EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

THE SOCIETY OF LLOYD'S, Plaintiff,	)	8:02CV118
v.	)	
EVERETT ARNOLD EVNEN, Defendant.	)	MEMORANDUM OPINION

This matter is before the Court on the plaintiff's motion for summary judgment (Filing No. 17) and the defendant's motion for summary judgment (Filing No. 27). After reviewing the parties' motions, the supporting briefs and evidentiary materials, and the applicable law, the Court finds that the plaintiff's motion should be granted and the defendant's motion should be denied.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment must always bear "the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When the party seeking summary judgment carries its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The United States Supreme Court has noted that "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." *Celotex Corp.,* 477 U.S. at 324. Thus, Rule 56(e) requires "the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* (internal quotations omitted); *see Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1996)(declaring that the opposing party "must set forth specific facts showing that there is a genuine issue for trial.").

A motion for summary judgment should be granted when "whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule

56(c), is satisfied." *Id.* at 323. Furthermore, the Supreme Court has acknowledged that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Id.* at 323-24.

At this stage of the proceedings, the Court views the evidence in the light most favorable to the nonmoving party, with all inferences drawn in that party's favor. *See Matsushita Elec. Indus.*, 475 U.S. at 587. In conducting such review, the Court is particularly aware that it does not "weigh the evidence and determine the truth of the matter" but instead determines "whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus.*, 475 U.S. at 587.

II. STATEMENT OF FACTS

The United Kingdom Parliament created the Society of Lloyd's ("Lloyd's") to regulate and oversee entities conducting insurance business in the Lloyd's market. Plaintiff's Ex. A, at ¶ 2. In undertaking these responsibilities, Lloyd's promulgates and enforces regulations and exercises disciplinary authority over entities in the Lloyd's market. *Id.* at ¶ 3. Lloyd's is not

an insurer. *Id.* at ¶ 4. Underwriting members of Lloyd's, known as "Names," insure risks in the Lloyd's market. *Id.* Pursuant to the U.K. Insurance Companies Act of 1982, Names are allowed to conduct insurance business only if they agree to be subject to Lloyd's regulatory jurisdiction. *Id.* Membership in Lloyd's is a license to conduct insurance business in the United Kingdom. *Id.*

The defendant, Everett Arnold Evnen, was a Name and underwrote insurance in the Lloyd's market. *Id.* at ¶ 5. As a condition to entering the Lloyd's market, Evnen and Lloyd's executed several agreements, including a "General Undertaking" in 1976 and another "General Undertaking" dated August 22, 1986. The 1986 General Undertaking required Evnen to (1) comply with all provisions of the Lloyd's Acts of 1871-1982 and any bylaws and regulations promulgated thereunder; (2) resolve all disputes arising out of his membership in and/or underwriting of insurance business at Lloyd's in English courts pursuant to English law; and (3) consent to the jurisdiction of English courts in suits against him to enforce his underwriting obligations. *Id.* at ¶ 5; Plaintiffs Ex. 2 at ¶¶ 1, 2.1 - 2.3.

Specifically, section 2.1 of the 1986 General Undertaking provides: "The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and

construed in accordance with the laws of England." Plaintiff's Ex. 2 at ¶ 2.1. Section 2.2 of the General Undertaking states:

> Each party hereto irrevocably agrees that the 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 and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that such Proceedings have been brought in an inconvenient forum and further *irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.*

Plaintiff's Ex. 2, at ¶ 2.2 (emphasis added).

Names provided insurance through groups of Names called syndicates. Evnen, the defendant, incurred liabilities by assuming a portion of his syndicate's risk in the Lloyd's market. Plaintiff's Ex. A, at ¶ 7. To close the syndicate's business at the end of each year, reinsurance is purchased to cover any

outstanding liabilities. *Id.* Names incurred aggregate underwriting losses of over $12 billion in the late 1980s and early 1990s, and because of such losses they were unable to purchase affordable reinsurance for their outstanding liabilities. *Id.* at ¶ 8. As a result, many Names defaulted on their underwriting obligations as they came due. *Id.*

