LA TERCERA PARTE DE LOS PRINCIPIOS DE DERECHO CONTRACTUAL EUROPEO

THE PRINCIPLES OF EUROPEAN CONTRACT LAW

PART III

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INTRODUCTION

Chapter 13 of the Principles of European Contract Law, Part Three, deals with the institution of «set-off» in seven provisions. In order to reach a common solution for both English and Civil Law systems, the Commission on European Contract Law not only had to understand the roots of the institution in both Common and Civil Law, but it also had to examine its variations within the Civil Law world. Indeed, despite common origins in Roman Law, Continental codifications had adopted very different approaches to the operation of set-off. The ambit of this paper does not allow to present in detail the developments of set-off from its origins to the Lando-Principles. I have done it elsewhere\(^1\) and Reinhard Zimmermann has extensively discussed the issue in two of his publications\(^2\).

At first sight, the Principles might appear as revolutionary, in particular in regards to the effects of set-off (art. 13:106). As we will...
see, they should be considered as taking the consequences of the evolution of the institution on the Continent and in English Law very seriously. Within approximately 150 years, most European Legal Systems largely converged on the exercise of set-off, even though they dragged on some remaining elements of the old conception of set-off. In order to understand the main provisions of the (European) Principles on Set-off, I will divide my presentation into three parts: I will, first, discuss how set-off operates (I.), and will then consider the substantive requirements for it (II.). Finally, I will shortly present the effects of set-off (III.).

I. THE OPERATION OF SET-OFF

The operation of set-off is conditioned by two aspects. First, it depends on whether set-off is a procedural or a substantive device (I.) and, secondly, on how set-off is triggered in the absence of an agreement between the parties (2.). Indeed, in everyday life, set-off is often unproblematic, because it is usually based on a reciprocal agreement to set off obligations. Since this possibility of contractual set-off is undisputed and recognised in all legal systems, we will not address it in further detail.

1. From a procedural to a substantive device

Set-off is the institution which permits that, when two obligations are reciprocally opposed, they can be extinguished up to the smaller amount if the requirements fixed by the applicable law are fulfilled. However, as we all know, under this apparently simple definition a number of different modes and requirements are hidden. This variety of modes of set-off on the Continent and in English Law finds its roots in the fact that set-off was first understood as a procedural device.

This procedural nature had as a result that set-off was only possible through the rendering of a judgment, which implied the necessity to file a lawsuit in order to set-off two reciprocal claims. This was the case in Roman Law, whose ways to set-off were linked to the various forms of actions (bonae fidei iudiciae4; agere cum deductione of the honorum emptor in case of bankruptcy5, specific set-off for bankers—the so-called argentarius6—and set-off in the actiones stricti iuris by means of an exceptio doli7).

This was and still is partly the case in English Law, which knows of at least four various devices for set-off: (1) legal (or statutory) set-off and (2) common law abatement, which were initially made possible by Statutes adopted to protect insolvent debtors, (3) equitable set-off, which was introduced in Equity only and based on «natural justice» and (4) insolvency set-off, which is the only device understood as an automatic substantive device. The scope of this paper does not allow us to get into the evolution of these various modes of set-off8. What is however striking in English Law is that, despite the unification of proceedings through the Judicature Acts of 1873 and 1875, it kept the idea that set-off operates «as a shield, not as a sword» to borrow the well-known words of Chief Justice Cockburn in Stooke v. Taylor (1880)9. In relation to legal (or statutory) set-off, Lord Hoffmann expressed «this idea» ten years ago in Stein v. Blake (1995) by saying the following: «Legal set-off does not affect the substantive rights of the parties against each other, at any rate until both causes of action have been merged in a judgment of the court»10.

