Article

Comparative Law of Limitation of Actions in Insurance in England, Germany and Taiwan: A Step for Harmonization

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I. INTRODUCTION

A. *The Stairway to harmonization*

The aim of this work is to try to fix a minimum level of standard of harmonization between common law and civilian traditions[1] with respect to limitation of actions in insurance, in order to formulate a model code for the contracting parties to choose to incorporate the rules of the code in the contract as well as international reference or follow-up.

The author was inspired by the fact that Taiwan, as a member of the World Trade Organization (WTO) dated from January 1, 2002, had opened up, *inter alia*, cross-border supply of reinsurance and marine and aviation insurance[2] on hull, cargo and liability arising therefrom as well as consumption of personal life insurance abroad, to enable to meet the criteria as set out by the WTO in the Understanding on Commitments in Financial Services. It is realized that the policies subject to distinct national laws and jurisdictions from various legal systems would be marketed, either by their local branches or by offices domiciled abroad in Taiwan. Certain legal issues resulting from the sale of such policies would unavoidably emerge, such as those under the discipline of private international law dealing with the conflicts between two legal systems. Nonetheless, the rules of the conflict of laws cannot totally resolve some practical problems arising from such cross-border transactions as set forth below.

First, the competing offers from different member states do not appear comparable to local customers, as, in the absence of sufficient comparative study on the several laws governing the policies, local customers would not be in a position to compare the rights and obligations of the contracting parties arisen therefrom. Hence, in the absence of such transparency, customers would rather refrain from buying foreign policies, fearing that they might lose some benefits or protections as they may enjoy under domestic law. It is hard to see that the promotion of cross-border transactions can be successfully achieved. Second, even if, by mutual agreement of the parties or by operation of the conflict of laws rules, the domestic law of the policyholder is to govern the insurance; again, without sufficient comparative study, foreign companies would

1. There are two main divisions of the modern legal systems, one is common law tradition and the other is civilian; *see* PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD (Cavendish Publishing 2d ed., 1999).

2. It has to be mentioned that the English standard form marine and aviation policies have been popularly used by the market practice such as Institute Time Clauses-Hull 1983, Institute Cargo Clauses [(A)、(B)、(C)] 1982, Lloyd's Hull Policy (AVN 16), London Aircraft Insurance Policy (AVN 1B, 1C or 69) and Institute Cargo Clauses (Air).

probably face legal risk — as a result of the divergence of the laws — of incurring unpredictable costs of operation in local markets. This might lead to the undesirable situation whereby foreign insurers would be wary of entering into local markets or even dispense with exploration of their products to the local market. Third, a policy governed by laws imposing strict rules and requirements on the policyholder or, conversely, loose rules on the insurer usually carries with it a premium relatively lower than those of policies governed by laws with contrary effect. It is apparent that the *prima facie* marketability of the former with lower premium is higher than that of the latter, which would unavoidably result in unfairness in competition between the insurers. Fourth, although private international law rules may be applied to cope with the conflicts between different legal systems, it remains undesirable, as the applicable rules of private international law with respect to insurance are complicated[3] enough to follow for professional bodies such as practising lawyers, let alone ordinary policyholders. There is, again, a lack of transparency.

As is apparent, the problems mentioned would not be unique to Taiwan; they would occur in every national market where insurance transactions involve cross-border transactions or multinational elements. Views have to be extended to a global perspective. Harmonization of essential points of insurance contract law would help to make customers trust in the comparability of policies offered by foreign companies, and the international trade of insurance service would be ultimately promoted, as would the general standard of living. It was thus considered whether international harmonization with respect to specific issues of insurance contract law can be done, and this work on limitation of actions is the very first step.

International harmonization of the legal systems can be achieved by the measures of supranational legislation, international conventions or model laws,[4] among which the most economical and efficient method without state sovereignty or political arguments is believed to be the model laws approach, although it goes no further than a mere recommendation and is virtually of theoretical value only. This is why the model law approach is preferred by the author, or more importantly, put

3. For example, there are several sets of rules dealing with choice of law issues connected to European cases, namely: the Convention on the Law Applicable to Contractual Obligations (OJ 1980 l266/1) (known as Rome Convention 1980, applying to reinsurance contracts if the insured risks are situated in the EU or to direct insurance if the insured risks are situated outside the EU); the Second Non-Life Directive (90/618/EEC), as amended by the Third Non-Life Directive (92/49/EEC) (applying to contracts of direct insurance covering non-life risks situated in the EU); and the Second Life Directive (90/619/EEC) applying to contracts of direct insurance insuring life risks situated in the EU.

4. *See generally* RENE DAVID, "THE INTERNATIONAL UNIFICATION OF PRIVATE LAW" IN INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW, Volume II, Chapter 5, paras. 207-217 (Oceana Publications, 1971).

another way, it is unlikely that a private initiative would be capable of dealing independently with supranational legislation or international conventions.

England and Germany have been chosen as comparators representing respectively common law system and civilian system, resting on distinctive grounds, while Taiwan has been selected for her hybrid nature in insurance contract law.

This work roots primarily on comparative law study between the comparators through microcomparison approach to enable to find out the best solution. English law, the mother of the common law families, has a good reputation for her mature and predictable insurance law system and for her dynamic insurance market situated in her capital, London. German law, apart from French law, is the representative system of civil law families, which probably have equal influence as English law does, which is selected as a opposite comparator, as German legal system is, in most of its attributes, diametrically opposed to common law system. As to Taiwanese law is concerned, the Taiwanese Insurance Code and the Marine Insurance Chapter in the Maritime Code, were the product of the partial mixture of German and English laws from their very initial legislation in 1929, the hybrid nature of which has made her a great source of solutions in harmonizing civil law and common law.

B. *Limitation of actions in a brief*

Legal proceedings or rights arising from an event must, whether under a common law or a civil law system, be brought or exercised within a specific time limit as fixed by the law. Such a time limit is generally referred to as the limitation period in common law systems or the prescription period in civil law countries.

