

Time Bar in Reinsurance

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Most systems of law fix, by legislation, a period of time after which claims arising from an event may no longer be pursued by litigation. This is generally referred to as the limitation period or prescription period. Where no proceedings have been commenced in respect of a claim within the appropriate limitation period, the claim is said to be "time-barred".

In England, the limitation period relating to claims under contracts, including reinsurance contracts, is to be found in the Limitation Act 1980. Section 5 of the Act provides:-

"An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued."

This limitation period applies whether or not the reinsurance contract contains an arbitration clause.¹

The limitation period fixed by the Act does not operate automatically to bar claims six years from the date of accrual. On the contrary, it is in the discretion of the reinsurer whether he wishes to rely upon a time-bar defence. The court will not, of its own motion, determine that the Plaintiff's claim is out of time.²

It will be appreciated, from the foregoing, that the effect of time-bar is not to extinguish the cause of action completely but merely to make it unenforceable where the time-bar defence is successfully pleaded.

In considering when causes of action accrue in reinsurance, it is helpful to consider first the position under contracts of insurance.

When does time begin to run in insurance contracts?

As stated above, the Limitation Period runs from the date on which the insured's cause of action has accrued, i.e. when the insured could first have sued.

In English law, there is a significant difference between the date when a cause of action accrues under contracts of insurance covering property risks and contracts of insurance covering liability.

Property insurance

Under a property insurance the cause of action accrues on the occurrence of the insured event. In **Chandris v. Argo**³, Megaw J. considered the accrual of the cause of action against insurers under a hull policy. He found that the insured's cause of action was a claim in breach of contract for unliquidated damages. The cause of action arose as soon as the insured event had occurred. This was so even though:

¹ Section 34 of the Limitation Act 1980.

² Thursby v. Warren (1628) Cro. Car. 159

³ Chandris v. Argo (1963) 2 Lloyd's Rep. 65

- (i) The insured's loss might not be capable of quantification at the time of the occurrence;
- (ii) The insured might be unaware of the loss at the time of the occurrence; and
- (iii) Insurers would not have been notified of the loss.

The Chandris decision has been approved by the Privy Council⁴ and followed in many subsequent cases.

Liability insurance

In respect of liability insurance it was determined by the House of Lords in **Bradley v. Eagle Star**⁵ that for a cause of action to accrue the liability of the insured must be "ascertained", i.e. determined as a precise sum payable by the insured. Lord Brandon said:

*"In my opinion the reasoning of Lord Denning MR and Lord Justice Salmon contained in the passages from their respective judgments in the Post Office case set out above, on the basis of which they concluded that, under a policy of insurance against liability to third parties, **the insured person cannot sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party has been established by action, arbitration or agreement, is unassailably correct.**" (emphasis added)*

Lord Brandon was approving the judgment of Lord Denning in **Post Office v. Norwich Union**⁶.

One issue which has arisen is whether a global settlement which includes both insured and uninsured items without specifying the settled amount attributable to each is capable of ascertaining the insured claim. In the Lumbermen's⁷ decision Coleman J. found that there was no ascertainment in such a settlement because he considered the insured loss required to be specifically ascertained.

The Lumbermen's decision attracted much criticism including comment by Aikens J. in *Enterprise Oil*⁸ to the effect that extrinsic evidence could be relied upon to establish what part of a global settlement related to insured losses.

In **AIG v Faraday Capital Ltd**⁹ Morrison J. went so far as to say that, "the [Lumbermen's] decision ... is ... unsound and should not be followed." The Lumbermen's problem may, therefore, be resolved in favour of treating global settlements as constituting the date of ascertainment for insured claims where evidence is available to establish what part of the settlement ought to be treated as relating to insured claims. But the safe course would be to define what sums relate to (re)insured and un(re)insured claims in the settlement itself.

