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LIMITATIONS ON THE POSSIBILITY TO SETOFF IN LIQUIDATION PROCEEDINGS IN THE HUNGARIAN LAW

Abstract: *After the starting date of the liquidation, there is only a place for setoff in case of special conditions included in the Hungarian Bankruptcy Act. Therefore, if the debtor is in liquidation, the rules of the Civil Code concerning setoff can only be applied with the exceptions set out in the Bankruptcy Act. In the following, we examine the provisions that can be linked to setoff in the Bankruptcy Act or that have some effect on the possibility of setoff. To give a transparent picture of the relevant provisions, we cite the rules of the Act.*

Keywords: *setoff, Hungarian Bankruptcy Act, Hungarian Civil Code, liquidation proceedings, creditor's claims*

I. INTRODUCTION

Although the Hungarian Bankruptcy Act doesn't have a similar rule for the application of substantive law rules as it has for the settlement of conflict of procedural norms in Subsection (3) of Section 6, but according to the legal principle governing the relationship between lex specialis and lex generalis, if the bankruptcy law provides differently from the general rules of substantive civil law, the special rule must be followed. Thus, from the starting date of liquidation, instead of the rules of the satisfaction of creditors' claims laid down in civil law, the rules of the order of satisfaction governed by the Bankruptcy Act have to be applied. After the starting date of liquidation, there is only a place for setoff in case of special conditions included in the Bankruptcy Act. Therefore, if the debtor is in liquidation, the rules of the Civil Code concerning setoff can only be applied with the exceptions set out in the Bankruptcy Act.

The Bankruptcy Act has been amended many times since 1991, including the rules of setoff, yet the problem still raises a number of questions. In many cases, the legislature had to approach the law in response to the solutions of parties trying to circumvent the mandatory rules of liquidation proceedings. In his own legal practice, the author has on several occasions encountered coordinated transactions by other companies with debts to companies in liquidation, which tried to use the legal institution of setoff fraudulently.

In the following, we examine the provisions that can be linked to setoff in the Hungarian Bankruptcy Act or that have some effect on the possibility of setoff.

To give a transparent picture of the relevant provisions, we cite the rules of the Act.

Subsection (1) of Section 27 states, that the court shall order the liquidation of the debtor by way of a ruling if it finds that the debtor is insolvent. The time of the opening of liquidation proceedings is the date of publication of the final ruling ordering liquidation (Section 28). The date of the opening of liquidation proceedings is therefore an objective date, independent of when the parties were informed of it (EBH2003. 961).

According to Subsection (1) of Section 28, upon the ruling ordering liquidation of a debtor becoming final, the court shall without delay appoint the liquidator and shall order to have the abstract of the ruling ordering liquidation and the ruling on the appointment of the liquidator published in the Cégközlöny (Company Gazette). Thus, the ruling ordering liquidation does not actually start the liquidation of the debtor, only with the publishing of the final ruling starts the liquidation. This is of particular importance because Subsection (3b) of Section 26 states, that in proceedings opened at the creditor's request pursuant to Paragraph b) of Subsection (1) of Section 22 the court shall terminate the proceedings without the creditor's consent if the debtor provides proof before the time of the opening of liquidation proceedings of having paid the debt underlying the final ruling ordering liquidation to the creditor in full.

Subsection (2) of Section 28 states, that the notice published shall contain – among others -: the date of filing the petition for the opening of the liquidation proceedings; an indication that the time of the opening of liquidation proceedings coincides with the day of publication of the final ruling ordering liquidation on the website of Cégközlöny; the notice sent to the creditors to report their known claims to the liquidator within forty days of publication of the ruling ordering liquidation.

According to Subsection (2) of Section 34, as of the time of the opening of liquidation only the liquidator shall be authorized to make any legal statements in connection with the assets of the economic operator. The liquidator is in legal relations with third parties related to the assets the person replacing the debtor's senior official in the direction of the authorities and courts, exercising the rights of the senior official, unless otherwise provided by law (EBH2015. G.2.).

Subsection (1) of Section 35 states, that all debts of the economic operator shall be deemed payable (due) at the time of the opening of liquidation proceedings.

