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Bank's Right of Setoff in Latin American Countries

by Lewis M. Smoley*

I. INTRODUCTION

EMERGING FROM THE complexity and confusion surrounding the Iranian crisis and its effect upon the banking and financial communities both in the United States and abroad, several significant legal issues striking at the very heart of business and industry have had severe impact upon traditional business considerations and practices. The advent of U.S. Foreign Assets Control Act (FACO) regulations freezing Iranian assets brought to an immediate standstill almost all trade and banking transactions between the United States and Iran.¹ In many instances affected transactions were halted in mid-stream without adequate means of preventing severe inequities to U.S. companies as well as Iranian nationals. In the banking industry, FACO regulations appeared to prohibit bank-creditors from attaching and offsetting Iranian funds which they held against Iranian indebtedness.² Notwithstanding these regulatory restraints, some U.S. banks and their foreign branches and subsidiaries attempted to offset frozen Iranian assets (or took other action which amounts to doing so), thus embroiling the banking community in a major controversy over the effect and applicability of these regulations both at home and abroad as they relate to a bank's traditional right of setoff.

From the surfeit of lawsuits and controversies which relate to the setoff issue, there appears to have emerged a serious concern on the part of bankers in the United States as to whether they can rely upon the

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¹ Foreign Assets Control Act, 50 U.S.C. §§ 1701-1706, Regulations, 31 C.F.R. §§ 535.201-203 (1979). *See also*, Exec. Order No. 12170, 44 Fed. Reg. 65,729 (1979).

² According to the Foreign Control Act Regulations, 31 C.F.R. § 525.201(a) (1979): "No property subject to the jurisdiction of the United States or which is in the possession or control of persons subject to the jurisdiction of the United States" in which an Iranian entity has "any interest of any nature whatsoever may be transferred, paid, . . . withdrawn or otherwise dealt in except as authorized . . ." A subsequent amendment, however, contained in 31 C.F.R. § 535.902 (issued Nov. 16, 1979) authorized foreign branches and subsidiaries of U.S. entities to offset funds held by them outside the United States against Iranian indebtedness.

right of setoff in regard to deposits held by their banks in foreign offices. Considerations prompting major policy decisions concerning asset and liability management of international banking institutions now appear to include a more serious discussion of, if not investigation into the availability of, setoff as a legal right and a practical mechanism for recovery of matured indebtedness. Consequently, it appears appropriate to examine the right of setoff as it applies in Latin American countries which in recent years have become significant borrowers in the Eurodollar market as well as receptive localities for the establishment of branches and subsidiaries of large U.S. banks. Six major Latin American borrowers (i.e., Argentina, Chile, Brazil, Mexico, Peru, and Venezuela) raised over \$24 billion from the Eurobank credit market during 1979, an amount which is almost 33 percent of all syndicated credits negotiated in that year.³ The ability of these major Latin American countries to service such a heavy indebtedness, however, will depend immeasurably upon their corresponding ability to bring inflation under control, take corrective measures to adjust the imbalance of payments and trade, increase productivity, build up a viable and dependable work force and internal industry, and service the needs of growing populations. Perhaps the battle-hardened capital markets can recycle enough money to tide over the deficit countries, both rich and poor. Private bankers, however, continue to warn that the international banking system is over-stretched. Fear of rising instability in countries which are large borrowers, such as Iran and Korea, produces an increasing paranoia which has a telling effect upon future credit determinations. With Latin America's history of political instability, only dissipating within the past decade or two in some of the major countries, high level Latin American borrowers may find that requests for funding of future financial needs arising both from the desire to finance major government projects as well as the probability of cash flow impediments resulting in the necessity of rollover loans, may be met with less positive responses than banks have given in the past. To understand the impact of the Iranian crisis and its potential effect on Latin American borrowers, it is important to highlight the chain of events which precipitated questions regarding the efficacy of the right of setoff.

II. EVENTS CAUSING CONCERN AS TO THE RIGHT OF SETOFF

Initially, the newly-installed revolutionary Government of Iran nationalized local industry in general and Iranian banks in particular.⁴ This

³ See *WORLD FINANCIAL MARKETS*, March, 1980 at 16 *et seq.*; *Country Risk Evaluation 1979*, *EUROMONEY*, Feb., 1980, *passim*.

