You get what you bargained for

English law and jurisdiction clause in a marine insurance policy barred claim by insured against the insurer in the United States. Our guest author, Jessie Elizabeth Shifalo, takes us through the Fifth Circuit Court of Appeals' decision in Noble House LLC v. Certain Underwriters at Lloyd's, London.

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On August 20, 2018, Noble House's yacht lost its port-side rudder while entering a channel in the Bahamas. The following day, Noble House advised Underwriters at Lloyd's, its insurer, of the casualty, whose policy allegedly covered the claim. Noble House purchased the policy from Underwriters by way of a Texas-based insurance broker in February 2018. The policy contained a forum-selection clause which selected the courts of England and Wales for all disputes. Attached to the policy was a cover note with its own forum-selection clause which selected any court of competent jurisdiction within the United States. Allegedly, the cover note was not prepared by Underwriters, but by Noble House's own insurance broker. Approximately two months after the casualty, on October 19, 2018, Underwriters issued a letter advising that coverage "may not exist." To date, Underwriters have not denied coverage.

Noble House, attempted to bring suit against the Underwriters in the U.S. District Court for the Southern District of Texas in November of 2021. This was after a failed attempt to sue in the U.S. District Court for the Southern District of Florida in October of 2020. The Underwriters successfully moved to dismiss all claims on the grounds of *forum non conveniens* . Noble House then took this appeal to the Fifth Circuit.

Applying its decision in *Atlantic Marine* , the Fifth Circuit court used its precedent to enforce the forum-selection clause thus sending the litigation to a foreign forum under the doctrine of *forum non conveniens* . Under this doctrine, "a court may decline to exercise its jurisdiction and dismiss a case that is otherwise properly before it so that the case can be adjudicated in another forum." The *Atlantic Marine* decision called for a mixed standard of review for analyzing the enforcement of forum selection clauses. First, the Court reviews the district court's interpretation of the forum-selection clause and the district court's assessment of that clause's enforceability *de novo* . Second, the Court reviews the district court's balancing of the *Atlantic Marine* private- and public-interest factors for abuse of discretion. This is the analysis the Court applied in the instant case of *Noble House LLC v. Certain Underwriters at Lloyd's, London* .

The appeals court concluded the only way Noble House could overcome the forum selection clause would be to show that it was unreasonable. The Fifth Circuit Court analyzed the reasonableness factors in this case and found that they favored enforcement because:

1. There was no evidence the forum selection clause was the result of fraud or overreaching.

2. There was no evidence Noble House would be deprived of its day in court because it chose to litigate in the wrong forum.

3. There was no evidence English law would be fundamentally unfair or deprive Noble House of a remedy simply because it had a shorter state of limitations.

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[4.] There was no evidence that the enforcement of the forum selection clause would contravene a strong public policy of Texas.

Noble House also argued its claims would be time-barred under the foreign forum's statutes of limitations. Addressing both similar Supreme Court and Fifth Circuit decisions, the Court acknowledged the risk of time-barred claims in the forum-selection-clause context. But, they held "when the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum-selection clause ... [it] work[s] no injustice on the plaintiff." "[T]hat an action may be time-barred in the chosen forum does not make a forum-selection clause unreasonable."

Noble House finally argued that the district court had prompted Underwriters to provide an express commitment that it would "not count the pendency of this action against any statute of limitation argument that's made in the future." (a return-jurisdiction clause). Noble House contended on appeal this return-jurisdiction clause was mandatory and the district court's failure to include it in the dismissal order was a *per se* abuse of discretion. The Fifth Circuit Court disagreed. Instead, they stated "[t]he existence of a mandatory, enforceable forum-selection clause swallows the purpose of a return-jurisdiction clause whole." They concluded the need for a return-jurisdiction clause or other waiver of a statute of statute of limitation or laches defense was not needed because the parties had consented to the foreign jurisdiction.

The Court's ruling in *Noble House* expanded certainty on the enforceability of these clauses. The *Noble House* decision builds on the rule from *Atlantic Marine* and while *Noble House* does not change the application of law in any significant way, it does drive home the importance of knowing what forum and laws are consented to when you purchase an insurance policy.

The case citation is *Noble House, L.L.C. v. Certain Underwriters at Lloyd's, London, No. 22-20281, 2023 WL 3168603 (5th Cir. May 1, 2023).*

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