

Mandatory Forum Law and Public Policy Concern In Transnational Commercial Litigation under the Common Law System

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Abstract

Under the common law system, a Court will grant a stay if the proceeding out site of its jurisdiction would exclude the application of mandatory law and contravene the public policy of the forum. Courts have applied various doctrines in refusing or granting the enforcement of “choice of forum” agreements. This essay is aimed to discuss and analyze issues relating to the application of the mandatory forum law and public policy concern by Courts under the common law system as a reason to decline its jurisdiction where there is a choice of forum agreement. It is found that Courts tend to consider the need of consistency, predictability and certainty in deciding whether or not it has jurisdiction to hear the case.

Keywords: *mandatory law, public policy, transnational litigation.*

1. Introduction

Parties in international business transactions commonly enter into a commercial agreement which includes “choice of forum” clause. This special clause reflects the belief of parties in an agreement that a jurisdiction or an arbitration tribunal will provide a neutral and fair forum to settle their disputes. Furthermore, a forum is designated by both Parties because of the expertise of that forum in settling specific type of dispute. However, Parties to this “choice of forum” clause or agreement might not always be able to realized their intention either because the chosen forum refuse to hear the case and grant a dismissal or there is a decision from a court that it is capable and more appropriate to hear the case.

Under common law system, courts have applied various doctrines in refusing or granting the enforcement of “choice of forum” agreements. Several courts have invoked the doctrine of forum non conveniens, deciding that a court other than the court chosen by the parties would be a more convenient forum. Other courts, on the other hand, refused to hear cases where the disputed transaction lacks a "reasonable relationship" to the forum. Consequently, the lack of uniformity between courts regarding the enforcement of the choice of forum agreement has provided an

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incentive for forum shopping.¹ Furthermore, Bell explained that the mandatory forum law and public policy aspect are other reasons that would attract a Party to breach the choice of forum agreement and filed a law suit out site of the designated jurisdiction or tribunal.²

There were several cases that heard by different courts in various States under common law tradition which related to the enforcement of choice of forum clause. These were the cases which involved various Lloyd's "Names" where they have sought to escape from the choice of forum clause by raising mandatory forum law and public policy concern. This essay is aimed to discuss and analyze the application of the mandatory forum law and public policy aspect by courts under the common law system as reasons to decline its jurisdiction where there is a choice of court agreement.

This essay then will discuss scholars' point of view on general doctrine applied by courts to grant a stay and decline its jurisdiction. This is followed by a comparative analysis on the Courts' decisions in Australia, New Zealand, Canada and the United States of America in cases which involved various "Lloyd's Names". Finally, a conclusion on the enforcement of choice of forum clause and its relation with the existence of mandatory forum law and public policy aspect will be withdrawn. It is interesting to note that despite the lack of uniformity in the procedural aspect between courts in determining the weight of public policy concerns, courts tend to consider the need of consistency, predictability and certainty in deciding whether or not it has jurisdiction to hear the case.

2. Enforcement of Foreign Jurisdiction and Arbitration Clauses

An English court has its own discretion whether to exercise its jurisdiction or to grant a stay. A stay will be granted if it satisfies three conditions: firstly when the doctrine forum non conveniens applies; secondly where there is a foreign jurisdiction clause; and thirdly where there is an agreement on arbitration.³ This part will further discuss case laws and scholars' opinions relating to the second and third condition

¹ Andrew S. Bell, 'Forum Shopping and Venue in Transnational Litigation', Oxford, Oxford University Press, 2003, p37.

² Ibid p42, p46.

³ James J. Fawcett, Jonathan M. Harris and Michael Bridge, "International Sale of Goods in the Conflicts of Laws", Oxford, Oxford University Press, 2005, p240.

above for the court to grant a stay. Emphasises will be given to the mandatory forum law and public policy concern and how these aspects affects the decision of Judges.

A. Foreign Jurisdiction Clause

In the case where there is a foreign jurisdiction clause, a court will grant a stay to a case brought in English court in breach of the agreement, unless the plaintiffs can give strong evidence that it is just and proper to allow them to continue the proceeding.⁴ Consequently, the burden of proof is much heavier for plaintiff who seeks leave to serve out of the agreed jurisdiction⁵. Regarding to this burden of proof, as cited by Fawcett, Harris and Bridge, the House of Lords in *Donohue v Armco Inc*⁶ has summarized the principles to be applied to stay proceedings brought in England by a plaintiff in breach of foreign jurisdiction agreement, as follows:⁷

...the English court will ordinarily exercise its discretion ... to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.