⁴ The Law of Nationalization of Banks, dated 17. 3. 1358 (June 7, 1979); The Law of Nationalization of Insurance Corporations, dated 4. 3. 1358 (June 25, 1979); The Law for the

resulted in serious concern on the part of many U.S. banks as to whether the outstanding Iranian debts would be repaid. This concern reached crisis proportions when many nationalized Iranian companies began to openly repudiate foreign debt to U.S. banks — even repayment of Iranian interbank indebtedness became uncertain.⁵ When Iranian officials began to drop hints about withdrawing their U.S. dollar deposits, President Carter froze Iranian assets in the United States and attempted to apply this freeze to U.S. banks operating abroad.⁶ Under the FACO regulations, Iranian depositors would be prohibited from withdrawing their funds, but so would bank creditors, who were in many cases continuing to fund past due credits while they had sufficient funds on deposit to liquidate outstanding obligations. Major U.S. banks appeared to be least at risk since most of the approximately \$8 billion of Iranian deposits in the U.S. were placed with them. Ironically, the first protective steps were taken by the major New York banks. Although international interbank debt has traditionally been considered inviolate, many U.S. banks feared that regardless of the resolution of the political crisis, Iranian banks might make massive withdrawals once the freeze was lifted. Contrary to the general aversion among banks against suing each other, several major U.S. banks began to move against Iranian bank debtors (as well as government and private sector debtors) in the courts here and abroad. Rumors spread that some U.S. banks were offsetting Iranian deposits, notwithstanding the freeze.⁷ Fearing the loss of these deposits, other banks began instituting suit in an effort to place a subordinate block on Iranian deposits which would have the effect of inhibiting withdrawals if and when the freeze was lifted. Although Treasury Department regulations appear to prohibit entry of any judgment or of any decree or order,⁸ two major United States banks were able to obtain prejudgment orders of attachment against Iranian deposits.⁹ As a consequence, a few days thereafter the Treasury Department revised its regulations to allow such attachments.¹⁰ The flood of subsequent litigation threatened to deluge as well as muddy the waters of

Protection and Development of Iranian Industry, dated 14. 1. 1358 (July 5, 1979).

⁵ Kifner, *Iranian Now Calls Foreign Debts Void But Exempts Some*, N.Y. Times, Nov. 24, 1979, at 1, col. 1; Hershey, *Banking World Puzzled Over Iran's Stand on Debt*, N.Y. Times, Nov. 24, 1979 at 29-30, col. 1.

⁶ Exec. Order 12170, 3 C.F.R. 457 (1979).

⁷ Reports were widely circulated during the early stages of the crisis that Citibank and Chase Manhattan Bank had, in fact, offset much of the Iranian funds then held on deposit.

⁸ Foreign Assets Control Act Regulations, 31 C.F.R. § 535.504(b) (1) (1979).

⁹ *Morgan Guaranty Trust Co. of New York v. The State of Iran (Islamic Republic of Iran)*, 70 Civ. 6312 (1979); *European American Banking Corp. v. Bank Barzargani Iran*, 79 Civ. 6316 (1979).

¹⁰ Foreign Assets Control Act Regulations, 31 C.F.R. § 535.504(d) (1979) was reinterpreted to allow pre-judgment attachment without authorizing execution on property under 31 C.F.R. § 535.418 (1979).

all future international interbank relationships. Strong adverse reaction followed from European bankers who criticized the attempt by U.S. regulators to apply the Iranian freeze on an extra-territorial basis.¹¹ Although the Treasury Department subsequently exempted from the freeze Iranian deposits held in foreign currencies by U.S. banks abroad,¹² the Eurodollar market was severely shaken by both the applicability of the freeze and the litigation commenced by Iranian banks in an effort to have it declared illegal. These chaotic circumstances were not without profound consequences for international banks, especially as they related to the issue of lending to lesser developed countries (LDC's), such as those in Latin America. New strategies are being considered by several U.S. banks to promote a better asset/liability balance for a given country on the assumption that deposit liabilities will be used to offset outstanding indebtedness. The revolution in Nicaragua and the major revision of international country debt in Peru have served to fan the fires of concern originally ignited by the Iranian crisis.