⁴ Castle Insurance Co Ltd v. Hong Kong Islands Shipping Co Ltd (1983) 2 Lloyd's Rep. 376

⁵ Bradley v. Eagle Star (1989) 1 Lloyd's Rep. 456

⁶ Post Office v. Norwich Union (1997) 1 Lloyd's Rep. 216

⁷ Lumbermen's Mutual v Bovis Lend Lease [2005] Lloyd's Rep. 494

⁸ Enterprise Oil v Strand Insurance [2006] 1 Lloyd's Rep. 500.

⁹ AIG Europe (Ireland) v Faraday Capital Ltd [2007] LILR 267

When does time begin to run in reinsurance contracts?

With regard to reinsurance contracts, the courts have adopted the same approach to limitation as applies to direct liability policies, i.e. time runs from the date that the reinsured's liability is ascertained by agreement, judgment or award.

The leading authority is ***Daugava v. Henderson***¹⁰ where the Court of Appeal decided that the cause of action of a reinsured, under the reinsurance of its fire policy, did not accrue until the liability of the reinsured was in an ascertained sum. Lord Justice Scrutton said:

"The fire was on 11 April 1930: the settlement and payment by the insurer in January 1932. I am of the opinion that the latter date fixes the rate of exchange to be applied. I do not understand how the reinsurer can be liable to pay an amount until it has been fixed between insurer and insured. It is then that the insurer pays, and the reinsurer is bound to indemnify him. If the rate of exchange is fixed at a date before reinsurers' liability to pay is quantified and satisfied, the insurer may, as in the present case, recover more than an indemnity, which is contrary to all principles of insurance." (bold added)

His Lordship went on to say:

"There is no privity between the original insured and the reinsurer. The liability of the latter is only to indemnify the insurer, the reinsured, in respect of a loss for which he is liable to the insured by reason of his insurance policy. If the insurer is so liable, and the amount of his liability is ascertained, he can recover against the reinsurer, though he has not paid the insured; for he is liable for an ascertained amount and the reinsurer must indemnify him... but the reinsurer is not liable to pay the reinsured until the amount of his liability has been ascertained in accordance with the terms of the policy, which may or may not be the same as the terms of the original policy".

The Courts have consistently followed the principle established by ***Daugava v. Henderson***, including the decision in ***Halvanon v. Companhia de Seguros***¹¹. Lord Justice Steyn delivering the unanimous decision said:-

"The cause of action arises when the underlying liability is ascertained by agreement, by an award or by judgment."

The effect of contract wordings

The general principles outlined above may be overridden by the terms of the reinsurance contract concerned. There is no reason why parties to a reinsurance contract may not contract upon terms which result in the cause of action accruing at some time other than the date upon which the reinsured's liability is ascertained.

¹⁰ *Versicherungs Und Transport A.G. Daugava v. Henderson* (1934) 34 Com Cas 154 312

¹¹ *Halvanon Insurance Co Ltd v. Companhia de Seguros do Estado de Sao Paulo and Others* (1995) 4 Lloyd's Reinsurance Law Rep. 303

For example, in **Halvanon v. Cia de Seguros**¹², Counsel for the reinsured argued that on the true construction of the contracts there was an implication that time ran from the date of rendering accounts. Steyn LJ dismissed this argument in the following terms:-

"He (the reinsured's Counsel) approached the matter on the basis that it would be possible for a Court to find a constructional implication, from the terms of the reinsurance contract, that time would only run from the time of submission, the rendering of accounts or the failure to do so. For my part I am satisfied that there is not sufficient material to warrant such an implication. It is well-established that a construction application, like any other implication, can only be found if a strict test of necessity is satisfied. The contract here is perfectly workable without such application and I rule that there is no prospect whatever of a Court finding such an implication established."

On the particular facts of this case the court was not satisfied that the reinsured could discharge the burden of showing it was necessary to imply terms to give the contract business efficiency.

The Halvanon judgment does not rule out the possibility that the terms of reinsurance contracts might result in a cause of action occurring only when accounts are rendered.

