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Set-off Defence in International Commercial Arbitration

Master's Thesis

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Declaration:

I hereby declare that this thesis represents my own work and effort and that it has not been submitted anywhere for any degree or diploma in any university or other institution. All sources and aids used for this thesis have been indicated in a way commonly used in a scientific research.

In Tilburg: 22. 05. 2012

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Abstract

Set-off is meant to be one of the most important defences in arbitration proceedings. About 15 – 20 per cent of all international arbitrations involve set-off defence. There is not much dispute about the possibility to virtually extinguish mutual claims of the parties however national concepts of set-off differ dramatically. Moreover, in contrast to most other legal mechanisms set-off is always formed by no less than two obligations. These obligations may be regarded differently and be subject to different laws which can lead to a series of difficult questions regarding not only choice-of-law but also judicial competence. The centrum of the controversy lays in the situation when the defendant raises his cross-claim, which falls outside the scope of an arbitration agreement, to be mutually offset. Arbitrators can be in a very difficult position as they have to find, in the absence of any clear rule, reasonable limits of the adjudication of set-off. This work aims to find out what should be the limits of the adjudication of set-off with the cross-claim over which the tribunal normally wouldn´t be competent to decide. There is offered a legal framework with a set of good practices which should be followed in order to strengthen legal certainty, procedural efficiency and effective functioning of set-off in international commercial arbitration.

KEY WORDS: international commercial arbitration, set-off, jurisdiction

Abstrakt

Započtení je považováno za jednu z nejdůležitějších obran v arbitrážním řízení. V rámci mezinárodní obchodní arbitráže je započtení zahrnuto v přibližně 15-20 procentech případů. Možnost absorpce vzájemných pohledávek není obecně sporná, nicméně národní úpravy se dramaticky liší. Mimo to, na rozdíl od mnoha jiných právních mechanismů, je započtení vždy tvořeno nejméně dvěma pohledávkami, které mohou být navíc předměty odlišných právních režimů, což může vést k sérii obtížných otázek týkajících se nejen rozhodného práva, ale i příslušnosti ohledně započtení. Centrum kontroverze spočívá v situaci, kdy žalovaný namítne započtení své protipohledávky, která nespadá do rozsahu dané rozhodčí smlouvy. Rozhodci se poté mohou dostat do velmi složité situace, jelikož musí najít, v případě absence jasného pravidla, přiměřené limity své příslušnosti. Cílem této práce je nalezení limitů přípustnosti započtení protipohledávky, o které by tribunál nebyl obyčejně příslušný rozhodnout. Práce navrhuje právní rámec a soubor osvědčených postupů, které by měly být přijaty, aby byla posílena právní jistota, procesní efektivita a účinné fungování započtení v rámci mezinárodní obchodní arbitráže.

KLÍČOVÁ SLOVA: mezinárodní obchodní arbitráž, započtení, příslušnost

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INTRODUCTION

The world is changing. This sentence seems to be rather superfluous as the world has always been changing. However, I see the great difference in the meaning of this sentence in the context of the last years as the world is changing much differently than it used to be. The informational revolution which we have been facing over the last decade has completely changed the inner logic of the human. In this respect we can also speak about the discourse of the world order. The discourse does not just modify the law as such but it necessarily brings the change in the given system creating a new unity. However, there must be seen that the unity of the discourse is not based upon the existence of the given object but *"it would be the interplay of the rules that make possible the appearance of objects during a given period of time…"*[1] This situation has to be reflected by the legal order composed by its individual object. However, as law by its nature follows the economic and social discourse with a certain delay, there emerges a space for the over protection of the "old object" despite the fact that a new interplay of rules calls for the change. Therefore, the legal traditions of the "old world" bring in several aspects significant obstacles to the "informative society". However, the contra balance to that, as *Glenn* noted, can be the fact that *"the traditions just do go on talking to one another, however you try to limit the process."*[2]

[1] FOUCAULT, Michel. The Archaeology of Knowledge and the Discourse on Language. New York: Pantheon Books, 1972, pp. 32-33.

[2] GLENN, Patrick. Legal traditions of the world: sustainable diversity in law. 4th ed. Oxford: Oxford University Press, 2010, p. 174.

The reckless unification is not desirable however, there can be seen a number of areas where the united approach would significantly strengthen the effectiveness of law and legal certainty of the parties. In other words some instruments which are perfectly working within the national system are not working effectively for the purposes of the international sphere. The typical example of such an instrument is set-off. As *Fountoulakis* stated the fact that set-off is *"a legal instrument which supposed to enhance efficiency and facilitate transactions clashed with the fact that, in the guise of domestic provisions, set-off takes on a peculiarly domestic, almost antique character."*[3] There can be seen that the oversized restrictive power of tradition undermines the effective functioning of the instrument in the arbitration proceedings as the international commercial arbitration is still under the great influence of *lex loci arbitri.*

Set-off is meant to be one of the most important defenses in arbitration proceedings. About 15 – 20 per cent of all international arbitrations involve a set-off defence.[4] Generally, set-off is defined as *'the process by which a person may use a right to performance held against another person to extinguish in whole or in part an obligation owed to that person.'*[5] There is not much dispute about the possibility to virtually extinguish mutual claims of the parties however national concepts of set-off differ dramatically. In some countries set-off is regarded as a procedural instrument in the others as the matter of substantive law. Moreover, in contrast to most other legal mechanisms set-off is always formed by no less than two obligations. These obligations may be regarded differently and be

[3] FOUNTOULAKIS, Christiana: Set-off Defences in International Commercial Arbitration: A Comparative Analysis. Oxford: Hart Publishing Ltd, 2011, p. 18-19.

[4] See BERGER, Klaus Peter. Set-off, in: ICC International Court of Arbitration Bulletin (Special Supplement), 2005, p. 17 et seq.

[5] III. – 6:101(1) of the Draft Common Frame of Reference (DCFR). BAR, CH., VON and collective: Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). Munich: Sellier: European Law Publishers, 2009.

subject to different laws. Therefore, the modern business life, where set-off plays a crucial role, faces serious practical problems concerning mainly choice-of-law and judicial competence. This work will focus mainly on the latter

The centrum of the controversy lays in the situation when the defendant raises his cross-claim, which falls outside the scope of an arbitration agreement, to be mutually offset. If an arbitral tribunal considers set-off as a matter of substantive law it will have to justify its competence to decide. It implies the examination of the existence of the cross-claim. The issue is then whether the arbitral tribunal should decide over the cross-claim which is subjected to the different forum. Arbitrators can be in a very difficult position as they have to find, in the absence of any clear rule, reasonable limits of the adjudication of set-off. The main research question of this master thesis, therefore, is what are the limits of the adjudication of set-off with the cross-claim over which the tribunal normally wouldn´t be competent to decide. There will be offered a legal framework with a set of good practices which should be followed in order to strengthen legal certainty, procedural efficiency and effective functioning of set-off within the international commercial arbitration.

The topic of this master thesis is "Set-off in international commercial arbitration". The work is divided into two main parts. Firstly, the question of the notion and functions of set-off is discussed in international context. This part aims to analyze what are the main differences and similarities between the national concepts of set-off. The main aim is to introduce the leading problems which are connected with the questions of jurisdiction and choice-of-law and prepare the grounds for the further analysis. The core issue of the work is discussed in the second part

which answers the question how are the difficulties regarding tribunal's competence over set-off dealt with in international commercial arbitration. Further, the questions of set-off in enforcement proceedings and the grounds for the corrective activity of national courts are discussed. The research then comes up with a legal framework with a set of good practices which will improve the current situation. At this place I would like to also mention that the research was launched at Charles University in Prague however, the great part of this master thesis was written during my study period at Tilburg University. In order to support my research I also undertook several study visits of The Peace Palace Library in The Hague.

I. THE NOTION AND FUNCTIONS OF SET-OFF IN INTERNATIONAL PERSPECTIVE

Under the first impression it does not seem to be a difficult task to find the definition of set-off. The attributes of economic efficiency, equity and security arise from its very nature and brings together the general understanding of its main aims. However, in the context of different legal traditions of national legal systems can be seen significant differences in its nature and conditions under which it operates. In order to find the scope of common grounds for the subsequent analysis there seems to be necessary to define the similarities of the instrument. However, as *Danneman* provides the eye shall be necessary kept also on differences as finding a similarity in a difference and vice versa contains an outstanding added value for the legal research.[6]

There must be noted that the great number of legal systems use in connection with set-off Latin term *"compensatio"*. It seems to be the most appropriate expression *"since it is used, or at least understood, in the three major linguistic families within EU."*[7] However, the common law system recognized the term *"compensatio"* in the different meaning as *it "basically refers to an indemnity of damages."*[8] In order to avoid any misuse of the instrument there will be further used the term "set-off".

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[6] DANNEMANN, Gerhard. Comparative Law: Study of Similarities or Differences? In: REINMANN, Mathias and Reinhard ZIMMERMANN. The Oxford Handbook of Comparative Law, 2006, pp. 383-420.

[7] ZIMMERMANN, Reinhard. Comparative Foundations of a European Law of Set-off and Prescription. Cambridge: Cambridge University Press, 2002, p. 21.

[8] PEEL, Edwin. The Law of Contract. London: Sweet & Maxvell, 2007, par 20-003 et seq, cited in FOUNTOULAKIS supra note 3 at note 58.

1. SIMILARITIES ACROSS THE NATIONAL JURISDICTIONS

1.1. Extinction of mutual obligations

Generally, set-off is defined as *"the process by which a person may use a right to performance held against another person to extinguish in whole or in part an obligation owed to that person."*[9] The definition express the defensive nature of set-off as it gives a shield into the hand of the debtor against his creditor. There can be also said that if the debtor is at the same time the creditor of his debtor he has under certain circumstances right to disregard mutual obligations up to the amount of the smaller of these two. In general there is a consensus that the operation of set-off can be achieved if five requirements are met. *Zimmermann* summarized these requirements as follows: (1) mutuality of claims; (2) both obligations have to be of the same kind; (3) *the cross claim has to be due*; (4) set-off is not excluded; (5) *the debtor may not normally set-off a claim which is unascertained* (requirement of liquidity.)[10] These basic characteristics are accepted by all modern legal systems.[11]

[9] See III. – 6:101(1) of the Draft Common Frame of Reference (DCFR). BAR supra note 5.

[10] ZIMMERMANN, supra note 7, pp. 60-61.

[11] Author´s note: for purposes of this analysis have been taken into account German law, French law, English law and Czech law as the first three represents the three main approaches to set-off and the last one is author´s home jurisdiction.

1.2. Contractual set-off

Generally undisputed point which also builds the common ground of the analysis can be seen in the possibility to create set-off by an agreement. Contractual set-off is generally recognized by all legal systems. According to *Zimmermann* this fact comes from the general recognition of the freedom of the contract and therefore is not in most codifications explicitly expressed.[12] *Wood* adds that the main purpose to agree upon set-off is to activate it in circumstances where it would not have been otherwise available.[13] The frequent use can be mainly seen in the banking industry where new instruments like netting and clearing agreements have emerged and created a new dimension of its use.[14] The following part of the analysis will deal just with the questions of unilateral set-off.

1.3. Set-off v. Counterclaim

The other issue which has to be stressed is generally recognized distinction between set-off and counterclaim. The difference can be seen in the fact that the counterclaim is in its nature a procedural device. It cannot be seen as a defense but as an independent cross-claim action which is

[12] See ZIMMERMANN supra note 7, pp. 18-20. Author's note: however see for instance Section 364 of Czech Business Code No. 513/1991 Sb. which provides that by the agreement can be set-off any mutual obligations of the parties. There can be even considered the obligations which are not due or which have lapsed. See ŠTENGLOVÁ, I., PLÍVA, S., TOMSA, M. et al. Obchodní zákoník. Komentář. 13. vydání. Praha: C. H. Beck, 2010, p. 1025.

[13] See WOOD, Philip R. Law and practice of international finance series. 2nd ed. London: Thomson/Sweet, 2007, pp. 81-83.

[14] Author's note: "*netting is a process to settle the existing claims and debts between the companies in a corporate group"*…on the other hand *"cash pooling concentrates the whole liquidity of the corporate group on a single bank account…"* In: JANSEN, Justus. International cash pooling: cross-border cash management systems and intra-group financing. Munich: Sellier. European Law Publ., 2011, p. 2.

brought in the same proceedings.[15] For that reason the counterclaim contains great potential to increase procedural efficiency as the costs of the proceedings are lowering. Differently from set-off the counterclaim has typically an offensive character. If the mutual obligations of the parties are of the same kind the counterclaim extinguishes the primary claim but in the same time also leads to the decision over the balance between the primary claim and the cross-claim.[16] On the contrary as was provided in the famous decision *Stooke v. Taylor* set-off *"can be used…as a shield, not as a sword."*[17]

1.4. Set-off in insolvency proceedings

The opening of insolvency proceedings is not in most of the jurisdictions an obstacle for permission of set-off. The reasons can be seen in the necessity to ensure commercial predictability and the availability of credit. Moreover, set-off is in this manner an instrument which protects the possibilities of strategic misuses of the insolvency proceedings.[18] According to some authors the key issue is in this manner also the protection of bona fide creditor.[19] However, there must be noted that the use of set-off in case of insolvency is connected with a lot of tricky issues as it challenges the principle of equal treatment of creditors. The need *"to avoid the effects of*

[15] See DERHAM, Rory: The law of set-off. 3rd ed. New York: Oxford University Press, 2003, pp. 2-4.

[16] Cf. DRÁPAL, Ljubomír and Jaroslav BUREŠ. Občanský soudní řád: komentář. 1. vyd. Praha: C. H. Beck, 2009, pp. 636-638; ZIMMERMANN supra note 7, pp. 20-21; FOUNTOULAKIS supra note 3, pp. 20-21; DERHAM supra note 15, pp. 2-4.

[17] Stooke v. Taylor 5 QB 569, Cockburn CJ, 1880. In FURMSTON, Michael and Vincent POWELL-SMITH. Powell-Smith and Furmston's building contract casebook. Ames, Iowa: Wiley-Blackwell, 2012, p. 169. Author's note: Stooke v. Taylor is meant to be the first step towards the modern law of set-off in common law. See ibid.

[18] See UNCITRAL legislative guide on insolvency law. New York: United Nations, 2005, pp. 155-156.

[19] See HÁSOVÁ, Jiřina. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon): komentář. 1. vyd. Praha: C. H. Beck, 2010, pp. 278-281.

certain pre-commencement actions by creditors have to be also limited."[20] For these reasons most jurisdictions deals with insolvency set-off through specific rules which goes beyond the general provisions of civil law. The analysis of these mechanisms within the insolvency proceedings goes beyond the scope of this work and will not be further discussed.

[20] UNCITRAL supra note 18, p. 155; Cf. HAVEL, Bohumil. Předpoklady (jednostranného) započtení nejen podle insolvenčního zákona. Obchodněprávní revue No. 10, 2010.

2. DIFFERENCES ACROSS THE NATIONAL JURISDICTIONS

There is not much dispute about the possibility to virtually extinguish mutual claims of the parties however national concepts of set-off differ dramatically. The main issue which needs to be determined is whether set-off is regarded as a procedural instrument or as the matter of substantive law. The second problem is connected with the questions of operation of set-off. Does set-off operates *ipso iure* or by unilateral declaration? What is the effect of its operation? Finally, the attention is also in short turned to the requirements for set-off.

