THE RETROACTIVE EFFECT OF SET-OFF (*COMPENSATIO*)

A journey through Roman Law to the New Dutch Civil Code

by

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Introduction

Result of an extensive analysis of comparative Law, the new Dutch Civil Code (NBW) has adopted the idea that the declaration of set-off (*compensatio*) produces an effect from the moment when for the first time the two reciprocal claims were capable of being set-off. Purpose of this paper is to present, in large strokes[1], what historically led to this retroactive effect and why it is, in my view, dogmatically inappropriate.

One understands usually by set-off of claims (*compensatio*) a mode of extinguishing obligations. Thus, according to set-off when two claims are reciprocally opposed, they can be extinguished up to the smaller amount if the requirements fixed by the applicable law are fulfilled. 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. The difficulty often begins already with terminology. It is thus important to fix some points in this respect.

I will designate hereafter by *main claim*, the claim of the plaintiff in an action, or the person against whom set-off is declared, and by *counterclaim*, the claim of the defendant in an action, or the person who declares set-off. Thus, the main claim generally is the most important one. If Albert has a claim of $100 against me and if he owes me $30, I will generally be the one who will declare set-off, for instance when he claims payment, possibly in court. But one could also imagine that the main claim is the lower one and that when I claim payment of $30, Albert declares set-off using his claim of $100 and will have to claim the payment of the remaining $70 afterwards. These distinctions are of course arbitrary, but they should help to clarify the concrete situations.

Whatever legal system is envisaged, set-off always implies at least two basic requirements:

1. – *Mutuality of claims* (*concursus debiti et crediti*). In other words, in order to envisage set-off, the claims must exist between the same parties and in the

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1. For a more detailed analysis of this subject, see my forthcoming book, *La compensation légale, Etude historique et comparative sur les modes de compenser*.

same rights. The situation was already envisaged by Roman law. Thus the emperor Gordian decided in a constitution of the year 238 AD that '*eius quod non ei debetur qui convenitur, sed alii, compensatio fieri non potest*' ('Set-off can only be made with what is due to the defendant, but not to somebody else')[2]. This principle is however not always strictly followed, in Roman as well as in modern contract law, especially in the case of claim assignments, surety or representation.

2. – *Both claims must be of the same kind.* By definition, it is not possible to subtract one claim from another when the two claims are not identical in kind. Normally, one sets off an amount of money with another amount of money, or wheat with wheat or wine with wine, to cite the usual examples used since the time of Gaius (Gai. 4,66) up to modern codification[3]. As soon as a claim concerns specific goods, set-off is no longer possible.

To these basic requirements, one has to add *specific requirements* related to the particular mode of set-off. Thus, claims sometimes have to arise out of the same contract or out of different contracts, they must be enforceable, they must be due, and one or both claims must be liquid[4], i.e. their existence and extent must be easily determined or both claims should even be certain.

In the same way, the *mode* whereby set-off is activated differs from one system to the other. There are basically four different ways:

1. – *Automatic set-off*, as in art. 1290 French Civil Code[5] (CCfr) and codes deriving from it such as the Spanish (art. 1.202), the Italian (art. 1242 seq.) Civil Codes and the [Oud] Burgerlijk Wetboek (art. 1462); as well as in the Austrian

2. Gord. C. 4,31,9; see already in this sense Paul. D. 16,2,9 and Paul. D. 16,2,23 (*Id quod pupillorum nomine debetur si tutor petat, non posse compensationem obici eius pecuniae, quam ipse tutor suo nomine adversario debet*).

3. See for instance art. 1291 al. 2 CCfr. – On the requirement of claims of same kind, see for instance art. 1291 al. 1 CCfr., for details, B. Starck / H. Roland / L. Boyer, *Droit civil, obligations,* vol. 3, 5th ed., Paris 1997, no. 326 seq.; F. Terré / Ph. Simler / Y. Lequette, *Droit civil, Les obligations,* 6th ed., Paris 1996, no. 1298; § 387 BGB, for details, J. Gernhuber, *Die Erfüllung und ihre Surrogate*, 2nd ed., Tübingen 1994, p. 236 seq.; art. 6:127 (N)BW, for details, see C. Asser / A.S. Hartkamp, *Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht,* Part I, 4th ed., Zwolle 1996, no. 534; § 1440 ABGB, for details, P. Rummel, in: Rummel, *Kommentar zum ABGB*, 2nd ed., 1992, § 1440, no. 1; H. Honsell / P. Heidinger, *Praxiskommentar zum ABGB*, 2nd ed., Wien 1997, § 1440 ABGB, no. 1; art. 120 al. 1 CO, for details, V. Aepli, *Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht,* V 1h: *Das Erlöschen der Obligationen (Art. 114–126 OR)*, 3rd ed., Zürich 1991, art. 120 no. 49 seq.; and in a comparative perspective, Ph. Wood, *English and International Set-off*, London 1989, no. 24–145C seq.; R. Zimmermann, *Die Aufrechnung, Eine rechtsvergleichende Skizze zum Europäischen Vertragsrecht*, in: V. Beuthien et al., Festschrift für Dieter Medicus, München 1999, p. 707 seq., esp. p. 731 seq.

4. See for instance art. 1291 al. 1 CCfr.; art. 1243 al. 1 CCit. – On the requirement of liquidity, see among others, Starck / Roland / Boyer, *Droit civil* (n. 3), no. 329 seq.; Terré / Simler / Lequette, *Droit civil* (n. 3), no. 1299; on Italian law, recently M. Kannengiesser, *Die Aufrechnung im internationalen Privat- und Verfahrensrecht*, Tübingen 1998, p. 13 seq. and in a comparative perspective, Ph. Wood, *English and International Set-off* (n. 3), no. 2-68, 24–24 seq.; Zimmermann, *Die Aufrechnung* (n. 3), p. 707 seq., esp. p. 734 seq.

5. 'La compensation s'opère de plein droit par la seule force de la loi, même à l'insu des débiteurs; les deux dettes s'éteignent réciproquement, à l'instant où elles se trouvent exister à la fois, jusqu'à concurrence de leurs quotités respectives'.

Allgemeines Bürgerliches Gesetzbuch (§ 1438 ABGB[6]), at least in the way it was understood initially and, of course, in the Prussian Code (Allgemeines Landrecht für die preussischen Staaten, ALR I, 16, § 301[7]);

2. – *Set-off by declaration*, as adopted by legislation inspired by the Pandectists of the 19th century, such as in the Dresdener Draft (of a general German statute on obligations) of 1866 (art. 372[8]), the German Civil Code of 1900 (§ 388 al. 1 BGB[9]), the Swiss Code of obligations of 1907 (art. 124 al. 1 CO[10]), and recently the new Dutch Burgerlijk Wetboek (art. 6:127 al. 1 NBW[11]);

3. – *Judicial set-off*, in which the judge is entitled to declare set-off, such as in the Common law[12] or in Roman law;

4. – *Conventional set-off*, which is known in every legal system[13]; it is also the most usual way for parties to set-off in practice; one may think, for instance, of the interbancal clearing, netting-agreements, or general practice in international trade contracts.

As I will indicate, an understanding of the various ways of activating set-off is of particular importance with regard to the question of the *retroactive effect* of set-off. I understand by that expression what art. 6:129 para. 1 NBW describes as follows: 'De verrekening werkt terug tot het tijdstip, waarop de bevoegdheid tot verrekening is ontstaan' ('Set-off is retroactive to the time that the right to set-off has arisen'[14]); or as stated by article 124 para. 2 CO: 'Les deux dettes sont alors réputées éteintes, jusqu'à concurrence du montant de la plus faible, depuis le moment où elles pouvaient être compensées' ('If this has occurred, it is considered that the claim and counterclaim, insofar as they compensate each other, have already been discharged at the earliest possible time they could have been set-off'[15])[16].

6. 'Wenn Forderungen gegenseitig zusammentreffen, die richtig, gleichartig, und so beschaffen sind, dass eine Sache, die dem Einen als Gläubiger gebührt, von diesem auch als Schuldner dem andern entrichtet werden kann; so entsteht, insoweit die Forderungen sich gegeneinander ausgleichen, eine gegenseitige Aufhebung der Verbindlichkeiten (Kompensation), welche schon für sich die gegenseitige Zahlung bewirkt'.

7. 'Sobald die Forderung, durch welche die Compensation gesetzmässig begründet wird, entstanden ist, wird auch die Schuld, so weit die Compensation reicht, für erloschen erachtet'.

8. 'Die Forderungen und Gegenforderungen gelten mit dem Zeitpunkte, zu welchem sie sich als zur Aufrechnung geeignet einander gegenüber stehen, soweit sie sich ausgleichen, wie durch Zahlung getilgt. Diese Wirkung tritt jedoch nur unter der Voraussetzung ein, dass der Schuldner dem Gläubiger erklärt hat, von seinem Rechte zur Aufrechnung Gebrauch machen zu wollen'.

9. 'Die Aufrechnung erfolgt durch Erklärung gegenüber dem anderen Teile'.

10. 'La compensation n'a lieu qu'autant que le débiteur fait connaître au créancier son intention de l'invoquer'.

11. 'Wanneer een schuldenaar die de bevoegdheid tot verrekening heeft, aan zijn schuldeiser verklaart dat hij zijn schuld met een vordering verrekent, gaan beide verbintenissen tot hun gemeenschappelijk beloop teniet'.

12. See for instance R. Derham, *Set-off*, 2nd ed., Oxford 1996, p. 20 seq. (Set-off by Statute in England), p. 57 (Equitable set-off).

13. As it is almost self-evident, most codifications do not mention it; see however Art. 1252 CCit, for details Kannengiesser, *Die Aufrechnung* (n. 4), p. 44 seq. – On conventional set-off, see among others K.-P. Berger, *Der Aufrechnungsvertrag*, Tübingen 1996; also Ph. Wood (n. 3), no. 24–43 seq.

