

Legal News

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The new law on the statute of limitation

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1. New statutory limitation periods

1.1 Limitation period for tortious liability

The most important changes concerning tortious liability are the extension of the short relative limitation period from one year to three years as well as the introduction of an absolute limitation period of twenty years for cases involving loss of life or personal injury (Art. 60 (1) and (1^{bis}) Draft CO). The long twenty-year period is intended specifically for victims of long-term harm that only comes to light more than ten years after the harmful conduct took place (e.g. in the numerous asbestos cases). For all other claims for damages or compensation the existing ten-year limitation period will continue to apply.

Furthermore, the extraordinary limitation period for claims resulting from criminal offences was revised. The existing provision states: "However, if the action for damages is derived from a criminal offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim." According to the revised provision, claims for damages and compensation become time-barred at the earliest at the end of the statutory limitation period for prosecution under criminal law, irrespective of the absolute and relative limitation periods under Art. 60 (1) CO (Art. 60 (2) Draft CO).

The aim of the reformulated provision is to clarify aspects that are not addressed in or are disputed under existing law.

1.2 Limitation period for contractual liability

For claims for damages or compensation for personal injury or loss of life arising from a breach of contract, two new limitation periods were introduced (Art. 128a Draft CO):

- ▶ a three-year relative limitation period, which starts to run on the day on which the injured party becomes aware of the damage;
- ▶ an absolute twenty-year limitation period, which starts to run on the day on which the harmful conduct occurred or ended.

The introduction of the relative limitation period constitutes a de-gradation of the rights of the injured party with respect to statutory limitation periods, because under existing law contractual claims for damages and compensation only become time-barred ten years after the harmful event, irrespective of the time when the injured party became aware of his or her loss.

The introduction of the twenty-year limitation period stems in part from a reprimand by the European Court of Human Rights from 2014 which considered the current applicable statutory limitation period of ten years, running from the time of the harmful event, a breach of the right to a fair trial under Art. 6 (1) ECHR.

Art. 127 CO, according to which all claims based on contractual liability become time-barred after ten years, unless otherwise provided by federal civil law, as well as Art. 128 CO, which sets forth a list of specific claims that become time-barred after five years, continue to apply unchanged. The statutory limitation periods for warranty rights under contracts of sale and contracts for work and services pursuant to Art. 210 and 371 CO also were not revised. Further, the statutory limitation periods for damages claims based on corporate law responsibility pursuant to Art. 760 CO also were not adjusted; the relative statutory limitation period of five years and the absolute statutory limitation period of ten years continue to apply.

1.3 Limitation period for unjust enrichment claims

For unjust enrichment claims as well, the relative statutory limitation period was extended from one to three years (Art. 67 (1) Draft CO). It was decided against introducing a longer absolute statutory limitation period of twenty years.

2. Suspension of limitation periods

The most important change concerns numeral 6 of Art. 134 (1) CO: Under the new law, the statutory limitation period will be suspended if a claim cannot be brought before any court due to objective reasons that are independent of the individual circumstances of the creditor (Art. 134 (1) No. 6 Draft CO) and not, as up to now, if the claim cannot be brought before a Swiss court. This change has been justified by the change in the legal situation concerning national and international jurisdiction and enforcement. The fact that litigation abroad may be more difficult and costly for the creditor than in Switzerland cannot be relevant as regards the reasons for prevention and suspension.

In addition, two further grounds for suspension were incorporated into the law: First, the suspension of the statutory limitation period during the conduct of a public inventory, which is currently regulated under Art. 586 (2) CC (Art. 134 (1) No. 7 Draft CO) and second, the suspension of the statutory limitation period during the course of an alternative dispute resolution procedure, if agreed to in writing by the parties (Art. 134 (1) No. 8 Draft CO).

3. Interruption of limitation periods

The existing law continues to apply unchanged with the following exceptions:

- ▶ The interruption of the limitation period for a person who is jointly and severally liable for a debt or jointly liable in respect of an indivisible performance, respectively, for the principal debtor, under the new law only extends to the co-obligor, respectively, the surety, if the interruption is based on an act of the creditor (Art. 136 (1) and (2) Draft CO).
- ▶ The interruption of the limitation period for the insurer will in future also apply in respect of the debtor and vice versa, provided that there is a direct right of action against the insurer (Art. 136 (4) Draft CO).

4. Waiver of limitation period

The marginalia to the revised law refers to a waiver of the objection of the statute of limitation, and no longer to a waiver of the statute of limitation (Art. 141 Draft CO). However, the practical effect remains the same - the statutory limitation period will be extended, as is now the case, by the

duration of the waiver.

Under the new law, the objection of the statute of limitation may already be waived from the beginning of the limitation period, which contradicts the current practice of the Federal Supreme Court. The jurisprudence of the Federal Supreme Court, which prohibits any waiver of the objection of the statute of limitation before the claim arises, will no longer have validity after the new law on the statute of limitation comes into force; only the beginning of the statutory limitation period will then be relevant (Art. 141 (1) Draft CO).

A waiver of the objection of the statute of limitation in each case may only be made for a maximum of ten years (Art. 141 (1) Draft CO). This corresponds to the current practice of the Federal Supreme Court. A renewal of the waiver for additional periods of a maximum of ten years is permissible.

In order to be valid, the waiver must be made in writing. Under the new law, the signature of the waiving party pursuant to Art. 14 CO is therefore required. The revised provisions further contain a statutory prohibition on incorporating a waiver of the objection of the statute of limitation into General Terms and Conditions, unless it is not the author of the General Terms and Conditions that gives the waiver, but its contracting party (Art. 141 (1)^{bis} Draft CO).

As a rule, the waiver can only be invoked against the waiving party. Under the new law, a waiver by a debtor may also be invoked against the insurer and vice versa, provided that there is a direct right of action against the insurer (Art. 141 (4) Draft CO).

5. Transition provisions

The date on which the new law on the statute of limitation will enter into force has not yet been established. It is not expected to occur before 1 January 2020. Intertemporal questions in connection with the entry into force of the revised law on statute of limitation will be regulated by the new Art. 49 CC Final Title. According to this provision, the new law is applicable to the extent it provides for a longer limitation period than the existing law provided that the limitation period has not yet expired under existing law. Absolute statutory limitation periods which under existing law are ten years and which have not yet expired upon the entry into force of the new law, will thus be extended to twenty years to the extent that they are henceforth subject to Art. 60 (1)^{bis} Draft CO. The same applies to ordinary statutory limitation periods under contract law pursuant to Art. 127 CO. The relative statutory limitation periods of one year will under given conditions be extended to three years. However, if the new law provides for a shorter limitation period, the existing law will continue to apply.

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