2.1. The nature of set-off

There can be seen the tension between common law and civil law legal systems in understanding the nature of set-off. On the one hand, in common law jurisdiction, set-off is a procedural device and takes effect on and from the date of judgment, on the other hand in civil law jurisdictions set-off operates mostly retroactively to extinguish mutual claims at the moment when they firstly met. The effect of set-off is achieved extra-judiciary and therefore is recognized as a matter of substantive law.[21]

2.1.1Common law

As a typical example of system which recognized set-off as a purely procedural mechanism should be mentioned English law. The main reason

[21] Cf. ZIMMERMANN, supra note 7, pp. 22-32.

for the highly different understanding can be seen in the absence of the acceptance of the Roman law tradition. The first statutes emerged in the first half of the 18th century.[22] Statutory set-off is in current English legislature still recognized as an own category. As *Aeberli* noted *"Statutory set-off never acquired the characteristics of a substantive defence. The set-off only crystallises in the judgment of the court."*[23]

Differently from statutory set-off, English law recognize also the term "equitable set-off"[24] which is historically derived from the activity of the Court of Chancery which acted as an equity court. Equitable set-off aims to reflect the fairness principle in the common law system. The main purpose is to reduce the creditor´s primary claim provided that he breached his obligation to the debtor. As an example can be seen the situation when a defective product is delivered to a debtor; then there seems to be fair to raise the objection against the payment of full price.[25]

The distinction between statutory set-off and equitable set-off has been to the great extent reduced by the fusion of law and equity in 1873.[26] However, as *Hapgood* provides, equitable set-off is still recognized by the judicature of English courts.[27] Some modern authors see even equitable set-off as a bridge from the strictly procedural nature of English set-off to the substantive waters. *Derham* noted that model situations which allow the use

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[22] See HAPGOOD, Mark. Law of Set-Off in England, The International Financial Law Review, Vol. 2, Issue 6, 1983, pp. 22-25.

[23] AEBERLI, Peter. Abatements, Set-Offs and Counterclaims in Arbitration Proceedings. ADR Law Journal, 1993 [online 2012-04-18]. Available at: WWW: <http:// www.aeberli.com /uploads/articles/setoff.pdf>.

[24] Author´s note: some authors prefer the term "transaction set-off". See WOOD, Philip. English and international set-off. London: Sweet and Maxwell, 1989, pp. 1154-1156; As an alternative to equitable set-off there is also recognised the term "abatement" which was developed by common law courts. As there is no significant difference between these two the term abatement will not be further discussed. For more information about the abatement cf. AEBERLI supra note 23, pp. 1-4.

[25] See WOOD supra note 24, p. 1154.

[26] See ZIMMERMANN, supra note 7, pp.27-28.

[27] See HAPGOOD supra note 22, p. 22.

of equitable set-off has transformed itself to the title of the demand which operates per se.[28] However, as *Fountoulakis* adds the world "substantive" has in common law countries a different meaning then in civil law. It means rather a self-help remedy because the mutual claims still hold their own identities up to the moment of the court decision.[29] In this respect the connection between common law and civil law cannot be seen.

2.1.2Civil law

The civil law system is based on the Roman law tradition. Therefore, it would seem to be natural that different set-off models are between common law and civil law jurisdiction deeply rooted. However, as *Zimmermann* noted the truth is different as set-off had in Roman law procedural character.[30] The operation of set-off was dependent on the applicable formula which was appropriate to the given situation. There can be seen three regimes which emerged within the relation of solvent parties: *bonae fidei iudicia*, *actiones stricti iuris* and specific *actiones stricti iurist.*[31]

First of them, *bonae fidei iudicia,* reminds in a great extent English equitable set-off as it, according to *William and Hunter*, *"allowed unrestricted power to estimate how much fairness and equity ought to be given up to the plaintiff."*[32] According to my opinion this discretion can be still seen as the necessary technique in the analysis providing the questions

[28] See DERHAM supra note 15, pp. 94-98.
[29] See FOUNTOULAKIS supra note 3, pp. 112-113.
[30] See ZIMMERMANN, supra note 7, pp.23-25.
[31] SOHM, Rudolph. The Institutes of Roman Law. New Jersey: Gorgias Press, 2002, pp. 348-354; ZIMMERMANN, supra note 7, pp.23-25; WILLIAM, Alexander and Gaius HUNTER. A systematic and historical exposition of Roman law in the order of a code. London: W. Maxwell & Son, 1876, pp. 1017-1018 [online 2012-04-19]. Available at: WWW: http://archive.org/details/asystematicandh00crosgoog.
[32] WILLIAM, supra note 31, p. 1017.

of jurisdiction over set-off.[33] On the other hand, the above mentioned leeway of the judge was not the common practice in *actiones stricti iuris* as there were roped in formally strict proceedings. However, the mechanism was in the later time brought into the proceedings of strict law as well.[34] Finally, there must be recognized also specific *actiones stricti iurist* connected with the activity of the bankers. This is the only mechanism recognized as substantive. However, its operation was quite different in comparison to the modern understanding of set-off as it was an obligation of the claimant to raise set-off. Not doing so, the claimant would risk the loss of his claim as the consequence of *pluris petitio.*[35]

The original Roman law mechanism, which is surprisingly closer to the common law, was not accepted by civil law jurisdictions. Set-off started to be understood as the matter of substance after the misinterpretation of *Justinian's Corpus Iuris Civilis* Inst. IV, 6, 30 which states that set-off operates *"ut actiones ipso iure minuant".*[36] The different interpretation of this phrase divided the civil law jurisdictions into two groups.[37]

The typical example of the first group is reflected in Art. 1290 of the French Civil Code which states that *"Set-off is brought about as of right by the sole operation of the law, even without the knowledge of the debtors…"*[38] The strict use of *ipso iure* operation has been recognized as

[33] Cf. the second part below, pp. 41, 50, and 58.
[34] See SOHM supra note 31, pp. 350-351; Cf. WILLIAM supra note 31, p. 1017.
[35] See FOUNTOULAKIS supra note 3, p. 29.
[36] *Actions should be automatically reduced or declared.* LANDO, Ole et al. The principles of European contract law. The Commission on European Contract Law. The Hague: Kluwer Law International, 2003, p. 149.
[37] Author´s note: detailed analysis of the historical misinterpretation of the provision Cf. PICHONNAZ, Pascal. Retroactive Effect of Set-off (Compensation) - A Journey through Roman Law to the New Dutch Civil Code. Tijdschrift voor Rechtsgeschiedenis/Legal History Review, Vol. 68, Issue 4, 2000, pp. 541-564.
[38] *La compensation s'opère de plein droit par la seule force de la loi, même à l'insu des débiteurs.* Translation: ROUHETTE, Georges. Civil Code Translation [online 2012-04-19]. Available at: WWW: http: //www.legifrance.gouv.fr/content/download/ 1950 /13681/version/3/file/ Code_22.pdf.

practically unsatisfactory and therefore has been to the great extent modified by the French courts which require in order to set-off mutual obligations a certain expression of will in the court proceeding. The reason can be seen in the fact that strict operation of *ipso iure* principle would cause the necessity to consider the obligation available for set-off *ex officio* which would put an enormous burden to the system of justice.[39]

The second approach can be typically seen in the German legal system.[40] In this jurisdiction set-off operates by *"unilateral declaration, which directly alters the legal relationship by compensating the respective claims."*[41] In contrary to the French approach set-off operates extra judicially and informally without any prescribed form. Therefore, the effect of set-off is achieved even if just an oral expression of the will is directed to the other party.[42]

According to some academics the main aspect which allows us to recognize French and German approaches as the matter of substantial law is the retroactive effect of set-off.[43] It means that the unilateral declaration or *ipso iure* operation have effect *ex tunc* to the time when both claims became due. I cannot accept this argument as I see the character of set-off rather

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[39] See ZIMMERMANN, supra note 7, pp. 33-34.

[40] Cf. See § 388 BGB (Bürgerliches Gesetzbuch) *"Erklärung der Aufrechnung Die Aufrechnung erfolgt durch Erklärung gegenüber dem anderen Teil."(Set-off is effected by declaration to the other party.)* Translation: MUSSETT, Neil (ed.) Langenscheidt Translation Service [online 2012-04-19]. Available at: WWW: http://www.gesetze-im-internet.de/englisch_ bgb/englisch_bgb.html#p1347. Author's note: similarly as well Czech Civil Code (No. 99/1963 Sb.) § 580 "Mají-li věřitel a dlužník vzájemné pohledávky, jejichž plnění je stejného druhu, zaniknou započtením, pokud se vzájemně kryjí, jestliže některý z účastníků učiní vůči druhému projev směřující k započtení" (If a creditor and a debtor have mutual claims whose performances are of the same kind, they shall be extinguished by set-off provided that they cover each other and that one of the parties expresses its will of set-off to the other party.) Translation: author.

[41] BÖHLHOFF, Klaus and Julius BUDDE. Law of Set-off in Germany. International Financial Law Review, Vol. 3, Issue 4, 1984, p. 28.

[42] See ŠVESTKA, Jiří et al. Občanský zákoník: komentář. Praha: C. H. Beck, 2009, p. 1696.

[43] See reference in ZIMMERMANN supra note 7, p. 23 on GOODE, Roy. Commercial Law. Harmondsworth: Penguin Books, 1995.

determined by the possibility to achieve its effect extra judiciary after the substantive conditions of the applicable law are met. The substantive character of the mechanism is determined by the exclusion of a constitutive decision of the court. However, the issue of retroactivity, as will be further analyzed, still seems to be the black swan in the problematic functioning of the instrument.

2.2. Criticism: retroactivity is unjustifiable

There can be seen that all civil law countries accepted the retroactive effect of set-off. However, retroactivity brings serious practical problems which cannot be justified. The debtor will for example *"have to pay no interest at all if he uses his right to set-off."*[44] Free disposal of the debtor over his cross-claim allows him to use several waiting tactics as he is not encouraged to declare set-off till he is suited. The pendency period before the declaration has therefore negative impact on legal certainty and transactional security. Further, the retroactive effect has potential to condone the debtor in the case of default of the payment.[45] Moreover, the retroactivity does not seem to be very systematic solution as it is subject to many exceptions. As an example given by *Zimmermann* there can be seen the situation when the debtor pays his debt not realizing that he could declare set-off. As the consequence of retroactive effect the debtor should have *"expected to be granted the condicion indebity."*[46] However, by exception for which there are good reasons, this is not usually the case.[47] There exist also opinions supporting the retroactivity. The main argument

[44] PICHONNAZ supra note 37, p. 561.
[45] See LANDO supra note 36, p. 152.
[46] ZIMMERMANN, supra note 7, p. 38.
[47] Author's note: in French law see for example Art. 1299. In German law see the references in ZIMMERMANN supra note 7, p. 39.

favoring the mechanism provides that it protects the good faith and fair dealing of the parties. However, this is quite doubtful what the parties think in the situation when they find that they are creditor and debtor towards each other.[48] The only reason for the maintenance of the retroactivity principle can be then probably seen in the restrictive power of tradition.

However, as mentioned above the traditions go on talking to one another[49] and the unify solution can be seen to emerge through the supra-national instruments which attributed to set-off, in contrast to the civil law approach*, ex nunc* effect. As an example there can be mentioned UNIDROIT Principles of International Commercial Contracts[50], The Principles of European Contract law (PECL)[51], The TransLex Principes[52] or Draft Common Frame of Reference (DCFR)[53]. These documents offer the middle way between civil law and common law approaches as set-off can be claimed in the procedure or extra judiciary without retroactive effect.[54]

Article 13:106 of PECL for instance states that *"Set-off discharges the obligations, as far as they are coextensive, as from the time of notice."* As

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[48] ZIMMERMANN, supra note 7, p. 39-40.

[49] See above GLENN supra note 2.

[50] Article 8.5(3) UNIDROIT Principles of International Commercial Contracts 2010 [online 2012-04-19]. Available at WWW: http://www.unidroit.org/english/ principles /contracts/principles 2010/blackletter2010-english.pdf.

[51] Article 13:106 The Principles of European Contract law (Part III) [online 2012-04-19]. Available at WWW: http://frontpage.cbs.dk/law/commission_on_european_contract_law /Skabelon/pecl_e ngelsk.htm.

[52] Author's note: the TransLex Principes is a project of the Centre for Transnational Law (CENTRAL) at the University of Cologne. The principles are part of online codification and research platform 'TransLex'. Through it flexibility and openness offers a missing link between theory and international practice. See [online 2012-05-05]. Available at WWW: www.trans-lex.org; Cf. BERGER, Klaus Peter. The Translex Principles: an Online Research Tool for the Vis Moot and International Arbitration. In: BERGSTEN, Eric E and Stefan KRÖLL. International arbitration and international commercial law: synergy, convergence, and evolution. Kluwer Law International: Alphen aan den Rijn, the Netherlands, pp. 33-53, 2011.

[53] III. – 6:105 Draft Common Frame of Reference, see supra note 5.

[54] See RODNER, James Otis. "Unilateral Setoff and the Principles of Unidroit" In: DERAINS, Sous la direction de Laurent Lévy et Yves. Liber amicorum en l'honneur de Serge Lazareff. Paris: Editions Pedone, 2011.

was provided by majority of authors the consequences of this provision are very positive.[55] Firstly, the interest of the party *runs until set-off has been declared*[56] which support the awareness of the debtor and block his potential waiting tactics. In this respect there is also supported legal certainty in the case of penalty clause which will, in the most cases, have to be paid.[57] Secondly, the issue of set-off in the context of delay payment is solved. If one party fails to perform without an excuse, the other party has usually several options as claiming performance, damages or termination of the contract. In this respect if the non-performing party *"fails to declare set-off or only subsequently becomes aware of the fact there is a claim against the claimant for the same amount, this does not condone the breach of the non-performance."*[58] At last but not the least, the concept as such much better reflects the purpose of set-off and its theoretical grounds. The unnecessary exceptions which undermine the systematic in case of retroactivity are avoided.[59]

2.3. The requirements for set-off

In order to complete the analysis which seeks to find the main differences within the elements of set-off, the attention shall be in short

[55] See BUSCH, Danny and Harriët SCHELHAAS (ed.). The principles of European contract law (Part III) and Dutch law: a commentary. The Hague: Kluwer Law International, pp. 161 et seq.; LANDO supra note 36, pp. 151-153; ZIMMERMANN supra note 7, pp. 39-43.

[56] BUSCH supra note 55, p. 161.

[57] Author´s note: some author´s do not see the difference between the consequences of set-off on the interests and the contractual penalty and a priory presume the same consequences of set-off in this context cf. BÖHLHOFF supra note 41. However, on the one hand the interest has accessory character in relation to the main claim, on the other hand the contractual penalty is a special kind of damages which is not primarily derived from the primary claim See ŠVESTKA supra note 42, p. 1606 – 1610. Therefore, there is no ground for the analogic application of set-off on these two different instruments.

[58] LANDO supra note 36, p. 152. Author's note: the quote is modified by author.

[59] Author's note: see above the discussion over *condition indebity*.

turned also to the requirements for set-off. As noted in the first chapter, five basic requirements of set-off are accepted by all modern legal systems.[60] However, the problem often lays in the detail. Not pretending to be exhaustive there should be mentioned at least two issues.

Firstly, the obligations which are aimed to be set-off must be of the same kind. The serious practical problem which arises in this context is the fact that in the cross-border situations the monetary claims are often related to the different currencies.[61] For example in England the authors see no high obstacles for eligibility of statutory set-off of claims in different currencies, however, the situation is uncertain for the purposes of equitable set-off.[62] The opinions in France also rather incline to the acceptance of the different currencies if they are convertible however, the unify approach is not confirmed by the case law of the French courts. The opposite approach can be seen in Germany where debts in different currencies are never meant to be obligations of the same kind.[63]

As the second example there should be mentioned different requirements for the enforceability of the mutual claims. On the one hand there is a general consensus that the cross-claim should be enforceable, on the other hand the requirement of enforceability of the main claim is disputable. According to *Zimmermann* it flows from the very nature of set-off that *"as soon as a debtor may thrust his payment upon his creditor (which may be long before the claim falls due) there is no reason not to allow him to declare set-off."*[64] The opposite treatment however persists in

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[60] Cf. sub-chapter 1.1.
[61] Cf. BĚLOHLÁVEK, Alexander J. Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého: vydání k 17.12.2009. Vyd. 1. Praha: C. H. Beck, 2009, pp. 1595-1600.
[62] See DERHAM supra note 15, par. 5.76; Cf. BERGER supra note 4, p. 17 et seq.
[63] Cf. ZIMMERMANN, supra note 7, pp. 48-49; FOUNTOULAKIS supra note 3, p. 52 and p. 71.
[64] ZIMMERMANN, supra note 7, p. 50.

practice as different constructions of set-off have been developed. In England seems to be logical that judicial operation of set-off requires the enforceability of both claims. Similar results could be expected in France where set-off is understood as an automatism however, the case law of French courts overcomes the doctrinal difficulties and does not require the enforceability of the main claim.[65] In the jurisdictions like Germany or the Czech Republic, where the key aspect is the declaration of the will, is required just enforceability of the cross-claim.[66] However, some authors still argues in favor of the enforceability of both claims.[67]

[65] Ibid. Cf. FOUNTOULAKIS supra note 3, p. 126.

