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51/96 and 191/97 – *Deliège and others v ASBL* [2000] ECR I-2549); (ii) discriminatory entrance rules for private higher education institutions which have been accredited by public bodies; and (iii) clauses in → standard contract terms putting EU nationals at a disadvantageous position, like higher tariffs for foreigners in insurance cover or higher costs for cross-border banking services as opposed to national transactions).

### 5. No direct horizontal effect of Directive 2004/38

Directive 2004/38 of 20 April 2004 on the free movement and residence of EU citizens consolidates and codifies the free movement rights of EU citizens and their family members, but from its wording it has only a 'vertical direct effect' against the state, not a horizontal direct effect against restrictions instituted by private law relations. The general prohibition on discrimination in Art 24 of Dir 2004/38 has been shaped similarly to primary law and has a similar effect. There are however four possible cases for a horizontal direct effect:

(i) The concept of 'family member' is defined in Art 2(2) and includes the marriage of a Union citizen with a third country national seeking asylum in a Member State, even if the latter did not have a residence right (ECJ Case C-127/08 – *Blaise Baheteb Metock* [2008] ECR I-6241).

(ii) The notion of 'family member' includes partnership relations under the dual condition that they are registered in the state of origin and put on an equal standing with a marriage in the state of residence. This is important with regard to the prohibition of discrimination with regard to sexual orientation, encompassed by Dir 2000/78 (see ECJ Case C-267/06 – *Tadao Maruko* [2008] ECR I-1757). Recital 31 refers to Art 21 of the Charter on Fundamental Rights which does not require dual recognition of same sex partnerships.

(iii) Directive 2004/38 does not recognize a right of access to or a supply of goods and services available to the public by Union citizens who reside legally in another Member State. This is quite different from Art 11(1)(f) of the Third Country National Residence Directive 2003/109. Since it cannot be imputed that the EU legislature wanted to put Union citizens in a less favourable position than third country nationals, Art 11 can be applied by analogy in favour of Union citizens as well.

(iv) Art 35 transforms the prohibition of the abuse of rights, as known to private law, also into the sphere of residence rights, particularly in cases of marriages of convenience, thus following the case law of the ECJ (Case C-109/01 – *Akrich* ECR [2003] I-9607, para 57). Recital 28 defines 'marriage of convenience' as 'relationships contracted for the sole purpose of enjoying the right of free movement and residence'. It is an open question whether this broad power of Member States corresponds to the guarantee of marriage and family as fundamental rights under Arts 7/9 of the Charter (→ human rights and fundamental rights (ChFR and ECHR).

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*Norbert Reich*

## Unjustified Enrichment

### 1. Basic principles

'It is a fundamental principle of natural justice that no one ought unjustly to enrich himself at the expense of another.' This statement, attributed to the Roman jurist Pomponius (D. 12,6,14 and D. 50,17,206), is universally acknowledged throughout Europe. Indeed, every jurisdiction has legal remedies for correcting receipts of benefits not approved of by the law. Nonetheless, so far there has been no consensus as to the meaning of Pomponius' statement. Is it a mere maxim of equity, or is it a substantial (and therefore directly applicable) rule of law? There has always been the fear of boundless sway of natural justice. But, on the other hand, there have always been endeavours to systematize the existing claims for the surrender of benefits received, and to coordinate their requirements and characteristics. Nowadays, Pomponius' expression is recognized as either a legal rule or at least as a legal principle that underlies the existing claims for restitution of benefits and can also be used to justify newly created claims for restitution.

### 2. *Ius commune* foundations

The European *ius commune* did not have a general unjustified enrichment action. There were, however, specific actions directed at the surrender of a benefit the defendant had obtained in some way, at the expense of the claimant, which were associated with Pomponius' unjust enrichment principle by the *ius commune* scholars.

Undue or failed transfers could be reclaimed by way of the *condictio indebiti* or other *condictiones* (→ restitution in case of undue transfer). However, some *condictiones*, eg the *condictio sine causa* or the *condictio ex iniusta causa*, also covered cases in which the defendant had received the claimant's property not by transfer, but in some other way, such as an act of God or of a third party, and where there was no legal basis for retaining the benefit received. The *condictio furtiva* could be brought against thieves and their heirs and was directed at restitution of stolen objects or their value.

