"Equitas Under English law":

An English Lawyer Replies

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ABSTRACT

"Equitas Under English law": An English Lawyer Replies is a summary, non-exhaustive reply to J. B. Haarlow and H. C. Griffin, *Equitas Under English Law*, 38 Tort & Ins. L.J. 1 (2003).

Haarlow and Griffin correctly distinguish between Equitas Re as RRC 4, §3 reinsurer and RRC 4, §9 run-off agent; correctly criticise the *non sequitur* that Equitas Re is a reinsurer because it is a run-off agent, and fairly question — and do so in the EquitasRe-assured's-at-Lloyd's financial and legal interests — the point, whatever may be the supposed ground, of seeking to make Equitas Re personally liable as a reinsurer in the first place.

Haarlow and Griffin misrepresent the extent to which English law has considered Equitas Re to be a reinsurer and conventional reinsurance-to-close ("conventional RTC") to be reinsurance; mischaracterise as provisions of law mere judicial précis of contractual provisions; fail to mention essential provisions dispositive of the nature and effect of conventional RTC; mis-state the nature and effect of conventional RTC, including in relation to its extrication and infiltration effects; mischaracterise the extent to which an assured-at-Lloyd's is required, constrained or able to collect directly from a relevant SYA participant personally; and mis-state the liability to the assured-at-Lloyd's of a conventionally outward-RTCed *originalis*, and omit to mention that the EquitasRe-reinsured SYA participant is the EquitasRe-assured's-at-Lloyd's conduit to a number of relevant expressly available and arguably available trust funds established precisely

because of the infelicitousness of recourse to either Equitas Re or to any EquitasRe-reinsured SYA participant personally.

"Equitas Under English law": An English Lawyer Replies discusses the rudiments of conventional reinsurance-to-close and its novatory and "conduit" effects; the relevance of Equitas Re as reinsurer and run-off agent; the logical absurdity of seeking to impose on Equitas Re liability as a reinsurer by arguing that it is a run-off agent; the recourse dangers of successfully transplanting reinsurance liability towards Equitas Re personally and away from EquitasRe-reinsured SYA participants as conduits to trust and other funds at the Lloyd's enterprise; and the significance and personal liability to an assured-at-Lloyd's of a SYA participant, including a conventionally outward-reinsured-to-close *originalis*.

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Part I: Orientation

1. Preliminary

The present article is a summary, non-exhaustive reply to J. B. Haarlow and H. C. Griffin, *Equitas Under English Law*, 38 Tort & Ins. L.J. 1 (2003) ("the Article"). It does not purport to deal with every contentious point in the Article or be a complete account of every relevant feature or component of the Lloyd's or Equitas enterprise.

Herein, references to byelaws are to those promulgated by the Council of Lloyd's under Lloyd's Act 1982, s.6,[1] and "**Equitas Re**" means Equitas Reinsurance Ltd.[2] and or (if appropriate) Equitas Ltd.;[3] "**FSA**" means the Financial Services Authority;[4] "**Member**"

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1 Lloyd's Act 1982, s.6 provides, so far as presently relevant:-

> (1) The Council shall have the management and superintendance of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder. (2) The Council may — (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act; and (b) amend or revoke any byelaw made or deemed to have been made hereunder.

On the FSA's supervision of the Council of Lloyd's, see for example Financial Services and Markets Act 2000, Part XIX, and FSA Lloyd's Sourcebook ("LLD").

2 Incorporated in England and Wales, number 3136300. A private company the financial liability of each member of which is limited to the face value of his share(s). Its one £100 ordinary share is owned by Equitas Holdings Ltd.

3 Incorporated in England and Wales, number 3173352. All 780,000,001 £1 ordinary shares are owned by Equitas Re.

4 Incorporated in England and Wales, number 1920623 under the name Securities and Investments Board; changed its name to FSA October 28, 1997; a private company the liability of whose members is limited to the amount of the guarantees they give to the company. *See* www.fsa.gov.uk.

means member of Lloyd's;[5] "***originalis***" means a **SYA participant** who sold insurance to an **assured-at-Lloyd's;** "**RTC**" means reinsurance-to-close; "**SUA 1**"[6] means the standard-form agency agreement between a natural (*cf*. a corporate) SYA participant and his managing agency (often called by "Lloyd's" "the managing agent's agreement (general)) at Byelaw 8 of 1988, Sch. 3, governing the relationship between the parties in respect of participation on SYAs budding in the 1990 underwriting year and subsequent underwriting years; "**SYA**" means "syndicate year of account",[7] "**YA**" means year of account, and "**RRC 4**"[8] means version FW962500.261/2+ (as amended and corrected by Reinsurance and Run-Off Contract Amendment Agreement, December 17, 1997) of the September 3, 1996 "Reinsurance and Run-Off Agreement" between: (1) Equitas Re; (2) Additional Underwriting Agencies (No. 9) Ltd.; (3) "Names" as defined; (4) "Closed Year Names" as defined; (5) the Corporation; (6) Equitas Ltd.; (7) Additional Underwriting Agencies (No. 10) Ltd.; (8) Equitas Policyholders Trustee.

2. Equitas Re's two capacities

The Article, p.5 rightly adverts to Equitas Re's two capacities. In relation to the same liabilities the company is RRC 4, §3 (FSA-authorised[9]) "reinsurer",[10] and also *ibid*., §9 run-

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5 *Viz*., the corporation, called "Lloyd's" *simpliciter*, created by Lloyd's Act 1871, s.3. The appellations "Society of Lloyd's" and "Corporation of Lloyd's" are bogus.

6 Astor Catalogue Number: see *Astor's Law of Lloyd's, 2nd Ed.*

7 Summarily described, a syndicate year of account is an accounting and collectivisation device enabling its individual participants (if more than one) to enter in a coordinated, collectivised fashion into their own individual separate contracts with each assured-at-Lloyd's through the mediation of their common, contractually enfunctioned managing agency. Participants on one particular YA of a particular syndicate are collectively referred to as the SYA "stamp". The word "syndicate" is often used, always erroneously, to designate SYA participants and SYA stamps, leading to immense confusion among those unfamiliar with the course of insurance business at Lloyd's, and to some misguided US federal jurisprudence concerning diversity jurisdiction over SYA participants.

8 *Astor's Equitas Re Handbook* catalogue number. *Op. cit*. catalogues more than twenty R&R instruments, of which the so-called Reinsurance and Run-Off Contract is only one. Curiously, relevant R&R instruments do not appear to have been catalogued by number elsewhere, and some, especially including RRC 4, appear to exist in more than one final version.

9 Equitas Re and Equitas Ltd. are authorised and regulated by the FSA. US state regulation of Equitas Re and Equitas Ltd. is beyond the present article's scope, but see for example then New York State Insurance Commissioner Edward Muhl's address to New York Law School's Center for International Law, *Implications of the Reconstruction of Lloyd's of London* Symposium, November 6, 1996 (http://www.nyls.edu/content.php?ID=713):-

> … I was handed a report and it was the [New York Insurance] department's review of the adequacy of the Lloyd's of London U.S. trust fund. Along with this report was an order that the insurance department counsel had put together. If I had signed that order, it would have de-accredited Lloyd's of London as an accredited reinsurer and an accredited excess and surplus lines rendered in New York, basically for their failure to maintain adequate monies in trust. … New York is basically a port of entry of Lloyd's for the United States because we oversee all the U.S. trusts. We also control its status as an eligible writer in the United States market

off agent.[11] The Article correctly notes that some assured-side lawyers appear to have materially misunderstood[12] and confused Equitas Re's two capacities. There can indeed be no proper factual, legal or logical basis for the *non sequitur* that Equitas Re is an assumption reinsurer because it is a run-off agent.

The Article, p.12 correctly indicates that Equitas Re's comprehensive RRC 4, §9 run-off functions mirror, and are derived directly from, those of every managing agency[13] ordinarily at Lloyd's under relevant agency agreements[14] promulgated by the Council of

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> as well as in the excess and surplus lines. I asked my senior management if they realized what would happen if I signed the order. The general answer was very simply that Lloyd's would be de-accredited. I responded by saying, "If I sign this order, the insurance world as we know it would change."
>
> I then asked my staff how many New York license companies had the bulk of their reinsurance recoverables through Lloyd's, and how many countrywide. The answer was that New York had fifty-one companies and countrywide we figured about 300 companies. So if I sign that order, Lloyd's and its reconstruction effort at the time would have failed and we would have fifty-one insolvent New York insurance companies and, at a minimum, 300 insolvencies countrywide. … We set out to find a solution to this monumental problem because we did not like the alternatives.…

10 RRC 4 provides (so far as presently relevant):-

> 3.1 [Equitas Re] shall … reinsure and indemnify each and every Syndicate and each Closed Year Syndicate by payment in accordance with clause 3.4 and otherwise upon and subject to the terms and conditions of this Agreement. 3.2 The reinsurance and indemnity obligation of [Equitas Re] shall be to indemnify without limitation in time and amount, subject to and in accordance with the remainder of this clause 3, each Syndicate and each Closed Year Syndicate from and including the Effective Date, by way of reinsurance, in respect of all liabilities, losses, claims, returns, reinsurance premiums, costs and other liabilities including extra-contractual obligations or punitive or penal damages arising in relation to the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate ….

And see the parallel provision at the so-called Retrocession Contract (Astor Catalogue Number RRC 5), §2. Per RRC 4, Sch. 2, §1, "1992 and Prior Business" means "all liabilities under contracts of insurance underwritten at Lloyd's (other than life business) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account but excluding any liabilities re-signed, or re-allocated pursuant to a premium transfer, into the 1993 or any later year[.]"