[66] Cf. Nejvyšší soud České republiky (The Highest Court of the Czech Republic), rozhodnutí 32 Odo 1143/2004 [online 10-05-2012] Available at: WWW: http://www.nsoud.cz/Judika tura/judikatura_ns.nsf/WebSearch/8BCFFFC358DDA14 CC1 257983005C2304?open Document&Highlight=0; Cf. ŠTENGLOVÁ supra note 12, pp. 1021-1022; Cf. FOUNTOULAKIS supra note 3, p. 126; Author's note: in-depth analysis is provided in ELIÁŠ, Karel. Lze-li započíst splatnou pohledávku proti nesplatné aneb jak se pozná mistr. Právní rozhledy 12/2003, p. 604 et seq.

[67] See ŠVESTKA supra note 42, p. 1702.

3. PROBLEMS WITH SET-OFF IN INTERNATIONAL COMMERCIAL ARBITRATION

This chapter aims to introduce two basic problems connected with the functioning of set-off in international commercial arbitration. The first one lays in the area of choice-of-law, the other concerns the questions of jurisdiction. Only the latter is then in the second part of this thesis the subject of the in-depth analysis as complex research about both problems would cause the extension of the scope of this work.

3.1. Choice-of-law

The fact that set-off is always formed by no less than two obligations implies that these obligations may be subjects to different laws and therefore regarded differently. Moreover, as analyzed above, set-off concepts differ dramatically.[68] *Bělohlávek* holds an opinion that the fact that set-off can be understood within one jurisdiction as a procedural device and within the other as a matter substantial law causes a qualification conflict extending to the entire system.[69] If we set the problematic into the context of international commercial arbitration the issue is even more variable. As *Kaufmann-Kohler* stressed the process of globalized arbitration procedure makes the seat of arbitration a legal fiction.[70] The applicable law can be then, contrary to the state court proceedings, determined in much more

[68] Cf. Chapter 2 above.
[69] See BĚLOHLÁVEK supra note 61, pp. 1576-1577.
[70] KAUFMANN-KOHLER, Gabrielle. Globalization of Arbitral Procedure. Vanderbilt Journal of Transnational Law, Vol. 36, 2003, pp. 1313-1333.

flexible way.[71] The arbitral tribunals can for example use traditional approaches like the application of the *lex fori*, the law of the primary claim or the cumulative method where laws of both claims are applied. The international arbitration then recognizes also modern methods of determination as *tronc commun* approach[72] or application of a-national law[73]. This large flexibility on the one hand offers a high chance that arbitral practice will provide efficient and fair treatment, on the other hand the multiplicity of possible methods can lead to unpredictable results which endangers legal certainty.

An in-depth analysis of various choice-of-law methods used in international commercial arbitration is out of the scope of this work however, the problematic should be shortly demonstrated on at least two examples. Firstly, the application of the law of the primary claim will be mentioned as this is the approach which is within judicial proceedings recognized by the Rome I Regulation.[74] Secondly, application of a-national law represents the method which is considered by modern authors as the most suitable to overcome the difficulties connected with set-off in the transnational sphere.

The approach chosen by the European Union (EU) in the Rome I Regulation is based on the leading role of the principal claim which determines the right of set-off. Article 17 of the Rome I Regulation provides

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[71] Author´s note: beside many others Cf. HERBOCZKOVÁ, Jana. Autonomie vůle rozhodců při určení rozhodného práva pro meritum sporu při absenci volby práva stranami v mezinárodním rozhodčím řízení. Obchodněprávní revue No. 7, 2010, p. 202 et seq.

[72] Author´s note *tronc commun* seeks to take into account the consequences of the will of the parties to refuse the possibility to choose the applicable law. The arbitral tribunal then take into account all laws which are involved in the given case. The common trunk of the laws is used and the gaps are then filled by the general principles of law. Cf. NOVÝ, Zdeněk. Tronc commun v mezinárodním rozhodčím řízení. Právní rozhledy No. 6, 2009, p.

[73] Author´s note: by application of a-national law should be further understood the application of set of rules which have just persuasive authority.

[74] Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

that *"Where the right of set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted."* There can be seen that the law applicable to set-off is the law of the passive party. Some authors see that the rationale behind this approach is the protection of the creditor and its justified expectations.[75] According to *Hellner "the (main) creditor cannot defend himself against the extinction of his claim and therefore should have the benefit of the protective rules of the law applicable to his own claim."*[76] However, some authors do not see the principal claim approach as a suitable solution for international commercial arbitration. According to *Fontoulakis* the idea of equilibrium of parties' interests has not been supported by the comparative study of the different aspects of set-off mechanism; there is not recognized general policy of set-off friendliness or hostility, moreover this approach is very susceptible to different shrewd tactics.[77] Currently, as the same author concluded, even a uniform conflict rule will not ensure legal certainty and efficiency of the set-off mechanism as it would still just determine domestic law which has often an antique character.[78]

The solution then probably lays in the use of directly applicable substantive uniform rules which much better reflect the shift of paradigm in international commercial law.[79] International commercial arbitration calls

[75] Cf. HELLNER, Michael. Set-off. In: FERRARI, Franco and Stefan LEIBLE. Rome I Regulation: the law applicable to contractual obligations in Europe. Munich: Sellier. European Law Pub., 2009, pp. 251-267; CALLIESS, Gralf-Peter et al. ROME REGULATIONS: Commentary on the European Rules of the Conflict of Laws. Alphen aan den Rijn: Wolters Kluwer, 2011, pp. 297-300; Author's note: similar opinion and in depth analysis of the Article 17 of the Rome I Regulation is provided in BĚLOHLÁVEK supra note 61, pp. 1575-1637.

[76] HELLNER supra note 75, pp. 256-257.

[77] See FOUNTOULAKIS supra note 3, pp. 173-174.

[78] Ibid, pp. 18-19.

[79] Author's note: according to Berger the paradigm lays in "a marked shift away from formal rule-making by international formulating agencies to private codification efforts." The codification of transnational commercial law is being 'privatized'." BERGER, Klaus Peter. The creeping codification of the new lex mercatoria. Alphen aan den Rijn: Kluwer Law International, 2010, p. 10; Cf. also supra notes 47-50.

for the application of a-national law. This approach puts aside the problems connected with traditional choice-of-law methods through the direct application of substantive rules.[80] The main problem can be seen in the difficulty to find effective and fair rule. However, as pointed by *Berger* the current commercial transnationalism produce efficient autonomous legal mechanisms which put into the account *"a dialectical understanding of the interaction between commercial practice and the law…"*[81] Set-off is not in this respect an exception as codified general principles offers relatively clear rules which reflect a modern understanding of this mechanism.[82]

3.2. Judicial competence

Judicial competence of an arbitral tribunal is in particular cases still a disputable issue. Consider the situation when a defendant raises his claim, which falls outside the scope of an arbitration agreement, to be mutually offset. What if a cross-claim is governed by a different forum? Should the arbitral tribunal in this case decide over the cross-claim and consider the admissibility of set-off?

The focus of the controversy can be seen in the very nature of the arbitration – in the will of the parties that their dispute will be resolved by an independent arbitral tribunal instead of a competent national court. The parties´ will is incorporated in the arbitration agreement which set the very bases of the arbitral jurisdiction. In contrast, national courts derive their competence just from procedural rules of the given state or from an

[80] See FOUNTOULAKIS supra note 3, pp. 183-194.
[81] BERGER, supra note 79, p. 146.
[82] Author's note: as an example see the discussion in sub-chapter 2.2 above about the compromise provisions dealing with the operation of set-off.

international convention.[83] There is no certainty whether the scope of the jurisdiction of the arbitral tribunal can be also extended to other contractual relations of the parties. The answer is determined by the interpretation of the scope of the arbitration agreement which is in most cases the matter of arbitral tribunals.[84]

The arbitral tribunal will have to, at the first place, find out whether the instrument of set-off is in the given case considered as a procedural device or as a matter of substance. If set-off is considered as a matter of substantive law the tribunal will have to justify its competence to decide. As *Fountoulakis* stated *"This is due to the fact that set-off is, technically speaking, a special case of legal defense: in order to assess whether the main claim has been (partially) extinguished by way of set-off, it must first be assessed whether the cross-claim with which set-off is sought exist."*[85] The examination of the existence of the cross-claim is necessary as the subject of the jurisdictional analysis is the given legal relationship of the mutual claims which are meant to be extinguished. In this fact can be seen the very basic ground which enables the tribunal to provide an independent examination of the cross-claim. There can be therefore implied that the decision over the cross-claim which is subjected to the different forum cannot be a priory forbidden. Arbitrators can be then in a very difficult position as they have to find, in the absence of any clear rule, reasonable limits of the adjudication of substantive set-off.

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[83] See AGARWAL, Anurag. Party Autonomy in International Commercial Arbitration. INDIAN INSTITUTE OF MANAGEMENT AHMEDABAD-380 015 INDIA, 2007, pp. 1-15 [online 20-01-2012]. Available at WWW: http://www.iimahd.ernet.in/publications/ data/ 2007-05-06_AAgarwal.pdf.

[84] See BORN, Brian Gary: International Commercial Arbitration. Volume I. Alphen aan den Rijn: Kluwer Law International, 2009, pp. 1160-1163.

[85] FOUNTOULAKIS supra note 3, p. 16.

According to *Schöll* there can be recognized two rivaling schools which determine the shape of rules of arbitral tribunals. The first, more traditional, 'jurisdictional' or as well 'restrictive' approach is based on the presumption that the cross-claim must be in all extent covered by the scope of an arbitration agreement. The second, 'substantive approach' hold the view that the arbitral tribunal shall have jurisdiction over set-off "*irrespective of the jurisdictional provisions of the cross claim.*"[86] It means that arbitration rules, which are based on the substantive approach, contain the provisions which explicitly extend the competence of the arbitral tribunal to the relations which are not covered by the arbitration agreement. In addition there seems to be a necessity to recognize as well the third approach which has emerged. A great number of the arbitration rules do not cover the problematic of set-off at all. For that reason the silence of these rules must be mostly overcome by the provisions of the seat of arbitration. An in-depth analysis of the different approaches to the issue of jurisdiction over set-off is provided in the second part of this work.

[86] SCHÖLL, Michael: Set-off Defences in International Arbitration Criteria for Best Practice – a Comparative Perspective. ASA Special Series No. 26, conference of January 27, 2006 in Zurich, p. 98.

II. SET-OFF: JURISDICTIONAL QUESTIONS

The second part of the work provides an in-depth analysis of the different approaches of arbitral tribunals concerning the issue of jurisdiction over set-off. Moreover, the problematic of admissibility of set-off defences in the enforcement proceedings is also reflected. The issue is examined in its complexity aiming to propose a legal framework and set of good practices which would strengthen legal certainty, procedural efficiency and effective functioning of set-off in international commercial arbitration.

4. RESTRICTIVE APPROACH: UNCITRAL ARBITRATION RULES

The example of the first approach can be seen in the arbitration rules of the United Nations Commission on International Trade Law - UNCITRAL. The UNCITRAL Arbitration rules 1976[87] provided in Article 19 (3), that *"...the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off."* There could be seen that the hearing of set-off is in this case based on independent arbitral jurisdiction over the cross-claim. Consequently such a rule, if it is strictly applied, makes nearly no difference in treating a counter-claim and set-off. On the one hand the counterclaim is a procedural device which contains two independent cross - demands, on the other hand set-off is a defense which aims to extinguish mutual claims.[88] Functional fusion, which is the consequence of the strict application of the wording of Article 19 (3), would be therefore contrary to the nature of set-off which is meant to be a substantive defense which aim is to provide procedural efficiency.[89]

The virtual blocking of the functioning of set-off was during the years relaxed by the case law. There can be seen that we cannot read the wording of Article 19 (3) *"arising out of the same contract"* too narrowly as it can

[87] UNCITRAL Arbitration Rules adopted on 28 April 1976 [online 20-01-2012]. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.
[88] See SCHÖLL supra note 86, pp. 123-126.
[89] Cf. CARON, David, Matti PELLONPÄÄ and Lee CAPLAN. The UNCITRAL arbitration rules: a commentary. New York: Oxford University Press, 2006, pp. 412-415. Author's note: *Pellonpää* points out on the fact that larger complexity of set-off is thanks to the Article 19 (3) deleted. The only way how to overcome the possible difficulties is to modify the provision by the parties.

cover many related areas such as claims arising out of the relations between the claimant and the father company of the defendant. In *Saluka v The Czech Republic* the arbitral tribunal assumed[90] that in principle the jurisdiction conferred is wide enough to encompass counterclaims as the relation between the mother company (Nomura) and its daughter is so close that it enables to extend the Tribunal's jurisdiction to claims against the father company.[91] However, there must be noted that some tribunals still adopt strict interpretation. In *Econet v. Vee*[92] for instance parties concluded two agreements – for satellite capacity and telephony service. First agreement was governed by Danish law and subject to the ICC Rules[93]; the other was governed by English law and subject to the UNCITRAL Arbitration Rules 1976. In this case the arbitrational tribunal did not find its jurisdiction over the counterclaim of the defendant and therefore a set-off defence was not considered in the merits.

The UNCITRAL Arbitration Rules 1976 has been recently revised.[94] There was a broad discussion about the revising the wording of the Article 19 (3). The Article was finally replaced by Article 21 (3) which provides

[90] Author's note: Assumed but not ruled. In spite of the fact that the case concerns the problematic of counterclaims but not set-off, the interpretation of the Article 19 (3) can be in this respect used for the problematic of set-off as well (as the difference between set-off and counterclaim is not under the Rules accounted).

[91] See Permanent Court of Arbitration – *Saluka Investments B.V. v The Czech Republic*, 7 May 2004. Decision on Jurisdiction over the Czech Republic's Counterclaim, par. 39 and 44[online 8-02-2012]. Available at WWW: http://www.pca-cpa.org/upload/files/SAL-CZ%20Decision%20jurisdiction%20070504.pdf.; ANTONOPOULOS, Constantine: Counterclaims before the International Court of Justice. The Hague: T. M. C Asser Press, 2011, pp. 19-22.

[92] English Court of Appeal – Commercial Court in *Econet Satellite Services Ltd. v Vee Networks Ltd*, July 13, 2006 [online 8-02-2012]. Available at: http://www.unilex.info/case.cfm?pid=2&do=case&id=1209&step=FullText.

[93] International Chamber of Commerce Rules of Arbitration, 1998 (ICC Rules) [online 10-02-2012]. Available at: WWW: http://www.iccwbo.org/uploadFiles/Court/Arbitration/other/rules_arb_english.pdf. Author's note: ICC Rules deals with set-off just with regard to the costs.

[94] UNCITRAL Arbitration Rules adopted on 15 August 2010 [online 20-01-2012]. Available at WWW: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf.

that *"...the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it."* There can be seen diverging opinions about the change.

According to *Sanders* the option for the arbitral tribunal to decide on a claim for set-off on the ground that it *"has jurisdiction over it"* is too broad and does not give any guidance to the parties under which conditions set-off should be admitted.[95] In this respect *Fountoulakis* holds an opinion that despite the restrictive nature we can see rather flexible functioning of set-off which is not in reality often found inadmissible.[96] However, there must be noted that many decisions of arbitral tribunals are confidential therefore, there is very hard to prove this statement. Nevertheless, the strong guidelines how to deal with the jurisdictional issue can be seen outside the arbitration field in the practice of European Court of Justice (ECJ). For example in *Danvaern Production v. Shuhfabriken* the ECJ stated that the Brussels Convention[97] *"does not apply to the situation where a defendant raises, as a pure defense, a claim which he allegedly has against the plaintiff. The defences which may be raised and the conditions under which they may be raised are governed by national law."*[98] The applicable national rules will therefore determine whether and under which conditions national courts need the jurisdiction over the cross-claim in order to be allowed to

[95] See SANDERS, Pieter: The Revision of the UNCITRAL Arbitration Rules. International Council for European Arbitration, 2009, p. 30 [online 5-02-2012]. Available at WWW: http://www.arbitration-icca.org/articles.html.

[96] FOUNTOULAKIS, supra note 3, p. 17.

[97] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Author's note: the same can be said with relation to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation).