On the Continent, set-off (compensatio) had already become a substantive device at the time of the Glossators, which means that the effects are produced independently from the rendering of a judgment. They understood very well that it was important to free

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4 For more details see Pichonnaz, La compensation, n. 75 sqq.
5 Pichonnaz, La compensation, n. 314 sqq.
7 For more details, see Pichonnaz, La compensation, n. 591 sqq.
9 (1880) 5 QBD 569, 575, per Cockburn C.J. (C.A.).
10 Stein v. Blake, [1996] A.C. 243, 251, per Hoffmann L.J. (H.L.), see also p. 256 «[Legal set-off] is given effect only in the judgment of the court.»
the institution of set-off from the various local procedural laws, in order for it to become a general and common institution\textsuperscript{11}. Therefore, they understood set-off as being operated automatically\textsuperscript{12}. The defendant was however generally asked to invoke his cross-claim in front of the judge, since the judge could not be expected to guess the application of compensatio (or, in the words of Medieval Lawyers, *quid iudex utique divinare nequit*)\textsuperscript{13}. The obligations were therefore discharged ipso iure and not because of the judgement. This substantive approach still prevails on the Continent.

*In English Law*, there is now a tendency towards a substantive approach of set-off, although mainly in regard to equitable set-off. Thus, in the so-called Nanfrì case of 1978\textsuperscript{14}, Lord Denning, M.R., and Lord Goff underlined the substantive nature of equitable set-off. Lord Goff stated that «it cannot be right, in my judgment, that this defence is not operative until the claim has been agreed or awarded.\textsuperscript{15} A number of other decisions then followed the same path\textsuperscript{16}. Based on this series of cases, some scholars, including Philip Wood, Sheelagh McCracken, and, more reticently, Rory Derham now consider that when the requirements of equitable set-off are fulfilled, a party may validly declare set-off by means of a cross-claim\textsuperscript{17}. Set-off would thus operate without a Court injunction. Even Roy Goode, who initially rejected this opinion\textsuperscript{18}, left the question open in 1995 by writing the following: «What is not clear is whether set-off is purely procedural, so that it does not relieve the defendant from liability in respect of the plaintiff's claim except at the point of judgment, or whether in certain circumstances it operates as a substantive defence»\textsuperscript{19}.

The Principles of European Contract Law consider set-off as a matter of substantive law\textsuperscript{20}. This clearly lies in the continuity of the evolution and is a welcome choice, since it enables the generalisation of the same requirements for almost all hypotheses.

### 2. Set-off by notice

**Article 13:104 PECL** reads as follows: «[Set-Off by notice] The right of set-off is exercised by notice to the other party\textsuperscript{21}. The Comment on this provision states that «an informal, unilateral, extrajudicial declaration to the other party is sufficient to declare set-off»\textsuperscript{22}. In accordance with the substantive nature of set-off, the comment continues by stating that «if the matter subsequently comes to court, the judgement has a merely declaratory effect: it does not bring about the set-off but merely confirms that it has been brought about\textsuperscript{23}. The solution chosen by the PECL is the most appropriate one for several reasons:

\textsuperscript{11} Pichonnaz, *La compensation*, n. 979 sqq.


\textsuperscript{18} Royston Miles Goode, *Legal Problems of Credit and Security*, 2nd ed., London 1998, p. 140. He though acknowledged that «there is a view that in some cases this may provide a substantive defence. Certainly there are dicta lending colour to this suggestion».


\textsuperscript{20} PECL-Part III, Comment ad art. 13:101, p. 139.

\textsuperscript{21} PECL-Part III, Comment ad art. 13:104, p. 148; [The Principles can also be found on Internet: http://www.cbs.dk/departments/law/staff/ol/commission_on_ec/index.htm].

\textsuperscript{22} PECL-Part III, Comment ad art. 13:104, p. 148.

\textsuperscript{23} PECL-Part III, Comment ad art. 13:104, p. 148.
A. The convergence of all systems towards set-off by notice

A large number of legal systems already practice set-off by notice, such as German Law (§ 388 BGB)\textsuperscript{24}, Swiss Law (art. 124 CO), Austrian Law in the actual interpretation of § 1438 ABGB\textsuperscript{25}, Greek Law (art. 441 CC), Portuguese Law (art. 848 CC) and Dutch Law (art. 6:127 BW), as well as Nordic Law systems\textsuperscript{26}.

