

JULY 2018

# Newsletter

Authors:  
Nathalie Voser  
Benno Strub



## DISPUTE RESOLUTION

### Revision of the Statute of Limitations

On 15 June 2018, the Swiss parliament passed a revision of the statute of limitations. A special category of damages was created, namely personal injuries, to which a relative limitation period of three years and an absolute limitation period of 20 years will generally apply in the future. In addition, after a long legislative history of this revision, only one significant amendment remained, namely the extension of the relative limitation period from one to three years for non-contractual claims and unjust enrichment claims.

#### 1 BACKGROUND AND CORE CONTENT OF THE REVISION

In the mid-1980s, efforts began to comprehensively revise and standardize liability law. However, this undertaking encountered great difficulties. Over the years, a viable consensus only developed for an amendment of the statute of limitations in the field of **personal injuries** and a few **other selective adjustments**. The Federal Council therefore submitted a corresponding draft with adjustment proposals to parliament in November 2013.

##### 1.1 STATUTE OF LIMITATIONS FOR PERSONAL INJURIES UNDER EXISTING LAW

###### 1.1.1 NO SPECIAL LIMITATION PERIOD FOR PERSONAL INJURIES

Under current Swiss law, there is no special limitation period for personal injuries. They thus become time-barred after **ten years** in cases of both contractual and non-

contractual liability. In the case of tort liability, the so-called relative period of one year, within which the claim must be asserted in court or at least the limitation period must be interrupted, must also be observed. This limitation period begins on the day on which the injured party becomes aware of the damage and of the person liable for compensation. The absolute limitation period of ten years in tort law begins with the day of the action causing the damage or, in the case of unlawful omissions, with their end.

The current statute of limitations is problematic for those cases in which damages only manifest themselves many years after the action or omission causing the damage (so-called **late damages**). Thus, cancers of the pleura or peritoneum (mesothelioma) and other asbestos-related diseases have latency periods of 15 to 45 years from the beginning of exposure to asbestos dust. For this reason, under the existing law, a claim for damages in cases with a

long latency period can become statute-barred before the injured party even knows of the asbestos damage. This also applies to claims for damages arising from the breach of contractual obligations in accordance with the established practice of the Federal Supreme Court.

In the Federal Supreme Court's leading decision ATF 106 II 134 of 1980, the case of a watchmaker who was exposed to ionizing radiation at work in the 1940s and 1950s had to be assessed. Only 18 years after termination of the employment relationship did the health consequences manifest. The worker sued the former employer for damages in 1976. She argued that the employer had failed to take occupational safety measures. The Federal Supreme Court ruled that the ten-year limitation periods in tort and contract law begin to run **irrespective of whether the injured party is aware of a claim or not**. The Court concluded that in the case of contractual and tortious claims by employees, the ten-year limitation period begins to run when the safety measures incumbent on the employer are omitted, but at the latest at the time of termination of the employment relationship, and therefore considered the claims to be statute-barred.

"Currently, in the case of diseases with a long latency period, a claim for damages can become statute-barred before the injured party even knows of the damage."

The Federal Supreme Court did not disregard the fact that it appears **strict for the injured party** if the absolute statute of limitations becomes effective before they are even aware of their claim and are not at fault for their inactivity. This possible consequence, however, had not escaped the legislature, thus the judge here was not allowed to deviate from the law in order to avoid the statute of limitations in a specific case.

### 1.2.2 THE MOOR CASE

In recent years, the question of limitation periods has been repeatedly referred to the Federal Supreme Court, in particular in connection with **asbestos diseases**, but the Federal Supreme Court has confirmed the above-mentioned case law in all cases.

Two such decisions in connection with Hans Moor, who died of a mesothelioma, were appealed to the **European Court of Human Rights (ECHR)** in Strasbourg (Howald Moor et al. v. Switzerland, 52067/10 and 41072/11, the so-called Moor case).