Although traditionally recognized and regarded as a virtually inalienable right, setoff as a legally viable practice has come under closer scrutiny. Some of the underlying reasons for concern over its availability relate to the historical perspective in which the right of setoff has developed. While traditionally recognized at common law in most nations which have a reasonably sophisticated banking system and participate in international financial transactions, the right of setoff as it applies to banks has only in rare instances been codified in statutory law. Many Western European countries have implicitly acknowledged the right of setoff more in the breach than in the honor of it. The lack of widespread uniformity of law on this subject rarely caused concern, but the often severely cautious approach of U.S. banks regarding legal protection of their assets has resulted in serious concern over the adequacy of setoff as a common law right.

Notwithstanding the apparant lack of significant written law on set-off, general principles have developed upon which the right is most often predicted. These principles are discussed below.

¹¹ Geddes, *Europeans in Rift with U.S. Banks*, N.Y. Times, Dec. 5, 1979, at 1, col. 1; Porter, *London Report: Manner in Which U.S. Handled Freeze of Iranian Assets Angers Foreign Banks*, J. COM., Dec. 5, 1979, at 30; *Iran Freeze and British Wrath*, Financial Times (London), Dec. 10, 1979, at 1, col. 1; Luhomski, *German Bankers Disturbed*, J. COM., Dec. 10, 1979, at 24; *A Banking Rift Over Iran's Assets*, BUS. WEEK, Dec. 10, 1979, at 30-31.

¹² Foreign Assets Control Act Regulations, 31 C.F.R. § 535.566 (1979).

III. GENERAL PRINCIPLES OF THE RIGHT OF SETOFF

A. Mutuality

1. The Debtor-Depositor

The creditor (depositor) and the debtor must be one and the same entity (i.e., in mutuality). Only funds (deposits) held in the name of or for the benefit of the debtor itself may be offset.¹³ Consequently, the deposits of Company X could not be offset against the indebtedness of Company X's wholly-owned subsidiary unless Company X had so agreed in advance (i.e., by guaranty or hypothecation). During the initial phase of the Iranian crisis, several U.S. banks sought to offset deposits of Iranian government entities against indebtedness of private Iranian companies on the theory that the mutuality test was satisfied by reason of the nationalization of these formerly private-company debtors. The question whether a government's assets can be offset in satisfaction of the debts of companies nationalized by that government is without precedent in the United States. The success or failure of this argument (which has yet to be finally determined) will depend in part upon the manner in which Iranian companies had been nationalized. Mere acquisition of the shares of an Iranian Company by the government as a method of nationalization may, *arguendo*, result in limited liability of the government as a shareholder. Conversely, if the Iranian government seized the assets and literally took control of the operations of the company such that the company no longer had an independent status, it may be argued that the company debts would have been implicitly assumed by the government in the act of nationalization. In the event these issues should have to be decided by a court of law, any such decision would certainly have a monumental effect upon international aspects of a bank's right of setoff.

2. The Bank As Creditor-Depository

The same banking institution must hold both the debt and the deposit to be offset against it.¹⁴ This rule should also apply to bank subsidiaries. Therefore, a subsidiary of a U.S. bank located in a Latin American country could not offset deposits held by it against the indebtedness of its depositor with the bank's U.S. parent. While it is generally recognized in the United States (under applicable state law) that a branch may offset deposits held by it against the indebtedness of the depositor with a sister branch in that state (the theory being that branches are all part of the same legal entity for this purpose), it is uncertain whether the same ap-

¹³ 10 AM. JUR. 2D, *Banks* §§ 666-683 (1963).

¹⁴ *Id.*

plies to foreign branches, especially on a cross-border basis.¹⁵ To overcome this problem, banks sometimes transfer outstanding indebtedness to a branch, subsidiary or affiliate holding a deposit of the debtor so as to satisfy this aspect of the mutuality test.¹⁶ While there appears to be no specific prohibition against such a transfer of indebtedness (by reason of sale, assignment, participation or otherwise), the same procedure may not be available with respect to the transfer of deposits. Banking practice does not condone transfer of deposits, especially if intended as a means of effectuating recovery of debt, without the depositor's consent. During the Iranian crisis, several banks attempted to effectuate transfers of indebtedness to branches or subsidiaries which held Iranian assets on deposit. Some European central bankers reacted unfavorably to this action, possibly in part resulting from their negative attitude toward the attempt by the U.S. Treasury Department to apply FACO regulations to deposits held in U.S. banks operating in their respective jurisdictions.

