Time to get real

SOME US LAWYERS HAVE MISUNDERSTOOD EQUITAS RE'S TWO CAPACITIES – AND IT'S TIME THEY STOPPED MISLEADING THEIR CLIENTS, SAYS BARRISTER RICHARD J ASTOR*

Capacities confused

Consistent with pandemic mythology and misunderstanding of key fundamentals of the Lloyd's enterprise, some US lawyers have also misunderstood Equitas Re and its two capacities. Equitas Re is a principal reinsurer. Entirely separately, and in relation to the same liabilities, Equitas Re is a run-off agent. In some US cases against Equitas Re, US coverage lawyers have illogically alleged that Equitas Re is an assumption reinsurer because it is a run-off agent. The greater its agency functions, the greater — so goes the allegation — is its liability as a principal. This wholly unsustainable argument, a bizarre non sequitur, appears to be based on ignorance of the role of managing agencies at Lloyd's. Every conventional managing agency at Lloyd's conducts comprehensive, absolutist run-off agency functions without incurring any personal liability for any of the insurance transactions of any of its principals. The error emphasises the paramount importance of familiarity with the rudiments of ordinary insurance business at Lloyd's.

The point in asserting assumption reinsurance

The Lloyd's insured's underlying strategy in attempting, in US litigation, to make Equitas Re personally liable directly to him — usually on an assumption reinsurer argument — has its own special hazards, to which the client insured is exposed because his lawyer is not genuinely familiar with relevant trust deeds. "Successfully" transplanting personal liability to Equitas Re to the exclusion of relevant syndicate-year-of-account participants closes off various US trust funds specifically and expressly available to pay 100 percent of a relevant claim.

It usually will make no financial sense, be bad strategy, and is wholly illogical for the insured to try to obtain a judgment against Equitas Re personally. If the insured has obtained a judgment against Equitas Re personally, he is likely to have been able to obtain a judgment at least as easily against relevant syndicate-year-of-account participants, and thus against relevant trust funds. Those trust funds are not available to pay a judgment against Equitas Re; indeed, it would be wholly illogical if they were since Equitas Re has no personal liability on any Lloyd's policy. Suing and enforcing directly against Equitas Re appears to be yet another example of the US assured-at-Lloyd's being badly advised by his US lawyers.

"Ringfence"

Indeed, the most spectacular misunderstanding about Equitas Re concerns its personal relevance in the first place. The typical assured-at-Lloyd's, especially in the United States, appears to accept from his lawyer, without investigation, an elaborate string of misunderstandings and half-baked misconceptions, including (for example): (1) that his recourse is against Equitas Re personally; (2) that he has no recourse against any component of or fund at the Lloyd's enterprise; (3) that he is bound by such Proportionate Cover Plan as Equitas Re may decide to adopt; (4) that he is bound by any other insolvency process to which Equitas Re may become subject; and (5) that he must pursue each relevant syndicate-year-of-account participant individually and directly when Equitas Rre runs out of money.

Each of these myths — easily dispellable by elementary investigation — appear to derive from three sources. First, "ringfence" mythology disseminated to Names by self-regulators-at-Lloyd's at the time of, and since, Reconstruction and Renewal (1996). Secondly, Lloyd's brokers failing — presumably in breach of their duty to act with reasonable skill and care — to inform their clients of the existence of relevant trust and other funds at Lloyd's. Thirdly, a pandemic and comprehensive failure by US professedly expert insurance lawyers to master those funds' governing instruments.

The assured-at-Lloyd's is entitled to better

In reality, the assured-at-Lloyd's can be properly, lawfully and effectively dispossessed of his securitisation at Lloyd's only by due process, not by second-hand gossip, wishful thinking at Lloyd's or incompetent lawyering. Conspicuously absent from the 1996 Reconstruction and Renewal exercise at Lloyd's was any due process dispossessing any assured-at-Lloyd's of various rights to 100 percent securitisation at Lloyd's. Indeed, publicity put out by self-regulators-at-Lloyd's since R&R continues to emphasise the continuing availability of "superior security at Lloyd's" to all assureds-at-Lloyd's without discrimination. There is no underclass of assured-at-Lloyd's.

It follows that recourse solely to Equitas Re is a myth. It is time that US coverage lawyers "got real" and stopped misleading their clients. Clients should stop being panicked into doing cheap deals at Equitas Re. Every valid claim on an insurance contract made at Lloyd's is payable 100 percent at Lloyd's.

*Richard J Astor is the author of Astor's Equitas Re Handbook.