According to Subsection (1) of Section 36, in a liquidation proceeding, with regard to the debtor's claims, right of setoff may be exercised only with respect to such creditor's claims which have been registered by the liquidator as acknowledged and have not been assigned subsequent to the date when the court received the petition for opening liquidation proceedings, or, if the claim has occurred at a later date, subsequent to its occurrence. If performance is affected after the time of the opening of liquidation proceedings, the creditor may not exercise the right of setoff with regard to debts assumed under Section 6:203 of the Civil Code, or undertaken under Section 6:206 of the Civil Code inside a period of two years prior to the date when the court received the petition for opening liquidation proceedings, or subsequently, nor with regard to performance assumed under Section 6:205 of the Civil Code.

However, if the liquidator has assigned the debtor's claim for consideration, the new creditor (assignee) is no longer entitled to the benefit limiting the setoff against the debtor (BH2012. 125).

Subsection (1) of Section 37 states, that the liquidator shall register the claims against the debtor which are notified after forty days, but within one hundred and eighty days of the publication of the opening of liquidation proceedings. These claims shall be satisfied, if there are sufficient funds remaining following the settlement of the debts specified in Subsection (1) of Section 57.

The general rules on the order of satisfaction (Sections 57-58) shall apply to the creditors notifying their claims in the prescribed time limit. According to Subsection (2) of Section 37, in respect of claims, which are incurred in the process of liquidation and which are not qualified as liquidation expenses, if the final liquidation balance sheet has not yet been submitted, creditors' claims shall be notified to the liquidator within forty days following the date when the claim falls due, and the liquidator shall register the claim among the creditors' claims duly submitted within the forty-day time limit. Registration and satisfaction of claims submitted after the forty-day period, but within one hundred and eighty days before the final liquidation balance sheet is submitted, shall be subject to the provisions contained in Subsection (1). Subsection (3) states, that in the cases set out in Subsections (1) and (2), failure to observe the time limit of one hundred and eighty days shall constitute forfeiture of rights.

It can be seen that the Act regulates the process of liquidation proceedings and the possibilities of claim enforcement with strict deadlines, the general limitation period does not play a role here. The primary reason for this is obviously to keep creditors who already have a claim against an insolvent debtor uncertain for only a short time regarding the satisfaction of their claims. However, the law also requires a great deal of attention from creditors, as the limitation period prescribed for their report of claim begins with the publishing in the Company Gazette.

II. THE CREDITOR'S RIGHT OF SETOFF

It has been shown that the Section 36 of the Act regulates the right of creditors to setoff in liquidation proceedings. In the following we try to show the practical application of the latter rules.

We have seen, that in a liquidation proceeding, with regard to the debtor's claims, right of setoff may be exercised only with respect to such creditor's claims which have been registered by the liquidator as acknowledged. This means that the right of setoff is allowed only in respect of a claim which has been reported to the liquidator by the creditor within 180 days of the publication of the order ordering the liquidation and which the liquidator has also registered as acknowledged. The claims already notified and registered during bankruptcy proceedings conducted immediately before the liquidation proceedings [Paragraph e) of Subsection (2) of Section 27] are an exception to the notification obligation.

According to this, the setoff is subject to the following conditions:

– the liquidator registers the claim as acknowledged;
– the claim has not been assigned.

Thus, there is no legal obstacle to the setoff of a claim registered as a registration fee (BH2007. 304.) and the right of setoff belongs not only to the creditor who registers within the forty day deadline, but also beyond the deadline, but within the 180 days.[1]

Subsection (1) of Section 36 regulates the setoff, but only states that the liquidator must register the claim as acknowledged as a positive condition for setoff, but no mention is made of uniformity of the claims neither in the previous nor in the current rule. The Supreme Court ruled in its decision BH 1996/113. that uniformity of the claims is not a condition, because it is not mentioned in the special rule cited above. Thus, it is a criterion according to the Civil Code, but it is not a criterion in liquidation proceedings, because this is not stated in the Bankruptcy Act. In the opinion of several authors, one can agree with Attila Harmathy, who criticizes the decision, because he thinks that it may not be expedient to separate this provision from the rules of setoff in the Civil Code at such a level. From the undoubted fact that the Bankruptcy Act does not mention it as a criterion, it is not clear that non-homogeneous claims can also be setoff. There is no provision in the law that would provide differently from the Civil Code, so the underlying rules of the legal institution regulated by the Civil Code shall also be applied, if they are not in conflict with principles and provisions of the Bankruptcy Act. And the uniformity of claims hardly contradicts these.[2]

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[1] László Juhász, „A magyar fizetésképtelenségi jog kézikönyve I-II.", Budapest 2019. 654-655.