In other circumstances, the *actio negotiorum gestorum* was applied by analogy: if, in a case of an unauthorized → management of another's affairs (*negotiorum gestio*), the manager's claim for reimbursement of his expenses failed because he had managed the principal's affair for his own benefit, he could at least bring a claim against the principal insofar as the latter was enriched by the manager's actions. This claim could be used to help those who had made improvements, whether in good or bad faith, to another's property. Conversely, where A had, in good faith, disposed of B's property in favour of C, the principal's claim against the manager for handing over everything received in course of the management could be used, by way of analogy, to grant B a claim against A for the surrender of the price received from C.

Finally, there was the *actio de in rem verso*. Initially, it was applied in cases where persons in power (slaves, sons and daughters) contracted with third parties. As → representation was not recognized in Roman law, the third party had no contractual claim against the principal (owner/father). But if and insofar as the third party's contractual performance had enhanced the principal's patrimony, the principal could be forced to give up the benefits by the *actio de in rem verso*. Later, the action was extended to cases where a free person contracted on behalf of another: if A granted a loan to B, who was secretly acting for C, A could claim repayment from C to the extent that C had received the money from B. This *actio de in rem verso utilis*, directed towards the enrichment received, was extended to two-party cases in the 18th century, for instance where a contractual performance was made in favour of a minor and the contract was void for lack of the guardian's consent. As the *condictio*, leading to strict liability, could not be brought against a minor (→ restitution in case of undue transfer), there remained the *actio de in rem verso utilis*, forcing the minor to give up his enrichment. The *actio de in rem verso* of the *usus modernus* generally covered cases where the defendant's patrimony had been enriched, whether directly or indirectly, by the claimant. Thus, it became the basis for a general action of unjustified enrichment in many legal systems.

The late scholastics of 16th century Spain were the first who put all these scattered remedies together in order to form a general action of unjustified enrichment. Regarding non-contractual liability, they made a distinction between claims to compensate a loss on the one hand and claims for giving up an enrichment received on the other hand. This idea was taken up and refined by the school of → natural law.

### 3. Unjustified enrichment in the European codifications

The basis of a codified general claim concerning unjustified enrichment was often the *actio de in rem verso*, as in the Prussian codification (→ *Allgemeines Landrecht für die Preußischen Staaten*) and in the Austrian Civil Code (→ *Allgemeines Bürgerliches Gesetzbuch*). The French legislature, however, rejected its inclusion into the → *Code civil*, believing that the *condictio indebiti* and the analogous application of the *negotiorum gestio* claims were sufficient to redress unjustified enrichment. However, a general action in unjust enrichment, called *actio de in rem verso*, was introduced by the judiciary in the famous *Boudier* case of 1892 (Cass. req., 15.6.1892, D.P. 1892.1.596). Legal systems which follow the

tradition of the *actio de in rem verso* (apart from those mentioned above, also Spain, Italy and the Netherlands) still distinguish between the *condictio indebiti* or *sine causa* as a claim for restitution of undue transfers on the one hand, and a general claim of unjustified enrichment on the other. The latter usually requires the enrichment of the defendant, a corresponding impoverishment of the claimant, a causal link, and the lack of a legal basis. It is also usually subsidiary to any other possible claims. The general claim is, in principle, aimed at the surrender of the enrichment, although in the Netherlands it takes the shape of a claim for compensation and is merely limited by the defendant's enrichment. There is no unanimity whether restitution in cases of undue transfers (the old *condictio indebiti*) is a wholly different remedy or (as it is increasingly seen) a special case of unjustified enrichment.

The German solution is based on the rejection of the *actio de in rem verso* by the pandectists and on Savigny's teachings of the *condictio sine causa generalis* as a general action encompassing all cases in which a defendant has been unjustifiably enriched at the claimant's expense. The German Civil Code (→ *Bürgerliches Gesetzbuch*) therefore contains a unitary claim of unjustified enrichment for cases where someone has received something without legal basis, either by the claimant's performance or otherwise at his expense. A similar general claim of unjustified enrichment, including the *condictio indebiti*, can be found in Swiss, Portuguese and Greek law. In Germany, it has been the source of innumerable controversies: does the general claim of unjustified enrichment have to be restricted in order to be manageable and, if so, in what manner? Is it actually a unitary claim or a collection of different actions with different characteristics? Eventually, the 'doctrine of separation' (*Trennungslehre*) developed by Walter Wilburg and Ernst von Caemmerer became widely accepted. It distinguishes between cases of undue or failed transfers (*Leistungskondiktion*), infringement of the claimant's rights by the defendant (*Eingriffskondiktion*), expenditure made on another's property (*Verwendungskondiktion*) and payment of another's debt (*Rückgriffskondiktion*). In every category, the requirements 'at the expense of' and 'without legal basis' have to be determined in a different manner.