In its decision of 2014, the ECHR considered the application of the statute of limitations under Swiss law in the Moor case to be a **violation of the right of access to court**. The ECHR took the view that the systematic application of the Swiss statute of limitations to the victims of diseases that cannot be diagnosed until long after the disease-causing events was likely to exclude the persons concerned from the possibility of asserting their claims in court. If it is scientifically proven that a person cannot know that they suffer from a certain disease, this should be taken into consideration when calculating the limitation period.

## 1.2 "ROUND TABLE": REGULATION OF PHYSICAL LATE DAMAGES FROM ASBESTOS EXPOSURE

While a total revision of liability law was still being pursued, from 2004 onwards there were **initiatives in parliament** demanding special rules of limitation for **claims by asbestos victims**. For example, in one of these initiatives concerning personal injuries, a relative period of five years and an absolute period of fifty years were called for.

In response to such initiatives and to the Moor case, the Federal Council set up the "Round Table on Asbestos" in early 2015, at which representatives of insurance companies, industry, administration, trade unions and victims' organizations discussed **solutions to support asbestos victims**.

Following the agreement reached at the "Round Table on Asbestos", the **Foundation compensation fund for asbestos victims (EFA Foundation; www.stiftung-efa.ch)** was established in March 2017; the EFA Foundation commenced operating in July 2017. In principle, the compensation fund is intended to compensate damages which are not covered by compulsory occupational accident insurance (SUVA), i.e. in particular damages to persons who suffer or have died from an asbestos-related disease but whose exposure to asbestos cannot be attributed to occupational exposure. The fund also retroactively covers damages caused by a mesothelioma outbreak after 1 January 2006.

## 1.3 THE NEW ABSOLUTE LIMITATION PERIOD OF 20 YEARS FOR PERSONAL INJURIES

The revision now adopted by the Parliament is based on a preliminary draft from 2011 and the draft from 2013 for a **partial revision limited to the statute of limitations of the Swiss Code of Obligations** and of various other laws.

The National Council, which first dealt with the bill in September 2014, decided to extend the limitation period for personal injuries to 20 years rather than 30 as proposed by the Federal Council. In December 2015, the Council of States discussed the bill. The Council voted against a special longer limitation period for personal injuries, but supplemented the bill with a retroactive transitional provision in favor of asbestos victims with claims that had already become statute-barred.

Subsequently, in February 2016, the National Council Committee suspended the procedure for the resolution of differences between the Councils, as the Committee wanted to await the **discussions on the establishment of a compensation fund for asbestos victims**. After the fund's establishment, the National Council Committee requested the abandonment of the revision, but the Council of States Committee opposed this request.

In the **parliamentary resolution of differences** in the first half of 2018, the Councils finally agreed on the solution by the National Council, i.e. **an extension of the limitation period for personal injuries to 20 years without special transitional provisions for cases that have already become statute-barred**. The new provision applies to damages arising from both non-contractual and contractual liability (new Articles 60<sup>1bis</sup> and 128a CO).

#### 1.4 INTRODUCTION OF A GENERAL RELATIVE LIMITATION PERIOD OF THREE YEARS FOR PERSONAL INJURIES

For personal injuries, at the same time as the new absolute limitation period of 20 years, the revision introduces an **additional relative limitation period of three years** for contractual liability. In the future, contractual liability will be split into one liability with and one liability without a relative period, depending on whether it relates to personal injuries or property damages.

The Federal Council's dispatch stated that the *"exceptional shortening of the limitation period... seems appropriate and justified"*.

In the future, the statute of limitations for contractual claims arising from personal injuries that are not late damages will in many cases **be in fact shorter than it has been so far**.

## 2 THE OTHER AMENDMENTS IN THE STATUTE OF LIMITATIONS

Besides the controversial extension of the limitation period for personal injuries, the revision also includes **other amendments**, some of which are described below.

### 2.1 EXTENSION OF THE RELATIVE PERIOD TO THREE YEARS

Swiss law currently has a **relative limitation period of one year in tort and unjust enrichment law**. Accordingly, claims for damages or unjust enrichment claims must be asserted within one year from knowledge of the damage and the person liable for damages or from knowledge of the enrichment claim. This limitation period was widely considered too short in doctrine and practice. Also, in other jurisdictions, such periods are usually longer.