[2] György Schadl – Tamás Ujlaki, „A kettős jelleg egyik megnyilvánulása a polgári jogban: a beszámítás." *Jogtudományi Közlöny 2010/5, 262.*

We have seen that failure to meet the 180-day deadline for reporting a creditor claim will result in forfeiture. However, Subsection (3) of Section 37 does not determine the content of the loss of rights or its substantive legal consequences. Legal practice and the legal literature, on the other hand, interpret the loss of rights uniformly as the final cessation (loss) of the subjective (substantive) right and the claim, which means that the claim does not survive even as a natural bond [1/2010. (VII. 30.) Civil Unity Resolution]. So the rule regulated in Subsection (3) of Section 6:121 of the Civil Code, which states, that if a claim that cannot be enforced by judicial process is satisfied voluntarily, it may not be reclaimed, cannot be applied in this case. Thus, if the liquidator were to satisfy the claim of the 'creditor' who failed to comply with the 180-day time-limit, it could be recovered on the ground of unjust enrichment.

It is unfortunate that jurisprudence sometimes in a lawsuit for restoration (or any other settlement) offsets the uniform and expired services (for example one party's usage fee claim into the other party's interest claim) and thus simply settles the claims of the parties. However, this solution, which seems logical and can be applied in any civil lawsuit outside liquidation proceedings, is in conflict with Subsection (1) of Section 57 of the Bankruptcy Act, which governs the order of satisfaction, and with Section 36, which governs the setoff. In a lawsuit against a bankrupt company, simultaneous enforcement is excluded. The losing defendant must be obliged to return the acquired property (thing or money), however, it can only enforce its own service (for example reimbursement of his investments in the returned property) in the liquidation proceedings.[3]

Thus, pursuant to Subsection (1) of Section 36 of the Bankruptcy Ac, it is basically possible to setoff claims against the debtor during liquidation proceedings. On the other hand, in the case of bankruptcy proceedings, this is not possible under Subsection (2) of Section 11 of the Act. In the opinion of Gábor Zoltán Szabó, the rules of setoff applicable in bankruptcy proceedings are on the one hand unfair and on the other hand unreasonable. The aim of the legislator was presumably that no claim against the debtor could be enforced during the payment moratorium and therefore setoff in bankruptcy proceedings is not possible. However, it is clearly not fair for the law to treat a creditor with a claim eligible to setoff in the same way as another creditor with no claim. [4]

Subsection (3) of Section 38 of the Act states, that from the time of the opening of liquidation proceedings, any pecuniary claim against the economic operator in connection with any assets to be liquidated may only be enforced in the framework of liquidation. The creditor – in the proceedings brought by the economic operator

[3] Sándor Fónagy, „Gondolatok az új Csődtörvény megalkotásához – A csődmegtámadási perek" *Magyar Jog 2008/7, 480.*

[4] Gábor Zoltán Szabó, „A csődeljárás alapvető kérdései" Gazdaság és Jog 2012/11, 3.

– may enforce his claim existing at the time of the opening of liquidation proceedings against the economic operator as a setoff claim, provided however, that the beneficiary of the claim was the same creditor at the time of the opening of liquidation proceedings as well.

Subsection (3) of Section 38 is in accordance with Section 36.

This possibility of setoff was introduced into the Act in its 1997 amendment, that means, that since the 1997 amendment has the Act allowed offsetting in lawsuits initiated by the economic operator. But what does that really mean?