In addition, Morris found that the allegation brought by a plaintiff that the contract which includes a foreign jurisdiction clause is not binding because it is voidable for non-disclosure of a material fact, can not be accepted as a strong reason by an English court for not granting a stay. However, judge's decision might be different if the plaintiff alleges that the contract is void.⁸

Furthermore, the House of Lords in *Eleftheria*⁹ as per Brandon J has determined several principles that might be considered by a Court when exercising its discretion, which are:¹⁰

- (a) In what country the evidence on the issues of the fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
- (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.
- (c) With what country either party is connected, and how closely.

⁴ J. H. C. Morris, "The Conflict of Laws", London : Stevens, 1980, 2nd ed., p98.

⁵ *Ibid* p99.

⁶ [2001] UKHL 64, [2002] 1 All ER 749.

⁷ Fawcett, Harris and Bridge, *op. cit.* p243.

⁸ J. H. C. Morris, *op. cit.* p100.

⁹ [1970] P94.

¹⁰ Fawcett, Harris and Bridge, *loc. cit.*

- (d) Whether defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
- (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
 - (i) be deprived of security for their claim;
 - (ii) be unable to enforce any judgment obtained;
 - (iii) be faced with a time bar not applicable in England; or
 - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

However, by comparing the judgment in *The Fehmarn*¹¹ and in *Eleftheria*, Morris criticizes that the application of the discretion principles above will not always come up with the similar decision. In *The Fehmarn* case, The Court of Appeal declined to stay the action, even though all of the plaintiff's witness resided in England and many other witnesses could conveniently be examined in England. On the contrary, in *The Eleftheria* Brandon J stayed the action, even though the factors whether to stay or not were nicely balance.¹²

In addition, another limitation to the enforcement of the jurisdiction clause is as shown in the principles of discretion as used in *The El Amria*¹³, Tilbury, Davis and Opeskin found that not every foreign jurisdiction clause will be given effect by the court; it must satisfy several criteria as stated below:¹⁴

- (a) Form part of the relevant contract. In the *Oceanic Sun Line Special Shipping Co. Inc. v Fay*¹⁵ the judge decided that the Greek jurisdiction clause which printed in the ticket where was handed over to the Plaintiff on board of the ship is not part of the contract of carriage.
- (b) Apply as a matter of construction to the circumstances of the case. In the *Carvalho v Hull Blyth (Angola) Ltd*¹⁶ the Court of Appeal held to refuse a stay because following the revolution in Angola there also a change in judicial system, therefore the court designated in the jurisdiction clause was not the same court which the parties agreed to settle all dispute arises.

¹¹ [1958] 1 WLR 159.

¹² J. H. C. Morris, *loc. cit.*

¹³ [1981] 2 Lloyd's Rep 119.

¹⁴ Michael Tilbury, Gary Davis and Brian Opeskin, "Conflict of Laws in Australia", Oxford, Oxford University Press, 2002, p109.

¹⁵ [1988] 165 CLR 197.

¹⁶ [1979] 1 WLR 1228.

(c) Must be a valid clause. The court may refuse to grant a stay and may decide to exercise its jurisdiction if the jurisdiction clause is not valid under the mandatory law of the forum where plaintiff commence the proceeding.

Similar to the third criteria as found in *The El Amria* above, Bell found that the English principle in the overriding effect of the mandatory forum law is as shown in *The Hollandia*¹⁷ case where the House of Lords refused to decline its jurisdiction regardless the exclusive jurisdiction agreement between the parties which designate the Dutch court to hear their dispute. The English court believed that if this case is being examined in the Dutch court, the carrier's liability will be lesser that it should as under the Hague-Visby Rules.¹⁸ Lord Diplock in this case emphasized that:¹⁹

...the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if ... the Hague-Visby Rules applied, then an English court is in my view commanded by the Act of the 1971 to treat the choice of forum clause of no effect."

