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Unjustified Enrichment in the Draft Czech Civil Code: a European Perspective

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1. Introduction

In Part Four of the Draft for a new Czech Civil Code,¹ we find several provisions on unjustified enrichment. In Chapter 4 on ‘quasi-contract’, the articles 2721-2733 are devoted to this area of the law. This contribution tries to place these provisions in a European perspective. This means that we will first look at how unjustified enrichment is treated in several national jurisdictions (section 2). Then, we will scrutinize the provisions of the Draft Common Frame of Reference, supposed to offer a model for Europe and hence also for the Czech legislator (section 3). Section 4 answers the question how the Czech draft fits in: to what extent does it follow either another national jurisdiction or the European model? This section will be limited to discussing only the main issues of the Draft: details are discussed in the other contributions to this volume.

2. National Approaches to Unjustified Enrichment: Finding Similarities and Differences

The member states of the European Union share several things when it comes to the law of unjustified enrichment.² Most importantly, there is the general maxim on which probably every European jurisdiction agrees to some extent. It is the maxim, also expressed in the Digest,³ that no one should be enriched at another’s expense. It is a maxim and not a legal rule because of its broad and abstract character (in which, in the Roman version, even the element of ‘unjustified’ is left out): the mere enrichment of a party does not give rise to a claim, but in specific cases the maxim can be used to allow a claim if some further requirements are met. These requirements differ from one jurisdiction to another.

With the general principle underlying the whole of the law of obligations, it is not too difficult to find, also in the law of contracts and torts, many cases that can be understood as preventing unjustified enrichment from taking place. This was well expressed by the famous

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¹ I made use of an English translation of the Draft, provided to me in June 2008.


³ Pomponius, Dig. 50, 17, 206: ‘Iure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem.’
French scholar André Tunc when he related the general delict clause with the principle against unjustified enrichment:

‘Le principe énoncé par l’article 1382 du Code Civil est l’une de ces grandes règles d’équité qui pourraient, à elles seules, résumer le Droit tout entier. On pourrait (…) concevoir (…) tout le droit des obligations régi par un seul principe: ‘Chacun doit réparer le dommage qu’il cause, par sa faute, à autrui’; on pourrait d’ailleurs, substituant au principe de responsabilité celui tout aussi général d’enrichissement sans cause, se contenter d’écrire: “Nul ne peut s’enrichir injustement aux dépens d’autrui.”’

This is the view in which the principle against unjustified enrichment is used as a building block to understand the private law system better: it makes the system more intelligible. At the same time, in concrete cases, the principle can be used as an argument to allow compensation from a party that was unjustifiably enriched – as long as the other requirements to allow the claim are met. In this sense, the general principle against unjustified enrichment is recognised in both the civil law and the common law tradition.

A second aspect in which most European jurisdictions converge is the allowance of specific enrichment claims. At a general level, there are three requirements that have to be met before such a claim can be put forward. First, there has to be some enrichment, second this enrichment needs to be unjustified and third, the enrichment has to be at the expense of the claimant. But despite these three uniform requirements, there are also important differences in so far as to this so-called ‘taxonomy’ of unjust enrichment is involved.\(^5\) There are at least three different taxonomies.

First, many civil law countries make a distinction between undue payment (condictio indebiti) on the one hand and unjustified enrichment on the other. This is true for, inter alia, France, Italy, the Netherlands and Spain. The (codified) action for undue payment intends to reverse a transfer (the payment was not due and it is irrelevant whether the value of the recipient’s patrimony increased or not). Next to this action, many of the countries mentioned before allow for a general action for unjust enrichment or at least for claims in cases analogical to the ones accepted in their civil codes. These actions were usually developed in case law.\(^6\)

Secondly, there is the German distinction between several types of enrichment claims. This distinction finds its basis in the work of Wilburg and Von Caemmerer.\(^7\) Apart from the Leistungskondiktion (the enrichment is based on performance or transfer without a legal basis) and the Eingriffskondiktion (the defendant encroaches on the property of the other party),\(^8\) two other types of restitutionary claims are accepted. One is where the defendant’s property is improved at the expense of the plaintiff, another where the plaintiff paid another person’s debt.

Finally, there is a third way of looking at enrichment law. In the distinctions mentioned above, the focus is on the element of ‘sine causa’: the enrichment is to take place without a legal basis before the plaintiff can claim any compensation. The other approach would be to focus on a positive reason that makes the enrichment unjustified: only if such a


\(^5\) On taxonomy, see e.g. J. du Plessis, Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Jurisdictions, 2005 South African Law Journal 39 ff.