B. Enforceability

In order for the indebtedness to be subject to setoff, it must be in such form as would render it enforceable against the debtor-depositor in the country in which the deposit being offset is maintained. While most international banking institutions lending to Latin American countries seek opinion of legal counsel in the jurisdiction in which the borrower is located to determine the enforceability of the indebtedness in that jurisdiction, the assets of the borrower may be located in several jurisdictions rendering a predetermination of enforceability of indebtedness extremely difficult. This risk, however, is somewhat diminished by the common practice among government and large private-sector borrowers to maintain deposits in banks located in major international financial centers where enforceability may not be a serious problem.

C. Conditionality

In order to effectuate setoff, there must be no conditions or other impediments (legal or contractual) applicable to either the deposit or the indebtedness against which the deposit is being offset. Therefore, bank accounts held in the name of the debtor but specifically designated as "in

¹⁵ Furthermore, the dual banking system in the United States that has to date prevented interstate branching virtually eliminates any possibility of a determination of the setoff questions on an interstate basis.

¹⁶ The problem may be one of timing. First, the transfer must be made and (as noted below) the debt must have matured prior to setoff. If the deposit involved is unencumbered and held on demand, it may be withdrawn by the depositor (or attached by another creditor) before setoff can be accomplished.

trust for" another person, for the beneficial interest of another or held in some other limited capacity with regard to ownership and control over the deposit would not be available for setoff. In some instances, contractual obligations or restrictions may limit the right of setoff even if the relevant contract relates to third parties. For example, banks participating in a syndicated term loan transaction may be required by the terms of the related loan agreement to share with the other bank participants any deposits of the borrower offset against indebtedness of that borrower incurred in the applicable transaction. Legal impediments to setoff may involve statutory or other liens which have priority over or restrictions imposed by law on setoff (i.e., in bankruptcy).¹⁷

D. Payable in Kind

The credit and the debt involved in a setoff must both be payable in the same kind (i.e., in money). It is uncertain as to whether a bank's right of offset is limited to deposits or whether it can be extended to negotiable securities or other property held by the bank in a capacity other than as a depository institution. Some Latin American countries (e.g., Argentina) have specific rules relating to setoff against negotiable instruments payable to bearer.¹⁸

E. Maturity

Generally, a bank's right of setoff does not arise until the obligations of the depositor to the bank have matured. It appears that no such limitation relates to the deposit itself (i.e., where such deposit is held on a time basis, it still may be offset against a matured debt of the depositor).

IV. CURRENT STATUS OF THE LAW OF SETOFF IN LATIN AMERICA

In an effort to determine the viability and applicability of the traditional bank's right of setoff in Latin America, we surveyed the current status of applicable law in nine representative Latin American countries: Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, Mexico, Panama and Venezuela. Each of these countries was chosen by reason of its strong participation in the international financial market either as a borrower or host country for branches or subsidiaries of U.S. banking institutions. In most jurisdictions which recognize a bank's right of setoff in one form or

¹⁷ See Bankruptcy Reform Act of 1978, 11 U.S.C. § 553 (1978), which recognizes setoff for pre-petition claims but limits the amount available for setoff so that a creditor may not enhance its position during the 90-day preference period.

¹⁸ A debtor cannot setoff against a legitimate bearer by negotiable instruments by endorsement unless he is a creditor of such bearer. Art. 819 Código Civil (Argen.).

another, the legal basis for asserting such right is derived more often from business custom and practice or generic principles of commercial or civil law than from specific statutory or regulatory authority. In only three of the countries investigated could we cite references to codified law on the subject specifically pertaining to banks. In Bolivia, Article 1350 of the Commercial Code contains specific authority for a bank to debit the checking account of its customer for amounts which represent past due obligations of that customer to the bank, provided that joint accounts may not be offset unless all the account holders are liable for such obligations.¹⁹ Setoff is similarly permitted by statute in Argentina²⁰ under the particular conditions that the offsetting credits and debits be reciprocal and enforceable at the same time. Colombian law also recognizes the banker's right of setoff with the proviso that such right can be limited or denied by agreement of the bank and its customer.²¹ Opinions issued by the Superintendent of Banks in Colombia have substantiated the right while prohibiting its application to government-owned deposits.²²