The third principle as in *The El Amria* above was also applied in the High Court of Australia by the majority of the judges in *Akai Pty Ltd v People's Insurance Co Ltd*.²⁰ As per Toohey, Gaudron and Gummow JJ held that if a stay were granted, the English court as the chosen forum would not apply Section 8 of the Insurance Contracts Act 1984 (Cth) which the appellants sought to rely. The majority of the judges refuse to give effect to the foreign jurisdiction clause because the stay would serve to exclude the operation of Section 54 of the Act from the litigation and therefore the foreign jurisdiction clause is rendered void by the Act.²¹ Interestingly as cited by Davies, Ricketson and Lindell, two other Judges in this case (Dawson and McHugh JJ) have made a dissenting opinion by using principles as drawn by Brandon J in *The Eleftheria*. Their Honours concluded that "no strong reasons are apparent which would justify the refusal of a stay of the New South Wales Proceedings".²²

¹⁷ [1983] AC 565.

¹⁸ Andrew S. Bell, *op. cit.* p295.

¹⁹ [1983] AC 565, p575.

²⁰ [1997] 188 CLR 418.

²¹ Tilbury, Davis and Opekin, *op. cit.* p113.

²² Martin Davies, Sam Ricketson, Geoffrey Lindell, "Conflict of Laws Commentary and Materials", Butterworths, 1997, p202.

In the United States, the choice of court clauses has been enforced in the Supreme Court since the decision of *Bremen v Zapata Off-Shore Co.*²³ in 1972. As cited by Buxbaum²⁴, the Court noted that:

The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting... It would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.²⁵

Therefore, court held that the choice of court clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances”.²⁶ Furthermore, by analyzing this case Buxbaum found that the enforcement of choice of court clause could be denied by court if a clause was found to be “unreasonable and unjust”.²⁷ The reasons that an exclusive jurisdiction clause might be found unreasonable and therefore could be ignored if it were:²⁸

- a) Seriously inconvenient;
- b) Defects in information such as fraud, undue influence or overweening bargaining power.

There was another U.S. Supreme Court decision which also emphasised the importance of choice of forum clause. As cited by Buxbaum, in *Scherk v Alberto Culver Co.*²⁹ the court noted that:³⁰

“a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction”.

However, Silberman believed that even though majority of the judges in *Bremen* ruled that forum selection clause were “prima facie valid and should be enforced”, this case is more likely to be applied as a specific standard in admiralty cases. Consequently, other state courts are independent from adopting *Bremen* principles in examining a case.³¹ Nevertheless, the Supreme Court has applied the *Bremen*

²³ 407 U.S. 1 (1972).

²⁴ Hannah L. Buxbaum, ‘Forum Selection in International Contract Litigation: The Role of Judicial Discretion’, (2004) 12 Willamette J. Int’l L. & Dispute Res. 185, p192.

²⁵ 407 U.S. 1 (1972), p13-14.

²⁶ 407 U.S. 1 (1972) p10.

²⁷ Hannah L. Buxbaum, *op. cit.* p193.

²⁸ Hannah L. Buxbaum, *op. cit.* p194.

²⁹ 417 U.S. 506, 516 (1974).

³⁰ Hannah L. Buxbaum, *op. cit.* p191-192.

³¹ Linda J. Silberman, ‘The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions : The U.S. Regim’ (2004) 26 Hous. J. Int’l L. 327, p347.

principle in *Carnival Cruise Lines, Inc. v Shute*³² and upheld the enforcement of domestic forum selection clause in a non-negotiated passenger contract.

On the other hand, as studied by Buxbaum, there are at least two cases in the United States where courts give less emphasise on the parties' choice of forum clause as held in *Bremen*.³³ In *Mercier v Sheraton International*³⁴ a U.S. plaintiff filed a law suit in Massachusetts against an international hotel chain despite the forum selection clause on favour of Turkey. The First Circuit held that despite the existence of a contractually valid forum agreement, the "transaction's link" with the United States could be used as a reason to deny the motion to dismiss on forum non conveniens ground.³⁵ Interestingly, in this case the Court suggested that "the U.S. citizenship of the parties triggered the public interest of the United States in providing a convenient forum for its citizens, and justified imposing jury duty on U.S. citizens".³⁶ The second case is *Apotex Corp. v Istituto Biologico Chemioterapico S.p.a.*,³⁷ a U.S. plaintiff sued an Italian defendant in the District Court of Illinois despite an exclusive forum selection clause in favour of Italy. Although the court recognise the *Bremen* principle in the enforcement of choice of court clause, nevertheless the court focuses more to the connections between the disputes and the Supply Agreement between the parties in dispute. Instead of using the *Bremen* principle, the court used "most significant contact" test and held that it has jurisdiction to hear the case.³⁸

