

## TIME BAR: A LEGAL UPDATE RICHARD LEEDHAM/ALEX PARKER ADDLESHAW GODDARD - DECEMBER 2008

### Basic Principles of English Law

In summary, under the English Limitation Act, a claim is time barred if it is not collected within 6 years.

Therefore, if a reinsured has suffered a loss and fails to collect from the reinsurer within 6 years of suffering that loss, the reinsurer may not be liable for that debt.

In reinsurance disputes the date of loss triggering the 6 year period is deemed to be:

- the date on which the reinsured agreed the inwards claim (not from the date on which it paid claim); or
- the date on which there was a judgment or award against the reinsured in respect of an amount which was recoverable from the reinsurer.

This was restated in the original first instance *Baker v Black Sea & Baltic* case [1995] LR 201 where the Judge stated the principle, that the date of loss is the date of ascertainment of liability by agreement, arbitration award or judgment, was common ground between the parties.

This guiding principle will apply unless there is a clear and unambiguous clause in the reinsurance treaty which defers reinsurers' obligation to pay, for example until such time as the reinsured renders an account.

In reinsurance disputes, English law has most recently been summarised in the decision of *Halvanon Insurance Company v Seguros* [1995] LR 303. The Court held that Halvanon was not entitled to recover from Seguros, any amounts which Halvanon had agreed to pay, more than 6 years before it issued proceedings in the English High Court against Seguros.

Therefore, under English law, if a claim is made on the reinsured, and the reinsured agrees the claim, as far as the reinsurer is concerned, time starts running against the reinsured from that date.

### Stopping Time Running

The only way time can stop running is if one of the following steps are taken:-

- Court proceedings are commenced by the reinsured in respect of its claims on the reinsurer.
- A formal Arbitration Notice is served by the reinsured against the reinsurer.
- A formal standstill or moratorium or tolling agreement is entered into between the reinsured and the reinsurer, whereby it is agreed that time stops running for the specific debt.
- The reinsurer formally admits the specific debt in a document which can be relied on as an admission.

It should also be noted that liquidations stop time running against the insolvent company.

### Popular Misconceptions

It is the broking community who have the initial responsibility for bringing in the reinsurance asset. There remains a fallacy in the market that simply by sending accounts or by making demands on reinsurers, there is no risk of time bar. This is indeed a fallacy and, the only way to stop the risk of a time bar defence being taken by a reinsurer, is to take one

of the formal steps referred to. Further, although a reinsurer has to plead a defence of time bar (it does not arise automatically), if pleaded and established, it is an absolute defence to these claims.

## Arbitration/Litigation

Firstly, it is important to realise the distinction between arbitration and litigation.

The English Courts have previously decided that unless there is agreement between the parties to the contrary, there are virtually no grounds on which they will allow disputes to be heard by the Court where there is an Arbitration Clause (*Halki Shipping v Sopex*, TLR 9th July 1997). As a result, if the reinsured seeks to stop time by issuing a Claim Form, and the Court subsequently decides that the appropriate way to resolve the dispute is by arbitration (because the Defendant applies to stay the litigation on the grounds of the Arbitration Clause), time will be deemed not to have stopped when the Claim Form was issued, and time will run until the Arbitration Notice is served. (*"The Merak" [1964] 2 Lloyd's 283*). It should be noted, however, that where a Court in another European Union Member State potentially has jurisdiction over proceedings the English court may be obliged under EU law to prefer that Member State's court's jurisdiction over arbitration proceedings (*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA & Ors [2007] UKHL 4*).

The preparation of an Arbitration Notice does not, of itself, stop time running. The Arbitration Notice must be served for time to stop running. A protective, un-served Arbitration Notice will therefore not work, and in arbitration, the reinsured needs to show his hand.

However, if there is no signed wording with an arbitration clause, serving an Arbitration Notice will not operate to stop time running. In that case a claim form should be issued, which will stop time running from the date of issue. You then have 4 or 6 months to serve the Claim Form, depending on whether the Defendant is a UK or overseas company. It does not need to be served for that period, for time to stop running, and having stopped time running, this period can be used for negotiation.

## Excess of Loss Contracts

The issue of time bar, in the context of a fairly unusual form of contract namely the Variable Aggregate Excess of Loss contract, was considered in the English case of *North Atlantic v Bishopsgate [1998] LR 459*.

