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Introduction before Art 13:101

[...]

VII. Outlook

[...]

Asking for the ratio of regulating set-off becomes even more urgent if one includes the experiences and statements elsewhere, because the ratio or rationes given for the set-off regimes differ. As indicated at the outset of this Introduction, for Severus Alexander it is nothing less than aequitas that justifies set-off, a term also used by Gaius and Papinian. Very similar is the notion that it would be unjust to demand something that has to be returned immediately, or more generally, that set-off is based on good faith, fairness, fair dealing, or natural justice. The second group of rationales often heard to justify set-off rules may be referred to as considerations of efficiency; set-off is believed to reduce the number of unnecessary lawsuits, avoid circuity of action, and prevent multiplicity of suits. While making lawsuits more efficient is certainly in the public interest, because it helps concentrate the scarce resources of the judicial system on those cases that cannot be settled otherwise; it is also - as properly observed by Pomponius almost two millennia ago - in the parties’ own interest. Discussing these and similar reasons for enacting set-off rules is not a philosophical exercise for those mulling over set-off rules in the ivory tower. Instead, it is the very question that has to be answered prior to any revision of the model rules, because the rationale for enacting set-off rules directly determines the proper scope of the rules: if the rules are based on the notion of aequitas, good faith, etc., then it suffices to allow defendants to raise set-off as a defence; if the rules are (also) based on the notion of efficiency, then set-off will have to go beyond a mere defence, and the scope of the rules will be much broader.

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VIII. Conclusion

32 Requirements of set-off. For those entrusted with the formulation of or set-off rules, the requirements of set-off appear to be uncontroversial. The drafter of the German Aufrechnung provisions noted that there was little dispute about the prerequisites of set-off,¹²⁶ and the PECL reporter maintained that it ‘follows from the nature of things’ that ‘the requirements for set-off are largely identical (mutuality, obligations of the same kind, the cross-claim must be due, the party declaring set-off must be entitled to perform)’.¹²⁷ Those statements have to be taken with a grain of salt, though. Claiming that the proposed rules reflect a general consensus belongs to the basics of statutory drafting, and the set-off provisions under investigation here are no exception. Aside from the principle of reciprocity, which is the formative element of set-off, all requirements discussed in the previous sections have turned out to be controversial over time and across jurisdictions (including the various exceptions from the principle of reciprocity). And this is still just the surface. A more detailed examination of the sources provided above would reveal many additional differences.¹²⁸ Even the model rules, ie, regimes that are supposed to identify common principles, are not homogeneous. They are split on whether liquidity (along with connexity) should form a substantive prerequisite of set-off or not; in addition the requirements that the cross-claim be enforceable and that the principal claim be fulfillable differ in several respects. Is there anything else to add to the list of prerequisites? The DCFR also requires that ‘each party has authority to dispose of that party’s right for the purpose of the set-off, to exclude situations where third parties, especially creditors, have acquired rights with respect to the claims’.¹²⁹ In the PECL and the PICC, this is implicitly assumed,¹³⁰ and it is indeed difficult to see how the DCFR adds anything but the obvious.¹³¹ Overall, therefore, it appears that the requirements mentioned in the three model rules are those that are decisive. Users should only be reminded that the requirements themselves, and many details, differ from jurisdiction to jurisdiction - and to some extent even among the three model rules.

¹²⁸ C 4.31.5 (Severus Alexander, AD 229) (‘etiam si fideicommissum tibi ex eius bonis deberi constat, cui debuisse te minorem quantitatein dicis, aequitas compensationis wurrarum excludit computationem, petitio auterri eius, quod amplius tibi deberei probaveris, sola relinquitur’); C 4.31.6 (Severus Alexander, AD 229) (‘neque scriptura, qua caucum est accepta quae negas tradita, obligare te contra fidem veritatis potuit et compensationis aequitatem iure postulas. non enim prius exsolvi, quod debere te constiterit, aequum est, quam petitioni mutuae responsum fuerit, eo magis, …’); C 5.21.1 pr (Severus Alexander, AD 229) (‘compensationis aequitatem iure postulas. non enim prius exsolvi quod debere te conscienter aequum est, quam petitioni mutuae responsum fuerit, eo magis, …’).

¹²⁹ Gai D 16.2.5 (‘si quid a fideiussore petetur, aequissimum est eligere fideiussorem, quo ipsi an quod reo debecur, compensare malic: sed et si utrumque velit co.mpensare; audiendus est’).

¹³⁰ Pap D 16.2.18 pr (‘in rem suam procurator datus post litis contestationem, si vice mutua convematur, aequitate compensationis utetur’); Pap D 26.7.36 (‘aequitas, quae merum ius compensationis ind._ucit’); Pap D 34.9.15. (‘…sed Falcidiae beneficia non utetur, si tantum in amissis portionibus erit, quod Falcidiam aequitate compensauoms recusaret’).