11 RRC 4 provides (so far as presently relevant):-

> 9.1 In consideration of the Names and Closed Year Names, acting through the Substitute Agent, entering into the reinsurance agreement contained in Part I of this Agreement, ERL shall be entitled to assume, and undertakes and agrees to assume, responsibility for, and the Names and Closed Year Names irrevocably appoint ERL to perform, the Run-off in accordance with the provisions of this Part II of this Agreement and subject to and in accordance with the provisions of the EATD, the ECTD and any Overseas Trust Deeds. 9.2 With effect from the time and date on which the last condition in clause 2.1 is satisfied, and subject to and in accordance with the provisions of the EATD, the ECTD and any Overseas Trust Deeds, ERL will assume exclusive and irrevocable responsibility for the Run-off of the Syndicate 1992 and Prior Business of each Syndicate and each Closed Year Syndicate.

And see the parallel provision at the so-called Retrocession Contract (Astor Catalogue Number RRC 5), §8.

12 Serious professional ethics issues arise, because some errors made in US federal and state litigation involving Equitas Re display an egregious lack of familiarity with elementary Lloyd's-Equitas law and practice.

13 The managing agency is in contractual and other legal relations not principally with any assured-at-Lloyd's but principally with each of its principals, the individual participants on individual YAs of individual syndicates. On the nature of those relations, see for example *Henderson v Merrett Syndicates Ltd*. [1995] 2 AC 145 (HL; July 25, 1994) on appeal from *ibid*. [1994] 2 Lloyd's Rep 468 (CA; December 13, 1993) on appeal from *ibid*. [1994] 2 Lloyd's Rep 193 (Saville J; October 12, 1993); *Aiken v Stewart Wrightson Members Agency Ltd*. [1995] 2 Lloyd's Rep 618 (Potter J).

14 See for example the standard agency agreement between a SYA participant and his members' agency (and between a SYA participant and a members' agency which happens also to be the managing agency of one or more of his chosen SYAs) at Byelaw 1 of 1985, Sch. 1; standard sub-agency agreement between a SYA participant's members' agency and the relevant managing agency at Byelaw 1 of 1985, Sch. 2; standard agency agreement between a natural SYA participant and a managing agency at Byelaw 8 of 1988, Sch. 3. On earlier forms of agency agreements, see for example *Hambro v Burnand* [1904] 2 KB

Lloyd's[15] or its predecessor, the Committee of Lloyd's[16] (and it is not irrelevant that some of the same US defense attorneys are now retained to advise Equitas Re as to advise managing agencies ordinarily at Lloyd's). Singularly, no rigorous comparison appears to have been ventured, by either side in any US federal or state litigation involving Equitas Re, between relevant parts of RRC 4, §9 and any relevant agency agreement. Such a comparison would have conclusively demonstrated the substantive and logical absurdity of invoking comprehensive, absolutist run-off agency functions to support an assumption reinsurance argument. The more extensively contractually empowered as a RRC 4, §9 run-off agent, the more similar Equitas Re becomes to a mere managing agency ordinarily at Lloyd's.

Part II: Equitas Re as insurer

3. Equitas Re as reinsurer in "English cases"

The Article discusses Equitas Re's role and function. *Ibid*., p.6:-

> The English cases that have examined R&R and the Reinsurance Contract have clearly recognized the same principles that the majority of American courts have considered in holding that none of the Equitas entities is a proper party to U.S. coverage litigation. These English cases firmly support the [conclusion] reached by those American courts that Equitas is a reinsurer ….

The representation is presently unsupportable. In none of the thirty-four[17] reported and unreported English cases, or the two practice notes[18] and one practice direction,[19] disgorged

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10, 17-18 (Collins MR); *ibid*., 23 (Romer LJ); *Henderson v Merrett Syndicates Ltd*. [1994] 2 Lloyd's Rep 193, 195 *et seq*. (Saville J). For a 1982 version of the non-standard agreement between a SYA participant and his members' agency, see *ibid*., 202-207. For a 1978 version of the non-standard sub-agency agreement between that members' agency and each relevant managing agency, see *ibid*., 208-210.

15 See Lloyd's Act 1982, s.3.

16 See the now obsolete Lloyd's Act 1871, s.11 (repealed by Lloyd's Act 1982, s.15(1)(a) and *ibid*., Sch. 3). An incarnation of that committee was created by Lloyd's Act 1982, s.5.

17 *McBride v Blackburn (Inspector of Taxes)*, Special Commissioners' Decision, [2003] STC (SCD) 139; *Society of Lloyd's v Jaffray and others* (CA) [2002] All ER (D) 399 (Jul), [2002] EWCA Civ 1101; *Johnson and another v Society of Lloyd's* [2002] All ER (D) 315 (Jul); *Society of Lloyd's v Noel* (CA), [2002] EWCA Civ 937, unreported, 20 June 2002; *Logistic Resources Ltd. v Eastgate Group Ltd*. [2002] EWHC 1229 (Comm), unreported, 19 June 2002; *Society of Lloyd's v Jaffray and others* (CA) [2001] EWCA Civ 1503, unreported, 8 October 2001; *Society of Lloyd's v Noel* (CA) [2001] EWCA Civ 521, unreported, 30 March 2001; *Society of Lloyd's v Waters* [2001] BPIR 698; *Society of Lloyd's v Noel* (CA), unreported, 31

by a recent[20] LEXIS search of <Equitas> "and" <reinsurance> does any English court make any adjudication to any such effect. Indeed, the nature of that product (for which the EquitasRe-reinsured SYA participant paid a "premium"[21]) appears never to have been the subject of any relevant controversy or dispute in any English case. In every relevant case, the court appears to have supinely accepted, and never adjudicated, that the RRC 4, §3 product was reinsurance. It may happen to be reinsurance, but only adjudication of its substance, not judicial adoption of its terminology or of its status as externally regulated insurance company, determines its legal nature (many a lawyer has fallen into the trap of describing RTC as a species of reinsurance[22]). US federal and state courts should therefore exercise caution in acceding to the presently bogus proposition that English law holds that Equitas Re is a reinsurer.

March 2000; *Thornton Springer v NEM Insurance Co. Ltd. and others* [2000] 2 All ER 489; *Society of Lloyd's v White and others, The Times*, 14 April 2000, 144 SJ LB 190; *Mander and others v Equitas Ltd.* [2000] Lloyd's Rep IR 520; *Society of Lloyd's v Jaffray* unreported, 26 January 2000; *Avon Insurance plc and others v Swire Fraser Ltd.* [2000] Lloyd's Rep IR 535; *Amerada Hess and others v CW Rome and others* 144 SJ LB 126, *The Times*, 15 March 2000, 19 January 2000; *Jones v Society of Lloyds; Standen v Society of Lloyd's*, *The Times*, 2 February 2000, 16 December 1999; *Price and another v Society of Lloyd's* [2000] Lloyd's Rep IR 453; *Garrow v Society of Lloyd's* (CA), *The Times*, 28 October 1999, [2000] Lloyd's Rep IR 38; *Re a debtor* (No. 544/SD/98) (CA) [2000] 1 BCLC 103; *Garrow v Society of Lloyd's*, *The Times*, 18 June 1999; *Re a debtor* (No 544/SD/98) [2000] 1 BCLC 103; *Society of Lloyd's v Jaffray* [1999] 1 All ER (Comm) 354; *Society of Lloyd's v Fraser and others* (CA) [1999] Lloyd's Rep IR 156; *Baker v Black Sea and Baltic General Insurance Co Ltd (Equitas Reinsurance Ltd. intervening)* [1998] 2 All ER 833, [1998] Lloyd's Rep IR 327 (House of Lords); *Society of Lloyd's v Fraser*, unreported, 4 March 1998; *Society of Lloyd's v Burningham*, unreported, 4 March 1998; *Trygg Hansa Insurance Co. Ltd. v Equitas Ltd.* [1998] 2 Lloyd's Rep 439; *Aneco Reinsurance Underwriting Ltd (In Liquidation) v Johnson & Higgins Ltd.* [1998] 1 Lloyd's Rep 565; *Society of Lloyds v Lyon et al*., *The Times*, 11 August 1997 (CA); *Manning v Society of Lloyd's; Society of Lloyd's v Colfox and others; Philips v Society of Lloyd's* [1998] Lloyd's Rep IR 186; *Re Yorke (deceased); Stone v Chataway* [1997] 4 All ER 907; *Society of Lloyd's v Wilkinson (No.2)* unreported, 23 April 1997; *Wynniatt-Hussey v J Bromley (Underwriting Agencies) Plc* unreported, 16 April 1996; *Wynniatt-Hussey v J Bromley (Underwriting Agencies) Plc* [1996] LRLR 312. The appellation "Society of Lloyd's" is erroneous in each case. There is no such entity. The correct name of the entity incorporated by Lloyd's Act 1872, s.3 is Lloyd's *simpliciter*: *ibid*.

18 Practice Note, Chancery Division, [2001] 3 All ER 765; Practice Note, Queen's Bench (Commercial Court), [1998] 1 Lloyd's Rep 126.

19 Practice Direction, Chancery Division, [1998] 1 Lloyd's Rep 223.

20 April 4, 2003, 1pm GMT.

21 See for example RRC 4, recitals (E) and (K); *ibid*., §3.1(b) etc.; *ibid*., Sch. 1, §1, definitions of "Name's Premium" and "Syndicate Premium".

22 See for example *Unisys Corporation v Insurance Company of North America*, Docket No. L-1434-94-S, *Uniroyal Inc. v American Re-Insurance Co*., Docket No. L-8172-94, Deposition of Stewart Boyd QC, November 15, 1999 and November 16, 1999.

4. Equitas Re "is not a party to original insurance contracts" in "English cases"

The Article, p.1 refers to US litigation in which certain EquitasRe-assureds-at-Lloyd's have "claimed that by reason of the Reinsurance Contract, [Article footnote omitted] Equitas has stepped into the shoes of Lloyd's Underwriters and is therefore liable on insurance contracts to which Equitas is not a party." *Per ibid*., p.6, "The English cases that have examined R&R and the Reinsurance Contract … firmly support the [conclusion] … that … Equitas is not a party to the original insurance contracts between the policyholders and Lloyd's Underwriters ….". The representation is presently unsupportable. It may be that Equitas Re may in due course be held by an English court indeed not to be a party to any EquitasRe-reinsured insurance contract — English law presently lacks an established "assumption reinsurance" or "implied novation" doctrine — but no English court appears to have adjudicated the point. US federal and state courts should exercise caution in acceding to the presently bogus proposition that English law holds that Equitas Re is not a party to any EquitasRe-reinsured insurance contract.