To address the large amount of litigation that arose in the Lloyd's market due to the defaults, Lloyd's implemented the Reconstruction and Renewal ("R&R") Plan. *Id.* at ¶ 9. The R&R Plan created Equitas Reinsurance Ltd. ("Equitas"), which provided for reinsurance otherwise unavailable to Names. The R&R Plan also included a settlement offer for each Name, including Evnen, to end litigation and to assist the Names in meeting their underwriting obligations. *Id.* Lloyd's offered each Name a package of "credits" that would reduce the amount of pre-1993 underwriting liabilities the Name owed. The Name was not required to accept the settlement offer; if the Name chose to reject the offer, it could litigate against Lloyd's or other entities in the Lloyd's market. *Id.* However, pursuant to its regulatory authority, Lloyd's required each Name to reinsure its outstanding pre-1993 obligations with Equitas. When a Name refused to accept the settlement offer, it was required to pay the full amount of its underwriting obligations, including the Equitas premium. *Id.* Lloyd's permitted Names to resign their

membership upon payment of their Equitas premium and any other outstanding obligations. *Id.*

English courts reviewed the R&R Plan prior to its implementation and found that the plan was within Lloyd's regulatory authority. After the R&R Plan was implemented, English courts reached the same conclusion. *See, e.g., Society of Lloyd's v. Lyon, Leighs and Wilkinson* (Court of Appeal July 31, 1997), 6 Re. L.R. 289, 1997 C.L.C. 1398; *see also* Plaintiff's Ex. A.

Lloyd's gave Names until September 11, 1996, to accept the settlement offer, and ninety-five percent of the Names accepted the offer. Evnen did not accept the offer and therefore forfeited any potential settlement "credits." As such, Evnen was required to pay the full amount of the Equitas premium by September 30, 1996. *Id.* at ¶ 10.

On October 2, 1996, Equitas assigned to Lloyd's its right to collect the premium. *Id.* at ¶ 11. The assignment included the right for Lloyd's to sue certain Names to recover any unpaid Equitas premiums. Lloyd's commenced several causes of action in English courts against the Names who did not accept the settlement offer. Lloyd's sued Evnen for full payment of the Equitas premium and for interest and costs. *Id.* at ¶ 12. The action commenced on September 17, 1998, and Lloyd's notified

Evnen that it had commenced the English action by serving him with a Writ of Summons.[1]

Evnen obtained counsel to represent him in the English action. *Id.* at ¶ 13. On October 2, 1998, Evnen's counsel filed an Acknowledgment of Service of Writ of Summons. Ten days later, Evnen filed his defense to the action. Plaintiff's Ex. 6. Lloyd's subsequently sought a final judgment against Evnen pursuant to Order 14 of the English Rules of the Supreme Court, a procedure similar to summary judgment in American practice.

Before the English court decided Evnen's case, the courts heard "test cases" during which the American Names' defenses were litigated. Hearings and appeals in the test cases took thirty-two days, during which the defendant Names raised a number of defenses, including, *inter alia*: (a) Lloyd's lacked authority to mandate the purchase of reinsurance; (b) Lloyd's lacked authority to appoint substitute agents to bind Names to the reinsurance contract with Equitas; (c) Names were entitled to rescind their membership due to fraud and misrepresentation; (d) Names were not bound by certain provisions of the Equitas contract; and (e) Equitas's assignment to Lloyd's of the right to sue the Names was invalid. English courts rejected each of these defenses.

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[1] A writ of summons is the English equivalent to a complaint in American practice.

Subsequently, on December 10, 1998, the English court issued its decision in Evnen's case. Plaintiff's Ex. 8. The English court found in favor of Lloyd's and awarded Lloyd's £146,110.09. *Id.* Pursuant to the Judgments Act of 1838, interest accrues on the judgment at the rate of eight percent per annum. Judgments Act 1838, Ch. 110, § 17 (Eng.).

III. DISCUSSION

Each party has filed a motion for summary judgment. The plaintiff claims that it is entitled to summary judgment because it obtained a valid final judgment in an English court, and United States courts should enforce the judgment as a matter of international comity. The defendant, however, claims that he is entitled to summary judgment because the English judgment violates Nebraska public policy and the plaintiff's actions violated Nebraska securities laws.

A. Forum Selection Clause

The enforceability of forum selection clauses in international agreements is governed by *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). *See Bonny v. The Society of Lloyd's*, 3 F.3d 156, 159 (7th Cir. 1993). In *M/S Bremen*, the United States Supreme Court held that forum selection clauses are "prima facie valid and should be enforced" unless a litigant demonstrates that the clause is "unreasonable under the circumstances." *M/S Bremen*, 407 U.S. at 10. Construing this

exception narrowly, the Supreme Court has stated that such clauses are unreasonable only if (1) their incorporation into the contract resulted from fraud, overweening bargaining power, or undue influence; (2) the selected forum is so "gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or (3) enforcement of the clauses would contravene a strong public policy. *Id.* at 15.

