



## Statute of Limitation under Kazakh law: A Practitioner's Perspective

Rules relating to statute of limitation contained in the Civil Code of the Republic of Kazakhstan (the “**Civil Code**”) may seem relatively straightforward. However, in our practice we frequently encounter situations where rules relating to the calculation of the statute of limitation are erroneously applied or where their applications to relevant facts create disputes. In this article, the author has attempted to provide a practical perspective on some of the most frequently encountered questions relating to the statute of limitation under Kazakh law and express views on the interpretation of certain rules.

### 1. Commencement of the Statute of Limitation:

#### 1.1. The Main Rule: the day when the affected party learned or ought to have learned of the violation of his (her) rights (Article 180(1) of the Civil Code)

Article 180(1) of the Civil Code provides as follows:

"Statute of limitation starts on the day **when the party learned or ought to have learned of the violation of the right**. Exceptions to this rule are established by this Code and other legislative acts." (emphasis added)

The provision above speaks for itself. The statute of limitation begins when: (1) a right is violated and (2) the party whose right is violated learned or ought to have learned of this.<sup>1</sup> Usually, disputes arise over the determination of the moment when the statute of limitation commenced in relation to a specific individual or legal entity.

#### A. *Cause of Action*

In the author's opinion, the moment when the affected party's right is violated shall be counted from the time when such party started to have a cause of action to file a claim to court.

According to Article 148(2)(4) of the Civil Procedure Code of the Republic of Kazakhstan (“**Civil Procedure Code**”), the statement of claim must, among other things, describe: “[t]he essence of violation or threat of violation of rights and freedoms of a citizen or legitimate interests of the claimant and relief of the claimant.”

As seen from the above, the claimant must explain which rights were violated. If the claimant's right is not violated, there is no cause of action and, therefore, there is no possibility to sue. Thus, statute of limitation is a period of time during which the claimant had the opportunity to sue and he (she) was or ought to have been aware of this possibility.

This follows from Article 177(1) of the Civil Code, which states that: “[s]tatute of limitation is a period of time during which a **claim** arising from the violation of a right or an interest protected by law can be granted.” (emphasis added)

#### B. *Awareness of the Violation*

Some Kazakh academics expressed the opinion that words “learned or ought to have learned” about the violation of a right refer to “a reasonable assumption that the right is

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<sup>1</sup> Such a moment of the commencement of statute of limitation is called subjective. Academics debate as to whether it is fair to link commencement of the statute of limitation with a subjective moment, i.e. the moment when a specific party became aware of the violation of his (her) rights, as it is difficult to determine this point in time. The Russian Federation (**'Russia'**), for example, amended its Civil Code to the effect that in some cases the maximum term of the statute of limitation cannot exceed 10 years from the date an obligation is created. There are prominent supporters of this approach in Kazakhstan who argue that commencement of the statute of limitation should be linked to some objective criterion, such as the date of an obligation. See *Statute of Limitations in the Legislation of Post-Soviet Countries: myths and reality*, by M.K. Suleimenov.

violated". In other words, it is not necessary for an interested party to be certain about the violation of his (her) right. A "reasonable suspicion" of the violation of a right is sufficient.<sup>2</sup>

The UK High Court of Justice recently analysed rules of Kazakh law relating to the statute of limitation. In that case, a prominent Kazakh academic and practising lawyer expressed their views on this issue. There were opinions in that case that the awareness of the violation of a right is more than suspicion, but less than absolute certainty about it. If a claimant has suspicions of violation of his (her) right, he (she) shall make reasonable efforts to identify whether his (her) right has been violated.<sup>3</sup>

#### *Awareness of a Legal Entity*

There are two approaches to determination of the moment when a legal entity learned or ought to have learned of the violation of a right: (1) the moment when an authorised body of the legal entity learned or ought to have learned of the violation<sup>4</sup> (e.g. a director of the company), or (2) the moment when an employee of the legal entity learned or ought to have learned of the same.<sup>5</sup>

On the one hand, the first approach makes it more difficult to establish the moment of commencement of the statute of limitation. Also, it may be seen as unreasonably extending the moment of commencement of the same (one has to prove when a specific authorised person within the company learned of the violation). An argument that the statute of limitation does not commence as the director of the company was unaware of the violation could be seen unfair in a situation where other employees were aware of the same.