5. Equitas Re has "no contractual privity" with EquitasRe-assureds-at-Lloyd's "in English cases"

As part of its argument that an EquitasRe-assured-at-Lloyd's has no contractual rights against Equitas Re, the Article, p.6-7 discusses English privity of contract. *Ibid*., p.6: "The English cases that have examined R&R and the Reinsurance Contract … firmly support the [conclusion] … that … Equitas has no contractual privity with the policyholders of the Lloyd's Underwriters[.]" The representation is presently unsupportable. It may be that Equitas Re is not in privity with any EquitasRe-assured-at-Lloyd's, but there is no such adjudication in any of the four[23] English cases disgorged in a recent[24] LEXIS search of <Equitas> "and" <privy>, or in the sole relevant English case disgorged in a recent[25]

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23 *Lloyd's v Jaffray* [2002] All ER (D) 399 (Jul), [2002] EWCA Civ 1101 (CA); *Thornton Springer v NEM Insurance Co. Ltd.* [2000] 2 All ER 489; *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); *Lloyd's v Wilkinson (No. 2)* unreported, April 23, 1997.

24 April 9, 2003, 12pm GMT.

25 April 4, 2003, 1pm GMT.

LEXIS search of <Equitas> "and" <privity>.[26] US federal and state courts should exercise caution in acceding to the presently bogus proposition that English law holds that Equitas Re has no contractual privity with an EquitasRe-assured-at-Lloyd's.

6. Equitas Re "not bound by the terms" of EquitasRe-reinsured insurance contracts in "English cases"

The Article, p.6, represents: "The English cases that have examined R&R and the Reinsurance Contract … firmly support the [conclusion] … that … Equitas is not bound by the terms of the insurance contracts between the policyholders and Lloyd's Underwriters …." The representation is presently unsupportable. It may be that Equitas Re is not bound by the terms of any EquitasRe-reinsured contract, but English law does not presently so hold.

The proposition is controversial in principle. Which terms of which underlying insurance contracts govern Equitas Re's performance, to EquitasRe-reinsured SYA participants, of its RRC 4, §3 reinsurance obligations and its *ibid.*, §9 run-off agency obligations, if not the relevant terms of each EquitasRe-reinsured insurance contract? No R&R instrument furnishes any other relevant contracts or terms determinative of (as appropriate) Equitas Re's relevant reinsurance liability or its run-off agency functions, which is presumably one reason why Equitas Re seeks to be a third-party beneficiary of releases granted in settlement agreements by EquitasRe-assureds-at-Lloyd's to EquitasRe-reinsured SYA participants. US federal and state courts would fall into error in acceding to the presently bogus proposition that Equitas Re is not bound to observe, or that it has been held by English law not to be bound by, relevant provisions of EquitasRe-reinsured insurance contracts.

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[26] *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA).

7. Equitas Re "is not subject to a breach-of-contract action" in "English cases"

The Article, p.6, states: "The English cases that have examined R&R and the Reinsurance Contract … firmly support the [conclusion] … that … Equitas is not subject to a breach-of-contract action by the policyholders." The representation is presently unsupportable. It may be that Equitas Re is not subject to a breach-of-contract action by an EquitasRe-assured-at-Lloyd's, but English law does not so hold.

The proposition should be examined in principle in relation to Equitas Re's exercise not of its RRC 4, §3 reinsurance functions — the EquitasRe-reinsured SYA participant has assigned his relevant rights against Equitas Re as RRC 4, §3 reinsurer to Equitas Policyholders Trustee Ltd.[27] in any event — but of its *ibid.*, §9 run-off agency functions. The EquitasRe-reinsured SYA participant, just like the SYA participant ordinarily at Lloyd's, is contractually[28] prohibited from interfering in the running off of his own insurance business. In addition, Equitas Re (like a managing agency ordinarily at Lloyd's) never informs him of any relevant day-to-day technical, financial, legal or commercial aspect of that run-off. Though he will ordinarily never know — from Equitas Re or any other source — nor will he ever wish to know, of any relevant misconduct by Equitas Re which could found a RRC 4, §9 breach-of-contract action by him against it in the first place, the unpaid claimant EquitasRe-assured-at-Lloyd's will not always be so fortunate, and may well wish to pursue Equitas Re for bad-faith claims handling. Whether he will be able to do so in contract under English law is not presently covered by English authority.

Equitas Re itself appears to recognise that, as a general matter, it is not irrelevant to disputes involving EquitasRe-reinsured SYA participants. The Article's reliance, at *ibid.* p.11, on the words ''[English law] does not permit the assignment of liabilities" extracted from *Baker v Black Sea and Baltic General Insurance Co. Ltd*. [1996] LRLR 353, 361 (Millett LJ) is not to its advantage or to its credit. For example: (1) Equitas Re was not a party to the Court of Appeal proceedings; (2) the peculiarities of any type of RTC were not

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27 See for example RRC 4, §4.1; and see the contemporaneous Equitas Policyholders Trustee trust deed (Astor Classification Number RRC 7). The RRC 4, §4 assignment does not include rights against Equitas Re for actionable performance of its *ibid.*, §9 run-off agency functions.

28 See RRC 4, §9.4 (EquitasRe-reinsured SYA participant). There are similar provisions governing the SYA participant ordinarily at Lloyd's: see for example SUA 1, §7.3.

in controversy in that case; (3) the Article omits to quote relevant preceding words,[29] which make clear that the judge's non-adjudicatory allusion to the English law of assignment was in the context of annual re-signing at Lloyd's, not RRC 4; (4) the Article fails to mention that, far from supporting the notion that Equitas Re is not a relevant party in relation to EquitasRe-reinsured insurance contracts, Lord Lloyd — when the case was heard on appeal in the House of Lords[30] — appears to have been sympathetic to the apparently uncontroversial notion that Equitas Re, which had chosen to intervene personally in that appeal, was indeed a relevant party.[31]

Part IV: Reinsurance-to-close

8. conventional RTC and EquitasRe-RTC confused

The Article, p.13 states: 'Some policyholders argue that Equitas is directly liable to them because the Reinsurance Contract between the Names and Equitas is like the Lloyd's practice of "reinsurance to close." That argument misses the mark.' That is correct. Some self-professedly expert US assured-side lawyers have indeed expressed the view that Equitas Re is personally liable to an EquitasRe-assured-at-Lloyd's because RRC 4 was a form of RTC.

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29 See *Baker v Black Sea* [1996] LRLR 353, 360-361:-

> It is a requirement of Lloyd's that policies which last for more than one year are subject to annual re-signing. … [I]t takes the form of an annual reinsurance …. The transaction probably only takes the form of reinsurance rather than assignment because English law does not permit the assignment of liabilities.

30 [1998] 1 WLR 974; [1998] Lloyd's Rep IR 327; [1998] 2 All ER 833.

31 See *Baker v Black Sea* [1998] 1 WLR 974, 978-979:-

> I should mention an important development which has occurred since the case was before the Court of Appeal. In September 1996 the offer which had been made to members of Lloyd's as part of the reconstitution scheme became unconditional. That meant that a company called Equitas Reinsurance Ltd (Equitas) took over the rights and liabilities of all members in respect of the 1992 year of account and prior years, for a premium in excess of £14bn. Equitas now has the responsibility, as equitable assignee, of pursuing claims by members against their reinsurers, including the syndicate's claim in the present proceedings. … Because of its market-wide interest in the outcome of the present proceedings Equitas petitioned the House for leave to intervene in May 1997, and your Lordships granted leave shortly thereafter. In their written case the interveners indicated that they would be content to adopt the submissions advanced by the syndicate in the syndicate's written case. By agreement it was Mr Boyd QC, for the interveners, who opened the case on behalf of the syndicate ….

And see for example *Mander v Equitas Ltd*. [2000] Lloyd's Rep IR 520 (Morison J).

The argument appears to be based on confusion between conventional RTC[32] and EquitasRe-RTC.[33] The Article itself confuses[34] the two. Their principal shared incident is the closure of outward-RTCed SYA participants' relevant accounts. In other respects, the two forms are materially different. Whereas conventional RTC does extricate the conventionally outward-RTCed SYA participant from all liability in relation to the conventionally outward-RTCed insurance contract, and does infiltrate liability therefor into the accounts of the conventionally inward-RTCing SYA participant, EquitasRe-RTC does not. EquitasRe-RTC appears to have been deemed by the Council of Lloyd's to be a form of RTC only for SYA closure purposes, not for extrication-infiltration purposes, the essence of RTC being the *retention* — including when RTC has been sold by a body not comprising SYA participants[35] — of the RTCed liability within the financial responsibility and responsiveness of the *Lloyd's* enterprise.

R&R's populist concept of "finality"[36] for, and various R&R formal releases[37] of, the EquitasRe-reinsured SYA participant, though suggestive of conventional RTC-type extrication — and thus suggestive of infiltration into Equitas Re — are a different point entirely. They relate not to the EquitasRe-reinsured SYA participant's extrication — and still less to the Lloyd's enterprise's extrication — but to the Lloyd's enterprise's intentional, politically motivated self-impoverishment.

There appears to be no RTC-based ground on which the EquitasRe-assured-at-Lloyd's can properly sue Equitas Re; nor should he do so if to do so successfully would supplant any EquitasRe-reinsured SYA participant and thus deprive the plaintiff of his recourse to

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32 A partial, misleading definition is at Syndicate Accounting Byelaw (No. 18 of 1996), Sch. 1, §1, definition of "reinsurance to close", §(a).

33 A partial, misleading definition is at Syndicate Accounting Byelaw (No. 18 of 1996), Sch. 1, §1, definition of "reinsurance to close", §(d).

34 See the confusion at Article, p.13: "The fundamental point … is that neither Lloyd's reinsurance to close nor the Equitas transaction transfers to the reinsurer any of the reinsured insurer's liability to the policyholders." Conventional RTC does so transfer; EquitasRe-RTC does not.