The establishment of the institution of limitation period, by which the interest of the right holder is sacrificed to some extent, generally aims, taking English law as an example,[5] at a number of aspects. First come the interests of the defendant: a limitation period protects defendants, as evidence deteriorates over time, which might put the debtor under a disadvantage. It also protects the debtor from suffering uncertainty and stress, and from incurring unnecessary costs in keeping up liability insurance or preserving relevant records for an infinite period. Second are the interests of the state: it is desirable that claims which are brought should be brought at a time when documentary evidence is still available and the recollections of witnesses are still reasonably fresh, or it would not be possible to give a fair trial to disputes. On the other hand, the

5. English Law Commission, Consultation Paper No. 151, paras. 1.22-1.38.

simple time-bar defence would eliminate the burden of the court in trying the case. Third come the interests of the plaintiff: it encourages plaintiffs not to sleep on their rights, but to institute proceedings as soon as it is reasonably practicable for them to do so. Put another way, plaintiffs would be punished for not taking swift action within the time limit. However, any limitation institution must reconcile the conflict interests of the defendant, the state and the plaintiff, and avoid injustice.

While the institution of a limitation period applies to a number of events, this work focuses specifically on insurance.

II. LEGAL POSITION UNDER ENGLISH LAW

Limitation of actions is entirely a matter of statute, as no rules of limitation are derived from common law.

The time limit for an action for breach of contract, including of course insurance, is six years from the date on which the cause of action accrued under s. 5 of the Limitation Act 1980. However, under s. 8, if the contract is in the form of a specialty, *i.e*. made by deed, the limitation period is twelve years. Action means proceedings in any court of law, including an ecclesiastical court,[6] and extends to arbitrations.[7] In addition, within an insurance context, the policy usually provides that notice of loss or claim must be given to the insurer within a specified period.[8]

The effect of the expiry on contract is not to extinguish the cause of action itself but merely to bar the remedy[9] where the time limit defence is successfully pleaded. Exceptionally, where cases involve real property[10] or international carriage of goods by sea,[11] the effect of the expiry can serve to extinguish the cause of action of the claimant. The court will not take initiatives to look into the facts finding a time bar in favour of the defendant in the absence of a time-bar defence raised by the defendant.[12] Put another way, the time limit does not operate automatically to bar claims, but, on the contrary, it is at the discretion of the defendant whether he wishes to rely on such a defence and, if so, include details of the expiry of the limitation period in the defence. It follows that if the defendant fails to raise the time-bar defence, the claimant may obtain a remedy

6. Limitation Act 1980, s. 38(1).
7. Limitation Act 1980, s. 34.
8. *Ex*. International Hull Clauses 2002, Cl. 46.
9. *Royal Norwegian Government v. Constant & Constant* [1960] 2 Ll. L. Rep. 431, 442, *per* Diplock J.
10. Limitation Act 1980, s. 17.
11. Hague-Visby Rules, Article III, Rule 6, Schedule to the Carriage of Goods by Sea Act 1971.
12. *Thursby v. Warren* [1628] Cro. Car. 159.

notwithstanding the fact that the limitation period has expired.[13] Where the defendant raises a limitation defence, the legal burden of proof rests throughout on the claimant, although the evidential burden may rest on the defendant according to the particular matter in issue.[14]

Generally, once the time has started to run, it will run continuously; but there are five exceptions. First, under the Limitation Act 1980, s. 34(5), where the High Court orders that an arbitration award should be set aside or that an arbitration agreement should cease to have effect, the court may also order that the period between the commencement of the arbitration and the making of the order shall not count for the purposes of calculating the time within which proceedings may be commenced. Second, the Limitation Act 1980, s. 33 allows the court to extend the normal three-year limitation period in the case of actions for personal injuries. Third, where in most carriage statutes, *e.g.* the Convention on the Contract for the International Carriage of Goods by Road, article 32, incorporated in the Carriage of Goods by Road Act 1965, the running of time is suspended if a plaintiff makes a written claim to the carrier, even no proceedings are started. Fourth, it was held in *Sheldon v. Outhwaite*[15] that a deliberate concealment by the defendant of a material fact after the cause of action has accrued operates to reset the limitation clock to zero. Finally, the running of time is suspended under the Limitation (Enemies and War Prisoners) Act 1945 where any person who is a necessary party to the action is an enemy or is detained in enemy territory. Without the exceptions, the only method for the claimant to stop the running of time and preserve his claim from becoming subject to a limitation period defence is to commence proceedings, that is, when a claim form is issued by the court at the claimant's request,[16] within the specified time limit, in the absence of an agreed suspension of time.

The running of time may be postponed in the situations where if the claimant to whom the cause of action accrues is under a disability,[17] or the claim is based on fraud,[18] or the defendant deliberately conceals a fact relevant to the claimant's right of action,[19] or an action is for relief from the consequences of a mistake,[20] or the defendant either acknowledges the title or claim of the claimant or makes a payment in respect of it.[21]

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13. The Civil Procedure Rules 1998, Rule 16.5; *Ronex Properties Ltd. v. John Laing Construction Ltd*. [1983] 1 Q.B. 398, CA.
14. *Crocker v. British Coal Corporation* [1996] 29 B.M.L.R. 159.
15. [1995] 2 All E.R. 558.
16. *Thompson v. Brown* [1981] 1 W.L.R. 744; *Dresser UK Ltd. v. Falcongate Freight Management Ltd.* [1992] 1 Q.B. 502, 517-518; Civil Procedure Rules, Rule 7.2.
17. Limitation Act 1980, s. 28.
18. Limitation Act 1980, s. 32(1)(a).
19. Limitation Act 1980, s. 32(1)(b).
20. Limitation Act 1980, s. 32(1)(c).
21. Limitation Act 1980, s. 29.

The rules of the limitation period may be excluded[22] or varied,[23] expressly or impliedly, by agreement. Similarly, a party may be estopped by his own conduct from asserting a limitation defence[24] if the representation by him is clear.

Above rules apply generally to insurance contracts. Nevertheless, it is believed, and discussed below, that the rules as to accrual of the cause of action and factors postponing the limitation period need to be particularly treated in the context of insurance.

A. *Commencement of the Limitation Periods*

The starting point for the running of time in a contract is the date on which the cause of action accrued.[25] A cause of action for breach of contract accrues as soon as the breach occurs,[26] independent of the time when damage arises.