## 4. Development in England

For a long time, the principle of unjustified enrichment was viewed with suspicion in England, as there seemed to be the danger of a vague jurisprudence of natural justice and equity. Restitutionary claims based on failed transfers were labelled 'quasi-contract' in the 19th century and thus formed an appendix to the law of contract. Claims for the surrender of benefits gained by way of infringement of another's property operated under the name 'waiver of tort'. In addition, restitutionary claims were also part of the law of equity, eg claims for the surrender of gains made in breach of a fiduciary duty, or claims against third parties who had received trust property. It was not until the second half of the 20th century that scholars, inspired by the American → restatements and the work of Robert Goff and Gareth Jones, began to collect the various different cases under the name 'restitution' or 'unjust enrichment' and to organize them systematically. In 1991, the House of Lords finally recognized the existence of a separate law of unjust enrichment (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548).

Regarding taxonomy, English scholars went their own way. According to the teachings of Peter Birks, a claim in restitution/unjust enrichment requires a so-called 'unjust factor', which is used to identify the receipt of a benefit at another's expense as unjust. These unjust factors usually refer to the transferor's will, which may have been vitiated (due to mistake, duress, compulsion, undue influence or minority) or qualified (where counter-performance or another event forming the basis of the transfer—as in fact known by the transferee—did not occur). Other unjust-factors refer to the transferee's behaviour (free acceptance) or to particular policy reasons. Whether there is a legal basis for the enrichment is irrelevant. The fact that the claimant, by his performance, discharged an existing liability towards the defendant is, at most, the basis for a defence against a restitutionary claim. Because the purpose of the transfer is not taken into account, a claim in restitution for mistake is available regardless of whether the claimant intended to discharge an obligation that did not actually exist, made a gift for erroneous reasons, or improved another's property in the mistaken belief of being the owner. Problems in identifying the correct unjust factor, in particular in cases involving payments on void contracts, caused Birks to abandon his teachings in 2003 and, following the continental tradition, to base claims of unjust enrichment on an 'absence of basis'.

## 5. Common structures and problems

The majority of European legal systems have a claim of unjust(ified) enrichment which is composed of three elements: (1) the defendant must have received a benefit (2) at the expense of the claimant and (3) without justification, ie without a legal basis or in some other 'unjust' way. There is no unified approach to interpreting the criteria 'at the expense of' and 'without justification' in detail, in particular as to whether the claim of unjustified enrichment requires the claimant to have suffered a loss. Some legal systems also have further requirements, such as correspondence between the defendant's gain and the loss suffered by the claimant, immediacy of the shift of wealth between claimant and defendant, or a general subsidiarity of unjustified enrichment claims. The law of unjustified enrichment is generally considered a counterpart to the law of → contract and the → law of torts/delict. However, the questions of its *ratio*, its scope of application and, in particular, whether there should be an independent law of unjustified enrichment at all have consistently provoked considerable controversy and discussion. Are claims for restitution in case of undue transfers, the surrender of profits arising from an infringement of other's rights, claims for reimbursement of expenses by someone helping in an emergency, or the apportionment between solidary debtors (→ solidary obligations) part of the law of unjustified enrichment, or are they separate institutions? Is the law of unjustified enrichment, more than other areas of law, characterized by equitable considerations? Does it constitute an independent branch of law, or does it exist merely to close gaps in other branches? Should, perhaps, the unity of the law of unjustified enrichment be abandoned and the individual claims integrated into the branches of law (contract, discharge of obligations, fiduciary obligations, law of wrongs, *negotiorum gestio*) that they relate to?

## 6. Enrichment caused by an act of the claimant

If the defendant's enrichment is due to an act done by the claimant, the continental legal systems ask whether the claimant consciously benefited the defendant with respect to a particular purpose such as discharging a contractual or other obligation, ie whether he acted with regard to a specific legal basis between him and the defendant. If this is the case, and the legal basis is lacking, his remedy is → restitution in case of undue transfer (*condictio indebiti/sine causa*, *Leistungskondiktion*), a remedy to be found separate from, or within, the general law of unjustified enrichment.

