

# SET-OFF

Questionnaire, last up-date 08.06.2005 10:07

---

## *I. Definition of set-off*

### **Case 1. Set-off –counterclaim**

Debussy transport Ltd (DTL) delivered a piano to the Concert Hall of Lamda City. The cost of transportation was €2000. However, during the installation of the piano, an employee of Debussy transport Ltd (DTL) scratched a valuable painting of Manet. The exploitation firm of the Concert Hall refused to pay for the transportation, arguing that the damages were higher than the transportation costs agreed upon. DTL filed an action for €2000.-. Concert Hall Exploitation Firm (CHEF) countered with a counterclaim for damages, which they estimated at €3'000.-. CHEF wrote that they would set-off both claims. *Is it possible to set-off by means of a counterclaim? What are the consequences ?*

Variation: DTL did not cause a scratch on Manet's painting, but was owing CHEF an amount of €3'000.- due to a previous damage caused during a transportation.

## *II. Conditions of set-off*

### *1. Nature of the claims*

#### **Case 2. Set-off – mutuality**

On April 2000, Bank Hannibal Ltd bought computers from CompuShop for €10'000. A local branch of Bank Hannibal Ltd, Hannibal Bank - Utopia City, gave on January 2000 a €6'000 short time loan to CompuShop. Although the loan was already due by CompuShop on 1<sup>st</sup> April 2000, CompuShop explained not to be in a position to pay at that time.

- a) *Can Bank Hannibal Ltd consider to pay only €4'000 to CompuShop by invoking set-off in the appropriate way?*
- b) *Would the situation be the same if in the loan contract with Hannibal Bank – Utopia City, CompuShop would have agreed to reimburse the loan to Bank Hannibal Ltd ?*

#### **Case 3. Set-off between price-claim and claim for damages**

Romeo chartered a small ship to transport precious furniture from Le Havre to Dreamland. He had asked for specific containers. However, some of the containers contained xylophagous insects. After two months of transportation, it appeared by unloading that the precious wood had been partially damaged by the insects. As Charter Ltd requires payment, Romeo invokes set-off for an amount that should be fixed by an expert.

*Will set-off be effective? Does it make a difference if Charter Ltd recognizes its responsibility for damages or, on the contrary, denied the existence of any claim for damages due to the xylophagous insects?*

#### **Case 4. Set-off between two claims in different currencies**

Alejandro sold to Benedek goods for a price of €20'000, due on 1<sup>st</sup> April 2004. Since Benedek was not paying, Alejandro filed a claim on 1<sup>st</sup> November 2005 stating his claim in Euros. Benedek stated in his answer on 1<sup>st</sup> February 2006 to have already alleged/declared set-off on 1<sup>st</sup> June 2005, invoking a claim of 25'000 US\$ arising out of a judgment rendered in his favour against Alejandro on 1<sup>st</sup> September 2004. The amount concerned expenses he had incurred to fix the goods received, an amount that under the same contract was considered to be born by Alejandro according to the judicial sentence. The final judgment on the matter was rendered on 1<sup>st</sup> October 2006. *Was such a set-off possible and, if yes, how would it work ?*

(Fictional conversion rate :

1 <sup>st</sup> April 2004:	1 €= 1 US\$
1 <sup>st</sup> September 2004:	1 €= 1,1 US\$
1 <sup>st</sup> June 2005:	1 €= 1,25 US\$
1 <sup>st</sup> November 2005:	1 €= 1,3 US\$
1 <sup>st</sup> February 2006:	1 €= 1,35 US\$
1 <sup>st</sup> October 2006:	1 €= 1,4 US\$)

#### **Case 5. Set-off between two claims out of two different contracts (complex or independent)**

Genius Work Contractor Ltd (GWC) entered into a contract for the construction of a new building for Metal Construction Ltd (MC), a manufacturer of steels to be used for construction. In order to get a lower price for that construction, MC was ready to sell concrete-reinforcing steels to GWC at a discounted price. Once GWC had begun to construct the new building, it terminated the sale contract, because it had found another seller for the same concrete-reinforcing steels for a lower price. MC considered this breach of contract as illegitimate and did not want to pay the full construction price, but deducted what it considered as an appropriate amount for the loss of benefit resulting from the sale contract. *Is such a set-off possible?*

Variation:

1. *Would the result be different if the second contract for sale would have been concluded at a different period of time, with no regard as to the first contract?*
2. *Would the result be different if MC would have just wanted to (partly) set-off the price of construction with its claim for payment of the concrete-reinforcing steels?*

**Case 6. Effects of set-off with a time-barred claim**

David is selling all sorts of goods. He asked Contractor Ltd to renovate his little shop. The construction work was finished on end of October 2005 and the construction price claim matured on 1<sup>st</sup> November 2005. On February 2006, Contractor Ltd wrote a letter to David asking for payment of the construction price of €10'000. David replied on March 2006 invoking set-off by means of a claim for payment of several goods bought in his shop by Contractor Ltd and which were never paid for. The price claim for these items (value of €10'000) was however time-barred on 31<sup>st</sup> December 2005. Since Contractor Ltd opposed to set-off, he filed a lawsuit and David, as defendant, invoked again set-off by means of this time-barred claim. *Is set-off possible ?*

**Case 7. Ascertainment of claims (liquidity)**

Fun-Textile Ltd bought for €10'000.- a new machine to do imprints on T-shirts. The first tests were not at all conclusive and Fun-Textile Ltd damaged hundreds of T-shirts by using this new machine. After some corrections were made by the seller to the machine, it worked again properly. Fun-Textile considered to have suffered some damages for an estimated amount of €4000. It explained to the seller to be ready to pay for €6'000, setting-off the claim for damages against the price. As the seller filed a lawsuit against Fun-Textile Ltd for €10'000 plus interests, Fun-Textile alleged set-off against the claim using its claim for damage of €4000. *Is set-off possible?*

a) *Assuming that the seller contests any responsibility for the damages ?*

b) *Assuming that the seller contests only the amount of damages claimed ?*

**Case 8. Interdiction to set-off by bank deposits**

In her general-terms clause, Bank of Deposit Ltd mentioned a clause allowing her to set-off money deposited with any claim arising from other accounts opened at the same branch. An express mention was made for claim of interests. Geoffrey did not pay his loan interests. After three months of none payment, the bank declared to set-off his claim for interests against a part of the sum deposited in the same branch by Geoffrey.

*Is set-off possible ?*

**Variation:**

1. *Would the result be different if Geoffrey had signed a contract that allowed for set-off in such a case ?*
2. *Would the result be different if Geoffrey had signed a General Term clause allowing for set-off in such a case ?*

## **2. Mode to set-off**

### **Case 9. Within bankruptcy**

Hard Work Ltd could no more pay its debts. One debt was due on 1<sup>st</sup> April 2004 of an amount in capital of €5000 to be paid to Alan, a second debt was due on 1<sup>st</sup> June 2005 of an amount in capital of €5000 to be paid to Bertha, a third debt was due on 1<sup>st</sup> August 2005 of an amount in capital of €5000 to be paid to Christine, a fourth debt (which came into existence on 1<sup>st</sup> May 2005) was due on 1<sup>st</sup> October 2005 of an amount in capital of €5000 to be paid to Danny and a fifth debt was due on 1<sup>st</sup> January 2006 of an amount in capital of €5000 to be paid to Ennio.

Hard Work Ltd had however a claim for €2000 against Bertha due on 1<sup>st</sup> July 2005, a claim for €2000 against Christine due on 1<sup>st</sup> November 2005, a claim for €2000 against Danny due on 1<sup>st</sup> August 2005, a claim for €2000 against Ennio due on 1<sup>st</sup> February 2006.

On 1<sup>st</sup> September 2005, the judge declared bankruptcy over Hard Work Ltd. It is envisaged that Alan will obtain about 10% of his claim out of the bankruptcy proceeding.

*Will Bertha, Christine, Danny and Ennio be able to partly set-off their claims with their debts after declaration of bankruptcy ?*

#### Variation:

1. *Would it be possible for Bertha, Christine, Danny and Ennio to set-off their claims already before the declaration of bankruptcy? Does it make a difference if the claims are or not connected ones?*
2. *Would the solution be the same if Danny's claim came into existence and was matured on 1<sup>st</sup> October 2005?*
3. *Would the solution be the same if the contracts passed by Hard Work Ltd with Bertha, Christine, Danny and Ennio indicated that set-off was excluded?*
4. *Compare Alan's position with the other (sort of summary of the figures).*
5. *What if Hard Work Ltd claim against Bertha is a conditional one, which condition is fulfilled after bankruptcy declaration?*