Moreover, a closer look at the evolution in countries with a so-called automatic set-off regime surprisingly shows that most of them have now adopted a regime equivalent to set-off by declaration. In Italian or French Law, the tendency appeared more recently than in Austrian Law, where the Pandectists' Doctrine already played an important role at the beginning of the 20th Century\textsuperscript{27}. In Italy for instance, in spite of the wording of art. 1242 CC\textsuperscript{28}, which expresses the idea of an automatic set-off, the majority of recent Italian authors consider that set-off operates by constitutive declaration, which can even be extrajudicial\textsuperscript{29}. The same is apparently also true for Spanish Law\textsuperscript{30}. In French Law, the role of the will of the parties has become more and more central, with the so-called facultative set-off and the automatic set-off conditioned by declaration\textsuperscript{31}; in those cases, the pseudo-automatic effect of set-off will not take place unless a party invokes it\textsuperscript{32}.

B. Greater flexibility to meet the economic interests of the parties\textsuperscript{33}

To let each party decide when she wants to set-off her obligation is economically more efficient than an automatic set-off regime. Dogmatically, it is also more coherent with the idea that the obligations are discharged because of the will of one party. In the regime of automatic set-off, with or without allegation, the requirement of liquidity (or ascertained claims) does not foresee the possibility of set-off. That is exactly one of the reasons why the legal systems based on automatic set-off created a new way for not yet liquid or ascertained claims, i.e. the so-called judicial set-off, such as provided for in art. 124 para. 2 CC\textsuperscript{34} and in the French «compensation judiciaire»\textsuperscript{35}. As


\textsuperscript{25} Pichonnaz, La compensation, n. 1688; Paul Friedrich von Wyss, Motive und auf Grund der Kommissionsbeschlüsse vom September 1877 bearbeiteten neuen Redaktion des allgemeinen Teiles des Entwürfs zu einem schweizerischen Obligationenrechte, Berne 1877, p. 32 (cité: Motive).


\textsuperscript{27} See references in PECL-Part III, Comment ad art. 13:104, p. 149.

\textsuperscript{28} Pichonnaz, La compensation, n. 1774 sqq.


\textsuperscript{30} Compare art. 1202 CC. and art. 543 old Ley de Enjuiciamento Civil, and Diego-Picazo II, 4\textsuperscript{th} ed. 554 sqq.


\textsuperscript{32} For the evolution in French Law see Pichonnaz, La compensation, n. 1751 sqq.; see also the judgment by the French Cour de cassation commerciale, Com., 6.2.1996, Bull. civ. IV, n. 42, in: D.1998.87, obs. V. Bremon.

\textsuperscript{33} Pichonnaz, La compensation, n. 2010.

\textsuperscript{34} Se il debito opposto in compensazione non è liquido ma è di facile e pronta liquidazione, il giudice può dichiarare la compensazione per la parte del debito che riconosce esistente, e può anche sospendere la condanna per il credito liquido fino all'accertamento del credito opposto in compensazione.; see on this point, Pichonnaz, La compensation, n. 1649 sqq.; Elena Merlin, Compensazione e processo, t. I, Milano 1991, p. 8 sqq.

\textsuperscript{35} Pichonnaz, La compensation, n. 1819 sqq.; for more details on this subject see René Cassin, De l'exception tirée de l'inexécution dans les rapports symmétrologiques (exception non adimpleti contractus) et ses relations avec le droit de rétention, la compensation et la résolution, th., Paris 1914, p. 191 sqq.
Terre/Simler/Lequette, three French authors, put it: «A la réflexion, l'automatisme de l'effet extinctif présente plus d'inconvénients que d'avantages».

C. Procedural advantage of the extrajudicial notice

The idea of an extrajudicial notice is an achievement of Swiss and German drafters, who were able to definitively free themselves from the Pandectist’s idea that set-off can only be declared in front of a judge. The availability of set-off outside of a courtroom allows to reduce the dispute brought in front of the judge. Of course, as soon as a party rejects the declaration of set-off, they might go to court, but the judgement will have a purely declaratory effect, i.e. it will merely state that the notice of set-off had already produced its effects, if the requirements were fulfilled. Of course, the invocation of set-off in front of a court will have to fulfill the procedural formal and time requirements. If it is not done correctly, the judge will not have to deal with the question of the cross-claim. The defendant will, however, be able to bring the cross-claim again in another proceedings.

