Adhesion Claims in Criminal Investigations

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A) Introduction

Under Swiss criminal law, injured parties such as defrauded bank clients may join criminal proceedings as private claimants to pursue damages through so-called "adhesive proceedings," In doing so, the injured party can take part in the criminal investigation and – at the end – request the criminal court to grant relief in the form of civil damages. This mechanism is primarily governed by the Swiss Code of Criminal Procedure (CPC) and offers claimants an efficient alternative to ordinary civil proceedings. Nevertheless, adhesion proceedings come with their own specific requirements and limitations which need to be borne in mind when assessing the strategy against a perpetrator.

Some recent decisions by the Swiss Federal Supreme Court, the highest court in Switzerland, has given some further guidance to both civil and criminal claimants which may be involved in such proceedings.

1) Legal basis

The adhesive procedure is primarily set out in articles 115–125 CPC. By doing so, an injured party, whose rights were directly violated by the offense being investigated, gains party rights such as access to the prosecution's investigative files. It may take part in hearings, request the taking of (additional) evidence, and appeal certain decisions affecting its claim. The unique feature is, that its status also permits the assertion of a civil damages claim if such injury was related to the crime (most commonly tort claims pursuant to art. 41 et seqq. Swiss Code of Obligations, CO).

2) Constitution - becoming a party

To join the criminal proceedings, the injured party must submit an express declaration in writing or put on record by oral declaration to an investigative authority (referred to as "constituting itself as a party"), ideally at the beginning of preliminary proceedings, expressing that it wishes to join the investigation as a criminal claimant (art. 118 CPC). This can include lodging a criminal complaint for crimes which are only pursued upon application by an injured party (certain crimes within the family, low value financial misdemeanours).

In addition, the private claimant can lodge its civil claim for compensation (art. 122 CPC). This process entails no advance fee for the private claimant, however, in some cases, procedural costs may apply where the private claimant is eventually unsuccessful with its application (art. 427 CPC).

3) Scope of claims

There has existed some controversy as to the exact scope of the civil claims that may be brought under an adhesion claim. As the wording of art. 122(1) CPC only states that civil damages emanating from the criminal act may be brought to the adjudication of the criminal court, it was for some time unclear, whether a breach of contract that was the result of a crime could also fall under this array of claim (see on this contentious issue section B below).

Typically, losses suffered by an injured party would range from financial losses to satisfaction for non-pecuniary harm, the statutory basis for which would usually be found in art. 41–49 CO (for tort claims) or related laws (e.g., art. 28a Swiss Civil Code dealing with claims based on the breach of personality rights).

4) Procedural integration

The unique feature of the adhesion claim is that it "adheres" (sticks) to the criminal case, with the criminal court having jurisdiction both for the criminal aspects of the matter as well as the civil damages claim (art. 122 CPC).

Public prosecutors take into account the private claimants' position during the investigation phase. Private claimants can assist in the prosecution's investigation, though the prosecution strategy remains in the hands of the attorney general. A well- informed criminal claimant may nevertheless be of assistance to the prosecution, as frequently such parties are familiar with the background of the matters being investigated. The public prosecution is required by law to investigate fairly and objectively and to examine incriminating and exculpating circumstances with equal care.

Once the indictment has been lodged with the criminal court, the judges must afford the private claimant equal rights during trial and consider the pleadings of civil claimants. If the accused is

convicted, the court may award awards civil damages. Courts may also confirm liability only in principle leaving the calculation of damages to a civil court.

5) Advantages

It is the intention of the law maker that with adhesion claims, a criminal claimant may avoid two court proceedings. Civil claimants benefit, as they can rely on the evidence gathered by the public prosecution in the criminal proceedings.

With regard to the assets obtained by criminal means, Swiss law provides for substantial countermeasures: The court shall order the forfeiture of assets that have been obtained through a criminal offense or were intended to induce or reward a criminal offense, unless they are handed over to the victim to restore the lawful state of affairs. Assets obtained through criminal activity may, in principle, be confiscated from any third party who acquires them with knowledge of the grounds for confiscation or without providing equivalent consideration.

If the assets subject to forfeiture are no longer available, the court shall order the state to be awarded a claim for compensation in the same amount.

B) Limits to adhesion claims and negative declaratory applications

In its decision of September 1, 2022 (decision 148 III 401), the Federal Supreme Court clarified key limits to adhesion claims under Swiss criminal law.