To sum up, the above case laws and scholars' opinions have suggested that the foreign jurisdiction clause is subject to the principles as determined by the Judges. However, even though a court use the same principle with the previous judgment, the decision might not necessarily be the same. The enforcement of foreign jurisdiction clause is also depend on the Judge's consideration relating to mandatory forum law and public interest concern. Thus, courts in different jurisdiction use different principles to test the effectiveness of foreign jurisdiction clause.

³² 499 U.S. 585 (1991).

³³ Hannah L. Buxbaum, *op. cit.* p201.

³⁴ 935 F.2d 919 (1st Cir. 1991).

³⁵ Hannah L. Buxbaum, *op. cit.* p202-203.

³⁶ Hannah L. Buxbaum, *Ibid.*

³⁷ No. 02-C5345, 2003 WL 21780965 (N.D. Ill. June 30, 2003).

³⁸ Hannah L. Buxbaum, *Ibid.*

B. The Arbitration Agreement

It is obvious that by the virtue of the New York Convention³⁹, agreements to arbitrate received broad enforcement internationally. Consequently, a motion from defendant to dismiss a case brought by plaintiff in breach of arbitration agreement should be granted unless the courts find that the arbitration agreement is null and void, inoperative, or incapable of being performed. One of the reasons that an arbitration clause is incapable of being performed when the disputes involve a “statutory claim”. As cited by Bell in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*⁴⁰, the United States Supreme Court held that antitrust claim under the Sherman Act is capable of being referred to Arbitration. However, because the arbitration clause in this case was operating together with the choice of law clause, which may exclude the application of the Sherman Act, the Court held that in such a case the enforcement of arbitration clause is illegitimate.⁴¹

Another example is as shown in *Vimar Seguros Y Reaseguros SA v M/V Sky Reefer* as cited by John Mo, the United States Supreme Court held that an arbitration clause would contravene the Carriage of Goods by Sea Act 1936 (US) if the application of the clause lessening the carrier’s liability under the Act.⁴² Therefore, it is clear that parties to a contract have a broad opportunity to designate arbitral tribunal where any dispute arises can be settled. It is a mandatory to a court in the Member State of the New York Convention to stay a proceeding in breach of the arbitration agreement. However, statute and legislation of the forum where the proceeding is brought have limited the ability of the parties in contract to freely designate an arbitral tribunal.

3. The Comparative Analysis on the Courts Decision under the Common Law System

As discussed in point 2 above, courts will grant a stay if the proceeding out site of jurisdiction would exclude the application of mandatory law and contravene the public policy of the forum. Interestingly, several cases which involved certain

³⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958; entered into force, 7 June 1959. United Nations, Treaty Series, vol. 330, p. 38, No. 4739 (1959).

⁴⁰ 473 US 614 (1985).

⁴¹ Andrew S. Bell, *op. cit.* p302.

⁴² John S. Mo, “International Commercial Law”, 2nd ed., Butterworths, 2000, at 248-249.

Lloyd's Names as plaintiffs in the United States of America, Canada and New Zealand have shown the opposite results. In those cases, even though plaintiffs arguments was relate to the violation of national securities act and consumer protection legislation, nevertheless courts granted to stay the proceeding and give effect to the exclusive jurisdiction in England. However, an attempt of certain Lloyd's Names to bring proceeding in Australia have resulted in two contrasting Judge's decision.

This part will then analyse and compare the courts judgment in several common law States. Emphasis will be given on how these cases resemble and adopt principles and criteria of the previous judgments as described in part 2.

A. The United States of America

The first case related to the certain Lloyd's 'Names' which held by the United States Court of Appeals was *Riley v Kingsley Underwriting Agencies Ltd*⁴³. In this particular case Riley claimed that Defendants have engaged in the offer and sale of unregistered securities and made untrue statements of material fact and material omissions in connection with the sale of securities, violating the Securities Act of 1933. Riley further argued that the agreement requiring arbitration should be held void as against public policy because several of his claims were grounded in the 1933 and 1934 securities acts, and the application of English law would result in a waiver of certain provisions of those acts.

