

PhD Thesis-Summary

Key words: set-off, obligation, payment, judicial rapport, reciprocity, exigibility - due, liquid, effect, law.

The PhD thesis entitled "Theory and Judicial Practice in set-off domain" belonging to the PhD-student Andreea-Livia Turculeanu, having as scientific coordinator Univ.Prof.PhD. Ion Dogaru – correspondent member of the Romanian Academy, is structured on six titles and ends with a bibliography as follows:

Title I Introduction in the Study of Compensation

Chap. I General Overview

Section I Modes of Extinguishing Obligations "*per exceptionem*"

A. *Compensatio*

B. *Pactum de non petendo*

C. *Transactio*

D. *Praescriptio temporalis*

E. Reaching the Extinctive Date

F. Fulfilling the Extinctive Condition

Section II Modes of Extinguishing Obligations "*ipso iure*"

A. *Solutio* (payment)

B. *Confusio*

C. *Impossibilium nulla obligatio*

D. Forgiving the Debt

Section III In Brief, Set-off Today

Chap.II Short History of the Judicial Institution of Compensation

Section I

A. Set-off in Roman Law

I. Before Marc Aurelius

II. From Marc Aurelius and up to Justinian

III. Justinian and the Time After His Reign

1. Conditions

a. To Coexist

b. To be Homogenous

c. To be Exigible - due

d. To be Liquid

e. To be Reciprocal

2. Cases in which the Set-off Mechanism Does Not Apply

3. Consequences of Fulfilling the Requested conditions

Section II Set-off in Old Romanian Law

Title II Set-off in the System of the 1864 Romanian Civil Code

Section I Payment – General Mode of Extinguishing Obligations

A. About payment

B. Who Can Make the Payment

C. Exceptions

D. The Persons Entitled to Receive

E. Object of the Payment

F. Principle of Indivisibility

G. Exception to the Principle of Indivisibility of Payment

Section II Obligation in Romanian Law

A. Classification of Obligations

1. Classification According to Origin

2. Classification According to their Nature

3. Classification According to Opposability

4. Classification According to Relation to Modalities

5. Classification According to Sanction

B. Positive Obligations

1. Obligation to Give

2. Obligation to make

C. Negative Obligation

1. Obligation not to Do

D. Origins of Obligations

Section III Set-off, Way of Extinguishing Only Applicable to Certain Obligations to Give

Section IV Reciprocity of Obligations to be Set-off

A. Theoretical Application of the Term of Reciprocity

B. Practical Application of the Term of Reciprocity

Section V Conclusions Payment – Set-off

Chap. II Functioning of the Set-off Mechanism

Section I Realizing the Extinctive Effect

A. Condition of the Extinctive Effect

I. Liquidity

II. Exigibility- due

III. Fungible Character

IV. Simultaneity

B. Importance of the Extinctive Effect

C. Automatic and Legal Character

Section II Extinguishing the Two Obligations

Section III Exceptions to the Set-off Mechanism

A. Restitution of a Good Unlawfully Taken from the Owner and of an Irregular Deposit

B. Un-sizeable Debts

Section IV Un-sizeable Goods Belonging to Persons

A. Goods Excepted from Enforcement as Inalienable

B. Goods Excepted by Law because of Their Use

I. Goods Needed for Everyday Living

1. Art. 406-407 Romanian Civil Procedural Code

2. Art. 150 Law no. 8/96

3. Art. 151 Romanian Fiscal Procedural Code

II. Wages and Periodic Income

1. Art. 409 Romanian Civil Procedural Code

a. Established Judicial Regime

b. Manner of Calculation

c. The Same Sum of Money Followed by Numerous Creditors

2. Art. 140 Romanian Civil Procedural Code

a. Debts Towards the State

b. Exceptions Based on the Rights of Third Parties

c. Exceptions Based on the Will of the Parties

Sections V Conclusions on the Functioning of the Set-off Mechanism

Chap. III Starting the Set-off Mechanism

Section I Role of the Will in Applying the Set-off Mechanism and Realizing the Extinctive Effect