Cause of action has been defined as "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court."[27] The plaintiff must prove that the defendant has owed him a duty and has committed a breach of that duty. It follows that breaches of distinct contractual duties may give rise to separate causes of actions, and a distinct limitation period will apply in relation to that cause of action, so that the limitation period for a particular cause of action commences at the time of the breach of that duty.

Within an insurance context, various obligations, primary or secondary, are imposed on the parties either by law or by agreement; breach of these obligations gives rise to distinct causes of actions, and thus distinct limitation periods.

1. *Breach of primary obligations*

The primary obligation is defined as the obligation of performance,[28] which is determined by the contracting parties.

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22. *Lade v. Trill* [1842] 11 L.J. Ch. 102.

23. *Walker v. Pennine Insurance Co.* [1980] 2 Lloyd's Rep. 156; *Ex.* International Hull Clauses 2002, Cl. 46 provides that notice of claim must be given to the insurer within 180 days of the date on which the assured becomes aware of the loss, or the insurer will be automatically discharged from liability in respect of that claim.

24. *Co-operative Wholesale Society Ltd. v. Chester le Street District Council* [1998] R.V.R. 202; *Ellis v. Lambeth London Borough Council* [2000] 32 H.L.R. 596, CA; *London Borough of Hillingdon v. ARC Ltd. (No2)* [2000] R.V.R. 283, C.A.

25. Limitation Act 1980, ss. 5 & 8.

26. *Gibbs v. Guild* [1882] 9 Q.B.D. 59.

27. *Coburn v. Colledge* [1897] 1 Q.B. 702 *per* Lord Esher M.R.

28. *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827 *per* Lord Diplock.

(a) Indemnity insurance

The primary obligation of an insurer under an indemnity policy, which is a very common example of a contract of indemnity, is to prevent the assured from suffering loss proximately caused by perils insured against[29] in return for the performance of the assured's primary obligation in the payment of the premiums. Once the assured suffers an insured loss, *i.e.* the failure of the insurer to hold the assured harmless against the relevant loss, the insurer is in breach of his primary obligation and there simultaneously gives rise to a cause of action for unliquidated damages. So, as far as the cause of action for breach of the insurer's primary obligation is concerned, the limitation period commences at the time when the assured suffers the relevant loss which in practice depends largely on the terms of the policy.

In the case of the breach of the assured's primary obligation to pay the premium, the insurer's cause of action under all classes of insurance for such breach arises at the time when the payment of the premium becomes due, and the limitation period starts to run at that time.

In the absence of policy terms, there is a significant difference between the date when such cause of action accrues under property insurance and that under liability insurance. This merits separate discussion.

(i) Property insurance

In the absence of express contractual provisions, the assured is to be regarded as having suffered a loss on the happening of an insured peril. The cause of action thus accrues as soon as an insured event has occurred,[30] despite the fact that the assured's loss might not be capable of quantification at the time of the occurrence,[31] the assured might be unaware of the loss at that time,[32] or the insurer would not have been

29. *Per* Lord Goff in *The Fanti and Padred Island* [1991] 2 A.C. 1, 35-36; *The Italia Express* (No. 2) [1992] 2 Lloyd's Rep. 281; *Sprung v. Royal Insurance (U.K.) Ltd.* [1997] C.L.C. 70, CA; *Callaghan v. Dominion Insurance* [1997] 2 Lloyd's Rep. 541. It has been argued that the primary obligation of a property insurer is to compensate the assured for losses that occur rather than preventing the assured from suffering losses, and that the English courts have wrongly assumed that what is true for liability insurance is true also for property insurance; *see* Neil Campbell, *The Nature of an Insurer's Obligation*, L.M.C.L.Q. 42 (2000). If the argument is to be true, then the cause of action for the breach of the primary obligation in property insurance accures at a later stage when the insurer fails to compensate the assured for the insured loss within the period specified in the contract.

30. *Chandris v. Argo Insurance Co.* [1963] 2 Lloyd's Rep. 65; *Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd*. [1983] 2 Lloyd's Rep. 376; *Lefevre v. White* [1990] 1 Lloyd's Rep. 569; *Apostolos Konstantine Ventouris v. Trevor Rex Mountain, The Italia Express No. 2* [1992] 2 Lloyd's Rep. 281; *Virk v. Gan Life Holdings* [2000] Lloyd's Rep. I.R. 159, 162 *per* Potter L.J.

31. *O'Connor v. Isaacs* [1956] 2 Q.B. 288; *Chandris v. Argo Insurance Co*. [1963] 2 Lloyd's Rep. 65.

32. *Universities Superannuation Scheme Ltd. v. Royal Insurance* [2000] 1 All E.R. 266.

notified of the loss.

Thus, the accrual of the cause of action, that is, the commencement of the limitation period, is decided solely by the time when an insured peril occurs, which is normally a question of fact to be determined in the light of the surrounding circumstances. Nevertheless, the definition of the insured event, which involves construction of the policy, is a key element in ascertaining the accrual of a cause of action.[33]

(ii) Liability insurance

Again, the general rule is that the limitation period commences as soon as the assured has suffered a loss. In liability insurance practice, the insured event is usually either the making of a claim against the assured by a third party, *i.e*. a "claims made" policy, or some default by the assured which causes property damage, personal injury, or financial loss to a third party, *i.e*. an "occurrence" policy. Occurrence of such insured events will not give immediate rise to the assured's loss; nor will it constitute the breach of the insurer's primary obligation, which marks a distinction from property insurance. In the absence of policy terms otherwise provided, the date on which the assured suffers the loss is not the date on which he has committed the act which subsequently gives rise to his liability, but rather the date on which his liability to the third party is established and quantified by means of judgement, arbitration award or binding agreement.[34] Upon that particular date, the assured legally suffers a loss as he owes a debt in the form of damages to the third party as from that date. The same principle applies to reinsurance.[35]

In some liability policies, commonly in protection and indemnity insurance or reinsurance, the insured event is that discharged by the assured of a liability to a third party, *i.e*. a policy containing a "pay to be paid" clause. Self-evidently, the general rule is inapplicable here, as the assured or the reassured will suffer a loss at a later stage only if he has discharged his ascertained liability to the third party by making payment. The effect of an effective "pay to be paid" clause[36] is apparently to convert the contract from under which the loss is defined as the establishment of the assured or the reassured's liability into one under which the loss is defined as an actual payment by the assured or the

33. *E.g. Virk v. Gan Life Holdings* [2000] Lloyd's Rep. I.R. 159.

