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Set-off under the European insolvency regulation (and English law)

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This paper addresses critically the meaning and effect of the set-off provisions in the European Insolvency Regulation. The Regulation sets out the authority of EU Member States to open insolvency proceedings and provides that, subject to exceptions, the law of the State that opens insolvency proceedings shall apply to those proceedings. Setoff is one such exception for the opening of insolvency proceedings does not affect the rights of creditors to demand the set-off of their claims against the insolvent debtor. Set-off is intended to perform a guarantee type function for creditor claims. Nevertheless, the Regulation does not define what is meant by set-off nor clarify whether set-off rights under the law of a third country (such as English law) may be relied upon. The paper provides valuable clarification and critical analysis.

1 | INTRODUCTION

This paper will address critically the meaning and effect of the set-off provisions in the European Insolvency Regulation (Insolvency Regulation or Regulation).[1] These provisions have remained the same between the original and recast versions of the Regulation and moreover, the Virgos-Schmit Report,[2] which preceded the original Regulation remains relevant as an interpretative aid.[3] The expression "set-off" is not defined in the Insolvency Regulation but it may be described broadly however, as the offsetting or balancing of reciprocal rights and obligations between two parties so that only a net balance becomes payable from one party to the other.[4]

After this introductory part, the second (substantive) section of the paper address the general structure of the Insolvency Regulation and the role of set-off within that structure;

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the third section addresses what is meant by set-off and whether set-off in the context of insolvency should be construed in a different way than set-off in a noninsolvency setting. In this connection, it concentrates its analysis on English law. The fourth section considers the interaction between set-off provisions in different national laws and the Insolvency Regulation. It focuses in particular, on the opinion of the Advocate General and the judgment of the Court of Justice in Case C-198/18 *CeDe Group AB*.[5] The fifth section examines the protection of set-off rights under Article 9 of the Regulation including the possible relevance of the laws of third countries as distinct from the laws of Member States. Now that the UK is no longer an EU Member State this issue has particular resonance. The final section concludes.

2 | INSOLVENCY REGULATION AND SET-OFF

The European Insolvency Regulation, in both its original and recast versions, sets out what State or States may open insolvency proceedings in respect of a debtor. Main insolvency proceedings may be opened where the debtor has its "center of main interests" (COMI) and secondary insolvency proceedings may be opened where the debtor has an "establishment." Main insolvency proceedings have a quasi-universal effect applying in principle to all assets of the debtor wherever they are located throughout the world.[6] Secondary insolvency proceedings, on the other hand, have a strictly territorial effect. Their effect is limited to the territory of the State where the debtor has assets.[7]

The Insolvency Regulation has not only jurisdictional rules but also conflict of law rules. Article 7 contains the general rules for determining the law applicable to "insolvency proceedings and their effects." It is provided in Article 7(2) that the law applicable to insolvency proceedings and their effects shall be that of the State where such proceedings are opened. It goes on to stipulate that:

> "the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular... (d) the conditions under which set-offs may be invoked."

This law, however, the so-called lex concursus, is subject to a number of exceptions stated in Articles 8–18. Article 9, entitled "set-off," provides that the opening of insolvency proceedings shall not:

> "affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim."

It is added, however, that this provision shall not preclude actions for voidness, voidability, or unenforceability.

According to the Virgos-Schmit Report, the substantive effects referred to the law of the State that opens insolvency proceedings are typical of insolvency law and effects, which are necessary for the insolvency proceedings to fulfil its aims.[8] Therefore, subject to the Articles 8–18 exceptions, the law of the opening State may displace the law normally applicable to the act concerned, under the common pre-insolvency conflict of laws rules.[9] To facilitate the

interpretation of Article 7, what is now Article 7(2) contains a nonexhaustive list of matters that are governed by the law of the opening State. It explains Article 9 as a "sort of guarantee governed by a law on which the creditor concerned can rely" at the moment of contracting or incurring its claim.[10]

The Insolvency Regulation places considerable emphasis on where a debtor has its "center of main interests," or "COMI". COMI is the centerpiece of the Regulation for it determines not only jurisdiction to open main insolvency proceedings but also applicable law in most cases. The COMI concept is in some respects a compromise between the rival "real seat" and "incorporation" theories of jurisdiction in respect of companies. Under the "real seat" theory, the law applying to the internal affairs of a company is the law of the country where it has its so-called "real seat", that is, its effective central administration, whereas the incorporation doctrine refers to the law of the state of incorporation. Common law countries apply the incorporation theory but the majority of civil law countries apply the "real seat" theory. COMI appears closely akin to the concept of "real seat" but there is a nod in the direction of the incorporation theory by a presumption that, in the case of a company, COMI is the same as the place of the registered office. The presumption, however, may be rebutted.

The first, and still the leading CJEU judgment on the interpretation of COMI remains that in the *Eurofood* case.[11] The court said that the concept had an autonomous meaning for the purpose of the Regulation and must be interpreted independently of national legislation.[12] In general terms, the European Court and national courts adopt, so far as possible, autonomous, "European" meanings for terms that may have different meanings in national laws. Moreover, the approach to construction will be purposive or teleological with the principal aim of giving effect to the purpose underlying the various provisions of the Regulation.[13] These matters have been addressed recently by the European Court in Case C-250/17 *Tarrago da Silveira v Massa Insolvente da Espírito Santo*.[14] One might apply this approach to the definition of "set-off" and say that an autonomous Europe wide interpretation is called for.