A. Will – Legal Set-off without the Intervention of the Will of the Parties

Section II Legal Set-off

A. Invoking Set-off

I. Manifestation of Will

II. Who Invokes Set-off

III. Need to Invoke Set-off

B. Rights of Third Parties

C. Sequestration of Goods

D. Liquidation Procedure

E. Not Invoking Set-off

I. Art. 1153 Romanian Civil Code

1. Conditions of Protection

2. Protected Persons

3. Un-opposable Guaranties

4. Measure of Protection

F. *Actio Pauliana*

I. Beneficiaries of Protection

II. Means of Protection

Section III Facultative, Conventional and Judicial Set-off

A. Facultative and Conventional Set-off

I. Activity of Parties

1. Facultative Set-off

2. Conventional Set-off

II. Third Parties Rights

1. Protection of Acquired Rights

2. Protection in Case of Fraud

B. Judicial Set-off

I. Power of Appreciation of the Judge

1. Admissibility of Counterclaim

2. Acknowledgement of the Claim

II. Limits of the Powers of the Judge

Title III Set-off in Other Branches of Law

Chap. I Set-off in Various Law Branches

Chap. II Set-off in Civil Law

Chap. III Set-off in Commercial Law

Chap. IV Set-off in Fiscal Law

Section I Differences Between Set-off and Compensation in Fiscal Law

Section II Set-off at Will of Fiscal Debts

Section III Set-off by law of Fiscal Debts

Section IV Order in which Fiscal Set-off Take Place

Title IV Set-off in Comparative Law

Chap. I English Law

Section I Origins and Development

Section II Consequences of Application

Section III Differences between Compensation and Set-off

Section IV *Compensatio* – Conditions

Section V Set-off in Particular Cases

Section VI Debts that Cannot Be Set-off

Chap. II German Law

Chap. III Italian Law

Chap. IV Spanish Law

Chap. V French Law

Chap. VI Greek Law

Title V Set-off Mechanism in the Project of the New Civil Code

Title VI Conclusions

This thesis has as purpose clarifying the institution of set-off as a way of extinguishing debts. This way does not imply the intervention of the judicial system and thus presents the benefit of a short period of time in which two reciprocal debts are extinguished partially or in their entirety. The complex

subject of the thesis presents numerous aspects of theory and practice in the general theory of obligations.

I looked to very clearly determine the domains of interest, respectively:

- conceptual definition of the origins of obligations;
- presenting the importance of obligation rapports in civil law;
- presenting the system of extinguishing obligations in the Romanian judicial system;
- analyzing the effects of extinguishing obligation rapports;
- describing and analyzing the instruments and mechanisms to entering obligation rapports;
- analyzing each institution that plays a role in extinguishing the obligation rapports;
- identifying the common characteristics between the institution of payment and that of set-off;
- identifying similar institutions or ones that have the same purpose and means of action in different legal European systems.

The institution of obligations is the most important one in Romanian civil law, and the means through which the obligation rapport is brought to an end is a very big part of the Romanian judicial system. The role of obligations in judicial life is determined by the fact that they are the base of any legal rapport, and they are encountered in all sections of law. In Roman law, the notion of obligation was initially understood as a purely material bond between debtor and creditor – *vinculum corporis* – but the development of Roman society made the bond become a purely legal one – *vinculum iuris* – which permits the debtor to ask from the creditor to give, do or not do something, with the possibility for the creditor to ask enforcement upon the belongings to the debtor.

The classification of obligations is, among other criteria, made following certain aspects as exemplified next:

- Origin of the obligation;
- Object of the obligation;
- Opposability of the obligation;
- Judicial Sanction;
- If they are or are not affected by modality-time or condition.

Mainly, obligation is analyzed as a legal rapport between the creditor and the debtor. The creditor is an active subject of the obligation rapport, and the debtor is a passive subject, which is in debt with the creditor at the execution of an action.

In the introductory part of the thesis, the author characterized the terminology used and its origins, determining the place of the legal rule in Romanian legal system. At the same time, she underlined the role obligations fulfil in everyday file of individuals, discussing various means to extinguish a legal obligation rapport. Thus, it was brought to light the principle of contractual liberty, as basis of civil law.