34. *Bradley v. Eagle Star* [1989] 1 Lloyd's Rep. 456; *London Steamship Owners Mutual Insurance Association Ltd. v. Bombay Trading Co. Ltd., The Felicie* [1990] 2 Lloyd's Rep. 21.

35. *Halvanon Insurance Co. Ltd. v. Companhia de Seguros do Estado de Sao Paulo* [1995] L.R.L.R. 303.

36. In *The Fanti and The Padre Island* [1990] 2 All E.R. 705, the House of Lords gave full effect to a "pay to be paid" clause in a Protection and Indemnity cover. By contrast, the House of Lords in *Charter Reinsurance Co. Ltd. v. Fagan* [1997] A.C. 313 held a similar clause when an excess of loss reinsurance policy was of only quantitative nature. The effect of a pay to be paid clause depends mainly on the construction of the policy in question.

reassured.

(b) Contingency insurance

The primary obligation of a contingency insurer is to provide benefit to the assured on the happening of certain insured events without indemnity features.[37] Upon occurrence of the contingency, the insurer is in breach of the contract giving rise to a cause of action for liquidated damages, and the limitation period commences at that particular time,[38] which is the same position as property insurance.[39]

2. *Breach of secondary obligations*

In addition to primary obligations, the parties have imposed by law or agreement various obligations other than obligations of performance, which are termed here as secondary obligations, such as the bilateral duty of utmost good faith, the duty to notify of the loss, the duty of sue and labour, etc. Breach of a secondary obligation gives rise to a separate cause of action distinct from that arising from the breach of a primary obligation, and the limitation period commences at the time when a secondary obligation is breached. For example, in the situation where the assured, in the absence of fraud, illegality or deliberate concealment,[40] breaches the pre-contractual duty of disclosure, the insurer's action to avoid the contract *ab initio*[41] must be brought within the limitation period starting from the date of the breach, *i.e.* the time of contract and, on the other hand, the assured's action to claim for the return of the premium, in case the risk has not attached,[42] must be brought within the period starting from the date of the avoidance, as at which time the insurer owes him a duty to return the premium.

B. *Factors Postponing the Running of Time*

As mentioned, the running of time may be postponed in cases of disability, fraud, deliberate concealment, mistake, acknowledgement or part payment, rules of which are taken into the context of insurance.

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37. *Gould v. Curtis* [1913] 3 K.B. 84, 95-96 *per* Buckley L.J.; *Medical Defence Union Ltd. v. Department of Trade* [1980] 1 Ch. 82.

38. *Re Haycock's Policy* [1876] 1 Ch. D. 611; *London & Midland Bank v. Mitchell* [1899] 2 Ch. 161.

39. *Virk v. Gan Life Holdings* [2000] Lloyd's Rep. I.R. 159, 162 *per* Potter L.J.

40. The running of the time of the limitation period may be postponed in cases of fraud or concealment.; *see* para. II.B. of the work.

41. MIA 1906, s. 18.

42. MIA 1906, s. 84(3)(a).

1. *Claimant under a disability*

Where the claimant is under disability at the time when the cause of action accrues, the general rule is that proceedings may be commenced at any time within six years of the date on which the disability ends or the person dies, whichever occurs first. However, if the person comes under a disability after the accrual of the cause of action, the normal limitation period applies.[43] For limitation purpose, a person is under a disability if he is a child aged under eighteen or a person of unsound mind who, by reason of mental disorder, is incapable of managing and administering his property and affairs.[44]

Two circumstances can be distinguished as to the application of the rule within the context of insurance. First, the assured becomes disabled as so defined under the 1980 Act at the time of the occurrence of the perils insured against. It is irrelevant whether the disability is covered under the policy or as a result of the insured perils. Second, the assured has already been disabled since the time of effecting the policy through his agent through the time of the occurrence of the insured perils. It follows that in the former case the running of time arising from the breach of the pre-contractual duties is not affected at all.

2. *Fraud, deliberate concealment and mistake*

Where a claim is based upon the fraud of the defendant,[45] the limitation period does not begin to run until the claimant discovers the fraud or concealment, or could with reasonable diligence discover it.

An action is based upon the fraud within the purpose of the 1980 Act when and only when fraud is an essential ingredient of the cause of action.[46] It appears that the rule shall not apply to the case where there is fraudulent non-disclosure or misrepresentation on the assured, as the insurer's action to avoid the contract would be rooted on breach of contract. If the assured makes a fraudulent claim solely for the purpose of making a profit and the insurer pays for it, the insurer's causes of action could be founded on two grounds. First, the action can be based on breach of the continuing duty of utmost good faith, though the remedy is to be ascertained according to the general law of contract.[47] Second, the other

43. Limitation Act 1980, s. 28.

44. Limitation Act 1980, s. 38(2) & (3).

45. Limitation Act 1980, s. 32(1)(a).

46. *Beaman v. ARTS Ltd.* [1949] 1 All E.R. 465, CA; *Phillips-Higgins v. Harper* [1954] 1 K.B. 550.

47. *See Manifest Shipping & Co. Ltd. v. Uni-Polaris Insurance Co. Ltd., The Star Sea* [2001] Lloyd's Rep. 389, at 400 Lord Hobhouse expressed, *obiter*, that the post-contractual duty of utmost good faith can be dealt with by general law of contract in the form of an implied term, and

alternative is to found the claim on fraud or in deceit for restitution and damages. It is arguable that the latter case would fall within the meaning of "an action based on fraud" for the purpose of the law of limitation.

The same rule applies where the defendant deliberately conceals a fact relevant to the claimant's right of action.[48] It is immaterial whether the concealment occurs before or after the accrual of the cause of action.[49] It follows that where the assured is in breach of the pre-contractual duty of disclosure by deliberate concealment, the limitation period for the insurer's right to avoid the contract *ab initio* commences at the time when the non-disclosure is discoverable by the insurer rather than the time of the contract. It also follows that the rule shall apply where the loss adjuster, being the agent of the insurer, deliberately conceals the quantum of the loss during the adjustment process.