14. English translation by P.P.C. Haanappel / E. Mackaay, *New Netherlands Civil Code Patrimonial Law (Property, obligations and special contracts)*, Deventer–Boston 1990.

15. English translation by A. Reber, *Swiss Code of obligations : English translation of*

Set-off has thus a retroactive effect in the sense that its discharging effect goes back to a time prior to that of the declaration which activated it. In its proper use, this retroactive effect fits only in a system where set-off is operated by declaration. In a system of judicial set-off, the judge creates the requirements of set-off. Set-off cannot thus take effect before the time of judgement or, if it does, this is only because of procedural rules (e.g. the time of the opening of the claim). This effect is then purely procedural and of no interest for us in relation to the substantive problem we deal with here.

In its 1863 session, the authors of the Dresdener Draft (of 1866), which is in a way the first draft of a German civil code, made the following statement in the course of the discussion of today's § 389 BGB: '... wobei es sich, wie dies auch aus Art. 356 erhelle, von selbst verstehe, dass die Wirkungen der Erklärung auf den Moment zurückzubeziehen seien, in welchem die Compensabilität beider Forderungen eingetreten sei' ('it *goes without saying*, as it appears in art. 356, that the effect of the declaration is to be reported at the time in which the two claims could be for the first time set off')[17].

It is therefore legitimate to ask for what reason one would write on the retroactive effect of set-off, when it seems to be so *self-evident*. I can give at least two reasons:

1. – Some years ago, some authors in various European countries raised doubts about the legitimacy of a retroactive effect of set-off[18]. And I am of the opinion that their doubts are well-grounded.

2. – The Lando Commission for the unification of European Private Law, which is commissioned by the European Parliament, is in the process of preparing a whole core of rules to unify European Contract Law[19]. In its third round of discussions, the commission deals with among other legal questions the problem of set-off. The project currently foresees a provision which denies any retroactive

the official text, vol. 1: *Contract law (articles 1–551)*, ed. by Swiss-American Chamber of Commerce, Zurich 1990.

16. See also § 389 BGB which states [Effect of set-off]: 'Die Aufrechnung bewirkt, dass die Forderungen, soweit sie sich decken, als in dem Zeitpunkt erloschen gelten, in welchem sie zur Aufrechnung geeignet einander gegenüber getreten sind'.

17. Italic added; *Protocolle der Commission zur Ausarbeitung eines allgemeinen deutschen Obligationenrechtes*, ed. by W. Schubert, Vol. 2, Frankfurt/Main 1984, p. 1261, ad art. 349 (session of 13 November 1863).

18. Already P.F. von Wyss, *Motive zu der auf Grund der Commissionsbeschlüsse vom September 1877 bearbeiteten neuen Redaktion des allgemeinen Theiles des Entwurfes zu einem scheizerischen Obligationenrechte*, Bern 1877, p. 39; P. Bidlinski, *Die Aufrechnung: Verjährung, Rückwirkung und § 414 al. 3 HGB*, Das Recht der Wirtschaft (RdW) 1993, p. 238 seq.; P. Bidlinski, *Aufrechnung mit verjährten Forderungen*, Österreichische Richterzeitung (RZ) 1991, p. 2 seq.; P. Bidlinski, *Die Aufrechnung mit verjährten Forderungen: Wirklich kein Änderungsbedarf?*, Archiv für die Civilistische Praxis (AcP) 196 (1996), p. 276–304; S. Dullinger, *Handbuch der Aufrechnung*, Vienna–New York 1995, p. 172 seq.; Zimmermann, *Die Aufrechnung* (n. 3), p. 707 seq., esp. p. 721 seq.

19. See Part I, already published in O. Lando / H. Beale, *Principles of European Contract Law*, Part I: *Performance, Non-performance and Remedies*, Dordrecht–Boston–London 1995; Part II (combined with the revised version of Part I) has been published in 2000, and is available on Internet at: 'Principles European Contract Law 1998' (http://www.ufsia.ac.be/~estorme/PECL2en.html) (5.1.2000); in the meantime, a third round of discussion has begun working on assignment, assumption of debt, conditions, illegality, set-off, prescription or limitation, and some other elements.

effect to set-off; the effect of the declaration of set-off would be merely *ex nunc*.

It is therefore interesting to see whether this modern trend in favour of an *ex nunc* effect is grounded on a correct dogmatic analysis of the problem.

The origin of the problem of retroactivity may be traced back to the understanding of automatic set-off and to the various interpretations given to it in the Middle Ages (I.). This understanding evolved under the Pandectists' influence during the 19th Century (II.). They admitted a fiction of a retroactive effect of set-off grounded especially on two texts of the Digest which I will examine briefly (III.). I will then mention some of the reasons which favour the renunciation to any kind of retroactive effect attaching to set-off by declaration (IV.).

I. – Automatic set-off and its interpretation: the origin of the problem

To understand the problem of the retroactive effect of set-off, one has to understand and follow, surprisingly, the evolution of the concept of automatic set-off.

1. – *The alleged Justinian origin of automatic set-off*

The origin of automatic set-off *ipso iure* has long since been attributed to the Emperor Justinian, who is alleged to have instituted it by way of a constitution from the year 531 AD and confirmed in the Institutes of 533:

Iust. C. 4,31,14, Iohanni, a. 531:

> *pr.* Compensationes ex omnibus actionibus ipso iure fieri sancimus nulla differentia in rem vel personalibus actionibus inter se observanda. 1. Ita tamen compensationes obici iubemus, si causa ex qua compensatur liquida sit et non multis ambagibus innodata, sed possit iudici facilem exitum sui praestare...
>
> *pr.* We decide that set-off operates ipso iure in all actions, without any distinction between personal and real law suits (actiones). 1. However, we wish that set-off be objected only if the matter out of which a counterclaim is used for set-off is clear (liquidated) and not surrounded by many difficulties, but, on the contrary, the judge must be able to solve it easily...

Inst. 4,6,30 i.f.:

> ... Sed nostra constitutio [C. 4,31,14, a. 531] eas compensationes, quae iure aperto nituntur, latius introduxit, ut actiones ipso iure minuant sive in rem sive personales sive alias quascumque ....
>
> ... But our constitution has introduced more widely set-off based on a right which is evident, in order that law suits *in rem*, personal or of another kind are reduced *ipso iure* ...

It is probably wrong to consider that Justinian's constitution introduced an automatic set-off of claims[20]. On the one hand, Justinian certainly innovated on some points:

20. See however the majority of modern Romanists, who still consider that set-off was automatic under Justinian, see for example Honsell / Mayer-Maly / Selb, *Römisches Recht*, Berlin et al. 1987, p. 276; Max Kaser, *Das Römische Privatrecht*, II, München 1975, p. 448 note 69.

1. – He introduced the possibility of a set-off against the *actiones in rem*. He stated this expressly: There is no difference to be noted between *actiones in rem* or *in personam* ('... *nulla differentia in rem vel personalibus actionibus inter se observanda*')[21].

2. – Justinian introduced the requirement of liquidity of the counterclaim (C. 4,31,14,1 '... *si causa ex qua compensatur liquida sit*').

On the other hand, Justinian did not innovate by speaking of a *compensatio ipso iure*[22]:

1. – *The word itself was not new*. It has been used by classical jurists such as Paul (D. 16,2,21; D. 16,2,4) and Ulpian (D. 16,2,10)[23]. The words '*ipso iure*' have a good explanation in each of these texts, which makes a Justinian interpolation doubtful[24].

2. – *Justinian only ratified a previous practice*. From the time of Diocletian (284 AD), procedural requirements became less and less formal in the post-classical extraordinary proceedings. It was thus possible, under Justinian also, to invoke set-off not only at the beginning of the proceedings (*in limine*), but even later on, just before the judgment or even on appeal[25]. It was then possible for a defendant to delay a judgment by merely invoking set-off, the judge being compelled to examine the exception and the validity of the counter-claim. It was thus not necessary to invoke a special *exceptio* (which was no longer understood in a technical sense) at the beginning of the proceedings. Thus, Justinian was of the view that the possibility of set-off was included, immanent to any action (or claim). The right to ask for set-off was already included in the claim or the actio itself (*ipso iure*). That is the reason why he recognized that all the actions could be reduced *if* one invoked the existence of a counterclaim. By speaking of *compensatio ipso iure*, he thus merely stated what already existed since Diocletian.

This is not the place to deal in full with the question of *ipso iure compensatio* in Justinian times[26]. The Justinian *constitutio* is merely the common text upon which later jurists would build their theory of an automatic set-off.

21. In his Institutes, Justinian added that set-off can be invoked also in other claims ('*alias quascumque*'), but one does not see easily to which claims Justinian wanted to refer, since at the begining of the title *de actionibus* (Inst. 4,6,1), the main subdivision is made between claims *in rem* and *in personam* ('summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam'). Justinian might have referred to pretorian claims, also mentioned by the Institutes (Inst. 4,6,3: 'Aliae autem sunt, quas praetor ex sua iurisdictione comparatas habet').

22. For an opinion in the same direction R. Zimmermann, *Law of obligations*, Paperback, Oxford 1996, p. 766 seq.

23. See also Gai. 3,81.

24. The ambit of this paper does not allow to examine this question in particular; for a detail presentation, see my forthcoming book on *compensatio* (n. 1).

25. M. Kaser / K. Hackl, *Das Römische Zivilprozessrecht*, 2nd ed., München 1996, p. 585 and authors cited.

26. Among others Biondo Biondi, *La compensazione nel diritto romano*, Cortona 1927, p. 127 seq.; Siro Solazzi, *La compensazione nel diritto romano*, Napoli 1950, p. 147 seq.

2. – *The interpretation of set-off in the Middle Ages*

Even if Justinian did not introduce a system of automatic set-off, one must be aware that the first commentators of the Digest already understood the expression *ipso iure* in that sense.

