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Civil damage claims in criminal proceedings

Exclusion of contractual claims and interruption of the statute of limitations

Par Fabio Burgener le 10 October 2022

The end of the summer saw the publication of two Federal Supreme Court rulings concerning civil claims by adhesion to criminal proceedings (6B_1310/2021, summarized in Lawinside.ch/1231 and 4A_417/2021, commented in Lawinside.ch/1232). This case law is of practical importance in banking disputes, where the question regularly arises as to which procedure customers should initiate to assert their civil claims against a bank and its employees.

The Court of Criminal Law first ruled that the notion of “civil claims” in art. 122 para. 1 of the Criminal Code covers only those claims under private law that can be deduced from a criminal offence (see art. 41 et seq. of the Swiss Code of Obligations), to the exclusion of contractual claims.

For example, in the event of a breach of an asset management mandate constituting unfair management (art. 158 Swiss Criminal Code), the principal may, in criminal proceedings, only assert claims of a tortious nature against the defendant. Even if they concern facts identical or closely related to those set out in the indictment, claims based on the agency agreement must necessarily be the subject of civil proceedings.

The Ist Court of Civil Law then held that the limitation period for a contractual action cannot be interrupted by a declaration of participation in the criminal proceedings as a civil plaintiff (art. 119 al. 2 let. b CPP ; cf. art. 135 ch. 2 CO). On the other hand, it leaves open the question of whether and when claims in an adhesive civil action, pending as soon as the injured party has asserted civil claims under art. 119 al. 2 let. b CPP (art. 122 al. 3 CPP), must be quantified and substantiated in order to interrupt the statute of limitations.

The Court of Criminal Law in an obiter dictum (6B_321/2014), a number of cantonal courts (GE, FR and BL) and the majority of academic writers rightly maintain that a civil action, even if not quantified, is sufficient to interrupt the statute of limitations.

However, the above-mentioned decision of the Ière Cour de droit civil (First Court of Civil Law) contains a number of elements which suggest that the Ière Cour de droit civil may in future adopt the opposite solution :

After pointing out that the catalog of acts interrupting the statute of limitations listed in art. 135

ch. 2 CO is exhaustive, the federal judges indicate that “the declaration of participation in the criminal proceedings as a civil plaintiff (art. 118 al. 1-2 and 119 al. 2 let. b CPP) is not included”. They also point out that, in order to interrupt the statute of limitations, it is necessary that “the claim asserted be individualized by its basis (complex of facts ; Entstehungsgrund) and that its amount be quantified, unless an unquantified action for payment is admissible under art. 85 CPC”.

In our view, the first quotation should not be interpreted as meaning that a declaration of participation in criminal proceedings as a civil plaintiff can in no way interrupt the civil statute of limitations. Rather, it should be understood to mean that this simple declaration of intent is not sufficient. Combined with the second quotation, the Federal Court seems to indicate between the lines that only an adhesive civil action (subject to cases where the conditions of art. 85 CPC would be fulfilled ?) and summarily motivated would interrupt the statute of limitations.

This commentary looks at some of the practical consequences (by no means exhaustive) of this solution for interrupting the statute of limitations in banking litigation.

While the plaintiff’s declaration must necessarily be made before the close of the preliminary proceedings (art. 118 para. 3 CCP), the plaintiff is nevertheless free to quantify and substantiate his or her civil claims up to the time of the pleadings (art. 123 para. 2 CCP). In practice, this room for manoeuvre allows the injured party, in the first instance and with the aim of interrupting the civil statute of limitations, to put a figure on the maximum amount that could be taken into consideration, and to give reasons that are limited to a brief statement of the complex of facts. At a later stage, and up to the closing arguments, the customer can modify his civil claim and proceed to (i) put an exact figure on it, (ii) give a detailed statement of the facts on which it is based, and (iii) give a precise indication of the evidence relied on.

However, a quantified and briefly reasoned civil claim would interrupt the statute of limitations only for those civil claims that can be the subject of an adhesive civil claim. In the case of contractual claims, whether or not they are based on the same complex of facts as those which are the subject of the adhesive action, the customer must interrupt the statute of limitations by means of another interruptive act mentioned in art. 135 para. 2 CO.

Even in the case of an identical complex of facts based on both tort and contract (objective concurrence of actions), a customer who intends to interrupt the limitation period of the contractual action by means of a legal claim should not be barred by the exception of litispendence due to a pending adhesive civil action, necessarily limited to the tort action (art. 64 al. 1 let. a and 59 al. 2 let. d CPC ; cf. ATF 139 IIII 126).

In view of the uncertainty surrounding this point, the prudent customer should nonetheless opt for a requisition to interrupt the limitation period for the contractual action. He will then lose nothing by indicating in the box reserved for the “cause of the obligation” that the basis of his claim is both contractual and tortious.

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