II. THE SUBSTANTIVE REQUIREMENTS

Article 13:101 PECL reads as follows: «Requirements for Set-Off»

If two parties owe each other obligations of the same kind, either party may set off that party's right to performance («claim») against the other party's claim, if and to the extent that, at the time of set-off, the first party: (a) is entitled to effect performance; and (b) may demand the other party's performance.

The requirements are in fact common to most Continental and Common Law systems. Mutuality of claims and obligations of the same kind constitute the essence of set-off and will not be discussed further in this paper, though difficulties might of course arise in relation to these requirements as well. It is however worth mentioning in this respect that the Principles set a specific rule for set-off between claims expressed in different currencies. According to that rule, each party may set-off his claim against the claim of the other, unless the parties have agreed that the claim is to be paid exclusively in the specified currency (arta. 13:103 PECL). The situation is thus similar to the one provided for payment (arta. 7:108 PECL).

Three further requirements are worth mentioning: (1.) The cross-claim must be due; (2.) the declaring party must be entitled to perform; and (3.) ascertainment (liquidity) is a condition of set-off.

1. Cross-claim must be due

Set-off constitutes a form of enforcement of the cross-claim, since by declaring set-off the creditor compels the debtor to perform by having his obligation discharged. Yet it is not always certain that the debtor wanted to discharge his obligation at that time, and set-off can therefore only be legitimate if the debtor of the obligation was not only entitled to perform, but rather had to perform, because the obligation (cross-claim) was already due. This requirement is self-evident in any system built on automatic set-off and is also acknowledged in all Continental systems.

It is however important to stress this requirement with respect to the second point, which is that the declaring party must be entitled to perform her own obligation.

36 See article 13:103 PECL.
38 See the references in PECL-Part III, Comment ad art. 13:101, p. 140.
2. The declaring party must be entitled to perform

The principal claim (i.e. the obligation of the person declaring set-off) does not have to be due at the time of set-off; it is sufficient that the declaring person is entitled to perform it. Indeed, by declaring set-off, the debtor of the principal claim performs. Yet, one may have the right to perform long before the claim is due. On the contrary, if the debtor is not already entitled to perform (e.g. because the parties agreed that performance should not be made before a specific date) or if the debtor is no longer entitled to perform (e.g. because the principal claim has become subject to an order of attachment), she is not able to declare set-off.

3. The question of liquidity (ascertainment)

The most delicate question is to determine whether or not the cross-claim used to discharge the principal obligation by way of set-off should be liquidated, i.e. ascertained as to its existence or value.

The origin of the requirement of liquidity goes up to the Emperor Justinian, who formalized the idea that a judge should not take a cross-claim into consideration for compensatio, if it appears to the judge that the dispute underlying this claim could not be easily solved. One could speak of a procedural liquidity requirement. This is for instance the case of the English legal set-off, though in a probably more restrictive approach, since the claim must be either liquidated or in sums capable of ascertainment without valuation or estimation. Thus, a claim for liquidated damages will be liquidated, but not if the damage has to be ascertained.

With the introduction of the automatic set-off in the Middle Ages, jurists realized that set-off was only possible if both claims were ascertained as to their existence and amount; they required therefore a so-called substantive liquidity. That is exactly what the natural law codifications required (CCfr. 129146, CCcit. 1243; ABGB § 1439).

Art. 13:102 PECL provides as follows in this respect: «Unascertained Claims» (1) A debtor may not set off a claim which is unascertained as to its existence or value unless the set-off will not prejudice the interests of the other party. (2) Where the claims of both parties arise from the same legal relationship it is presumed that the other party's interests will not be prejudiced.

The particularity of this provision is that it plays with two meanings of ascertainment (liquidity). On the one hand, the Principles understand liquidated claims as claims ascertained as to their existence or value, which is a substantive understanding. On the other hand, however, the judge could allow set-off, despite the unliquidated claim if the interests of the other party are not prejudiced. If the claims are connected («arise from the same legal relationship»), the absence of prejudice is however presumed.