Thus, Theophilus, a professor in Beyrut, co-author of the Justinian Institutes, was of the view in his Greek paraphrase of the Institutes that the expression '*actiones ipso iure minuant*' had no other significance than that set-off was automatic and did not need any particular act of one or the other party to be effective[27]. He wrote: 'If somebody has an action for 10 coins against me but owes me 3, as soon as he begins to owe 3 to me, at the same time the action is reduced by 3 golden coins against me, so that I appear to owe him not 10 but only 7'.

During the Middle Ages, it is possible to note two different understandings of the words *ipso iure*:

1. – Some authors considered that set-off was automatic and '*sine facto hominis*', as Theophilus did. The first which seems to do so was Martinus Gosia[28]. The fact that he had a different opinion than the other *doctores* of Bologna is not really surprising[29].

2. – The Glossa[30], following Johannes Bassianus[31] or his pupil Azo among others, recognized an automatic set-off, but required a declaration in court. A distinction was drawn, however, between two types of cases. In the ordinary case, the defendant had to plead set-off in court[32], but set-off had nevertheless an automatic effect, and in some specific cases (for interest and for claims which had arisen out of delicts[33]), set-off was automatic without any act of the defendant[34].

27. Theophilus Antecessor, *Institutionum Graeca paraphrasis*, ad Inst. 4,6,30, vol. 2, Aalen 1967 (reprint ed. Berlin 1897), p. 432 seq.

28. Cf. Gl. *ipso iure* ad C. 4,31,4; Hugolinus, *Diversitates sive dissensiones dominorum super toto corpore iuris civilis*, in: G. Haenel, *Dissensiones dominorum sive controversiae veterum iuris romani interpretum qui glossatores vocantur*, Aalen 1964 (reprint of ed. Leipzig 1834), p. 423.

29. The litterature on *Dissensiones* seems to find its grounding on the numerous dissenting opinions between Martinus and Bulgarus; see for such a position G. Dolezalek, *Die Casus Codicis des Wilhelmus de Cabriano*, in: W. Wilhelm (edit.), Studien zur europäischen Rechtsgeschichte, Frankfurt/Main 1972, p. 45; see also H. Lange, *Römisches Recht im Mittelalter*, vol. 1: *Die Glossatoren*, München 1997, p. 218, who cites Azo, *Summa Codicis*, ad C. 7,43,8.

30. Gl. *si constat* ad C. 4,31,4.

31. See Gl. *si constat* ad C. 4,31,4; on Johannes Bassianus, pupil of Bulgarus, see Lange, *Die Glossatoren* (n. 29), p. 215 seq.

32. Azo, *Summa Codicis*, ad C. 4,31, no. 13, fol. 97 (ed. Lugduni 1557): 'Et dixerunt quidam eam fieri ipso iure, ut etiam hominis facto non sit opus. Et dicunt, ius ipsum compensat. Sed ego puto eam ipso iure tunc demum fieri cum a partibus est opposita: ut dixit textus Institutionum de act. § Compensationes in fi. titu. [Inst. 4,6,39]'.

33. Eventually the authors recognized four cases, see for instance Jacobus de Ravanis, *Lectura super tit. de actionibus*, in: L.J. van Soest-Zuurdeeg, *La Lectura sur le titre de actionibus (Inst. 4,6) de Jacques de Révigny, édition du texte, précédée de prolégomènes*, Leiden 1989, p. 293, li. 183 seq. ad Inst. 4,6,30: 'Et quod dictum est 'ipsum ius non compensat sine obiectu hominis', verum est nisi in quatuor casibus, in quibus ipso iure fit compensatio. Hic fuit in debitum ex maleficio [...]. Item in alio casu: ut evitetur pena, ipsum ius compensat absque hoc quod obiciatur compensatio ab homine. Item ut evitetur cursus usurarum [...]. Vel ut pignus liberetur [...]'.

34. Gl. *si constat* ad C. 4,31,4; Azo, *Summa Codicis*, ad C. 4,31, no. 13, fol. 97: 'Secus

It is important to understand that for Azo the declaration had no substantive effect; set-off was automatic, but the judge could only take it into account if it had been pleaded in court[35].

This latter conception of an automatic set-off made subject to a declaration in court was the view of the majority of the authors[36]. Cynus[37] and Bartolus[38], among others, followed such an approach. Apart from doctrinal justifications, practical considerations motivated also the authors to follow this theory. For instance, Ioachim Mynsinger von Frundeck (1514–1588), cameralist (i.e. an author who first edited decisions or summaries of decisions taken by Law Courts) was also of the view that a party has to invoke set-off in court to make it possible for the judge to consider set-off[39], since otherwise he could not be expected to guess the application of the latter (*'qui iudex utique divinare nequit'*).

Martinus' position was, however, followed by the French historical school, especially by Cuiacius (1520/1522-1590)[40]. Tyndarus, who wrote a treaty on set-off in the 16th century, tried again to explain Martinus' opinion and adopted his conception of an automatic set-off without any declaration[41]. He had a direct influence on Domat[42] and on Pothier and his treaty on obligations[43]. As one

dico in delictis, in quibus etiam sine facto hominis fit compensatio ipso iure: ut supra diximus'.

35. See for such an explanation Cynus Pistoriensis, *In Codicem et aliquot titulos primi pandectorum ... Commentaria*, ad C. 4,31,4 (ed. Francoforti ad Moenium 1577, reprint Torino 1964, fol. 244A).

36. See for a detailed presentation Sebastianus Medices (1543–1598), *De compensationibus*, pars II, Qu. 21 (ed. in: Tractatus universi iuris, Vol. 6, Pars 2, Venetiis 1584).

37. Cynus, *In Codicem*, ad C. 4,31,4, fol. 244A.

38. Bartolus a Saxoferrato, ad C. 4,31,4, *si constat*, no. 2 (ed. Venetiis 1602, vol. 7, fol. 147).

39. Ioachim Mynsinger von Frundeck, *Apotelesma*, ad Inst. 4,6,30, no. 9 (ed. Coloniae 1659): 'Generalis regula, sive thesis, ex hoc tex. colligenda est: videlicet, quod *omnis actio idem habet* ... Cuiuscumque generis et qualitatis hodie ipso iure per compensationem tollatur, in tantum, quantum compensari debet. Excepta sola depositi actio'.

40. Jacobus Cuiacius, *In lib. III. Quaest. Papin.*, ad D. 16,2,7 (ed. *Opera omnia*, vol. 4, col. 668): 'Moribus Galliae non fit ipso iure, ac ne remedio quidem exceptionis, sed ex rescripto principis nominatim, *par lettres de chancellerie*, non potest uti compensatione is unde petitur, nisi id princ[eps] nominatim concedat. Jure nostro, id est Romanorum, compensatio in omnibus iudiciis fit ipso iure ... hoc est, compensationem fieri ipso iure mero iure. Et ideo, si ego a te acceperim 100 ex aliqua causa, et tu mihi debeas 30, ipso iure non debeo 100 sed 70 tantum, quia aes tuum minuit aes meum ipso iure, et ex 70 tantum usurae debebuntur ex mora in bonae fidei iudiciis'.

41. Alphanus Tyndarus, *De compensationibus*, art. 6 and his conclusions (ed. in: Tractatus universi iuris, Vol. 6, Pars 2, Venetiis 1584, f. 253r, 255r): 'Prima est, quod compensatio omni casu fit ipso iure ab ipso initio tempore contractorum debitorum, etiam sine hominis ministerio in rebus et iuribus compensabilibus, quam tamen conclusionem sub nube enuntiat solus Mar[tinus] glo[sator] antiquus'.

42. Jean Domat, *Les loix civiles dans leur ordre naturel, le droit public et legum delectus*, 2nd ed., Paris 1756, t. I, liv. IV, tit. II, sec. 1, no. 4, p. 288: 'La compensation étant naturelle, elle a d'elle-même son effet et de plein droit, quoique ceux qui peuvent compenser ne s'en avisent pas et quand même l'un et l'autre ignoreraient les dettes qu'ils ont à compenser, car l'équité et la vérité font que chacun d'eux étant en même temps et créancier et débiteur de l'autre, ces qualités se confondent et s'anéantissent'.

43. Robert Joseph Pothier, *Traité des obligations*, in: Œuvres complètes, tome II, Paris 1821, no. 635: 'Lorsqu'on dit que la compensation se fait *de plein droit, ipso iure*, cela signifie qu'elle se fait par la seule vertu de la loi, sans qu'elle ait été prononcée par le juge,

knows, Domat and Pothier would be the main source of inspiration for the drafters of the French Civil Code. This probably explains the solution of an automatic set-off of article 1290 CCfr.

In this brief overview of the interpretation of set-off by lawyers from the Middle Ages[44], it is interesting to set out the original opinion of Hugo Grotius. His view with regard to the mode of set-off was not a new one, since he was of the opinion that set-off was automatic, but had to be pleaded in court[45]. However, he sought to free this institution from the Justinian constitution and grounded it on natural reason. In his work *De iure belli ac pacis* (published for the first time in 1625), Grotius recognized set-off as one kind of *alienatio* based on *leges naturae*. He wrote the following (II,7,2)[46]:

> Expletione iuris fit alienatio, quoties id quod meum nondum est, sed mihi dari debet, aut loco rei meae, aut mihi debitae, cum eam ipsam consequi non possum aliud tantundem valens accipio ab eo qui rem meam detinet, vel mihi debet. Nam iustitia expletrix quoties ad idem non potest pertingere, fertur ad tantundem, quod est morali aestimatione idem.
>
> Alienation by legal compensation[47] takes place when, from one who retains my property or is in debt to me, I receive, as of equal value, something which is not yet mine but which ought to be given to me in the place of a thing belonging to me or due to me, and I am unable to obtain the thing itself. For whenever expletive justice cannot acquire the same thing it tries to obtain something of equal value which, morally, is considered the same.

In this passage, Grotius spoke clearly about a kind of *datio in solutum* imposed by natural law. It is interesting to note that Grotius put on the same level the fact that one party retains property of the other party and the fact that it is indebted to it.

