Case-law on partial actions and counterclaims for a negative declaratory judgment

The Swiss Civil Procedure Code (CPC), in force since 1 January 2011, excludes a counterclaim if it is subject to another type of court procedure than the main action (Article 224 para. 1 CPC).

For partial claims with a value in dispute not exceeding CHF 30’000 this legal provision led to unsatisfactory situations since simplified court proceedings generally prevented the defendant from filing a counterclaim for a negative declaratory judgment in order to have the non-existence of the remaining claim determined.

The Federal Tribunal has thus granted counterclaims for a negative declaratory judgment a special treatment and ruled in favour of their admissibility even if the applicable type of procedure is different.

1. Partial action

The plaintiff may bring a partial action if his claim is divisible. Monetary claims are, due to their nature, always divisible claims. It is therefore possible to bring an action for only part of a monetary claim.

The value in dispute is generally a decisive factor for determining the amount of the court costs and for awarding a compensation for the litigation costs of the successful party. Therefore, considering the costs involved, a partial action can reduce the litigation risk. Partial actions thus favour the bringing of risky court actions in highly controversial legal disputes.

Simplified court proceedings apply for the enforcement of financial claims with a value in dispute not exceeding CHF 30’000. In comparison to ordinary court proceedings, the simplified procedure is characterised by its extensive orality as well as the judicial assistance in the establishment of facts. The parties should thus be able to enforce a claim without the aid of a legal representation. Simplified proceedings should allow the enforcement of a claim within reasonable time and in a cost-effectively way if the factual background of the matter is rather simple.

Partial actions with a value in dispute not exceeding CHF 30’000 are also assessed in simplified proceedings, even if the partial claim arises from a legal dispute about a much higher value which is why the action about the total claim would actually be subject to ordinary court proceedings.

2. Counterclaim

The defendant may file a counterclaim in her statement of defence if such a claim is subject to the same type of procedure as the main action and if the court seized has territorial jurisdiction over the counterclaim. With regard to a counterclaim for a negative declaratory judgment, the factual connection between such a claim and the partial action of the plaintiff establishes a place of jurisdiction.
3. Counterclaim for a negative declaratory judgment

In response to a partial action, the defendant may file a counterclaim for a negative declaratory judgment in order to have the remaining claim declared non-existent.

According to the wording of the CPC, a counterclaim is generally not admissible in simplified proceedings if its value exceeds CHF 30'000. The counterclaim must therefore be assessed in separate ordinary proceedings. However, with regard to counterclaims for a negative declaratory judgment, the Federal Tribunal has granted special treatment and confirmed their admissibility (see Section 4 f. below).

Whoever files a counterclaim for a negative declaratory judgment must expect that the court requests an advance payment for the presumed court costs in proportion to the value of the counterclaim.

4. First leading case on the admissibility of the counterclaim

Numerous authors criticized the unsatisfactory legal situation which in most cases made a counterclaim for a negative declaratory judgment in response to a partial action in simplified proceedings impossible.

The Federal Tribunal provided clarity with its leading case DFT 143 III 506 of 13 June 2017 and ruled that a counterclaim for a negative declaratory judgment is not an ordinary counterclaim. The Federal Tribunal confirmed that a negative counterclaim for a declaratory judgment in simplified proceedings is admissible even if it is not to be assessed in the same type of proceedings as the main action. In such cases, the partial action and the counterclaim for a negative declaratory judgement are transferred to the ordinary court proceedings.

The authors welcome such transfer to the ordinary court proceedings since simplified proceedings are generally directed and assessed by one single judge, whereas claims in ordinary proceedings are in the hands of courts with two or more judges. In complex and highly controversial legal disputes with extensive taking of evidence it is usually an advantage if the claim is assessed by judges with greater experience. The standard of proof is generally high and requires that the court is convinced of the correctness of the factual assertions from an objective point of view. Any doubts must appear as irrelevant. Since the court has certain discretionary powers with regard to the assessment of the probative force of evidence and the establishment of the relevant facts, the unsuccessful party often files an appeal against the decision of the first instance in order to have the judgement reviewed by the appeal court.

5. Second leading case on the admissibility of the counterclaim

In its leading case DFT 145 III 299 of 10 July 2019, the Federal Tribunal commented on the question of whether the admissibility of a counterclaim for a negative declaratory judgment depends on the existence of a so-called genuine partial action.

As an example for a genuine partial action, the Federal Tribunal mentioned an action for part of a purchase price claim. The court said, in this situation, it is obvious that the defendant has an interest in a counterclaim for a negative declaratory judgment in the same proceedings because the initiation of court proceedings on the partial claim prevents the bringing of the same matter in a second trial while the proceedings of the main action are still ongoing.

The Federal Tribunal clarified that the exception to the requirement of an equal type of procedure in case of a counterclaim pursuant to Article 224 para. 1 CPC is not limited to genuine partial actions, but generally applies if the partial action results in an uncertainty which justifies a judgment about the question of whether the total claim or legal relationship exists or not in the procedure of the partial claim.

