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## THE COMPENSATION FUNCTIONS AS THE WAY OF EXTINGUISHING OBLIGATIONS

### ФУНКЦИИ ЗАЧЕТА КАК СПОСОБ ПРЕКРАЩЕНИЯ ОБЯЗАТЕЛЬСТВ

In this article are emphasized set-off functions as a separate legal institution of civil law: a) function to simplify the extinguishment of obligations and satisfying obligation law; b) function of ensuring realization of obligation law; c) function of a method of defending subjective civil right. All these functions highlight the complexity of institution studied. In order to advance the functionality of this legal institution of civil law system of Republic of Moldova, the author makes suggestions of *lege ferenda*. Function to simplify the extinguishment of obligations and the realization of the obligation law of set-off is analyzed in the light of several application areas especially of the bank, forms of set off in banking relationships being some civil legal structure elements of financial instruments. All this in the context of fast developing banking relationships.

**Key words:** *functions, obligations, warranty, simplification, exception.*

У статті відображені функції заліку як окремого юридичного інституту громадянського права: а) функція спрощення врегулювання зобов'язань і реалізації права вимоги; б) функція, яка гарантує реалізацію права вимоги; в) функція методу захисту цивільного суб'єктивного права. Усі ці функції сигналізують про складний характер досліджуваного інституту права. З метою підвищення функціональності цього юридичного інституту в системі цивільного права Республіки Молдова автор робить пропозиції щодо *lege ferenda*. Функція спрощення врегулювання зобов'язань і реалізації права вимагати заліку аналізується у світлі декількох галузей застосування, особливо банківських. Формами заліку в банківських відносинах є цивільно-правові структури з деякими елементами фінансових інструментів. І все це в контексті запаморочливого розвитку банківських відносин.

**Ключові слова:** *функції, зобов'язання, гарантія, спрощення, засіб.*

В статье отражены функции зачета как отдельного юридического института гражданского права: а) функция упрощения урегулирования обязательств и реализации права требования; б) функция, гарантирующая реализацию права требования; в) функция метода защиты гражданского субъективного права. Все эти функции сигнализируют о сложном характере исследуемого института права. В целях повышения функциональности этого юридического института в системе гражданского права Республики Молдова автор делает предложения по *lege ferenda*. Функция упрощения урегулирования обязательств и реализации права требовать зачета анализируется в свете нескольких областей применения, особенно банковских. Формами зачета в банковских отношениях являются гражданско-правовые структуры с некоторыми элементами финансовых инструментов. И все это в контексте головокружительного развития банковских отношений.

**Ключевые слова:** *функции, обязательства, гарантия, упрощение, средство.*

**Introduction.** Recently, the term is used more and more often because it is impossible to characterize a social (legal) phenomenon to the right value if we do not understand how the given phenomenon is active, working, manifesting its social value. Functions allow the broader feature of the essence and destination of the phenomenon [11, p. 224]. Not only to characterize but also to highlight the imperfections that characterize it at a certain stage of its evolution, especially if we are talking about a legal phenomenon. The legal institution of compensation as a concept and the effects it produces can be thoroughly analyzed in terms of its functions.

The role of compensation within the entire system of ways of extinguishing obligations is determined by its functions. If the performance of the obligation only fulfills the principal and typical function of extinguishing the obligation, then the compensation also fulfills additional functions. This way of extinguishing obligations is set not only to extinguish a civil obligation, but also to fortify it until it ceases. Thus, we consider that compensation is a multifunctional legal institution.

**Applied methods and materials used.** The results of the research were obtained using the following methods of knowledge: synthesis, analysis, and comparison. The analytical method contributed to highlighting the particularities of the regulation of offset functions in the legislative acts.

**Results and discussions.** Following the analysis of the specialized literature, the judicial practice and the legal effects of the compensation, we found that besides the main function of the compensation to discharge an obligation, it still performs the following functions: a) the function of simplifying the settlement of obligations; the realization of the claim; b) function to guarantee the realization of the right to claim; c) function of the method of defense of the civil subjective right. In the literature, some of these functions are also called “practical utilities” [8, p. 578] or “practical advantages” [16, p. 359] of the compensation. We believe that in order to comprehensively determine the role of compensation in the obligatory ratios, it is much closer to using the term of functions. This includes the broad application of compensation.