Yet, according to the PECL-Comment64, the purpose of the liquidity requirement is to avoid that a defendant may protract legal proceedings by invoking set-off on account of a dubious cross-claim. Clearly, the drafters of the Principles chose a middle path, inspired by Dutch

43 Stooko v. Taylor (1880) 5 QBD 569, 575, per Cockburn J. «Set-off is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained»; also Aectra Refining and Manufacturing Inc. v. Exxon N.V., [1994] 1 W.L.R. 1634, 1648 seq., per Hoffmann L.J. (C.A.).
44 PECL-Part III, Comment ad art. 13:102, p. 144.
45 See Derham, Set-off, p. 15.
46 Axel Johnson Petroleum AB v. MG Mineral Group AG, [1992] 1 WLR 270, 272, per Leggatt L.J. (C.A.): «For set-off to be available at law the claim and cross-claim must be mutual, but they need not be connected. They need not be debts strictly so called, but may sound in damages.», see however Aectra Refining and Manufacturing Inc. v. Exxon N.V., [1994] 1 W.L.R. 1634, 1648, per Hoffmann L.J. (C.A.): «The fact that [the liquidated claims] were disputed on grounds which could not easily be resolved does not in my judgment affect their liquidated nature.».
47 On the reason of this requirement in French Law, see Pichonnaz, La compensation, n. 1371 seq.; Pothier Robert Joseph, Traité des obligations, in: M. Dupin (édit.), Oeuvres de Pothier, t. 1, Paris 1824, p. 628.
Finally, in cases where both claims do not arise out of the same contract, the Principles—and the comment—state that the judge will have to consider the declaration of set-off as inefficient if the principal claim is ascertained\(^56\). Is it really commercially more effective to ask the defendant to open a new lawsuit in order to have his (cross-)claim examined by the judge? Procedural economy would rather require to extend the ability to set-off as much as possible, except in cases of procedural abuses. Yet, a procedural rule may (and should) anyway be able to protect the claimant against dubious or fraudulent claims, by fixing a procedural deadline to declare set-off in front of a Court. This is the case in most modern procedural laws\(^57\). It was not the case at the time of Justinian, where an exceptio compensationis could be brought at any stage of the proceeding, even shortly before the rendering of the judgement; this explains why at that time a substantive requirement of liquidity was justified\(^58\).

### III. THE EFFECT OF SET-OFF

**Article 13:106 PECL** provides that «Set-off discharges the obligations, as far as they are coextensive, as from the time of notice». What a German or a Swiss Scholar would consider as a revolution may be self-evident for a Common Lawyer, since equitable set-off does not have a retroactive effect to the time of coexistence of both reciprocal claims, as it does under most Continental legal systems based on set-off by declaration (§ 389 BGB\(^59\); art. 124 para. 2 CO\(^60\); BW 6.129 para. 1\(^\text{t}1\))

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\(^{50}\) BW 6:136: «De rechter kan een vordering ondanks een beroep van de gedaagde op verrekening toewijzen, indien de gegrondheid van dit verzoek niet op eenvoudige wijze is vast te stellen en de vordering overigens voor toewijzing vatbaar is.»; see also: Asser/Hartkamp, *Vertbinissenrecht*, Dec I, De verbintenis in het algemeen, negende druk, Zwolle 1992, n. 550 seq.

\(^{51}\) PECL-Part III, Comment ad art. 13:102, p. 144.


\(^{53}\) Pichonnaz, *La compensation*, n. 1605; ATF 30/1904 II 91/99; ATF 27/1901 II 142 c. 4.

\(^{54}\) PECL-Part III, Comment ad art. 13:102, p. 145.

\(^{55}\) Pichonnaz, *La compensation*, n. 2102.

\(^{56}\) PECL-Part III, Comment ad art. 13:102, p. 145.