It has been shown that failure to comply with the 180-day deadline for filing a creditor claim will result in forfeiture. This also means that the right of setoff is allowed only in respect of a claim which the creditor has notified to the liquidator within 180 days of the publication of the order of the liquidation and which the liquidator has also registered as acknowledged. A creditor who has not been registered by the liquidator cannot therefore enforce its claim against the economic operator by way of a setoff claim in a lawsuit brought by the economic operator. The court hearing the lawsuit is bound by the final decision made in the liquidation proceedings on the issue of creditor quality (BH2010. 335). However, according to the decision Gf.40401/2009/5. of the Metropolitan Judgment Board, in the lawsuit initiated by the debtor [Subsection (3) of Section 38] the acknowledgement of the creditor's claim is not a condition for the submission of the setoff, a disputed creditor's claim may also be enforced by a setoff. The decision BDT 2011.2605. stated that if the litigation or non-litigation proceedings are initiated before the opening date of the liquidation, the creditor's claim notified in accordance with Subsection (2) of Section 38 – if the liquidator declares it disputable – is decided by the court in the previously initiated litigation or non-litigation proceedings, the liquidator does not have to send it to the liquidation court.

According to the decision published as EBH 2009.2063., a claim enforced as a counterclaim against the debtor before the opening date of the liquidation shall also be notified as a creditor's claim in the liquidation proceedings against the debtor. Failure to file a monetary claim as a creditor claim will result in forfeiture.

However, in a lawsuit initiated by the debtor, the defendant may no longer file a counterclaim after the opening date of the liquidation, it may terminate the debtor's claim against him only by setoff. The debtor must therefore become a creditor in the liquidation proceedings and may be setoff against the debtor in the proceedings against it, while it continues to be a creditor in the liquidation proceedings for the remainder of its claim.

In this regard, it should be noted that the forty-five-day time limit laid down in Subsection (1) of Section 209 of the Code of Civil Procedure or the time limit extended by the court for the filing of a setoff is only relevant in the court proceedings, the submitter of the setoff document must become a creditor in the liquidation of the debtor in order to file such a claim.

Thus, if the debtor has instituted legal proceedings against the person who otherwise has a claim against it, setoff may be filed only by a creditor who has filed a creditor claim in the liquidation and paid the corresponding registration fee within at least the 180 days. In this case, it can setoff. It is irrelevant whether it has a claim that is due or overdue (but filed within one hundred and eighty days) because the law only requires to have an acknowledged claim. (After the expiration of the one-hundred-and-eighty day period, the claim shall also be terminated with respect to the forfeiture period.)[5]

Point cd) of Subsection (1) of Section 3 states, that after the time of the opening of liquidation proceedings, any person who has a claim, whether in money or in kind expressed in monetary terms, against the debtor shall be treated as a creditor, if it was registered by the liquidator. Thus, a person who has no claim registered by the liquidator does not qualify as a creditor. Claims not declared during the liquidation cannot be enforced by offsetting even if the liquidation procedure has meanwhile been terminated by agreement (BDT2008. 1881). In an action brought by an economic operator in liquidation against a claim outside the liquidation proceedings, a setoff can therefore be enforced only if three conjunctive conditions exist: the right to setoff can only be exercised by a person who is a creditor in the liquidation proceedings; the claim must be outstanding at the opening date of the liquidation; the claimant must also be the creditor at the starting point of the liquidation, which means, that the claim cannot be assigned during the liquidation (BDT2008. 1751.).

If the above requirements are met, Subsection (1) of Section 6:50 of the Civil Code cannot be disregarded, which states, that time barred pecuniary claims may be also be offset if the pecuniary claim to be offset had not yet expired at the time when the monetary debt became due.

According to Subsection (4) of Section 6:23 of the Civil Code, prescription may not be taken into consideration ex officio in court or administrative proceedings. However, when adjudicating creditors' claims, the liquidator does not act as a court or authority, but makes statements concerning the debtor's assets by registering or denying the creditors' claims, which only he is entitled to according to the Bankruptcy Act, so of course it can take the limitation period into account, and in my opinion it is also his obligation. This view seems to be supported by the decision BH2000.314., according to which the statute of limitations in the legal relationship of the parties also affects the liquidation proceedings, therefore, a claim which has already expired against the debtor cannot be enforced as a creditor in the liquidation proceedings. With regard to enforcement in the context of liquidation proceedings, it is primarily the special liquidation provisions that apply, but the general rules apply to matters not covered by bankruptcy legislation.

[5] Andrea Csőke "Nagykommentár a csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvényhez" Budapest 2015. Commentary to Section 38.