The remaining Latin American nations surveyed recognize an historical legal principle referred to as "la compensacion", upon which the right of setoff is propounded. According to this juridical concept as most succinctly stated in the Civil Law of the Republic of Ecuador, "if two persons are debtors one to the other, between them would be a compensation which extinguishes both debts".²³ A related section of the Ecuadorian Civil Law, however, provides that "the depository cannot without consent of the depositor, withhold the item deposited, either as a compensation or as security for what the depositor owes . . ."²⁴ with certain exceptions which relate primarily to goods not including money (e.g., the depositor's account may be debited for losses or expenses incurred in maintenance of the account, such as service charges). Under Venezuelan law, a compensation exists under similar circumstances without express declaration and even without knowledge of the debtor, but only for indebtedness in money or a determined amount of goods which can be substituted one for the other and are both liquid and matured.²⁵ Statutory law codifying the concept of "la compensacion" may also be found in Brazil²⁶ and Colombia.²⁷

¹⁹ Art. 1350 Código De Comercio (Bol.).

²⁰ Art. 818 Código Civil (Argen.) includes a reference to both national and foreign banks as authorized to effectuate setoff.

²¹ Art. 1385 Código De Comercio (Colom.).

²² Opinion of the Banking Superintendant of Colombia (May 28, 1975).

²³ Art. 1698 Código Civil (Ecuador).

²⁴ *Id.* art. 2166.

²⁵ Arts. 133-1333 Código Civil (Venez.).

²⁶ Art. 900 Código Civil (Braz.).

²⁷ Art. 1.714 Código Civil (Colom.).

A related theory which has received some acceptance in Venezuela as a basis for asserting a right of setoff is referred to as "derecho de retencion" or the "right of retention". Under this legal doctrine, a creditor may retain goods in its possession belonging to a debtor who has shown reluctance to repay his indebtedness or perform any other contractual obligation.²⁸ The right of retention applies even where ownership of the particular personalty or securities in the creditor's possession has been transferred by the debtor to a third party who has no knowledge of the debt. By analogy, under this theory, a bank in Venezuela should be within its rights in refusing to honor a check drawn on an account which has been either offset or blocked because of failure of the depositor to repay his indebtedness to the bank. Is it advisable, however, for the bank to notify the depositor of any such action with regard to his account so as to prevent any unnecessary loss or damage to the customer or his reputation which may result from his assumption that funds remain available in the account against which he can continue to draw drafts? Failure to so notify the depositor may result in potential liability of the bank for such loss or damage. Since the right of retention is subject to contract principles, it would not apply if incompatible with the terms of an agreement between the parties, specific instructions of the debtor or a direction accepted by the creditor to dedicate the assets to a particular use. Furthermore, the debtor may prevent the exercise of the right of retention by furnishing the creditor with a collateralized guaranty. Contrary to general principles of setoff, the right of retention may even be exercised with regard to unmatured debts (1) when the debtor is bankrupt or insolvent, or (2) when execution against the debtor has been unsuccessful.²⁹

Further derivative sources of the right of setoff may be found in general commercial or banking law provisions. For example, Article 613 of the Chilean Commercial Code states that the final closing of current accounts unalterably fixes the status of the parties' legal relation and produces by operation of law a setoff which is predicted upon offsetting debits and credits.³⁰ Article 1662 of the Chilean Code, however appears to prohibit setoff where a claim is made by a depositor for repayment of his deposit.³¹ The banking community in Chile follows the General Condi-

²⁸ Art. 123 Código De Comercio (Venez.).

²⁹ The Venezuelan Commercial Code provides that "instructions of the debtor to the creditor, or directions accepted by the latter to use the articles or securities for a determined purpose, do not militate against the right of retention in those cases where the creditor was unaware until after delivery of the articles or securities or the acceptance of the instructions of any of the events described in (1) and (2) above." Art. 123 Código De Comercio (Venez.).

³⁰ Art. 613 Código De Comercio (Chile).