\(^6\) See for French law e.g. the famous decision in Cass. 15 June 1892, S. 1893.1.28 (Boudier), for English law Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548 and for Dutch law Hoge Raad 30 January 1959, NJ 1959, 548 (Quint/Te Poel).

\(^7\) See for an overview e.g. Gordley, Foundations of Private Law, o.c., 420.

\(^8\) See also Visser, Oxford Handbook, o.c., 969 ff., who emphasises (p. 997) that the different national approaches are not too far apart.
positive reason exists (the obvious unjust factors being mistake, duress, failure of consideration and illegality) can a claim be allowed. This is the position of English law: even with the acceptance of a general action, several types of restitution remain to be identified. It was Peter Birks who played a big role in the emancipation of the English law of restitution and in distinguishing between various types of actions, even though – as is well known – he changed his opinion in 2003\(^9\) and adopted the continental approach of only allowing a claim in case of enrichment ‘without a legal basis.’

In my view, there is still a third aspect in which European jurisdictions converge. It is that the law of restitution differs in one important aspect of other parts of the law of obligations. While contract law and tort law are coherent sets of rules, the law of unjust enrichment is much less coherent. As James Gordley indicates: the law of restitution does not rest on a coherent principle, but on ‘the need in disparate cases to fill the gaps left by other branches of the law.’\(^10\) The traces of this *residual* character of restitution law can be found in all major jurisdictions. In Germany, the Wilburg/Von Caemmerer typology is for example not seen as exhaustive: there are other cases in which restitutionary claims should be allowed and it is difficult to structure these other cases in any consistent way. English law struggled for a long time with finding a proper place for the various enrichment claims. And in many jurisdictions there is an enduring struggle about the extent to which the enrichment action is a subsidiary one vis-à-vis contractual claims and claims in tort.\(^11\) These are signs of the unclear place of enrichment law in the law of obligations as a whole.\(^12\)

3. Unjustified Enrichment in the Draft Common Frame of Reference

Having looked at the various national solutions in Europe in the previous section, it is now time to consider whether there is any best European model. The obvious starting point in answering this question is to look at the Draft Common Frame of Reference (DCFR), published in 2008.\(^13\) This DCFR was presented to the European Commission as a result of the Commission’s desire to improve the European *acquis*. In its Communication on European Contract Law of 2004,\(^14\) the European Commission had indicated that ‘definitions, principles and model rules’ for a European contract law would have to be prepared in order to improve the quality and overall consistency of the existing rules.

According to its drafters, the Common Frame of Reference has several purposes.\(^15\) First, it is a possible model for a political CFR: the presented text is an academic text and the European Commission has to decide whether it will use it as a building block when revising the present acquis or when drafting new directives. Second, the drafters regard the CFR as standing on its own as an academic text for legal science and teaching. They highlight that the CFR will promote knowledge of private law in the jurisdictions of the European Union, and

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\(^15\) *Draft CFR*, o.c., 6 ff.
will in particular ‘help to show how much national private laws resemble one another and have provided mutual stimulus for development and indeed how much those laws may be regarded as regional manifestations of an overall common European legacy.’\textsuperscript{16} Third, in the same vein as the previously published Principles of European Contract Law (PECL), the CFR can be a source of inspiration for the national courts, the European Court of Justice and for national legislators.

It should be reiterated that the main aim of the final CFR (that is to be established in 2009) is to serve as a ‘tool box’ for the European legislator:\textsuperscript{17} it can, ‘where appropriate’,\textsuperscript{18} make use of the CFR to draft new directives or to review the existing \textit{acquis}. The instrument is not in any way binding upon the European legislator or the member states:\textsuperscript{19} it is to derive its authority from the quality of its provisions.

Of the ten books of the Draft CFR, Book VII is devoted to unjustified enrichment. It contains seven chapters with 23 different provisions (‘model rules’). Unfortunately, comments and illustrations are not added to the provisions. This makes it difficult to assess them in an adequate way. The provisions almost literally follow the \textit{Principles of European Unjustified Enrichment Law} as recently published on the internet by the Study Group on a European Civil Code.\textsuperscript{20}

The main provision of Book VII is Art. VII. – 1:101:

‘(1) A person who obtains an unjustified enrichment which is attributable to another’s disadvantage is obliged to that other to reverse the enrichment.