"The revision brings the desired extension of the relative limitation period in tort and unjust enrichment law to three years."

The period will now be **extended to three years**, which should in particular facilitate the out-of-court settlement of liability cases by allowing more time for it. In unjust **enrichment law**, too, the longer relative period will improve the situation of the creditor, even if the case law has so far interpreted the conditions for assuming effective knowledge of the claim relatively generously in favor of the deprived party.

### 2.2 ADJUSTMENT OF THE REASONS FOR THE SUSPENSION OF THE LIMITATION PERIOD

Article 134(1) CO contains a **catalogue of reasons** for which the **limitation period does not begin or is suspended**, which is now being extended.

In particular, the limitation period will now be suspended *"for the duration of settlement discussions, mediation proceedings or other out-of-court settlement proceedings"* (no. 8). As the wording of the law states, the methods of dispute resolution listed are not exhaustive, but should include all formal and informal forms of **out-**

**of-court dispute resolution**. The parties must agree on this suspension of the limitation period in writing.

In addition, the previous provision, according to which the limitation period is suspended as long as a claim *"cannot be asserted before a Swiss court"*, has been adapted. It is now necessary that a claim cannot be asserted **"for objective reasons before any court" worldwide**, including arbitration tribunals (no. 7).

### 2.3 OTHER AMENDMENTS

With the revision of the statute of limitations, further provisions will also be amended. In particular, the following amendments are worth mentioning:

- > The injured party now always has an **additional three-year period from the issuance of the first-instance criminal judgment** to assert his claims for damages (Article 60(2) CO).
- > The effect of the interruption of the limitation period on **joint and several debtors, guarantors and insurers** will be partly revised (Article 136 CO).
- > The amendments to Article 141 CO, whose margin title is now *"Waiver of the statute of limitations defense"*, enshrine the case law of the Federal Supreme Court to **waive the assertion of the statute of limitations** and provide some clarifications. A waiver is possible for a maximum of ten years and, in the future, will be possible only from the moment **when the limitation period has begun to run**. A special rule applies if the waiver is contained in general terms and conditions.
- > The limitation period for the initiation of **claw-back claims** is extended from two to three years, beginning after service of the certificate of shortfall, the opening of bankruptcy proceedings, or the confirmation of a composition agreement with assignment of assets (Article 292 of the Swiss Debt Enforcement and Bankruptcy Act).

## 3 CONCLUSION AND ENTRY INTO FORCE

The extension of the limitation period for the assertion of claims for damages from personal injuries both under contract and under tort to 20 years will be assessed differently depending on the interests involved. Apart from that, the revision of the statute of limitations brings the largely **desired extension of the relative statute of limitations in tort and unjust enrichment law**, which in practice leads to a significant facilitation of the overall process. In contrast, the general limitation period of ten years for contractual claims for property damages remains unchanged.

The **referendum period** for the revision of the statute of limitations passed by Parliament on 15 June 2018 runs until 4 October 2018, but a referendum is unlikely. The entry into force of the revised provisions will then be determined by the Federal Council.

## Contacts

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

### In Zurich:



**Nathalie Voser**

Partner  
nathalie.voser@swlegal.ch

### In Geneva:



**Christian Girod**

Partner  
christian.girod@swlegal.ch



**Benno Strub**

Counsel  
benno.strub@swlegal.ch



**Louis Burrus**

Partner  
louis.burrus@swlegal.ch

**SHELLENBERG WITTMER LTD / Attorneys at Law**

**ZURICH** / Löwenstrasse 19 / P.O. Box 2201 / 8021 Zurich / Switzerland / T+41 44 215 5252

**GENEVA** / 15bis, rue des Alpes / P.O. Box 2088 / 1211 Geneva 1 / Switzerland / T+41 22 707 8000

**SINGAPORE** / Schellenberg Wittmer Pte Ltd / 6 Battery Road, #37-02 / Singapore 049909 / [www.swlegal.sg](http://www.swlegal.sg)

[www.swlegal.ch](http://www.swlegal.ch)

This Newsletter is available on our website [www.swlegal.ch](http://www.swlegal.ch) in English, German and French.