\(^{59}\) «Die Aufrechnung bewirkt, dass die Forderungen, soweit sie sich decken, als in dem Zeitpunkt erloschen gelten, in welchem sie zur Aufrechnung geeignet einander gegenübergetreten sind».

\(^{60}\) «If this has occurred, it is considered that the claim and cross-claim, insofar as they compensate each other, have already been discharged at the earliest
Thus, according to the PECL, the effects of set-off take place at the time the notice reaches the creditor of the principal claim according to art. 1:303 para 3 PECL (Receipt principle\textsuperscript{65}). This is even the case if one or several requirements are disputed, as long as a judge later on considers that the cross-claim was ascertained at the time of notice or did not have to be \textup{(}art. 13:102 PECL\textup{)}.

Although the general rule is that requirements for set-off have to be fulfilled at the time of the declaration of set-off, the comment states that «a debtor whose claim is not yet due may declare set-off, but such declaration only takes effect when the claim becomes due (declaring set-off early)\textsuperscript{64}». This is in contradiction with the idea that to oppose a claim by way of set-off is to enforce it. First, it seems difficult to enforce a claim which is not yet due. Secondly, the declaration of set-off cannot be conditional or affected by a time clause (\textit{dies}), since it directly affects the existing legal relationship. How is it therefore possible to envisage an early declaration of set-off? It is true that if the principal claim is already due and its creditor is already entitled to perform the cross-claim, she will be allowed to declare set-off. This is however not sufficient to justify an early set-off by the debtor of the principal claim (If A is allowed to set-off unilaterally, it does not mean that B should also be allowed to unilaterally set-off). Thus, the only possibility, in our opinion, for the debtor to set-off by means of a cross-claim which is not yet due is to obtain the agreement of the other party. But then, it is a contractual set-off, which is not directly governed by art. 13:104/106 PECL.

1. The principle of non-retroactivity of effects

The drafters of the PECL should be congratulated to have finally managed to get rid of the retroactive effect of set-off, which is still the rule in most systems where set-off is triggered by declaration\textsuperscript{66}. We have already explained elsewhere why it is wise to adopt an \textit{ex nunc} effect for the declaration of set-off\textsuperscript{68}. Let us just summarize briefly three arguments:

A. The freedom of the debtor to use set-off

In a system of set-off based on an extra-judicial declaration, the debtor can decide whenever he wants to set-off his claim in order to perform his obligation. The same is true for payment. It is therefore correct to say, as did the Commentators in the Middle Ages, that to oppose a claim by way of set-off is to pay «\textit{quod compensat solvitur}\textsuperscript{67}». One should therefore treat set-off and payment in the same way with respect to the effects. At the end of the 19 Century, however, the Pandectists' conception was that the debtor could only operate set-off by an \textit{exceptio compensationis} invoked within a procedure. Therefore, the debtor having a smaller claim was usually induced to wait until his creditor brought an action against him and then set-off his cross-claim. The debtor did not therefore have a choice on when and how she would declare set-off. That is why the Pandectists decided that the effect of set-off should re-act at the time when the debtor could have invoked it for the first time.

Since, according to the PECL, the declaration of set-off can be made at any time and, above all, outside a court room, the debtor has a full


\textsuperscript{67} Cynus Pistola, \textit{In Codicem et aliquot titulos primit pandectorum tomi, id est, Digesti veteres, Doctissima Commentaria, Francfort-sur-le-Main 1578, reprint Torino 1964, ad C. 4,51 (fol. 245r), n. 2; for further references, see also Pichonnaz, \textit{La compensation}, n. 1107 sqq.
freedom to decide when she would like to perform by means of set-off. The ground for retroactivity has therefore disappeared. 

B. Retroactivity would give the debtor an undue security

Set-off should be equivalent to payment. However, in legal systems where set-off by declaration has retroactive effects, the result is that the creditor of the cross-claim benefits of a security: from the moment both claims can be set-off, she is certain to be paid. This security is important in case of bankruptcy, since the regime of set-off by declaration with retroactive effects accept that the creditor of the cross-claim can set-off with the creditor of the principal claim who is bankrupt. Thus, this creditor is privileged towards other creditors of the bankrupt, who cannot set-off. The principle of equality of creditors ("par conditio creditorum") is no longer protected. Moreover, this security is often kept hidden from other creditors, as there is no way for them to know which creditor was able to set-off before the declaration of bankruptcy.