[98] ECJ case C-341/93 *Danvaern Production A/S v Shuhfabriken Otterbeck GmbH*, 13. July 1995 [online 5-02-2012]. Available at: WWW: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993CJ0341:EN:PDF. Cf. PHILIP, Allan. Set-Offs and Counterclaims Under the Brussels Judgments Convention, IPRax: Praxis des internationalen Privat und Verfahrensrechts, 1997 pp. 97-98.

decide over set-off in the merits.[99] In relation to that, there can be also seen that at least within civil law countries is agreed that set-off is the matter of substantial law and *"should not be impeded by procedural requirements such as requiring judicial competence."*[100]

There can be concluded that the formulation of the wording of Article 21 (3) is very broad to ascertain the future practice of the tribunals. However, despite the formally restrictive character of the UNCITRAL Arbitration Rules 2010 its application seems to be rather flexible. The inspiration for the flexible application of the UNCITRAL Arbitration Rules 2010 is supported by the judicial practice of the ECJ. However, there must be also noted that the flexible approach has its limits; the tribunal shall always bear in its mind that it cannot run over the parties will and avoid the claim of *extra petitia*.[101]

[99] Author´s note: Moreover, the other possible aspects like the decision about the effects of an agreement on exclusive jurisdiction will be determined by the national rules on international civil procedure. See CALLIESS supra note 75, pp. 299-300.

[100] FOUNTOULAKIS, supra note 3, p. 17.

[101] See MOOSA, Al-Azri. Prevention of Non-Compliance with Arbitral Awards: Some Proposals for Efficient Enforcement. Tilburg Foreign Law Review, Vol. 12, Issue 4 (2004-2005), pp. 348-363.

5. EXPLICIT EXTENSION OF COMPETENCE

In addition to the first approach offered by the UNCITRAL arbitration rules 2010[102], there must be recognized also the second mechanism which provides an explicit extension of competence over set-off. The second approach is based on the presumption that set-off is a substantive defense admissible irrespective of jurisdictional provisions of the cross-claim. The very essence of the given mechanism lays in potential of the tribunal to broaden its jurisdiction over set-off claim which does not fall within the scope of the arbitration clause or which is already subject to the different dispute resolution forum.

The first example of this approach can be seen in the Rules of the Arbitration Court in the Czech Republic.[103] Article 28 (3) of the Rules provides that, *"Provisions, governing the counter-claim shall be applied, mutatis mutandis to the defence of set-off raised by the Defendants, provided such defence is based on legal relations other than the main claim of the Claimants."* Even more radical example can be then seen in Swiss Rules of International Arbitration (Swiss Rules).[104] Article 21 (5) of the Swiss Rules states that *"The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause."* There must be noted that the perspective which was offered by the Swiss Rules has to be considered as rather unique solution. However, the fact that Switzerland

[102] Author´s note: and similarly by UNCITRAL arbitration rules 1976.

[103] The Rules consolidated text as of 1 February 2007 The RULES of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (2007) [online 01-04-2012]. Available at: WWW: http://en.soud.cz/rules/rules-consolidated-text-1st-february-2007.

[104] Swiss Rules of International Arbitration (Swiss Rules) took effect on January 1, 2004 [online 01-04-2012]. Available at: WWW: https://www.sccam.org/sa/download/SRIA_english.pdf.

represents one of the most favourite choices of arbitration gives the diction of the Article 21 (5) due attention of the legal community all over the world.[105] This provision represents a typical example of the approach based on the explicit extension of the competence of the arbitral tribunal and it will be therefore subject to further discussion.

The very basis of this approach can be seen in its confirmation of the *"Le juge de l'action est le juge de l"* [106] exception principle. The meaning of this principle can be demonstrated on frequently cited case *ICC No. 5971*[107] where three parties entered into three different agreements: a joint investment agreement, sales purchase agreement and an agreement for the transfer of the know-how. The situation was very difficult as all of the contracts were subject to different arbitration bodies which used different applicable law. The question concerning the arbitral tribunal jurisdiction over set-off was decided on the basis of close economic and legal connection of the contracts. The joint venture contract fixed the main terms of the complex legal relationship which was then concretized by the other two contracts.[108] The tribunal stated that *"any other view would appear to be overly formalistic and would deny justice to the Parties."*[109] There can be seen, that the basis of the analyzed principle lays in the presumption that the

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[105] See PAVIC, Vladimir: Counterclaim and Set-off in International Commercial Arbitration, Annals International Edition, 2006, p. 107 [online 01-04-2012]. Available at: WWW: SSRN: http://ssrn.com/abstract=1015713.

[106] 'The judge of the claim is the judge of the defence', translation in BERGER, Klaus Peter, Emmanuel GAILLARD, Berthold GOLDMAN, John SAVAGE and Philippe FOUCHARD. Private dispute resolution in international business: negotiation, mediation, arbitration. Kluwer Law International, 2006, p. 505.

[107] Case No. 5971 of 1995, Court of Arbitration of the International Chamber of Commerce, published in Bulletin / Association suisse de l'arbitrage, 1995, pp. 728-741.

[108] See LEW, Julian, Loukas MISTELIS and Stefan KRÖLL. Comparative international commercial arbitration: a global commentary on the New York Convention. The Hague: Kluwer Law International, 2003, pp. 153-154.

[109] Case No. 5971 of 1995, Court of Arbitration of the International Chamber of Commerce. In: HANOTIAU, Bernard. Complex arbitrations: multiparty, multicontract, multi-issue and class actions. Frederick, MD: Sold and distributed in North, Central, and South America by Aspen Publishers, 2005, p. 217.

given arbitral tribunal is obligated to decide on all defenses which are directed against the principal claim under condition that their nature is substantive. However, the above mentioned case implies that some level of economic and legal connection of the given claims should exist in order to make the extinction of mutual claims available.

5.1. Justification of the explicit extension

The mechanism provided by the Swiss Rules is accepted by significant minority of authors. *Poudret* sees the justification of this approach in the defensive nature of a set-off plea. Set-off is meant to be a shield which aim is to extinguish the principal claim up to its amount. There is no possibility to award more than what is demanded by the principal claim. In this way set-off is just a defence and can be provided even if there are no grounds in the arbitration agreement. Moreover, the given solution limits various delaying tactics and allows the given tribunal to decide without distractions.[110] In his earlier works *Poudret* stressed the fact that the arbitrator who has jurisdiction over the principal claim should also decide whether this claim exists or not otherwise the substantive function of set-off to extinguish part or whole of the principal claim would be locked by the jurisdictional key.[111] However, as *Mourre* simply noted, this argument can be used in the same manner to the opposite as the aim of set-off also rests on the mutual amortisation of both - the principal claim as well as the cross-claim.[112]

[110] POUDRET, Jean-François, Sebastian BASSON, Stephen BERTI and Annette PONTI.: Comparative law of international arbitration. 2nd ed. updated and reviewed. London: Sweet & Maxvell, 2007, pp. 273-280.

[111] See MOURRE, Alexis: The Set-Off Paradox in International Arbitration. Arbitration International, Vol. 24, No. 3, 2008 at note 30.

[112] See MOURRE supra note 111, p. 395.

The above mentioned position should be discussed in the context of parties' will which is incorporated in their arbitration clause. There can be seen that the given argumentation is based on the presumption that there exists an implicit acceptance of the extension of the competence. *Poudret* holds a strict position as he recognizes only a very narrow margin of possible exceptions from the scope of implicit acceptance. The substance of these exception lays in the situation where can be implied that the parties have obviously different intention. These implied intentions can be proven by the fact that the parties choose an expedited procedure or some kind of specialised arbitration as for instance exists in maritime matters.[113] There can be seen that the implicit acceptance has in this view character of general assumption which is subject to several exceptions.

The supporters of the approach offered by Swiss Rules differ in outcome of their analysis. *Schöll* refused *Poudret´s* general assumption of the implicit acceptance and rather focused on the analysis of the given contractual situation: *"…arbitral tribunals have broad jurisdiction to decide preliminary questions…Hence, the absence of arbitration clause for the cross-claim does not per se bar the arbitrators from dealing with the set-off defence."*[114] He also emphasizes a significant role of intentions of the parties, arbitral justice and equity: *"The inquiry into what is reasonable, fair-minded professional parties would have agreed on in good faith, had they thought to the problem of set-off in advance, is hypothetical in nature, but…not speculative."*[115] There can be said that in the context of the Swiss Rules author suggests to find balance based on principles of best practices; he refuses automatic acceptance of all unconnected cross-claims and stress that the admissibility still depends on the conditions of set-off which are given by applicable law.

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[113] See POUDRET supra note 110, p. 277-278.
[114] SCHÖLL, supra note 86, pp. 135-136.
[115] SCHÖLL, supra note 86, p. 136.

5.2. Criticism: no discretion, party autonomy, parallel proceedings and res iudicata

5.2.1No discretion

There must be noted that majority of authors (nearly all non-Swiss) found the mechanism established by the Swiss Rules as problematic.[116] The Rules are criticized especially for its imperative character. According to *Pavic* the diction of Article 21 (5) aims to achieve the procedural economy however, the imperative nature of the provision could ultimately lead to unpredictable consequences as the provision reduces the discretion of the tribunal to a minimum. Firstly, wording of Article 21 (5) provides that the tribunal *"shall have jurisdiction"* which is obviously an imperative. Secondly, civil law jurisdictions don't recognize *forum non conveniens*[117] doctrine. This fact seems to block, to the high extent, any attempt to somehow limit "the infinity" of the provision. Thirdly, the imperative nature of Article 21 (5) may lead to serious practical problems concerning *res judicata* and *lis pendens* issues. On the one hand, the provision calls for its unconditional application, on the other hand, unconditional application of

[116] Cf. FOUCHARD, Philippe, Emmanuel GAILLARD, Berthold GOLDMAN and John SAVAGE. Fouchard, Gaillard, Goldman on international commercial arbitration. Boston: Kluwer Law International, 1999, pp. 660-662; KEE, Christopher: Set-off in International Commercial Arbitration: What can the Asian region learn? Asian International Arbitration Journal, Vol. 1, No. 2, 2005, pp. 154-155; BERGER, supra note 106, pp. 504-507; SHACKELFORD, Elizabeth.: Party Autonomy and Regional Harmonization of Rules. University of Pittsburgh law review, Vol. 67, No. 4, 2006, pp. 897-912; PAVIC, supra note 105; MOURRE, supra note 111.

[117] Author's note: Common law doctrine which allows the courts to refuse their jurisdiction if there is other forum which is according to the court more appropriate. See for example REED, Alan: Anglo-American perspectives on private international law. Lewiston, N.Y.: E. Mellen Press, 2003, p. 175 et seq; BOHŮNKOVÁ, Petra: Vývoj doktríny forum non conveniens v judikatuře nejvyššího soudu USA. In: Historie mezinárodního práva soukromého: sborník příspěvků z workshopu konaného dne 11. 12. 2008 na PrF MU. 3rd ed. Editor Klára Svobodová. Brno: Masarykova univerzita, 2008.

the provision builds potential of an appearance of conflicting decisions of different arbitral tribunals which endangers procedural efficiency.[118]

5.2.2Party autonomy

The question of party autonomy seems to be another strong argument weakening the justification of the Swiss approach. *Berger* states that arbitral efficiency is always subject to hierarchy of rules of international arbitration. The strongest rule is the autonomy of parties will. If we consider the situation where there are two different arbitration clauses with two different arbitral tribunals, then the extension of one jurisdiction of the forum disregards the will of parties in connection with the other forum.[119] *Berger* then comes to the conclusion that *"A respondent in an international commercial arbitration may defend itself with a set-off if the cross-claim on which the defence is based falls squarely within the scope of arbitration agreement. The set-off is not admissible if the cross-claim is subject to another institutional arbitration clause, unless the cross–claim is undisputed between the parties or has been decided with res idudicata effect by a court or arbitral tribunal."*[120]

According to my opinion this argument cannot per se succeed. If we consider the wording of Article 21 (5) then the parties to the dispute can reasonably expect that the tribunal will be obligated to apply this provision and extend its jurisdiction no matter that the cross-claim is subject to different forum.[121] Therefore, such extension, if not excluded by different

[118] See PAVIC, supra note 105, pp. 108-110.
[119] See BERGER supra note 106, pp. 506-507.
[120] BERGER, supra note 106, p. 507.
[121] Cf. HUBER, Stephen and Maureen WESTON. Arbitration: cases and materials. New Providence, NJ: LexisNexis, 2011, pp. 52-57. Author's note: the authors stressed that question whether parties agreed to arbitrate certain matter will be, when the national court is present, under the national principles of contract law. Therefore, the question whether the

agreement, is contained in the scope of the parties will. The problem which I see in this matter is rather connected with the imperative character of the wording of Article 21 (5). If the parties choose two different forums then there exist, in case of absence of any concrete agreement about set-off, two concurring jurisdictions of different arbitrational tribunals. The imperative of Article 21 (5) is then an uneasy obstacle for possible discretion of the given tribunal to achieve efficient solution.

5.2.3Parallel proceedings

The explicit extension of arbitral tribunal jurisdiction brings with it also question concerning the existence of parallel proceedings. There can be seen two most frequented scenarios: 1) parallel proceedings between the arbitral tribunal and a state court and 2) parallel proceedings between two arbitral tribunals. Prior to the analysis of concrete aspects related to the explicit extension of jurisdiction, there is a necessity to introduce the problematic of parallel proceedings within international arbitration in general terms.

National courts: problematic aspects

Generally, if we consider that a national court finds its exclusive jurisdiction, there can´t be expected any flexibility. The rigidity of the national courts is in this respect mainly given because of non-existence of *lis alibi pendens* exception in the area of international arbitration. This can be seen as a significant deficit which surely does not help to fulfil the general requirement of procedural efficiency. As *Van Houtte* stated

wording of Article 21 (5) implies the "true" intentions of the parties will be based on the principles of national law. However, there must be noted that this argument cannot be used when just two arbitral tribunals are at the stake.

"Arbitration and court proceedings belong to separate worlds with their own jurisdiction and enforcement conventions, which have neglected the interface between arbitration and court jurisdiction."[122] The position of the court would be therefore determined by the provisions of national law. In this respect can be the outcome very unsure.[123]

Raban in the context of Czech law holds an opinion that parties have their constitutional right to let their dispute be decided by an impartial and independent national court. Therefore, the court has to, in compliance with the will of the parties, decide their dispute. This fact implies that the court has no obligation to determine *ex officio* the existence of the concurring jurisdiction of a potential arbitral proceedings. However, there is not possible to have two concurring decisions. Therefore, if the court decides, despite the fact that there have already been in the same manner decided by another arbitral tribunal or if there is a pending proceedings, one of the parties shall use the correction mechanism of the national law. Vice versa in case of a defective arbitral award shall one of the parties seek an annulment of the arbitral award however, this procedure would be according to *Raban* much more complicated.[124]

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[122] VAN HOUTTE, Hans: Parallel proceedings before state courts and arbitration tribunals: is there a transnational lis alibi pendens - exception in arbitration or jurisdiction conventions?" in Arbitral Tribunals or State Courts: Who must defer to whom? ASA Special Series No. 15, 200, pp. 53-54.

[123] Author's note: see for example very astonishing decision and reasoning of Court in Madrid: Sentencia nº 551/2010 de la Audiencia Provincial de Madrid, Sección 10ª, 24 November 2010 which is not primary connected with the parallel proceedings however interestingly illustrates the unpredictability concerning the jurisdiction of the court over set-off. The reasoning of the court was more than astonishing. The court found an arbitration agreement ineffective as a consequence of the "attitudes" of the Defendant before the action to the court was filled. For complete analysis see HAMILTON, Calvin and Luis CAPIEL. Invoking a Set-off Defence May Jeopardize The Effectiveness Of An Arbitration Clause. Mealey's International Arbitration Report, Vol. 25, No. 10, 2010.

[124] See RABAN, Přemysl: K otázce vzájemného působení zahájení soudního a rozhodčího řízení, Soudní rozhledy 1/2007, p. 4 et seq.