On the other hand, national insolvency laws appear to differ widely on what is meant by set-off and in this context of disharmony, more recourse to national autonomy seems appropriate and the CJEU has acknowledged the legitimacy of this approach. The *Bank Handlowy* case[15] raised issues about recognizing the closure of insolvency proceedings that have opened in another EU state. The CJEU, on a reference from the Polish courts, concluded that in the absence of the harmonization of substantive insolvency law, the concept of closure of insolvency proceedings cannot be given an autonomous Community interpretation and must be interpreted according to national law. The court said that it was for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.[16]

In this connection, it should be noted that the expression set-off may be used in different Member States to refer to different legal processes and, in particular, may not encompass contractual netting arrangements. The language of Article 9 refers to a debtor's claim, but, on the other hand, contractual netting involves agreement (usually under a master agreement) that disparate claims from a large number of individual contracts made by the insolvent debtor will be set off against the various creditor claims. The end result is a net loss or profit for one party. It is possible to distinguish "payment netting"—aggregation of payment obligations under separate transactions so that only net balance payable one way or the other, from "close out netting." The latter involves the cancellation of open executory contracts between parties, calculation of losses and gains and then the calculation of the net balance. Netting may also be done bilaterally between two parties or multilaterally through a clearing system.[17]

Article 12 of the Regulation in fact contains special protection for "payment systems and financial markets."[18] It provides that the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market. Recital 71 also refers to a need for "special protection in the case of payment systems and financial markets", for example, in relation to "position-closing agreements and netting agreements to be found in such systems."[19] It refers to the fact that the Settlement Finality Directive—Directive 98/26/EC—contains special provisions, which should take precedence over the general rules of the Insolvency Regulation.

3 | WHAT IS MEANT BY SET-OFF—OUTSIDE AND INSIDE INSOLVENCY

As we have seen, set-off may be defined broadly as the offsetting or balancing of reciprocal rights and obligations between two parties so that only a net balance becomes payable from one party to the other. Borrowing from the terminology developed and employed by Lord Hoffmann in a series of leading judgments and Philip Wood in his huge treatise on *English and International Set Off*,[20] outside insolvency, English law recognizes three forms of set-off—legal (or statutory) set-off, equitable (or transaction) set-off and contractual set-off (or netting).

3.1 | Legal set-off

Legal set-off can be traced back to Statutes on Set off in the 18th century. While these statutes have long been repealed, the underlying principles remain in force.[21] Lord Hoffmann explained in the leading case *Stein v Blake*[22] that legal set-off does not affect the substantive rights of the parties against each other, at least until both causes of action have been merged in a judgment of the court. It addresses questions of procedure and cash-flow. As a matter of procedure, it enables a defendant to require its cross-claim (even if based upon a wholly different subject matter) be tried together with the plaintiff's claim instead of having to be the subject of a separate action. In this way it ensures that judgment will be given simultaneously on claim and cross-claim and thereby relieves the defendant from having to find the assets to satisfy a judgment in favor of the plaintiff before the cross-claim has been determined.

Legal set-off is confined to debts, which at the time when the defense of set-off is filed were due and payable and either liquidated or were for sums that were capable of ascertainment without valuation or estimation.

3.2 | Equitable or transactional set-off

Equitable or transactional set-off, on the other hand, is somewhat broader than legal set-off and is now understood to act as a substantive defense. It involves the setting off of claims from the same or closely connected transactions. The leading case is *Geldof v Simon Carves Ltd* and in particular the judgment of Rix LJ.[23] In this case it was held that a building contractor was entitled to set-off its counterclaim for damages against a claim brought against it by a

subcontractor. While the claim and counterclaim concerned two separate contracts, the events, which had arisen had brought them into a close and inseparable relationship with one another. Therefore, it was deemed to be manifestly unjust to allow the claim under one contract without taking into account the counterclaim.

The test for transactional/equitable set-off involved considerations of both the closeness of the connection between claim and cross-claim, and of the justice of the case. There was both a formal element in the test and a functional element. The importance of the formal element ensured that the doctrine of equitable set-off was based on principle and not discretion while the importance of the functional element reminded litigants and courts that the ultimate rationality of the regime was equity.

3.3 | Contractual set-off

A contract between parties may make provision on how obligations owed under the contract from one party to the other may be set off against other claims and go to reduce the net balance owed by one contracting party to the other. Article 17 of the Rome I Regulation[24] on the law applicable to contractual obligations states that:

> "where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted."

The debts that may be set off may simply be the claims of the other contracting party or it may also include the claims of other parties. This depends on the agreement between the parties on the extent to which set-off is allowed. The contract between the parties may simply be the product of bilateral exchange or it may spring from a broader contractual environment—a multilateral setting involving many different parties.

Arguably, the leading English case on set-off is the decision of the House of Lords in *British Eagle v Air France*.[25] This case demonstrates the interaction between contractual set-off mechanism and the set-off rules that apply in insolvency. In this case, the relevant parties were members of the International Air Transport Association (IATA) clearing-house system for ticket sales by member airlines. All payments were channeled through IATA and at the end of an accounting period, all debits and credits due to transactions were totaled, to arrive at a figure for the net debit or credit of the individual airline against IATA. British Eagle went into liquidation being net debtors to IATA, in respect of services provided by the other airlines to them but were in credit against Air France. The British Eagle liquidator brought an action against Air France claiming this credit balance. The House of Lords in a split majority decision held that Air France were bound to pay the liquidator the moneys it owed to British Eagle for services provided through the IATA clearing house scheme.

In his majority judgment, Lord Cross observed that the clearing house creditors were clearly not secured creditors but were claiming to achieve, through the clearing house medium, a position analogous to that of secured creditors without the need for the creation and registration of security interests on the (debts) receivables in question. In his view, in an insolvency situation the clearing house provisions were contrary to public policy. The fact that the parties may have had sound business reasons for entering into such arrangements in a noninsolvency context was irrelevant. They did not consider how the arrangements might be affected by insolvency of one of the parties.

There were strong dissents from Lords Morris and Simon. Lord Morris argued that British Eagle had no claims against, and no rights to sue, other individual members of the clearing house. In Lord Simon's view, no party to the clearing house agreement had any right to claim direct payment from another airline.