Similarly, the same rule applies where an action is for relief from the consequences of a mistake.[50] Thus, in the case where the insurer makes an insurance payment to the assured under either a mistake of law or a mistake of fact,[51] the relevant limitation period for the insurer's action to recover the money paid under such a mistake commences at the date on which the mistake is discoverable.

3. *Acknowledgement and part payment*

Where the defendant acknowledges the title or claim of the claimant, or makes a part payment in respect of it, the limitation period is restarted in respect of the claim, that is, the clock is reset from the date of that acknowledgement or payment. This rule applies, *inter alia*, to claims to recover a debt or other liquidated sum.[52]

The limitation period may be repeatedly extended by further acknowledgements or payments. However, a right of action which has been previously time-barred cannot be revived by an acknowledgement or payment.[53]

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accordingly by which the remedy should be governed.

48. Limitation Act 1980, s. 32(1)(b).

49. The wording of the Limitation Act 1980, s. 32(1)(b) reflects the assumption that the concealment will predate the accrual of the cause of action. However, it was held by the House of Lords in *Sheldon and Others v. R. H. M. Outhwaite (Underwriting Agencies) Ltd*. [1995] 2 All E.R. 558 that s. 32(1)(b) shall apply where the concealment occurs even after the accrual of the cause of action.

50. Limitation Act 1980, s. 32(1)(c).

51. In *Kleinwort Benson v. Lincoln City Council* [1998] 4 All E.R. 513, the House of Lords by majority removed the distinction between a mistake of fact and a mistake of law, and held that restitution is permissible in both cases. The House of Lords also held that an action to recover the money paid under a mistake falls within the terms of section 32(1)(c) of the 1980 Act.

52. Limitation Act 1980, s. 29(5)(a).

53. Limitation Act 1980, s. 29(7).

A claim for insurance payment under a contingency policy or under a valued marine policy for total loss is a claim for liquidated damages, which is certainly a "liquidated pecuniary claim" for the purposes of the Limitation Act 1980, s. 29(5)(a), as such claim is sufficiently certain as specifically described in the policy. Accordingly, if a contingency insurer has acknowledged the claim or made a part payment in respect of it before the expiry of the limitation period, the period begins to run again from the date of the acknowledgement or part payment. As to the claim in the form of unliquidated damages under indemnity insurance, it is unlikely to fall within the meaning of s. 29(5)(a). Nevertheless, it is arguable following the decision in *Amantilla v. Telefusion*,[54] which held that a claim on a *quantum meruit* having a sufficiently certain contractual description for the amount to be ascertainable by the court was, though controversially, a liquidated claim, if the law of precedent so prevails and permits.

No particular form of acknowledgement is required except that it should be in writing and signed by the person making it to cause the time to re-set.[55] Duly authorised intermediaries may make and receive acknowledgements or payments.[56]

III. LEGAL POSITION UNDER GERMAN LAW

The counterpart of the limitation period under German law is termed "prescription" (*Verjahrung*). Prescription can be either extinctive or acquisitive. Extinctive prescription denotes the legal fact that the claim (*Anspruch*) is extinguished through the non-exercise of the right for a certain period, while acquisitive prescription produces rights through the exercise of possession for a corresponding period. Self-evidently, there is no room for the application of the relevant rule of acquisitive prescription in the context of insurance.

Extinctive prescription should also be distinguished from the other institution, namely, fixed time limit, in a numbers of aspects. First, the justification of fixed time limits differs from that of prescription, as, while prescription is primarily concerned with the protection of the debtor — aiming to maintain the new order formed by the non-exercise of the right of the creditor — the purpose of fixed time limits is to ensure that the creditor is diligent in the pursuit of his right, aiming to maintain the existing order. Second, while the rules of the extinctive prescription exist to govern the rights to claim, rights to shape conditions (*Gestaltungsrecht*), *e.g.* rights to rescind or rights to terminate, are

54. (1987) 9 Con. L.R. 139.
55. Limitation Act 1980, s. 30.
56. Limitation Act 1980, s. 30(2).

governed by the rules of fixed time period. Third, the extinctive prescription period may be interrupted or suspended under certain circumstances, whereas the fixed time period cannot, as its name suggests. Fourth, while the effect of the expiry of the prescription period merely gives rise to a countervailing right on the defendant to refuse performance[57] (*Einrede der Verjährung*), *i.e.* only the right to claim is extinguished and the cause of action remains, the right to shape conditions itself is extinguished after the expiry of the fixed time period. It follows that it is open to the defendant to plead the prescription defence; the court will not take notice of this fact *ex officio*, whereas even if the defendant does not raise the defence of the fixed time period, the court is obliged to look into it.

The general rules on extinctive prescription are provided in the Civil Code (*Bürgerliches Gesetzbuch*, BGB), §§ 194–225. There are special rules provided in the German Insurance Contract Code (*Gesetz über den Versicherungsvertrag*, VVG), § 12 particularly applicable to insurance contracts. Nevertheless, it is important to bear in mind that the general rules on extinctive prescription in the BGB are supplementary to the VVG, § 12. As to the fixed time period, the judicial nature of which is relatively simple as compared with extinctive prescription as mentioned, there is no need to frame general rules, and in fact no general rules are provided in the BGB; they are specified in individual provisions as the case may be. In the VVG, there are a number of provisions expressly specifying the fixed time period, such as that the insurer's right to rescind the policy as a result of the policyholder's breach of the pre-contractual duty of disclosure must be exercised within one month after the insurer acquires knowledge of the breach. For these reasons, only rules on extinctive prescription are discussed.

A. *Commencement of the Extinctive Prescription Period*

Claims based on insurance contracts are subject to a two-year period of extinctive prescription (five years in life insurance), the period of which shall begin to run at the end of the year during which the claims become enforceable.[58] The starting point for the running of time is deferred at a later stage under the VVG in favour of the policyholder which departs from the general rule under the BGB providing that time begins to run from the date when the claim becomes enforceable.[59]

For the purpose of the prescription period, all claims based on an

57. BGB, § 222(1).
58. VVG, § 12(1).
59. BGB, § 198(1).

insurance contract, such as the insurer's claim for the payment of premium or the policyholder's claim for insurance payment, become enforceable at the time when they are due. In practice, whether the premium or the insurance payment is due or become enforceable depends largely on the terms of the policy.

