

COMPENSATION IN INSOLVENCY PROCEEDINGS

Roxana Maria ROBA*

ABSTRACT: *The paper aims to analyze the institution of mutual claims compensation in insolvency proceedings, with emphasis the general and special requirements provided by Law no. 85/2014 on insolvency prevention and insolvency procedures. The advantages of this institution as well as controversial practical aspects of case law will also be highlighted.*

KEYWORDS: *compensation; insolvency; certain debt; mutual claim; discharge of obligations.*

Jel Code: K 22

DOI: 10.62838/cjjc-2024-0076

1. INTRODUCTORY CONSIDERATIONS. COMPENSATION NOTION

Compensation is defined as a means of extinguishing two reciprocal and similar obligations existing between two persons, so that each is simultaneously creditor and debtor of the other (Pop, et al., 2012).

Compensation is therefore the legal means of extinguishing two reciprocal obligations up to the competition of the lesser of them or, if the obligations subject to compensation are of equal value, these obligations are extinguished in their entirety.

2. THE LEGAL FRAMEWORK

The regulations of common law in the matter of compensation are found in the Civil Code ¹, art. 1616-1623, of the Fifth Book ("About Obligations"), Title VII ("Straining Obligations"), Chapter II ("Compensation").

The legal framework provided by this regulation includes provisions relating to the concept, conditions and types of compensation, cases where compensation is excluded, the incidence of the grace period on compensation, the order of payment on debts, the claim of compensation by the fidejussor, the effects of compensation to third parties and the possibility of the debtor to oppose compensation in the event of assignment or mortgage

* Lecturer Phd, „George Emil Palade” University of Medicine, Pharmacy, Sciences and Technology of Tirgu Mures, Faculty of Economics and Law, ROMANIA.

¹ Republished in the Official Gazette no. 505 of 15.07.2011.

establishment on the claim in relation to the third party assigning the claim, or respectively beneficiary of the mortgage on the claim, as the debtor accepted or not the assignment or mortgage (Bratis , 2014).

The provisions of article 90 of Law no. 85/2014² states the special conditions under which a creditor has the right to invoke the compensation of his claim with that of the debtor over him when the conditions laid down by the law on legal compensation are fulfilled at the date of opening the proceedings.

3. CLAIMS THAT MAY FORM THE SUBJECT OF COMPENSATION

According to article 1617 of the Civil Code, certain, liquid and chargeable debts, which have as their object a sum of money or a certain quantity of fungible goods of the same nature, may be the object of compensation. Any kind of obligations may be the object of compensation, regardless of their legal, contractual or extra-contractual source, if the object of the benefit consists in the giving of amounts of money or fungible goods of the same nature.

4. SITUATIONS IN WHICH COMPENSATION IS EXCLUDED

According to Article 1618 of the Civil Code, compensation cannot take place in the following cases:

- when the claim results from an act made with the intention of damaging;
- when the debt has as its object the restitution of the good given in the deposit or as a convenience;
- when it has as its object an inessible good.

Also, the compensation is not allowed by Article 1622 para. 2 of the Civil Code according to which the debtor who, being a third party, acquires a claim on the creditor who claims, cannot oppose the compensation against the latter.

5. TYPES OF COMPENSATION

The legal compensation is defined by the provisions of art. 1617 Civil code, meaning that it is that compensation which operates in full law, under the law, without the need for the consent of the parties or for a judicial decision.

The legal conditions of the compensation are described in Article 1617 of the Civil Code, so that it operates as follows:

- a) the obligations are reciprocal, in the sense that they exist between the same persons, each having, in relation to each other, both the capacity of creditor and that of debtor;
- b) the debts are certain, liquid and chargeable, which means the requirement that the debts meet all the conditions in order to confer on the creditor the right to demand enforcement in kind or by equivalent. The certain character refers to the undoubted existence of the claim. The liquid character designates knowledge of the extent of claims.

² Published in the Official Gazette no. 466 of 25.06.2014.

Exigibility refers to the maturity, or the decline from the benefit of the term in favor of the debtor.

c) the debts have as their object the benefit of giving a sum of money or a certain quantity of fungible goods of the same nature, so that, by the effect of the compensation, the parties would be put in the same situation in which they would have been if the mutual benefits had actually been paid;

d) the parties have not expressly or tacitly waived the compensation.

All of this must be met cumulatively.

Also, in case of invocation of compensation after the opening of the insolvency proceedings, the same legal conditions must have been fulfilled before the opening of the proceedings.