In this case, the defendant has not met his burden of proving the clauses unreasonable. Evnen has not offered any evidence that the incorporation of the forum selection and choice of law clauses into the contract resulted from fraud, a vast difference in bargaining power, or undue influence. In addition, Evnen has not offered any evidence that the English forum is "gravely difficult and inconvenient."

The third factor of the reasonableness inquiry, however, is more difficult: Does the forum selection clause violate a strong public policy of the State of Nebraska? Evnen argues that the plaintiff's acts constitute violations of Nebraska securities laws, and as such, the Court should not enforce the plaintiff's English judgment. Lloyd's argues, however, that a simple difference in Nebraska and English law should not render the clause unenforceable as against public policy.

In *Bonny v. Society of Lloyd's,* 3 F.3d 156 (7th Cir. 1993), the Seventh Circuit noted that "[t]o allow Lloyd's to avoid liability for putative violations of [securities laws] would contravene important American policies unless remedies available in the selected forum do not subvert the public policy of [the securities laws]." *Bonny*, 3 F.3d at 161. Likewise, this Court finds that it would be untenable to allow Lloyd's to escape liability for violations of securities laws if the remedies available to Evnen are insufficient to protect the public policy behind Nebraska securities law. In this case, however, even if Lloyd's violated Nebraska securities law by entering into contracts with Evnen, which may have constituted the sale of a security, such action does not necessarily mean that enforcing the forum selection and choice of law clauses would contravene a strong public policy. If, for example, sufficient remedies exist under English law, the clauses would clearly be enforceable. "The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not alone a valid basis to deny enforcement of forum selection, arbitration and choice of law clauses." *Bonny,* 3 F.3d at 162 (citing *Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993)). Further, "[n]othing excuses [Evnen] from not being aware of the substantive provisions of English law that

the forum selection clause incorporates into his agreement." *Bonny*, 3 F.3d at 160.

An important issue, then, is whether English law provides Evnen with any remedies for the actions he alleges Lloyd's engaged in. The Lloyd's Act of 1982 grants immunity to Lloyd's for various causes of action, but it does not cloak Lloyd's with such immunity in the event of bad faith. Plaintiff's Ex. 1; *see also Bonny,* 3 F.3d at 161 (citing *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir.), *cert. denied,* 506 U.S. 1021 (1992)). Although the remedies in English courts may be more limited than those potentially available in the United States, Evnen nevertheless does have a remedy against Lloyd's in England for any actions Lloyd's took in bad faith. "All that is required is that the rendering court operate under procedures 'compatible with the requirements of due process.'" *Society of Lloyd's v. Ashenden*, 223 F.3d 473, 477 (7th Cir. 2000). In addition, Evnen could have causes of action against its Member Agent and Managing Agent for fraud. In short, English law does provide Evnen with an avenue for relief.

Evnen argues that the decision in *Society of Lloyd's v. Jaffray* (Court of Appeals July 26, 2002), changes this analysis and renders the previous circuit court opinions meaningless. After reviewing the lengthy *Jaffray* opinion, the Court finds that

Jaffray does not substantially change the basis upon which the many circuit court opinions were decided. Evnen's argument on this point is without merit.

Numerous federal appellate courts have evaluated the forum selection clause from the General Undertaking and determined that it is valid and enforceable. *See, e.g., Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied,* 525 U.S. 1093 (1999); *Stamm v. Barclays Bank of New York*, 153 F.3d 30 (2d Cir. 1998); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998); *Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997), *cert. denied,* 523 U.S. 1072 (1998); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied,* 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied,* 510 U.S. 945 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied,* 506 US. 1021 (1992). We agree with these eight federal appellate courts that have found the forum selection clause to be valid and enforceable. Because the forum selection clause is valid and enforceable, the Court will evaluate whether it should enforce the resulting English judgment.