The question of whether a cause of action only accrued when accounts are delivered was considered in **Nissan Fire v Malaysian British Insurance**¹³. The contract involved quarterly accounting in respect of sums payable by both the reinsured and the reinsurer with a provision that the "debtor party" would pay within 30 days of the account being agreed. The reinsured was claiming summary judgment on the basis that claims could only be ascertained when the account was struck because, prior to that time, the parties had no way of knowing what would be due as the net amount and which party would be the paying party.

Reinsurers argued that it would be wrong to treat the account as triggering the limitation period because this would result in the reinsured being able to delay the submission of accounts and thereby delay the running of the limitation period. The judge was dismissive of this argument as he considered the reinsurer has a remedy if he is concerned about late submission of accounts.

The point was not finally determined in Nissan Fire as the judge reached his decision on the summary judgment application by a different route. But the case does demonstrate that the door is open for a reinsured to contend that, where the accounting provisions are sufficiently clear, they may have the effect of delaying the running of the limitation period until the date accounts are submitted. Mere submission of claims bordereaux would not suffice but an accounting procedure where balances are struck each way on a running basis may delay the accrual of the cause of action until the account is submitted.

It may be that the wording of a reinsurance contract introduces a condition precedent to reinsurer's liability, which would have the result of delaying the date on which the cause of action accrues until the date when the condition precedent is satisfied. For example, this arose for consideration in **Charter Re v. Fagan**¹⁴, where the House of

¹² Halvanon Insurance Co Ltd v. Compaghia de Seguros do Estado (1995) 4 Lloyd's Reinsurance Law Rep. 303

¹³ Nissan Fire and Marine v Malaysian British Insurance [1996] unreported

¹⁴ Charter Reinsurance Co Ltd v. Fagan (1996) 2 Lloyd's Rep. 113

Lords unanimously decided that the phrase "sum actually paid" when construed in context did not make a payment a precondition to recovery under the excess of loss reinsurance contract concerned. If the decision had been the reverse, the effect would have been that no cause of action could have accrued until the reinsured had made payment, and the six year limitation period would run from that date. Again, clear wording could achieve this result.

Where a reinsured is faced with a possible time bar defence, it is important to consider the contract wordings to establish whether there might be any argument that, upon a proper construction of the reinsurance contract, the cause of action accrues at some date later than the ascertainment of the reinsured's liability.

What is the position for claims under X/L contracts?

The issue arose in *North Atlantic v. Bishopsgate Insurance Ltd*¹⁵ (Judgment delivered in July 1997 and currently unreported). The reinsurance contract contained a variable aggregate excess of loss provision and the issue was whether the cause of action against reinsurers arose when the initial aggregate excess of £2.5 million had been reached or when a higher aggregate excess had been determined pursuant to the terms of the contract. Mr Justice Walker held that the reinsured had a cause of action once the initial aggregate excess point was reached.

The Judgment is authority for the general proposition that in excess of loss reinsurance there are two elements to be satisfied to complete the reinsured's cause of action. Firstly, losses must be ascertained and secondly they must exceed the excess point. Once both elements are satisfied the limitation period commences. A single claim will satisfy both elements provided it is both ascertained at a figure exceeding the excess point. In other circumstances two or more claims may have to be aggregated to exceed the excess point and give rise to a cause of action.

Once the excess point has been reached, claims which arise thereafter will each have a separate date of ascertainment and, therefore, a different date from which the reinsured's cause of action arises and the limitation period in respect of that particular claim runs.

How may the running of the limitation period be avoided/suspended or interpreted?

i) Contractual Terms

The parties to a contract of reinsurance may contract out of the Limitation Act provided their agreement is not contrary to public policy. It would be possible, for example, to contract for a shorter limitation period.