After underlining that it was forbidden by civil statutes to enforce one's right by use of one's own force, he nevertheless recognized this right – a kind of *retentio in solutum* – when courts ceased to act for a continuous period ('*Locum ergo habebit quod diximus ubi iudicia continue cessant*'). A kind of set-off can be recognized in this process[48] and would also mean that set-off was possible

ni même opposée par aucune des parties ... Je ne suis obligé d'opposer la compensation que pour instruire le juge que la compensation s'est faite; de même que lorsque quelqu'un me demande une dette que j'ai payée, je suis obligé, pour instruire le juge, d'opposer et de rapporter les quittances'.

44. For more details, see my forthcoming book on this subject (n. 1).

45. See Hugo Grotius, *Inleidinge tot de Hollandsche Rechts-geleerdheid* III, 40,7; for the critical edition in Dutch, see F. Dovring / H.F.W.D. Fischer/ E.M. Meijers, Leiden 1952 (reprint 1965), it includes Grotius' handwritten marginal notes written in 1639 in his own copy of the 1636 edition and discovered in Lund in 1948; for the English translation, I quote from R.W. Lee, *The jurisprudence of Holland by Hugo Grotius*, vol. I, 2nd ed., Oxford 1953, p. 490 (reprint Aalen 1977).

46. English translation by F.W. Kelsey in the Classics of international Law (edited by J.B. Scott), Oxford 1925, p. 268; Hugo Grotius, *De iure belli ac pacis...*, ed. 1939 B.J.A. de Kanter-van Hettinga Tromp, with annotationes novae by R. Feenstra et C.E. Persenaire, Aalen 1993, lib. II, cap. 7, par. 2.

47. I would rather say 'by legal satisfaction'.

48. Speaking about set-off (*De iure belli ac pacis*, III,19,15), Grotius referred expressly to this passage.

without referal to a judge. If courts ceased to act only for a short duration, Grotius allowed to take someone's thing, but was of the opinion that property over it was only acquired when the judge made a ruling about it ('*ubi vero momentanea est cessatio, licita quidem erit acceptio rei* [...] *Sed dominium a iudicis addictione erit exspectandum*'). Thus, this kind of *retentio in solutum*, or set-off, was mainly justified by the fact that courts did no more act, otherwise a ruling by a judge was required[49].

Grotius then implemented these observations on the level of international law, where no courts were available. He stated the following (*De iure belli ac pacis*, III,19,15):

> The origin of set-off[50] I indicated elsewhere (*De iure belli ac pacis*, II,7,2) when I said that if anything is ours or is due to us, and we cannot otherwise obtain it from who has it or owes it to us, we can accept an equivalent amount in something else. From this it follows the more clearly that we may keep what is in our possession, whether it be corporeal or incorporeal. Therefore what we have promised will not have to be fulfilled if the value involved is no greater than that of our property which is wrongfully in the possession of the other (Seneca, *De ben.* 6,4,4)[51].

He thus conceived set-off as a compensation for a duty which was not fulfilled and could not be implemented by courts. He seemed to deal in particular with the question of property wrongfully kept by the enemy[52]. In this first step, set-off was not understood as a way of extinguishing reciprocal contractual obligations. Grotius, however, reflected on this further by stating:

> The same principle will hold if the party with whom I have dealings owes as much or more under another agreement, and I am not able otherwise to secure what is due to me. In the law courts, as the same Senecas says (*De ben.* 6,6/7), different actions are separated, and the [formulae] are not mixed. But, as noted in the same passage, those cases are guarded by definite statutes which it is necessary to observe: a law must not be mixed with a law; we must go whether we are led. The law of nations does not recognise those distinctions; in the cases which fall within its scope there is no other hope of acquiring one's right[53].

49. Grotius gave one further exception: 'Quod si ius quidem certum sit, sed simul moraliter certum per iudicem iuris explementum obtineri non posse, puta quia deficiat probatio; in hac etiam circumstantia, cessare legem de iudiciis, et ad ius rediri pristinum verior sententia est'; 'if the right is certain, but at the same time it is morally certain that enforcement of the right cannot be obtained from a judge, for the reason, for instance, that proof is lacking, the truer opinion is that in these circumstances the law of the courts ceases to apply and one has recourse to primitive right' (transl. by Kelsey, *op. cit.*, p. 268).

50. Kelsey writes 'compensation' to translate '*compensationis*'; it seems better to use the technical word of 'set-off'.

51. English translation (n. 46), p. 800; Hugo Grotius, *De iure belli ac pacis*, lib. III, 19,15: 'Compensationis originem alibi indicavimus [lib. II, cap. VII, § 2], cum diximus nos, si quod nostrum est aut quod nobis debetur consequi aliter non possumus, ab eo qui nostrum habet aut nobis debet tantundem in re quavis accipere posse: unde sequitur ut multo magis possimus id quod penes nos est sive corporale est sive incorporale retinere. Ergo quod promisimus poterit non praestari si non amplius valet quam res nostra, quae sine iure est penes alterum. Seneca libro de beneficiis sexto [cap. 4] ...'.

52. Chapter 19 deals indeed with this question: '*De fide inter hostes*'.

53. English translation (n. 46), p. 801; Grotius, *De iure belli ac pacis*, III,19,16: 'Idem erit si ex alio contractu is qui cum negotium est, plus aut tantundem debet, idque ego aliter

He applied thus the same principle to the situation in which a party owes me as much or more money than I owe him. And this is the typical situation of someone who has a counterclaim. If I could not secure my counterclaim, what I promised had not to be performed. From this principle, one could admit that set-off must necessarily be automatic in international law. In absence of courts, it was imposed by natural law to ensure that the creditor got what he was entitled to.

Although Grotius did not deal specifically with contracts under national Law, these statements gave a new justification for set-off, independant from the Justinian constitution. They showed how set-off could be conceived as an automatic mechanism. Of course, for Grotius, set-off had to be pleaded in court under national law, since there was a judge available in the national system, and since otherwise the fact could not be known ('om datmen anders daer van niet en kan weten'), as said Grotius in his *Inleidinge*[54]. This last point is essential to understand that, even under national law, set-off was conceived by Grotius as having an automatic effect[55], but subject to be pleaded in court.

Automatic set-off when subjected to a requirement that it be pleaded in court creates a situation which can be compared with a retroactive effect. In proper theory however, pleading has only a declarative effect and not a constitutive one. The judge has only to state the existence of a reduced claim; there is therefore no proper retroactive effect. In absence of a declaration, the judge has to condemn the defendant for the whole amount of the main claim, but the latter will be able to sue the claimant for unjust enrichment (*condictio indebiti*)!

Hugo Donellus had already noticed the difficulty of admitting, on the one hand, that set-off was equivalent to a payment and of giving, on the other hand, a kind of retroactive effect to its allegation. He felt then compelled to state that

> ... tertium illud ad vim compensationis pertinens, ut compensatio pro solutione habeatur ex eo tempore, quo pecunia utrinque deberi coepit, dubitari potuit, an ideo esset admittendum, quia compensatio numerationem quamdam in se haberet. Dici enim potuit ex eo tempore eam habere, quo primum obiicitur: quasi debitore tunc primum pecuniam numerante, cum vult pecuniam sibi debitam pro soluto esse. Dignum est igitur notatu, quod placet non exinde primum compensationem pro soluto haberi ipso iure, cum obiecta est; sed ex quo primum obiici potuit, id est, ex quo

consequi non valeo. In foro quidem, ut idem Seneca (*de Ben.* 6,6/7) ait, actiones quaedam separantur, nec confunditur formula: sed illa exempla, ut ibidem dicitur, certis legibus continentur, quas necesse est sequi: lex legi non miscetur: eundum est qua ducimur. Ius gentium ista discrimina non agnoscit, ubi scilicet alia iuris sui obtinendi spes non est'.

54. Grotius, *Inleidinge*, Chap. 40 no. 7, p. 490 – For a similar idea, see also Iohannes Voet, *Commentarius ad Pandectas*, ad D. 16,2 no. 2 (ed. Halae 1775/1778, vol. III, p. 280): 'Quamvis ergo verum sit, opponendas seu allegandas esse in iudicio compensationes, ut iudex earum possit rationem habere, et eatenus dici possint facti esse [Inst. 4,6,39], effectus tamen earum totus iuris est, et existit ante allegationem; quippe quae non ad inducendam compensationem pertinet, sed magis ad manifestandum, eam retro ab eo tempore, quo coepit utrimque deberi, iam a iure factam esse; nec extinguit obligationem, sed iam ante extinctam fuisse monet'.

55. See Grotius, *Inleiding*, Chap. 40 no. 7, p. 490 (translation by Lee): '... but [set-off] takes effect by virtue of the fact, so that, if a person was to incur a penalty or other damage in the event of failure to perform, [set-off] sets him free'.

primum coepit pecunia utrinque deberi d. l. 4 C. de comp. [C. 4,31,4]. Quod est aequissimum ...[56].

With Donellus' statement the difficult question of the retroactivity of set-off and its compatibility with the analogy made with regard to payment appears in full light!

II. – The Pandectists' conception of set-off

Savigny's Historical School, which grounded its theory directly on classical sources, gave a new orientation to the question of the effect of set-off.

Despite what one may think, it was not Savigny himself who gave a new shape to set-off. He merely restated the Roman law, indicating that set-off was first reached by means of an exception in the period before Justinian (*ope exceptionis*) and *ipso iure* (i.e. automatically) thereafter. He did not give a general answer for his period of time. I could only find one sentence dealing with the question of time-barred claims, which may well indicate that Savigny was still considering an automatic effect of set-off[57]. He wrote: 'Wenn ich etwas schuldig werde demjenigen, gegen welchen ich eine noch unverjährte Klage auf dieselbe Summe habe und dann die Verjährung abläuft, so werden jetzt alle annehmen, dass sich die beiden Forderungen sogleich ipso iure zerstört haben, so dass von einer Verjährung nicht weiter die Rede sein kann. (...)'. He was of the view, moreover, that the position was similar when the counterclaim was already time-barred when the main claim came into existence. It is therefore apparent that this conception is only possible if one considers that set-off is automatic.