(2) This rule applies only in accordance with the following provisions of this Book.’

This is followed by art. VII. – 2:101 on the circumstances in which an enrichment is unjustified:

‘(1) An enrichment is unjustified unless:
   (a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law; or
   (b) the disadvantaged person consented freely and without error to the disadvantage.

(2) If the contract or other juridical act, court order or rule of law referred to in paragraph (1) (a) is void or avoided or other wise rendered ineffective retrospectively, the enriched person is not entitled to the enrichment on that basis.

(3) However, the enriched person is to be regarded as entitled to an enrichment by virtue of a rule of law only if the policy of that rule is that the enriched person is to retain the value of the enrichment.

(4) An enrichment is also unjustified if:
   (a) the disadvantaged person conferred it:
      (i) for a purpose which is not achieved; or
      (ii) with an expectation which is not realised;
   (b) the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation; and
   (c) the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.’

Three aspects of these principles deserve further attention. First, if compared with the national systems of enrichment law, it is clear that the Draft CFR does not follow any of the existing national taxonomies. It turns away from the two-tier structure in civil law jurisdictions of the

\textsuperscript{16} Draft CFR, o.c., 6.
\textsuperscript{17} Communication 2004, o.c., 14.
\textsuperscript{18} Communication 2004, o.c., 3.
\textsuperscript{19} Communication 2004, o.c., 6.
\textsuperscript{20} Revised version of 27 February 2006, available at \url{http://www.sgecc.net}. The comments to these principles are not yet available, but will be published in a volume in the series \textit{Principles of European Law} announced for 2009.
condictio indebiti on the one hand and other enrichment claims on the other. The German distinction between Leistungskondiktion and Nichtleistungskondiktion is not followed either. Instead, there is an integrated system in which all enrichment claims are governed by a set of uniform requirements. However, not all restitutionary claims found a place in Book VII: the restitutionary effects of avoidance and termination of contracts are laid down in the arts. III. – 3:511 ff. The main rule that a party is entitled to claim restitution of benefits conferred under the contract before termination was already part of the Principles of European Contract Law.

Secondly, it is worth noticing that the provisions look at the enrichment claim from the perspective of the defendant (the enriched person). The question always is whether this defendant received the enrichment in an unjustified way, prompting the court to look at the various factors of art. VII. – 2:101. This approach comes close to the position of English law, in which an unjust factor also needs to be identified before a claim can be brought. However, the difference with English law seems to be that the factors identified in art. VII – 2:101 are formulated in a much more abstract way than the factors in English law.

Third, it is important to realise that the draft does not adopt the principle of subsidiarity. Instead, there is free concurrence of actions between the enrichment claim and other claims. In national jurisdictions, such concurrence is often seen as a possible threat to other fields of private law because it may undermine the coherent structure of this domain: if the enrichment claim is freely available, it may mean that the law of contract and tort are circumvented by parties turning to an enrichment claim instead. This is why in Italy and France the enrichment claim is a subsidiary one. The drafters do not seem to have this fear: they insist that enrichment law only has a supplementing function.

4. The Draft Czech Civil Code: Some Questions

How does the Draft for a new Czech Civil Code relate to the European model? In the remainder of this contribution, I will consider the Draft on the three points discussed in section 3: the existence of the general maxim, the taxonomy of the various actions and the question of subsidiarity of the enrichment claim. I will raise some questions about the Draft based on my understanding of the provisions and without having access to the underlying materials in Czech.

First, the Draft does indeed state the general principle against unjustified enrichment and thus places itself firmly in the civil law tradition. Article 2721 s. 1 of the Draft states:

‘(1) Those who unjustly enrich themselves at the expense of others shall reverse the enrichment to the impoverished.’

The essence of art. 2721 s. 1 is similar to that of art. VII. – 1:101 DCFR, even though the aspect of impoverishment (‘disadvantage’) is somewhat less clear in the Czech provision.