Alternatively, terms could be incorporated which stipulate that no cause of action shall accrue until the occurrence of a particular event such as the rendering of an account (as dismissed above) or the date upon which reinsurers decline to pay.

ii) Standstill Agreements

A reinsured may find itself in a situation where a claim against reinsurers is subject to protracted settlement negotiations, at a time when the expiry of the limitation period is approaching. Rather than commencing proceedings, the reinsured and its

¹⁵ North Atlantic v Bishopsgate Insurance Ltd [1998] 1 Lloyd's Rep. 459

reinsurers may prefer to enter into a Standstill Agreement, which is sometimes referred to as a moratorium or, in the USA, a tolling agreement. The effect of such agreement is to suspend the running of time from a specified date and is usually on terms that any defences, including any time bar defences, which have already arisen, are preserved. Although the circumstances of some cases may require more complex wording, a simple wording for such an agreement might be as follows:

"In consideration of the Insured/Reinsured not commencing proceedings, and entirely without prejudice to any other rights and defences underwriters may have, [including issues relating to the existence, validity or enforceability of the contract] Underwriters agree that any current limitation period ceases to run from today until this agreement is terminated on not less than 28 days' notice."

The words in square brackets may be appropriate in circumstances where reinsurers believe they may have grounds to avoid the contract for breach of warranty or material nondisclosure and/or misrepresentation and do not wish to take any step which might be deemed to affirm the contract.

iii) **Commencement of Proceedings**

A time bar defence only arises when proceedings have not been commenced within the limitation period.

Commencement of legal proceedings by issuing a Claim Form (formerly known as a Writ) or commencement of arbitration by giving notice of appointment of an arbitrator stops the running of the limitation period. This is the only method of preserving claims from becoming subject to a time bar defence in the absence of an agreed suspension of time.

It is important to commence proceedings in the correct manner. Commencement of Court proceedings, where a reinsurance contract contains an arbitration clause, will not stop the running of the limitation period unless, of course, the other party acknowledges service of the Claim Form and thereafter participates in the Court proceedings. Similarly, the commencement of an arbitration, where the dispute may be outside the scope of the arbitration clause, or the arbitration clause may not be valid, will not protect the time limit.

Generally, it is a simple process to commence appropriate proceedings. All that is required for either Court or arbitration proceedings is a correct description of the parties to the reinsurance contract, their registered offices, a correct description of the contracts under which the claims arise and evidence of the contract preferably in the form of a slip and/or wording and a schedule of the claims which are outstanding. For arbitrations it is desirable to have the wording of the arbitration clause which may, for example, stipulate what qualifications the arbitrators must have. Armed with this information, a Claim Form can be issued or notice of arbitration served and time will then be protected.

iv) **Admissions**

Although it is the general rule that upon the expiry of the limitation period the Defendant has the right to plead that claims are time-barred, there is authority which suggests that the right may be lost in certain circumstances. In particular, the right may be lost where there is an admission of liability. This point was considered in

Wright v. John Bagnall¹⁶ where the Plaintiff brought a claim against his employers under the Workman's Compensation Act. The employers admitted liability, but both parties reserved the right to go to Court to have the quantum of damages determined. For this purpose, it was necessary for the employee to issue a Writ, which he did after the expiry of the limitation period which applied to his claim, whereupon the employers alleged that the claim was time-barred. However, the Court of Appeal held that the unambiguous admission of liability precluded the employers from relying on the statute. This decision of the Court of Appeal was approved and followed in **Rendall v. Hills Drydocks**¹⁷. It is not entirely clear from these decisions whether the fact of admission is to be treated as amounting to a contract not to plead the statute, or whether it precludes the plea on more general equitable grounds.

