WISHFUL THINKING VERSUS REALITY:
CHALLENGING THE ASSUMPTIONS OF CERTAINTY BEHIND CROSS-BORDER EXCESS INSURANCE.

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When designing a compliant multinational programme, considering the role and interplay of excess insurance – either for traditional property or casualty exposures or more specialist D&O, environmental, clinical trials and other risks – needs more careful attention.
So far so good. But there is something missing from this important dialog. In short, it fails to take into account the often significant role of excess insurance – whether available locally in excess of the primary policy, or as a tower purchased outside the locations where a company’s risks are based. When designing a compliant multinational programme, considering the role and interplay of excess insurance – either for traditional property or casualty exposures or more specialist D&O, environmental, clinical trials and other risks – needs more careful attention. After all, an excess insurance policy is governed by the same insurance regulations and tax rules that govern a primary policy and the same questions apply. Where is the excess insurance policy issued? What does it insure or not insure? And, perhaps most important of all, where can covered claims be paid compliantly? Two broad options exist. Clients and brokers may actively seek ‘full’ limits in local jurisdictions (sometimes without asking whether the local primary and excess policy provides them with ‘full’ cover as they are used to in their home jurisdiction). Alternatively, they may procure a local primary policy and then build an excess tower in the jurisdiction where the parent company is located or where excess capacity is traditionally procured. Both options may be viable. But they also need further analysis. It would be ironic if, in the desire to increase certainty, the professionals designing the multinational programme failed to take account of the issues that may actually reduce it.

In a recent ACE survey targeting the multinational casualty insurance buying habits of 170 US multinationals, 86% routinely purchased local casualty policies while 70% currently buy a local admitted primary policy at minimum cost with minimum limits. However, 50% of the respondents anticipate the need for increased local limits in the next five years. Of those anticipating the need to increase local limits, 78% acknowledge that local contractual obligations will be the primary motivator driving them to evidence higher local limits. This is followed by sensitivity to local business customs and practices, local compliance and local claims handling capabilities. The take away from the survey is that as global trade increases potentially fueling higher local contractual obligations and heightened sensitivity to local business practices, demand for evidencing higher local limits should increase commensurately.
So what are the excess insurance-related issues that should be top of mind when considering a multinational programme?

First, it is important to recognize some of the reasons why the benefits of local excess policies are not always clear-cut. The local market may not support the use of local excess policies in practice, for example because many insurers may not actually have the data or the appetite to be excess of a local insurer on a follow-form basis. Alternatively, even though appropriate limits may be purchased, the local form may not insure the needed risks allowing for inadvertent gaps in coverage. It is also worth bearing in mind that a local excess policy will often be in a different language, making administration more complex. Another practical issue may arise if there is not enough capacity, or it may be prohibitively costly, to purchase a local excess policy because a tower purchased elsewhere actually provides better economies of scale.

Yet before assuming that creating an excess tower outside the local jurisdiction is the answer, it is important to take a step back. Such an excess tower is generally going to be compliant in the jurisdiction where it is negotiated and placed. Although there are a few countries that allow unlicensed insurers to insure local risks without any conditions or restrictions, most countries are highly restrictive and place a varied burden of rules governing the international placement on the local insured or the local broker. Excess insurance is no different in this respect. As a result, an excess tower created overseas, although entirely compliant in the jurisdiction where it is issued, is therefore rarely able to compliantly pay claims or remit the appropriate premium taxes in countries where the underlying loss has occurred.

So it quickly becomes clear that lack of advanced planning when structuring an excess tower in the parent’s jurisdiction or in jurisdictions where excess capacity is efficiently available, can introduce execution uncertainty, potential adverse tax consequences and potential misrepresentation of locally available limits.
Drilling down into greater detail, insuring clauses that directly name the local subsidiary, affiliate or joint venture as direct insureds in the excess programme should be carefully considered so that they are not redefined as directly insuring those risks where claims are expected to be paid locally. Otherwise, when directly paying a claim in those jurisdictions, the client or broker may incur unanticipated costs – or the policy may simply not perform as intended.

Another important item to take into account when considering the role of excess insurance in a multinational programme is the certificate of insurance. First and foremost, understanding that local insurance laws apply equally to primary and excess insurance is critical.

Following on from this, it is imperative to recognize that while overseas excess towers combined with local excess policies provide the highest level of coverage certainty, they have limitations when not designed appropriately.

Third, when crafting clauses and local certificates under excess policies, clients, brokers and their insurers should factor in the importance of careful wording to avoid redefinition, unavailability of limits locally and other undesired consequences.

Finally, it is imperative to collaborate with an insurer and broker with international expertise and servicing capabilities as well as internal and external tax, finance and legal specialists, to plan and document a clear risk-financing strategy complemented by appropriate excess risk-transfer and ensure the multinational programme achieves performance certainty.
When working with a select group of truly global insurers — those that have an extensive owned global network combined with leading-edge technology that provide value-added services such as real-time, desk-top access to an account’s local policy, premium collections and transfers, local claims and loss data, and other pertinent local information, a menu of options addressing multinational excess insurance challenge are readily and seamlessly available. Options include, (i) providing ‘full’ limits in local jurisdictions; (ii) local primary policy complemented by a follow-from excess tower in the jurisdiction where the parent company is located or where excess capacity is traditionally procured; or (iii) separate local excess policies excess of the local primary policy in select countries where this is an optimal, cost effective solution. These options may or may not be married with traditional multinational offerings with appropriately tailored master policies protecting the parent’s insurable interests in the parent’s jurisdiction.

Often clients and brokers insist on flexibility when it comes to cross-border insurance. Carriers are, when appropriate, happy to acquiesce to these requests.

Understanding the role and interplay of excess insurance and working with a sophisticated, leading edge multinational insurer is an integral part of designing a flexible, tailor-made global programme that meets expectations in an evolving global landscape.

Whether insurance is required for first party risks, third party risks, corporate indemnity risks or personal asset protection risks — and whether it encompasses property, casualty, clinical trials, D&O, environmental, cyber-risk, surety, E&O or business travel accident insurance — understanding the role and interplay of excess insurance and working with a sophisticated, leading edge multinational insurer is an integral part of designing a flexible, tailor-made global programme that meets expectations in an evolving global landscape.
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Based in New York, Suresh Krishnan is Executive Vice President and Global Accounts Division Leader managing ACE’s large multinational customers with complex underwriting and servicing needs in Latin America and Asia Pacific. The ACE Global Accounts Division encompasses regional teams of global client and claims executives and multinational servicing units, the North American National Accounts segment, and the global services group that manages the award-winning ACE Worldview™ information portal for clients and brokers. Most recently, Suresh was General Counsel for the ACE Group’s Multinational Client Group, where he had global legal oversight for matters connected with the company’s multinational products and services. He joined ACE in 1999 and served as General Counsel of ACE USA and ACE Financial Solutions. With more than 20 years of experience in the insurance industry, he has authored numerous reports on multinational issues, which are available under the ACE Perspectives tab at acegroup.com.

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