It becomes more interesting when we look at the second point: the taxonomy of the Draft provisions. Does the Draft follow the age-old distinction between undue payment and unjust enrichment (as in Romanist systems), the German view of Leistungskondiktion and Nichtleistungskondiktion or the English approach of defining unjust factors? It seems to me that the Draft does not follow any of these, but contains a mixture of the first and the third

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22 Cf. arts. 9:307-309, 4:115 and 15:104 PECL.
23 Also see art. VII. – 7:102 DCFR.
24 This is less clear in Dutch and German law. See Beatson & Schrage (eds.), o.c., 425 ff.
On the one hand, art. 2721 s. 2 defines when there is unjustified enrichment. The provision reads as follows:

‘(2) Is unjustly enriched he who acquires a property benefit achieved due to performance without legal grounds, to performance on legal grounds that have lapsed, irregular employment of a value belonging to others, or due to performance provided by another person, which, based on the law, the groundlessly (unjustly) enriched was supposed to provide himself.’

Next to this summing up of specific cases of unjustified enrichment, there is a specific provision on undue payment. Article 2724 s. 1 of the Draft states:

‘Has the right to obtain repayment a party who has performed without a valid obligation to do so. If both parties have performed without an obligation to do so, each of them is entitled to demand the restitution of what the other party acquired. The same shall apply in case of an obligation which has been wounded up.’

This mixture of defining cases of unjustified enrichment in art. 2721 and accepting the action for undue payment in art. 2724 raises two questions.

One question is whether the summing up of cases in art. 2721 s. 2 is meant to be limited: does it mean that in any other cases on unjustified enrichment for reversal of the enrichment cannot be allowed? I assume that the Draft intends to follow the civil law approach of accepting the general action for unjustified enrichment and that therefore the answer should be negative. It would be good to make this more clear in the provision. In the Dutch Civil Code of 1992, art. 6:212 states for example the following:

‘A person who has been unjustifiably enriched at the expense of another is obliged, so far as is reasonable, to make good the other’s loss, up to the amount of his enrichment.’

This leaves completely open when exactly the enrichment is unjustified. A good reason for this is that one does not know in advance when exactly one has to use this provision as filling a gap or correcting an unjust outcome: we cannot predict for which cases we will need unjustified enrichment as a source of obligations. This is at the core of the general action for unjustified enrichment: we trust the courts to apply the general provision in the cases they consider fit.

Another question is whether it is sufficiently clear that the arts. 2721 and 2724 are separate grounds for an action for unjustified enrichment. I assume that for the action for undue payment of draft art. 2724, the requirement of unjust enrichment as defined in draft art. 2721 does not have to be met. This could be made clearer than it is in the present text: it is in line with any national system that undue payment is an action separate from the general enrichment claim. The DCFR seems to follow a different approach, but this should be criticised. 26

Thirdly, there is the question whether the enrichment claim is a subsidiary one. Art. 2722 of the Draft is clear about this. It states:

‘If another right to compensation of the loss suffered can be claimed, it is not possible to bring claims based on unjust enrichment.’

This seems to be the right approach: although the principle against unjustified enrichment may underlie the whole of the law of obligations, it should only play a role as a separate action if one cannot claim on basis of contract or tort.

It is good to realise that if the subsidiarity principle is accepted, this may have consequences for dealing with a case that is important in practice: the case of supplying goods or services without a formal contract. An example is the English case of *British Steel v. Cleveland Bridge and Engineering*, in which British Steel negotiated with Cleveland Bridge about the supply of steel nodes. During the negotiations, a letter of intent was issued by Cleveland Bridge asking British Steel to start the work and, while the parties were still negotiating, almost all the nodes were delivered but not paid for. British Steel then claimed payment, in the absence of a contract, on basis of the reasonable value of the nodes. Robert Goff, J. found reason to allow payment but had trouble in finding the proper legal basis for this. Starting the work did after all not mean there was a contract: the parties were still negotiating and it was impossible to say with any certainty what the terms of the contract would have been. In the end, Goff found the following to be the proper reason for allowing a claim:\(^{27}\)

> ‘In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we say now, in restitution.’

This case illustrates how the principle against unjustified enrichment is accommodated as a restitutionary claim. In many other jurisdictions, the claim would be seen as a contractual one. With a strong emphasis on the subsidiarity of the enrichment claim, it is likely that Czech courts would reason in the same way and would thus prefer to base the claim on contract rather than on art. 2721.

5. Conclusions

The above shows that the Draft Chapter on ‘quasi-contract’ is well in line with the way in which other European countries deal with claims for unjustified enrichment. At the same time, there is not one model that is followed in the Draft: it seems more of a mix between various approaches.

\(^{27}\) [1984] 1 *All ER* 504, at 511.