



## LITIGATION BRIEFING

### Notes on the Groundbreaking Judgment of the European Court of Human Rights in the Proceedings Howald Moor et al. against Switzerland dated 11 March 2014

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*The European Court of Human Rights rendered a groundbreaking judgment regarding the application of limitation periods under Swiss law in cases of victims of asbestos-contamination and found that the application of these rules in the present case is a breach of the European Convention on Human Rights. It is difficult to forecast the resonance of this decision in Switzerland, especially whether it will change the jurisprudence of the Swiss Federal Supreme Court regarding the question of when the limitation period starts to run for claims based on mere financial damage.*

#### The facts

A man worked from 1964 until 2005 – date of his death – in a machines factory in Switzerland. From 1965 until at least 1978 he was exposed – due to his work – to asbestos without knowing the risks of such exposure. In 2004 he was diagnosed with a malignant pleural mesothelioma. In 2005, the man claimed against his employer for damages and compensation for pain and suffering caused by a breach of contract. The same year, this man died and his two daughters, as his heirs, decided to pursue the claim. In another proceeding, the widow claimed after her husband's death against the Swiss National Insurance Fund in case of Accidents for compensation for pain and suffering. In both cases the competent authorities and the appeal courts rejected the claims with the argument that both claims were prescribed and so forfeited. The Swiss Federal Supreme Court confirmed both rulings and repeated its jurisprudence: the absolute limitation period (in this

case 10 years) starts to run from the date of accrual of the cause of action, i.e. in these proceedings the breach of contract respectively the harmful act, regardless of whether the damage only arises after the end of the limitation period, meaning that the damaged person cannot know before the end of the limitation period that he or she is damaged. The European Court of Human Rights deemed that both decisions breached Art. 6 para. 1 of the European Convention on Human Rights.

#### The merits

The European Court of Human Rights (hereinafter „the Court“) first recalled that the right to a fair trial, as guaranteed by Art. 6 para. 1 of the European Convention on Human Rights (hereinafter „the Convention“), must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights. The Court acknowledged that the right to a court remedy is not absolute; it is subject to limitations permitted by implication, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. Such limitations will not be compatible with Art. 6 para. 1 of the Convention if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between

the means employed and the aim pursued. The Court repeated its jurisprudence and specified that limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.

The Court took a cautious approach in the present case and underlined many aspects of the particularity of asbestos-contamination. First, it stated that the matter is complex. As the latency period for diseases linked to the exposure to asbestos can be very long, the Court observed that the absolute limitation periods of 10 years will always have expired under the current Swiss legislation and jurisprudence. Hence, every damages claim is a priori deemed to fail, as it is prescribed or forfeited before the victims of asbestos know objectively about their rights. The Court held that the claims of the victims of asbestos who were exposed to this substance until its general prohibition in Switzerland in 1989 are all prescribed or forfeited under current Swiss law. The Court allowed itself to observe that the current legislative project of modification of the limitation periods in Switzerland does not offer a fair solution to this problem, not even an interim one (grace period). The Court noted that, even if the widow and the daughters received certain benefits or payments and even if the aims pursued by the limitation period rules are legitimate, the application of the said rules in the present proceedings does not seem enough to compensate the damage linked to the limitation periods and does not seem proportionate when applied in the present case. In more general terms, the Court deemed that when it is scientifically proved that a person is incapable of knowing that she or he is suffering from a certain illness, such a circumstance should be taken into account for the calculation of the limitation periods. The Court came to the conclusion that, considering the exceptional circumstances of the present case, the application of

limitation periods limits the access to a court remedy in such a way that the right of the plaintiffs was affected in its core substance and led to a breach of Art. 6 para. 1 of the Convention.

### **The planned reform of Swiss limitation period rules**

The Swiss Federal Council issued a message to the legislative project on revision and harmonization of limitation periods within the Swiss Code of Obligations. The Swiss Parliament will have to debate the proposed modifications. In the proposed legislative project, the relative limitation periods will be extended from one to three years in tort law and unjust enrichment law and the absolute limitation periods will be extended from 10 to 30 years for claims resulting from personal injuries. Starting point for the latter is the day when the harmful act ends, also in cases where the damaged person does not have knowledge of the damage. The planned new limitation periods will be applicable to cases where the current limitation periods are shorter, provided however that the claim is not prescribed under the current limitation periods.

### **What next?**

During the ordinary session of the Swiss National Council of 17 March 2014, a member of the Swiss National Council asked the Minister of Justice whether Switzerland planned to refer the matter to the Grand Chamber of the Court. The Swiss Minister of Justice explained that the Swiss Federal Office of Justice was looking into that question and did not exclude a referral of the matter per se. The deadline for referral expires in June 2014. If Switzerland does not request the referral of the case to the Grand Chamber of the Court, the decision of the Court will be final and the applicants will most certainly seek a revision of the Swiss decisions before the Swiss Federal Supreme Court. The difficult questions as to the causal link between the claimed breach of contract and the damage and its provability will then be at the centre of the proceedings.



The same member of the Swiss National Council asked further if the criticism of the Court would be taken into account in the planned revision. The Swiss Minister of Justice explained that the Commission for legal questions of the Swiss National Council was looking into it and that the Swiss Federal Office of Justice would carefully take into consideration all the available documentation before any decision.

It is clear that the Swiss courts will have to take into account the jurisprudence of the Court in cases of asbestos victims but, due to the general statement of the Court, also in cases where victims suffer other

late health damage. One can ask if the jurisprudence of the Court can be applied to different cases with mere financial damages, such as for example claims for restitution of retrocessions against banks. As the Swiss Federal Supreme Court did not rule on the length and the beginning of the limitation periods in cases of restitution of retrocessions claims yet, the question might be relevant in some proceedings in the future. Other examples could be claims out of defects or deficiencies in the construction of a building or a plant that emerge long after the statute of limitations period has elapsed as well as claims arising in connection with defective pharmaceutical products.

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