Parallel Arbitration Proceedings

There must be noted that if two parallel arbitration proceedings are at the stake, the question of their jurisdiction should not be considered as a clear *lis pendens* bud rather as a question of case management. The International Commercial Arbitration Committee expressed in its Final Report on Lis Pendens and on Res Judicata in International Commercial Arbitration the hope that the issue will be in a significant number of cases resolved in the name of procedural efficiency and justice. In order to achieve that, one of the tribunals should stay the proceedings or the parties should consolidate their disputes.[125] Such a wish is however, according to my opinion, very difficult to be fulfilled. There must be said that in this respect still persists a high level of uncertainty.

If we consider the problematic under the optic of Article 21 (5) of the Swiss Rules, there can be seen the possibility that two tribunals simultaneously decide on the same cross-claim which is meant to be set-off. As *Pavic* noted the most interesting issue is in this manner *"the determination of indirect jurisdiction, i.e. the determination whether the other tribunal (court) has jurisdiction."*[126] The author emphasizes the existence of various conditions for assessing indirect jurisdiction such as system of bilateralisation or a liberal position. No matter which methodology would be used, the key question is whether the tribunal treats its jurisdiction as an exclusive.[127] Doing *so "the very logic…dictates that no regard should be given to the competence of another tribunal (be it court or*

[125] International Law Association. Final Report on Lis Pendens and Arbitration: Toronto Conference, 2006, p. 15 et seq. [online 04-04-2012]. Available at WWW: http://www.ila-hq.org/en/committees/index.cfm/cid/19.
[126] PAVIC, supra note 105, p. 114.
[127] Ibid.

arbitration).”[128] The author sees the possible solution in the fact that both tribunals will regard their competence as “relatively exclusive”. However, the first raise of the cross-claim would modify the “relative competence” of the given tribunal to “absolute exclusive competence”.[129] According to my opinion this solution is without any doubt reasonable, however, the situation is still very problematic as the arbitral tribunal deciding under the Swiss Rules would still have the obligation to decide upon set-off. Therefore, it would probably have to suspend the proceedings. This solution is however not in compliance with procedural efficiency and which is one of the main purpose of set-off.

5.2.4Res iudicata

Opposite to the uncertainty connected with parallel proceedings, the systematic of *res judicata* does not cause, according to my opinion, any additional problem. There can be said that in general *“The term res judicata refers to the various ways in which one judgment exercises a binding effect on another.”*[130] This concept is in some way or the other recognized in all modern legal systems, however its scope differs. In common law legal systems is *res judicata* recognized as a broader concept than in civil law countries.[131]

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[128] Ibid.

[129] See PAVIC, supra note 105, pp. 114 – 115.

[130] YUVAL, Sinai. Reconsidering Res Judicata: A Comparative Perspective. Journal of Comparative & International Law, Vol. 21, No. 2, 2011, p. 353 [online 10-04-2012]. Available at: http://scholarship.law.duke.edu/djcil/vol21/iss2/3.

[131] Author’s note: the systems differ mainly in distinction of positive and negative effects of res judicata. In civil law the res judicata is usually connected just with the holding, on the other hand common law countries extend its effect as well to *ratio decidendi*. See PAVIC, supra note 105, pp. 112-113; Cf. YUVAL, supra note 130, pp. 353-400; Cf. also VAN DEN BERG, Albert Jan. Arbitration advocacy in changing times. Alphen aan den Rijn: Kluwer Law International, 2011, pp. 235-251.

There is generally accepted that the arbitral tribunals are autonomous in the determination of their jurisdiction.[132] However, the limit which is embodied in the *res judicata* naturally exists. On the one hand, the extent of this limit is not very broad if we consider the relation between two different arbitral tribunals. In this case the arbitral award of the one arbitral tribunal is binding for the other just if it is recognised in the country of the *situs* of the latter.[133] There is interesting to remark, as many authors have concluded from the provisions of the New York Convention, that the award of the first tribunal does not have to be recognized in the place of its origin.[134] On the other hand, if we consider the relation between a national court and an arbitral tribunal, the main criterion which needs to be used is the competence of the national court which takes precedence over the arbitral tribunal.[135]

In contrary to the problematic situation concerning parallel proceedings *the res judicata* issue does not seem to cause many problems. *Pavic* summarized the issue in context of the analysed Swiss Rules: *"...a decision on set-off defence reached by a Swiss arbitration would bind another arbitration (which has to decide on the remainder of the sum owed[136]) only if the Swiss award has been recognized in the country of the seat of the other tribunal. Holding of an arbitral award would normally*

[132] See VAN DEN BERG supra note 131, p. 238.
[133] See PAVIC, supra note 105, p. 113.
[134] See DOBIÁŠ, Petr. Uznání a výkon rozhodčích nálezů zrušených ve státě původu podle relevantní judikatury zahraničních obecných soudů. Právník, 2007, Vol. 146, No. 3, pp. 325 - 336; FOJTÍK, Luboš and Lenka MACÁKOVÁ. Otazníky nad uznáním a výkonem cizích rozhodčích nálezů, Právní fórum, Praha: Wolters Kluwer, a. s., 5/2009, pp. 184-188.
[135] See SÖDERLUND, Christer. Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings Journal of International Arbitration, Vol. 22 No. 4, 2005, pp. 305 – 306.
[136] Author's note: if statutory set-off is at the stake, the given tribunal could possibly decide over the cross-claim with reference to the substantial nature of a set-off defence in any case. The same is true if the amount of the cross-claim is not fully ascertained.

contain a statement with regard to the existence and the amount of counterclaim."[137]

[137] See PAVIC, supra note 105, p. 113.

6. NO PROVISION IN TRIBUNAL'S RULES

Most of arbitration rules don't deal with the problematic of set-off at all. There can be seen from the "Swiss" example that there are good reasons for this choice. *"The silence must be understood in that sense that, of course, this topic was not ignored by those working on the institutional arbitration rules, but was rather believed to be too difficult for promulgation in to a particular rule."*[138] In this example we can see that the speech goes through its silver ways in opposition to the silence which shines in the gold. However, some author's hold an opinion that the given silence about set-off brings with it an unnecessary complications to the issue.[139]

As an example of rules which are in this manner silent, can be mentioned the Vienna Rules of Arbitration and Conciliation.[140] In commentary to the Vienna Rules *Schwarz and Konrad* stated that the choice of the authors of the rules not to deal with set-off can be seen as a logic decision as *"arbitration rules are not necessarily the appropriate place to regulate the admissibility of a set-off, as it is for applicable substantive law to determine whether or not a set-off is permissible in the first place."*[141] The question of jurisdiction is therefore highly dependent on the fact whether set-off is based on the claim which is under applicable law considered as a procedural defense (*compensation judiciaire*) or as a substantive defense (statutory set-off).

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[138] BLESSING, Marc. Introduction to arbitration: Swiss and international perspectives. Basel: Helbing und Lichtenhahn, 1999, p. 192.

[139] See KEE supra note 116, pp. 151-152.

[140] Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber, 2006 (VIAC), [online 05-04-2012]. Available at WWW:http://portal.wko.at/wk/format_detail.wk?angid=1&stid=323813&dstid=347#counter.

[141] SCHWARZ, Franz and Christian KONRAD. The Vienna rules: a commentary on international arbitration in Austria. Frederick, MD: Sold and distributed in North, Central and South America by Aspen Publishers, 2009, p. 261.

The admissibility of set-off as *compensation judiciaire* is dependent on the constitutive decision of the competent court/tribunal. The typical example is a claim for damages. In this case the party which has suffered the harm has right for damages since the time the harmful even occurred. However, it is entitled to the payment just after the constitutive decision of the court/tribunal. In this case the solution of the issue of admissibility of set-off seems to be quite easy. If the claim falls within the scope of arbitration agreement the arbitral tribunal has jurisdiction over a set-off defence.[142]

The second case which concerns statutory set-off is much more complicated. In this place we get again to the point discussed within the analysis concerning the Swiss Rules. However, the situation is a bit more comfortable as the arbitral tribunal is not blocked by the obligatory extension of its jurisdiction. The given arbitral tribunal will probably at the very outset of its analysis try to answer the following questions: is the cross-claim undisputed or is there no objection from the claimant side, is there agreement of the parties about the extension of the arbitration agreement to set-off (expressed or implied)? If the answer to these questions is positive set-off would be probably permitted.[143] Moreover, the tribunal has still the possibility to decide over set-off on the basis of close economic and legal connection of the contracts.[144] In case that none of these elements are present the arbitral tribunal will probably have to apply the solution offered by *Schöll*[145] and look mainly on the substantive conditions of set-off under applicable law and reasonable expectations of the parties. However, it would mean that the question of eligibility would be de facto identical with the question of admissibility which according to my opinion goes too far.

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[142] See MOURRE supra note 111, pp. 398-399.
[143] See SCHWARZ supra note 141, pp. 261-263.
[144] Author's note: see above pp. 39-40.
[145] See above SCHÖLL at supra notes 114 and 115.

There can be seen that the situation is still very complicated and in several aspects very controversial. According to *Kee* if the arbitration rules don't provide any guidance, the practice will look as following: *"...the party seeking to raise the set-off defence may be called upon to prove it is permitted to do so by the law of the seat of arbitration. In practice, this will often mean demonstrating that it is not barred as opposed to being positively permitted. Alternatively, the party may be able to argue that it is entitled to the defence pursuant to the substantive law of the contract."*[146] The arbitrators are then in a very difficult position. If on the one hand, the tribunal finds on the basis of the above mentioned auxiliary criteria's[147] set-off permissible, it will still decide besides its own jurisdiction. If it, on the other hand, does not do so, the tribunal will *"risk granting to the claimant a right to payment which may have legally disappeared as from the date as which defendant's own claim would be found to exist..."*[148] The probable solution is then to *"suspend its award, up to the amount of the claim opposed in set-off, until the final decision of the competent court or arbitral tribunal on the claim opposed in set-off."*[149]

According to my opinion the situation should be evaluated in its very complexity and besides parties expectations and intentions should be taken into consideration also procedural efficiency and the fact whether the parties act *bona fidei*. The substantive test offered by *Schöll* can serve as a supportive criterion for the final decision about the issue.[150] There must be also noted that according to judicature of some national courts, the defendant has a reasonable chance to raise a set-off defence in the

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[146] KEE supra note 116, p. 152.
[147] See p. 50 above.
[148] MOURRE, supra note 111, p. 399.
[149] MOURRE, supra note 111, p. 400.
[150] See above SCHÖLL supra notes 114 and 115.

enforcement proceedings of an arbitral award.[151] This particular aspect deserves further attention as it could have a significant impact on the final result concerning the eligibility of the given mutual claims of the parties. Therefore, this problematic is a subject of the analysis in the next chapter.

[151] See for example Federal Supreme Court, decision on 30 September 2010, File No. III YB 57/10, Schields VY 2010, 330.

7. SET-OFF IN ENFORCEMENT PROCEEDINGS

The recognition and enforcement of a foreign arbitral award are elements which need to be necessarily fulfilled to let the award become fully effective. According to the New York Convention the award may be refused just if there is proved the existence of one of the conditions set in Article V.[152] There is a necessity to see the difference between the two notions. The recognition of a foreign arbitral award indicates the fact that the foreign decision is considered to have the same legal effect as if it was the decision of the home institution.[153] Consequently, the foreign arbitral award cannot have an effect which is not recognized by the legal order of the country of the recognition even if it would have had such an effect in the country of its origin.[154] The enforcement of the arbitral award is a procedure which aim is to realize the rights and obligations contained in the given decision.

According to *Dirk* there can be quite frequently seen that defendants attempt to use set-off as a defense during an enforcement proceedings of an arbitral award.[155] This fact indicates that the situation over set-off can be in a great extend changed and the further analysis is necessary. If we consider the issue in the context of the New York Convention there can be stated that

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[152] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention).The Convention entered into force on 7 June 1959 [online 10-02-2012]. Available at WWW: http://www.uncitral.org/ pdf/english /texts/arbitration/NY-conv/XXII_1_e.pdf.

[153] See HENDRYCH, Dušan. Právnický slovník. 3.vyd. Praha: C. H. Beck, 2009, Beckovy odborné slovníky, word*: Uznání cizích rozhodnutí.*

[154] Author's note: the example could be the binding character of the reasoning. If the laws of the state of the recognition do not consider the reasoning as binding it will never be recognized as binding even if it would be opposite to the laws where was the award originally released. See VAŠKE, Viktor. Uznání a výkon cizích rozhodnutí v České republice. 1. vyd. Praha: C. H. Beck, 2007, pp. 428-431.

[155] KRONKE, Herbert, Patricia NACIMIENTO and Otto DIRK: Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention. Alphen aan den Rijn: Kluwer Law International, 2010, pp. 199-200.

it does not provide any specific provision about set-off. It merely states in Article III that each contracting state shall enforce arbitral awards in accordance with the procedural rules of the state where the enforcement is sought. Therefore, even if the arbitrational tribunal does not find its jurisdiction over set-off, there is still a possibility that the cross-claim will be offset in proceedings for the declaration on enforcement of an arbitral award on the grounds of national law.

The aim of this chapter is to analyze the possible factual change of the situation over a set-off defence in proceedings for a declaration of enforceability of an arbitral award in case if an arbitral tribunal declines its jurisdiction over a set-off claim. The practice which has emerged in several jurisdictions seems to be an interesting step towards the procedural efficiency.

7.1. Admissibility of set-off defences in enforcement proceedings

There can be distinguished two main situations in which the cross-claim can be extinguished by the way of set-off during proceedings for the declaration on enforcement of an arbitral award. Firstly, set-off can be based on the cross-claim which was adjudicated by a court or awarded by an arbitral tribunal. Secondly, set-off can be even based on the cross-claim which is not yet adjudicated.[156]

[156] Ibid.

7.1.1Set-off defence based on a court or arbitral decision

According to *Dirk* the vast majority of countries admit set-off of the cross-claim which is *"enforceable in the country where enforcement of the arbitration award is sought."*[157] However, a judgment or an arbitral award has to be final. In order to overcome some uncertainty which exists in relation with the notion, the 'final award' is in this analysis understood as a conclusive decision about the given issue which just needs to be enforced. There is also a necessity to distinguish the final award and the global award as the latter is sometimes denoted as the earlier.[158]

There must be also noted that the parties should raise any defense as early as possible.[159] For instance in *Chemical Overseas v. Republica Oriental del Uruguay* the US Court ruled that a set-off defence cannot be raised in enforcement proceedings if such a claim is not raised during arbitral proceedings.[160] The set-off defence is neither admissible if the arbitrational tribunal already rejected set-off on the merits. As the court in the given cased argued the defendant cannot disturb the ruling *"merely because it is unhappy with the result from the arbitrator."*[161]

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[157] KRONKE supra note 155, p. 200.

[158] See ROZEHNALOVÁ, Naděžda. Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku. ASPI: Praha 2002, p. 70.; Cf. RŮŽIČKA, Květoslav. Mezitimní a částečný rozhodčí nález. Právní fórum, 4/2008; Cf. also GREENBERG, Simon, Christopher KEE and Romesh WEERAMANTRY. International commercial arbitration: an Asia-Pacific perspective. New York: Cambridge University Press, 2011, pp. 395-399.

[159] Ibid.

[160] United States Distinct Court for the Southern District of New York in Chemical Overseas Holdings Inc. v. Republica Oriental del Uruguay, 11 January 2005. In: KRONKE supra note 155, p. 200.

[161] United States Court of Appeals in Seung Woo Lee as co-receiver for Medision Co. Ltd v Imaging3 Inc., 19 June 2008, p. 8[online 05-02-2012]. Available at WWW: http://archive.ca9.uscourts.g ov/coa/memdispo.nsf/pdfview/061908/$File/06-55993.PDF.

7.1.2 Set-off defence based on the cross-claim which is not yet adjudicated

In general, *"there is a tendency to reject such a claim as a set-off defence in enforcement proceedings."*[162] However, in several jurisdictions the courts applies national laws in the way that the respondent is allowed to raise the set-off defence in proceedings for a declaration of enforceability of an arbitral award. For example German courts apply Section 767 (2) ZPO[163] by analogy also to enforcement proceedings of arbitral awards.[164] The German Federal Supreme Court[165] in this respect confirmed in its judicature that in proceedings for the declaration on enforcement of an arbitral awards can be declared set-off even if the cross-claim falls outside of the jurisdiction of the arbitral tribunal.[166] Furthermore, much simpler but in the main aspects similar to German law is Austrian *'Oppositionsklage'*.[167] There can be seen that under Austrian law may be the respondent allowed

[162] KRONKE supra note 155, p. 201.