As far as insurance payment is concerned, in the absence of express contractual terms, payment by the insurer other than a liability insurer[60] shall be due upon completion of the investigations necessary to ascertain the insured event and the extent of the insurer's liability,[61] which accords with the general principle under the general law of obligations that debt must be ascertained before it can be performed. It follows that the prescription period generally commences at the time when the relevant investigations are completed. Nevertheless, where the investigations are not completed within one month of the notification of the insured event,[62] the policyholder may demand partial payment as it is available.[63] However, if the non-completion of the investigations is attributable to the fault of the policyholder, the running of time of the one-month period shall be suspended.[64] To balance the benefit of the parties, the insurer, on the other hand, may, after the occurrence of the insured event, require the policyholder to furnish any information that is necessary for ascertaining the insured event or the extent of the insurer's liability.[65]

In liability insurance, the insurer must make payments within two weeks of the time at which the policyholder has indemnified the third party or the third party's claim has been ascertained by judgement, admission or compromise.[66] It follows that the policyholder's claim for recovery becomes enforceable at that particular time, and the prescription period commences accordingly at the same time.

B. *Varying the Rules*

Under the BGB, the rules relevant to extinctive prescription are mandatory to the extent that they may neither be excluded nor made more onerous by agreement, but prescription may be facilitated, especially by shortening the period.[67] However, within the context of insurance, weight must also be put on the so-called "semi-binding system" — a mechanism

60. *See* the VVG, § 154(1) and below.
61. VVG, § 11(1).
62. The policyholder is obliged to notify the insurer of the occurrence of the insured event without delay, *per* the VVG, § 33.
63. VVG, § 11(2).
64. VVG, § 11(3).
65. VVG, § 34(1).
66. VVG, § 154(1).
67. BGB, § 225.

of legislative control. The provisions of the VVG are divided by the scholar theory[68] into two categories: relative binding provisions (*relativ zwingende Vorschriften*) or semi-binding provisions (*halb zwingende Vorschriften*), which may be varied to the extent solely in the policyholder's favour and absolute binding provisions (*asolut zwingende Vorschriften*), which, on the other hand, can by no means be varied by the parties, enabling to cope with the common use of the standard contract in the market. Put to another way, it has made the provisions in the VVG a minimum standard for the insurers to comply with. While the theory tried to categorize the VVG provisions into "absolute binding," such as those provisions of requirement of insurable interest, prohibition of double insurance and over-insurance, and "semi-binding," no general rule is set up. It is submitted here that if the variation would lead to the result to contravene the nature of insurance, public policy or to materialize moral hazard, then it shall be the "absolute binding," otherwise it shall not. The very nature of insurance is that of "uncertainty" being a question of whether or when, *i.e*. the aleatory nature, which make itself an important departure from other types of contracts. It follows that the VVG, § 12 is of semi-binding provision [69] and the prescription period for the policyholder's claim or its commencement may be extended, excluded or postponed.

C. *Suspension or Interruption of the Running of Time*

Generally, time can be stopped from running in two different ways, suspension (*Hemmung der Verjahrung*) and interruption (*Uterbrechung der Verjahrung*).

Under the VVG, § 12(2), if the policyholder has submitted a claim to the insurer, the running of time of the prescription period is suspended until receipt of the insurer's written decision. Apparently, from the wording of the VVG, § 12(2), the insurer is not permitted to rely on it, as it applies only to the claims made by the policyholder. In addition to the VVG, § 12(2), the parties may apply the relevant rules in the BGB to suspend the running of time, especially in situations where the debtor is granted indulgence[70] or they are prevented from enforcing their rights by the cessation of the administration of justice or by act of God within the last six months of the prescription period.[71] During suspension, time ceases to run, but on the cessation of the suspension it restarts at the point

68. HOFMAN, PRIVATVERSICHERUNGSRECHT 218 (3d ed. 1991).
69. VVG, § 15a.
70. BGB, § 202(1).
71. BGB, § 203.

where it stopped rather than from zero.[72]

As to interruption, no rule is specifically provided in the VVG. Interruption occurs in the conditions prescribed by the BGB, §§ 208–216, the most important of which are interruption by admission of the claim[73] (*Anerkenntnis*), by bringing an action for satisfaction of a claim[74] (*Klagerhebung*) and by the equivalent to bringing an action.[75] Time elapsed before an interruption is not taken into account and a new period of prescription must begin again once the interruption is over,[76] which is a protection stronger than suspension.

D. *Effect of the Expiry*

As a general rule, the effect of the expiry of the prescription period merely gives rise to a countervailing right on the defendant to refuse performance,[77] that is, the cause of action remains. It follows that where if the insurer makes the payments despite the expiry, whether with knowledge or not, he cannot rely on the rule of unjust enrichment to recover them.[78]

However, after the submission of the claim, the policyholder must institute a proceeding in relation to that claim within six months of the time at which the insurer rejected the claim in writing, indicating the legal consequence of the expiry of the prescription period; otherwise the insurer shall be released from its liability.[79] The six-month period is of the nature of fixed time period.[80]

IV. LEGAL POSITION UNDER TAIWANESE LAW

As the Taiwanese Civil Code (TCC) is deeply influenced by the German BGB, the general rules on extinctive prescription provided in the TCC, §§ 125–147 are at points extremely similar to those in the BGB, §§ 194–225, except where otherwise mentioned here. Nonetheless, to govern the claims based on insurance contracts, § 65 of the Taiwanese Insurance Code (TIC) frames its own rules, which are somewhat different from those in the VVG.

Again, focus is only placed on the extinctive prescription period.

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72. BGB, § 205.
73. BGB, § 208.
74. BGB, § 209(1).
75. BGB, § 209(2).
76. BGB, § 217.
77. BGB, § 222(1).
78. BGB, §§ 813(1), 813(2) & 222(2).
79. VVG, § 12(3).
80. *See* para. III. of the work as to the nature and effect of the expiry of the fixed time period.