35 For example, outward RTC sold by Lioncover Ltd. is characterised by Corporation indemnification of Lioncover, ensuring the retention of the Lioncover-RTCed liabilities within the Lloyd's enterprise.

36 See for example relevant parts of *Settlement Offer Document* (Lloyd's, July 1996).

37 See (for example) the various releases set out in the Settlement Agreement (Astor Catalogue Number RRC 1) at *Settlement Offer Document* (Lloyd's, July 1996), App. 1.

relevant funds at the Lloyd's enterprise, assuming such funds exist in relevant quantity in the first place. Rather — and this point demonstrates the difference between conventional RTC and EquitasRe-RTC — the EquitasRe-assured-at-Lloyd's sues the EquitasRe-reinsured SYA participant in the ordinary way, and, if successful, collects not against each or any SYA participant personally but solely, and for 100% of the judgment, against one or more expressly available claims payment trust funds and, when those trust funds are no longer available, there are funds at the Lloyd's enterprise such as the Central Fund which are *arguably* available to pay him 100%.

9. Conventional RTC: what English law "holds"

In attempting to describe what English law "holds", the Article, p.13, states: "Reinsurance to close is a process through which a Lloyd's syndicate reinsures its entire business for a particular year of account, usually by an agreement with the Names who are members of the syndicate in a later year." The passage is multiply infelicitous. For example:-

(1) As authority for the above-quoted proposition, the Article, footnote 111 cites solely to *Lloyd's v Clementson* [1997] LRLR 175, 216 (Cresswell J). The Article thereby suggests, and an otherwise uninformed reader is likely to infer, that conventional RTC was held in that case to be reinsurance. In reality, the nature of conventional RTC was not disputed, argued or adjudicated in *Clementson*. Cresswell J's *op. cit.*, 216 *obiter* excursus on conventional RTC is neither authoritative nor authority for the proposition that conventional RTC is (or is not) any form of reinsurance.[38]

(2) a "syndicate" properly so called has no "business", including "business" capable of being reinsured. A syndicate is a regulatory concept, and an entrepreneurial idea in the mind of a managing agency. Notwithstanding various misconceived US federal jurisprudence concerning diversity jurisdiction over "syndicates", a syndicate does not sell insurance or otherwise trade.

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[38] As discussed elsewhere in the present article, conventional RTC is incapable of being reinsurance because (for example) the conventionally outward-RTCed SYA participant is incapable of ever suffering a relevant loss.

(3) a syndicate properly so called is incapable of having members or participants.[39] A member of Lloyd's sells insurance at Lloyd's as an semi-automatic consequence of deploying premium income limit (never cash) on one or more particular chosen YAs of one or more particular chosen syndicates.

(4) the use of the word "year" *simpliciter* at Lloyd's is meaningless given the calendar year, the underwriting year,[40] the year of account,[41] and a YA's year of operation.

10. Conventional RTC "described under English law"

The Article, p.13-14, represents that "[r]einsurance to close is described … under English law as follows" followed by a quotation attributed, at *ibid*., footnote 113, solely to *Henderson v Merrett* [1997] LRLR 247, 277 (Cresswell J). That sole cite appear to seek to indicate, and an otherwise uninformed reader is likely to infer, that that case judicially adjudicated on conventional RTC. In reality, the quote appears to be merely a judicial précis of a mere contractual provision[42] promulgated by the Council of Lloyd's. Indeed, neither conventional RTC as such nor that contractual provision in particular was the

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39 Even the profoundly unsatisfactorily drafted FSA Lloyd's Rulebook (the so-called FSA Lloyd's Sourcebook ("LLD")) now speaks (almost accurately) of "syndicate years" rather than "syndicates": see for example FSA Handbook Glossary, definition of "syndicate year". And see similarly the definition of "Syndicate" at RRC 4, Sch. 1, §1.

40 The insurance equivalent of the financial year. At Lloyd's, presently January 1 to December 31.

41 Not a time period but a collectivisation device to enable members of Lloyd's to deploy premium income limit collectively.

42 See (for example) Syndicate Accounting Byelaw (No. 18 of 1996), Sch. 1, §1, definition of "reinsurance to close" (italics added), which provides (so far as presently relevant):-

> "reinsurance to close" means … (a) an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another single syndicate for a later year of account (the "reinsuring members") that the reinsuring members will *discharge or procure the discharge of*, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account, in consideration of: (i) a premium; and (ii) … (aa) the assignment, or agreement to assign, to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business (including without limitation the right to receive all future premiums, recoveries and other monies receivable in connection with that insurance business)[.]

Compare the above — the Lloyd's rulebook contains other, similar definitions of conventional RTC — with the Article's *Henderson v Merrett* Syndicates Ltd. [1997] LRLR 265, 277 text:-

> "Reinsurance to close'' … means an agreement under which underwriting members who are members of a syndicate for a year of account agree with underwriting members who comprise that or another syndicate for a later year of account that the reinsuring members will indemnify the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year, in consideration of a premium and the assignment to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business.

subject of relevant dispute, argument or judicial consideration in *Merrett*. "[U]nder English law" is therefore inaccurate and misleading.

11. Conventional RTC in "English law": Financial Services Authority opinion

The Article, p.14 represents that "English law supports the decisions of the majority of American courts that labeling the Reinsurance Contract as "reinsurance to close" does not render Equitas liable to the policyholders on their underlying insurance contracts with Lloyd's Underwriters." In support of that proposition, *ibid.*, p.14 quotes the following text:-

> "In the opinion of the FSA, where an insurer agrees to meet the liabilities (this may include undertaking the administration of the policies) of another insurer by means of a reinsurance contract, including Lloyd's reinsurance to close, this would not constitute an insurance business transfer because the contractual liability remains with the original insurer."

The Article's reliance on that quote is multiply infelicitous. For example:-

(1) the source document's correct title is not "Financial Services Authority, Insurance Business and Friendly Society Transfers" (Article, fn. 116) but "Supervision".

(2) the Article chooses to give a materially incomplete paragraph reference. The correct paragraph reference is "18.1.5[G]". The "G" signifies that the text, self-evidently mere opinion,[43] has the status only of guidance, not rule. It has no legal status whatever.

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43 The Article's authors' law firm appears to eschew even soundly-based technical opinion — indeed, any text where the writer has no direct personal experience of what he is writing about — which also excludes, among most of the world's factual literature, the judicial opinions of almost all judges and lawyers: see for example *Howmet Corporation v Liberty Mutual Insurance Company* (Superior Court, New Jersey, Law Division Morris County Docket, Nos. MRS-L-3486-91 and MRS-L-4138-91), Lord, Bissell & Brook-drafted May 9, 2000 Defendant London Insurers' Reply Memorandum In Support Of Their Renewed Motion For Summary Judgment As To Plaintiff's Idaho Site Claims And London Primary Insurers' Defense Obligation For Plaintiff's Idaho Site Claims, p.19: plaintiff's deponent "has no apparent personal knowledge of the business of insurance in the marketplace of Lloyd's. According to his affidavit, the closest [the deponent] has come to personal experience at Lloyd's is to have a copy of his book in the Lloyd's library."

(3) even if the FSA opinion had legal status so far as it went, it does not go very far. The words "this would not constitute an insurance business transfer because the contractual liability remains with the original insurer" appear to be attempting to express the limited view that a conventional RTC contract, whatever may be its inherent, inescapable, inalienable, invariable, ineradicable, irrevocable back-office extrication-and-infiltration effects, happens not to be an "insurance business transfer" in accordance with an "insurance business transfer scheme" as those phrases are defined in the FSA Handbook Glossary. As to those effect themselves, the FSA opinion appears to be expressing no view at all, in "English law" or otherwise.

(4) in any event, the Article appears[44] to be claiming that the FSA opinion addresses the peculiar type of deemed RTC effected by RRC 4.[45] There is no suggestion whatever in FSA: Supervision, Chapter 18 ("Transfers of Business") that the FSA is addressing any type of RTC other than conventional RTC. The FSA's opinion may happen to apply *a fortiori* to EquitasRe-RTC, but it does not express any view on the point. As the present article mentions elsewhere, the more that an EquitasRe-reinsured liability can be considered to remain with the EquitasRe-reinsured SYA participant, the more irrelevant becomes Equitas Re to the EquitasRe-assured's-at-Lloyd's right to recourse to the Lloyd's enterprise for 100% of his valid claim and for performance of 100% of any commutation formally agreed with EquitasRe-reinsured SYA participants.

12. Conventional RTC as reinsurance "[u]nder English law"

The Article, p.14, represents that "[u]nder English law the process of reinsurance to close is still reinsurance ….". The Article particularly represents, at *ibid*., p.14, that (the italics were added by the Article's authors):-

> [u]nder English law the process of reinsurance to close is still reinsurance whereby "reinsuring members *agree to indemnify*

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44 *Ibid*., p.14: "English law supports the decisions of the majority of American courts that labeling the Reinsurance Contract as "reinsurance to close" does not render Equitas liable …".

45 See for example RRC 4, recital (F) ("The Council has resolved that a reinsurance contract with [Equitas Re] in the terms of this Agreement (alone or, in the case of any Syndicate which includes business other than 1992 and Prior Business, taken together with another designated contract or contracts of reinsurance) will constitute reinsurance to close as at the Inception Date").

> the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the managed syndicate and allocated to the earlier year."

That is multiply infelicitous. For example:-

(1) The Article, footnote 114, attributes the above quote solely to *Lloyd's v Clementson* [1997] LRLR 175, 216 (Cresswell J). That sole cite appears to seek to indicate, and an otherwise uninformed reader is likely to infer, that the quote is a judicial dictum. In reality, the quote is merely a judicial précis of a mere contractual provision[46] promulgated by the Council of Lloyd's. Neither conventional RTC nor the quoted text was the subject of relevant dispute, argument or judicial consideration in *Clementson*. "Under English law" is inaccurate and misleading.