In many respects, the crucial question in the case concerned the identity of British Eagle's debtor and whether this was Air France or IATA. If in fact it was IATA, then the latter would be entitled to set off cross-claims vested in it for services supplied by other airlines to British Eagle. On the other hand, if IATA acted merely as an agent of the airlines in operating the clearing mechanism, then at the commencement of winding-up British Eagle had a claim against Air France, which could not legitimately be set-off against claims by other airlines. It merely had the right to have the value of such service respectively credited and debited in the monthly IATA clearing house settlement account.[26] The IATA clearing house rules have since been amended. Consequently, it has been held by the highest court in Australia that the only claim or liability of member airlines was against IATA rather than against each other.[27]

3.4 | Insolvency set-off

In England, there are special provisions on set-off in the Insolvency Act and the Insolvency Rules. These essentially require mutual debts, mutual credits or other mutual dealings between the counterparties at the relevant cut-off point, which is essentially the commencement of the liquidation process (or bankruptcy in the case of individuals) or where the administrator signals its intention to make a distribution to creditors in the case of a distributing administration.[28] For example, Rule 14.25 of the Insolvency Rules 2016 provides that where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation, then an account must be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other. The balance, if any, once the account has been taken, is provable as a debt in the bankruptcy.

Therefore, if a creditor owes an insolvent GBP 5,000 and the insolvent owes that same creditor GBP 6,000, the two amounts will be set-off and the provable debt would be GBP 1,000, being the difference between GBP 5,000 and GBP 6,000. The provisions relating to insolvency set-off are intended to do substantial justice between the insolvent and its creditors. It is considered unjust if the creditor had to discharge its debt to the insolvent in full while being left only with the right to prove and perhaps eventually receive a small dividend in respect of the debt due it, depending on the extent of the claims by other creditors.

In *Stein v Blake*, Lord Hoffmann said of bankruptcy set-off that it:

> "affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance."[29]

So, in *Forster v Wilson*,[30] Parke B. said that the purpose of insolvency set-off was "to do substantial justice between the parties." Although it is often said that the justice of the rule is obvious, it is worth noticing that it is by no means universal.[31]

In *Stein v Blake*, the court was concerned with section 323 of the Insolvency Act 1986, which related to individual bankruptcy and, as Lord Hoffmann explained, it applies to any claim arising out of mutual credits or other mutual dealings before the bankruptcy for which a creditor would be entitled to prove as a "bankruptcy debt." In his words[32]:

> "The taking of the account really means no more than the calculation of the balance due in accordance with the principles of insolvency law. An obvious occasion for making this calculation will be the lodging of a proof by a creditor against whom the bankrupt had a cross-claim. Indeed, it might have been thought from the words "any creditor of the bankrupt proving or claiming to prove for a bankruptcy debt" in section 323(1) that the operation of the section actually depended upon the lodging of a proof. But it has long been held that this is unnecessary and that the words should be construed to mean "any creditor of the bankrupt who (apart from section 323) would have been entitled to prove for a bankruptcy debt." Thus the account to which section 323(2) refers may also be taken in an action by the trustee against a creditor who, because his cross-claim does not exceed that of the trustee, has not lodged a proof..."[33]

In *Stein v Blake*, it was held that bankruptcy set-off in effect gave the creditor security to the extent of his own indebtedness to the bankrupt. Bankruptcy set-off applied to all claims from mutual credits or dealings prior to the bankruptcy, including claims, which at the time of the bankruptcy were due but not payable, unascertained or contingent. Nevertheless, the parties were not required at any particular time to meet and calculate the extent of each other's liability. The "account" referred to was a deemed account by which the claim and counterclaim were automatically reduced to a net balance and the original choses in action, that is, the claim and counterclaim, were in effect replaced by a claim to the net balance. The court noted the majority decision of the House in *Halesowen Presswork & Assemblies Ltd v National Westminster Bank Ltd*[34] that the application of section 323 is mandatory in the sense that it cannot be excluded by prior agreement of the parties.

The UK insolvency set-off regime is generally wider than legal (statutory) set-off or transaction (equitable) set-off in that it does not require that debts should have matured or be free from uncertainty at the cut-off point though it does require that debts should be provable in the insolvency process, which may be controversial in some cases.[35] There are a set of provisions on the estimation of liabilities and the calculation of claims. Contractual set-off arrangements are also enforceable on insolvency insofar as they are consistent with the mandatory set-off regime but not further or otherwise. In particular, extending set-off to situations where it would not otherwise exist because of a lack of mutuality may fall foul of the insolvency regime. In the *British Eagle* case, set-off failed within the clearing house context because of a perceived lack of mutuality. A had credits with B, which could not be set off against debits A had with C.

3.5 | UK insolvency law and the pari passu and anti-deprivation principles

Section 107 of the Insolvency Act 1986 provides that subject to the provisions of the Act relating to preferential payments, the company's property in a voluntary winding up shall be applied in satisfaction of the company's liabilities pari passu. The same dispensation holds good for

compulsory winding up and for bankruptcy proceedings. Essentially, however, the provision applies to unsecured liabilities because assets of a company subject to a security interest in favor of third parties do not have to be shared pari passu with unsecured creditors. Insolvency set-off is also a recognized statutory exception to pari passu. Lord Hoffmann in *Stein v Blake*[36] saw insolvency set-off as performing a security type function and the same analysis commended itself to the Virgos Schmit Report[37] on the European insolvency regime though the UK Insolvency Act nowhere refers to set-off as a form of security.

As we have seen, *British Eagle v Air France*,[38] concerned a multiparty clearing house agreement where all the debits and credits arising from transactions between the parties within a clearing house agreement were totaled, so as to avoid multiplicity of payments. Lord Cross said the "clearing house" creditors were clearly not secured creditors but claimed, by the medium of the "clearing house" agreement, they had achieved a position analogous to that of secured creditors without the need for the creation and registration of security interests on the payments in question and thereby bypassed the pari passu doctrine under insolvency law. He added that the power of the court to go behind agreement whose results were repugnant to the insolvency legislation was not confined to cases where the dominant purpose of the parties was to evade the operation of the legislation.[39]

It may be pointed out, however, that mandatory distribution of available assets among unsecured creditors is a statutory principle and it need not be supplemented by any judicial or public policy gloss. Apart from pari passu, UK insolvency law also embraces what is known as the "anti-deprivation" principle. It was accepted by Lord Neuberger in *Money Markets International v London Stock Exchange Ltd*[40] as a fundamental principle of the law that:

> "there cannot be a valid contract that a man's property shall remain his until his bankruptcy, and on the happening of that event shall go over to someone else."