### **Case 10. Insolvency and reversal of set-off**

Hard Work Ltd had difficulties to pay its debts of €5000 due to Fine Art Ltd and matured for a couple of months already. Knowing that an insolvency proceeding may be declared very soon, Fine Art Ltd obtained from Hard Work Ltd a loan of €4000. Money was paid to Fine Art Ltd and it was agreed between the partners that the loan had to be reimbursed within one year, at the latest. Two months later, Fine Art Ltd declared to set-off (or alleged that set-off had taken place) his debt of €4000 with its claim of €5000. One month later an insolvency proceeding was opened against Hard Work Ltd and Hard Work Ltd produced its residual claim of €1000 against Fine Art Ltd in the insolvency proceeding.

*Would it be possible for the administrator of the insolvency proceeding, for other creditors to ask for reversal of the set-off effects ? If yes, under which conditions ?*

Variation:

*If instead of obtaining a loan from Hard Work Ltd, Fine Art Ltd has acquired a claim of € 4000 against Hard Work Ltd from Go-Paintings Ltd about 2 months before opening of the insolvency proceeding, could set-off be reversed, taking into account that Hard Work Ltd knew that Fine Art Ltd was about to run into an insolvency proceeding.*

**III. Consequences of set-off****Case 11. Effects of set-off on the running of interests**

On 1<sup>st</sup> November 2005, the PhoneShop contracted a loan of €10'000 from Bank of A. The amount had to be reimbursed on 1<sup>st</sup> May 2006. The contractual rate of interests for delay was set at 6% a year to be added to the 8% contractual loan interests. On 1<sup>st</sup> March 2006, the Bank of A bought a whole range of phones for his various offices. The total amount of the contract was up to €10'000 and had to be paid on 1<sup>st</sup> June 2006, an interest of 4% a year was due in case of delay. The PhoneShop was in financial difficulties. Due to its bad administrative organisation and also to the illness of the bookkeeper during one month, it did not notice immediately the possibility of setting-off the two abovementioned claims. On 1<sup>st</sup> November 2006, the PhoneShop contacted the Bank of A, which had not paid its debt either, to invoke set-off or to allege that it had taken place. Bank of A opposed to it and filed a claim for reimbursement of the loan including interests. The PhoneShop alleged that both amounts had to be/were set-off. *Was set-off possible and to what extent ?*

Variation:

*Would the solution be different if instead of a claim for reimbursement of a loan of €10'000 to Bank of A, the PhoneShop had damaged some parts of the electrical system of Bank of A, while installing (on 1<sup>st</sup> May 2006) some of the phones bought by Bank of A. When the PhoneShop asked for payment of the €10'000 price claim (due on 1<sup>st</sup> June 2006 at an interest rate of 4%), Bank of A. opposed by pretending to set-off a claim for damages of €10'000 against the PhoneShop. The PhoneShop contested the amount claimed, but not its liability.*

**Case 12. Set-off with several claims on both sides**

Ideal Home Ltd and Wood&Cut Ltd are in commercial relations on a regular basis. Ideal Home Ltd has been assigned by Jimmy Carr a secured claim of €6000, due on 1<sup>st</sup> April 2005, against Wood&Cut Ltd. The latter has been informed of this assignation and has decided to use the open claims he has against Ideal Home Ltd to pay this claim.

The situation of claims is the following:

Claim of Ideal Home Ltd against Wood&Cut Ltd

1. €6000, secured claim, due on 1<sup>st</sup> April 2005
2. €2000, interest rate 4%, due on 1<sup>st</sup> April 2005
3. €4000, due on 1<sup>st</sup> June 2005
4. €2000, due on 1<sup>st</sup> December 2005.

Claim of Wood&Cut Ltd against Ideal Home Ltd

1. €6000, interest rate 5%, due on 1<sup>st</sup> July 2005
2. €4000, interest rate 8%, due on 1<sup>st</sup> July 2005
3. €2000, interest rate 4%, due on 1<sup>st</sup> October 2005
4. €2000, due on 1<sup>st</sup> December 2005.

*According to the national set-off mode, which claim will be set-off against which other and when will it take place (if by declaration, on 1<sup>st</sup> November 2005) ? Can the parties influence the order of the set-off effect?*

---