The judges disagreed with Riley arguments and cited the Court decision in *Scherk*⁴⁴ in which it held that arbitration agreement should be respected and enforced in accord with the explicit provisions of the Arbitration Act for two reasons. Firstly, the judges found that in *Mitsubishi* the Court relied on the strong federal policy favouring arbitration, which was stated as follows:

"questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ."⁴⁵

⁴³ *Riley v Kingsley Underwriting Agencies Ltd.*, 969 F 2d 953 (1992).

⁴⁴ *Scherk v. Alberto Culver Co.*, *op. cit.* p520 n.15

⁴⁵ *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc*, *op. cit.* p626.

Secondly, the judges believed that the policy of signatory nations to the United Nations Convention is the enforceability of arbitration agreements. Therefore, based on the combination of those two policies the judges concluded that “the “null and void” exception in the United Nations Convention is to be narrowly construed”. By citing the decision in *Scherk*, the judges concluded that these conditions also apply when enforcement is sought of an award in violation of public policy. The court affirmed the District Court judgment that the arbitration and choice of forum and law provisions in the contracts were valid and enforceable. However, the Judges did not give explanation on the level of “*narrowly construed*” in the exception as stated in the United Nations Convention⁴⁶.

A different approach to the public policy concern by the judges is as shown in *Robby v Lloyds of London*⁴⁷. Firstly, the judges explain the aim of the securities law; it was found that the basic principle of the securities act is “...to protect American investors from injury by demanding “full and fair disclosure” from issuer”⁴⁸. Secondly, the judges also gone back to the Congress desire as to provide a potent means of deterring the exploitation of American investor. Based on these two considerations the judges concluded that:

“...the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors”⁴⁹.

However, because Roby failed to show that available remedies in England are insufficient to satisfy those two considerations as set up by judges in this case, consequently the judges held that the choice of law, forum selection and arbitration clauses were not against public policy.

Both judges decision in *Riley* and *Robby* as discussed above are followed and confirmed by the Judges in *Bonny v Society of Lloyd’s*⁵⁰, *Shell v RW Sturge Ltd*⁵¹, *Allen v Lloyd’s of London*⁵² and in *Haynsworth v Corporation of Lloyd’s*⁵³. In these cases the Courts concluded in similar decision that English law will sufficiently provides protection for fraud and misrepresentations in securities transactions. Therefore, as shown in *Haynsworth*, the courts held that “The plaintiff’s remedies in

⁴⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Ibid*.

⁴⁷ *Robby v Corporation of Lloyd’s* 996 F 2d 1353 (1993).

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ 3 F 3d 156 (1993).

⁵¹ 55 F 3d 1227 (1995).

⁵² 94 F 3d 923 (1996).

⁵³ 121 F 3d 956 (1997).

England are adequate to protect their interests and the policies behind the statutes at issue”⁵⁴.

Interestingly, in *Richards v Lloyd’s of London*⁵⁵ a dissenting opinion by Judge Sidney R. Thomas has shown a contrast decision with the majority of the judges in this particular case and with the previous decisions of The United States Courts of Appeal as discussed previously. Judge Thomas firmly believed that the United States Securities Act 1933 is clear and unambiguous and therefore announced a per se rules that American laws cannot be ignored. Furthermore, His Honors stated that “Courts should not employ amorphous public policy to emasculate plain statutory language”.⁵⁶ In addition, he stated that the principle as shown in *Scherk* could not be applied in this case, because in *Scherk*, although the arbitration agreement was in favor of Paris, France, the contract specified that the governing law would be the law of the State of Illinois. However in this particular case, the parties not only agreed to the choice of forum in England but also mandated that the contracts should be govern by English law. More over, by comparing several articles in the US Securities Act 1993, the US Securities Exchange Act 1934 and the Lloyd’s Act, Judge Thomas came with the decision that “...the choice clauses should not be enforced, because they afford a level of protection far lower than the remedies the Acts provide.”⁵⁷ Judge Thomas concluded that the differences between American and English securities law is another reason to invalidating the choice of forum clause on the grounds of public policy concern. He finally concluded as follow:

Enforcing the choice clauses gravely disadvantages American businesses, because foreign businesses, like Lloyd's, can recruit investors without expending the time and money involved in fulfilling the requirements of the Acts - a burden that American businesses cannot legally evade⁵⁸.