*The function of simplifying the settlement of the obligation and realization of the right to claim.* Throughout its existence, compensation was a convenient way of mutual satisfaction of debt rights [24, p. 760]. As stated in the Draft Common Frame of Reference (DCFR), compensation rules can be regarded as based on the principle of efficiency [14, p. 95]. This principle is one of the most practical principles among the four principles underpinning DCFR (Freedom, Security, Justice and Efficiency).

As many Romanian authors point out, compensation is a simplified way of fulfilling obligations by avoiding two payments of those expenses, the loss of time and the risks involved in any payment [13, p. 488; 17, p. 379]. We support this view, but in our opinion, by the syntax, “simplified way of fulfilling the obligation”, it is necessary to understand the simplification of the realization of the right of receivable, but not a procedure by which the way of extinguishing the obligation through execution is applied more simplistically. Compensation is a distinct way of extinguishing the obligation. Thus, in our opinion, compensation does not exist in order to be easier to apply the way of extinguishing the obligation by execution, but the obligation itself is extinguished in a simpler way, avoiding not only the application of the way of extinguishing the obligation by execution, but and the application of other ways of extinguishing the obligation (such as recording the creditor’s delay and novatization) that are more complex. The idea we are promoting does not contradict the opinion of the Russian author Irina Shoumeiko, who in his doctor’s thesis about the problems of fulfilling the obligations, points out that “the obligations that must not be executed do not even exist” [31, p. 14] on the grounds that the obligation that is extinguished by offsetting results in the satisfaction of the creditor’s claim as well as the execution of the obligation. Although such an extinguished obligation could also cease by enforcement, being compensated, the same legal result is obtained.

Once the way of extinguishing the obligation is not enforced, the debtor who also has the creditor quality is exempt from performing certain acts of execution in kind [25, p. 15]. Therefore, by exempting both parties from the execution of the obligation, double enforcement is avoided [17, p. 379]. Thus, parties that each have the capacity of creditor and debtor to each other, to pay a sum of money, their mutual pecuniary obligations will be extinguished by offsetting without performing any actions for the payment of these sums of money.

In principle, we consider that the existence of most of the grounds for discharging the obligations is due to the need to ensure the proper execution of the obligations. Any simplification of the obligatory ratios, and especially the simplification of the clearing obligation, ensures the proper execution of the obligation.

We assume that the simplification of the clearing obligation function makes the simpler form of the legal act of extinction of the obligation easier. For example, in the case of the certification of the extinction of the obligations through execution, in order to prove the existence of the legal act of extinguishing the obligation by execution, which must, according to art. 210 par. 1 of the Civil Code of the Republic of Moldova to be concluded in writing, the debtor shall request from the creditor the receipt, the return of the original title or the authenticated notarial statement regarding the extinction of the obligation according to art. 644 of the Civil Code of the Republic of Moldova. We note that, from the interpretation of the provisions of art. 644 of the Civil Code of the Republic of Moldova, most of these documents are issued by the creditor. However, in order to prove that the obligation has been extinguished by offsetting, the debtor is to prove the fact of declaring the obligation to be compensated by his own act, which is not drawn up by the creditor. Therefore, the debtor’s situation regarding the proving of the settlement of the obligation by offsetting is simpler than if it was extinguished by execution. The problem of proving

the extinction of the obligation is more complex in the case of the recording, the fortuitous impossibility of execution, the remission of the debt, the death of the natural person or the liquidation of the legal person.

Given that compensation is more applied to pecuniary obligations, the mechanism that it involves contributes substantially to saving money. This aspect of the function analyzed is evidenced by the French authors Philippe Malaurie, Laurent Aynès, Philippe Stoffel-Munck, arguing that this is one of the reasons why contemporary practice develops compensation [12, p. 699]. The widespread application of compensation allows to reduce the monetary mass necessary for its normal circulation [29, p. 454]. But not only compensation can be applied to perform this function in case of extinction. In this regard, according to the Russian author I.A. Isaev there is a payment system that does not involve money circulation. This system includes: compensation, exchange, assignment of debt, release of the bill of exchange, issuance of the deposit certificate, issuance of other securities [28, p. 18]. Under this scheme, compensation is one of the most effective ways to pay without cash.

Every business is interested in the speed with which its money flows. The rhythm, stability and outcome of each economic agent’s activity depend largely on financial means [26, p. 13]. It is right that the financial operations performed on the basis of the compensatory mechanism contribute to the actual reduction of cash when making payments. Some payment systems widely applied in the financial sphere of the state work similarly to the compensation mechanism in order to reduce cash payments. It is well known that there are four means of payment in pay-per-transaction payment: cash payments; transmission of credit obligations (debt); clearing of reciprocal claims; factoring operations [21, p. 49].