The second approach appears to be erroneous for the following reason. Although a legal entity is liable for the actions of its employees according to Articles 362, 921 of the Civil Code, i.e. where the employee who has learned about the violation fails to inform the authorised bodies of the legal entity, this is an omission of the legal entity. However, a receptionist who, for example, learned that the former management of the company procured an automobile at the company's expense may not necessarily consider this as violation of the company's charter. Thus, she may not reasonably be expected to inform new management of this fact. It is difficult to accept a scenario where according to the second approach, the statute of limitation would commence at the moment when the receptionist learned of the respective facts.

It appears that a more balanced approach is one where the statute of limitation in relation to a legal entity commences at the time when an employee of the company learned of certain circumstances and such employee is capable of understanding that such circumstances violate the company's rights. For example, it could be the moment when the receptionist learned of relevant facts, provided he (she) understood that such facts violate internal rules or regulations of the company.

#### *C. Identity of the Defendant*

Unawareness of defendant's identity prevents the claimant from filing the claim to court as a matter of civil procedure. In this author's opinion, the statute of limitation should not run during a period of time where the claimant is unable to file a claim due to unawareness of the respondent's identity. However, this does not mean that the claimant should not take steps to identify the defendant.

In Russia law, for example, this issue is clear. According to Article 200(1) of the Civil Code of the Russian Federation:

"[u]nless otherwise stated in the law, the statute of limitation commences on the day when a party learned or ought to have learned of the violation of his (her) right and **about the proper defendant in the proceeding for the protection of a violated right.**" (emphasis added)

#### *D. Awareness of the Volume of Damages*

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<sup>2</sup> See *Statute of Limitations in the Legislation of Post-Soviet Countries: myths and reality*, by M.K. Suleimenov. (the article also refers to A.G. Didenko, who believes that a "reasonable assumption" that the right has been violated is enough).

<sup>3</sup> See *Kazakhstan Kagazy PLC and others vs Mr A.Zh. Baglan and others* (available at <http://www.bailii.org/ew/cases/EWHC/Comm/2017/3374.html>)

<sup>4</sup> Summary of the judicial practice of the Nizhny Novgorod Regional Court of the Russian Federation, <http://www.garant.ru/products/ipo/prime/doc/36406035/>

<sup>5</sup> See *Statute of Limitations in the Legislation of Post-Soviet Countries: myths and reality*, by M.K. Suleimenov.

The claimant's lack of awareness of the volume of damages does not affect the commencement of the statute of limitation.<sup>6</sup> It is difficult to disagree with this view. The volume of damages can be determined during a court proceeding, for example, by an expert.

## 1.2. Obligations with a Defined Period of Performance (Article 180(2) of the Civil Code)

Article 180(2) of the Civil Code provides: "[i]n relation to the obligations which have a defined period of performance, the statute of limitation commences upon the expiry of the period of performance."

If a contract or law provides for a defined period of time for the performance of an obligation, failure to perform the obligation upon expiry of the term allows the creditor to file a claim to court for the failure to perform the obligation.

### A. *Recurring Payments*

According to item 4 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated 23 December 2005, No. 9 "On Some Issues of Application by Courts of the Legislation related to the Recovery of Arrears for Heat and Electricity":

"A general statute of limitation applies to obligations arising from power supply contracts. Citizens under a power supply contract must pay for consumed power on monthly basis; therefore, the statute of limitation for a subscriber's obligation starts from the expiry of a deadline for the obligation to pay for the power received."

In other words, the statute of limitation for each monthly payment starts on every day of the corresponding month and expires exactly in three years. For example, the statute of limitation for a payment which is due on 5 May 2018 starts on the following day, i.e. 06 May 2018, and expires on 05 May 2021, and for each subsequent month the statute of limitation will start and expire in the same way.

### B. *Performance in Instalments, Penalty*

Similar rules apply to obligations performed in instalments and liquidated damages. For example, the Overview of Judicial Practice of the Nizhny Novgorod Regional Court of the Russian Federation on statute of limitation dated 31 October 2016 provides in relevant part that:

"In relation to obligations to make periodic payments, statute of limitation commences separately for each payment. Same applies to obligations performed in instalments.