C. Retroactivity gives an undue privilege not to pay interests for delay

By payment in cash, the debtor will have to pay interests for delay in payment. She will not be able to argue, for instance, that, although she had the money early enough, she had forgotten to pay on time. Yet, the debtor who has a cross-claim is suddenly privileged, since, because of the retroactive effect of set-off, she will not have to pay interests for delay, even if she declares set-off much later than the first time she could have done so. What is the reason underlying this privilege? In fact, there is none, since the debtor is free to declare set-off at any time, without a specific form. The reason for the retroactive effect of set-off may have had a historical justification, but with the evolution of set-off, this is no more the case.

For all these reasons, it is perfectly coherent for the PECL to have adopted a regime of set-off with ex nunc effects.

2. The consequences of the ex-nunc effect

Having understood that the effects of set-off are similar to those of payment, one need not explain in further detail what the effects of set-off are. It is sufficient to mention the following elements:

A. Interests (on both obligations) run until set-off has been declared. Since the rate of interests may be different between both obligations, the party having a higher rate shall declare set-off as soon as she is aware of the possibility of doing so.

B. Restitution for undue payment takes place only when payment has been made after one of the parties has declared set-off. However, if one party performs not knowing or not using the possibility to set-off, no claim for restitution is available, since performance has discharged the obligation. Set-off (if declared) would not have discharged it earlier.

C. Set-off for part of the claims. As it is the case for payment, the use of set-off with a smaller cross-claim does only discharge the principal obligation up to the smaller amount. Equally, the debtor having a larger cross-claim can use only part of it to declare set-off and the remaining part will still be valid.

Let us turn, finally, to the question of whether it is possible to set-off an obligation by means of a cross-claim for which the period of prescription has already expired.

Usually, in systems based on set-off by declaration, it is possible to use those cross-claims without any restrictions (art. 120 para. 3 CO; § 390 para. 2 BGB; art. 6.131 para. 1 BW).

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69 On this point, see esp. Pichonnaz, La compensation, n. 2128 seq.
70 See on this point also Pichonnaz, La compensation, n. 2130; Pichonnaz, Retroactive effect, p. 562; art. 123 LW (Swiss Statute on forced execution: Loi fédérale du 11 avril 1889 sur la poursuite pour dettes et la faillite); ABGB § 1396; § 294 EO (Austrian Statute on execution; Exekutionsordnung).
71 Zimmermann, Die Aufrechnung, p. 726; Pichonnaz, Faillite, p. 115.
72 For details, see: Pichonnaz, La compensation, n. 2108 seq.; Pichonnaz, Retroactive effect, p. 560 sqq.
73 PECL-Part III, Comment ad art. 13:106, p. 151.
74 PECL-Part III, Comment ad art. 13:106, p. 152.
75 PECL-Part I-II, Comment ad art. 7:109, p. 350.
76 It is also the case in Austria, see among others Heinrich Honsell/Albert Heidinger, Praxiskommentar, n. 23 ad § 1438 ABGB; see also Pichonnaz, La compensation, n. 2148 and the references.
The Principles state not only a solution which is very original in this respect, but fully in accordance with the ex-nunc effect of set-off and the idea that the expiration of the period of prescription does not extinguish the claim automatically, but only if a party invokes it. Indeed, art. 14:503 PECL prescribes the following: «A claim in relation to which the period of prescription has expired may nonetheless be set off, unless the debtor has invoked prescription previously or does so within two months of notification of set-off».

Thus, a creditor can successfully oppose a declaration of set-off using a prescribed cross-claim if she had already invoked the period of prescription. This will, however, rarely be the case, since a debtor will invoke prescription when the creditor asserts a claim. Therefore, since to set-off is to enforce payment of the cross-claim, the debtor should have the opportunity to invoke the expiration of the period of prescription. That is why the Principles give a two months period from the receipt of the declaration of set-off for the debtor to invoke prescription. If the debtor fails to invoke prescription within this time frame, set-off is effective from the time it has been declared and the debtor is considered to have renounced by concluding acts to invoke prescription.