Subsection (3) of Section 1 of the Bankruptcy Act states, that 'liquidation proceedings' shall mean the proceedings aimed to provide satisfaction, as laid down in this Act, to the creditors of an insolvent debtor upon its winding-up without succession. The regulations of satisfaction are laid down in Section 57 of the Act. According to Subsection (1) the economic operator's debts shall be satisfied from its assets that are subject to liquidation in the following order:

a) liquidation costs described in Subsection (2);

b) the part of a claim secured by a pledge that were not satisfied according to Subsections (1)-(2a) of Section 49/D before the time of the opening of liquidation proceedings

c) alimony and life-annuity payments, compensation benefits,

d) with the exception of claims based on bonds, other claims of private individuals not originating from economic activities, claims of small and micro companies and small-scale agricultural producers,

e) debts owed to social security funds, taxes – with the exception of the tax arrears and compulsory contribution debts described in Subsection (2) – and outstanding public dues enforced as taxes,

f) other claims;

g) irrespective of the time and grounds of occurrence, default interests and late charges, as well as surcharges and penalty and similar debts;

h) claims, other than wages and other similar benefits if below double of the prevailing minimum wage.

Thus, in Hungarian insolvency law, as a general rule, the order of satisfaction according to the title of the claim prevails. In most cases, only creditors at the top of the list can count on at least partial satisfaction of their claims.

The above order of satisfaction also played a significant role in the case – in which the author of the present study was a legal representative – Fpkhf.III.30.148/2020. before the Szeged Judgement Board in which the tax authority acted as a creditor in the liquidation proceedings. The creditor had claims acknowledged by the liquidator in HUF 7,478,623 classified in Section 49/D and in points (e) and (f) of Subsection (1) of Section 57, and on 10 December 2019 it also announced to the liquidator that it has a HUF 13,301,378 claim as liquidation costs according to point a) of Subsection (1) of Section 57. It was also undisputed that during the liquidation procedure, the debtor overpaid a total of HUF 3,714,000, which means that it had a claim of this sum, in the form of a contribution tax, against which the tax authority, as a creditor, made a setoff declaration.

In the present case, the creditor submitting the objection had a claim registered as acknowledged by the liquidator, in respect of which it was undisputed that no assignment had taken place and there were no other exclusionary circumstances specified in Section 36 of the Act. Therefore, the creditor who raised the liquidation objection initiating the proceedings was entitled to exercise the right of

setoff, as it had a claim against the debtor. The effect of setoff is that, to the extent of the setoff, the creditor obtains its claim by disregarding the order of satisfaction, which is entirely true if the creditor has a claim belonging to one group of the order of satisfaction or all claims belonging to different groups of the ranking recoup due to offsetting. However, it must be held differently if the creditors' claims fall into different categories of the order of satisfaction and, after offsetting, not all the creditors' claims cease to exist, a circumstance which also existed in the present case.

The creditor submitting the objection had in excess of the amount of its debt to be setoff a claim qualifying as a liquidation cost pursuant to point a) of Subsection (1) of Section 57, which in the case of the creditor tax authority is subject to the provisions of points b) and d) of Subsection (2) of Section 57 as it consisted of the payment of taxes, contributions and other public charges payable after the opening date of the liquidation, which the liquidator – in accordance with Subsection (2) of Section 37- had to register without separate notification. The overpayment of the debtor arose during the liquidation, after the starting date of the liquidation. Therefore, if the creditor were to offset his debt in the debtor's debt incurred before the starting date of the liquidation, it would be in a doubly advantageous position vis-à-vis the other creditors, as part of his claim will be recovered and his remaining claim will be ranked in the first place according to Subsection (1) of Section 57, so it has a higher chance of recovering during the liquidation proceedings. Therefore, despite the existence of a claim pursuant to point a) of Subsection (1) of Section 57, offsetting into debts ranked in point e) of Subsection (1) of Section 57 means the abuse of rights in accordance with Subsection (1) of Section 1:5 of the Civil Code and violates the order of satisfaction regulated in Section 57.

In view of this, the amount of the overpayment incurred during the liquidation can be setoff in the creditor's claim, which qualifies as a liquidation cost, and not in the creditor's claim incurred before the liquidation. So, the liquidator did not act unlawfully by refusing the setoff requested by the creditor.

