

Set-off without mutuality (compensation ex personae tertii) in business relations

Abstract

The aim of this thesis is to answer the question whether the statute contains exhaustive or non-exhaustive list of cases in which a person may set-off without mutuality. Accordingly, whether it is possible to negotiate the set-off of claims where mutuality cannot be found. I have done so by analysing selected cases of set-off without mutuality. I have described the cases expressly embodied in the statute, as well as those on which the Supreme Court of the Czech Republic has already ruled. The objective was to uncover the meaning and purpose common to all these exceptions and, with this knowledge, to establish a method that will lead to an answer to the question of whether the set-off without mutuality can be counted in a particular case.

The first section of this thesis explains what is meant by the creditor's entitlement to demand satisfaction of his/her own claim. I came to the conclusion that this category includes not only mature claims, but also a case when the time of performance is determined in favour of the creditor [according to the section 1962 (3) of Act No. 89/2012 Sb., the Civil Code]. I have used this conclusion as a reasoning throughout this thesis.

In the following section, I categorized the ways of offsetting without mutuality and further examined them. I have answered selected questions related to them and then uncovered their meaning and purpose.

First, I addressed the debtor's authority to set off without mutuality when several debtors are obliged to perform jointly and severally, and when several creditors are entitled jointly and severally. Then I described the assignment of a claim and debtor's right to invoke against the assignee all rights of set-off which were available against the assignor at the time of assignment. In this section, I have included two cases of set-off without mutuality to which the assignment rules also apply. Namely, the case of subendorsement as well as situations where a third party has intentionally satisfied debtor's debt without latter's consent and without any obligation to do so. Afterwards, I discussed a controversial judgment in which the Supreme Court did not grant the surety the right to set off debtor's claim against the creditor. I opposed this decision and suggested that the surety should at least be granted the right to (temporarily) withhold performance from the creditor. In the next section, I have spelled out why the issuer of a financial guaranty generally does not have the right to set off the debtor's claim against the creditor. Lastly, I outlined the circumstances under which I would allow parties to negotiate set-off without mutuality, pointing out how the Supreme Court currently assesses such agreements.

In conclusion, I summarized when it should be possible to set off without mutuality even if the statute does not expressly allow it, and why. Finally, I have outlined a procedure which was designed to answer whether it is possible to set off without mutuality even in cases non resolved in this thesis.

Keywords: set-off, mutuality, defence