

The Principle of Balancing Benefits and Losses in Contract

论损益同销原则

By Zheng Haotian (under the editorial supervision of Mary Zhu)

It is generally accepted that the principle of balancing benefits and losses (the “Balance Principle”) refers to a debt law system that the obligee for the compensation both suffers losses and gains benefits due to a damaging incident and is therefore only entitled to claim compensations from the obligor with such benefits deducted.

理论中普遍认为损益相抵是指赔偿权利人基于发生损害的另一原因受有利益者，应由损害额内扣除利益，而由赔偿义务人就其差额赔偿的债法制度。

Under the Contract Law system, the Balance principle and other four principles (the principles of complete compensation, foreseeability, mitigation and contributory negligence) are together followed when compensation for loss caused by breaking a contract is to be decided.

在合同法领域，它与完全赔偿原则、合理预见原则、减轻损害原则、过错相抵原则共同构成违约损失赔偿原则。

The last four principles are accordingly stipulated in Article 113, 119 and 120 of the Contract Law. However, Balance Principle was not included in the Contract Law or the Civil law, but based on the principles of good faith, fairness and compensatory characteristic of damages, the balance principle is an inherent part of the principles of damages compensation. Furthermore, the judicial practice also adopted this principle. However, due to a lack of directions, it is not uniformly determined throughout the judicial process.

后四个原则分别在合同法的第 113 条、119 条和 120 条有所规定。然而损益相抵原则在民法通则和合同法中都未规定，但基于诚实信用原则、公平原则和损害赔偿的补偿性特点，损益抵消原则应是违约和侵权损害赔偿原则的应有之义，司法实践中也已经适用。但因缺少相关规则，具体适用时，各法院做法不一。

The Interpretation of the Supreme People’s Court on Issues Concerning the Application of Law for Hearing Cases of Sale and Purchase Contract Related Disputes (the “Interpretation”) which was ratified on March 31, 2012, and became effective on July 1, 2012 formally established this principle.

2012 年 3 月 31 日通过、7 月 1 日实行的《最高人民法院关于审理买卖合同纠纷案件适用法律问题的解释》（“解释”）正式在买卖合同中确认了该原则。

Since the sale and purchase contract is the reference to other contracts, this principle is established on a wider scale. Article 31 of the Interpretation stipulates:

鉴于买卖合同的规定是其他有偿合同的参照，因此该原则在更广泛的范围内得以确认。解释第 31 条规定：

...where here a party to the sale and purchase contract gains benefits from the breach by the other party, and the breaching party claims a deduction of such benefits from the compensation for losses, the people’s court shall uphold such claim.

买卖合同当事人一方因对方违约而获有利益，违约方主张从损失赔偿额中扣除该部分利益的，人民法院应予支持。

This article provides some guidance for the realization of the deductible benefits in the application of the balance principle. According to the “interpretation”, the composed elements of balance principle have to include the following cardinal ground:

这对于可予扣除利益的识别具有指导意义。这也正是损益相抵规则的重点和难点，实践中争议纠纷之所在。根据“解释”，损益相抵原则的构成要件至少包括以下几点：

- The debt of compensation is caused by contractual breach. This is the precondition. Once satisfied, it is necessary to determine the scope of damage compensation for breach and the balance principle is just an element to limit the scope.
- 违约损害赔偿之债已经成立。这是前提条件。即只有构成违约损害赔偿之债时，才有必要确定损害赔偿范围，而损益相抵恰恰是限制损害赔偿范围的因素。

Because of the precondition, benefits produced during the performance of the contract can not be deducted. For example, the price of the goods rises after the conclusion of the sale and purchase contract to the advantage of the buyer. The seller cannot make use of such benefit gained by the buyer during the performance of the contract by the buyer.

基于此前提的限制，“合同履行中受有利益”则不适用损益相抵原则。如买卖合同订立后，因买卖的标的物的货物价格上涨，买受人因而受有利益，当买受人请求履行契约时，虽然该项所得利益系因买卖合同的缔结使然，然而出卖人不得请求扣除买受人所得利益

Furthermore, the balance principle is not applicable when a party asks for reducing the payment in the following case:

Party A sells goods to Party B, and the quality of the goods turns out to be inferior. As a result, Party B requests a reduction of the goods amount. However the inferior quality does not affect the price when Party B resells the goods to Party C. Under such circumstance, Party A is not titled to claim for an offset against the deduction of goods amount by the benefits produced from Party B’s reselling.