One might be surprised that Savigny did not give more weight to the declaration by the debtor, since one of the characteristics of the conceptions of the 19th century Pandectists was to give a greater significance to the declaration of will[58].

Thibaut, the usual opponent of Savigny, followed Azo and Grotius by recognizing an *ipso iure* set-off, subjected to a requirement that it be alleged in court[59].

Puchta seems to have been the first to declare that the mere fact of having two co-existent claims does not discharge them *ipso iure*. For him[60], the creditor had

56. Hugo Donellus, *Commentarii de iure civili*, lib. 16, chap. 5 no. 34 (ed. Lucae 1764, T. IV, col. 866).

57. F.C. von Savigny, *System des heutigen römischen Rechts*, 2nd ed., Berlin 1841 (reprint Aalen 1981), vol. 5, p. 403.

58. See on this question, recently B. Schmidlin, *Die beiden Vertragsmodelle des europäischen Vertragsrechts: das naturrechtliche Modell der Versprechensübertragung und das pandektistische Modell der vereinigten Willenserklärungen*, in: Knütel / Meincke / Zimmermann, Rechtsgeschichte und Rechtsdogmatik, München 2000, p. 187–206.

59. Anton F.J. Thibaut, *System des Pandekten-Rechts*, vol. 2, 7th ed., Jena 1828, § 997: '...so erlöschen ihre gegenseitigen Forderungen, mit allen Wirkungen der Zahlung in dem Augenblick, da sie gleich sind, bis auf die concurrente Summe. Dieses Erlöschen, welches man *compensatio* (oder auch *pensatio*) nennt, kann in Ansehung seiner Erfordernisse natürlich durch willkührliche Geschäfte bestimmt werden; es tritt aber auch ohne dies nach den Gesetzen ein (*compensatio necessaria s. iuris*), und zwar *ipso iure*, sobald gleiche Forderungen einander gegenüber stehen, jedoch nur insofern, als sich ein Theil darauf berufen will und kann'.

60. Georg Puchta, *Pandekten*, 9th ed., Leipzig 1863: 'Allerdings ist der Gläubiger, der

to invoke set-off unilaterally (*ope exceptionis*), but the claim appeared to be discharged by itself ('von selbst'), as if the declaration would have taken place at the moment of the co-existence of both claims. Thus there is, in a sense, *a retroaction of the declaration itself.* But then awkwardly, however, Puchta added that the claims had to be considered as if they were discharged *ipso iure* and if someone has omitted to declare set-off, he must be able to use a *condictio indebiti* to get back the amount paid which he could have set-off[61]. This is typical of a remark one would make in a system based on automatic set-off. We can see how difficult it was to free oneself from the doctrine developed during the Middle Ages. Has the declaration by Puchta a declarative or constitutive effect? It is difficult to answer this question, as already noted by Eisele[62].

It is probably the works of Dernburg in his *Geschichte und Theorie der Kompensation* (1st ed., 1854) and of Windscheid (*Die Pandekten*, 1st ed., 1862) which give the dogmatic foundation to a system of set-off based on a constitutive declaration and, at the same time, a genuine retroactive effect to set-off. It is probably because of these works that the authors of the Dresdener Draft felt entitled to hold that the retroactive effect went without saying. However, the question was still controversial as one can see by the works of authors such as Eisele[63], Schwanert[64], Brinz[65] or Ubbelohde[66] (all writing on set-off in the second half of the 19th century)[67].

For Dernburg[68], the existence of an automatic set-off in Justinian's time was historically not credible. He thought that *ipso iure* meant only that set-off occurred without an exception (*ope exceptionis*)[69]. He was of the opinion that the claims are not specifically affected from the beginning, but that their extinction is the result of a specific declaration by the debtor. But then, once the declara-

dasselbe schuldet, als befriedigt anzusehen, aber dieses muss, aus jenem Grund, durch einen besonderen Act in Wirksamkeit gesetzt werden, durch Uebereinkunft bei der freiwilligen Compensation oder durch einseitige Geltendmachung gegen die Klage des Gläubigers durch den Schuldner, ope exceptionis. Es soll aber die Forderung, die Geltendmachung und Zulässigkeit der Compensation vorausgesetzt, als von selbst um den Betrag der Gegenforderung von der Entstehung dieser an gemindert, gleich als wenn jener Act schon damals eingetreten wäre, und überhaupt so betrachtet werden, als sei sie *ipso iure* (ganz oder teilweise) getilgt'.

61. Puchta, *Pandekten*, p. 447: 'Ist die Compensation versäumt worden, so kann dies dem Berechtigten die condictio indebiti geben'.

62. F. Eisele, *Die Compensation nach römischem und gemeinem Recht*, Berlin 1876, p. 217.

63. Eisele, *Die Compensation nach römischem und gemeinem Recht*, Berlin 1876.

64. H. Schwanert, *Die Compensation nach römischem Recht*, Rostock 1870.

65. A. von Brinz, *Die Lehre von der Compensation*, Leipzig 1849.

66. A. Ubbelohde, *Über den Satz: ipso iure compensatur*, Göttingen 1858.

67. See also for a description of the discussion, Heinrich Dernburg, *Geschichte und Theorie der Kompensation*, 2nd ed., Heidelberg 1868 (reprint Aalen 1965), p. 4–8.

68. Dernburg, *Kompensation*, 2nd ed., p. 293 seq.: 'Es ist allerdings kein Grund ersichtlich, warum man die überkommene Auffassung [...] aufgegeben haben sollte, um anzunehmen, dass sich die Forderungen *ohne Antrag* der Partheien und ohne menschliches Zuthun vom Augenblick ihrer Coexistenz an aufhören. Niemand, der die stetige Weise römischer Rechtsentwicklung kennt, wird es für wahrscheinlich halten, dass man den Weg, auf den man Jahrhunderte lang fortgeschritten war, plötzlich verliess und ohne Weiteres zu einem entgegengesetzten Gesichtspunkte übersprang'.

69. Dernburg, *Kompensation*, p. 283.

tion is made, the set-off of the claims takes place *ipso iure* from the moment when both claims are in opposition to each other: '... gleich als ob jener Act schon damals eingetreten wäre, als sei die Forderung schon seit jener Zeit ipso iure getilgt'[70]. According to Dernburg, this would be the majority opinion.

Windscheid was much clearer: 'Der rechtliche Vorgang bei der Compensation ist nicht so zu denken, als wenn die beiden einander gegenüberstehenden Forderungsrechte sich von der Zeit ihres Gegenüberstehens an gegenseitig ohne Weiters aufhöben, vernichteten. Vielmehr behält jedes Forderungsrecht seine rechtliche Existenz, und es ist dem Gläubiger überlassen, ob er dasselbe zur Compensation verwenden oder in anderer Weise verwerthen will'[71]. Thus, the legal proceedings in set-off are not to be thought of as if both reciprocal claims would be discharged automatically at the moment of their co-existence; each claim maintains its own juridical existence, and it is left to the creditor whether he wants to use it for set-off or to claim it in some other way. He added, however, that from the beginning the claim was affected by an exception (if the creditor enforces his claim, the defendant would be able to invoke this exception: *dolo facit qui petit, quod redditurus est* [D. 44,4,8*pr.*]. But he was at the same time of the view that interest would no longer run without the special intervention of the parties.

The *shift in meaning* occurred imperceptibly. Having referred to Azo to justify their positions, the Pandectists gave a new meaning to the declaration by the party. The declaration has no longer a mere declarative effect, but a constitutive one, as evident from Windscheid and, to partial extent, Dernburg. It is made *as if* the declaration would have been given as soon as the claims were co-existent.

From Azo and Grotius to Dernburg and Windscheid, there is thus a shift in the importance of the declaration; firstly declarative, the declaration of set-off then became constitutive, i.e. the effect of set-off can only be realized by way of declaration. It is this shift which led to retroactivity.

III. – The Roman origin of retroactivity alleged by the Pandectists

If the Pandectists adopted a system of set-off by means of a constitutive declaration, it is however not clear why the effect of this declaration should be retroactive. I think the main reason is that they wanted to reconcile their theory with, in particular, two texts of the Digest[72]: the first one deals with the *condictio indebiti* when the debtor could have set off, and has not done so, and the second one holds that interest is not due when two claims co-exist. It is worth examining briefly these two texts.

1. – *The right to a* condictio indebiti

Ulp. (63 *ed.*) – D. 16,2,10,1:

> Si quis igitur compensare potens solverit, condicere poterit quasi indebito soluto.

70. Dernburg, *Kompensation*, p. 288.
71. B. Windscheid, *Lehrbuch des Pandektenrechts*, vol. II, 7th ed., Frankfurt/Main 1891, § 349 no. 4.
72. Eisele, *Die Compensation*, p. 214 seq.

> Accordingly, if someone who is able to make set-off pays, he can bring a *condictio* as if what was not owing has been paid.

When one reads this text without any knowledge of its context, it seems to mean that already the possibility of set-off discharges the claims, even if the debtor of the main claim forgets to invoke it. The Pandectists understood this text in this general meaning. The text dealt initially, however, with a very specific case. The generalisation of the latter led the Pandectists to a wrong conception of the Roman set-off. Thus, one of their reasons for the adoption of a retroactive effect of set-off disappears.

According to the *inscriptio*[73], Ulpian writes in this text about the set-off in the *venditio bonorum*, which was in classical times a way of executing judgments by selling the debtor's goods to a specific buyer (*bonorum emptor*). The *bonorum emptor* received the estate of the bankrupt because he bid for it and offered the higher price. To estimate what price he might be ready to pay, the *bonorum emptor* had to know the amount of the claims of the bankrupt's different creditors. He would then propose to pay a percentage to all the creditors who had informed the *curator bonorum* of their claim.