While the principle has been enshrined in case law for nearly 200 years, it has not been codified in any statute. It may be argued, however, that Parliament has tacitly acknowledged and confirmed the common law principle through successive re-enactments of the Insolvency Code, most recently in the Insolvency Act 1986, as amended by the Enterprise Act 2002 and other recent statutes.

Early cases exemplifying the general principle include *Whitmore v Mason*[41] and *Ex parte Mackay*, *In re Jeavons*.[42] In *Mackay*, James LJ said that:

> "a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy from that which the law provides."[43]

Mellish LJ said that:

> "a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage..."[44]

The interaction between the pari passu and anti-deprivation principles were considered by the UK Supreme Court in *Belmont Park Investments v BNY Corporate Trustee Services Ltd*.[45] Lord Collins said[46]:

> "The anti-deprivation rule and the rule that it is contrary to public policy to contract out of pari passu distribution are two sub-rules of the general principle that parties

cannot contract out of the insolvency legislation. Although there is some overlap, they are aimed at different mischiefs: Goode 'Perpetual Trustee and Flip Clauses in Swap Transactions" (2011) 127 LQR 1, 3–4. The anti-deprivation rule is aimed at attempts to withdraw an asset on bankruptcy or liquidation or administration, thereby reducing the value of the insolvent estate to the detriment of creditors. The pari passu rule reflects the principle that statutory provisions for pro rata distribution may not be excluded by a contract which gives one creditor more than its proper share."

4 | INTERACTION BETWEEN SET-OFF RULES IN DIFFERENT JURISDICTIONS

Insolvency set-off in the United Kingdom appears wide compared with many other countries.[47] A creditor may be in the fortunate situation where its previously unsecured debt against an insolvent counterparty is completed wiped out; or to put it more positively is effectively paid in full through the operation of set-off. The creditor's claim may payable in the future, unliquidated or contingent but there is the requirement of mutuality and it must be based on mutual dealings etc. before the cut-off date. What is connoted by the notion of "mutual dealings" may also be problematic in certain situations.[48]

Nevertheless, the wide scope of set-off rules in an English insolvency was recognized in *Re Bank of Credit and Commerce International SA (No 10)*.[49] The case predates the coming into force of the Insolvency Regulation and it was held that an English court had an obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up, which is brought before the court. It was also made clear *in Re Bank of Credit and Commerce International SA (No 10)*, however, that assets in the hands of English liquidators fell to be distributed between the worldwide creditors of the debtor; and there was no question of the relevant creditors being limited to those in the home jurisdiction. Scott V-C observed that every creditor, wherever resident and whatever may be the proper law of its debt, can prove in an English liquidation.[50]

That case concerned the interaction between English law and Luxembourg Law with liquidation proceedings in both jurisdictions and there was evidence before the court that set-off under the Luxembourg rules was much more limited than under the English insolvency rules. It was held that the English liquidators before releasing funds to the Luxembourg liquidators should retain sufficient funds to enable them to satisfy any claims by creditors entitled to take advantage of any set-off available to them under the set-off rules governing an English insolvency. It was held that the court had no power to disapply the English set-off rules.

In a sense, this position is confirmed by the Insolvency Regulation with Article 7(2)(d) stating that the law of the insolvency forum (the lex concursus) shall govern the conditions under which set-offs may be invoked. It does not matter for this purpose whether the insolvency proceedings are main or secondary proceedings; the law of the State that opens the insolvency proceedings in principle applies irrespective of whether the proceedings are main or secondary proceedings. But a creditor claiming from an insolvent counterparty has a second bite at the cherry as it were because of Article 9 of the Regulation. Simply put, if the lex concursus allows for set-off, the creditor may set off its claim. On the other hand, if the lex concursus does not allow for it, the creditor is still allowed to set off its claim if that creditor shows that this is permitted by the law applicable to the debtor's claim (lex causae). In practice, this means that set-off is allowed if either the lex concursus or the lex causae permits it. There are

still some uncertainties however, about the Articles 7/9 relationship. Since the words permitting the invocation of Article 9 are somewhat obscure; it is not clear whether the lex causae can be the law of a non-EU State; whether the law invoked under Article 9 involves a reference to insolvency set-off rules or general set-off rules applicable to the debtor's claim and finally, does set-off encompass contractual netting arrangements?

To give a practical flavor to these issues, it is appropriate now to consider the opinion of the Advocate General and the decision of the CJEU in *CeDe Group AB v KAN Sp. z o.o*,[51] a case that has a somewhat tangled procedural history. In this case, a contractual dispute arose pursuant to supply arrangement between a Polish supplier and a Swedish buyer, which were governed by Swedish law. The Polish supplier entered insolvency proceedings in Poland and it claimed that it was owed money by the Swedish buyer but the latter asserted the existence of set-offs which wiped out the debt and which were in fact larger than the amount of the claim. The Swedish buyer submitted a claim in the Polish insolvency proceedings but this claim was rejected. While in principle it seems that Polish insolvency law allowed set-off, set-off was not in practice permitted on the facts of this particular case. The liquidator of the Polish company brought proceedings in Sweden seeking payment of the amount allegedly owed by the Swedish counterparty and the European court was asked whether the provisions of Polish insolvency law on set-off or the contractual rules under Swedish law applied to the claim?

The European court expressed the view that the general contractual rules, rather than insolvency specific rules under Polish law applied even though the action had been brought by the liquidator of an insolvent company established in one EU State, that is, Poland against a counterparty established in another EU State, that is, Sweden. In its view, the concept of "insolvency proceedings and their effects" under Article 7(2)(d) of the Regulation did not cover an action for the payment of goods delivered under a contract that had been concluded before the opening of insolvency proceedings.