B. Canada

In *Ash v Lloyd’s Corporation*⁵⁹ the plaintiffs submit to the Ontario Court of Justice (General Division) that as a result of fraud alleged by Lloyd’s, all of agreements signed by the plaintiffs and Lloyd’s are void and that the exclusive

⁵⁴ *Ibid.*

⁵⁵ 135 F 3d 1289 (1998).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ (1991) 6 OR (3d) 235

jurisdiction clause are also void. Likewise, all of the agreements are void because they constituted a breach of the Securities Act R.S.O. 1980. McKeown J. firstly determined whether an exclusive jurisdiction clause is void on the ground of fraudulent acts. His Honour held that even though the fraudulent act of Lloyd's is proven; it did not make the exclusive jurisdiction clause unenforceable⁶⁰. There are previous cases cited by Lloyd's and affirmed by the judge in support of his judgment. From the previous judgment used as reference both in Canada and England, it was found that the allegation of fraud, illegality and non disclosure do not make the contract void but only voidable, therefore the foreign jurisdiction clause stipulated in the contract is not unenforceable⁶¹.

Secondly, McKeown J. then turned to determine whether there is a violation of Securities Acts R.S.O. 1980 by Lloyd's as submitted by the plaintiffs. His Honour found that with regard to the amount of investments made by the plaintiffs, the Securities Act R.S.O. 1980 exempt Lloyds from obligation to provide prospectus to such investors. Finally, the judge held that:

In Ontario, the statutory remedy of rescission does not permit the plaintiff to obtain an injunction enjoining payment under a letter of credit unless a prima facie case of fraud is established.⁶²

Therefore, in the absence of fraud, the plaintiff can not obtain any injunction decision on the ground of a breach of the Securities Act R.S.O. 1980.⁶³ More importantly McKeown J. firmly believed that he found no reason that English court would not apply the Securities Act.⁶⁴ This particular decision to stay the actions against Lloyd's is affirmed by the Court of Appeal.⁶⁵

It is interesting to note that the above Canadian court decision is slightly different in nature with the United States Courts decision as discussed before. The Canadian court believed that the Canada Securities Acts will be applied by English court, on the other hand the court in the United States believed that English law will sufficiently provides protection for fraud and misrepresentations in securities transactions.

⁶⁰ *Ibid.*

⁶¹ *Op. cit.* para33, 34.

⁶² *Op. cit.* para44.

⁶³ *Op. cit.* para45.

⁶⁴ *Op. cit.* para48.

⁶⁵ *Ash v Lloyd's Corporation* (1992) 9 OR (3d) 755, p10.

C. The Commonwealth of Australia

In *Williams v The Society of Lloyd's*⁶⁶ the plaintiff alleged that the defendant breaches s52 of the Trade Practices Act 1974 (Cth) and s11 of the Fair Trading Act 1985. Therefore, the agreements, deeds and securities entered into by the plaintiff and The Society of Lloyd's were void for illegality. In order to exercise its discretion power the Supreme Court of Victoria rely on the principles as set up in the *The Eleftheria* and in *Oceanic Sun Line Special Shipping Co Inc v Fay* that the court will grant a stay unless the plaintiff can show a strong reason for not to grant a stay.⁶⁷ The court also referred to several cases where exclusive jurisdiction clause was not enforced. As cited by the Judges in this case, in *Ramcorp LTD v DFC Financial Services LTD*⁶⁸ the exclusive jurisdiction clause can not be enforced because the relief for plaintiff's claim was not available in the chosen forum.⁶⁹ Although the plaintiff submitted that the proceeding in England would deprive him because English court would not have jurisdiction to determine cause of actions against him based on The Trade Practice Act, nevertheless the court held that:

In the event of the court staying the plaintiff's claims against such parties he would be able to proceed in England and within the jurisdiction of the commercial court at London where practices and procedures would enable him to fairly, fully and expeditiously prosecute his claim⁷⁰.

Subsequently, the court decided that the exclusive arbitration agreement should be given effect⁷¹.