B. Enforcement of Foreign Money Judgments

In 1895, the United States Supreme Court established principles that govern whether federal courts should recognize and enforce a foreign country's money judgment. *Hilton v. Guyot*, 159 U.S. 113 (1895). The Supreme Court noted:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton, 159 U.S. at 163-64. "To give the judgment preclusive effect, it must be recognized as a legitimate judgment." *Shen v. Leo A. Daly Co.*, 222 F.3d 472 (8th Cir. 2000) (citing *Hilton*, 159 U.S. at 163). The Eighth Circuit recently noted that although the Nebraska Supreme Court has not expressly adopted the principles from *Hilton*, Nebraska courts would likely apply the principles of *Hilton*. *Shen*, 222 F.3d at 476. As such, this Court will also apply the principles of *Hilton*.

Pursuant to *Hilton*, United States courts should recognize foreign judgments under the principle of international comity if certain factors are present:

> Previously litigated claims should not be retried if the reviewing court finds that the foreign court provided a full and fair trial of the issues in a court of competent jurisdiction, the foreign forum ensured the impartial administration of justice, the foreign forum ensured that the trial was conducted without prejudice or fraud, the foreign court had proper jurisdiction over the parties, and the foreign judgment does not violate public policy.

Black Clawson Co. v. Kroenert Corp., 245 F.3d 759 (8th Cir. 2001) (citing *Shen,* 222 F.3d at 476; *Hilton,* 159 U.S. 113). The party seeking to enforce the foreign judgment has the burden of proof in establishing that the judgment should be recognized. *Shen*, 222 F.3d at 476 (citing *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276, 286 (S.D.N.Y. 1999)).

The first four components of this test were clearly satisfied in the English action. The only remaining question is whether enforcing the judgment would violate a strong public policy of Nebraska. "[C]ourts of a forum state may refuse to enforce a contract which violates a strong public policy of the forum even though the contract is valid where made and where it is to be performed." *Toronto-Dominion Bank v. Hall,* 367 F.Supp. 1009, 1014-15 (D.Ark. 1973). Generally, states do not automatically refuse to recognize and enforce a judgment simply because it is invalid under state law. *Id.* Rather, courts will

enforce the judgment as long as it meets the requirements set forth in *Hilton*. *Id.*

Evnen argues, both in his motion for summary judgment and in opposition to Lloyds' motion for summary judgment, that Lloyds' sale of a security to him constituted a violation of Nebraska securities laws. The essence of Evnen's argument is that Nebraska law prohibits Nebraska citizens from waiving any rights under the Nebraska Securities Act, and that the forum selection clause and English judgment combined to result in such a waiver which is a violation of Nebraska public policy. The Court does not find this argument convincing.

Numerous other courts have evaluated whether the forum selection clause and resulting foreign judgments constitute waivers of rights under American securities laws. Those courts have consistently held that the clauses are valid and enforceable and do not constitute such a waiver. In *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998), the United States Court of Appeals for the Eleventh Circuit determined that applying the *Bremen* test was the appropriate method of determining the enforceability of the forum selection clause. *Lipcon*, 148 F.3d at 1291-93. The Court rejected the argument that the *Bremen* test undermined the policies behind the anti-waiver requirements of United States securities laws. In short, the Eleventh Circuit rejected an argument similar to the one put

forth by Evnen in this case.[2] The Court finds that the forum selection clause and subsequent foreign judgment are not rendered invalid by Nebraska securities laws.

Because the forum selection clause from the 1986 General Undertaking is valid and enforceable, and because the foreign judgment does not violate a strong public policy of Nebraska, the Court finds no reason why it should not enforce the forum selection and choice of law provisions contained in the contracts between the parties. The Court will therefore grant the plaintiff's motion for summary judgment. The Court will also deny the defendant's motion for summary judgment.

The underlying English judgment, which was entered on December 10, 1998, ordered Evnen to pay the Society of Lloyd's the amount of £146,110.09. Plaintiff's Ex. 8. The conversion rate between United States dollars and the United Kingdom pound sterling, as of December 10, 1998, was USD $1.66 / UK £ 1. Plaintiff's Ex. A, at ¶ 18. As such, the equivalent dollar amount of the English judgment is $242,542.75. Pursuant to English law, Society of Lloyd's is also entitled to interest at eight percent per annum.

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[2] The *Lipcon* court noted that seven other appellate courts had already reached similar conclusions with respect to this issue.

A separate order will be entered in accordance with this memorandum opinion.

DATED this 28th day of April, 2003.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court