The court took the basically the same line as that of the Advocate General though there was somewhat fuller consideration of the issues by the Advocate General. The latter suggested that the mere fact that Article 7(2) made reference to the conditions for invoking set-offs and to the effects of insolvency on current contracts did not mean that any claim relating to a contract where a contracting party was subject to insolvency proceedings (and/or where a set-off was invoked against that claimant) fell automatically within Article 7(2). In his opinion, the conclusion was not changed merely by reason of the fact that it was the liquidator who brought the action for any other analysis would lead to unpredictable, or even bizarre, results.[52] The law governing the contractual claim would differ from the one that the parties agreed on and would also change repeatedly, due to subsequent assignments and/or the assignees themselves eventually becoming subject to insolvency proceedings.

The judgment in Case C-198/18 *CeDe Group AB* should be seen in the light of the general jurisprudence of the court on Article 3 of both the original and recast versions of the Regulation and Article 6 of the recast Regulation. The new Article 6 confirms the interpretation adopted in relation to Article 3 and states that the jurisdiction of an EU State under the Regulation extends to "insolvency related actions." Article 6(1) provides that the courts of Member States where insolvency proceedings have been opened in accordance with Art 3 shall have jurisdiction for any action that derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions. Essentially this is a codification of the existing law, for the message from the European Court in *Gourdain v Nadler*[53] and *Seagon v Deko Marty*[54] is that insolvency-related actions are outside the Judgments (Brussels I) Regulation but within the

Insolvency Regulation.[55] Therefore, the defendant should be sued in the State that opens the insolvency proceedings rather than in its country of domicile.[56]

Having regard to the different jurisdictional rules in the Judgments Regulation and the Insolvency Regulation, it is still imperative to decide what is or is not an insolvency-related action.[57] The case-law does not provide a decisive demarcation point but rather broad examples of cases that fall into one realm rather than another.[58] The following have been held to fall into the realm of insolvency-related actions, though the categories undoubtedly overlap—actions based on insolvency law that seek to fix liability on company officers; actions based on provisions particular to insolvency law or to insolvency-related adjustments of general legal provision; actions based on insolvency law that seek to set aside pre-insolvency transactions entered into by the debtor; actions challenging the exercise of a power or discretion either by an insolvency practitioner liquidator or by members of a creditors' committee in the course of insolvency proceedings. Other types of proceedings have been held however not to be "insolvency-related." These include actions by an insolvency practitioner seeking to establish the debtor's ownership of property and actions by a debtor's insolvency representative based on general contract or commercial law that seek the recovery of monies allegedly owing to the debtor.[59]

In *Nickel and Goeldner Spedition GmbH v "Kintra" UAB*,[60] for example, the CJEU held on a reference from Lithuania that a breach of contract claim brought by an insolvency representative against one of the debtor's counterparties did not fall within the category of insolvency-related actions. The European Court said that the right or obligation that formed the basis of the action had its source in the common rules of civil and commercial law rather than in any special rules of derogation applying to insolvency proceedings. The action could have been brought by the creditor itself before the opening of insolvency proceedings relating to it and, in these circumstances, the action would have been governed by the ordinary rules of jurisdiction that applied to civil and commercial matters. The fact that the claim was now brought by the insolvency representative who acted in the interest of the creditors with a view to augmenting the assets of the insolvent undertaking so that as many creditors' claims as possible could be satisfied, did not alter the nature of the claim, which remained subject to the same rules of law as before.

In Case C-198/18 *CeDe Group AB*, the claim was essentially seeking the recovery of a debt due to the insolvent company and could have been brought on behalf of the company by its own officers before the opening of insolvency proceedings. The fact that the company had now entered the insolvency process and that the action was instead brought by the liquidator on behalf of the company should not alter the analysis. The dispute was the same—who owed money to whom? Resolution of this issue turned on the underlying contractual nexus between the parties.

5 | PROTECTION OF SET-OFF RIGHTS UNDER ARTICLE 9

The recitals to the Regulation and also the Virgos-Schmit Report set out the underlying rationale of Article 9. Recital 66 provides that the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.[61] But Recital 67 recognizes that the automatic recognition of insolvency proceedings under the Regulation may "interfere with the rules under which transactions are carried

out."[62] Therefore, to protect "legitimate expectations and the certainty of transactions," there are a number of exceptions to the general rule. Recital 70 states that:

> "If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off would acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises."[63]

It can be seen that the exceptions are intended to protect the legitimate expectations of a party, which has entered into transactions with another entity that has since become insolvent. The former party should be able to rely on the legitimate expectations as to its rights and obligations, which it forms when it enters into a transaction. Those expectations should not subsequently be defeated by the insolvency law of another State. According to the recitals and the Virgos-Schmit Report, set-off should be regarded as akin to security. A party to a contract is entitled to rely on a contractual right to set off its obligations against those of the debtor in the event of the debtor's insolvency and in the same way that a secured creditor should not have the prospect of its security being ignored, a contracting party should not face owing a gross obligation where the contract provides for set-off, that is, a net obligation.

Article 9 preserves certain set-off rights. Set-off rights can still be claimed if they are permitted by the law applicable to the insolvent debtor's claim. While this is seen as a valuable safeguard for creditors who have entered into certain transactions on the basis that set-off rights would be available, it is not the law of the creditor's claim (the "active" claim) that governs the availability of set-off, but rather the law of the insolvent debtor's claim (the "passive" claim). It has been pointed out[64]:

> "[Article 9(1)] does not facilitate any recourse to the set-off provisions of the so-called 'active' claim, for which the creditor's claim against the insolvent debtor is derived. Thus, if the lex concursus and the law applicable to the 'passive' claim both happen to deny set-off, the position under the third law is of no relevance. Nor does [Article 9] enable any set-off to be excluded by reference to the law applicable to either of the claims, where the lex concursus itself would otherwise allow set-off to be demanded."

A simple example illustrates the point. Take the situation where there are two contracts between a party that has become insolvent (I) and a counterparty (X). These are contracts A and B. I is owed money under contract A and X is owed money under contract B. Contract A is governed by the law of Utopia and contract B by the law of Dystopia. I enters insolvency proceedings in Illyria which does not permit any form of insolvency set-off. Dystopian law does not permit any form of set-off whatsoever but Utopia law does permit set-off in certain circumstances including the present case. Applying the wording of Article 9, then X would be able to rely on set-off under Utopian law, even though the contract under which it is in credit, contract B, is governed by Dystopian law which does not permit set-off. At first glance at least, the result seems counter-intuitive as it is in credit under a law, which does not permit set-off.