³¹ Local legal practice in Chile seems to favor application of Article 613 as the governing rule of law since it applies specifically to current accounts. By implication, setoff of

tions for Current Bank Accounts which is approved by the Banking Superintendent and contains established rules prescribing the conduct of banking operations. These rules authorize setoff of a customer's current account in respect of any type of debt the customer may have with the bank depository, whether for expenses, discounted documents remaining unpaid or extensions of credit. Generally, Chilean banks debit to current accounts the value of documents or commercial instruments which they have discounted for their customers and which are protested at maturity for non-payment by the acceptor or drawee. The Chilean Banking Superintendent has instructed banks under his aegis not to effect such debits unless the following conditions are fulfilled:

- (1) the current account has sufficient disposable funds;
- (2) the bank's customer has been given express written notice of, and has consented to, the debit being made; and
- (3) the debit is made no earlier than two days after the customer has been notified that the account is to be debited, so that he can have the opportunity to note the debit on his account records.

Similar principles are applicable in Venezuela. Under Article 503 of the Venezuelan Code of Commerce:

a current account is a contract in which one of the parties deposits with the other or receives from the latter, title to amounts of money or other valuables without being destined to a particular use or without any obligation to hold a particular valuable or its equivalent value to the order of the former, but rather to credit the depositor for his deposits liquidating same through payments at the periods agreed upon up to the current amount of the respective deposits on the basis of the *aggregate of debits and credits* and to pay over any balance (*italics mine*).³²

This language is usually interpreted to allow the aggregate of all such debits and credits to be so applied, thus effecting setoff by operation of the account. This underlying theory of current accounts is generally acknowledged to apply to bank accounts as well as mercantile accounts.

Regardless of the merits of derivative legal arguments regarding bank's right of setoff, most of the Latin American countries surveyed have adopted a cautious approach relying on general contract principles where no specific prohibition exists. It is common banking practice in these countries to obtain a specific written authorization for setoff from the customer as part of the account documentation. In Mexico, which has a statutory prohibition against setoff of deposits,³³ and in Panama, which

time deposits may not be enforceable unless and until they mature (thereby becoming demand or current deposits).

³² Art. 503 Código De Comercio (Venez.).

³³ Art. 2185 Código Civil (Mex.). It is unclear, however, whether this general prohibi-

is silent on the issue, application of this practice is most important. Conversely, in Venezuela, Article 525 of the Code of Commerce is interpreted to permit setoff as a consequence of its permissive attitude toward the parties to a banking transaction establishing the juridical relations between them unless limited by particular statutory law or regulation.

In addition to the conditions and limitations referred to above, setoff may be restricted by foreign exchange control and bankruptcy laws. Regarding the former, Brazilian law prohibits setoff of foreign currency deposits of local residents against foreign indebtedness without the express authorization of the Central Bank. This restriction applies by virtue of the government's control of remittances abroad in foreign currency. With regard to bankruptcy, some of the Latin American jurisdictions surveyed prohibit exercise of the right to setoff after the filing of a petition in bankruptcy,³⁴ while others limit the amount which can be setoff under such circumstances to pre-petition indebtedness.³⁵

V. CONCLUSION

This brief analysis of local law in nine Latin American countries indicates both the dearth of concrete law on the subject of setoff and the diversity of legal theories upon which its practice is based. Although emergence of these nations as significant participants in the international financial market is relatively recent, the conduct of banking operations therein as it relates to setoff is generally predicted upon time-honored principles of banking applicable in most Western nations. All the jurisdictions surveyed in one form or another recognize or at least tolerate the principle of a bank's right of setoff. Furthermore, while subject to differing rules and restrictions on its application, the right of setoff seems to have a legal status in the Latin American countries similar to other major Western nations. While U.S. banks operating in these Latin American jurisdictions may take some comfort in their reliance on setoff from its general acceptance in these countries, fallout engendered from the recent Iranian crisis has caused speculation that setoff may not be as inviolable a right as traditionally presumed. Concern over balancing bank assets and liabilities on a country-by-country basis will have an immeasurable effect upon cross-border risk analysis of potential Latin American borrowers. Efforts will undoubtedly be made to shore up the legal adequacy of setoff in banking practice — for example, by including specific authority therefor in loan and deposit account documentation. Resistance from borrow-

tion applies to commercial deposits. In any event, it appears that rights granted under this Article may be waived by a specific authorization from the customer.

³⁴ See, e.g., Art. 1350 Código De Comercio (Bol.).

³⁵ Art. 134 Código Civil (Argen.).

ers on this issue appears likely. Clarification of the setoff question — whether by specific statute or judicial decision — may become imperative as reliance on this common practice becomes increasingly dubious. The time has come for custom to be translated into clear, precise and workable law.