It might well be that a creditor would be at the same time a debtor of the bankrupt. In that case, when the *bonorum emptor* sued for payment of this debt on behalf of the bankrupt, the creditor could ask the judge to reduce the amount of his claim (*agere cum deductione*). This special mode of set-off was thus not at all an automatic set-off, but a judicial one.

Ulpian gives the right to the creditor of the bankrupt to use an action similar to a *condictio indebiti* when he has 'forgotten' to invoke set-off. The reason for this is not that the claim of the *bonorum emptor* does not exist, but follows merely from the fact that the creditor would have to pay less by way of set-off than if each party had claimed separately. It is therefore as if the creditor did not owe the difference between the two possibilities.

The creditor would have to pay less by way of set-off because he could have reduced the whole amount of his claim if he had set-off. On the contrary, if he had sued for payment, he would only have received the percentage fixed at the time of the *venditio bonorum*. Therefore, Ulpian considers that this is a particular enough case to justify the granting of a *condictio* '*quasi indebito soluto*', which is instituted to avoid injustice[74].

Indeed, one can easily imagine that the *bonorum emptor* would often have reduced by himself the amount of the counterclaim, as he perfectly knew its

73. O. Lenel, *Palingenesia Iuris civilis*, Graz 1960, vol. II, no. 1426; O. Lenel, *Das Edictum perpetuum*, 3rd ed., Leipzig 1927, p. 428 footnote 4; O. Lenel, *Quellenforschungen in den Edictcommentaren*, SZ 4 (1883), p. 119 [= Gesammelte Schriften, I, p. 501]; and the majority of the authors, *contra*: Wl. Rozwadowski, *Studi sulla compensazione nel diritto romano*, BIDR 81 (1978), p. 131 footnote 208, for whom the text deals with set-off by way of *exceptio doli*.

74. *Aequitas* is one of the main reason for granting a *condictio indebiti*; see the general principle in Pomp. D. 12,6,14: 'Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem'; or Pap. D. 12,6,66: 'Haec condictio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consuevit'; see among others, Christian Wollschläger, *Das stoïsche Bereicherungsverbot in der römischen Rechtswissenschaft*, in: Römisches Recht in der europäischen Tradition, Symposion für Franz Wieacker, Ebelsbach 1985, p. 41 seq.; Zimmermann, *Law of obligations*, p. 852 seq.

extent, since the *curator bonorum* had to be informed of the claim before the selling of the goods. But, because the claim was normally reduced, it is possible to say that it should be reduced according to *bona fides* when it was not reduced by the *bonorum emptor* by himself. One could consider that the amount corresponding to the counterclaim was so to say not due ('*quasi indebitum*')[75].

Indeed, the *condictio indebiti* was very peculiar in this case, since the only reason for granting it was that the creditor would have received more by using the set-off (as he could reduce the whole amount of his initial claim) than if he had sued the *bonorum emptor* directly. One should therefore not generalize upon the result, which was reached during the Middle Ages and by the Pandectists. This text as such cannot therefore justify a retroactive effect of set-off.

2. – *Interest no longer accrues*

In the following text, Paul[76] refers to a decision of the Emperor Septimius Severus (193–211 AD)[77], who decided a case in which interest ceased to accrue in a contract of *societas*:

Paul. (32 *ed.*) – D. 16,2,11:

> Cum alter alteri pecuniam sine usuris, alter usurariam debet, constitutum est a divo Severo concurrentis apud utrumque quantitatis usuras non esse praestandas.
>
> When one party owes the other money without interest and the latter owes money with interest, it has been decided in a *constitutio* by the deified Severus that the interest on the respective sums of both parties is not to be paid.

In this text, there are two claims opposed to each other, one with and one without interest. The Emperor decided that as soon as the claims were opposed to each other, the interest – and *only the interest* – need not be paid. In the Middle Ages authors referred always to this text as a ground for their theory of

75. See also E. Stampe, *Das Compensationsverfahren im voriustinianischen stricti iuris iudicium*, Leipzig 1886, p. 24 seq.

76. Ch. Appleton (*Histoire de la compensation en droit romain*, Paris 1895, p. 85 seq.) convincingly demonstrated that the text is probably by Paul and not by Ulpian, contrary to what one would think by reading the word 'idem' in the *inscriptio*; Book 32 by Paul dealt with *societas* (Lenel, *Palingenesia*, I, no. 500 and footnote 3), book 32 by Ulpian dealt with contract of sale and *locatio-conductio* (Lenel, *Palingenesia*, II, no. 930 seq). Compilators might have forgotten to change the *idem* of the *inscriptio* when they changed its place in the title (i.e.: Paul) D. 16,2,11, initially situated just after Paul. D. 16,2,9, to be replaced after Ulp. D. 16,2,12, which dealt also with the issue of interest. It is also unusual that a fragment excerpted from a later book is placed before (fr. 10 comes from book 63 by Ulpian and fr. 11 from book 32 by Ulpian); moreover, both persons must pay to the other an amount of money, which is rather unusual for a contract of sale, *locatio-conductio* (dealt with in book 32), but common for mandate or *societas* (dealt with in book 32 by Paul); see also Lenel, SZ 4 (1883), p. 119 footnote 23 [= Gesammelte Schriften, I, p. 501], followed by Solazzi, *Compensazione*, p. 159.

77. This *rescriptum* does no more exist; Cuiacius (*Notae in Tit. XXXI lib. IV Cod.*, Opera omnia, vol. IX, ed. Prati 1837, col. 492) was of the opinion that the *rescriptum* was by Alexander Severus (C. 4,31,4, a. 229); for arguments in favour of a *rescriptum* by Septimius Severus, see Paul Kretschmar, *Über die Entwicklung der Kompensation im römischen Rechte*, Leipzig 1907, p. 70 footnote 123.

an automatic set-off. The Emperor did not say, however, at least not expressly, that the claim and counter-claim were set-off, but only that the interest need not be paid on the corresponding amount.

According to the *inscriptio*, it is possible to conclude that this text deals with a case of *societas*[78]. It is then possible to envisage several hypotheses in which, after conclusion of a contract of *societas*, such a case occurs. A *socius* may pay interest, among other reasons, on the following grounds:

(1) When an associate lends money with interest to a third party on behalf of the *societas*, he has to return the amount and the interest he thereby received[79]. The interest is the equivalent of the profit obtained by the associate through his dealings with a third party. Our text does not really seem to envisage such an hypothesis.

(2) When an associate does not return immediately the profits obtained while dealing on behalf of the *societas*, he will have to pay interest for the loss of profit ('*non quasi usuras, sed quod socii intersit moram eum non adhibuisse*', not as interest as such, but for the loss of profit due to the delay of the associate in returning the money)[80].

(3) When an associate uses money of the *societas* for his own benefit, he has to return it with interest, even without being in delay[81].

In my opinion, the text can only envisage a case of *abuse of common funds*; interest is then due for the delay in returning the money or for unlawful personal use.

Thus, in a *societas* with only two associates, which is the case in our text ('*alter alteri*'), the obligation to return money to the *societas* amounts theoretically[82] to giving half of the money to the other associate. Therefore, there is no longer an abuse of common funds where the other associate is equally obliged to return an amount of money which he has held unlawfully. The interest for abusive use should thus be limited to the amount which is equal. However, a constitution of the Emperor was necessary as, in fact, the amounts have not been paid to the other party[83]. The constitution is based on equity.

Interest is no longer incurred, not because there is set-off, but because it is no longer equitable to penalize the keeping of the money by the incurring of interest. In both cases interest is probably of the same amount, since interest here is legal and not conventional. This may also explain why the text does not speak about the rate of interest.

It is therefore possible to reject the explanation given for this text by modern authors[84]:

78. See *supra* footnote 73.
79. Paul. D. 17,2,67,1–2 (32 *ad ed.*).
80. Pomp. D. 17,2,60 (13 *ad Sab.*).
81. Pomp. D. 17,2,60 (13 *ad Sab.*); Pap. D. 22,1,1,1 (2 *quaest.*).
82. It is the *communio* of ideal parts; see e.g. M. Kaser, *Das Römische Privatrecht*, vol. I, 2nd ed, München 1971, p. 575; Wieacker, *Das Gesellschafterverhältnis des klassischen Rechts*, SZ 69 (1952), p. 332 seq.
83. Renzo Rezzonico (*Il procedimento di compensazione nel diritto romano classico*, Basel 1958, p. 19) grounds also the fact that interest are no longer incurred on equity; but, curiously, he is of the opinion that if a party, instead of keeping the amount had paid it, he would not have to pay interest and is therefore of the opinion that it should be the same in case of set-off.
84. Biondi, *Compensazione*, p. 155, is of the opinion that the text was deeply altered;

1. – Some said there was an implicit[85] or explicit[86] agreement for set-off. But then it is difficult to imagine what purpose would be left for the *actio pro socio*[87]. Moreover, the text does not say anything about the set-off of the claims themselves. I do not consider that the fact that the text is part of Titel 16,2 *de compensationibus* of the Digest suffices for the view that there is a proper set-off. The effect on the interest is rather of the same kind as the compensation for negligence in a previous passage (Ulp. D. 16,2,10*pr.*).

2. – Others thought the text was dealing with claims existing before the constitution of a *societas omnium bonorum*[88]. There are however no indications in favour of such a solution.

Thus, the text cannot be used to ground any retroactive effect of set-off. Indeed, the text has some features in common with an authentic case of set-off, but the dogmatic reasons are different. Our interpretation may also be confirmed by another text of Ulpian dealing with the relation between ward and pupil. The reasoning is to a good degree the same:

Ulp. (36 *ed.*) – D. 27,4,3,3:

> Quare et si in usus suos convertit, deinde aliquid impendit in rem pupillarem, quam impendit desinit vertisse et exinde usuras non praestabit. Et si ante impendit in rem pupillarem, mox in usus suos vertit, non videbitur vertisse quantitatem, quae concurrit cum quantitate sibi debita, ut eius summae non praestet usuras.
>
> And so if he put something to his own use and then paid something on behalf of the pupil, he ceases to have converted what he paid out and so will not pay interest. And if he first paid out on the business of the pupil and he put something to his own use, he is not considered to have converted that amount which agrees in sum with that which he is owed and on that amount he will not pay interest.