However, the act by the claimant enriching the defendant can be made for reasons other than a legal basis towards the defendant. Improvements of another's property and payment of another's debt are cases where most legal systems, at least to a certain extent, grant claims of unjustified enrichment. Following the tradition of the *ius commune*, the continental laws have special rules for improvements by possessors which differ from the unjustified enrichment rules, thus causing problems of coordination (→ improvement of another's property). In case of payment of another's debts, recourse against the debtor may be based not only on unjustified enrichment but also on → management of another's affairs without a mandate (*negotiorum gestio*) or on → subrogation. The fundamental question in both situations is whether a claim in unjustified enrichment should be available only in particular types of cases (eg where the claimant made expenditure on property he believed to be his) or should be granted freely, even in cases where the claimant benefited the defendant without any mistake or compulsion. The benefit may, furthermore, be of no value to the defendant, eg if the claimant built a house on land the defendant wanted to use for agriculture, or if the discharge of the debt was made shortly before the debt would have become statute-barred. English law takes a hostile view to uninvited intermeddling with another's affairs. Any claim in unjust enrichment is therefore dependent on the existence of a specific reason, such as mistake or duress. The continental legal systems, on the other hand, often do not restrict the claims of unjustified enrichment but rather protect the defendant by using an extremely subjective test of enrichment when the benefit was forced upon him.

In some cases the defendant's gain is merely an indirect consequence of the claimant's act, eg where he constructed a dam which also protects neighbouring properties. All legal systems tend to exclude claims of unjustified enrichment in these cases. To this end, some laws work with a requirement of an immediate shift of wealth, some with a restrictive interpretation of the criterion 'at the expense of', while yet others exclude claims of unjust enrichment where the claimant acted out of self-interest.

## 7. Enrichment by infringement of another's right

Where someone obtains a benefit through unlawful use, disposal or consumption of another's property, European laws usually give the holder of that property a claim against the infringer for the surrender of the benefit. However, this claim is not universally considered a claim in unjustified enrichment. In France and Italy, due to the subsidiary nature of unjustified enrichment, a claim of damages in delict has precedence,

while in the Netherlands claims in unjustified enrichment often fail because they require a loss suffered by the claimant. Nonetheless, most laws do not allow a defence based on the assertion that the rights holder could not or would not have achieved the gain in question since the claimant having suffered loss or damage is either not a requirement of a claim of unjustified enrichment or is already seen to lie in the fact that his property was used without his consent. The claim is usually for the objective value of the benefit, ie the price the infringer would have had to pay if he had used the right lawfully. A claim directed at the profits achieved by the infringer will only be allowed in special cases, notably in cases of intentional infringement (→ disgorgement of profits).

The restitutionary claim can be explained in two different ways. Under English law, restitution is traditionally seen as a possible remedy, in addition to damages, in case of a wrong such as a tort or a breach of fiduciary duty. Restitution rests on the wrong as such. There is no consensus as to whether restitution for wrongs is part of the law of unjust enrichment at all or whether it rather belongs to the law of torts or the law of trusts. In opposition to that, there is the theory of attribution (*Zuweisungsgehalt*), to be found mainly in Germany. Here, the claim is not based on an unlawful act as such, but on the fact that a legal position has been infringed that is attributed (or: assigned) by the law to the claimant for his exclusive use and benefit. A claim in unjustified enrichment by the victim of an infringement will only fail if the gain is legally unattributable to him, for instance if it was achieved through the sale of degrading photographs of the victim, or if it is a reward paid by a third party to the defendant for causing bodily harm to the victim. In order to give the victim a claim for the profits in such circumstances, one often finds a combined solution, as in Dutch law and in the Draft Common Frame of Reference (Art 6:104→ *Burgerlijk Wetboek* (BW), Art VI.-6:101(4) DCFR), which allows for gains made by an infringement to be surrendered both through the law of unjustified enrichment and through the law of delict.

### 8. Indirect enrichment

Indirect enrichment cases cause particular problems. A benefit may pass from the claimant to a third party and then to the defendant; or the claimant may perform an obligation towards a third party and, in so doing, benefit the defendant. At least where the third party is insolvent, there is the desire to give the claimant a direct claim against the defendant who, after all, is undoubtedly enriched. On the other hand, there is the need to protect the privity of commercial relations and the security of receipts: the defendant should only be exposed to claims by the person who was his contract partner and from whom he received the benefit. He should not be concerned with problems within the relationship between the claimant and the third party.