Admittedly, this fact situation appears somewhat unusual and perhaps more typical is a fact situation which more closely mirrors the facts in *CeDe Group*. It appeared in that particular case

that the parties had made a series of contracts governed by Swedish law, which allowed set-off, but the supplier entered insolvency proceedings in Poland, which did not allow set-off. The supplier was the insolvent debtor and making a claim under Swedish law, which did allow set-off. The buyer therefore could rely on Swedish law permitting set-off as a defense to the supplier's action.

There was some consideration of Article 9 by Advocate General Bobek in *CeDe Group* though not by the European Court.[65] Essentially the Advocate General took the view that what is now Article 9 will apply regardless of whether the lex concursus does not permit compensation by means of set-off generally or in a specific case.[66] In his view, the provision should apply:

> "not only where the lex concursus entirely excludes the possibility of applying a set-off, but also in cases where the specific conditions of access to a set-off differ, so that, according to the lex concursus, set-off would not be possible in a specific case, whereas it would have been possible under the law applicable to the main claim."[67]

In other words, the mere fact that the lex concursus allows, under certain conditions, for the possibility of set-offs does not preclude the application of Article 9. The view is that Article 9 may be used when it is more generous as regards set-off than the lex concursus. In other words, it allows set-off where the law applicable to the insolvent debtor's claim permits this but this is not permitted under the lex concursus, for example, in relation to future or contingent claims or even by imposing monetary limits on set-offs.

It is not clear, however, whether the term "permitted by the law applicable to the insolvent debtor's claim" is a reference to the contractual set-off rules of the lex causae or the relevant insolvency set-off rules or a combination of both. The rules for set-off in formal insolvency proceedings may also be different from those that apply under the general civil law. Does the language Article 9 refer to the set-off rules in formal insolvency or those of the general civil law? In favor of the application of insolvency set-off rules, one might argue that the insolvent debtor has entered insolvency proceedings and its insolvency practitioner who acts on behalf of the debtor is more likely to be familiar with insolvency set-off rules than general civil law rules on set-off in different States. But this is by no means a "given."

Moreover, if the reference is intended to be to the insolvency set-off rules then insolvency proceedings may not have been commenced in the place of the applicable law and the question arises on how one determines which insolvency procedure should be considered? In the United Kingdom, for instance, there are different insolvency set-off rules with different cut-off dates in liquidation and administration. Any claims incurred or acquired by the counterparty after the cut-off date cannot be taken into account for insolvency set-off and so it is essential to determine the relevant date for this purpose.[68]

Financial sector and lobbying groups, in pressing home the advantages of the Article 9 protection, have generally stressed the advantages of contractual set-off rather than insolvency set-off or at least not focused on the differences between the two:

> "Contractual set-off and netting agreements play a vital role in reducing risks and enhancing efficiency in the increasingly integrated European, and indeed global, financial markets. The reduction of parties' gross exposures allows the more effective use of regulatory capital for regulated entities, extends the transaction volumes one party is prepared to assume towards another, increases the number of

> counterparties with whom a party may be prepared to transact and contributes to increasing access to, and accordingly the liquidity of, the wholesale financial markets."[69]

Both financial market participants and regulators consider it essential to have a high degree of legal certainty on the validity and enforceability of contractual set-off and netting agreements in the event that a counterparty should default.

Commentators are somewhat divided on the question whether Article 9 should be taken to as a reference to the insolvency rules of the particular legal system.[70] Nevertheless, the *travaux préparatoires* tends to suggest that a reference to the insolvency set-off rules is intended, however difficult this interpretation may be to apply in a particular case. This analysis appears from the Virgos-Schmit Report, which states at paragraph 109 what now is now Article 9:

> "constitutes an exception to the general application of that law in this respect, by permitting the set-off according to the conditions established for insolvency set-off by the law applicable to the *insolvent debtor's claim*."

The wording of Article 9 also differs significantly from its immediate neighbors, Articles 8 and 10, by making no reference to the law of a Member state. Article 8 is on "Rights in Rem." It states that the opening of insolvency proceedings shall not affect rights in rem of creditors or third parties in relation to assets belonging to the debtor which are situated "within the territory of another Member State at the time of the opening of proceedings." Article 10 is on "Reservation of title" and seller's rights and refers to a situation where the asset sold is "situated within the territory of a Member State other than the State of the opening of proceedings."

The language of Article 9 is notably different but the significance of this difference is not patently obvious. The late Professor Fletcher has traced the legislative history of what is now Article 9 and draws from this the conclusion that the applicable law under Article 9 may be a law other than that of an EU Member State.[71] He also points to the Virgos-Schmit Report and the rationalization of Article 9 on the basis that set-off performs a guarantee function, which would not be fully realized if the applicable law could only be that of a Member State.[72] But similar reasoning might apply to Article 8. Rights in rem can be said to perform a guarantee function and for the Article 8 protection to apply, the assets belonging to the debtor have to be situated in a Member State. Nevertheless, while the ostensible difference in treatment between Article 8 rights and Article 9 rights may be hard to justify, there does not appear to be an obvious reason why one should ignore the difference in wording and apply the same construction to both.

6 | CONCLUSION

The Insolvency Regulation establishes the universality of main insolvency proceedings opened in an EU State where the debtor has its center of main interests, "COMI," though secondary proceedings may be opened in a State(s) where the debtor has an "establishment." In general, the law of the State that opens insolvency proceedings applies to those proceedings and this applicable law includes the law of the opening State on "the conditions under which set-offs may be invoked." But there is no definition in the Regulation of what is meant by "set-off" nor

any express indication that an autonomous Europe wide interpretation is intended. Studies of applicable laws suggest that the law on set-off varies widely among EU Member States.[73]

There are certain exceptions to the general rule. However that are designed to protect the legitimate expectations of a party, which has entered into transactions with another entity that has since become insolvent. The former party should be able to rely on legitimate expectations as to its rights and obligations, which it forms when it enters into a transaction, and those expectations should not subsequently be defeated by the insolvency law of another State. Article 9 sets out an important exception to the general rule on applicable law whereby the opening of insolvency proceedings will not affect the rights of creditors to demand the set-off of their claims against the claims of the debtor provided that such a set-off is permitted by the law applicable to the debtor's cross-claim.