A. *Commencement of the Extinctive Prescription Period*

All claims based on insurance contracts in whatever classes are subject to a two-year period of extinctive prescription, commencing from the time at which the claim is enforceable, subject to certain exceptions[81] discussed below.

First, where if the policyholder is in breach of the duty of disclosure, the time in relation to the insurer's claim for restitution or damages[82] does not begin to run until the insurer acquires knowledge of it.[83] Second, as a general rule the claim for insurance payments becomes due when the supporting documentary evidence has been furnished to the insurer within the agreed period of time; in the absence of an agreed period, payments shall be made within fifteen days of the receipt of the supporting materials.[84] It follows that the prescription period commences at that particular time, as only at that time is the claim enforceable. However, the time begins to run at the time when the policyholder or the interested party acquires knowledge of the occurrence of the insured event, if he can prove that there is no fault on his part as to his knowledge of the occurrence of the insured event.[85] Third, in the case of liability insurance, the prescription period commences at the time when the policyholder is claimed by the third party,[86] as the liability of the liability insurer comes into existence when the policyholder is claimed by the third party.[87]

B. *Varying the Rules*

As a general rule, the extinctive prescription period cannot be extended or shortened by the parties; nor can the benefit derived from the prescription be waived in advance.[88]

Within the context of insurance, the semi-binding system in Germany were borrowed and laid down in § 54(1) of the TIC.[89] The TIC, § 65 regulating extinctive prescription period has ever been treated as an

81. TIC, § 65(1).

82. As a general rule as provided in the TCC, § 259, the parties are obliged to restitute upon the exercise of the right of avoidance, except the premium received by the insurer *per* the TIC, § 64(2). The parties' right to claim damages shall not be affected by the exercise of the right to avoid the policy *per* the TCC, § 260. The insurer may nevertheless claim damages as a result of the policyholder's breach of the pre-contract duty of disclosure.

83. TIC, § 65(1)(1). The insurer's right to avoid the contract as provided in the TIC, § 64(3) must be exercised within one month from the time at which he acquires the knowledge of it or two years after the contract, whichever first expires. The periods here are of fixed time periods.

84. TIC, § 34(1).

85. TIC, § 65(1)(2).

86. TIC, § 65(1)(3).

87. TIC, § 90.

88. TCC, § 147.

89. Please *see* para. III.B for the system in Germany and the submission by the author.

absolute binding provision by the Supreme Court[90] in view of § 147 of the TCC not allowing the parties to extend or shorten the prescription. However, the court practice has been turned over in 1994 to recognize it as a semi-binding provision mainly based on the reason that the variation would not contravene against public policy,[91] so it is thus justifiable, for example, to extend the period in relation to the policyholder's claim for insurance payments, as it is solely in favour of the policyholder without infringing public policy.

C. *Interruption or Postponement of the Running of Time*

No rule is provided in the TIC either for interruption or postponement, and thus reference is made to the TCC.

The prescription period is interrupted by the exercise of the right to claim, admission of the claim or institution of proceedings. The effect of the interruption is to re-set the time from the point of the cessation of the interrupting events — the same effect as that under the German BGB. Nonetheless, where the running of time is interrupted by the exercise of the right to claim, proceedings must be brought within six months, otherwise it is deemed to be uninterrupted.[92]

The TCC adopts not the institution of suspension as established under the German BGB, but that of postponement, which means that where the claimant is prevented from exercising his claim or from interrupting the time by specific events at around the time of the expiry, the period shall be postponed for another certain period at the time of the cessation of those events; this aims to protect the claimant.

The prescription period is postponed for another one month in the case of act of God or other unavoidable events,[93] this being one of the rules of postponement under the TCC which is applicable to insurance contracts.

D. *Effect of the Expiry*

The right to claim, rather than the cause of action itself, is extinguished[94] upon the expiry of the extinctive prescription period, and

90. *Ex*. The Supreme Court, cases no. 64-Tai-Shang-Tze-1998, 75-Tai-Shang-Tze-2028 and 82- Tai-Shang-Tze-3076 all of which are cases before 1994.

91. *See* the conclusion on the 1st seminar of the Civil Division of the Supreme Court in 1994. Nevertheless, some local scholars still stick to the traditional view as those in the cases before 1994.

92. TCC, § 130.

93. TCC, § 139.

94. TIC, § 65(1).

the debtor is entitled to raise the defence to refuse performance.[95]

V. CONCLUSIONS

A. *Comparative Overview*

The scope of the institution of the English limitation period, as seen, encompasses the civil law extinctive prescription period and fixed time period, the former of which relates to right to claim while the latter refers to right to shape, *e.g.* right to avoid or right to terminate, though the nature and effect of the expiry of the fixed time period is distinct from those of the English limitation period. Nevertheless, such nature and effect of expiry in a civil law sense deserves to be maintained, as they were framed to serve a different function from that of English limitation period or civil law prescription period.

B. *Harmonization*[96]

The rules of limitation period or extinctive prescription period are of general application and are, indeed, complicated. Therefore, this work does not attempt to provide a set of comprehensive rules covering all aspects of limitation period, and focus is placed on insurance contracts only, in particular the nature of the insurer's primary duty in various classes of insurance.

For the sake of simplicity and the reason mentioned above, it is submitted that harmonization should only be done with respect to the length, the commencement and the effect of the expiry leaving the issues of suspension, postponement or interruption of running of the time of the prescription period to general law, and the distinction between prescription period and fixed time period should be preserved, following the approaches taken respectively by the VVG and the TIC.

It is further submitted that, as far as the prescription period is concerned, it is preferred that the English rules are taken as a model, subject of course to certain revisions as recommended in the Draft Limitation Bill[97] by the English Law Commission. As to the fixed time period, the civilian rules should certainly be the model.

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95. TCC, § 144(1).
96. *See* below the Model Code.
97. The Law Commission Report No. 270, 2001, Appendix A.

