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Begriff und Wirkung von Konzernverrechnungsklauseln

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Group offsetting clauses are agreements allowing a group-company, which is the debtor of a claim by a third party to meet this claim by offsetting a counterclaim of another group company. In case of bankruptcy of the third party, they can serve as collateral security regarding claims by other group companies. The legal doctrine regarding the validity and enforceability of group offsetting clauses is inconsistent. This essay shows that group offsetting clauses can be structured as contractual substitution-rights (Ersatzungsbefugnis, Alternativermächtigung, facultas a ternativa). This means that the obligation of the thirdparty creditor is limited from the very beginning by the contractual right of the debtor to substitute the payment of the outstanding debt by offsetting (fully or in part) a claim of another group company. The substitution right is a unilateral right of the debtor, which can also be exercised if the creditor of the claim is in bankruptcy and if (as a consequence of this) the counterclaim of the other group company is of no (economic) value.

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