(2) the Article appears to have misunderstood (and quotes selectively) the very words — "agree to indemnify" — on which it seeks especially to rely. Conventional RTC cannot be a contract[47] of indemnity, because its principal effect is to render the conventionally outward-RTCed SYA participant incapable of ever actually suffering, or procedurally dealing with, a relevant loss. For example, he is never the subject of any claim on any outward-RTCed insurance contract; can never pay it even if he wished to do so (including by way of supplementing any shortfall in the outward RTC premium); can never claim on any outward RTC; can never be reimbursed by any inward-RTCing SYA participant (including by way of refund for an excessive inward RTC premium); can never be pursued under any agency agreement (including by way of cash call) for any part of the claim; and can never be pursued under any trust deed for relevant personal-use funds (such as

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46 See for example Syndicate Accounting Byelaw (No. 18 of 1994), Sch. 1, §1, definition of "reinsurance to close", §(a).

47 On the notion that conventional RTC is a contract of indemnification, see also (for example) *Aiken v Stewart Wrightson Members Agency Ltd.* [1995] 2 Lloyd's Rep. 618, 622 (more complicated RTC contracts have recently been devised in relation to corporate SYA participants):-

> IN CONSIDERATION of the payment to us of a sum of • the receipt of which amount we hereby acknowledge, we hereby undertake each for his own part and not one for another, to pay and make good in the proportions shown below against our respective Names all Claims, Returns, Reinsurance Premiums and the like taken down on and after 1st January [year], against the [UY] Underwriting Account of Syndicate • PROVIDED ALWAYS that there shall be paid to and retained by us all Premiums, Salvages, Refunds and Reinsurance Recoveries which may be taken down on behalf of the Reassured Account on and after the 1st January [year].

personal reserve and Lloyd's deposit). No indemnification ever occurs, whether by reimbursement or otherwise.

The Council of Lloyd's appears regulatorily to have recognised these elementary dynamics — the contractual bases for which are alluded to later in the present article — when promulgating the words "discharge or procure the discharge of" in the Syndicate Accounting Byelaw's definition of conventional RTC, which definition reads (so far as presently relevant; italics added):-

> an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another single syndicate for a later year of account (the "reinsuring members") that the reinsuring members will *discharge* or procure the discharge of, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account ….

Like RTC other "reinsurance" paraphernalia such as a "premium" (in reality a reserve[48]) and its historical processing at Lloyd's Policy Signing Office,[49] indemnity is misleading as to conventional RTC's true nature.

13. Conventional RTC considered

Of the six[50] types of RTC established at Lloyd's, it may be useful to briefly consider conventional RTC. The Article omits to mention that *Clementson* — erroneously relied on

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48 See for example Syndicate Accounting Byelaw (No. 18 of 1994), Sch. 1, §1, definition of "reinsurance to close", §(f).

49 See for example Reinsurance to Close Byelaw (No. 6 of 1985), §3 ("…[E]very reinsurance to close shall be evidenced by a contract in writing which shall not later than twelve months after the date as from which such reinsurance to close takes effect be presented by a Lloyd's broker or the managing agent of the reinsured members for signing, embossment and dating at LPSO").

50 RTC is incompletely and misleadingly defined at (for example) Syndicate Accounting Byelaw (No. 18 of 1994) as amended, Sch. 1, §1 as any of the following:-

> (a) an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another single syndicate for a later year of account (the "reinsuring members") that the reinsuring members will discharge or procure the discharge of, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account, in consideration of: (i) a premium; and (ii) either (aa) the assignment, or agreement to assign, to the reinsuring members of all the rights of the reinsured members arising out of or

by the Article as English authority that conventional RTC is mere reinsurance — alludes to the true nature of that elusive transaction:

> A Name has been regarded by the DTI as ceasing to conduct insurance business when all his open years have been closed by RITC. Because RITC is treated as ending a Name's involvement in a syndicate for regulatory and tax purposes, it is effectively the mechanism whereby a Name is able to be released from his membership of Lloyd's.[51]

The Article omits to mention a similar passage in another of its relied-on cases, *Hayter v Nelson*.[52] That extrication (the very reason for the Council of Lloyd's promulgating the Reinsurance to Close (Restriction) Byelaw[53]), and the corresponding infiltration, are best described in the following SUA 1 provisions, which express prior relevant customary practice at Lloyd's. They are dispositive of conventional RTC however much a court may be misdirected to the contrary (and whether or not conventional RTC effects novation as

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> in connection with that insurance business (including without limitation the right to receive all future premiums, recoveries and other monies receivable in connection with that insurance business); or (bb) an agreement by the reinsured members that the reinsuring members shall collect on behalf of the reinsured members the proceeds of all such rights and retain them for their own benefit so far as they are not applied in discharge of the liabilities of the reinsured members;
>
> (b) an agreement underwritten by members of one or more syndicates and complying with requirements made under paragraph 2(3) of this byelaw;
>
> (c) a syndicate run-off reinsurance contract between members of a syndicate for a year of account and Centrewrite Limited, Lioncover Insurance Company Limited, Equitas Reinsurance Limited or any other insurance company which is designated by the Council for the purposes of this definition and is either authorised under the Insurance Companies Act 1982 or an EC company whereby that insurance company agrees to indemnify the members of the syndicate for that year of account against all known and unknown liabilities arising out of insurance business underwritten through the syndicate and allocated to that year of account;
>
> (d) in relation to the 1992 year of account or any earlier year of account of any syndicate whose members have underwritten general business, the Equitas Reinsurance Contract; ...
>
> (e) in relation only to the 1993 year of account, 1994 year of account or 1995 year of account of any syndicate whose members have underwritten general business, the Equitas Reinsurance Contract, taken together with an agreement such as is referred to in sub-paragraph (a) modified so as to reinsure the reinsured members in relation only to such of the insurance business underwritten through that syndicate and allocated to that year of account as has not been reinsured under the Equitas Reinsurance Contract; or
>
> (f) in the case of a syndicate consisting only of a single corporate member which is not closed by reinsurance to close by another person, the inclusion in the underwriting account of that syndicate for the next following year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing; and for the purposes of this byelaw, the amount representing such provision shall be treated as premium in respect of such reinsurance to close[.]

51 *Lloyd's v Clementson* (No. 2) [1997] LRLR 175, 216 (Cresswell J).

52 In *Hayter v Nelson*, unreported, September 14, 1989, LEXIS (Evans J), the judge quotes Kiln as indicating that RTC does involve such extrication: "Mr Kiln proceeded to hold that, so far as the two parties to the reinsurance agreement were concerned, this was indeed intended to be a reinsurance to close, that is to say that it was intended that the plaintiff syndicates' Names should be relieved of further liability so that, inter alia, their deposits could be released."

53 Byelaw 15 of 1993, passed when (among other things) the Council of Lloyd's and relevant managing agencies were no longer able to deceive SYA participants any further as to the toxic financial infiltration consequences of conventional inward-RTC. SYA participants thus trapped on run-off SYAs were the most vociferous in insisting that the settlement offer that eventually became the Settlement Agreement (Astor Catalogue Number RRC 1) did contain the "finality" apparently inherent in some form of outward RTC.

such is completely beside the point). The Article does not allude to any of them, though (as discussed elsewhere in the present article) it does quote, and attribute bogus jurisprudential status to, other Lloyd's contractual provisions.

The Article's failure to mention any of the following provisions recalls a recent deposition — apparently now claimed by Equitas Re to be conventional RTC's *locus classicus* — seeking to deal in detail with conventional RTC in which the deponent, a prominent English Queen's Counsel specialising in insurance law, having expressed the firm view that conventional RTC was reinsurance, was asked: "Does the Lloyd's agency agreement refer in any way to reinsurance to close?". He answered, "I shouldn't be surprised but I haven't looked at it recently and I don't know sorry."[54] Why these provisions have been pandemically ignored may become one of the curiosities of malpractice jurisprudence.

(1) SUA 1, §9.2A:-

> A decision by the Agent to close a year of account in accordance with clause 5(ad) shall be effected by the Agent by the inclusion in the underwriting account of the Managed Syndicate for the next succeeding year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing.

Infiltration of the conventionally inward-RTCed liability is effected under this provision. The transfer is effective for all back-office purposes including cash calls, cash call statements, funding from the SYA participant's premiums trust fund, and drawdown from his Lloyd's deposit, personal reserve fund and other funds at Lloyd's.

(2) SUA 1, §7.4:-

> The Name acknowledges that risks underwritten at a time when he was not a member of the Managed Syndicate (whether by reinsurance to close or under clause 8 or otherwise) may be included as liabilities of the Managed Syndicate and the Name hereby agrees that he will be bound by the manner of the Agent's accounting treatment of any such risks.

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54 *Unisys Corporation v Insurance Company of North America*, Docket No. L-1434-94-S, *Uniroyal Inc. v American Re-Insurance Co.*, Docket No. L-8172-94, Deposition of Stewart Boyd QC, November 15, 1999 and November 16, 1999. p.184.

Under this provision, the conventional inward-RTCing SYA participant consents to full infiltration. If the inward-RTC "premium" is too much, in principle he takes the benefit, and the outward-RTCed SYA participant has no recourse to the inward-RTCing stamp for any surplus (in practice, the managing agency manipulates the premium to show a "profit" or "loss" depending on circumstances). If the inward-RTC premium is insufficient, and relevant SYA participants' funds are insufficient to make up the deficit, the managing agency may choose to make a cash call on the inwards, who have no recourse to any outward for the deficiency.

(3) SUA 1, §9.2:-

> A decision by the Agent to close a year of account … shall be effected by the Agent, through the active underwriter of the Managed Syndicate or some other duly authorised officer of the Agent, executing a written memorandum of the terms of the contract of reinsurance to close. Upon the execution of the memorandum the contract of reinsurance to close shall be binding on the reinsuring members and the reinsured members. . ., and after such execution the Agent shall have no authority to cancel or vary the contract of reinsurance to close.