¹³¹ Generally Paul D 44.4.8 pr = Paul D 50.17.173.3 (‘dolo facit, qui petit quod redditurus est’), referred to by Zimmermann, Comparative Foundations, 29 (it should be noted, though, that the expression ‘dolo petit’, quoted ibid and in fn 53 by Zimmermann, is used neither by Paulus nor by anyone else in the Digest); also Windscheid, Pandektenrecht, § 349.2 and 349.6 fn 19 and FPF von Kübel, ‘Aufrechnung’ (1882), in W Schubert (ed), Die Vorlagen der Redakteuren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches: Recht der Schuldverhältnisse, vol I (1980) 1073–96, 1084.

¹³² Zimmermann, Comparative Foundations, 29, 35; MaxEuP/Zimmermann, ‘Set-Off, 1554.

¹³³ Zimmermann, Comparative Foundations, 29; MaxEuP/Zimmermann, ‘Set-Off, 1554.

¹³⁴ MaxEuP/Zimmermann, ‘Set-Off, 1554.

¹³⁵ Zimmermann, Comparative Foundations, 29; MaxEuP/Zimmermann, ‘Set-Off, 1554; similarly Loyd (fn 44) 562.

¹³⁶ Explicitly DCFR Princ. 55 (‘The: rules on set-off can be seen as based on the principle of efficiency. There is no reason
for X to pay Y and then for Y to pay X, if the cross-payments can simply be set off against each other') (no such principle in DCFRincerim); also PICC 8.1, Comment 1 ('Set-off avoids the need for each party to perform its obligation separately'). Practical considerations are also cited, eg, by von Kübel (fn 191) 1075; Zimmermann, Obligations, 760; id, Comparative Foundations, 35; MaxEuP/Zimmermann, 'Set-Off', 1554; Gullifer (fn 52) 284 fn 2; Malinvaud, Fenouillet, and Mekki (fn 56) 694.

Loyd (fn 44) 562.

Jeffs v Wood (1723) 2 P Wms 128, 129 (24 ER 668, 669) ('It is true; stoppage is no payment at law, nor is it, of itself, a payment in equity, but then a very slender agreement for discounting or allowing the one debt out of the other, will make it a payment, because this prevents circuity of action and multiplicity of suits, which is not favoured in law, much less in equity'); Percéwall Hutchinson v William Sturges (1741) Willes Common Plea Reports 261, 262 (125 ER 1163, 1163) ('The true reason is that this was only substituted in the room of an action, to prevent circuity or a bill in equity'); also von Kübel (fn 191) 1075, 1084; Loyd (fn 44) 541; Zimmermann, Comparative Foundations, 27, 35 (the reference to Hutchinson v Sturges should be replaced with Jeffs v Wood); Derham, Set-Off, 12 (ditto); MaxEuP/Zimmermann, 'Set-Off', 1554 (ditto); Gullifer (fn 52) 283, 284, 289, 305.

Jeffs v Wood (1723) 2 P Wms 128, 129 (24 ER 668, 669) (reproduced in fn 198); Zimmermann, Comparative Foundations, 27, 35 (the reference to Hutchinson v Sturges should be replaced with Jeffs v Wood); Derham, Set-Off, 12 (ditto); MaxEuP/Zimmermann, 'Set-Off', 1554 (ditto; the: quote is taken from Jeffs v Wood rather than Hutchinson v Sturges).

Pomp D 16.2.3 ('ideo compensatio necessaria est, quia interest nostra potius non solevere quam solutum repetere').

Very aptly observed by Loyd (fn 44) 562 ('Two distinct motives [se for set-off rules] may be detected; one based on the idea that an injustice is done: the defendant in refusing him this privilege, the other that unnecessary lawsuits are a nuisance. The predominance of the latter notion leads to enactments favouing affirmative relief for the defendant; the predominance of the: former to purely defensive statutes').

Zimmermann, 'UNIDROIT Principles', 21; similarly id, Comparative Foundations, 44; id, 'Ius Commune', 13; MaxEuP/Zimmermann, 'Set-Off', 1555

This is most obvious from the respective sections in the principal set-off accounts, such as those of Wood, Set-Off, Gernhuber (fn 23), or Terré, Simler, and Lequette, Obligations.

DCFR Outline Intr 29 ('The Article on the requirements for set-off (III.-6:102) has been redrafted after it was drawn to our attention that there was a difference in substance between the English and French texts in the PECL. and it has been expanded to make it dear that the rights being set off against each other must both be available for that purpose, and not for example frozen on the application of an arresting creditor'), further explained 10 DCFR III.-6:102, Comment A.

PECL 13:101, Comment B (4) ('Set-off is also excluded if the debtor may no longer perform because e principle claim has become subject to an order of attachment'); PICC 8.1, Comment 2 (reproduced in fn 27).

The rule is more sympathetically discussed by Lnb/e and Lehmann/Looschelders and Makowsky, 'Set-Off', 694 f and by Storme (fn 76) 205-7.

Referring Principles:

III.1 - Set-off