Here again we have interest to be paid as the result of an abusive use of funds belonging to someone else (the pupil). But, as soon as the ward uses his own money to pay a debt of his pupil the 'penal' interest is no longer due. Again, however, there is no set-off between a claim of the pupil against the ward and

he therefore replaces the words '*concurrentis apud utrumque quantitatis*' with '*post condemnationem*' (!), in order to get a text, which reproduces the classical general rule; *contra*: Rezzonico, p. 16; Solazzi, *Compensazione*, p. 161 seq.

85. See also Appleton, p. 87 seq.; Kretschmar, p. 71 (who admits the *ius singulare* in a contract of *societas* because of the *ius fraternitatis*); *contra*: Solazzi, *Compensazione*, p. 160.

86. Such an explicit provision cannot explain the decision taken by the Emperor Severus.

87. Underlining that the *actio pro socio* was the final settlement of all claims, see esp. Wieacker, SZ 69 (1952), p. 9; followed by Honsell / Mayer-Maly / Selb, *Das Römische Recht*, p. 334; Zimmermann, *Law of obligations*, p. 460; and Kaser, *Das römische Privatrecht* I, p. 575 seq. (however with distinctions); *contra*: V. Arangio-Ruiz, *Il contratto di società in diritto romano*, Naples 1950, p. 176 seq.; Mariagrazia Bianchini, *Studi sulla societas*, Milan 1967, p. 94 seq. – See on the question of the *actio pro socio* '*manente societate*', K.-H. Misera, *Klagen manente societate*, in: K. Bruchhausen (edit.), Mél. Rudolf Nirk, München 1992, p. 697–705.

88. Solazzi, *Compensazione*, p. 161 seq., who finally doubts that the original text by Paul dealt with set-off; followed by Kreller, *Kritische Digestenexegesen zur 'compensatio'*, IVRA 2 (1951), p. 92.

the counter-claim of the ward against the pupil. The set-off will only take place at the end of the relationship, by means of the *actio tutelae*[89].

Thus, the two main grounds of justification used by the Pandectists to base a retroactive effect on the Roman sources failed. The misunderstanding of these two texts led, however, to a doctrine of automatic set-off during the Middle Ages and encouraged the Pandectists to recognise a retroactive effect to the declaration of set-off.

However, there is a third argument which led the Pandectists to envisage a retroactive effect of set-off. For them, the declaration of set-off was understood as an authentic *exception which had to be pleaded in court*. Windscheid, for example, stated that it is not possible for the debtor to definitively extinguish both claims other than by means of opposing an exception for set-off and by a judgment rejecting the creditor's claim, and in particular not through a unilateral declaration not pleaded in court[90]. If this is so, one can understand why there is a need for a retroactive effect of the *exceptio compensationis*. Indeed, in the absence of the retroactive effect, the creditor of the larger amount could have waited quite a long time before going to court; as a result, if the effect of set-off would have been *ex nunc*, the creditor would have received interest by unduly delaying his claim, since the defendant had almost to wait till the enforcement of the main claim to oppose set-off.

The reason for the retroactive effect disappears, however, as soon as one can declare set-off outside of court. In Switzerland, von Wyss had already stated in his comment on the draft of the old Swiss Code of obligations in 1877 that the declaration should be allowed to take place in or outside court[91] and, consequently, rejected the retroactive effect of set-off. His proposal was however not followed on the second point.

Of course, the fact that the retroactive effect of set-off is not grounded upon a correct analysis of the Roman sources does not by itself supply a good enough reason for the adoption of an effect *ex nunc*. We have therefore to consider whether there are today dogmatic reasons in favour of such a retroactive effect.

89. Kaser, *Das römische Privatrecht* I, p. 576.

90. Windscheid, *Pandektenrecht*, 7th ed., II, p. 295 footnote 15 (see also Windscheid / Kipp, *Pandektenrecht*, 9th ed., p. 470 seq. footnote 15); see also Dernburg, *Kompensation*, 2nd ed, p. 529 seq. and esp. 530 footnote 1 and on this question also Richter, *Studien zur Geschichte der Gestaltungsrechte des deutschen bürgerlichen Rechts*, th. Münster 1939, p. 19 seq., 41 seq. – In Austria, the first writer to plead for a declaration to be effective even if made outside a courtroom was Victor Hasenöhrl, *Das Obligationenrecht*, 1st ed., Wien 1890, vol. II, p. 561 seq., 2nd ed., p. 570 and possibly before him Unger, *Fragmente aus einem System des österr. Obligationenrechts*, GrünhutsZ 15 (1888), p. 545, 550 footnote 27 (cited according to Dullinger, *Handbuch der Aufrechnung*, Wien–New York 1995, p. 98).

91. Von Wyss, *Motive*, p. 39: '...wir [gehen] mit dem Principe des Entwurfes einig ..., insofern als er die Compensation nicht stillschweigend, sondern nur in Folge ausdrücklichen Begehrens des Berechtigten eintreten lässt. An eine besondere Form soll dieses Begehren nicht gebunden sein; es kann daher gerichtlich oder aussergerichtlich stattfinden und im ersteren Falle von Seite des Beklagten oder des Klägers gestellt werden. Einer Annahme von Seiten des Gläubigers, also eines Vertrages, bedarf es nicht'.

IV. – The absence of any justification for the maintenance of a retroactive effect in modern Contract law

The ambit of this paper does not allow me to present all the arguments in favour of an *ex nunc*-effect in every last detail[92]. It is possible, however, to regroup such arguments under two main points[93].

1. – *The debtor's free disposal of his counterclaim*

As the drafters of the German Civil Code (BGB) noted, as soon as two claims co-exist, the debtor can declare set-off at any time[94], if he is aware of this possibility. They, as well as the drafters of the New Dutch Civil Code[95], were of the opinion, however, that the debtor usually waits till he is sued before he invokes set-off. He must therefore be protected in his belief that he no longer owes anything. This reasoning is defective on at least three counts:

1. – *Each party has already what is due to him only if the two claims are of the same amount*, which is usually not the case in practice. If the amounts are different, a remaining obligation is due in any case by one or the other party.

2. – *The fact that one is in a position to set-off a claim does not already affect one's own claim.* This is well recognized in a system of set-off by declaration; the effect cannot begin before the declaration is made. One might still have the impression that the debtor does no longer owe something to the creditor as soon as he is in a position to set-off his claim, but this is the mere result of the previous doctrine of automatic set-off. To protect a debtor who has not yet declared set-off would be without doubt to introduce a position foreign to the system inherited from the automatic set-off approach. It is this same reasoning which led the Pandectists to develop their '*Affektionstheorie*' of the claims (claims being in some way 'marked' as soon as two claims were co-existent, even before a declaration of set-off)[96]. This theory, however, does not work as soon as

92. For detailed explanations on Austrian Law, see Dullinger, *Handbuch der Aufrechnung*, p. 158 seq.

93. I will not deal here with provisions enabling the debtor to set-off, even if one of the conditions for this no longer exists (in the case of transfer of a claim to a third person). In these cases, there is no proper retroactive effect of set-off. A provision only protects the good faith of the debtor by allowing set-off even if this would not be possible in terms of the ordinary provisions. Most legislations have a special provision dealing with this case, e.g. art. 6:130 al. 1 BW; § 406 BGB; art. 169 al. 2 CO.

94. B. Mugdan, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das deutsche Reich*, vol. II: *Recht der Schuldverhältnisse*, Berlin 1899, reprint 1979, p. 562: '[2. Lesung] Es sei nicht üblich, dass der Schuldner, wenn er seinerseits eine Forderung gegen den Gläubiger erwerbe, sofort die Aufrechnung erkläre; vielmehr pflege er zu warten, bis der Gläubiger ihn durch Geltendmachung seiner Forderung Anlass hiezu biete. Von dem Augenblick an, in welchem die beiden Forderungen einander aufrechenbar gegenübertreten, habe jeder Theil das in Händen, was er von dem anderen Theile zu fordern habe, und er könne darüber frei verfügen, weil er die Forderung des anderen durch die Aufrechnung zurückzuweisen vermöge'.

95. Parlementaire Geschiedenis, Boek 6, Algemeen Gedeelte van het verbintenissenrecht, Deventer 1981, p. 497 (ad. art. 6.1.10.6.1).

96. E.g. Brinz, *Compensation*, p. 11 seq. and Brinz, *Pandekten*, 2nd ed., vol. II/1, p. 419 seq.; Windscheid, *Pandektenrecht*, 7th ed., p. 290 (9th ed., p. 463 seq.); *contra* however Eisele, *Kompensation*, p. 259 seq.

there are several claims on both sides, as usually the party declaring set-off has the choice to decide which claims should be discharged[97]. The law provides only default rules[98].

3. – *A debtor must not be led to wait until the creditor sues him before he declares set-off.* Declaration of set-off is very easily achieved, and no form is required. The approach that one should wait until one is sued is a mere remnant of the old theory of automatic set-off and can only be justified in a system where declaration has to be made in court, which is not the case in Germany, Switzerland or the Netherlands for instance. Moreover, it would be from an economic point of view much better to give an incentive to the debtor to declare set-off as soon as he is aware of the possibility. This is in the interest of transaction security and commercial certainty; there exists clarity in the relationship from an early stage, which allows one to avoid unnecessary legal expenses.