In the case assessed by the Federal Tribunal, the plaintiff asserted that he had a total claim under labor law for overtime compensation for the years 2014, 2015 and 2016. However, he only claimed the overtime compensation for the year 2016 with a partial action. The court held that, in this situation, it must be possible by means of a counterclaim for a negative declaratory judgement to assess the overtime compensation for the years 2014 and 2015 in the same proceedings, precisely because, according to the relevant facts, the whole period is relevant to the question of whether overtime from previous years was compensated in these years.
The court said, it is not decisive whether the compensation for overtime work done in different calendar years constitutes an independent subject-matter or not. The significance of the subject-matter lies in the assessment of whether two actions are identical with regard to the effect of a legally binding judgement (res judicata). In general, an action which has already been assessed by a court cannot be brought before a court a second time.

A counterclaim for a negative declaratory judgement is also admissible, for example, as a reaction to a partial action for liability arising from personal injury. Often the partial action is limited to individual parts of the claim such as the loss of earnings or the household damage whereas the plaintiff reserves the right to claim further damages and/or compensation for pain and suffering.

6. **Legitimate interest in a declaratory judgement**

An action for a declaratory judgement requires that the plaintiff has a legitimate interest in a declaratory judgement. If a counterclaim for a negative declaratory judgment is filed in response to a partial action, the Federal Tribunal has consistently held that there is an interest in a declaratory judgment. The Federal Tribunal bases its decision on, among other things, the dispatch on the CPC, in which the Federal Council said that a counterclaim for a negative declaratory judgement shall be possible and the case shall be transferred to the court with greater material jurisdiction.

The authors welcome the Federal Tribunal’s case law on admitting the counterclaim for a negative declaratory judgment. The party confronted with a partial action is impaired in its private legal sphere to the extent that it must defend itself against the basis of the entire claim.

The authors are of the view that the defendant (or principal plaintiff) should be free to file prayers for relief which are limited to the determination of the existence of the disputed legal relationship or liability without having to quantify the total claim. Under the principle of ‘non ultra petita’, a counterclaim for a negative declaratory judgment should not lead to the principal plaintiff being forced to substantiate and prove the entire claim. However, the principal plaintiff can certainly obtain a judgment of performance with corresponding prayers of relief provided that he can quantify and prove the entire claim. With regard to personal injury, proceedings may often also be brought for future damages (eg pension damage).

Efficiency and cost savings also speak in favour of one single court procedure without having to litigate about the same basis of the claim in a later second court procedure again.

In certain cases, the judgment on the partial action has legally binding effect (res judicata) for the remaining part of the claim, eg when a genuine partial action is dismissed due to inadequate substantiation by the plaintiff (DFT 143 III 254, recital 3.6). However, even if there is no legally binding effect, the judge who is responsible for the second proceedings can be guided by the first judgment on the partial action (factual binding effect).

A special case was subject to the decision 4A_194/2012 of the Federal Tribunal dated 20 July 2012. The plaintiff filed a partial action for incidental rental costs in the amount of CHF 30’000. In return, the defendant made a counterclaim for a negative declaratory judgment. The Federal Tribunal upheld the decision of the lower instance which approved the partial action in the amount of CHF 14’162, but dismissed it beyond that and did not admit the counterclaim for a negative declaratory judgment because it denied a legitimate interest in a declaratory judgment. The plaintiff had asserted a total claim of CHF 45’875.70 in his lawsuit, but his prayers for relief were limited to CHF 30’000 and he did not reserve the right to bring a subsequent action for the remaining part of the claim. This matter was still subject to the former cantonal civil procedure law.

The Federal Tribunal considered that the judgement on the partial action has a binding effect (res judicata) for the remaining part of the claim which has been substantiated in the proceedings. Therefore, it was clear how much the defendant owed to the plaintiff. Consequently, the courts denied a legitimate interest in a counterclaim for a negative declaratory judgment. However, the court said that claims which are based on other facts which were not asserted in the proceedings about the partial action remain reserved. The defendant had not asserted that such claims were in dispute though.
7. Leading case on partial action and combination of actions

In its decision DFT 144 III 452 of 28 August 2018 the Federal Tribunal commented on the civil procedural requirements that arise when parts of several claims are brought in court by means of a partial action in a so-called combination of actions.

The plaintiff filed a partial action for corporate liability with regard to a part of six individual damages which were alleged to have been caused by various culpable breaches of duty by three defendants in their functions as a member of the board of directors, auditor and de facto corporate body.

The Federal Tribunal clarified that the plaintiff does not have to specify in which order and/or to what extent the individual damages must be assessed by the court. It is sufficient if the plaintiff substantiates and evidences a claim exceeding the amount of the prayers for relief of the partial action.

The Federal Tribunal considered that, if the partial action was to be approved, the reasons for the judgment would indicate the extent to which the court had assessed the claims with legally binding effect.
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