1. *Length and commencement*

(a) Prescription period[98]

For the protection of the claimant, there is a tendency in either common law or the civil law system that the commencement of the limitation period should take into account the knowledge of the claimant as to the particular fact giving rise to a cause of action. On the other hand, to cope with the uncertainty arising from such consideration, a long-stop period, independent of the knowledge of the claimant, should also be applied.[99]

The justification for the length of the period rests on a number of reasons,[100] yet it has been the modern tendency to shorten the length to reflect developments of modern society. For example, the English Draft Limitation Bill,[101] the Principles of European Contract Law[102] and the First Draft of German Law on the Modernization of the German Obligation Law,[103] being the latest modern attempts, were respectively framed in such a similar manner to specify a short primary period of three years, which should be followed in this work. As to the long-stop period, the length of ten years as recommended by the English Draft Limitation Bill[104] should be followed.

Claims arising from insurance contracts should thus be subject to two limitation periods, a primary limitation period of three years, running from the date on which the claimant knows, or ought to know of, the relevant facts giving rise to cause of action, and a long-stop limitation period of ten years, running from either the accrual of the cause of action or the date of the act or omission which gives rise to the claim.

So far as the assured's claim for insurance payment is concerned, the accrual of the cause of action, unless the policy otherwise expressly provides, depends on what class the policy in question is. First, in property and contingency insurance, the cause of action generally accrues when an insured event occurs.[105] Second, in "claims made" or "occurrence" liability policy, the cause of action accrues when the assured's liability to the third party is established and quantified by means

98. *See* below the Model Code.

99. *E.g.* the English Draft Limitation Bill 2001, cl. 1(1) & (2).

100. The English Law Commission Consultation Paper No. 151, Parts III-VII.

101. The English Draft Limitation Bill 2001, cl. 1(1).

102. Principles of European Contract Law, art. 14:201.

103. In April 2000, the German Ministry of Justice presented a 566-page draft law for discussion; the official ministerial bill was introduced in the German Parliament on May 14, 2001; different periods of limitation for contractual claims will be substituted by a uniform period of three years; *see Bundesministerium der Justiz* (ed.), Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes 4 Apr. 2000.

104. The English Draft Limitation Bill 2001, cl. 1(2).

105. *See* paras. II.A.1.(a)(i) & II.A.1.(b).

of judgement, arbitration award or binding agreement, while in "pay to be paid" liability policy, the cause of action does not accrue until the assured has discharged his ascertained liability to the third party by making actual payment.[106]

(b) Fixed time period[107]

The commencement of the period should take the knowledge of the claimant into account as in the prescription period, taking the same approach based on the same rationales. Similarly on the same grounds, a long-stop period should also be applied here.

The consideration of the length usually involves practical considerations,[108] which would be time-consuming work and falls out of the project of the present work. For reasons of efficiency, the justification of the length has been referred to the existing rules under German law and Taiwanese law. This is why the comparative law is used. Thus, a one-month fixed time period would be applied, borrowing the rules from the VVG[109] and the TIC.[110]

As to the long-stop period, it is submitted that the right to avoid must be exercised within three years of the breach giving rise to the right or within the currency of the policy in the event where there is a right to terminate, based on the following reasons. First, the length of the long-stop fixed time period should be much shorter than that of the long-stop prescription period, as, for example, the strong legal effect of the right to avoid, namely, restoring the parties to their original positions, would cause much more uncertainty and stress on the parties if the right to avoid were not exercised within a shorter period. Second, the three-year length is simply borrowed from the conception of the length of the three-year primary prescription period. Third, the right to terminate would be meaningful to the aggrieved party only when the policy is still alive.

2. *Effect of the expiry*

(a) Prescription period[111]

The effect of the expiry is not to extinguish the cause of action itself but merely to bar the remedy where the time limit defence is successfully pleaded, following the common effect of English law and civilian rules. A claim may be barred by the expiry of the long-stop limitation period even where the primary limitation period has not started running.

106. *See* para. II.A.1.(a)(ii).
107. *See* below the Model Code.
108. *See* the English Law Commission Consultation Paper No. 151, Parts III-VII.
109. *E.g.* VVG, §§ 6, 20, 24(2), 70(1) & 70(2).
110. *E.g.* TIC, §§ 64 & 82.
111. *See* below the Model Code.

The term "extinctive prescription period" would probably lead to misunderstanding as to its effect; accordingly, the word "extinctive" qualifying the prescription period should be abolished. The term "prescription period" shall be used in the Model Statute rather than "extinctive prescription period."

(b) Fixed time period[112]

The right to shape conditions itself is extinguished after the expiry of the fixed time period, following civil law rules.

C. *The Model Code*

Based on the study of the work, it is submitted that the model code should be as follows:

1. *Prescription period: right to claim*[113]

(a) Claims arising from an insurance contract must be exercised within three years running from the date on which the aggrieved party knows or ought to know of the relevant facts giving rise to the cause of action or ten years running from the accrual of the cause of action or the date of the act or omission which gives rise to the claim, whichever expires first.

(b) In particular, so far as the assured's claim for insurance payment against the insurer is concerned, unless the policy otherwise expressly provides, the timing for the relevant facts giving rise to the cause of action or the accrual of the cause of action shall be as follows:

(i) In property and contingency insurance, the cause of action accrues when an insured event occurs.

(ii) In "claims made" or "occurrence" liability policy, the cause of action accrues when the assured's liability to the third party is established and quantified by means of judgement, arbitration award or binding agreement, while in "pay to be paid" liability policy, the cause of action does not accrue until the assured has discharged his ascertained liability to the third party by making actual payment.

(c) The effect of the expiry of the prescription period is not to extinguish the cause of action itself but merely to bar the remedy where the prescription defence is successfully pleaded.

112. *See* below the Model Code.
113. *See* paras. V.A.1.(a) & V.A.2.(a).

2. *Fixed time period: rights to avoid or terminate*[114]

Rights to avoid or to terminate the insurance contract arising from the breach of the insurance contract must be exercised within one month after the aggrieved party has, or ought to have, become aware of the breach or within three years of the breach giving rise to the rights or within the currency of the contract in the event where there is a right to terminate, whichever expires first, otherwise the aggrieved party shall lose his right.

114. *See* paras. V.B.1.(b) & V.B.2.(b).

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