A direct claim against the defendant is generally permitted where the claimant had a proprietary interest in the object received by the defendant (and a vindication or a proprietary remedy is no longer possible because the claimant has meanwhile lost his title or because the defendant disposed of the property). The claimant's proprietary interest in the object received by the defendant, making a direct claim possible, can be particularly far-reaching under English law, which acknowledges not only property at law, but also property in equity. In cases of failed transactions, equitable title often remains with the transferor. Moreover, ownership in equity extends to money and to substitutes for the original property. However, all legal systems protect defendants from restitutionary claims when they have acquired the property in good faith and for value.

Where a claimant had no proprietary title in respect of the object received by the defendant, any claim of unjustified enrichment is dependent on the extent to which a legal system allows the *actio de in rem verso* or, in English terms, 'leapfrogging'. French law is particularly far-reaching as it allows even benefits transferred under a valid contract with the third party to be reclaimed from the defendant, as long as a legal basis is absent in the defendant's relationship with the now-insolvent third party. Conversely, English law seems not to allow restitution of benefits transferred under a valid obligation towards a third party. German law is even more restrictive, refusing a direct claim against the defendant also in the case where the contract between the claimant and the third party is invalid, as long as the claimant intended to perform in favour of the third party. However, most laws allow an exception to the restrictions of restitution claims in indirect enrichment cases, where the defendant received the benefit gratuitously.

### 9. Unification projects

Book VII of the DCFR contains extensive model rules for the law of unjustified enrichment, which follow an approach independent of the existing European laws. The basic rule in Art VII.-2:101 is that enrichment is unjustified unless either the defendant had a right to it on the basis of a contract, other juridical act, a court order or a rule of law, or the claimant freely and without error consented to the enriching transaction. Leaving aside the unusual relation of rule and exception, this design is remarkably similar to the unjust factor theory of English law. In addition, there are special rules for disgorgement of profits in delict and against trustees (Arts VI.-6:101(4), X.-7:203). Article 10 of the Rome II Regulation (Reg 864/2007) contains a conflicts of law rule on obligations arising from unjust enrichment.

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## Unsolicited Goods

### 1. Delivery of unsolicited goods and its consequences in European private law

#### a) Delivery of unsolicited goods before and after the formation of a contract

If a person receives goods that he has not ordered, two basic questions arise: the first is whether and under what circumstances the recipient of the goods is obliged to pay for them even though he did not order them. Secondly, if there is no duty to pay, it must be asked whether there is at least a duty to handle the goods with care and to give them back to the supplier. The answers are largely dependent on the reasons that led to the delivery. The supplier may have delivered the goods in order to fulfil a contractual duty (eg to deliver some other goods). In that case, the delivery of goods different from those due under the contract is either the result of a mistake or a deliberate attempt to discharge the contractual obligation without (fully) complying with the contract's terms. In both cases, the delivery of unsolicited goods is an attempt (though a flawed one) to perform an existing contractual agreement. In other cases the delivery of unsolicited goods constitutes an attempt to procure the conclusion of a contract: the supplier sends goods to a recipient in order to induce him to buy the goods and pay for them.

Modern European legislation generally aims at preventing suppliers from using the delivery of unsolicited goods as a means to procure the conclusion of a contract. The various statutory provisions tend to make the supplier's position as uncomfortable as possible. Consequently, this entry will focus on the fight against the delivery of unsolicited goods as a marketing tool (or, in the words of the European Distance Contracts Directive (Dir 97/7), a 'promotional technique'). We will only deal with the delivery of unsolicited goods in the course of the performance of an existing contract as far as this phenomenon is within the scope of the various provisions primarily aimed at preventing the abusive marketing strategy just explained, particularly the rules enacted by Member States to implement Art 9 of the Distance Contracts Directive. The delivery of goods not conforming to the recipient's order is a problem to be treated more extensively within the context of the seller's liability for defects in goods delivered under a contract of → sale.

#### b) Early history

Delivery of unsolicited goods as a marketing tool was discussed among the learned jurists on the European continent as far back as the early 19th century. In Germany the opinion seems to have prevailed among legal scholars for some time that the recipient of unsolicited goods was bound to pay for them if he failed to send them back. At around the same time, some German states enacted statutes designed to put an end to the practice of marketing lottery tickets by sending them to unwitting customers who had never ordered them. According to these statutes, when the recipient had been completely passive there would be no valid contract.