteenth Amendments. This case demonstrates the need for effective implementation of those constitutional protections in a world of increasingly international litigation.

A. As Commonly Applied, State Recognition Acts, Including New York's, Are Inadequate To Protect The Due Process Rights Of Americans Sued In Foreign Jurisdictions.

The Second Circuit, like most courts, treats the recognition of foreign judgments as a question of state law. Pet. App. 3a. New York and most other states have adopted the Uniform Foreign Money-Judgments Recognition Act. *See* N.Y. C.P.L.R. §§ 5301 *et seq.*; National Conference of Commissioners on Uniform State Laws, *Foreign-Country Money Judgments Recognition Act Summary*[16] (1962 version of Act adopted in thirty-two states).[17] These statutes generally prohibit enforcement of judgments from jurisdictions that fail

---

[16] *Available at* http://www.nccusl.org/ActSummary.aspx?title=Foreign-Country Money Judgments Recognition Act.

[17] A 2005 revision has been adopted in fifteen states. National Conference of Commissioners on Uniform State Laws, *Legislative Fact Sheet – Foreign-Country Money Judgments Recognition Act*, *available at* http://www.nccusl.org/LegislativeFactSheet.aspx?title=Foreign-Country Money Judgments Recognition Act.

to provide due process, and do not require recognition of judgments founded on causes of action repugnant to state policy. Pet. App. 4a. But over time, those limitations have been construed so permissively that it is now clear they are inadequate to protect the due process rights of Americans sued abroad. Two deficiencies are starkly illustrated on the facts of this case and the hundreds of cases like it arising from the Lloyd's scandal.

First, while the Uniform Recognition Act requires courts to examine the procedural fairness of the foreign forum, courts have limited the inquiry to "whether the judgment in question was obtained from a *system* that affords due process of law," Pet. App. 44a (emphasis in original), rather than examining whether the system fairly adjudicates the class of claims of which the defendant's is a part, or the defendant's particular case, *id.*; *see also, e.g.*, *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 160 (N.Y. 2003); Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1188 n.191 (2007) (collecting cases).

That protection is wholly inadequate. Due process is an individual right to actually receive basic procedural protections, not simply the right to a system that *usually* affords the basic requirements of procedural fairness. *Cf. Hilton v. Guyot*, 159 U.S. 113, 205 (1895) (explaining that it must "always be kept in mind that it is the paramount duty of the [U.S.] court . . . to see to it that the *parties have had* a fair and impartial trial" abroad) (emphasis added). Even when enforcing judgments of other states – which, unlike foreign judgments, are issued through

trials directly subject to the Due Process Clause and are constitutionally entitled to recognition under the Full Faith and Credit Clause – U.S. courts may not simply assume that generally fair systems always result in judgments entitled to recognition. *See, e.g.*, *Griffin v. Griffin*, 327 U.S. 220, 229 (1946) (holding that "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process" and scrutinizing whether prior court had violated due process in exercising personal jurisdiction over particular defendant); *Bird v. Glacier Electric Coop., Inc.*, 255 F.3d 1136, 1144 (9th Cir. 2001) (recognition of tribal judgment denied because the plaintiff's "closing argument violated due process").

Second, state recognition statutes have been interpreted to examine the *substantive* compatibility of a foreign judgment with U.S. law at such a high level of generality as to afford essentially no protection at all in a great many cases, including this one. Here, under New York precedent, it was sufficient that Lloyd's suit was based on "breach of contract" because "causes of action for breach of contract do not violate the public policy of New York." Pet. App. 51a; *see also, e.g.*, *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 333 (5th Cir. 2002) (same under Texas law); *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 995 (10th Cir. 2005) (same in New Mexico); *Soc'y of Lloyd's v. Mullin*, 96 Fed. Appx. 100, 103 (3d Cir. 2004) (unpublished) (same in Pennsylvania).

Of course, all manner of contract claims are deeply offensive to federal policy and constitutional values – *e.g.*, contracts regarding the sale of illegal drugs and prostitution, or involving child labor or

racial discrimination, etc. It cannot reasonably be contended that the Constitution would permit a state to enforce such a judgment, whether rendered in the United States or abroad, simply because it could be described as sounding in contract. *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (judicial award of damages for breach of racially restrictive covenant violates the Equal Protection Clause).