Conventional RTC's extrication-infiltration effects are immutable and irreversible. The assured-at-Lloyd's could not collect against a conventionally outward-RTCed SYA participant in the (presumably rare) event that he was ever (wrongly) advised that it was in his financial interest to do so, because after extrication there is no mechanism at Lloyd's to fix him with any relevant liability. Indeed, business at Lloyd's could not be conducted if any conventionally outward-RTCed SYA participant were to be resurrected into the financial matrix.

(4) SUA 1, §5(e) empowers the managing agency to:-

> determine (subject to any requirements of the Council) to which year of account the benefit and burden of any contract of insurance should belong, irrespective of the date of acceptance of a risk or the signing of a policy.

This provision, though not essential for conventional RTC's extrication-infiltration effects, further indicates that allocation of a particular insurance liability to a particular SYA stamp is not immutable, especially in relation to the relevant accounts of an *originalis*.

(5) SUA 1, §3(p) empowers a managing agency to:-

> run off the business of the Managed Syndicate in respect of any year of account until such time as the liabilities arising out of that business are covered by reinsurance to close.

The provision deprives the conventionally outward-RTCed SYA participant of a managing agency empowered to run off the conventionally outward-RTCed insurance contracts.

Part III: The liability of SYA participants

14. Liability of the conventionally outward-RTCed *originalis* "under English law"

The Article, p.14, states:-

> … [U]nder reinsurance to close, the Names subscribing to the original policies of insurance remain liable to the policy-holders on those policies because under English law "no such agreement can relieve those original Names of their liability to policyholders."

The passage is multiply infelicitous. For example:-

(1) the Article, footnote 115, attributes the words in quotation marks to *Hayter v Nelson*, unreported, September 14, 1989 (Evans J). The snippet is not authoritative, still less authority, on any aspect of conventional RTC as actually operated at Lloyd's. The sentence in the judgment actually reads: "As Mr Kiln [the arbitrator] points out, no such agreement can relieve the original Names of their liability to policy holders". It is not clear from the

judgment whether the "agreement" referred to by the arbitrator is reinsurance (which was the subject of the case), or conventional RTC (which was not). The judge's approbation of the arbitrator aside, the nature of conventional RTC was in any event not in issue in the case, nor the subject of any argument, nor judicially considered, nor adjudicated.[55] The judge particularly did not consider the relevant managing agency agreement provisions (mentioned elsewhere in the present article) under which the conventionally outward-RTCed SYA participant is necessarily comprehensively extricated from, and positively prevented from having anything to do with, any of his conventionally outward-RTCed liabilities.

(2) even if *Hayter* purported to adjudicate conventional RTC's extrication incident, which it does not, any conclusion that extrication was not effected would be wholly unsustainable. Were a purist English court to hold that conventional RTC does not in effect novate the underlying insurance contract, it would thereby deprive the assured-at-Lloyd's —who presumably consents to the rule-based and customary practice of conventional RTC — of such particular securitisation as is inherent in conventional RTC's transposition to a fresh SYA participant supposedly with captive funds at Lloyd's (and the Council of Lloyd's semi-automatic deployment of the Central Fund in default), and impose upon him the insecurity inherent in a former Member long dead, untreaceable, impecunious and without a managing agency. No rational court would so hold.

(3) the Article, footnote 115, also cites to *Clementson*, 201, which, according to the footnote, "recogniz[es] that the Names who underwrote the original policy are still liable after reinsurance to close". Neither conventional RTC nor the front- or back-office contractual liability of a conventionally outward-RTCed *originalis* was in issue, or the subject of any argument, or judicially considered, or adjudicated, in *Clementson*, including at *ibid*., 201, which page does not contain the formulation "the Names who underwrote the original policy are still liable after reinsurance to close" or any text resembling it. If the Article does mean to refer to *Clementson*, 201, that reference indicates that the Article's authors appear to have misunderstood conventional RTC. Because of the latter's

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55 And see the related *Hayter v Nelson* [1990] 2 Lloyd's Rep. 265 (Saville J).

comprehensive-extrication-and-infiltration incidents, neither the funds at Lloyd's nor the "chain of security" discussed at *op. cit.*, 201, is ever used to meet the liabilities of any conventionally outward-RTCed SYA participant. Indeed, because of conventional RTC's extrication incident, there is no back-office mechanism at Lloyd's whereby any such recourse (which would defeat the purpose of conventional RTC) could practicably be effected.

The principle applies not only to every conventionally outward-RTCed *originalis* but to every subsequent generation of conventionally outward-RTCed SYA participant.

15. "[T]he Names retain full liability to the policyholders"

The Article, p.8 (and see generally *ibid.*, p.7-9) represents that "the Names retain full liability to the policyholders". This appears to be a variation on the Article's *originalis*-based theme that the assured-at-Lloyd's must recourse to a SYA participant personally. In citing to *Re Yorke* and other cases, and (at *ibid.*, p.7) to RRC 4, recital (J),[56] the Article appears to seek to suggest that the EquitasRe-assured-at-Lloyd's must collect from the EquitasRe-reinsured SYA participant (and that the latter is susceptible to a collection action by the former). The apparently genuine apprehension of the *Re Yorke* and *Leighs* courts and the Article that the assured's-at-Lloyd's recourse is truly to each individual relevant SYA participant individually suggests profound ignorance of the front office and the back office at Lloyd's. It is correct that the EquitasRe-reinsured SYA participant does retain a certain liability on each of his EquitasRe-reinsured insurance contracts, but not in the direct-recourse sense insinuated by the Article. He is not a collection object.

(1) As a front office matter, from the EquitasRe-assured's-at-Lloyd's perspective, for collection (and, presumably, coverage before that) to be solely at the level of a dead insolvent individual EquitasRe-reinsured SYA participant, resident before his death in

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56 RRC 4, recital (J) provides: "This agreement is to take effect as a contract of reinsurance and shall have no effect on the liability of any Name or Closed Year Name under any original contract of insurance entered into by such Name or Closed Year Name". The Article, p.7 appears to seek to give the impression that the recital is an operative provision of RRC 4. It is not.

Ivory Coast, with a £72.31 gross liability on a particular EquitasRe-reinsured insurance contract, would render commerce at Lloyd's ridiculous. Far from providing the EquitasRe-assured-at-Lloyd's with front-office recourse to himself, the EquitasRe-reinsured SYA participant is (however eviscerating the EquitasRe-reinsurance premium) and remains (however dead, untraceable or impecunious) the EquitasRe-assured's-at-Lloyd's *conduit* to certain relevant funds at the Lloyd's enterprise, providing the latter with recourse to a variety[57] of expressly[58] and arguably[59] available common-use claims payment trust funds (a discussion of which is outside the present article's scope), furnished by the Lloyd's enterprise, as required by numerous external insurance regulatory authorities in numerous jurisdictions, in order specifically to obviate the absurdity of front-office collection from any individual SYA participant personally. For example, the Lloyd's US Surplus Lines Common-Use Trust Fund pays out 100% of a claim if the EquitasRe-assured-at-Lloyd's obtains a final judgment against a relevant SYA participant;[60] not so if the judgment has been obtained against Equitas Re. If the correct trust is correctly accessed, the trustees cut a check to the assured-at-Lloyd's for 100% of the judgment debt.

(2) as a back-office matter, the EquitasRe-reinsured SYA participant himself will typically have been released (as discussed elsewhere in the present article) from all liability to provide any back-office funds in relation to any EquitasRe-reinsured liability; nor is he under the slightest external insurance regulatory obligation to maintain any assets for any

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57 Such funds can be categorised by (for example): (1) specificity of SYA participant, *viz*., personal-use and common-use (usually at Lloyd's, confusingly and inaccurately, "several asset" and "joint asset" respectively); (2) availability, *viz*., expressly available and arguably available; (3) type of claimant or currency, *viz*., dedicated and not dedicated. The terms of each relevant trust instrument are beyond the present article's scope. Some are treated in detail at *Astor's Equitas Re Handbook*, others in *Astor's Law of Lloyd's, 2nd Ed.*

58 For example, Lloyd's US Surplus-Lines Common-Use Trust Fund; Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund. Each Lloyd's American Trust Fund is a personal-use fund.

59 For example, New Central Fund (see New Central Fund Byelaw (No. 23 of 1996), §8); the (other) personal assets of Lloyd's (see Lloyd's Act 1911, s.7(c); Old Central Fund Byelaw (No. 4 of 1986), §8). Lloyd's Act 1911, s.7: "The Society shall hold the funds and property of the Society and the income therefrom for all or any of the following purposes: … (c) for making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's which in the opinion of the Council it is in the interests of the members of the Society to make good[.]"

60 Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(a) (a relevant judgment against a relevant "Underwriter" — *per ibid*., §1.22, "Underwriters" means "underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt"). See similarly Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3(a) and *ibid*., §1.12.

purpose in any jurisdiction. The SYA participant's cufflinks are vulnerable[61] only in the back office (*viz.*, to members' agencies, managing agencies, Lloyd's, etc.) never in the front office (*viz*., to an assured-at-Lloyd's).

The FSA appears to share both the above pragmatic approach and also the Article's own logic that Equitas Re and its impecuniosity are completely irrelevant to the EquitasRe-assured's-at-Lloyd's right to collect 100% of a valid claim *at the Lloyd's enterprise*. Under the extraordinary circumstances of R&R, one would have thought that if direct collection had been intended, the FSA (and its relevant predecessor, the DTI) would have imposed meaningful relevant financial requirements on each EquitasRe-reinsured SYA participant and his personal representatives and heirs, and relevant SYA-participant-specific accounting requirements on Equitas Re. Equitas Re is believed presently to maintain no relevant records. As it is presently, the FSA register of EquitasRe-reinsured SYA participants presently is merely of such addresses, real or false, as registrants choose to provide.