There the Judge was asked to consider two specific limitation questions and his conclusions are as follows.

Firstly, he held that time started running from the date the reinsured had agreed the claim, and it was not the date of payment that mattered for time bar purposes. This is in line with the *Halvanon* case referred to above.

The second, and unusual question that he had to address, because of the variable nature of the contract, was whether the Plaintiffs' cause of action, in other words the date from which time starts running, commenced when the lower aggregate under the policy had been reached, or when the higher aggregate under the policy was reached (that higher deductible occurred if the net premium exceeded a certain limit).

In answer to this question, the Judge held that the time started running for time bar purposes, after losses had reached the lower limit (whether they were paid or not). It was at that stage that the Reinsurer became liable to pay even though if the net premium had lead to a higher limit, some later accounting would have been necessary, to effectively determine the amount of the reinsurers' liability.

## Brokers/Intermediaries

*Knapp v Ecclesiastical Insurance Company [1997] ALL ER 44* considered the involvement of brokers. Here, in line with previous authority, the Court held that for the purposes of calculating limitation periods, the brokers' act of negligence, in failing to exercise due skill and care, occurred at the earlier date of when the policy was effected, and not when the

insured discovered that they could not make a recovery on their insurance policy. This is in line with previous authority in the broker negligence area. (e.g. *Iron Trades Mutual v Buckenham* [1989] 2 LR 85).

Therefore, in the reinsurance context, the same analysis would apply. If an allegation is made against a broker that they have failed to effect proper reinsurance cover, or to comply with the instructions of their client, (i.e. the reinsured), that claim against the broker will need to be made at the latest within 6 years of the inception of the risk reinsured.

The position is different in the post contractual situation: where there is an allegation against a broker that they are in breach of their duty to their client, where they have, say, lost the wording or slip, or indeed failed to pursue a claim, that amounts to a continuing duty to their client. Time here, in my view, will only start running from the date of the breach, and not from the date of inception of cover. This is because until the date of the breach no damage was suffered by the broker's client.

Aside from the situation where the broker has breached a continuing duty, problems arise practically as an insured or reinsured may not know for several years after the cover is placed that the broker did not comply with his instructions at placement. The position has been mitigated somewhat by the Latent Damage Act 1986 which introduced a discoverability test in negligence cases: the Claimant has a three year period in which to commence proceedings, commencing from the date at which the Claimant knew, or should have known, about the damage. Thus for example, where a reinsured did not know that the broker had acted in breach of say, a binding authority, and attached excluded risks to the binder, the reinsured would have three years from his date of discovery of the breach to bring the claim. This exception does only apply to negligence cases and the issue as to when the Claimant had the requisite knowledge will be a question of fact in every case. However this provision has been used to effectively extend limitation periods against brokers and managing agents, notably in the cases which arose from the Lloyd's litigation, by the Names against their managing and members agents.

## Liquidations

Another important point to note is that liquidations stop time running against the insolvent company. Therefore all the reinsured needs to do is submit a proof of debt in the liquidation. There is no need to issue a Claim Form or take one of the other steps I have set out earlier. However, the insolvent company does need to act within 6 years in relation to its own recoveries as liquidation does not protect the insolvent company from time bar being taken against it by its own reinsurers.

## Civil Procedure Rules/Burden of Proof under the CPR

Under the Civil Procedure Rules which govern procedure in all proceedings before the English Courts, Defendants in litigation have to set out in their Defence when they say that time stopped running, if they rely on limitation as a defence. No longer can Defendants say the claim is time barred, they have to instead set out a positive case as to when the claims expired. However, as to who has to prove time bar, the burden lies on the Claimant to show that his cause of action accrued within the statutory period *Cartledge v Jopling* [1962] 1 QB 189, *London Congregational v Harris* [1988] ALL ER 15.

## US Position

The position in the US is rather different. In the case of *Continental v Stronghold* [77F.3d 16(2d) cir, 1996], a US Appeal Court has ruled that the reinsured's cause of action accrued only after it reported the losses to the reinsurers and the reinsurers denied coverage, not when the reinsured settled the underlying claim.

The Court held that the reinsured's losses were not payable, and therefore time did not start running, under the reinsurance contract, until a reasonable period had elapsed after notice was given to reinsurers.