B. Whether State Recognition Statutes, As Construed, Are Adequate To Fulfill States' Obligations Under The Due Process Clause Is A Question Of Growing Importance.

The questions presented by this petition are of pressing importance, not simply for the hundreds of American Names subject to Lloyd's U.K. judgments, but also for the great numbers of American businesses, investors, and individuals who are increasingly exposed to suit in foreign jurisdictions. *See, e.g., Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (addressing French judgment against American internet service provider for allowing online access to Nazi materials); *Dow Jones & Co., Inc. v. Gutnick*, (2002) C.L.R. 575 (Austl.) (High Court of Australia holds publisher of *Wall Street Journal* subject to Australian suit for libel based on an article published on the paper's web site, accessible in Australia); *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997) (denying recognition to U.K. libel judgment that would violate First Amendment); *see also* INVESTMENT COMPANY INSTITUTE, INVESTMENT COMPANY FACT BOOK Table 23 (50th ed. 2010)

(documenting dramatic increase in global investments by American mutual funds).[18]

The fundamental fairness of foreign law and foreign courts varies enormously around the globe, and from case to case. *See, e.g.*, Virginia A. Fitt, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT'L L. 1021, 1033-38 (2010). The risks to Americans are heightened by an emerging practice among some plaintiffs to seek out favorably disposed foreign forums in which to litigate their claims against Americans, with the expectation that the resulting judgment will be recognized and enforced in the United States. *See, e.g.*, JONATHAN DRIMMER, THINK GLOBALLY, SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES 4 (2010);[19] AVI BELL, LIBEL TOURISM: INTERNATIONAL FORUM SHOPPING FOR DEFAMATION CLAIMS (2008);[20] Lucien J. Dhooge, Aguinda v. Chevrontexaco: *Discretionary Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL. L.J. 241 (2010) (describing suit for $27.3 billion filed by American lawyers against Chevron in Ecuadorian courts, with expected enforcement in the U.S.); *Osorio v. Dole*

---

[18] *Available at* http://www.icifactbook.org/pdf/2010_factbook.pdf

[19] *Available at* www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf.

[20] *Available at* www.globallawforum.org/UserFiles/puzzle22New(1).pdf.

Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (suit seeking enforcement of $97 million Nicaraguan judgment against American company).

In recent years, this Court has developed a body of constitutional principles to help prevent similar forum shopping within the United States and to prevent American courts from giving effect to arbitrary judgments rendered by juries, often against foreign companies doing business in the United States. *See, e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (elaborating Due Process restrictions on punitive damages awards). It is no less imperative that this Court make meaningful the constitutional limitations on the power of those same courts to give effect to oppressive judgments of foreign courts against Americans doing business overseas.

C. The Due Process Clause Forbids Enforcement Of Lloyd's' U.K. Judgment In The United States.

New York's recognition of the U.K. judgment in this case cannot be reconciled with the Due Process Clause or this Court's decisions.

Tropp does not argue that a judgment is unenforceable in the United States unless obtained through procedures, or under substantive law, identical to our own. But the Due Process Clause does not permit enforcement of a judgment obtained without adherence to the fundamental precepts of due process, including the right to a genuine opportunity to contest the existence and extent of alleged liability. *Cf. Hilton*, 159 U.S. at 202-03; *Windsor v. McVeigh*, 93 U.S. 274, 280 (1876)

(embracing assertion that a foreign judgment issued with "no opportunity of . . . making a defence . . . . deserves not the respect of any foreign nation" because it violates "the eternal principles of justice") (citation omitted). That opportunity was not afforded in this case.

1. Tropp Was Denied A Reasonable Opportunity To Contest Lloyd's' Claims.

The U.K. courts were bound to enter judgment in Lloyd's' favor for the amount of the debt Lloyd's alleged, except in the most extraordinary circumstances. Although the alleged basis of the lawsuit was contractual, Tropp was prevented from showing that under the terms of his original contract with Lloyd's, he did not actually owe the debt that Lloyd's was forcing him to reinsure, unless he could show that this breach of contract amounted to fraud. Nor was he permitted to show that even accepting Lloyd's assertion that he was legally responsible for his syndicate losses, the amount of his alleged debt was wrong because it failed to credit him for his stop-loss insurance, other syndicate profits, and his share of syndicate assets.

