# KEY POINTS ON TIME BAR
# IN INSURANCE AND REINSURANCE

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Most jurisdictions set a time period after which claims become time barred. However, questions such as what law applies, when the limitation period commences and how it may be suspended are not always straightforward. In English law the limitation Act 1980 sets out the statutory framework, but its application to insurance and reinsurance is determined through an analysis of the relevant case law. Each case can turn on its own individual facts and contract wordings, so this summary should not be taken as anything more than it purports to be – some handy basic guidelines.

## Determining which country's law applies

To determine the relevant limitation period, the English Courts will apply whichever country's law applies to the contract (Foreign Limitation Periods Act 1984). This contrasts with some other jurisdictions (including many US States) which apply the local law of the court or seat of arbitration, irrespective of the law of the contract. This may be important since limitation periods and when they accrue vary between jurisdictions. In USA, for example, time may run from the date reinsurers denied coverage. This is very different from the English position, set out below.

## The English limitation period

Under English law, for a contract not under seal, which includes insurance and reinsurance contracts, under section 5 of the Limitation Act 1980, no action can be brought after the expiration of 6 years from the accrual of the cause of action. This can be changed by contract, but the Courts are reluctant, so very clear wording in the contract is needed. The English Courts will only dismiss a time barred claim if the defendant raises it as a defence – it is not a point the Court takes of its own volition. Arbitrators applying English law should also enforce time-bar when raised as a defence.

## The accrual of the cause of action

The 6 year period begins from the date the cause of action accrues and once accrued may run even though the claimant may not be aware of his cause of action. "Cause of action" is not defined in the Act but case law has determined the point of accrual into the following 3 categories in insurance and reinsurance contracts:

**• Hull or property insurance**

The cause of action accrues at the date of the loss (*Chandris v Argo 1963*). This means as soon as the insured event has occurred, even though the loss might not be quantifiable at the time of the occurrence, and the insurers might not have received notification of the loss (*The Italia Express No. 3 1992*). This marine principle also applies to property insurance (*Callaghan v Dominion Insurance Co Ltd 1997*).

**• Liability insurance**

The cause of action for indemnity against the insured loss accrues against insurers when the insured's liability has been established by litigation, arbitration or agreement (*Bradley v Eagle Star 1969*), This distinction between policies of liability and other "event based" types of insurance has repeatedly been confirmed (e.g. *Virk v Gan Life Holdings 2000*).

**• Reinsurance**

Reinsurance contracts follow the pattern of liability insurance, in that the cause of action accrues when the underlying liability is ascertained by agreement, by award or by judgment (*Daugava v Henderson 1934* and *Halvanon v Co. de Seg. Do Estado de Sao Paulo 1995*). In excess of loss reinsurance, time runs from the date the amount of the reinsured's liability as ascertained on the reinsured business, breaches the excess point (or the aggregate ascertained liability properly aggregated beaches the aggregate excess point). This is so even under a variable excess of loss, when the final excess point has not then been ascertained (*North Atlantic v Bishopsgate 1998*).

**• Burden of proof**

In the English Courts a (re)insurer must state a positive case as to when the claims became time barred. The burden then lies on the claimant to show that his cause of action accrued within the statutory period (*Cartledge v Jopling 1962*). Although not generally bound by strict procedural rules, arbitrators usually follow a similar process.

## How to stop or re-start the limitation period

**• Agreement**

The parties may be able to negotiate a standstill agreement. There will need to be an objectively clear, unambiguous agreement (*Fortisbank v Trenwick 2005*).

**• Waiver and estoppels**

This may apply if, viewed objectively, there has been a clear, unequivocal, unambiguous and unconditional promise made before expiry of the limitation period, not to rely on time bar in reliance on which the (re)insured has acted to his detriment, or it would be inequitable or unconscionable to allow (re)insurers to rely on time bar in the light of that promise not to.

**• Proceedings**

If there is an applicable arbitration clause in the contract, commencing arbitration will stop time running. Where there is not an applicable arbitration clause, commencing court proceedings will stop time running. In both cases, time stops running at the date of the commencement of the relevant proceeding only in respect of the claims included in that proceeding.

**• Concealment**

Deliberate concealment of the facts giving rise to a cause of action will postpone the running of time (Section 32(2) Limitation Act 1980).

**• Admission of liability**

A clear admission of liability may stop time running.

**• Insolvency**

A winding up order suspends the running of time on claims in respect of most types of debt owed by an insolvent company or individual. If a winding up order has not been made (e.g. under the terms of a scheme of arrangement) time may not stop running. Outward reinsurance claims by a reinsured in liquidation are subject to the normal limitation period.

**• Acknowledgement of part payment**

A right of action accrues on the date of an acknowledgement or part payment of a debt or claim for liquidated damages (section 29 Limitation Act 1980) but this must take place before expiry of the limitation period applicable to the claim. This therefore, in effect, serves to extend an existing limitation period. However, *Davies v Fenton Insurance Company 1996* decided that (unless the contract provides for a single fixed sum – e.g. a value policy) the limitation period cannot thereby be extended in the case of an insurance or reinsurance claim, which is considered a claim for unliquidated damages. This Central London County Court, Business List, decision is persuasive, but not binding on the High Court. An Australian case (*Odyssey Re (Bermuda) v Reinsurance Australia 2001*) also held that a reinsurance claim is not a debt, but is an unliquidated claim in damages.