The Lloyd's enterprise itself has indeed put itself in a difficult funding position. Those R&R releases mean that the typical[62] EquitasRe-reinsured SYA participant remains the EquitasRe-assured's-at-Lloyd's front-office conduit to relevant funds at the Lloyd's enterprise, yet (as a back-office matter) cannot be the subject of any relevant SYA-level cash call either at Lloyd's or by Equitas Re; nor is the EquitasRe-reinsured SYA participant susceptible to Member-level contributions to the Central Fund if he is no longer a Member. Such matters are not the concern of any EquitasRe-assured-at-Lloyd's or any EquitasRe-reinsured SYA participant,[63] but that of the Lloyd's enterprise and of current (especially current corporate) Members, to the extent they wish to fund and make available[64] the New

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61 See for example *Marchant & Eliot Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep 31 (CA); *ibid*., [1996] 1 Lloyd's Rep 313 (Rix J); *Boobyer v David Holman & Co. Ltd. and Lloyd's (No. 2)* [1992] 1 Lloyd's Rep 96 (Saville J); *Garrow v Lloyd's* [2000] Lloyd's Rep IR 38, 40 (Robert Walker LJ); *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453, 461 (Colman J); *McAllister v Lloyd's* [1999] Lloyd's Rep IR 487 (Carnwath J).

62 *Cf.* (for example) the "refusenik" EquitasRe-reinsured SYA participant who declined to enter into RRC 1.

63 If a former Member, he is not susceptible to any meaningful or enforceable relevant regulation.

64 See, at New Central Fund Byelaw (No. 23 of 1996), §8(4)(b) the purported discretion given to members of Lloyd's in Lloyd's general meeting to make available the New Central Fund to "directly for the purpose of extinguishing or reducing any liability of a member in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member" (*ibid*., §8(3)(b)).

Central Fund, and thus enable the Lloyd's enterprise to honour its public blandishments of superior securitisation.

Part V: Miscellaneous

16. Equitas Re as agent-for-service of EquitasRe-reinsured SYA participants: *Amerada Hess*

The Article, p.9-10 mentions the *Amerada Hess v Rome* case. The Article's quotations from and characterisation of the judgment are multiply infelicitous. For example:-

(1) the Article, p.9 states: "The clear distinction between the Reinsurance Contract involving Equitas and the Names on the one hand and the underlying insurance contracts involving the Names and their policyholders on the other is further illustrated in *Amerada Hess v. CW Rome*." The case discusses no such distinction. Indeed, it does not consider any insurance contract at all. Rather, so far as relevant, it considers certain provisions in an unspecified[65] managing agency agreement, and unspecified provisions in RRC 4.

(2) the Article, p.9-10 quotes the judgment in this way: "[the claimants] embarked on a course — the attempt to effect service on the syndicates by serving Equitas — which a few minutes' investigation of the Equitas reinsurance contract would have shown to be completely hopeless." The Article's insertion of the word "claimants" appears to seek to give the impression that the judge held that the claimants' attempt to serve Equitas Re as a principal was completely hopeless, and that he found that RRC 4 says that such an attempt was completely hopeless. Contrary to the Article's representation, the judge did not use the words "the claimants". He used the words "Holmans had". Far from trying to sue Equitas Re personally, Holman Fenwick & Willan — the claimants' solicitors — were trying to

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65 The judgment does not identify the "Managing Agent's Agreement". Only examination of *op. cit.*, §5(w) identifies it as SUA 1.

serve Equitas Re merely as an agent of relevant EquitasRe-reinsured SYA participants in the absence of any more obvious agent-for-service.

On that point, the judge held that Equitas Re was not an automatic agent-for-notice. In doing so, the judge did not investigate all relevant provisions of either RRC 4 — indeed, both the judge and relevant lawyers appear to have confused Equitas Re's RRC 4, §3 reinsurance and *ibid*., §9 run-off functions[66] — or any relevant managing agency agreement.[67] Had he done so, he would arguably have been led to conclude that one of Equitas Re's essential functions is to compulsorily (not discretionarily[68]) receive service of process on behalf of EquitasRe-reinsured SYA participants, especially in the current absence of any mechanism permitting service at, for example, One Lime Street (as the EquitasRe-reinsured SYA participant's last known place of business). Presumably no

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66 See for example transcript, p.10: Colman J recounts (transcript, p.10) that the lawyer for one of the parties:-

> points to the fact that, following Lloyd's Reconstruction and Renewal Settlement, Equitas was the reinsurer of all the Lloyd's syndicates in respect of 1992 and prior risks and that Equitas was in control of all defence matters relating to this claim and would, if approached, clearly have given authority to accept service.

And see *ibid*., p.13:-

> Mr McKenna telephoned … an in-house legal adviser at Equitas Ltd. He took this course because he took the view that because Equitas had taken over the syndicates' risks by way of … reinsurance under R&R, one possible solution to the problem of effecting service on the Lloyd's defendants would be to serve the writs on Equitas.

67 See for example the agreements appended to Byelaws 1 of 1985 and 8 of 1988.

68 The judge attributes to Equitas Re a mere discretion to accept service based on his construction of SUA 1, §5(w) as being a bare power: Transcript, p.18:-

> [T]here can be no effective service on a managing agent unless it chooses in any particular case to exercise the power granted to it by the clause to accept service. … [M]erely leaving the writ at the registered offices in question after business hours gave no opportunity to the agent to exercise that power ….

And see similarly, *ibid*., p.19:-

> What is the effect of clause 5 of the Managing Agents Agreement? The words of this clause are clearly designed to vest in the agent powers of a discretionary nature. They contrast with the words of clause 4 which set out the agent's duties. In other words it is up to the agent whether he chooses to exercise those powers as are necessary or expedient for the objects described in clause 5. Thus the agency is not under a duty to accept service of proceedings unless it decides to do so.

If that view (in which the judge appears to be addressing Equitas Re as RRC 4, §9 run-off agent) be correct, Equitas Re and a managing agency ordinarily at Lloyd's acting under that or a like form of agreement would be entitled not only to decline to accept service of any proceedings at will but to similarly pick and choose which other relevant functions to exercise, to decline to participate in a representation agreement with other managing agencies, and to compel a plaintiff to find some other servee, necessarily unempowered to deal with the proceedings, timeously or otherwise. In reality, §5 lists the managing agency's essential functions, not its bare powers. The judge appears to have misunderstood other issues. For example, at transcript, p.19, he says: "The plain representation contained in the Managing Agents Agreement is … not to the effect that the agency has authority to accept service, but that it has authority to exercise a discretionary power to accept service." Since no actual or prospective assured-at-Lloyd's is informed of any agency agreement between any SYA participant and any managing agency (or indeed of any other relevant back-office agreement or arrangement), query how there can be any "representation". Business at Lloyd's proceeds on the basis that, absent a service-of-suit clause, service cannot be and never is on any relevant SYA participant personally but solely on a person compulsorily exercising relevant agency functions. Ordinarily at Lloyd's, service of process in England on a representative SYA participant is on his managing agency, *whether or not* he is an external or working Member.

English court in possession of all the facts would deprive Equitas Re of the exercise to the fullest of its run-off agency role, *a fortiori* to the extent that Equitas Re insists that Lloyd's brokers broke claims on EquitasRe-reinsured insurance contracts solely to itself. Contentious business at Lloyd's as currently configured could not rationally be conducted on any other basis.[69]

(3) the Article, p.10 states "*Amerada* makes clear that policyholders under English law have no direct cause of action against Equitas by reason of the Reinsurance Contract." That is an egregious mischaracterisation of both the judgment and the underlying dispute. Equitas Re's personal liability to the claimants was never in controversy. The judge did not consider it. The claimants did not plead or argue it. The case did address an application the claimants happened to make to amend their claim, but an allegation that Equitas Re was personally liable to them, even as a run-off agent, was not even one of their proposed amendments. The case, so far as relevant, concerned only Equitas Re as agent for service of process.[70]

(4) the Article, footnote 69 asseverates: "The position advocated in *Amerada Hess* was affirmed as legally correct in *National Bank of Greece SA v. RM Outhwaite,* 16 January 2001 (Q.B.)." That statement is pernicious. The *National Bank of Greece* case[71] does not mention *Amerada Hess*, and does not adjudicate the extent to which Equitas Re was or was not an agent-for-service.[72] Irrationally dismissive[73] of Equitas Management Services Ltd. as

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69 For example: (1) it is futile to serve any EquitasRe-reinsured SYA participant personally — indeed, to serve *any* person other than the duly empowered agent — because he cannot conduct any procedural or substantive part of the litigation personally: see for example RRC 4, §9.4 ("It is expressly agreed that ERL and its delegates and sub-delegates will have irrevocable and exclusive power to manage each Run-off in accordance with the provisions of this Agreement and, subject to the provisions of the EATD, the ECTD and any Overseas Trust Deeds and to the fullest extent possible, shall manage each Run-off as if it were principal and, without prejudice to the generality of the foregoing, it is expressly agreed that: … (b) in no circumstances will any Name or any Closed Year Name interfere with the exercise of the management or control of any Run-off") — an example of when notice to the principal is not notice to the principal; (2) it is futile to serve his pre-RRC 4 managing agency because the latter is no longer the managing agency of any EquitasRe-reinsured SYA stamp. Service on Equitas Re as each relevant EquitasRe-reinsured SYA participant's compulsory RRC 4, §9 run-off agent is no less unavoidable or consistent with established practice than service on a managing agency under SUA 1.

70 See particularly transcript, p.13: the claimant's solicitor "took the view that because Equitas had taken over the syndicates' risks by way of … reinsurance under R&R, one possible solution to the problem of effecting service on the Lloyd's defendants would be to serve the writs on Equitas." The judgment does not suggest that the claimant's solicitor took the view that because Equitas Re was a reinsurer, it was personally liable to the claimant.

71 Reported at [2001] Lloyd's Rep IR 652.

72 See especially *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 656 (Andrew Smith J). The closest that the case came to overlapping with *Amerada Hess* was: (1) in considering, in relation to Equitas Management Services Ltd.,

an agent-for-service for EquitasRe-reinsured SYA participants, the judge appears to have adopted without consideration (and to some extent contradictorily[74]) the bizarre and obviously erroneous contention[75] by the legal representative of "Equitas"[76] that service had to be effected on either each relevant EquitasRe-reinsured SYA participant individually or on a representative SYA participant personally. Indeed, the case is noteworthy for the judge's failure to adjudicate the point, and for the claimant's unnecessary and inappropriate attempt to serve one supposed relevant SYA participant personally out of the jurisdiction.