Such a system runs afoul of two lines of this Court's Due Process cases.

First, the Court has been clear that although states may sometimes enact the equivalent of a "pay now, sue later" requirement, its constitutionality is dependent on the availability of a "clear and certain" post-deprivation remedy. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990). Thus, while a state can require taxpayers to pay disputed taxes under protest, the Due Process

Clause requires "a fair opportunity to challenge the accuracy and legal validity of their tax obligation" through a refund action. *Id.* In light of that obligation, a state obviously could not require immediate payment of taxes and "then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich v. Collins*, 513 U.S. 106, 108 (1994). Yet the U.K. courts permitted Lloyd's to do exactly that – demand immediate payment of the Equitas Premium without any ability to raise numerous defenses to liability, on the promise of the right to air those defenses in a subsequent suit, only then to turn around and insist that the defenses were barred by Lloyd's' immunity.

The district court noted that immunity defenses are common in the law. But Tropp's objection is not simply to the existence of Lloyd's' immunity, but rather to how it was *used* as a sword rather than a shield – *i.e.*, to prevent any defense to its claim of liability. A state could not, for example, demand immediate payment of contested taxes and then assert sovereign immunity to bar any refund claim.

Second, by precluding any effective challenge to Lloyd's' assertion of liability, the U.K. litigation deprived Tropp of his basic due process right to have his liability determined by a fair and impartial adjudicator. *See, e.g.*, *Tumey*, 273 U.S. at 523.

This Court examined a similar scheme in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). There, the Court considered a provision of the Multiemployer Pension Plan Act Amendments (MPPAA). The Act authorized the trustee of a multiemployer pension plan to

calculate a withdrawing employer's vested liabilities and require immediate payment of that assessment, subject to a later challenge in arbitration. This Court held that, in light of the trustee's interest in securing adequate funding for the plan, the constitutionality of the regime depended on the adequacy of the employer's ability to challenge the trustee's assessment in the later arbitration. The Court explained that "if the employer were required to show the trustees' findings to be either 'unreasonable or clearly erroneous,' there would be a substantial question of procedural fairness under the Due Process Clause." *Id.* at 626.

> In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made. In light of our assumption of possible [trustee] bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.

Id. (citations omitted). The Court therefore declined to read the statute to require employers to disprove the claimed liability by clear and convincing evidence. *Id.* at 629.

The system applied by the U.K. courts in this case is far more offensive to due process than even the reading of the MPPAA this Court avoided in *Concrete Pipe*. Under U.K. precedent, Tropp was not simply required to show that Lloyd's claim of liability

was clearly erroneous; he had to show that it was grounded in fraud.

Finally, some courts have suggested that Names' objections to the U.K. system are not procedural – after all, they obtained a hearing; they were simply deprived of any defense as a matter of substantive law, as if England had passed a statute providing that "Names shall pay Lloyd's whatever it demands." *See Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 480 (7th Cir. 2000); Pet. App. 48a. But the same could have been said of the MPPAA, which could be characterized as providing that "employers shall pay whatever liability the plan trustee determines." In any event, both procedural and substantive arbitrariness violate the Due Process Clause. *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537-38 (1998). And that substantive arbitrariness cannot evade constitutional scrutiny by cloaking itself in an innocuous "breach of contract" label. *Cf.* Pet. App. 51a.

2. Tropp Did Not Waive His Rights To Due Process By Agreeing To Abide By Lloyd's Bylaws.

The only basis Lloyd's has for arguing that the R&R litigation is even remotely consistent with basic notions of due process is its assertion that Tropp agreed to it. But, of course, he did not. Lloyd's agreed to the R&R terms on Tropp's behalf through the substitute "agent" that was Tropp's agent in name only, reporting instead to Lloyd's and acting in the interest of its creator and not its alleged principal.