Conventional compensation is that category of compensation which operates under the agreement of the will of the parties. This form of compensation is used when the conditions of legal compensation are not met, but the parties have the interest to settle certain reciprocal obligations, either before they become due or by offsetting debts of a different nature (Pop, et al., 2012).

The effects of conventional compensation are identical to those of legal compensation, except that it operates only from the date agreed by the parties.

Judicial compensation is that ordered by the court at the request of the complaining party concerned. The court will consider the reciprocity of the parties' debts, even if the obligations result from different benefits or are not liquid and chargeable simultaneously.

The judicial compensation will take effect from the date of the final judgment by which it was ordered.

6. LEGAL COMPENSATION IN INSOLVENCY PROCEEDINGS

6.1 In order to operate the legal compensation, its conditions must be met at the time of the opening of the procedure, conditions provided for in article 1617 of the Civil Code

Thus, in relation to the provisions of Article 90 of Law no. 85/2014, the conditions provided by law in the field of legal compensation must be fulfilled at the date of opening the procedure.

In the interpretation of this legal text, it has been established in the judicial practice that there are claims prior to the proceedings those claims whose legal source is situated, from a temporal point of view, before the date of opening of the proceedings, even if they are affected by a suspensive condition or a suspensive term, which are fulfilled after the opening of the proceedings. (Decision of the Timisoara Court of Appeal no. 207/2020)

Regarding the court decisions by which the debtor is obliged to pay money, it was argued that the court decision never constitutes a source of debt, therefore the date of birth of the claim will not be the date of the judgment, but the date of the act or fact generating the obligation. The judge only finds the existence of a mandatory report, its birth in the past, so the practitioner will have to identify in the recitals the action that caused the birth of a pecuniary obligation on the debtor (Clopotari, 2018).

The text of article 90 of Law no. 85/2014 establishes the possibility of compensating the mutual debts between the debtor and the creditor, the two paragraphs distinguishing

between the mutual claims that existed at the time of opening the procedure (previous claims) and the mutual claims born after the date of opening the insolvency procedure.

Insofar as compensation is required for an amount resulting from invoices after the opening of insolvency proceedings by an amount due on the basis of invoices issued before the opening of proceedings but which became chargeable after the opening of proceedings, the claim cannot be received.

In other words, it is not possible to demand compensation, up to the competition of the smallest amount, for a claim born during the proceedings with a claim prior to the proceedings. Art. 90 para. 1 of Law no. 85/2014 allows the compensation of the claims born before the opening of the procedure, and paragraph 2 of the same article allows the compensation of the claims born after the opening of the procedure, but in the Insolvency Law there is no basis to be able to request the compensation of a receivable prior to the opening of the procedure with a claim after the opening of the procedure (Craiu, 2019).

6.2. Persons entitled to claim compensation in insolvency proceedings

The provisions of Law 85/2014 provide for the right of any creditor to request the compensation of his claim with that of the debtor over him, when the conditions provided by law regarding legal compensation are fulfilled at the date of opening the procedure. Compensation can also be ascertained by the judicial administrator or the judicial liquidator.

6.3. The usefulness of legal compensation in insolvency proceedings

The usefulness of legal compensation can be seen in several aspects.

From the perspective of the creditor, the essential advantage is that, in the absence of compensation, the creditor should pay his debt in full to the insolvent creditor, but risks being paid only a part of it or not being paid at all the debt he in turn owns.

In relation to the proceedings, the set-off eliminates the need for legal claims for the recovery of amounts owed by the creditor who, in turn, owes money. This saves money and time resources.

6.4 Relevant judicial practice as regards compensation in insolvency proceedings

By Decision no. 19 of 17 February 2020 on the interpretation and application of the provisions of Article 90 (1) and (2) and Article 5 20 of Law no. 85/2014 on insolvency prevention and insolvency procedures, as amended and supplemented, the Court states that by compensation *"each party avoids the risk of insolvency of the other party. In the absence of this means of extinguishing the obligation, if the solvent debtor were to pay his debt and the other debtor were to become insolvent, then the one who made the payment must bear the competition of the other creditors of accipiens. The two creditors, at the same time reciprocal debtors, have a privileged situation, one in relation to the other, because the compensation represents for them a real cause of preference. As such, not by chance, given the special situation in which there is a debtor against whom insolvency proceedings were opened, Law no. 85/2014, by art. 90, regulates the right of the creditor to invoke the compensation of his claim with that of the debtor on his"*.