*Function to guarantee the realization of the claim.* Compensation is a guarantee because the creditor, by offsetting his claim against the debtor with his debt to him, is sure to satisfy his claim, at least to the value of his debt to his own debtor. This guarantee enables, in particular, the creditor to avoid the risk of insolvency of the debtor. If he did not operate the compensation and the debtor would pay his debt, while the other debtor would become insolvent, then the solvency would find himself unable to meet his or her claim, in full or in part, as it would have to bear the competition of the other creditors of his debtor. By offsetting debts, he avoids this, because he himself satisfies his debt against his debtor [19, p. 406]. Also, the risk of the correlative obligation [6, p. 59] can be avoided by applying the compensation. The amount of the claim whose satisfaction is guaranteed by a right to compensation is in the value of the equality between the claim and the opposite obligation.

In the present paper, we use the phrase guarantee of satisfaction of the claim, given that the compensation performs its warranty function without executing acts in order to settle the obligation. Therefore, this offset function can be understood only in the broad sense of the means of guaranteeing the satisfaction of the right to claim but not as a means of guaranteeing the fulfillment of the obligation.

A theoretical issue that we see fit to resolve is the determination of the place of this guarantee within the entire guarantee system of the satisfaction of the claim, using the broad meaning of the notion of collateral.

In art. 329 par. 1 of the Civil Code of the Russian Federation and in the specialized Russian literature [27, p. 50], several legal mechanisms are exhaustively listed as means

of ensuring the fulfillment of the obligations: the criminal clause, the pledge, the retention, the fiduciary, the guarantee banking, money and other means provided by law or contract. The Civil Code of the Republic of Moldova does not contain an article that would stipulate in a similar way all the guarantees of execution of the obligations, although it admits as a whole a non-limiting system of guarantees of satisfaction of the obligations. In our opinion, compensation in terms of its warranty function is part of the other means of guaranteeing the realization of the claim. These are not expressly covered by the Civil Code in their head. 6 “Means of Guaranteeing the Execution of Obligations” in Title 1, “About the Obligations in General” of the Third Book [3], perform their function of guaranteeing the satisfaction of the right of receivables regulated in other chapters of the Civil Code.

Concerning the exception to the contract, we do not agree with the opinion of the author T.P. Fahretinov explaining that, from the point of view of legal effects, these institutions are similar: the extinction of a definite obligation. But the economic consequences are different. In the case of compensation, in a certain amount the payments between the parties are extinguished and the economic effect is equivalent to the actual execution: the mutual transfer of the advantages and the extinction of the debt. In the case of the non-performance of the contract, the economic effect consists in the fact that the obligation of the party who did not fulfill the obligation “turns” (identically or in another amount) into the obligation to repair the damage [30]. In this respect, the function of guaranteeing the realization of the right to compensation by way of compensation can not be compared with the exception of the performance of the contract, since the latter is not limited to the strict assurance of the claim, but can give rise to the other part of an obligation to repair the damage caused by non-fulfillment of the obligation.

An important issue that is dealt with under each guarantee is whether compensation serves as the creditor’s reason for satisfying his claim with preference to other creditors. This issue is to be analyzed in the reports attended by gajist creditors and chirographic creditors.

In the first case, does the question arise whether the compensation is a guarantee that gives a creditor a privileged position to the creditors of the collateral? This question is answered in the light of the prerogatives that these two categories of creditors have. If the subjective right of pledge empowers the creditor to pursue the object of pledge [23, p. 156; 9], which is always a good, then the right to compensation gives the privilege holder the right to influence the active element of the patrimony, but not a good. Thus, within the limit of the pledged asset, the pledgee is entitled to satisfy its claim with priority over other creditors. However, the right to compensation does not affect a good, but only the active element of the debtor’s patrimony. Therefore, we conclude that the compensation in terms of the guarantee function does not give the creditor a privileged situation in relation to the pledged creditors.

In the latter case, the offsetting confers a privileged situation to the creditor, a preoccupation with the other chirographic creditors with whom he would normally have to compete [19, p. 406]. Although the law does not provide for this privilege, it stems from the essence of the prerogatives of compensation to influence the active element of the debtor’s patrimony. The chirographic creditor, having a gener-

al pledge on the debtor’s patrimony, does not have certain prerogatives on it [17, p. 350]. The existence of this general and common guarantee in many situations is insufficient [22, p. 141]. But in the case of compensation, the chirographic creditor has at his disposal the active element of the debtor’s patrimony. The creditor under compensation may make some changes in the contents of the debtor’s patrimony. Thus, we note that in respect of a single claim, in terms of the guaranteeing function of the compensation, the creditor is of a double quality: he is a creditor whose claim is secured in the part covered by the opposite obligation, and, respectively, a creditor for the part of the debt is not covered by the opposite obligation.