Also taking place with the legal representation of the author of the present study, in the case before the Capital City Judgment Board numbered 11.Fpkhf. 44.338/2019., the debtor had a claim for a tax refund of HUF 31,000 against the tax authority, which was also a creditor. The creditor had acknowledged claims of HUF 115,000 ranked in point a) of Subsection (1) of Section 57; HUF 1,333,973 + HUF 596,027 ranked in point e) of Subsection (1) of Section 57; HUF 200,000 ranked in point f) of Subsection (1) of Section 57 and had a claim ranked in point g) of Subsection (1) of Section 57. There was a dispute between the parties as to which category of the overpayment could be setoff in the creditor's registered claim, which category of the acknowledged creditor's claim could be reduced. The creditor complained that its setoff statement had not been accepted by the liquidator and

that its claims were kept unchanged. The liquidator did not change the amount of either the creditor's category e) or category g) claim.

However, in the opinion of the Metropolitan Judgment Board, the primary question is who can make the setoff and how. The Board pointed out that the liquidator (other party) does not have to give its consent, it does not have to accept unilateral legal declaration of the creditor (which contains the setoff) according to the rules of the Civil Code, and consequently the letter on which the proceedings are based contains only the liquidator's position on the settlement of the overpayment of tax. This reply cannot be considered as a specific liquidation measure and therefore no objection can be raised. By submitting the tax return and indicating the overpayment, the liquidator indicated to the tax authority that the debtor has such a claim against the tax authority. If the liquidator modifies the registered claim of the creditor with regard to the overpayment of tax, than it is an actual action of the liquidator and if the creditor does not agree with this modification, he may object to the measure.

An objection may arise if the debtor's liquidator takes a measure to setoff the debtor's claim in the creditor's acknowledged and registered claim and therefore reduces the amount of the creditor's claim registered so far, which the creditor concerned considers to be detrimental.

However, the Board also generally agreed with the liquidator's position that a creditor's right to setoff can only be exercised without harm to Subsection (1) of Section 57 and Subsection (3) of Section 1 even if Section 36 of the Bankruptcy Act does not prescribe any further restriction on setoff, because Subsection (1) of Section 1:5 of the Civil Code also prohibits the abuse of rights in civil law relationships.

Subsection (1) of Section 36 was amended by the XLIX Act of 2017. The cases of the above section of the Bankruptcy Act related to the restriction of the right of setoff have been supplemented by the legal declarations concerning the assumption of debts by the debtor regulated by the new Civil Code. The supplement is intended to prevent possible abuses. However, it should be emphasized – as explained by the Capital City Judgment Board, for example, in its decision 12.Fpkhf.43.255/2020/2. – that the legal opinion that the inclusion of a restriction on setoff in connection with the assumption of a debt in the law justifies that setoff was previously permitted in such a case is erroneous.

As the panel of judges has stated in the above-mentioned decision, as well as in several previous decisions, in the absence of a specific prohibitory, restrictive provision, in a case the setoff that can be given as a basis for abuse is contrary to the purpose of the legislation.

The legislator merely clarified the exclusions of setoff in addition to assignment.

Therefore, the position that the inclusion of debt assumption in Subsection (1) of Section 36 also proves that previously after the debt was assumed, the per-

formance was possible by offsetting, is wrong. Acceptance of such a position would result in one creditor owing a significant amount to the debtor being discharged by offsetting the claim of another creditor who assumed the debt of the above creditor up to the amount of the second debtor's claim to the detriment of the interests of all the other creditors.

The decision published under ÍH 2016.158. of the Metropolitan Court of Appeal also stated that the procedure by which the creditor of the economic entity (debtor) in liquidation intends to setoff its claim in the debt acquired by assuming a debt to the debtor cannot be considered lawful because its circumvents the rules of the Bankruptcy Act for ranking creditors' claims, and thus reduces the basis for satisfaction for creditors ranked higher.

A debt assumption contract is void if the content of the parties' intention to circumvent the law can be established beyond a reasonable doubt.

The following position was also adopted at the court hearing held at the Debrecen Judgment Board on June 8, 2018: "The deliberation unanimously concluded that the application of the rules on setoff in the Bankruptcy Act can't be circumvented with debts assumed or with performance assumed. There can be no room for abuse of the law in this way."