But, Lloyd's argues, Tropp consented to have Lloyd's appoint a substitute agent to make decisions for him (even, apparently, to the appointment of an agent controlled by Lloyd's and appointed for the sole purpose of agreeing to waive due process rights that Tropp himself had pointedly refused to waive on his own). But Lloyd's' only evidence of such an agreement is a boilerplate provision in Tropp's General Undertaking that required compliance with existing and future Lloyd's bylaws. Pet. App. 13a, 20a. That cannot suffice. Although parties may agree in advance to waive some procedural due process rights, *see, e.g.*, *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972), the necessary precondition for the waiver of any constitutional right is actual knowing and voluntary consent, *see id.* at 186 (waiver sustained where party directly agreed to forego court proceedings and did "not contend . . . that it or its counsel was not aware of the significance" of the waiver). Tropp's agreement to abide by Lloyd's bylaw cannot be construed as a knowing waiver of a right to defend himself against any future assertion of debt by Lloyd's. *Compare Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972).

D. This Case Presents An Ideal Opportunity To Resolve This Important Question.

1. Since Tropp was the first Name to completely exhaust his U.K. remedies, his case presents an ideal vehicle with a well-developed record for considering the constitutional limitations on the recognition of foreign judgments.

The facts of this case present the constitutional questions in stark relief. The court of appeals summarily concluded that the U.K. judgment in this case satisfied New York's due process test because the only "relevant inquiry under [state law] is the overall fairness of England's legal 'system,' which is beyond dispute." Pet. App. 4a (citation omitted). Had the Second Circuit asked, instead, whether the U.K. system provided fundamentally fair proceedings for adjudicating Names' alleged liability, or Tropp's in particular, it could not have been so cavalier. *See supra*, at 28-33.

Likewise, the differences in the standard for substantive review of the U.K. law upon which the judgment is based could hardly be more important in this case. To ask only whether "breach of contract" claims are consistent with U.S. policy and constitutional values is to provide effectively no review at all. Stripped of its innocuous label, the law applied by the U.K. courts becomes impossible to defend.

2. Lloyd's argued below that Tropp's declaratory judgment action was independently barred by the forum selection clause. But that claim is no barrier to this Court's resolution of the first question presented by this petition, as the forum selection ruling is equally erroneous and deserving review. *See infra*, at 35-39.

But even if this Court were to deny certiorari on the forum selection question, the recognition ruling would still be properly presented. Neither the district court nor the court of appeals addressed Lloyd's' odd assertion that the forum selection clause applied to require the parties to litigate in England

whether the U.K. judgment should be recognized in New York. *But see, e.g., Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 632 (9th Cir. 1982) (forum selection clause does not bar ancillary proceeding in the United States regarding foreign judgment). Accordingly, the Second Circuit's decision is best read as relying on the forum selection clause only to dispose of Tropp's request for an accounting.[21]

II. The Court Should Also Grant Certiorari To Decide When Limitations On Available Remedies Preclude Enforcement Of An International Forum Selection Clause.

Unable to obtain a fair hearing on his defenses in the U.K., Tropp filed suit for an accounting here to determine the true scope of any liability he may or may not have to Lloyd's. The lower courts dismissed that claim on the basis of Lloyd's' forum selection clause. Pet. App. 2a-3a, 32a-41a. That decision was wrong as well and independently warrants this Court's review.

A. The Lower Courts Are Divided Over The Proper Application Of This Court's "Available Remedies" Cases.

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court held that a forum selection clause is enforceable in federal court unless shown to

---

[21] To the extent there is language in the district court's opinion suggesting that its forum selection clause holding applied to both Tropp's claim for an accounting and his declaratory judgment request, the Second Circuit said nothing to indicate that it accepted Lloyd's' indefensible argument.

be "unreasonable under the circumstances." *Id.* at 10 (citation omitted).

Applying that standard, the courts of appeals generally recognize that a forum selection clause may not be enforced to deprive an individual of a federal forum when the "fundamental unfairness of the chosen law may deprive the plaintiff of a remedy." Pet. App. 3a (quoting *Roby v. Soc'y of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993)); *see also, e.g.*, *Albemarle Corp. v. AstraZeneca U.K. Ltd.*, 628 F.3d 643, 651 (4th Cir. 2010); *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009). However, the lower courts have divided over the proper implementation of that standard, both in the context of enforcement of foreign forum selection clauses and in the closely related context of *forum non conveniens*.