In order to ensure the performance of the warranty function of the compensation, it is necessary that the provisions of the Civil Code, which provide for the general concept of compensation, stipulate the priority given by the creditor to compensate other creditors. Not included in Chapter VI “Means of guaranteeing the execution of obligations” of the Civil Code of the Republic of Moldova, which is correct, in order to identify the guarantee that compensation is required, a legislative specification of the priority given by the compensation of a creditor to other chirographic creditors.

*The middle function of civil rights protection.* The Civil Code of the Republic of Moldova provides the holder with a complex legal means of defending his rights [1, p. 138]. In particular, art. 11 of the Civil Code provides for eleven methods of defense of civil rights as protective measures [15, p. 6], they are also called “methods of defense of civil rights”. Compensation as a way of extinguishing obligations, in our opinion, can be categorized as a group of means of defense of civil rights not listed in art. 11 of the Civil Code, and this one of the following considerations:

- it is a measure of protection for creditors who can submit concurrent claims [2, p. 513];
- has as an object the extinction of an obligation, but also the realization of a subjective right of claim;
- may be a solution for the dispute between the parties.

In the provisions of art. 21, par. 1 of the Consumer Credit Contracts Act [10], the legislator appoints a defense against the creditor: “In cases where the creditor’s rights under a credit agreement or the contract itself are transferred to a third party, the consumer is entitled to invoke against the transferee any remedy which may be invoked against the original creditor, including the right to compensation where this is provided for by law”. In these recent regulations, compensation was used as part of the broad group of civil defense assets.

In the case law of the Court of Justice of the European Community (Danvaern Production A/Sc/Schuhfabriken Otterbeck GmbH & Co.) [5], compensation is also regarded as a defense option for one party. On the basis of this possibility, the parties can plead for legitimate interests. So, the defense that compensation can offer in binding debts is incontestable.

In our view, compensation is a species of middle defense, and more specifically, “exception”. In the same sense, the doctrine of Roman private law calls it an “exception in the defense of the applicant” [20, p. 967]. In the explanatory dictionary of the Romanian language, the exception is also defined as “a means of defense in a dispute, aiming either at postponing its settlement, in removing the complainant’s claims without going into the examination of the dispute” [7].



From its analysis, we find that the important feature of an exception is that its application cuts the litigation without the court having access to the litigation. Processual scholars call it “defense on the merits” [18, p. 55]. However, given that exceptions are related to the exercise of the right to action, the doctrine of civil law also leads the “exception” to be a substantive defense [4, p. 99].

The Civil Code does not explicitly list exceptions as a means of defending civil rights. However, the legislator uses the exception term in order to regulate special legal relations to designate the means of defense specific to these civil relations. We note that in almost all provisions of the legal norms of the Civil Code of the Republic of Moldova in which the mechanism of exceptions as a means of defense is used (Article 128, par. 4, Articles 527, 534, 539, 547; Article 560, Article 570, Article 591, par. 2, Article 600, Article 711, letter “d”, Article 724, Article 766, par. 1, Article 1157 1161, par. 1, Article 1162, Article 1297, par. 1, Article 1312), the legislator included in its group also the compensation. For example, art. 570 of the Civil Code of the Republic of Moldova

stipulates expressly that the compensation is an exception, and in the category of the exceptions that the fiduciary may claim against the creditor, according to art. 1157, par. 4, compensation is also part of it.

**Conclusion.** Compensation is, in particular, a defense against the other party to the binding legal relationship. Other exceptions include other ways of extinguishing obligations such as: performance of obligations, confusion, resolution. Compared to this, in our view, compensation as an exception is based on the holder’s invocation of the existence of a claim against the one opposing an obligation. However, the three exceptions referred to contain an objection in itself, while compensation in substance does not imply the existence of that component. The stated aspect expresses the effectiveness of settling disputes by way of compensation relating to the challenge of a claim. All of this on the grounds that the obligation ceases with the operation of the compensation.

Given that compensation is being used to fulfill several functions, we conclude that it is not only a multifunctional legal institution but also an interamural one.

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