

## Summary

All legal systems recognize that debtor may, under certain circumstances, defeat his creditor's claim in view of cross-claim against that creditor. In other words, every developed legal system recognize the institution of set-off. Despite its use in everyday life, set-off has always been considered as a difficult subject-matter in its dogmatic construction and its concrete application. Through the last three decades set-off has received particular doctrinal attention in the context of private international law. This book analyses the common core of set-off, illustrates the differences between individual regimes, introduces and explains conflict of laws and procedural law issues. In addition, it deals with insolvency aspects of set-off.

1. On the whole, main function of set-off is to enable an effective and simplified way to discharge a party's obligation, thus avoiding overlapping payments. The comparative analysis of the institution of set-off under various jurisdictions shows significant differences among them, e. g. procedural or substantive nature of set-off, whether it has to be pleaded, and whether it takes *ex tunc* or *ex nunc* effect. For the sake of simplicity comparative analysis was based on 'Germanic', 'Romanic' and 'common law' legal families.

2. Heavily disputed is the question whether the competent court has jurisdiction to adjudicate set-off when the cross-claim is subject to the jurisdiction of another court. According to the Court of Justice of the European Union ruling in *Danværn Production A/S v. Schuhfabriken Otterbeck GmbH & Co.*, the jurisdictional rules of Brussels Convention do not cover a set-off defence; defences which may be raised and the conditions under which they may be raised are governed by national law. The author argues against international jurisdiction as a prerequisite of set-off. In consequence the rule *le juge de l'action est juge de l'exception* should apply.

3. The differences existing in material law regulations with respect to set-off are also mirrored in the corresponding conflict of laws sphere. In legal systems in which set-off has to be declared by one of the parties the applicable law to a set-off in the absence of the parties' choice is governed by status of the main claim. The 'Romanic' countries, on the other hand, adhere to the doctrine of cumulation; the requirements of both the laws governing the main obligation and the law governing the obligation which is set-off must be met. Finally in jurisdictions following the English common law system the doctrine of *lex fori* prevail; thus set-off shall be governed by the law applicable at the place of the court proceedings.

4. In contrast to Rome Convention, Rome I Regulation contains a separate provision which explicitly addresses set-off. Hence a loophole in European legislation was removed. According to Article 17 Rome I Regulation: where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted (main claim). Contractual agreement on the right for set-off is exempt from the scope of this provision and subject to Article 3 Rome I Regulation. The term 'set-off' under Article 17 Rome I Regulation is autonomous, without recourse to the understanding of the individual Member states; it encompass all kinds of unilateral set-off. Furthermore Article 17 Rome I Regulation is applicable to non-contractual obligation *per analogiam*.

5. Set-off is not regulated in the Convention on Contracts for the International Sale of Goods (CISG). In general it is governed by the law applicable by virtue of the rules of private international law, e. g. Article 17 Rome I Regulation. However the exception is so called 'convention-internal set-off' between claims arising from the same contract subject to the CISG. This view has been adopted by decision of German Supreme Court (*Bundesgerichtshof*) of 24 September 2014 (VIII ZR 394/12), according to which 'convention-internal set-off' can be inferred from provisions: 84 (2) CISG, 88 (3) CISG and 58 (1) CISG.

6. Unidroit Principles of International Commercial Contracts (PICC), same as Principles of European Contract Law (PECL) and Draft Common Frame of References (DCFR), deals with set-off as a matter of substantive law. In the light of those *lex mercatoria* acts set-off operates on the basis of an extrajudicial, unilateral declaration which has to be communicated to the other party. Such a declaration takes effect as from the time of notice (*ex nunc*). This modern approach should be welcomed. The state of pendency existing before set-off has been declared is undesirable from the point of view of legal certainty.

7. The Recast European Insolvency Regulation (EIR No. 2015/848) in provisions 7 (2) (d) and 9 repeated the conflict rules in Articles 4 (2) (d) and 6 of its predecessor, the EC Regulations on Insolvency Proceedings No. 1346/2000 that designated law applicable to set-off. The scope of application Article 7 (2) (d) is limited to the procedural and substantive bankruptcy law of the State of opening of proceedings. Article 9 of European Insolvency Regulation applies where a creditor's right of set-off is not permitted under *lex fori concursus*, provided that the right to set-off concerns mutual claims incurred prior to the opening of the insolvency proceedings.