Contractual liberty may be seen as component of individual freedom, as a subjective right to enter into contracts according to positive law and within the limits provided by it. From the principle of contractual freedom one can understand that the effects of a contract take place only between contracting parties and their successors. Third parties are strangers to entering the contract and must remain strangers for its effects as well – *res inter alios*. The freedom to enter into contracts and the position of legal equality are aspects of great importance in civil law in Romanian legal system.

The second chapter presents itself as an opportunity to uncover the origins and history of set-off, the author discussing the conditions that the obligations must fulfil in order to be extinguishable. An important step in the

development of this institution were Legiuirea Caragea and the Calimach Code, in which there are proofs the word "răfuială" was used when referring to set-off in old Romanian law.

The second title is dedicated to the set-off mechanism, as it is treated in the civil code at present. For an as exact and clear description of the institution as the author wanted to make, the comparison method was chosen. But, in order for it to have the desired effect, the comparison needs the characteristics of the most used way of ending obligations that helps reach the effect the contracting parties wanted when entering the contract-the execution of the debt. Ending it means considering an obligation as executed when liberation from payment of the debtor has occurred. Judicial means that realize the extinction of obligation are partially named in art. 1091 Civil Code.

Generally, by payment one understands the execution of any positive obligation. Specially and in everyday language, payment means the execution of an obligation to give a certain sum of money. The law maker has determined payment as a civil judicial act, meaning a convention between the one who makes the payment and the one who receives it. Payment is rigorously determined by the civil code in Book III, Title III, chapter VIII between the articles 1092 and 1121.

The comparison between payment and set-off has as focus their objects, theoretical and practical implication of each of them, the object of the obligations that they end and the possibility of any exceptions.

The civil code article that states that set-off is applied by law is a source of debating in this thesis, as it gives way to the discussion on the role of the will of the subject of a right, reported to the manner in which the extinction of obligations is started within the mechanism of set-off. The principle of autonomy of will that lays at the basis of the relativity of effects in contracts limits the number of people that can be harmed by those effects.

The persons that can be touched by the effects are just the contracting parties and any extensions of these effects beyond the circle of persons that took part in the contract can only be as an exception to the rule, an exception whose explanation must be perfectly argued. But there is still the real will of the parties to dominate, as the civil act is essentially voluntary and obligatory only for those who gave their consent to entering the contract.

From the point of view of the effects of contracts, they are produced before those persons who, by their manifestation of will, have created them modified it or extinguished it. Because its origins lay in the will of the people, it is only natural that it shall produce its effects on the parties that wanted these effects, and third parties shall remain untouched. Relativity of the obligatory effect is in harmony with the doctrine of individualism for autonomy of will. A contract cannot create obligations for third parties, in the same manner in which one will cannot force itself on another will.

Thus, civil legal rapport can be defined as the social relationship, patrimonial or personal unpatrimonial, determined by the legal rule, starting with the definition of the legal rapport in general. The social relation must be determined by law in the civil branch. This means that a social relation becomes civil judicial rapport and enters the law under the form of editing a civil rule which determines its purpose.

Thus, any rapport is a social relation, not all relations are of judicial nature. There are such relations such as that of friendship that does not make the object of law in general, such relations are of the ethic domain. The special characteristic, which distinguishes a legal rapport from a social relation, is the fact that, in case of need, executing a certain legal rapport is ensured with the force of the state.

Sections two and three of the third chapter describe each type of set-off and its characteristics: legal, judicial, facultative and conventional.

The importance of this institution in our legal system is demonstrated by the fact that civil law, commercial law and fiscal law use certain elements that are part of what that entire set-off mechanism.

In the fourth title, the content is dedicated to comparative law. In countries such as United Kingdom of Great Briton and Northern Ireland, France, Germany, Italy, Spain and Greece there are institutions with identical or similar mechanism to set-off in Romania.

The fifth title is dedicated to the discussion containing the determination made to set-off by the new civil code project. There are new aspects debated, new ways of expressing the will of the law-maker and new influences from other European countries that can be found in the new articles of the project. The entire thesis is brought up-to-date by the references made to the newest and most relevant decisions made by the courts.