The Federal Supreme Court found that adhesion claims as per art. 122(1) CPC were restricted to civil demands directly derived from the pursued criminal offense, excluding purely contractual claims, which fell outside the criminal court's jurisdiction. Contractual liability (arts. 97 et seqq., art. 398 CO) could not "adhere" to criminal proceedings, as criminal courts lacked competence ratione materiae for non-delictual claims.

Following this, in its recent decision 4A_294/2024 of 04 March 2025, the Federal Supreme Court gave a further noteworthy judgment in the context of adhesion claims which may impact the use of such an instrument. The decision turned on the permissibility of negative declaratory applications for contractual claims during pending adhesion claims in a criminal investigation or

if pending before a criminal court. Bearing in mind the advantages set out above for injured parties seeking to join the proceedings by the public prosecution, this new judgment gives contours to the limits of following in the wake of a criminal investigation.

1) Case background

The core conflict revolved around the liquidation of Swiss Bank A, which began in 2018. The bank faced a CHF 20 million damages claim from B. SA. Crucially, B. SA had already lodged a criminal complaint against the bank in 2016 and joined the proceedings as a private claimant using an adhesion claim for the same amount.

Consequently, the liquidators of Bank A could not conclude the liquidation due to three pending cases, including the CHF 20 million claim from B. SA. To resolve this, Bank A initially filed for a negative declaratory judgment at the Zurich Commercial Court in 2019, asserting it owed no such amount to B. SA. The Commercial Court rejected this claim, citing that the 2016 adhesion application had already established lis pendens.

Even after the clarifying judgment of September 1, 2022, Bank A reiterated this request, appealing to the Commercial Court to rule negatively on the claim based on the bank's (contractual) relationship with B. SA. Again, the Commercial Court dismissed the application in a March 2024 judgment, reiterating that lis pendens barred the identical claim, and noting the need to separate the issues of jurisdiction and substance. Bank A subsequently appealed this ruling to the Federal Supreme Court.

2) Federal Supreme Court permits negative declaratory applications

The Federal Supreme Court established that the principle of lis pendens prevents multiple conflicting lawsuits concerning the same parties and subject matter, thereby avoiding unnecessary legal proceedings. The Tribunal confirmed that lis pendens requires a "double identity": the identity of the parties and the identity of the dispute's subject matter.

A key finding involved the jurisdiction of the criminal court: while a civil claim can be raised through an adhesion action in criminal proceedings, the court's jurisdiction is strictly limited to civil claims based on tort precluding contractual claims (see above).

Consequently, the Federal Supreme Court determined that the scope of lis pendens must also be limited by the court's jurisdiction. If the criminal court can only adjudicate non-contractual (tort) claims, the preclusive effect of the adhesion claim cannot apply to contractual damages that fall outside the criminal court's competence. This legal distinction meant that while an injured party could bring tort claims as a private claimant, they must handle contractual claims in separate, ordinary civil proceedings.

Logically, this allowed the defendant in criminal proceedings to file a negative declaratory action in civil court specifically challenging those excluded contractual aspects. Therefore, the Federal Tribunal ruled that lis pendens only applied to the non-contractual claims arising from the criminal investigation.

3) Consequences – case management

This special situation may lead to the consequence that the same legal claim (or its contradictory opposite), and the same factual circumstances involving the same parties may be adjudicated in two separate proceedings, by two different courts, each based on different legal grounds. This can require additional coordinative efforts by the courts and brings the risk of conflicting decisions, which is precisely what the lis pendens rule intends to prevent.

The problems identified must be managed and mitigated by means of procedural coordination through the latter court seized with the civil damages claims. In the present case, the Federal Supreme Court invited the Zurich Commercial Court to stay the civil proceedings (art. 126(1) Civil Procedure Code) until the adhesion claim was finally adjudged by the criminal court. This does not bar the injured party from bringing all its civil claims before a civil court in a single proceeding with full jurisdiction and waive its right to assert damages in the criminal proceedings.

C) Conclusion

Adhesion proceedings constitute an interesting tool assisting private claimants in obtaining damages suffered through criminal actions. The jurisprudence of the Federal Supreme Court has clarified however that this instrument is available to pursue claims arising in relation with tort.

Claimants acting as private claimants in criminal proceedings therefore still have the option pursuing contractual claims in a civil court in parallel proceedings, if this seems more advisable.