As noted in the recitals of the Insolvency Regulation and the *travaux préparatoires* such as the Virgos-Schmit Report, the set-off protection in the Regulation was intended to ensure that set-off should function almost as a kind of guarantee. In particular, it was viewed as having a function analogous to that of security, thus meriting similar protection. Just as a secured creditor should not face the prospect of its security being ignored, a contracting party should not face the prospect of owing a gross obligation where the contract provides for set-off. This exception may be particularly important for financial institutions that need to establish definitively whether they have a right of set-off in relation to a corporate customer in order to assess their exposure to that customer.

But there are certain aspects of the set-off protection under Article 9 which are unclear and which require further clarification. In particular it needs to be clarified whether the Article 9 protection permits reliance on contractual set-off, the general rules on set-off under the applicable law, or the insolvency specific rules on set-off under the applicable law. It should also be clarified whether the law applicable to an insolvent debtor's claim under Article 9 can be the law of a non-Member State including English law which is a popular choice of law particularly for financial contracts.[74]

ENDNOTES

[1]Regulation 2015/848. This is referred to as the "new" or "recast" Regulation and replaces Regulation 1346/2000 which is referred to as the "old" or "original" Regulation.

[2]EC Council document 6500/96, DRS 8 CFC. The Report can also be found at: <aei.pitt.edu/952>.

[3]In *Re Olympic Airlines Ltd* [2015] UKSC 27, [2015] 1 WLR 2399, [9]–[10], the Report was given almost canonical force by the UK Supreme Court and the decision of the first-instance court was overturned on the basis that it failed to pay regard to paragraph 71 of the Report on the definition of an "establishment" and the need for external, market-facing activities.

[4]See section 553(a), US Bankruptcy Code which refers to "the right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case ... against a claim of such creditor against the debtor that arose before the commencement of the case..."

[5]Case 198/18, November 21, 2019.

[6]See Recital 23 of the preamble to the Recast Regulation; *Schmid v Hertel* Case C-328/12 [2014] 1 WLR 633.

[7]Article 3(2), Recast Regulation.

[8]Paragraphs 90–91, Virgos-Schmit Report.

[9]Ibid., paragraph 92.

[10]Ibid., paragraph 109.

[11]Case C-341/04, *Re Eurofood IFSC Ltd* [2006] ECR I-03813; [2006] Ch 508.

[12]Ibid., paragraph 31.

[13]See, for example, Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701; Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813, [2006] Ch 508; Case C-339/07 *Seagon v Deko Marty Belgium NV* [2009] ECR I-767, [2009] 1 WLR 2168; Case C-292/08 *German Graphics Graphische Maschinen GmbH v van der Schee* [2009] ECR I-8421.

[14][2018] 1 WLR 4148, [2018] ILPr 29.

[15]Case C-116/11 (2011/C 152/24), ECLI: EU:C:2012:739; [2013] BPIR 174.

[16]Ibid., paragraphs 49–50.

[17]"Netting" is defined in Article 2(k), Settlement Finality Directive - Directive 98/26/EC—as meaning "the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed." See also the definition provided in regulation 2 (1), Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979) (the UK implementing legislation).

[18]Article 9, "old" Regulation. Unlike some of the other choice of law provisions in this part of the Regulation, the avoidance rules of the law of the state of the opening of proceedings (Art 7(2)(m)) are not applicable.

[19]Recital 27, Regulation 1346/2000.

[20]1989. See also Rory Derham, *Law of Set-Off* (fourth edn) (OUP, 2010); Pascal Pichonnaz and Louise Gullifer, *Set-Off in Arbitration and Commercial Transactions* (OUP, 2014).

[21]See section 49(2), Senior Courts Act 1981.

[22][1996] AC 243, 251–253. See also *MS Fashions Ltd v Bank of Credit and Commerce International SA (No 2)* [1993] Ch 425.

[23][2010] EWCA Civ 667.

[24]Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), on which see, generally, Michael McParland QC, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (OUP, 2015) and, in particular, Chapter 20.

[25][1975] 1 WLR 758.

[26]See Kristin van Zwieten, *Goode on Principles of Corporate Insolvency Law* (fifth edn) (Thomson Reuters, 2018), 361–362.

[27]*International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151.

[28]For set-off in administration, see Rule 14.24, Insolvency Rules 2016.

[29][1996] AC 243, 251.

[30](1843) 12 M & W 191, 204.

[31]Reference was made to the treatise by Philip Wood, *English and International Set-Off* (Sweet & Maxwell, 1989), 1,165–1,169 (paragraphs 24–49 to 24–56). See, generally, Louise Gullifer QC, *Goode on Legal Problems of Credit and Security* (fifth edn) (Sweet & Maxwell, 2013), paragraph 7.75 et seq. See also Pichonnaz and Gullifer (above note 20), 298–301.

[32][2006] AC 243, 253.

[33]Reference was made in this connection to *Mersey Steel and Iron Co v Naylor Benzon & Co* (1882) 9 QBD 648; *In re Daintrey*; *Ex parte Mant* [1900] 1 QB 546, 568.

[34][1972] AC 785. The seminal Cork Committee Report on *Insolvency Law and Practice* (Cmnd 8,558, 1982) called for a statutory reversal of the majority decision but the recommendation has never been implemented (paragraph 1341).