Furthermore, if set-off is regarded as a way of simplifying payment, why should a debtor who sets off be treated differently from one who in effect pays? Indeed, by accepting the retroactivity idea, in the latter case, the debtor will have to pay interest until he pays what he owes, even if he had enough money to pay well before the effective payment; but, even if he waits a long time before declaring set-off, the debtor will have to pay no interest at all if he uses his right to set-off. The same applies to a penal clause. But why such a difference if set-off is merely a substitute for payment?

In my view, since the debtor has some liberty in the disposal of his counterclaim, he must also bear the risk linked to this liberty. He should *be liable for interest until the declaration of set-off is made*[99], as he is liable for interest until the effective payment. And this should apply in identical manner with regard to the consequences of delay or penal clauses.

Moreover, the principle of *non*-retroactivity seems to be in accordance with the principle of the statute of limitation (*praescriptio*). Indeed, why should the debtor be able to raise a time-barred counterclaim against the creditor when the debtor had no interest in suing him before? The function of the statute of limitation is to fix a limit on the right of action of the creditor who does not show any interest in his claim. Why should this initial absence of interest suddenly be forgotten, as soon as the other party brings a claim against the debtor? It would have been very easy for the creditor of the time-barred claim to declare set-off when this was still possible[100].

I would only be in favour of a different solution, in the case of claims arising

97. Windscheid, *Pandektenrecht*, 7th ed., p. 296 seq., who is of the opinion that the debtor can choose which of the counterclaims he will use; retroactivity should rather lead to a determination according to the moment at which the counterclaim came into existence; see for such a position in German Law: Ennecerus / Lehmann, *Lehrbuch des Schuldrechts*, 15th ed., Marburg–Tübingen 1958, p. 290 seq.

98. See today in Germany, § 396 al. 1 BGB, which refers to § 366 al. 2 BGB.

99. See also Zimmermann, *Die Aufrechnung* (n. 3), p. 723: 'Solange zur Aufrechnung nicht mehr erforderlich ist als eine formlose Erklärung gegenüber dem Aufrechnungsgegner, verlangt die Rechtsordnung sicherlich nicht zu viel von einem Schuldner, der daran interessiert ist, keine Zinsen mehr auf seine Verbindlichkeit zahlen zu müssen, oder von einem Gläubiger, dessen Forderung von der Verjährung bedroht ist'.

100. Cf. F. Peters / R. Zimmermann, *Verjährungsfristen*, in: Bundesminister der Justiz, Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, Bd I, Köln 1981, p. 266.

out of the same contract[101]. In this latter case, it is possible to find a reason for allowing the defendant to invoke his time-barred counterclaim, since he might have renounced it under the implied assumption that the other party would not sue him.

2. – *An unjustified surety*

The last point I would like to raise is the following. The retroactive effect of set-off plays an important role in the *bankruptcy* of a debtor, creditor of a counterclaim. It is generally recognized that the party who is able to set-off against a bankrupt has a privileged position, in other words that he has at his disposal a kind of surety which breaks through the principle '*par conditio creditorum*'[102]. He can avoid the risk of bankruptcy proceedings and enforce his whole claim, instead of getting only a percentage (a dividend) by declaring set-off after the commencement of bankruptcy proceedings.

However, most of the time this surety remains hidden for third party creditors. Indeed, in contrast to surety with respect to movable property, there is no open transfer of the possession of the surety[103], and no notation in a register as for immovable surety[104]. Why should then the creditor who can be sued by the bankrupt person be advantaged, even though he could have very easily declared set-off before the bankruptcy? When claims arise out of the same contract, one may see a reason for allowing set-off where a claim is due only after bankruptcy is declared; but this is probably the only case.

Art. 213 al. 2 of the new Swiss Bankruptcy Law recognizes set-off, for instance, when the counterclaim first became due before the declaration of bankruptcy, but not afterwards[105]. This is therefore typically a case based on the idea of retroactivity of set-off. This solution, however, lacks a sound dogmatic basis[106]; it is (again) a mere remnant of the previous theory of automatic set-off.

Conclusion

As the drafters of the BGB noted, to deny a retroactive effect to the declaration of set-off has the advantage of creating a legal situation which is simple and clear, and which is harmonious with the fact that the claims remain unaffected until the declaration of set-off[107]. Thus, it seems to me that the retroactive effect

101. Ibidem.
102. See for a similar position, Zimmermann, *Die Aufrechnung* (n. 3), p. 726.
103. See for instance art. 884 al. 3 Swiss Civil Code; § 1205 BGB.
104. See for instance art. 799 Swiss Civil Code; § 1115 BGB.
105. '[2] Toute compensation est toutefois exclue: 1. Lorsque le débiteur du failli est devenu son créancier postérieurement à l'ouverture de la faillite, à moins qu'il ait exécuté une obligation née antérieurement ou qu'il ait dégrevé une chose mise en gage pour la dette du failli et qu'il possède sur cette chose un droit de propriété ou un droit réel limité (art. 110, ch. 1, CO); 2. Lorsque le créancier du failli est devenu son débiteur ou celui de la masse postérieurement à l'ouverture de la faillite'.
106. See for German Law § 94 InsO: '[Erhaltung einer Aufrechnungslage]. Ist ein Insolvenzgläubiger zur Zeit der Eröffnung des Insolvenzverfahrens kraft Gesetzes oder auf Grund einer Vereinbarung zur Aufrechnung berechtigt, so wird dieses Recht durch das Verfahren nicht berührt'.
107. Mugdan, *Materialien* II, p. 60: '...dass durch die Verneinung der rückwirkenden

of set-off does not, as the authors of the Dresdener Draft thought, go without saying. On the contrary, as long as set-off was merely judicial or automatic, retroactive effect was not an issue. The effect of a declaration of set-off taking place prior to the declaration itself, was in fact an attempt made by the Pandectists to reconcile their theory with Roman law texts. To some extent, it was also a way to comply with some practical consequences of their conception, i.e. with the fact that declaration of set-off could only be made in court.

Our analysis has attempted to show that the retroactive effect of set-off has no more dogmatic or practical justification, as soon as the strict procedural approach of declaration is abandoned and as soon as it is possible to declare set-off at any time, even outside of court.

One might be surprised therefore that the New Dutch Civil Code has kept the retroactive effect of set-off, even though this codification was the result of intensive comparative research spanning decades. With the adoption of a system of set-off by way of declaration, I think the drafters should have chosen to deny the granting of any retroactive effect to set-off.

The Lando Principles seem therefore to follow the right path. Their choice of a set-off by declaration with only *ex nunc* effect produces a harmonious solution, which has to be preferred to any other[108]. One might note that this is already the solution which prevails under Swedish law[109].

This essay had also a further purpose, which was to show how an historical evolution may be grounded upon a 'productive misunderstanding'[110]. Identifi-

Kraft klares und einfaches Recht geschaffen würde und dass diese Verneinung auch mit der dem Entwurfe zu Grunde liegenden Auffassung, wonach sich beide Forderungen bis zur Aufrechnungserklärung des einen oder anderen Theiles unabhängig und unbeeinflusst von einander gegenüberstehen, eher im Einklange stände. Denn nicht ohne Grund kann gesagt werden, dass mit der Aufstellung der rückwirkenden Kraft im Wesentlichen doch anerkannt werde, dass schon von dem Zeitpunkt an, wo die Forderungen sich kompensationsfähig gegenübertreten, die eine von der anderen beeinflusst sei, und dass die Verlegung der Tilgung in die Vergangenheit nur im Wege positiver Satzung durch eine juristische Fiktion möglich sei'.

108. See for the position paper presented by Prof. Zimmermann at the Lando Commission, Zimmermann, *Die Aufrechnung* (n. 3), p. 707–739.

109. See for instance S. Lindskog, *Kvittning*, 2nd ed., Stockholm 1993, p. 565 and K. Rodhe, *Obligationsrätt*, Lund 1984, p. 71; also Zimmermann, *Die Aufrechnung* (n. 3), p. 719.

110. The expression was first used in a legal context, in Dutch, by H.R. Hoetink as 'productief misverstaan' in his speech, *Historische Rechtsbeschouwing*, held as Rector Magnificus on 10 January 1949 on the occasion of the 316th *Dies natalis* of the University of Amsterdam, Haarlem 1949, page 25; the text has been translated in English by R.W. Daniel and I. Wildenberg and published in: H.R. Hoetink, *Law as an object of historical reflexion*, in: J.A. Ankum et al. (edit.), *Opera selecta H.R. Hoetink*, Zutphen (Holland) 1986, p. 133 seq. (in particular p. 147, 'productive misunderstanding'); Hoetink indicates that he borrowed the expression from E. Seeberg, *Luthers Theologie. Motive und Ideen*, I: *Die Gottesanschauung*, Göttingen 1929 and, in particular, from the recension of this book by H.J. Iwand, Dt Literaturzeitung, 1929, col. 1613 ('Damit ist bereits das zweite Charakteristikum dieser neuen Lutherauffassung angegeben, das in einem methodischen Prinzip liegt. S. bezeichnet es gern paradox als 'produktives Missverstehen', worunter er die Umprägung überkommener Formen und Begriffe zu neuen Bedeutungen versteht'); see also Seeberg, *Luthers Theologie*, p. 105 ('Missdeutung Luthers'), p. 116 ('Die Idee kann [...] aus der negativen Gotteslehre der neuplatonischen Metaphysik in *produktivem Missverstehen* gewonnen sein'). The expression should not be understood in a pejorative way

cation of the latter may enhance our understanding of the actual situation at issue and may lead to different or new solutions, and which themselves are more thoughtfully conceived.

(see Hoetink, *Law as an object of historical reflexion*, p. 149); see however W. Kunkel, *Fides als schöpferisches Element im römischen Schuldrecht,* in: Festschrift P. Koschaker, vol. II, Weimar 1939, p. 8: 'Dass historische Irrtümer schöpferisch wirken, ist nicht Ungewöhnliches'. – I am grateful to Prof. em. R. Feenstra and Prof. em. F. Wubbe, who both helped me to trace down the origin of this well-known expression in a legal context.