It appears likely that if a reinsurer accepts, in clear language, that he is liable under a reinsurance contract, even though he disputes the amount of the claim, he may be precluded from relying on the Limitation Act in any action brought after the expiry of the time limit.

v) **Acknowledgement and Part Payment**

Section 29 (5) of the Limitation Act 1980 provides as follows:

"...Where any right of action has accrued to recover –

- a) *any debt or other liquidated pecuniary claim; and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of acknowledgement or payment."*

A claim on account submitted under a reinsurance contract may be a "liquidated pecuniary claim" for the purposes of the Act. If so, where a reinsurer has acknowledged the pecuniary claim or made a part payment in respect of it during the running of the limitation period, a new period begins to run again from the date of the acknowledgement or part payment. Unfortunately, an acknowledgement or part payment after the period of limitation has already expired will not have the same effect. In principle, the limitation period could be renewed more than once if acknowledgments or part payments occur during a period which has already been renewed.

Acknowledgements need not take any particular form but they do have to be in writing and signed by the person making them to cause time to start running again¹⁸. Duly authorised intermediaries may give and receive acknowledgements¹⁹.

As reinsurance relationships continue for lengthy periods and involve the submission of accounts and correspondence concerning sums due, it is quite conceivable that claims, which might otherwise have been thought to be time-barred, can be saved by the provisions of Section 29(5). For example, an acknowledgement may arise where a reinsurer or its agent, upon receipt of an account, replies, before the time limit has expired, to the effect that "we have received and are able to agree your account ". If the reinsurer later disputes liability under the contract the limitation period for the claims in that account would run from the date of the acknowledgement of the debt.

¹⁶ Wright v. John Bagnall & Sons Ltd (1900) 2 Q.B. 240 C.A.

¹⁷ Rendall v. Hills Drydocks & Engineering Company (1900) Q.B. 245. C.A.

¹⁸ Section 30 Limitation Act 1980

¹⁹ Section 30(2) Limitation Act 1980

It is worth reviewing the totality of the correspondence, accounts and payments passing between the parties to reinsurance contracts and/or their intermediaries to see whether acknowledgements or part payments have arisen, which have reactivated the running of time.

vi) **Concealment**

Section 32 of the Limitation Act provides as follows:

"(1)... Where in the case of any action for which a period of limitation is prescribed by this Act, either –

- (a) the action is based upon the fraud of the Defendant; or*
- (b) any fact relevant to the Plaintiff's right of action has been deliberately concealed from him by the Defendant; or*
- (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the Plaintiff has discovered the fraud, concealment or mistake (as the case may be), or could with reasonable diligence have discovered it."*

It may be that concealment by reinsurers in relation to claims under their reinsurance contracts is unlikely to arise. The sort of situation which would be covered is where a reinsurer makes an untrue statement in defence of a claim. For example that an agent purporting to write business on its behalf had no authority when, in fact, there was a written underwriting agency agreement. In such a case, if the reinsured had refrained from bringing an action but later discovered the existence of the underwriting agency agreement, after the expiration of the limitation period, he may still be able to bring an action.

vii) **Waiver and Estoppel**

Clear representations by reinsurers that they do not intend to rely upon any time bar defence may result in a finding that they have either waived their right to plead time bar or are estopped from doing so.

The conditions required to establish estoppel were considered by the Court of Appeal in **Seechurn v Ace**²⁰. It was held that:

1. There must be a "clear, unequivocal, unambiguous and unconditional promise" by (re)insurers that they will not rely on a limitation defence.
2. The promise must be construed objectively and is not to be understood by reference to how the (re)insured may have subjectively understood it.
3. The insured must act to his detriment in reliance on the promises, or it must otherwise be inequitable or unconscionable not to hold (re)insurers to their promise.

²⁰ Seechurn v Ace Insurance SA-NV [2002] EWCA Cir 67

It seems clear from the Seechurn decision that the promise would need to be made before the expiry of the limitation period as the reliance required by condition 3 above is usually refraining from commencing proceedings within the limitation period and the (re)insured may have difficulty in establishing detriment in respect of a promise made after the limitation defence has already accrued.