(5) the Article, p.9 states: "[t]he claimants delivered writs for service to Equitas instead of to the Lloyd's syndicates", "[t]he court held that service on Equitas would not effect service on the relevant reinsured Lloyd's syndicates", and "[t]he claimants argued that serving Equitas was effective service on the syndicates". These references to syndicates indicate misunderstanding. A syndicate properly so called is not a proper servee in any event, because it is incorporeal, has no members, participants or relevant representatives, and does not trade or conduct any activities.

17. The Article's purpose and conclusion

The Article's stated purpose, at *ibid*., p.4-5, was "to demonstrate that the majority view of American courts is entirely consistent with general principles of English law, including

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whether that company's address at the bottom of the claim form meant that, as far as concerned the EquitasRe-reinsured SYA participant defendants in that case, 'the Claim Form cannot be said to be one " to be served out of the jurisdiction" within the meaning of CPR, Rule 7.5'; (2) in the bald averment, at *ibid*., 656, 657, by Equitas "companies" "stating that service of the form did not constitute effective service upon the relevant syndicates". That point was not in controversy in *National Bank of Greece* and was not the subject of any adjudication.

73 *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657, §13. The judge gave no reason for considering that the point seemed to him "hopeless" (*ibid*.) His view that Equitas Management Services (which is not a run-off agent) was not agent-for-service is correct probably only by coincidence.

74 See for example *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657 (§9) and 663 (§47) (references to "Equitas" indeed representing the Outhwaite "syndicate").

75 See *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657 (§14). SYA participants appoint a managing agency to receive service on their collective behalfs. Any argument that Equitas Re is not the agent-for-service of every EquitasRe-reinsured SYA participant is wholly unsustainable: absent a service-of-suit clause mandating service on another party, what other agent-for-service do such SYA participants have? And see for example RRC 4, §10.3.

76 See *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657 (§14).

cases that have considered the Equitas reinsurance arrangement." English law, especially the jurisprudence which has considered RRC 4, does not provide the support claimed. The Article therefore fails in its purpose. It also missed a fine opportunity to counter the myth, misunderstanding, mischaracterisation, half-truth, omission and terminological imprecision obstructing this essentially straightforward subject's accurate exposition, and to expound, for the benefit of "misguided"[77] US assured-side lawyers, how Equitas Re and its reinsurance functions actually bear — financially, substantively, procedurally and administratively — on their all too often ill-served clients. Instead, the Article appears to be an attempt to disseminate fresh misinformation.

The first book[78] ever written specifically on the Lloyd's enterprise was published in 1991. Since then, and notwithstanding epic litigation[79] and continuing material financial and legal contentiousness, the law and practice of Lloyd's has failed to evolve into either a scrupulous academic subject or a rigorous professional discipline, in England as elsewhere. It is particularly fashionable for the self-professedly expert Lloyd's-Equitas lawyer to contrive bogus financial models, and counsel cheap settlement at Equitas Re, or even (as the Article correctly points out) to pursue Equitas Re personally, because he has failed to

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77 Article, p.1.

78 Richard J. Astor, *Lloyd's Membership: A Guide to Law and Practice* (looseleaf).

79 See the summary at Appendix 1 at *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J; appeal dismissed July 26, 2002). Relevant cases include (for example) *Lark v Outhwaite* [1991] LRLR 1; *Hiscox v Outhwaite* [1991] LRLR 93; *Boobyer v David Holman & Co Ltd. and Lloyd's* [1992] 2 Lloyd's Rep. 436; *Ashmore v Lloyd's* [1992] 2 Lloyd's Rep. 1; *Boobyer v David Holman & Co Ltd. and Lloyd's (No. 2)* [1993] 1 Lloyd's Rep. 96; *Napier & Ettrick v R. F. Kershaw Ltd.* [1993] 1 Lloyd's Rep. 10; *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620; *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176; *Napier & Ettrick v Hunter* [1993] AC 713; *Lloyd's v Morris* [1993] LRLR 217; *Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep. 579; *Feltrim and Gooda Walker actions* [1994] LRLR 168 [1996] LRLR 135; *The Merrrett, Gooda Walker and Feltrim Cases* [1994] 2 Lloyd's Rep. 193; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1995] 2 Lloyd's Rep. 197; *The Merrett, Gooda Walker and Feltrim Cases* [1994] 2 Lloyd's Rep. 468; *Sword-Daniels v Pitel; Brown v KMR Services Ltd*. [1994] LRLR 10; *Arbuthnott v Fagan* [1996] LRLR 143; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd*. [1995] LRLR 20; *The Merrett, Feltrim and Gooda Walker Cases* [1995] 2 AC 145; *Deeny v Gooda Walker Ltd*. [1996] LRLR 183; *Lloyd's v Clementson* [1995] LRLR 307; *Deeny v Gooda Walker* [1995] STC 439; *Cox v Bankside Members' Agency Ltd*. [1995] 2 Lloyd's Rep. 437; *Aikens v Stewart Wrightson Members Agency Ltd*. [1995] 2 Lloyd's Rep. 618; *Deeny v Gooda Walker Ltd*. [1995] LRLR 117; [1996] LRLR 176; *Caudle v Sharp* [1995] LRLR 389; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd*. [1996] 1 AC 102; *Cox v Bankside Members Agency Ltd*. [1995] 2 Lloyd's Rep. 437; *Deeny v Gooda Walker Ltd (No. 3)* [1996] LRLR 168; *Brown v KMR Services Ltd*. [1995] LRLR 241; *PCW Syndicates v PCW Reinsurers* [1995] LRLR 373; *Cox v Deeny* [1996] LRLR 288; *Deeny v Gooda Walker Ltd.* [1995] LRLR 361; [1996] LRLR 109; *Marchant & Eliott Underwriting Ltd. v Higgins* [1996] 1 Lloyd's Rep. 313; *Henderson v Merrett Syndicates Ltd.* [1997] LRLR 265; *Deeny v Walker* [1996] LRLR 276; *Marchant & Eliott Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep. 31; *Arbuthnott v Feltrim Underwriting Agencies Ltd*. [1996] CLC 714; *Henderson v Merrett Syndicates Ltd*. [1997] LRLR 247; *Deeny v Gooda Walker Ltd*. [1996] LRLR 109; *Berriman v Rose Thomson Young (Underwriting) Ltd*. [1996] LRLR 426; *Judd v Merrett* [1997] LRLR 21; *Lloyd's v Clementson* [1997] LRLR 175; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313; *Axa Reinsurance (UK) Plc v Field* [1996] 2 Lloyd's Rep. 233; *Hill v The Mercantile & General Reinsurance Co Plc* [1996] LRLR 341.

familiarise himself with his client EquitasRe-assured's-at-Lloyd's continuing right to 100% indemnity at Lloyd's.[80] Such matters, and the endemic imprecision that continues to characterise the practice of this most recondite subject, will doubtless eventually be aired in the malpractice courts.

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[80] At a bare minimum, the assured-side lawyer must be intimately familiar with relevant legal instruments, which tend to include (for example) Lloyd's US Surplus-Lines Common-Use Trust Deed; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, Lloyd's American Trust Deed, and other recourse-fund instruments. On the considerable complexity of Equitas Re's financial affairs in (for example) New York, see incidentally (for example): (1) DTI's authorisation letter to Equitas Re and Equitas Ltd., September 3, 1996; (2) Superintendant Muhl letter to David Rowland (Lloyd's) and Peter Von Kaufmann (Citibank) approving transfer of assets from LATFs to EATF, September 3, 1996; (3) Superintendant Muhl letter to David Rowland (Lloyd's) and Peter Von Kaufmann (Citibank) approving transfer of assets from LATFs to EATF subject to conditions, September 3, 1996; (4) David Westby (Lloyd's) to Vinnie Laurenzano (NYID) re annual list of underwriting members, August 30, 1996; (5) David Westby (Lloyd's) to Vinnie Laurenzano (NYID) re relevant documentation, August 30, 1996; (6) Jonathan Spencer (DTI) to Laurenzano (NYID) re Equitas reporting, September 3, 1996; (7) Jane Barker (Equitas) to Laurenzano (NYID) re notice and examination in event of proportionate cover, September 3, 1996; (8) Westby (Lloyd's) to Laurenzano (NYID) with attached September 3, 1996 letter from Jeffrey Mace (LeBoeuf) to Laurenzano (NYID) re managing agencies compliance with byelaws, August 30, 1996; (9) Jeremy Heap (Equitas) to Laurenzano (NYID) re Equitas premiums and reserves, August 30, 1996; (10) Martin Brebner (DTI) to Laurenzano (NYID) re amount of US dollar liabilities, August 30, 1996; (11) N.A. Jones (Citibank) to Laurenzano (NYID) re transfer to LATFs from Central Fund , August 30, 1996; (12) Jane Barker (Equitas) to Laurenzano (NYID) re top-up, August 30, 1996; (13) Agreement between Equitas Ltd. and NYID, September 3, 1996; (14) Collateral Agreement between Equitas Ltd. and NYID, September 3, 1996; (15) Agreement amending September 3, 1996 Collateral Agreement between Equitas Ltd. and NYID (undated?); (16) Custody Agreement relating to Charged Accounts between Bankers Trust Company, Equitas Ltd. and NYID, September 4, 1996; (17) Custody Agreement relating to Charged Accounts between Bankers Trust Company, Equitas Ltd. and NYID, October 1996; (18) Memorandum of Waiver between Equitas Ltd. and NYID, September 3, 1996; (19) UCC-1 Financing Statement between Equitas Ltd. (debtor) and NYID (secured party) (undated?); (20) Assignment Agreement Financial Reinsurances AUA 9, the Relevant Names, Lloyd's, AUA 10, Equitas Re, September 4, 1996; (21) Assignment Agreement between Equitas Ltd., and Citibank, September 4, 1996.