[163] See Zivilprozessordnung (ZPO) Date of issue 12. 09. 1950, Section 767, Vollstreckungsabwehrklage: , '*Action raising an objection to the claim being enforced (1) Debtors are to assert objections that concern the claim itself as established by the judgment by filing a corresponding action with the court of first instance hearing the case. (2) Such objections by way of an action may admissibly be asserted only insofar as the grounds on which they are based arose only after the close of the hearing that was the last opportunity, pursuant to the stipulations of the present Code, for objections to be asserted, and thus can no longer be asserted by entering a protest.'* Translation available [online 10-04-2012] at: WWW: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p2548.

[164] See HARBST, Ragnat and Heiko PLASSMEIER and Jürgen MARK: Admissibility of Set-off Defences in Proceedings for the Declaration on Enforcement of an Arbitral Award. In: Baker & McKenzie International Arbitration Yearbook: 2010-2011, JurisNet, LLC, 2011, pp. 248-251.

[165] Bundesgerichtshof, BGH. The website of the court available [online 10-04-2012] at WWW: http://www.bundesgerichtshof.de.

[166] See HARBST supra note 164, p. 249.

[167] See KERAMEUS, Constantinos. International Encyclopedia of Comparative Law: Civil procedure. Enforcement proceedings, 1982, Vol. 16, Chapter 10, p. 54. See also Section 35 of Exekutionsordnung (EO) RGBl 1896/79 [online 10-04-2012]. Available at: WWW:http://www.jusline.at/35_Einwendungen_gegen_den_Anspruch_EO.htmlExekution sordnung(EO).

"to raise a set-off available under substantive law against the enforcement of an arbitral award."[168]

The similar mechanism as the German and Austrian can be seen in most of the procedural national laws however, its application to the proceedings for a declaration of enforceability of an arbitral award is not established or is very uncertain. As an example of the similar approach however, within the litigation can be seen in the Czech Republic. In the decision of the Supreme Court of the Czech Republic No. 1329/2003[169] was confirmed that the enforcement of the decision should be stopped in case of the substantive set-off as it can be subsumed under reasons given by Section 268 (1) g) or h) OSŘ.[170] However, the circumstances which occurred before obtaining an enforceable title can´t be considered during the proceedings of enforcement of a judgment. Therefore, the unilateral expression which leads to a retroactive extinction of mutual claims has to be, under Czech law, made only after the issuing of the enforceable title.[171]

German example: Federal Supreme Court decision No. III YB 57/10

In its ruling of 30 September 2010[172], the Federal court ruled that *"a respondent in proceedings for a declaration of enforceability of an arbitral award can declare a set-off with a claim that is itself not subject to the arbitration agreement."*[173] Furthermore, the court clarified that *"the courts of appeal are competent to declare the award enforceable and decide on the*

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[168] SCHWARZ supra note 141, p. 262.

[169] Nejvyšší soud České republiky (The Highest Court of the Czech Republic), rozhodnutí 20 Cdo 1329/2003 [online 10-04-2012] Available at: WWW: http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/F6EA795D0D2240B5C1257983005BE4E6?openDocument&Highlight=0.

[170] Rules of Civil Procedure No. 99/1963 Sb., Občanský soudní řád [online 10-04-2012]. Available at WWW: http://business.center.cz/business/pravo/zakony/osr/.

[171] See Nejvyšší soud supra note 138.

[172] Federal Supreme Court, decision on 30 September 2010, File No. III YB 57/10, Schields VY 2010, 330.

[173] HARBST supra note 164, p. 248.

merits of the set-off defence."[174] There can be seen that according to the Court there is no difference if an arbitral tribunal declines its jurisdiction correctly or incorrectly. Moreover, the Court has clearly opened the possibility to set-off a claim which is not raised during the arbitral proceedings in case when there is certainty that the tribunal would not have jurisdiction.[175]

7.2. Grounds for the corrective activity of national courts

There can be said that set-off, if considered as the substantive defense against the main claim, could still play a crucial role during enforcement proceedings. German and Austrian examples show us an interesting mechanism which can balance the consequences of above analyzed restrictive approach concerning the jurisdiction over set-off as provided in UNCITRAL Arbitration Rules 2010[176]. The values as procedural efficiency, reasonable expectations of the parties and legal certainty should be taken into consideration. These values are in the same time indicators of the efficient solution.

There is a question if the other jurisdictions will follow the German and Austrian example. There can be seen potential to overcome the restrictive provisions of some rules applicable to the legal relations within the arbitration proceedings. However, the mechanism could be prone for an abuse. Moreover, the question of such a corrective activities brings us in front of the question of an interrelation between the national courts and arbitration as such. According to my opinion every case should be

[174] Ibid, pp. 249-250.
[175] See HARBST supra note 164, pp. 248-251.
[176] Author´s note: similarly by UNCITRAL Arbitration Rules 1976.

considered under the complexity of the given relationship of the parties. There is necessary to realize, as *Karrer* expressed, that *"contracts are not written for litigation, not even for arbitration clauses…contracts are primarily designed to prevent disputes or to resolve them amicably, and exercising a right to set-off is a perfectly acceptable way to extinguish obligations."*[177] This can be seen as a strong argument, however in international commercial arbitration is not recognized any policy favoring set-off. There are situations where admission of set-off would not be reasonable. However, as a lot of impractical jurisdictional barriers persist, there seems to be fair to recognize particular balancing powers of the national courts. Further, I see the great importance to stress that in general any proceedings have to be delimited not just by the applicable rules and arbitration agreement, but also by the principle of fair arbitration process.[178] It means, in the context of set-off, also to have a right to set-off substantial claims which by their very nature represent the appropriate and reasonably expected defence against the claimant.

[177] KARRER, Pierre. Jurisdiction on Set-Off Defences and Counterclaims, Arbitration: the journal of the Chartered Institute of Arbitrators, 2001, Vol. 67, Issue 2, p. 177.

[178] Author´s note: more about the due process in arbitration see VLASTNÍK, Jiří: Právo na spravedlivý rozhodčí proces? Právní rozhledy 1/2012, p. 1 et seq.

8. LIMITS OF ADJUDICATION AND PRINCIPLES OF GOOD PRACTICES

As can be concluded from the analysis provided in the second part of this work, the question of jurisdiction of arbitral tribunal over set-off is in certain aspects a very controversial issue. The main problem arises when a defendant uses its cross-claim, which is not subject to an arbitration agreement to be extinguished against a main claim. According to some authors *"the problem of set-off defences in arbitration has so far resisted all attempts to resolve it once and for all."*[179] There is hard to suppose that it will ever be solved as set-off is a very complex issue which by its nature includes several principles which needs to be balanced. On the one hand, there can be seen the question of good faith and fair dealing which aims to achieve fair results of the law, on the other hand stands procedural efficiency and economic effectiveness which ensures commercially useful solutions. The results of the arbitration proceedings shall be also predictable and immune to potential manipulative tactics of the parties. Above those, the very basic element of arbitration - the autonomy of the parties' will must be respected. Therefore, several aspects have to be let open for the arbitrators who shall balance these principles on the case to case basis. The problematic seems to be too complex to be resolved by detailed legal provisions. However, existence of several clear rules and limits supported by a set of good practices can significantly improve the uncertainty and minimalize the negative impact of the difficulties connected with the issue of set-off.

[179] MOURRE, supra note 111, p. 387.

8.1. The optimal rule

There can be seen that most of arbitration rules does not deal with the problematic of set-off at all.[180] I cannot support this approach as it leads to unnecessary complications. There must be noted that it is indeed true that even quality rules of given arbitration body cannot in any case completely solve the issue, however they can provide necessary guidelines for arbitrators and help them to decide the cases in a consistent way. Moreover, reasonable rules will support the legal certainty and predictability of decisions as the certain direction how the issue is understood will be given. As will be pointed further the final solution will be still largely dependent on a broad discretion of the given tribunal, however there must be defined some limits of this discretion. These limits shall go beyond the provisions of applicable substantive law as it will probably just uncover whether set-off is under its view considered as a substantive device or as the matter of procedural law.

In current arbitral practice there can be distinguished two basic approaches which expressly deal with the problematic – the extensive approach represented by the Swiss Rules[181] and the restrictive approach represented by the UNCITRAL Rules[182]. Firstly, I do not see an artificial extension of jurisdiction offered by Swiss approach as an optimal solution. The analysis provided above shows that the imperative character of such provision leads to unpredictable consequences.[183] The most serious problem lays in the reduction of the tribunal discretion which is roped by the necessity to decide over set-off in the merits. Moreover, it even, without any counterbalance, increases the potential problems concerning parallel

[180] See Chapter 6 above, pp. 49-52.
[181] See Swiss Rules of International Arbitration supra note 104.
[182] See UNCITRAL Arbitration Rules 2010 supra note 94.
[183] See Chapter 5 above, pp. 42-48.

proceedings. At last but not the least, this approach significantly interferes with the autonomy of the parties. Secondly, in opposite to the Swiss Rules, the UNCITRAL approach seems to set reasonable grounds. In principle, the direction which it encompasses can be accepted however, the wording of Article 21 (3) of the UNCITRAL Arbitration Rules 2010 seems to be too broad. The arbitral tribunal in order to decide on a claim for set-off on the ground that it *"has jurisdiction over it"* does not indicate much. It makes in fact no difference between set-off and counterclaim which reduces the positive potential of set-off to a minimum. There is surely expressed the necessity to provide some kind of admissibility test but, according to my opinion, it still gives too much leeway to arbitrators which can increase the danger that the same cases will be decided differently.

I came to an opinion that the fact that set-off operates as a special legal defence, which is determined always by at least two claims, calls for a flexible solution. It comes mainly from the flexible functioning of the mechanism which, in order to fulfill its potential of procedural efficiency, operates extra judiciary as a matter of substantive law. Therefore, jurisdiction of arbitral tribunal over the cross-claim cannot per se be the obstacle for the admission of set-off. It would go against the nature of the mechanism. The optimal rule should take this into consideration and focus mainly on the given relationship of the mutual claims which are meant to be extinguished. The legal relationship should be the only legally expressed limit for the admission of set-off. In case the main claim and cross-claim does not exist in sufficiently close relation, the set-off should not be admitted. I therefore propose the following rule:

The respondent may rely on a claim for the purpose of a set-off provided that such a claim is *"arising out of the same legal relationship."*[184]

8.2. Principles of good practice

The above proposed legal provision has still a very open character. Therefore, the application of this rule has to be supported by several principles of good practices which will mainly reflect the need of flexible functioning of set-off. I recognize mainly three of them which should serve as the basic ground for the analysis of the given arbitral tribunal: the substantive nature of set-off, implicit exclusion of set-off by parties and procedural efficiency.

8.2.1The substantial nature of set-off

As was pointed in the first chapter most of the civil law jurisdictions consider set-off as a substantive defence. The substantive character is mainly determined by the possibility to achieve its effect extra judiciary after the substantive conditions of the applicable law are met. Therefore, if the applicable law governs set-off as a matter of substance, there should be the general effort to prefer its use over impediments as judicial competence. The indication for arbitrators could be also a use of substantial test which would point out whether the admission of set-off would also probably lead to the mutual extinction of the claims.

[184] Authors note: the wording *"arising out of the same legal relationship"* was during preparation works for the draft of UNICITRAL Arbitration Rules 2010 offered as one of the possible solution by *Sanders*. SANDERS supra note 95, p. 29.

8.2.2Exclusion of set-off

There have to be considered whether the parties have explicitly or implicitly excluded set-off. The case of explicit extension seems to cause any doubts as a promise to perform in cash is generally recognized practice in corporate transactions. However, if parties have not mentioned set-off in their arbitration agreement the situation is a bit more complicated. In this case I see as appropriate to accept a general rule which provides that set-off has not been excluded. It comes from the presumption that its existence can be in modern business life reasonably anticipated. This general presumption should be further subject to the test of reasonableness which could in several occasions find the implicit exclusion of set-off. As provided by *Schöll "the key question an arbitrator must ask is: what would reasonable, fair-minded professional parties have agreed on in good faith, had they given though to the problem of set-off at time they negotiated their contract and/or arbitration agreement?"*[185] As I support the flexible functioning of set-off, the implied waiver should be found in case when the parties have obviously different intentions. This can be seen if the parties choose an expedited procedure or some kind of specialized arbitration as for instance exists in maritime matters.

8.2.3 Procedural efficiency

The issue of procedural efficiency can be seen as one of the added values which set-off encompasses. This aspect should also serve as a strong guide for arbitrators. There shall be mainly considered the liquidity of the cross-claim. The procedurally efficiency and also admission of set-off are

[185] SCHÖLL supra note 86, p. 132.

highly supported if the cross-claim and its amount are undisputed or already finally decided by a competent body. On the other hand, the strong argument against the admission of set-off lies in the situation when the decision over set-off would be connected with a lot of delays. Secondly, the relation between the main-claim and the cross-claim should be also taken into consideration as the close relation of these two also generally supports procedural efficiency.[186]

[186] See for example the case *Saluka Investments B.V. v The Czech Republic* supra note 91.

CONCLUSION

At the time of writing this thesis I have been inspired by the presentation given by *Diane Nijs* – the inventor of *"Imagineering"* theory in marketing.[187] She has realized and described the new discourse of current society. During last decade we have become a part of the change of the inner logic of the human. The old Newton´s industrial logic is not working anymore in the modern business word. The new network society is connected with new ways of communication which has created a new blue ocean in the business world. *"It all starts with the design of an appealing meaning construct that invites for sense making co-creation. Imagineering is the art to move people in value creating networks."*[188] More than any other field of law, the rules of commercial law should reflect this discourse as such. Limits and forms of this reflection are in international sphere a very controversial issue. However, we can be sure that certain instruments which are perfectly working within the national system are no longer working effectively for the purposes of the international sphere. One of these instruments is set-off.

Set-off is meant to be one of the most important defences in arbitration proceedings. Generally, set-off is defined as *'the process by which a person may use a right to performance held against another person to extinguish in whole or in part an obligation owed to that person.'*[189] I have analysed this instrument in the context of international commercial arbitration as this is the most popular mechanism for resolving international

[187] NIJS, Diane, International Entrepreneurship. Imagineering Strategies in the 'imagination age'. Tilburg University, Tiasnimbas Building, 04. 04. 2012.

[188] NIJS, Diane, Imagineering Academy [online 2012-04-18]. Available at: WWW: http://www.imagineeringacademy.nl/masterclass-imagineering-17-april-2012.

[189] III. – 6:101(1) of the DCFR supra note 5.

commercial disputes. According to some authors set-off is involved in about 15 – 20 per cent of all arbitrations.[190] Despite its frequent use national concepts of set-off differs dramatically. On the one hand set-off is a legal instrument which increases efficiency and facilitate transactions, on the other hand *"in the guise of domestic provisions, set-off takes on a peculiarly domestic, almost antique character."*[191]

The main clash can be seen in the fact that in common law jurisdictions set-off is understood as a procedural device which operates on and from the date of judgment, in opposite to that in civil law jurisdictions set-off is recognized as a matter of substantive law as its effect is achieved extra judiciary. Moreover, even within the civil law jurisdiction can be seen significant differences. In France is set-off understood as an automatism, in Germany or the Czech Republic is the key aspect the declaration of the will. Furthermore, most of the civil law jurisdictions accepted the retroactive effect of set-off which increases the risk of use of several waiting tactics and causes the necessity to accept many exceptions. These problems are reflected in modern supra-national instruments which attributed to set-off *ex nunc* effect.

The current arbitral practice struggles with two main problems concerning set-off. The first one lays in the area of choice-of-law, the other concerns the question of jurisdiction. Only the latter was the subject of the in-depth analysis. The main issue concerning the jurisdiction over set-off lays in the situation when the defendant raises his cross-claim, which is not covered by an arbitration agreement, to be mutually offset. The thesis analyzes different approaches which have emerged in the practice of arbitral tribunals. Consequently, there is offered a legal framework with a set of good practices which should be followed in order to strengthen legal

[190] See BERGER supra note 4, p. 17 et seq.
[191] FOUNTOULAKIS supra note 3, pp. 17-18.

certainty, procedural efficiency and effective functioning of set-off within international commercial arbitration.