The Application of Foreign Time Limits

The Foreign Limitation Periods Act 1984 provides that where in any action the law of a foreign country is to be taken into account in determining the matter, the law of that other country relating to limitation shall apply to that matter to the exclusion of the English limitation rules. Where both English law and foreign law apply to parts of a contract, English law will prevail on the question of limitation²¹.

Where the reinsured or the reinsurer is domiciled outside the United Kingdom, it is possible that the reinsurance contract will be governed by foreign law.

Matters become complicated where the parties have remained silent in the reinsurance contract on the question of choice of the governing law. In these circumstances, the Courts have to determine the proper law of the contract. Under English law the rules for determining the proper law of a contract have also undergone significant change as a result of enacting the E.C. Convention on the Law Applicable to Contractual Obligations of 1980 (the Rome Convention). The Rome Convention was given the force of law in England by the enactment of the Contracts (Applicable Law) Act 1990, which came into effect on 1 April 1991.

Before the Contracts (Applicable Law) Act 1990 came into force, the English Courts determined the proper law of contracts by ascertaining with which system of law the contract had its closest and most real connection. This test still applies to contracts entered into before 1 April 1991.

The Rome Convention applies to reinsurance contracts. Accordingly, to determine whether a reinsurance contract concluded after 1 April 1991, is affected by a foreign time limit, you need to apply the rules for determining the proper law of the contract set out in the Convention.

Where there is no express choice of law clause, the starting point under the Convention is to determine whether the parties have indicated an implied choice of law. Article 3 provides:

"1. The contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

It may be that if the parties have stipulated arbitration in London, but have not expressly chosen English law, there would be sufficient certainty of their intention to determine that English law applies. Similarly, if a reinsurance contract contained a "follow London" clause or similar wording this may also satisfy the test in Article 3. However, assuming there is no reasonably certain implied choice of law, the position is governed by Article 4 of the Convention, which provides as follows:

²¹ Section 2 – The Foreign Limitation Periods Act 1984

- "1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected...
- 2 It shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration."

The position is further complicated because there is a discretion to disregard the above principles "if it appears from the circumstances as a whole that the contract is more closely connected with another country."

Each case will turn on its own particular facts. One factor which has influenced the decisions is the market in which the reinsurance is written. In *Trade Indemnity v Njord*²², Rix J. held that there was an implied choice of English law largely because the contract contained an intermediary clause requiring communications and accounting to take place through the London brokers. In *Tryg Baltica v Boston*²³ an Argentinian insurer had obtained reinsurance in the London market which was held to be governed by English law. Factors influencing the decision were that the contract was in English and was issued in London on behalf of London based reinsurers in respect of proposals which were expressed in English all of which resulted in a finding that there was an implied choice of English law.

The danger is, of course, that reinsurance contracts may be governed by a proper law which provides for shorter periods of limitation than the six years stipulated by Article 5 of the Limitation Act 1980. On the other hand, claims which may appear to be time-barred under English law may be capable of being successfully pursued if it can be demonstrated that the proper law of the contract is the law of a country which provides for longer periods of limitation, e.g. Germany where the general time limit for non-marine insurance is 30 years. Alternatively, it may be that the foreign law is advantageous because it provides for the limitation period to commence at a later date than English law. For example, it has been held by the U.S. Court of Appeals for the Second Circuit that the limitation period only commences to run when the reinsurer refuses to pay the reinsured's claim.²⁴

The Foreign Limitation Periods Act does provide an exception to the general rule that limitation will be determined in accordance with the foreign law governing the contract. Section 2 provides that a foreign limitation period is not to apply if its application would conflict with public policy, which is deemed to occur where such application would cause "undue hardship" to a party to the action. The meaning of the phrase "undue hardship" has been considered by the English Courts in: *Jones v. Trollope*²⁵ and the "*Komninos S*"²⁶. In both cases it was held that the application of the foreign limitation period would cause "undue hardship". However, both cases turned upon their own special facts which involved, in each case, the Defendant leading the Plaintiff to believe

²² Trade Indemnity Plc and Others v Forsakringsakliebolaget Njord [1995] LRLR 367 (QB)

²³ Tryg Baltica International (UK) Ltd v Boston Compania de Seguros SA [2005] Lloyd's Rep. IR 40 (QB Com. Ct.)