请求少价金行为也不适用于损益抵消原则。如甲售乙一批货物，品质与约定相比较劣，乙请求减少价金，但将此物售给丙时，价格并未受影响。对此，甲在酌定减少价金时，不得主张乙因转卖得利而损益相抵。

In summary, the balance principle is not applicable for the above two cases, because there is no debt of compensation caused by breach of contract.

以上两种情况均不适用损益抵消原则，究其原因，都是因为不具备违约损害赔偿之债成立这一要件

- Losses and benefits must be at the same time caused by a same default.

② 违约行为造成了损害和收益。即损害和收益是同一违约行为的不同结果

Under this principle, when an obligee to compensation gets benefits through his own endeavor which is not his obligation, such benefits can not be offsetted.

根据此条件，在无义务的情况下，赔偿权利人通过自己的努力而获得的利益不在损益相抵原则中可予扣除的利益范围中

Below is an example.

Party A as the ordering party refuses to accept the appliances processed by Party B as the contractor. Party B then modifies the appliances and sells them to a third party.

Consequently Party A, as the breaching party, shall compensate Party B for the latter's total losses. Party A is entitled to claim for an offset against the total amount of the compensation by the residual value of the appliances before their modification, but not by the benefits produced from selling the appliances to the third party.

That's because the losses are caused by default, while benefits are merely the result of the contractor's modification. Obviously the losses and benefits are not based on the same cause.

比如定作方拒绝接收特定设备，加工方在对该设备进行改进后又转卖给他人。定作方应当赔偿加工方的全部损失，虽然对于该设备改进前的残值定作方可以主张损益相抵，但其不得以该设备转卖所得的收益主张损益相抵。因为损害事实是违约的结果，而该设备能够转卖收益完全是加工方进行改进的结果，即损害和收益不具有同源性。

Similarly, the money and property offered to the non-breaching party by a third party out of sympathy or whatever other reasons cannot be deducted. That's because the amount donated by the third party is not the result of the breach of contract.

同理，违约事故发生后，基于对受害人的同情、帮助渡过难关、或基于其他原因和动机，第三人赠送给受害人的财物、金钱等，不得扣减。因为此赠与是基于第三人的意思，而非违约行为。

□ Further, the purpose of the benefits should be also considered. The benefits can be deducted only when they are for the purpose of mitigating losses or narrowing down the scope of compensation.

③ 如果损害与利益具有同源性，则应当进一步考察该利益的产生是否在于减轻损害赔偿，缩小加害人的赔偿范围。若非此种目的，则不适用损益相抵规则：

We take a case where the occurrence of damage is set as the precondition of succession as an example. The victim to the damage inherits the benefits because the precondition for succession has been satisfied. However, the breaching party cannot claim for a deduction because the benefits are not to exempt the breaching party but to benefit the victim (the successor).

例如，以违约损害事实的发生为继承开始条件的，受害人因这一事实真正成就而继承了利益，则这一继承利益不得扣减。因为该继承利益的产生并不是使违约人免责，而是仅仅使受害人（继承人）受惠。

Similarly, the pension, retirement money or other benefits arising from the same damage as stipulated by law cannot be deducted. The reason is the same: the law aims

to protect the victims and their alive family members, but not to lower the compensation due from the breaching party.

同样，法律规定的基于同一违约损害事实而发生的抚恤金、退休金等利益也不得扣减，同样因为法律之所以给予此等利益，旨在使具有一定身份的受害人及其遗属获得相当程度的保障，其中并无为了减轻违约人损害赔偿的意思，自然不应允许损益相抵。

The circumstances listed above are most common in the field of tort law, but we can also take them as reference for damages for breach of contract.

尽管以上所列情形有些常见于侵权法领域，但是笔者认为去其对违约损害赔偿也具有参考价值。

On one hand, Article 31 of the “Interpretation” makes the application of the balance principle more practically feasible and uniform.

On the other hand, since the actual cases are more complicated than what we have discussed, legal professionals need to do more work to settle the disputes and improve the application of the balance principle.

总之，买卖合同司法解释第三十一条对损益相抵原则的规定使该原则在司法实践的运用中更具有操作性，做法趋于统一，但由于实践中案件更加复杂，仍有许多争议问题需司法工作者不断探索，总结经验，完善损益同销原则。