In order to improve the current state of affairs there is a necessity to expressly deal with problematic of set-off in the rules of the given arbitral body. The optimal rule should mainly focus on the given relationship between the main claim and the cross-claim. Therefore, there is proposed to accept the rule which states that "The respondent may rely on a claim for the purpose of a set-off provided that such a claim is arising out of the same legal relationship." This rule has an open character and has to be applied in the case by case bases in the light of several principles of good practices. Firstly, if the applicable law governs set-off as a matter of substance, there should be general effort to prefer its use. The opposite should be true if set-off is considered as a procedural device. Secondly, the express and implied exclusion of set-off by parties has to be taken into consideration. The expressed exclusion causes any doubts as it serves as a clear waiver of the right of set-off. The implied exclusion should serve as a waiver just when the parties have obviously different intentions. At last but not the least the issue of procedural efficiency should also serve as a strong guide for arbitrators.

In order to reflect the problematic in its complexity there must be also noted that even if an arbitrational tribunal does not find its jurisdiction over set-off, there is still a possibility that the cross-claim will be offset. This can be seen in proceedings for the declaration on enforcement of an arbitral award. As the New York Convention does not deal with set-off expressly, the situation has to be evaluated on the grounds of the national law. This practice can be seen in the case law of German and Austrian courts where in proceedings for the declaration on enforcement of an

arbitral awards can be declared set-off even if the cross-claim falls outside of the jurisdiction of the arbitral tribunal. This seems to be an interesting example how to overcome the restrictive provisions of some rules applicable to the legal relations within the arbitration proceedings. However, till this time this practice remains quite isolated.

At the very end there can be concluded that the question of jurisdiction over set-off within arbitration agreement is a highly complex issue which has not a clear solution. However, acceptation of several basic principles which would constitute a common basic framework would definitely support simplicity, efficiency and security of legal relations of the parties. There was already mentioned that the world is changing much differently than is used to be, however one rule still remains constant as *"It is an immutable law in business that words are words, explanations are explanations, promises are promises but only performance is reality."*[192]

[192] GENEEN, Harold. BRAINYQUOTE. Harold S. Geneen Quotes [online 2012-05-24]. Available at: WWW: http://www.brainyquote.com/quotes/authors/h/harold_s_geneen.html.

ABBREVIATIONS

- **Brussels Convention** – Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters
- **Brussels I Regulation** – Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
- **DCFR** – Draft Common Frame of Reference
- **ECJ** – European Court of Justice
- **EU** – European Union
- **ICC Rules** – International Chamber of Commerce Rules of Arbitration (1998)
- **New York Convention** – United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- **OSŘ** – Rules of Civil Procedure No. 99/1963 Sb., Občanský soudní řád.
- **PECL** – Principles of European Contract Law
- **Rome I Regulation** – Regulation (EC) No 593/2008 on the law applicable to contractual obligations
- **Swiss Rules** – Swiss Rules of International Arbitration (2004)
- **UNCITRAL** – United Nations Commission on International Trade Law
- **ZPO** – German Zivilprozessordnung (1950)

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TEZE V ČESKÉM JAZYCE

Úvod

Informační revoluce, které v poslední dekádě čelíme, změnila v podstatné míře logiku vnímání tohoto světa. V tomto smyslu lze též hovořit o diskursu světového pořádku, který zásadním způsobem mění zaběhnuté struktury skrze svou novou jednotu. Nové uspořádání je tvořeno především novou kvalitou vztahů pravidel, které generují originální objekty společenské reality. Tato situace musí být reflektována závaznými právními mechanismy. Nicméně je zřejmé, že sociální diskurs a ekonomika následují právo s určitým zpožděním, je zde tedy vytvořen určitý prostor, který umožňuje existenci mechanismů, které jsou stále orientovány na tradiční objekty společenské reality, které již ale fungují jiným způsobem. Tento fakt lze pozorovat především ve vztazích s mezinárodním prvkem, kdy je zřejmé, že určité instrumenty, které v rámci národní úpravy fungují bez větších problémů, nejsou již efektivně použitelné v mezinárodním kontextu. Typickým příkladem je v tomto směru institut započtení.

Započtení lze považovat za jednu z nejdůležitějších obran v rámci arbitrážního řízení. V rámci mezinárodní obchodní arbitráže je započtení zahrnuto v přibližně 15-20 procentech případů. Započtení lze vnímat jako určitý proces, jehož prostřednictvím může jedna strana využít svého práva proti druhé straně k tomu, aby zčásti nebo zcela splnila závazek, který této straně dluží. Jedná se tedy o právo zjednodušit realizaci vzájemných plnění v obchodím styku. Možnost absorpce vzájemných pohledávek není obecně sporná, nicméně národní úpravy započtení se dramaticky liší. V některých právních úpravách je započtení kvalifikováno jako procesní kategorie, což

je příznačné především pro Anglii a další země common law. Právní úpravy kontinentálního systému práva pak kvalifikují započtení především jako institut hmotněprávní. Kromě toho, na rozdíl od mnoha jiných právních mechanismů, je započtení vždy tvořeno alespoň dvěma pohledávkami. Na tyto pohledávky mohou být použita odlišná pravidla, což může vést k sérii obtížných otázek týkajících se nejen rozhodného práva, ale i jurisdikce ohledně započtení. Tato diplomová práce se zabývá především problematikou jurisdikce.

Centrum kontroverze spočívá v situaci, kdy žalovaný namítne započtení své protipohledávky, která nespadá do rozsahu dané rozhodčí smlouvy. Pokud daný tribunál vyhodnotí započtení jako institut hmotněprávní, je povinen se vyrovnat s otázkou, zda je kompetentní o započtení rozhodnout. Lze tak dovodit, že bude muset být analyzována také povaha protinároku žalovaného. Otázkou je poté, zda je daný tribunál příslušný rozhodnout o započtení i přes fakt, že nemá samostatnou jurisdikci ohledně protinároku nebo pokud je dokonce daný protinárok předmětem jiného rozhodčího řízení. Rozhodci se poté mohou dostat do velmi složité situace, jelikož musí najít, v případě absence jasného pravidla, přiměřené limity své příslušnosti. Cílem této práce je nalezení limitů přípustnosti započtení protipohledávky, o které by tribunál nebyl obyčejně příslušný rozhodnout. Práce navrhuje právní rámec a soubor osvědčených postupů, které by měly být přijaty, aby byla posílena právní jistota, procesní efektivita a účinné fungování započtení v rámci mezinárodní obchodní arbitráže

Tématem této diplomové práce je „Institut započtení v mezinárodní obchodní arbitráži". Práce je rozdělena do dvou základních částí. První část pojednává především o pojmu a funkcích započtení v mezinárodním kontextu. Jsou také vymezeny základní problémy započtení, které podkopávají efektivní využití tohoto mechanismu v rámci mezinárodní

obchodní arbitráže. Hlavním cílem této části je připravit základ pro další analýzu, tak aby bylo možné úspěšně opovědět na výzkumnou otázku. Druhá část přímo analyzuje odlišné přístupy k problematice příslušnosti daného tribunálu rozhodnout o započtení. V samostatné kapitole je také analyzována tato problematika v kontextu uznání a výkonu cizích rozhodnutí. Práce poté navrhuje přijet konkrétního pravidla a souboru principů, které mají potenciál minimalizovat negativní důsledky nejistoty panující ohledně otázek jurisdikce. Na tomto místě bych rád zmínil, že zkoumání tématu této práce započalo na Právnické fakultě Univerzity Karlovi v Praze, nicméně převážná většina výzkumu a samotné psaní této práce bylo provedeno na mém studijním pobytu na Tilburg University. Podnikl jsem také několik studijních cest do The Peace Palace Library v Haagu.

Pojem a funkce započtení v mezinárodní perspektivě

První dojem může naznačit, že nalezení definice započtení nebudou provázet pochybnosti. Vlastnosti procesní efektivity, spravedlnosti a jistoty vyplývají ze samotné přirozenosti tohoto institutu a unifikují tak společné chápání jeho hlavních cílů. Nicméně v kontextu rozdílných tradic národních právních úprav lze pozorovat zásadní rozdíly v povaze a podmínkách jeho fungování. Práce ve své první části nabízí analýzu hlavních společných znaků započtení v kontextu rozdílných národních úprav. Nicméně pozornost je ve stejné míře také upřena na vymezení podstaty rozdílností, tak aby byla problematika pochopena ve své komplexnosti.

Jak již bylo zmíněno započtení lze vnímat jako proces, jehož prostřednictvím může jedna strana využít svého práva proti druhé straně k tomu, aby zčásti nebo zcela splnila závazek, který této straně dluží. Jedná se

tedy o právo zjednodušit realizaci vzájemných plnění v obchodím styku s tím, že pohledávky jsou vzájemně absorbovány. Jinými slovy lze tento jev také vyjádřit tak, že pokud je dlužník zároveň také věřitelem svého věřitele, má při splnění určitých zákonných podmínek právo započíst existující pohledávky, a to do výše menší z nich. Obecně lze říci, že všechny moderní právní řády vyžadují pět základních podmínek, které musí být splněny, aby mohlo dojít k účinkům započtení. Jedná se o (1) vzájemnost pohledávek, které jsou (2) stejného druhu přičemž (3) protinárok musí být splatný (4) započtení není vyloučeno a (5) pohledávky jsou likvidní. Dalším obecně uznaným prvkem je možnost upravit započtení smluvně. V tomto směru je započtení využíváno především v bankovnictví, kde byla nalezena řada nových způsobů jeho využití. Rozdílné právní řády jsou také spojené rozlišením pojmů započtení a nezávislého protinároku (counterclaim), tedy samostatné pohledávky uplatněné protižalobou, kdy je tato protižaloba chápána jako ofensivní institut, který je striktně procesní kategorií. Předmětem protižaloby je nezávislý nárok, který je vznesen ve stejném řízení jako nárok hlavní. Poslední společný prvek započtení je nutní spatřit ve faktu, že je jeho existence obecně uznána také v insolvenčním řízení. Vzhledem ke specifičnosti insolvence a možného zneužití započtení jsou ve všech právních řádech v tomto kontextu přijata speciální pravidla.

Práce také analyzuje nejdůležitější rozdíly v úpravě započtení napříč čtyřmi zvolenými právními řády, tedy právem anglickým, francouzským, německým a českým. V první řadě je nutné zdůraznit zásadní rozdíl v chápání povahy započtení, tedy buď jako institutu procesně-právního nebo hmotně-právního. Jako institut procesního práva je započtení chápáno především v systémech common law, které započtení nikdy nepřiznalo hmotně-právní povahu a jeho účinků tak může být dosaženo pouze konstitutivním rozhodnutím soudu. Anglické právo rozlišuje dva základní druhy započtení, a to tzv. „statutory set-off“ a „equitable set-off“, kdy druhé

z nich je stále ještě užívaným pozůstatkem Equity – práva spravedlnosti. Na druhou stranu lze pozorovat, že v kontinentálním systému práva je započtení vnímáno jako institutu hmotného práva. Zdálo by se, že je to následek přijetí tradice římského práva, nicméně není tomu tak. Římské právo vnímalo původně započtení jako procesní nástroj, a je tedy mnohem bližší právu anglickému. Důvodem tohoto faktu je nepřesná interpretace ustanovení Corpus Iuris Civilis Inst. IV, 6, 30, které hovoří o automatickém zániku pohledávek. Rozdílná interpretace tohoto ustanovení rozdělila kontinentálními právní systémy na dva směry. Typickým příkladem první skupiny je právo francouzské, které pohlíží na započtení jako na automatismus. Automatický účinek započtení nicméně vede k řadě praktických problémů, které jsou většinou řešeny zákonnou výjimkou nebo překonávány výkladem francouzských soudů. Druhým příkladem jsou poté právní řády Německa a České republiky, kde je započtení aktivizováno kompenzačním projevem.

V rámci kontinentálního systému je započtení přiznán retroaktivní účinek. Retroaktivita spočívá v tom, že k zániku pohledávek, v závislosti na daném právním řádu, dochází kompenzačním projevem nebo *ipso iure*, a to *ex tunc*, tedy k okamžiku, kdy se pohledávky poprvé setkaly. Nicméně retroaktivní efekt s sebou přináší řadu praktických problémů, které narušují právní jistotu a bezpečné fungování transakčních operací. Retroaktivita má například za následek, že dlužník, který učiní kompenzační projev, nemusí platit za dobu mezi setkáním pohledávek a kompenzačním projevem úroky z prodlení. Největší kritiku lze tak především spatřovat ve volné dispozici dlužníka se svým protinárokem, což může vést k využití řady vyčkávacích taktik. Dlužník totiž nemá motivaci uskutečnit kompenzační projev, dokud není zažalován. Další významná negativa lze spatřovat v situaci, kdy retroaktivita má tendenci odpustit dlužníkovi následky jeho prodlení, pokud je následně učiněn kompenzační projev. Retroaktivní účinek započtení je

navíc značně nesystematickým řešením, jelikož musí být řada jeho negativních důsledků řešena výjimkou v zákoně. Národní právní řády by měly tyto argumenty reflektovat a opustit retroaktivní účinek započtení. Je nutné poznamenat, že velmi vhodnou inspirací může být řada modelových ustanovení, která jsou nabízena, lze zmínit například Zásady UNIDROIT, Principy evropského smluvního práva, Návrh společného referenčního rámce (DCFR) či Principy TransLex. Všechny tyto moderní instrumenty přiznávají započtení účinek *ex nunc*.

Analýza zásadních rozdílností ve vnímání započtení napříč zvolenými právními řády musí být také v krátkosti doplněna pojednáním o rozdílných úpravách jednotlivých podmínek započtení. Je nutné uvést alespoň dva příklady. V první řadě je velmi diskutována problematika podmínky, aby dané pohledávky byly stejného druhu. To platí především ve vztahu k pohledávkám, které jsou vyjádřené v různých měnách. Například ve Francii obecně platí, že rozdílnost měn není překážkou započitatelnosti daných pohledávek, pokud jsou dané měny konvertibilní, nicméně přesto není tento obecný názor zcela jednoznačně potvrzen judikaturou francouzských soudů. Na druhé straně stojí například praxe v Německu, kdy pohledávky vyjádřené v různých měnách nejsou nikdy pohledávkami stejného druhu. Jako druhý hlavní rozdíl v úpravě podmínek započtení je nutné zmínit otázku splatnosti daných pohledávek. V anglickém právu musí být splatné obě pohledávky, což vyplývá i z procesního charakteru započtení. Stejný výsledek lze očekávat i v právu francouzském, kdy je započtení vnímáno jako automatismus. V právních řádech České republiky a Německa pak převažuje názor, že splatnou musí být pouze pohledávka aktivní, tedy pohledávka té strany, která učinila kompenzační projev.

Z výše uvedeného lze konstatovat, že jednotlivé národní úpravy započtení se liší dramatickým způsobem. Započtení je navíc vždy tvořeno alespoň dvěma pohledávkami, které mohou být navíc předměty odlišných

právních režimů. V rámci mezinárodní obchodní arbitráže působí tyto dva faktory značné obtíže v otázkách nejen rozhodného práva, ale i jurisdikce ohledně započtení. Práce v krátkosti vymezuje tyto dva hlavní problémy, které provázejí současnou praxi mezinárodní obchodní arbitráže ve vztahu k započtení. Předmětem podrobné analýzy jsou poté pouze otázky jurisdikce.

Započtení: otázky jurisdikce

Problematika jurisdikce daného rozhodčího tribunálu je ve vztahu k započtení velmi komplexní a dosud nevyřešenou otázkou. Druhá část práce se zabývá především situací, kdy žalovaný namítne během rozhodčího řízení započtení své protipohledávky, která nespadá do rozsahu dané rozhodčí smlouvy. V teorii ani praxi nepanuje shoda, zda může, a za jakých podmínek, daný tribunál rozšířit svoji jurisdikci i na ostatní závazky daných stran. Vzhledem k cílům této práce je problematika analyzována ve své komplexnosti, kdy jsou nejprve zkoumány základní přístupy obsažené v pravidlech daných rozhodčích soudů, není však vynechána ani problematika uznání a výkonu cizích rozhodčích nálezů. V závěru druhé části je pak navrženo konkrétní ustanovení se souborem principů dobré praxe.