3. The peculiarity of plurality of claims and/or obligations

Let us finally consider the situation of set-off when two or more claims and/or obligations exist between the parties. The principles deal with this situation in art. 13:105, which states the following: «[Plurality of claims and Obligations] (1) Where the party giving notice of set-off has two or more claims against the other party, the notice is effective only if it identifies the claim to which it relates. (2) Where the party giving notice of set-off has to perform two or more obligations towards the other party, the rules in Article 7:109 apply with appropriate adaptations».

This solution is welcome, since it is in accordance with two principles:

77 PECL-Part III, Comment ad art. 13:106, p. 205 seq.; see also Pichonnaz, Compensation et prescription: le dialogue difficile d'un couple à la fleur de l'âge?, Revue fribourgeoise de jurisprudence (RFJ), Le droit en mouvement, Volume spécial pour les 10 ans de la revue, Fribourg 2002, p. 95 seq.

78 See for the ability to renounce implicitly to prescription, art. 141 para. 1 CO; § 225 BGB e contrario; § 1502 ABGB e contrario.

A. Set-off is a way to enforce a claim

As a way to enforce a claim (the cross-claim), the notice of set-off has to be precise enough to determine which claim is enforced by way of set-off. That is why, in case of plurality of cross-claims, the Principles require, and rightly so, from the noticing party to indicate which claim(s) is or are «used» for set-off. If that party has not done so, and the indication cannot be inferred by interpretation (art. 2:102 PECL), set-off does not take place. It is therefore never possible for the debtor of the cross-claims to determine which one should be used for set-off. She will, however, be able to declare herself set-off, if the requirements are fulfilled in her respect as well.

B. Set-off is equivalent to payment

If a debtor pays a sum of money without indicating which obligation the money shall be used to cover, art. 7:109 PECL provides a specific order for the so-called «appropriation of performance». Since set-off is equivalent to payment, the Principles logically consider that the same sequence should be used when there are several obligations which could be discharged by way of set-off. That means, first of all, that the noticing party can decide upon it. If this party does not make a declaration, the other party may within a reasonable time appropriate the performance to such obligation as she chooses. Finally, if none of them makes a choice, the obligations will be discharged in the sequence provided for by art. 7:109 para 3 et 4 PECL.

IV. CONCLUSION

Set-off is a difficult subject, which has been very much influenced by the understanding of Roman Law sources during the various periods of legal changes. Art. 132 of the Gandolfi Project (the so-called European Contract Code), based on the mixed system of Italian Law,
provides for a system of automatic set-off by allegation entangled in historical remaining. On the contrary, the Principles of European Contract Law have managed to create a new and perfectly coherent regime that is fully adapted to modern conceptions of set-off.

At the end of this paper, one cannot avoid thinking that this wonderful achievement was mainly possible because the drafters of the Principles took the time to examine the historical roots of the various regimes of set-off in Europe. By doing so, they became aware of the remainings of old understandings that are merely cast into new regimes. If one needed proof that comparative analysis cannot go without historical research, the rules on set-off provide a perfect example. Our own historical and comparative analysis of the institution of set-off, which was published in French in 2001\textsuperscript{83}, reached conclusions similar to Reinhard Zimmermann’s position paper\textsuperscript{84}. It should come as no surprise therefore that we welcomed not only the overall system of set-off by declaration with \textit{ex nunc} effect, but also most of the smaller details, with the important exception, of course, of the requirement of ascertainment of the cross-claim.

\textsuperscript{83} Pascal Pichonnaz, \textit{La compensation, Analyse historique et comparative des modes de compenser non conventionnels}, Fribourg 2001 (AISUF 208), with conclusions in English and German; For a review, see G. Wesener, in (2004) ZSS-Rom. Abteilung 605-613.

\textsuperscript{84} Zimmermann, \textit{Die Aufrechnung}, p. 707-739.