In jurisprudence³ it was pointed out that the law does not distinguish between situations where the debtor has only one creditor with claims born after the opening of the proceedings or several creditors of this type in the contest. If the legislator intended to

³ Court of Appeal Iasi, Civil Decision no. 26/21 January 2021.

allow for the compensation of reciprocal claims arising after the date of opening of insolvency proceedings only if the creditor is the sole creditor with such a claim at the mass of the debtor's creditors, he would have specified in the content of this text the limits of its application. However, as long as the legislator has not made such a delimitation, the text also applies if the debtor has several creditors with claims born after the date of opening of insolvency proceedings, but only one of them is also a debtor of the debtor, and the mutual claims meet the conditions of compensation.

The parties can no longer invoke the compensation of claims after the manifestation of the will in the sense of waiving the compensation and after this manifestation of the will has produced legal effects, by writing the claim in the preliminary table of the debtor. Thus, the creditor in question is a creditor entitled to request the opening of the insolvency proceedings of his debtor for the entire claim and not for the difference that would result from the compensation of the two reciprocal claims, the debtor being unable to oppose the compensation of the mutual claims⁴.

In Decision no. 2099/2017 of the Bucharest Court of Appeal it was argued that the application of the compensation rules is compatible with the insolvency procedure. To argue that compensation leads to favouring certain creditors or that the priority order of claims is violated is the equivalent of removing from enforcement a provision contained in the insolvency law itself.

The sentence of the Brasov Tribunal no. 668/SIND/2024 ordered the rejection of the appeal filed by the creditor contestants against the refusal of the judicial liquidator to operate the compensation of the mutual claims. It was noted in the recitals of that judgment that it was not possible to set off an amount receivable prior to the initiation of the proceedings, with a subsequent one. Thus, as an exception to the provisions of common law, the text of Article 90 of the insolvency law establishes certain limitations in the matter of the rightful compensation of the mutual claims between the debtor subject to the insolvency procedure and a third party who has in turn the capacity of debtor and also of creditor of the former. The special rule does not allow for the compensation of reciprocal claims which did not meet the common law conditions in order to intervene in legal compensation at the time of the opening of the proceedings. The restriction takes into account the situation where the claim of one of the parties to the legal relationship was certain, liquid and due before the opening of the procedure and the other claim meets these requirements only after the date of opening the procedure. This interpretation of the provisions of Article 90 of Law 85/2014 envisages the elimination of the possibility of compensating such claims, given that, in the context of the competition and collective insolvency procedure, the legislator establishes, for the indirect execution of the obligations, within the framework of Articles 159 and 161, an order of priority at distribution, which cannot be circumvented by such compensations.

By the Decision of the Brasov Court of Appeal no. 218/Ap/2025 it was noted that, in order to operate the legal compensation between the two mutual claims, it is necessary, by reference to the content of Article 90 para.1 of Law 85/2014, that at the date of opening

⁴ The Court of Appeal of Galati, Second Civil Division, decision no. 135/17.06.2020 published in the Romanian Journal of Jurisprudence 5 of 2020.

the procedure, the conditions of compensation, namely the certain, liquid and enforceable nature of the two claims, are met. In the present case, the claim held by the debtor company against the two opposing creditors was not certain at the time of the opening of the proceedings, since, although the obligation to pay the works executed by the contractor is assumed by the signed contracts, its amount was contested. It thus follows from the considerations of the judgment that the beneficiary parties were invoking an improper performance of contractual obligations, so the intervention of the court was needed to settle the dispute between the parties. In these conditions were not fulfilled at the time of the opening of the procedure, 08.05.2018, the conditions of the compensation that intervenes by right, without the need for a court to ascertain, as long as the claim invoked by the contestants was not a certain one.

7. CONCLUSIONS

From a practical perspective, the usefulness of legal compensation cannot be challenged. Thus, it allows the settlement of mutual debts with immediate consequences on the credal mass, thus avoiding costly and lengthy judicial proceedings.

If, by reference to the creditor obtaining the set-off, it obtains full satisfaction of its debt, until the lesser of them is satisfied, the other creditors consider this operation to be rather prejudicial. In this context, the role of the trade union judge is essential, and it is necessary for him to exercise a rigorous legality check regarding the fulfilment of the legal requirements in order to operate the compensation and also to ensure a fair balance in terms of the creditor's right to benefit from this mechanism to extinguish the obligation and the rights of the other participants in the procedure.

A controversial issue is also the moment of finding that the legal requirements relating to legal compensation are met. From this point of view, we consider that it would be appropriate for the legislator to allow compensation also if the claims being contested by the parties their existence is ascertained by final court decisions after the opening of insolvency proceedings.

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