Relying on this Court's *forum non conveniens* decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Second Circuit has held that a forum selection clause is enforceable unless its enforcement will deprive the opposing party of *"any* remedy." *Roby*, 996 F.2d at 1363 (quoting *Piper*, 454 U.S. at 254-55) (emphasis added by Second Circuit). It was thus enough in this case that Tropp could bring a claim of fraud against Lloyd's, even if his most significant objections did not sound in fraud. *See* Pet. App. 3a, 38a-39a.

The Seventh Circuit has taken an even more limited view, holding that the availability of remedies under the law of the forum jurisdiction is entirely irrelevant when the forum selection clause is coupled with a choice of law provision designating the foreign

forum's law as governing any dispute. *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 210-11 (7th Cir. 1993).

On the other hand, in a case similar in important respects to this one, the D.C. Circuit applied the same *Piper* standard but concluded that a defendant's immunity under foreign law made a remedy against the defendant in that jurisdiction unavailable and the case maintainable in U.S. courts. *See El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677-78 (D.C. Cir. 1996). The Fifth Circuit likewise held in *Calix-Chacon v. Global Int'l Marine, Inc.*, 493 F.3d 507 (5th Cir. 2007), that a remedy was not available within the meaning of *Bremen* if it was ineffective as a practical matter to the particular plaintiff because of limitations in the foreign forum on the amount of damages. *Id.* at 514-15.

B. The Second Circuit's Decision Contravenes This Court's International Forum Selection Decisions.

The scant scrutiny afforded international forum selection clauses by the Second Circuit and other courts is incompatible with this Court's precedents.

As this case illustrates, enforcement of a forum selection clause can be unreasonable even if the party challenging the clause could bring *some* kind of claim against *some* defendant in the foreign jurisdiction. In *Piper* itself, this Court explained that "where the remedy offered by the other form is clearly unsatisfactory, the other forum may not be an adequate alternative," thereby justifying denial of a request to remove the case from federal court. 454 U.S. at 254 n.22. As shown above, U.K. law pervasively precluded Tropp from obtaining any

remedy on his non-fraud claims against Lloyd's, either in defense against Lloyd's assertion of liability or in counterclaim.

Lloyd's also argued that Tropp had alternative remedies against his agents, and the district court expressed some sympathy for that claim without directly accepting its premise. *See* Pet. App. 39a-40a. But many of Tropp's claims had nothing to do with his agents – for example, his claim that Lloyd's itself had failed to credit him the proceeds of his stop-loss insurance and other syndicate profits after his agents turned those funds over to Lloyd's at its direction. *See* Complaint ¶¶129-130. In addition, any claim against his agents would have no practical value because Lloyd's would be entitled to impound the proceeds of any such suit and hold them for the eighty-year life of the Equitas trust. *See* Pet. App. 38a, 39a; Tropp Reply Declaration ¶60.[22]

Finally, even if an agent remedy were theoretically available, it would make no legal difference. Tropp's claim was that he did not owe Lloyd's the money it claimed. It is unreasonable to require him to pay Lloyd's money he did not owe, without any real chance to contest his liability, simply on the ground that he might be able to mitigate his losses by suing someone else in a separate (and, no doubt, costly) lawsuit. *Cf. Logan v.*

---

[22] The district court acknowledged that Lloyd's would impound any proceeds and hold them as security. Pet. App. 40a. It appears to have missed, or erroneously ignored, however, that Lloyd's could hold the security for the eighty-year life of the Equitas Trust.

Zimmerman Brush Co., 455 U.S. 422, 436-37 (1982) (right to bring a separate post-deprivation suit to challenge denial of right to original hearing inadequate under Due Process Clause).

Accordingly, the Second Circuit's decision is incompatible with *Bremen* and warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark S. Davies
Rachel M. McKenzie
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th St., NW
Washington, DC 20005

Kevin K. Russell
Counsel of Record
GOLDSTEIN, HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@ghrfirm.com

April 11, 2011

Blank Page