²⁴ Continental Casualty Co v. Stronghold Insurance Co No. 95-7326 (February 13, 1996)

²⁵ Jones v. Trollope & Colls Cementation Overseas Ltd (1990), The Times 26 January 1994

²⁶ Hellenic Steel Co and Others v. Svolamar Shipping Co Ltd and Others (The "Komninos S") (1990) 1 Lloyd's Rep. 370

that there would be no limitation issue. These circumstances led the Court in both cases to find that there would be "undue hardship" if the Defendant was allowed to succeed in relying upon a foreign time-bar after its expiry but before the expiry of the English limitation period.

It remains to be seen how the Courts will deal with the question of "undue hardship" in relation to reinsurance claims.

What is the effect of honourable engagement clauses?

Reinsurance contracts typically contain arbitration clauses, and quite often an "equity" clause or "honourable engagement" clause. Such clauses are designed to release arbitrators from applying strict rules of law.

In **Orion v. Belfort**²⁷ Mr Justice Megaw considered an honourable engagement provision in a reinsurance contract (which he was unwilling to uphold). He said:-

"The essence of the matter, as I see it, is that, so long as the Courts of this country have a statutory supervisory jurisdiction over arbitrators in England, it must remain a firm principle of the law governing arbitrations that that which is, in English law, a question of law, shall remain in all respects and for all purposes a question of law; and it cannot be turned into something other than a question of law by any agreement of the parties in their agreement to arbitrate or otherwise."

The Courts have tended, more recently, to uphold such clauses and to treat them as releasing arbitrators from strict rules of construction or rules of evidence.²⁸ However, the view of Megaw J. in **Orion v. Belfort** that "Arbitrators must in general apply a fixed and recognisable system of law", has met with consistent approval and it follows that arbitrators are probably bound to apply the law relating to limitation defences available to reinsurers.

What is the position when the reinsured or reinsurer is insolvent?

Where a winding up order is made in respect of an insurance or reinsurance company the effect is to suspend the running of any current limitation period in respect of claims against the company.²⁹ Claims which are not time barred at the date of the winding up order may be proved in the liquidation. Where the reinsured is insolvent, the liquidator is entitled to commence proceedings on behalf of the company and such claims are subject to the usual rules on limitation.

Frequently, it is not in the interests of the creditors of an insurance or reinsurance company to allow it to go into liquidation. A scheme of arrangement may be preferable.³⁰ In these circumstances, insurance or reinsurance companies have often remained in provisional liquidation for a period of years. It is important to understand that the appointment of provisional liquidators has no effect on the running of limitation periods. So, the usual steps must be taken against a company in provisional liquidation to protect the limitation period. If a standstill agreement is not obtained an application may be made to Court for leave to commence proceedings to protect the limitation period.

²⁷ *Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekering* (1962) 2 Lloyd's Rep. 257

²⁸ See *Eagle Star Insurance Co v. Yural Insurance Co Limited* (1978) 1 Lloyd's Rep. 357

²⁹ Under section 425 of the Companies Act 1985

Where a scheme of arrangement is sanctioned by the Companies Court, no winding up order is made and, in the absence of any agreement to the contrary, the limitation period will continue to run. It is important, therefore, to establish whether the terms of the scheme are such that the creditor is put in the same position in which he would have been, with regard to the running of the limitation period, had a winding up order been made on the effective date of the scheme. If so, the limitation period will have been suspended from that date. If not, consideration should be given to ensuring that claims which are in danger of becoming time barred are submitted promptly to the scheme administrators, and they are pressed to admit them or agree a standstill as soon as possible.

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