[35]A comparison can clearly be drawn with section 533, US Bankruptcy Code, which does not confer set-off rights. It merely recognises set-off rights, which may or not exist independently under the laws of the individual States. On this, see the decision of the US Supreme Court in *Citizens Bank of Maryland v Strumpf* (1995) 516 US 16 where Scalia J said: "The right of setoff (also called "offset") allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding "the absurdity of making A pay B when B owes

A." *Studley* v. *Boylston Nat. Bank*, 229 U.S. 523, 528 (1913). Although no federal right of setoff is created by the Bankruptcy Code, 11 U.S.C. § 553(a) provides that, with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy."

[36][1996] AC 243, 252

[37]Virgos-Schmit Report, paragraph 109.

[38][1975] 1 WLR 758.

[39]Ibid., 780–781.

[40][2002] 1 WLR 1150, paragraph 1. In this connection, reference was made to *In Ex p Jay*; *In re Harrison* (1880) 14 Ch D 19, 26 (per Cotton LJ).

[41](1861) 70 ER 1031.

[42](1873) 8 Ch App 643.

[43]Ibid., 647.

[44]Ibid., 648.

[45][2012] 1 AC 383. For a discussion of the overlap between the two principles, see also *Revenue and Customs Commissioners v Football League Ltd* [2012] EWHC 1372 (Ch); [2012] Bus LR 1539 (per David Richards J).

[46]Ibid., paragraph 1.

[47]See the statement at Virgos-Schmit Report, paragraph 109, that the laws of some Member States altogether restrict or prohibit set-off in insolvency.

[48]*Re West End Networks Ltd*; *Secretary of State v Frid* [2004] 2 AC 506.

[49][1997] Ch 213. The case is variously referred to as *Re Bank of Credit and Commerce International SA (No 10)* or *Re Bank of Credit and Commerce International SA (No 11).*

[50]See also *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2007] 1 AC 508 at [16] where Lord Hoffmann said: "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

[51]Case 198/18, November 21, 2019. In the judgment and opinion, reference is made to the set-off provisions in Regulation 1346/2000, rather than in Regulation 2015/848, but the provisions are effectively the same allowing for the difference in numbering.

[52]Ibid., paragraphs 25–37.

[53]Case 133/78 [1979] ECR 733.

[54]Case C-339/07 *Seagon v Deko Marty Belgium NV* [2009] ECR I-767, [2009] 1 WLR 2168.

[55]Regulation 1215/2012/EU (Brussels 1 Regulation recast), replacing the original Brussels 1 Regulation (Council Regulation 44/2001), which in turn replaced the earlier similar, but not identical, 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

[56]There is extensive jurisprudence from the Court of Justice holding that the concept of "civil and commercial matters" in the Brussels I Regulation should be given a broad interpretation—see *BUAK Bauarbeiter v Gradbenistvo Korana*, EU:C:2019:162, [2019] 2 WLUK 462, [2019] ILPr 12, paragraph 47 referring to *German Graphics Graphische Maschinen GmbH v van der Schee* (C-292/08), EU:C:2009:544, [2010] CEC 499, [2010] ILPr 1, paragraphs 22–23.

[57]See generally Gerard McCormack, "Reconciling European Conflicts and Insolvency Law" (2014) 15 *European Business Organization Law Review* 309.

[58]See also Case C-47/18 *Skarb v Stephan Riel* (ECLI: EU: C: 2019:754, September 18, 2019), where the European Court affirmed that that the respective scopes of the two regulations are clearly defined and that an action which derives directly from insolvency proceedings and is closely connected with them falls outside the scope of the Jurisdiction and Judgments Regulation but rather within the scope of the Insolvency Regulation.

[59]See also the judgment of the European Court in Case C-296/17 *Wiemer & Trachte GmbH, in liquidation v Tadzher*, EU:C:2018:902, [2019] BPIR 252, which holds that the courts of a Member State that opened insolvency proceedings under Article 3(1), Regulation 1346/2000 have exclusive jurisdiction to hear and determine an action to set a transaction aside by virtue of the debtor's insolvency, that is brought against a defendant whose registered office or habitual residence is in another Member State. See now Article 6(2), Regulation 2015/848 under which an insolvency practitioner may couple an insolvency related action (an action which derives directly from the insolvency proceedings and is closely linked with them) with an action based on general civil or commercial law against a defendant who is domiciled in a Member State where the courts have jurisdiction pursuant to the Jurisdiction and Judgments Regulation.

[60]Case C-157/13, [2015] QB 96, September 4, 2014. See also Case C-641/16 *Tunkers France v Expert France*. [2018] ILPr 7.

[61]For the equivalent under Regulation 1346/2000, see Recital 23.

[62]Ibid., Recital 24.

[63]Ibid., Recital 26.

[64]See Ian Fletcher, "The European Union Convention on Insolvency Provisions: Choice of Law Provisions" (1998) 33 *Texas International Law Journal* 119, 132. Article 9 is the equivalent of Article 6, Regulation 1346/2000.

[65]Case 198/18, November 21, 2019.

[66]Paragraph 70 of his opinion.

[67]Ibid., paragraph 75.

[68]See van Zwieten (above note 26), 868–867.

[69]See Protection for Bilateral Insolvency Set-Off and Netting Agreements under EC Law (A Report by the European Financial Market Lawyers' Group EFMLG, 2004), paragraph 1, available at: http://www.efmlg.org/Docs/Documents/2004%20October%20EFMLG%20report%20-%20Protection%20for%20Bilateral%20Insolvency%20Set-Off%20and%20Netting%20Agreements%20under%20EC%20Law.pdf.

[70]See Richard Snowden in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (OUP, 2016), paragraph 9.08 et seq. See also Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP, 2016), 144–145; Moritz Brinkmann (ed), *European Insolvency Regulation* (Verlag Beck, 2019), 100–103 and 133.

[71]Ian Fletcher, *Insolvency in Private International Law* (second edn) (OUP, 2005), 408–412.

[72]Virgos-Schmit Report, paragraph 109.

[73]See William Johnston and Thomas Werlen (eds), *Set-Off Law and Practice An International Handbook* (OUP, 2006).

[74]See, for example, *Etihad Airways PJSC v Flother* [2019] EWHC 3107 (Comm).

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