V zásadě lze pozorovat tři základní přístupy k dané problematice. První, restriktivní přístup je založen na presumpci, že pohledávka uplatňovaná k započtení musí být součástí dané rozhodčí smlouvy, aby mohla být v daném řízení započtena. V tomto směru lze zmínit například čl. 21 (3) Rozhodčího řádu UNCITRAL, který stanoví, že *„Žalovaný může v žalobní odpovědi nebo později v rozhodčím řízení, jestliže rozhodčí senát rozhodne, že za daných okolností byl odklad odůvodněný, podat protižalobu nebo uplatnit nárok k započtení za předpokladu, že rozhodčí senát je v dané*

věci příslušný.“[193] Druhý, materiální přístup, nebo v opozici k přístupu restriktivnímu, také permisivní přístup, je založen na předpokladu, že daný arbitrážní tribunál je příslušný rozhodnut o započtení bez ohledu na jeho jurisdikci ohledně pohledávky uplatněné k započtení. Příkladem tohoto přístupu jsou Švýcarská pravidla mezinárodní arbitráže z roku 2004, která ve svém čl. 21 (5) stanoví, že *„Rozhodčí tribunál má pravomoc projednat námitku započtení i tehdy, jestliže vztah, ze kterého tato námitka vychází, nespadá do rozsahu rozhodčí doložky nebo je předmětem jiné rozhodčí smlouvy či doložky o výběru fora.“*[194] V tomto směru tak lze pozorovat, že daná pravidla explicitně rozšiřují příslušnost daného rozhodčího tribunálu. V neposlední řadě je nutné zmínit také třetí přístup, který je zdaleka nejpočetnějším. Mnoho rozhodčích pravidel se totiž problematikou započtení vůbec nezabývá. Mlčení tak musí být překonáno ustanoveními *lex loci arbitri*. V tomto případě má rozhodčí tribunál značnou volnost rozhodnutí, jelikož aplikované právo v tomto směru jasně určí většinou pouze to, zda je započtení považováno za procesní nebo hmotněprávní institut.

Podle řady autorů problém započtení v mezinárodní obchodní arbitráži až dosud odolal všem pokusům o své vyřešení.[195] Je obtížné předpokládat, že kdy bude vůbec zcela vyřešen, problematika se zdá být totiž příliš komplexní a zahrnuje v sobě několik principů, které musí být určitým způsobem balancovány. Na jedné straně stojí otázka dobré víry a poctivého jednání, která se snaží zajistit, aby právo generovalo spravedlivé výsledky. Na druhé straně stojí otázky procesní účinnosti a ekonomické efektivnosti, které zajišťují obchodně užitečná řešení. Výsledky arbitrážního řízení by měly být také předvídatelné a imunní vůči potenciálním

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[193] Rozhodčí řád UNCITRAL (ve znění 2010) [online 2012-05-22]. Dostupné z WWW: http://www.aktrojan.cz/dokumenty/arb-rules-revised-2010-e_cz.pdf.

[194] Překlad autor.

[195] Viz např. MOURRE op. cit. sub. 111; PAVIC op. cit. sub. 105.

manipulativním taktikám stran sporu. Nad tím vším musí být převážně respektována vůle stran, která je základem rozhodčího řízení. Je tedy zřejmé, že v tomto smyslu je nutné ponechat značný prostor daným rozhodčím tribunálům, aby případ od případu mohly balancovat tyto jednotlivé principy. Zmíněná přílišná komplexnost problematiky brání přijetí detailní právní úpravy. Nicméně existence jasného základního pravidla, které by bylo podpořeno principy dobré praxe, by mohlo významným způsobem odstranit nejistotu a minimalizovat negativní důsledky potíží spojených s fungováním započtení.

Ve snaze nalézt uspokojivé řešení problému je v první řadě třeba konstatovat, že většina rozhodčích pravidel tuto problematiku vůbec neupravuje. S tímto stavem nelze souhlasit, jelikož absence jasného pravidla vede k zbytečným komplikacím. Je jistě pravdou, že jakékoliv, byť i kvalitní, pravidlo nemůže v žádném případě analyzovanou problematiku komplexně vyřešit, nicméně je třeba jasně a závazně vymezit určitý směr rozhodování, kterým se dané tribunály mají vydat. Jasné pravidlo podpoří především konzistentnost rozhodování a naplní tak požadavky právní jistoty a předvídatelnosti práva. Samotné rozhodnutí bude stále do velké míry závislé na poměrně široké diskreci daného rozhodčího tribunálu, nicméně daný rozhodčí řád by měl jasně definovat limity této diskrece.

V současné rozhodčí praxi existují dva základní přístupy, které problematiku řeší konkrétním ustanovením. Materiální přístup reprezentovaný Švýcarskými pravidly a přístup restriktivní, který je přijat pravidly UNCITRAL z roku 2010. První přístup nabízí umělé rozšíření jurisdikce, což podle mého názoru nelze považovat za optimální řešení. Z detailní analýzy provedené ve vlastní práci vyplývá, že imperativní charakter čl. 21 (5) Švýcarských pravidel vede k nepředvídatelným důsledkům. Nejzávažnější problém spočívá ve značném zúžení diskrece daného tribunálu, který je svázán nutností, až na několik málo výjimek,

rozhodnout o započtení v meritu věci. Kromě toho je, bez jakékoliv protiváhy, zvýšen potenciál vzniku problémů týkajících se souběžných řízení. V neposlední řadě pak tento přístup výrazně zasahuje do autonomie vůle stran. Na druhou stranu restriktivní přístup přijatý pravidly UNCITRAL z roku 2010 se zdá být založen na rozumných základech. Nicméně dikce ustanovení čl. 21 (3) se zdá býti příliš širokou. Limit rozhodnutí o přípustnosti započtení na základě formulace, že *„rozhodčí senát je v dané věci příslušný"* mnoho nenapoví. Pravidla UNCITRAL v tomto směru vůbec nerozlišují rozdíl mezi započtením a nezávislým protinárokem (counterclaim) uplatněným protižalobou, což redukuje pozitivní potenciál započtení na minimum. V daném ustanovení je jistě obsažen určitý jurisdikční test, nicméně je zřejmé, že je zde dán stále příliš velký prostor pro možnost rozhodovat případy stejného druhu protichůdně.

Podle mého názoru při snaze nalézt optimální pravidlo je nutné zohlednit fakt, že započtení v rámci mezinárodní obchodní arbitráže funguje jako speciální obrana, která je determinována vždy alespoň dvěma pohledávkami. Právě specifičnost započtení a jeho flexibilní funkce spočívající v potenciálu zvýšit procedurální efektivitu a rozumné a spravedlivé uspořádání vzájemných vztahů stran, zakládají nutnost maximalizovat snahu o flexibilní řešení dané otázky. Proto lze konstatovat, že by bylo proti smyslu mechanismu započtení, pokud by otázka příslušnosti ohledně protinároku byla per se jurisdikční překážkou pro samotné započtení. Optimální pravidlo by mělo tento prvek zohlednit a zaměřit se především na otázku vzájemného vztahu pohledávek, které mají být potencionálně započteny. Právě vzájemný právní vztah obou pohledávek by měl být, podle mého názoru, jediným přímo vyjádřeným jurisdikčním kritériem započtení. Pokud mezi hlavní pohledávkou a pohledávkou uplatněnou k započtení neexistuje dostatečně blízký vztah, započtení by nemělo být přípustné. Z těchto důvodů navrhuji následující

pravidlo: Žalovaný může uplatnit nárok k započtení za předpokladu, že tento nárok vychází ze stejného právního vztahu.

Výše uvedené pravidlo má stále velmi otevřený charakter, je proto nutné jej vykládat v kontextu několika principů dobré praxe. Považuji za nutné vymezit alespoň tři hlavní – preference přípustnosti započtení v případě jeho hmotně-právního charakteru, možnost vyloučení započtení stranami a otázku procesní efektivnosti. V první řadě, jak již bylo uvedeno výše, je započtení ve většině kontinentálních systémů vnímáno jako institut hmotného práva. Právě hmotněprávní povaha dává mechanismu značnou míru flexibility, která v sobě zahrnuje možnost zjednodušení obchodního styku. Pokud je tedy započtení podle rozhodného práva považováno za hmotněprávní institut, měla by existovat obecná snaha preferovat přípustnost započtení před různými procesními překážkami jako je například otázka jurisdikce rozhodčího tribunálu.

Jako druhý princip dobré praxe je vhodné přijmout možnost explicitně či implicitně započtení vyloučit. Případ explicitního vyloučení započtení nepůsobí žádné potíže. Závazek plnit v hotovosti bez ohledu na protinárok strany je obecně používanou praxí v rámci mezinárodního obchodního styku. Sporným bodem je ovšem možnost vyloučit započtení implicitně, tedy v případě, že daná rozhodčí smlouva či rozhodčí doložka neobsahují o započtení jakoukoliv zmínku. Skutečnost, že lze v moderní obchodní praxi možnost výskyt započtení rozumně předpokládat, spatřuji jako vhodné přijmout obecný předpoklad, že pokud není započtení vyloučeno explicitně, lze mít za to, že není proti vůli stran započtení připustit. Nicméně tento obecný předpoklad je nutné podrobit testu, který spočívá v otázce rozumného očekávání stran v každém konkrétním případě. Mělo by být především zohledněno, zda případné započtení bylo možno rozumně a v dobré víře předpokládat v době, kdy byla daná rozhodčí či jiná smlouva sjednávána. Jelikož podporuji flexibilní užití institutu započtení,

navrhuji, aby bylo implicitní vyloučení započtení uznáno, pouze pokud vše nasvědčuje tomu, že strany takový úmysl skutečně měly. Jako příklad může sloužit situace, kdy si strany například sjednají určitou formu specializovaného rozhodčího řízení, které například existuje v oblasti námořnictví.

Třetí a poslední navrhovaný princip dobré praxe spočívá v nutnosti uvážit vliv případného rozhodnutí o přípustnosti započtení na procesní efektivitu. Procesní efektivita představuje totiž jednu z nejdůležitějších přidaných hodnot, které institut započtení zahrnuje. V prvé řadě by měla být v tomto kontextu uvážena likvidita protinároku, jelikož pozitivní rozhodnutí o přípustnosti započtení je značně podpořeno, pokud například daná protipohledávka není zpochybňována či je již o ní rozhodnuto v rámci jiného řízení. Na druhou stranu pokud lze předpokládat, že by rozhodnutí o započtení mělo být spojeno s výraznými prodlevami v řízení, mohla by být takováto indicie rozhodující pro odmítnutí jurisdikce. V druhé řadě je také nutné zmínit, že s principem efektivního procesu souvisí také otázka blízkosti vztahu hlavního nároku a protinároku, jelikož lze obecně předpokládat, že čím bližší je vztah vzájemných nároků, tím více se může projevit pozitivní vliv započtení na procesní efektivitu.

Aby byla analýza problematiky jurisdikčních otázek ohledně započtení v mezinárodní obchodní arbitráži kompletní, je nutné zohlednit možnost využít práva na započtení ve stádiu výkonu a uznání cizích rozhodčích nálezů. Není totiž výjimkou, že se strany sporu často snaží uplatnit námitku započtení také v řízení o výkon rozhodčího nálezu. Pokud analyzujeme tento prvek v kontextu New Yorské Úmluvy, lze konstatovat, že Úmluva neposkytuje ohledně započtení žádnou konkrétní zmínku. Je tak zřejmě nutné se pouze opřít o čl. 3 Úmluvy, který stanoví, že *„Každý smluvní stát uzná rozhodčí nález za závazný a povolí jeho výkon podle*

předpisů o řízení, jež platí na území, kde nález je uplatňován.“[196] Procesní ustanovení dané národní úpravy tak mohou stanovit, že protinárok, který není předmětem rozhodčí doložky či smlouvy, je přesto možné započíst. Obecně lze konstatovat, že taková situace je spíše výjimečnou, nicméně aktuální judikatura především německých a rakouských soudů tuto možnost v praxi využívá. Jako příklad lze uvést rozhodnutí Spolkového soudního dvora z 30. září 2010[197], kde soud judikoval, že během řízení o výkonu rozhodčího nálezu může být vznesena námitka započtení, a to i přesto, že není předmětem rozhodčí smlouvy. Námitku započtení není navíc ani nutné vznést během samotného rozhodčího řízení pokud je patrné, že daný tribunál z důvodu nedostatku jurisdikce nebude moci rozhodnout. Je otázkou, zda bude praxe zavedená v Německu a Rakousku rozšířena i do dalších jurisdikcí. Analyzované řešení jistě nabízí zajímavý mechanismus, jak překonat obtíže spojené s určitými nepraktickými jurisdikčními překážkami.

Závěr

V posledních deseti letech zažívá celý moderní svět zásadní zlom své existence. Diskurs společnosti nastartovaný existencí nejnovějších informačních technologií kompletně změnil vnitřní logiku každého z nás. Právní úprava v kontextu nové informační společnosti musí na tyto změny pružně reagovat. Je však faktem, že zejména v mezinárodním kontextu se často jedná o velmi těžký úkol. Je zřejmé, že určité mechanismy, které perfektně fungují v národním kontextu, působí značné potíže v situacích s

[196] Článek 3 Úmluvy o uznání a výkonu cizích rozhodčích nálezů [online 2012-05-22]. Dostupné z WWW: http://www.arbitrazniarozhodcisoud.cz/legislativa/New-Yorska-umluva.pdf.
[197] Viz Rozhodnutí Spolkového soudního dvora (Bundesgerichtshof, BGH), III YB 57/10 ze dne 30. září 2010.

mezinárodním prvkem. V tomto smyslu je jedním z takových případů také institut započtení.

Bylo zjištěno, že jednotlivé národní úpravy institutu započtení se liší výrazným způsobem. Některé právní řády přiznávají tomuto mechanismu procesní charakter, jiné ho pak vnímají jako součást hmotného práva. V kontinentálních právních řádech je navíc odlišně vnímán také moment aktivizace započtení. Například francouzské právo pohlíží na započtení jako na automatismus, české a německé právo pak zdůrazňují význam kompenzačního projevu.

V rámci mezinárodní obchodní arbitráže lze pozorovat dva hlavní problémy spojené se započtením. První problém spočívá v obtížnosti předvídatelně a spravedlivě zvolit rozhodné právo, druhý problém souvisí s příslušností rozhodčího tribunálu. Tyto problémy úzce souvisí s již zmíněnými rozdíly mezi jednotlivými právními úpravami a poté také s charakterem započtení, které se vždy dotýká nejméně dvou odlišných nároků, které mohou mít často velmi rozdílné osudy. Diplomová práce se v detailu zabývá pouze problematikou příslušnosti rozhodčích tribunálů.

Hlavní řešenou otázkou je situace, kdy žalovaný namítne započtení své protipohledávky, která nespadá do rozsahu dané rozhodčí smlouvy. Bylo zjištěno, že tato otázka vzhledem své komplexnosti nemá jednoznačné řešení, nicméně přijetí určitého právního rámce a souboru osvědčených postupů může výrazným způsobem posílit právní jistotu, procesní efektivitu a zajistit účinnější fungování započtení v rámci mezinárodní obchodní arbitráže. Optimální pravidlo by mělo především zohlednit faktický vzájemný vztah pohledávek, které mají být potencionálně započteny. Bylo tak navrženo následující pravidlo, které by mohlo zlepšit stav věci: „Žalovaný může uplatnit nárok k započtení za předpokladu, že tento nárok vychází ze stejného právního vztahu.“ Vzhledem k otevřenému charakteru

daného ustanovení musí být přijaty principy dobré praxe, které budou pružně aplikovány na každý konkrétní příklad zvlášť. V první řadě je vhodné, pokud rozhodné právo kvalifikuje započtení jako hmotněprávní institut, založit obecnou snahu preferovat přípustnost započtení před různými procesními překážkami. V druhé řadě je navrženo uznat implicitní vyloučení započtení pouze v případě, že vše nasvědčuje tomu, že strany takový úmysl skutečně měly. Poslední navrhovaný princip dobré praxe spočívá v nutnosti uvážení vlivu případného rozhodnutí o přípustnosti započtení na procesní efektivitu, což spočívá především ve vyhodnocení likvidity protinároku a zjištění míry vztahu hlavního nároku a protinároku.