On the contrary, in *Commonwealth Bank of Australia v White; ex parte The Society of Lloyd's*⁷² the Supreme Court of Victoria held that the exclusive jurisdiction agreement in favour of England is unenforceable. In this case Mr White (defendant) filed a third party notice and statement of claim against Lloyd's alleging misleading or deceptive conduct contrary to s. 52 of the Trade Practices Act 1974 (Cth) and s. 11 of the Fair Trading Act 1985 and negligent misrepresentation. He further claimed that this exclusive jurisdiction clause has an improper purpose of shielding Lloyd's from statutory laws of Australia relating to misleading and deceptive conduct, and

⁶⁶ [1994] 2 VR 274

⁶⁷ *Op. cit.* p*134, p*137.

⁶⁸ (Unreported, Supreme Court of New South Wales, Waddell CJ in Eq, 30 April 1990), p*137.

⁶⁹ *Op. cit.* p*138.

⁷⁰ *Op. cit.* p*139.

⁷¹ *Op. cit.* p*140.

⁷² [1999] 2 VR 681.

therefore, the exclusive jurisdiction clause is void and contrary to public policy should be treated by the court as being of no effect.

D. New Zealand

In *Society of Lloyd's v Hyslop*⁷³ the Court of Appeal Wellington firstly decided the applicability of the Securities Act 1978 (NZ). The court held that the respondent did not have an arguable case under the Securities Act against Lloyd's and Oxford because neither Lloyd's nor Oxford fall within the definition of "issuer" as stipulated in the Securities Act. Furthermore, investment made by the respondent was not an investment that offered to public, instead it was offered to the members of the public. Therefore, it was not a matter that fall within the provisions of the Securities Act.⁷⁴

Secondly, it decided the applicability of English law. By using the test of discretion in the *Eleftheria*, the judges came to conclusion that despite the design of the Securities Act is to protect New Zealand investor, it is not sufficient to counter the fact that the weight of all other considerations is supporting England.⁷⁵ Another significant reason in favour of English law is the issue of "consistency, predictability and certainty". By referring to the judgment of other courts in Canada, United States and Australia relating to the similar matters as in this particular case, the judges held that:

There is no obvious New Zealand public policy consideration justifying having the applicability of our securities laws in relation to the Lloyd's arrangements determined in New Zealand while the applicability of the securities laws of other countries is determined in England.⁷⁶

Thirdly, the court decided the applicability of the exclusive jurisdiction clause. The court considered that this particular case should be better decided in a single jurisdiction.⁷⁷ Again the court referred to the previous case as decided in another jurisdiction and stated that the Securities Act is not dissimilar with the same legislation in those jurisdictions. Finally the court decided that: "New Zealand would

⁷³ [1993] 3 NZLR 135.

⁷⁴ *Op. cit.* p*24

⁷⁵ *Op. cit.* p*27

⁷⁶ *Op. cit.* p*29

⁷⁷ *Op. cit.* p*61

be out of step with the Courts in other jurisdictions if we were to accept jurisdiction in a case such as the present”.⁷⁸

It is clear from the above case that the Court of Appeal Wellington has the advantages from referring to Judgments from others common law States. Therefore, it is sufficient to say that in this particular case the issue of “consistency, predictability and certainty” has outweighed the mandatory law and public policy concern.

4. Conclusion

There is no uniformity in the Common Law system on how a Court should consider mandatory law and public policy concern where a choice of forum agreement is exist in a transnational commercial litigation. Statute and legislation of the forum where the proceeding is brought have limited the ability of the parties in contract to freely designate the forum of dispute settlement. In the United States of America a Court may grant a stay if the remedies in the chosen court are adequate to protect the plaintiff interests and the policies behind the statute at issue. Canadian Court takes a different approach, the stay may be granted only if the Canadian court believed that the chosen court will apply Canadian laws at issues. Different approach has also taken by courts in New Zealand and Australia. By comparing several cases which involve certain Lloyd’s Names as plaintiffs and defendants in the United States of America, Canada, Australia and New Zealand, it is suffice to say that under the common law system, cases with similar issues are more likely to be decided in a single jurisdiction. This is principally to create consistency, predictability and certainty.

⁷⁸ *Op. cit.* p*63

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