In relation to obligations where the right to make a claim arises not at a single time, but consecutively over days or periods of time (e.g., liquidated damages or interest for use of other's funds), the statute of limitation is calculated separately for each of them [from the moment when the corresponding right to make a claim arises]."<sup>7</sup> (emphasis added)

### C. *Damages*

In the author's opinion similar rules of calculation of the statute of limitation should apply to claims for recovery of damages, if the affected party incurred damages over different periods of time.

There are many situations where a claimant suffers various categories of damages over an extended period of time, such as: damages due to construction delays caused by the contractor, damages due to contract termination and replacement of the contractor (costs of holding a repeated tender, etc.), damages due to engaging experts to assess expenses for elimination of defects in the previous contractor's work, damages due to elimination of defects in the previous contractor's work, etc.

In such situation, each type of damages will have its own statute of limitation, which would begin at the moment the claimant started to have a cause of action for recovering

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<sup>6</sup> *Ib.*

<sup>7</sup> Summary of the judicial practice of the Nizhny Novgorod Regional Court of the Russian Federation, <http://www.garant.ru/products/ipo/prime/doc/36406035/>

the respective damages. The damages should not necessarily be incurred, it is sufficient to have a cause of action to claim them. Article 9(4) of the Civil Code defines damages as expenses which have been incurred or which should have been incurred by a party whose right is violated.

### 1.3. Obligations without a Defined Period of Performance (Article 180.3 of the Civil Code)

Article 180(3) of the Civil Code provides as follows:

"In relation to obligations where the period of performance is not defined or it is defined by the moment of demand, the statute of limitation commences **at the moment of demand for the performance of an obligation**, and where the debtor is granted a grace period to perform such a demand, the statute of limitation commences upon expiry of the grace period (Article 277(2) of this Code)." (emphasis added)

This provision causes many disputes and errors. The author had a case where a party took the position that Article 180(3) of the Civil Code is an exception to the general rule for commencement of the statute of limitation, as established by Article 180(1) of the Civil Code (that the statute of limitation commences at the moment of violation of a right).

The party argued that the moment of violation of one's right is irrelevant to calculate the statute of limitation in relation to obligations with undefined term under Article 180(3) of the Civil Code. The party argued that what matters for the purposes of Article 180(3) is the moment of demand regardless of the violation of a right.

The author disagrees with this interpretation of Article 180(3) of the Civil Code, as it allows relevant party to extend indefinitely the commencement of the statute of limitation, because such party may determine at its own discretion the moment of submission of a demand to perform the obligation.

It was also argued that such delayed submission of a demand to perform an obligation should be assessed from the perspective of the principle of good faith set out by Article 8(4) of the Civil Code.<sup>8</sup> In the author's opinion, however, a reference to the principle of good faith to identify moment of commencement and expiry of the statute of limitation does not give sufficient clarity, and it is simply contrary to law.

#### A. *Obligations to be Performed on Demand*

Article 180(3) of the Civil Code states that for obligations the term of performance of which is defined by the moment of demand the statute of limitation commences after such demand or a grace period.

For example, if a loan is extended for an undefined period of time, but it must be returned at first demand, the statute of limitation commences after the first demand, despite the fact that such a demand can be made even in 10 years. It is understood that if the debtor does not repay the debt after the demand is made, the creditor would have a cause of action to recover the debt.

Before such demand is made by the creditor, the creditor would not have a cause of action, as the obligation to repay the debt would not be due. Accordingly, until such demand is made the applicable right of the claimant would not be violated.

#### B. *Obligations with Undefined Due Date*

Similar rule applies to obligations without a defined due date, provided that the violation of a right has not occurred before the demand to perform an obligation is made.

Conjunction "or" in Article 180(3) of the Civil Code logically equates commencement of the statute of limitation for obligations which become due at the time of demand with the commencement of the same for obligations with an undefined due date. Thus, if a loan agreement does not indicate a repayment date, the statute of limitation would start at the moment of the respective demand, just like in the above example with a loan on demand, provided that the violation of the creditor's right has not occurred earlier.