Therefore, the VI. Novella of the Bankruptcy Act amended the law, stating that if performance is affected after the time of the opening of liquidation proceedings, the creditor may not exercise the right of setoff with regard to debts assumed under Section 6:203 of the Civil Code, or undertaken under Section 6:206 of the Civil Code inside a period of two years prior to the date when the court received the petition for opening liquidation proceedings, or subsequently, nor with regard to performance assumed under Section 6:205 of the Civil Code. According to the explanatory memorandum, this amendment is intended to prevent possible abuses.

At the meeting held at the Pécs Judgment Board on 15 September 2017, the question arose as to what to do if the liquidator or creditor does not acknowledge the setoff.

"Question X / 1: If the creditor 's setoff statement is not accepted by the liquidator on the basis of the setoff prohibition, how can the creditor' s damage be remedied?

The Government Decree 225/2000 on the accounting tasks of liquidation (XII. 19.) states that the creditor's debt and claim shall be reduced by the amount set off pursuant to Section 36 of the Bankruptcy Act. If the liquidator does not reduce the creditor's debt and claim as a result of the creditor's setoff statement, then it fails to comply with its obligation. Based on this omission, the creditor may file an objection in which it must ask the court to order the liquidator to reduce its debt and claim by the amount set off. If Section 36 prohibits setoff, the objection must be rejected.

However, this only applies to the setoff statement made by the creditor. If the liquidator wishes to setoff a debtor's claim against the creditor and the creditor disputes the debtor's claim, this dispute cannot be settled in the proceedings initiated on the basis of the objection, because the question of whether the debtor has a claim against the creditor, does not fall within the jurisdiction of the liquidation court. If the creditor does not recognize the debtor's claim, the liquidator must sue."[6]

Section 58 of the Act contains provisions on the order of payments. These are complemented by the rule in Subsection (4) on the settlement of personal guarantee and compensation claims, which is worth addressing briefly.

Point d) of Subsection (1) of Section 57 (which determines the order of satisfaction) – with the exception of claims based on bonds – contains the claims of private individuals not originating from economic activities, claims of small and micro companies and small-scale agricultural producers.

Subsection (4) of Section 58 states, that the liquidator shall commission another economic operator for the settlement of future guarantee, warranty and indemnification obligations considered customary in the trade, while simultaneously transferring the amount allocated for this purpose in accordance with Paragraph d) of Subsection (1) of Section 57, and shall make it public or shall grant a lump-sum compensation to the entitled parties. The liquidator is only obliged to set up a separate fund to meet the guarantee claims if there is adequate asset cover (EBH2002. 673). In the liquidation proceedings, as a general rule, only outstanding and due claims can be enforced; only private individuals, small and micro companies, and agricultural producers are entitled to enforce a latent creditor claim arising from a non-economic activity (BH2008. 219.). The liquidator's obligation, to commission another economic operator for the settlement of future guarantee, warranty and indemnification obligations considered customary in the trade and make it public or grant a lump-sum compensation to the entitled parties exists only against the group of persons defined by law (BDT2010. 2343).

It is clear that the holder of future warranty and indemnity obligations cannot setoff in the event of a possible debt to the debtor because it does not have a homogeneous and overdue claim, so it cannot apply to the liquidator under Section 36 either, because he has no claim, moreover, he cannot be a creditor under point c) of Subsection (1) of Section 3 of the Act.

III. CONCLUSION

After the starting date of liquidation, there is only a place for setoff in case of special conditions included in the Bankruptcy Act. Therefore, if the debtor is

[6] László Juhász, „A magyar fizetésképtelenségi jog kézikönyve I-II.", Budapest 2019. 655-656.

in liquidation, the rules of the Civil Code concerning setoff can only be applied with the exceptions set out in the Bankruptcy Act. In a liquidation proceeding, with regard to the debtor's claims, right of setoff may be exercised only with respect to such creditor's claims which have been registered by the liquidator as acknowledged and have not been assigned subsequent to the date when the court received the petition for opening liquidation proceedings, or, if the claim has occurred at a later date, subsequent to its occurrence.