If the claimant has a cause of action at an earlier date (if the violation occurred prior to the demand being made), the statute of limitation would commence at the moment of

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<sup>8</sup> See *Statute of Limitations in the Legislation of Post-Soviet Countries: myths and reality*, by M.K. Suleimenov.

violation of a respective right. Thus, the rule “learned or should have learned about the violation of right” provided for by Article 180(1) of the Civil Code applies to obligations with undefined period of performance set out by Article 180(3) of the Civil Code.

This position is supported by the Academic Advisory Board of the former Supreme Arbitrazh Court of the Russian Federation:

"[t]here is probably a contradiction between Article 195 [equivalent of Article 177(1) of the Kazakh Civil Code] and paragraph two of Article 200(2) [of the Civil Code of the Russian Federation] [equivalent of Article 180(3) of the Kazakh Civil Code]. The contradiction is in that the moment of the commencement of the term stated in Article 200 [of the Civil Code of the Russian Federation] does not meet the common criterion established by Article 196 . . . The statute of limitation is a period of time for the protection of a right which has been violated. Paragraph two of Article 200(2) [of the Civil Code of the Russian Federation], however, does not say anything about violation of a right: for statute of limitation to commence it would be sufficient for the creditor to have a right to make demand to perform an obligation.<sup>9</sup>

The contradiction can be avoided, if paragraph two of Article 200(2) of the Civil Code [of the Russian Federation] is interpreted in accordance with the concept of the statute of limitation provided in Article 195 [of the Civil Code of the Russian Federation].<sup>10</sup> Because the statute of limitation cannot commence before a right is violated in relation to obligations defined by the moment of demand, there can be no violation of a right prior to such demand of the creditor to perform the obligation."<sup>11</sup>

Thus, the rule set out by Article 180(3) of the Kazakh Civil Code that in relation to obligations with undefined period of performance the statute of limitation commences at the time of demand – should be interpreted in the context of Article 177(1) of the Civil Code. That is - the moment of demand and the moment of violation of a right should coincide.

There is another example: if someone’s property is damaged by a third party, and the affected party and the party which caused damage do not have contractual relationship. One could argue that the obligation to compensate for damage is an obligation without a defined term. In this case, the statute of limitation in respect of a claim for the recovery of damages would commence at the moment of a demand to reimburse relevant damage.

In the author’s opinion this approach would be erroneous. Article 9(4) of the Civil Code provides that:

"A party whose right is violated may demand full compensation of **damages** caused to him (her), unless otherwise stipulated by legislative acts or contract.

Damages refer to expenses that have been or should be have been incurred by a party whose right is violated, **loss or damage to its property (real harm)**, as well as lost income that he (she) could have received under in the normal course of business, had his (her) right not been violated (loss of profit)." (emphasis added)

It appears that in this example, the rights of the affected party were violated at the moment of the damage rather than the moment of demand to reimburse for the damage, because a cause of action to claim compensation arose at the moment of the damage. Thus, the statute of limitation would commence at this moment. In this example, the moment of submission of a demand to reimburse damages is not relevant for the commencement of statute of limitation.

For the reasons explained above, the author disagrees with the opinion that Article 180(3) of the Civil Code is an exception to the general rule stipulated by Article 180(1) of the Civil Code, i.e. the rule that statute of limitation commences at the moment of violation of

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<sup>9</sup> Article 200(2) of the Russian Civil Code is not identical to Article 180(3) of the Civil Code of Kazakhstan; nevertheless, this does not affect the finding on the contradiction between Article 177(1) and Article 180(3) of the Civil Code of Kazakhstan.

<sup>10</sup> According to Article 195 of the Russian Civil Code: "[s]tatute of limitation is a period for protection of the right of a person whose right has been violated."

<sup>11</sup> *Minutes of the Meeting of the Civil Section of the Academic Advisory Board at the Supreme Arbitration Court of the Russian Federation No. 8, dated 15 October 2008.*

a right does apply to Article 180(3) of the Civil Code.<sup>12</sup> In the author's opinion, in relation to entire Article 180 of the Civil Code (including Article 180(3)) the commencement of statute of limitation would be linked to the moment of violation of a right.

### C. *Termination of a Contract*

Recently, there has been expressed a view that if a contract provides for a deadline to perform an obligation, failure to perform at a due date will cause the commencement of the statute of limitation, while termination of the contract in turn leads to the termination of obligations. Thus, an argument was made that the statute of limitation which commenced according to Article 180(2) of the Civil Code (for obligations with defined due date) would fall under Article 180(3) of the Civil Code (obligations without a defined period of performance) after the termination of the contract. The statute of limitation which commenced as a result of a breach of the contract is annulled, and it does not commence until a demand to perform the obligation is made.<sup>13</sup>

It is difficult to accept this position, because the termination of a contract does not have a legal effect on the statute of limitation which has commenced during the validity of the contract. If a party breaches the contract, the statute of limitation starts from the moment of the violation, regardless of subsequent termination of the contract.

## 2. Interruption and Restoration of the Statute of Limitation

### 2.1. The statute of limitation which has expired cannot be restarted

Article 183(1) of the Civil Code provides as follows:

**"The flow of the statute of limitation** can be interrupted by filing a claim in the established procedure, signing a mediation agreement by the parties, as well as by taking by the obliged party of actions in recognition of the debt or any other obligation." (emphasis added)

Taking by the obliged party of actions in recognition of the debt leads to so-called interruption of the limitation period, i.e. it restarts and runs anew after relevant actions took place. Limitation period can be restarted only while it flows. Once expired, it cannot restart. It can only be restored, and restoration of statute of limitation is governed by different rules.

There was a case in our practice when after the expiry of the statute of limitation the debtor signed a reconciliation act (being not aware that the statute of limitation has expired). The debtor recognised the debt in writing after the expiry of statute of limitation. Upon review of the reconciliation act, the court initially expressed the view that the debtor had recognised the debt and there were no grounds to invoke the statute of limitation, as it considered that signing the reconciliation act restarts the statute of limitation. Such position is erroneous, as it is impossible to restart a statute of limitation which has expired.

If the statute of limitation expired by the time the debtor took actions in recognition of the debt, rules relating to interruption of the statute of limitation do not apply. Rules applicable to restoration of an expired limitation period would apply instead (i.e. Article 185(1) of the Civil Code).

This interpretation is supported by judicial practice. For example, according to Resolution of Civil Panel of the Supreme Court of the Republic of Kazakhstan No. 1n-126-016 dated 29 May 2001:

*"The court did not take into account the defendant's arguments on the expiry of the statute of limitation on the grounds that according to Article 183 of the Civil Code, the course of the statute of limitation can be interrupted when the obliged person takes actions in recognition of a debt or any other obligation. The claimant submitted Act No. 4, dated 8 December 1999 on accounts payable in the amount of 6,586,847.62 Tenge signed by directors of the parties.*

***It was not taken into account that according to the law, only the term that has not expired may be interrupted, and the term of the statute of limitation can be interrupted by actions which took place within such a term.***

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<sup>12</sup> See *Statute of Limitations in the Legislation of Post-Soviet Countries: myths and reality*, by M.K. Suleimenov.

<sup>13</sup> *Ib.*

*The court, in view of the defendant's arguments, should have identified whether as at 8 December 1999 statute of limitation expired in relation to claims which have been raised."*

Pursuant to Resolution of Civil Panel of the Supreme Court of the Republic of Kazakhstan No. 3a-158-03, dated 3 July 2003:

*"It is worth mentioning that **limitation period which has expired cannot be interrupted in accordance with Article 183 of the Civil Code**, it can only be restored in cases specified by law."*

## 2.2. Restoration of the Statute of Limitation is Possible for Individuals

Article 185(1) of the Civil Code provides:

*"In exceptional cases where the court considers that reasons for missing the limitation period are serious because of the circumstances associated with identity of the claimant (serious disease, helpless state, illiteracy, etc.), a violated right of the citizen must be protected. Reasons for missing the limitation period may be viewed as being serious if they took place during the last six months of the limitation period, and where the term is equal to six months or less - during the duration of the limitation period."*

A view has been expressed that restoration of limitation period is available only to individuals, i.e. it is not available to legal entities. Although there were also views to the contrary.<sup>14</sup>

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<sup>14</sup> See Kazakhstan Kagazy PLC and others against Mr A.Zh. Baglan and others (available at <http://www.bailii.org/ew/cases/EWHC/Comm/2017/3374.html>)