The liquidator shall register the claims against the debtor which are notified after forty days, but within one hundred and eighty days of the publication of the opening of liquidation proceedings. Failure to observe the time limit of one hundred and eighty days shall constitute forfeiture of rights. We have seen, that the Act regulates the process of liquidation proceedings and the possibilities of claim enforcement with strict deadlines, the general limitation period does not play a role here. The primary reason for this is obviously to keep creditors who already have a claim against an insolvent debtor uncertain for only a short time regarding the satisfaction of their claims. However, the law also requires a great deal of attention from creditors, as the limitation period prescribed for their report of claim begins with the publishing in the Company Gazette.

We have seen, that in a liquidation proceeding, with regard to the debtor's claims, right of setoff may be exercised only with respect to such creditor's claims which have been registered by the liquidator as acknowledged. This means that the right of setoff is allowed only in respect of a claim which has been reported to the liquidator by the creditor within 180 days of the publication of the order ordering the liquidation and which the liquidator has also registered as acknowledged. The claims already notified and registered during bankruptcy proceedings conducted immediately before the liquidation proceedings are an exception to the notification obligation.

According to this, the setoff is subject to the following conditions: the liquidator registers the claim as acknowledged; the claim has not been assigned. Thus, there is no legal obstacle to the setoff of a claim registered as a registration fee and the right of setoff belongs not only to the creditor who registers within the forty day deadline, but also beyond the deadline, but within the 180 days.

Subsection (1) of Section 36 regulates the setoff, but only states that the liquidator must register the claim as acknowledged as a positive condition for setoff, but no mention is made of uniformity of the claims neither in the previous nor in the current rule. The Supreme Court ruled in its decision BH 1996/113. that uniformity of the claims is not a condition, because it is not mentioned in the special rule cited above. Thus, it is a criterion according to the Civil Code, but it is not a criterion in liquidation proceedings, because this is not stated in the Bankruptcy Act. But from the undoubted fact that the Bankruptcy Act does not mention it as a criterion, it is not clear that non-homogeneous claims can also be setoff.

There is no provision in the law that would provide differently from the Civil Code, so the underlying rules of the legal institution regulated by the Civil Code shall also be applied, if they are not in conflict with principles and provisions of the Bankruptcy Act. And the uniformity of claims hardly contradicts these.

It is unfortunate that jurisprudence sometimes in a lawsuit for restoration (or any other settlement) offsets the uniform and expired services (for example one party's usage fee claim into the other party's interest claim) and thus simply settles the claims of the parties. However, this solution, which seems logical and can be applied in any civil lawsuit outside liquidation proceedings, is in conflict with Subsection (1) of Section 57 of the Bankruptcy Act, which governs the order of satisfaction, and with Section 36, which governs the setoff. In a lawsuit against a bankrupt company, simultaneous enforcement is excluded.

REFERENCES

Csőke Andrea, "Nagykommentár a csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvényhez" Budapest 2015.

Fónagy Sándor, „Gondolatok az új Csődtörvény megalkotásához – A csődmegtámadási perek" Magyar Jog 2008/7.

Juhász László, „A magyar fizetésképtelenségi jog kézikönyve I-II.", Budapest 2019.

Schadl György – Ujlaki Tamás, „A kettős jelleg egyik megnyilvánulása a polgári jogban: a beszámítás." Jogtudományi Közlöny 2010/5.

Szabó Gábor Zoltán, „A csődeljárás alapvető kérdései" Gazdaság és Jog 2012/11.

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Ограничења могућности пребијања потраживања у поступку ликвидације у мађарском праву

Сажетак: *Након покретања поступка ликвидације, пребијање потраживања је могуће само у складу са посебним условима прописаним мађарским Законом о стечају. Стога, ако је над дужником покренут поступак ликвидације, односна правила о пребијању потраживања из Грађанског законика могу бити примењена само уз поштовање изузетака прописаних Законом о стечају. С тим у вези, у раду ће бити испитане одредбе Закона о стечају које се могу довести у везу са пребијањем потраживања, или које могу имати утицај на могућност пребијања потраживања. Да би се приказала јасна слика о релевантним одредбама, оне ће, на одговарајућим местима, бити цитиране.*

Кључне речи: *пребијање потраживања, мађарски Закон о стечају, мађарски Грађански законик, поступак ликвидације, повериочева потраживања.*

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