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INFLATION IN UNJUSTIFIED ENRICHMENT CLAIMS: REFLECTIONS FROM ABROAD ON THE NEW BRAZILIAN CIVIL CODE

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INFLATION IN UNJUSTIFIED ENRICHMENT CLAIMS: REFLECTIONS FROM ABROAD ON THE NEW BRAZILIAN CIVIL CODE.

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ABSTRACT.

Inflation can be one of the risks assumed by the parties to a contract. But contractual terms may provide for monetary corrections (adjustments) to offset that risk in cases of regular inflation because the parties are in a bilateral agreement. The same may not hold true however for claims arising in unjustified enrichment because the parties are not necessarily in a bilateral agreement. They may find themselves in the position of two innocents because the events that brought about the decline of purchasing power of the currency were unconnected to them. In such cases, the change-of-position (loss of enrichment) defence might be available to the defendant as a matter of justice.

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1.1- Introductory Remarks.

The recently enacted Brazilian Civil Code of 2002, which came into force in 2003, revised the 1916 Brazilian Civil Code (The Beviláqua Code) and added a title to its law of obligations denominated ‘Enrichment sine causa’ (articles 884-886). Article 884

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enacts into law a general principle against unjustified enrichment in Brazilian law, which was lacking in the previous Code. The provision of article 884 reads as follows:

'Whoever has been enriched at another’s expense without just cause is obliged to restore what was unduly obtained, after ‘updating (or adjusting) the monetary values.

[Caveat] (parágrafo único): If the object of the enrichment claim consists in a specific thing, he who has received it is under a duty to restore it, and, if the thing no longer subsists, its restitution shall be effected by its value at the time it was demanded.\(^2\)

The reflection that follows explores the meaning and implications of adding the expression ‘after updating monetary values’ (monetary adjustment) to the general principle of unjustified enrichment because such an expression (or its equivalent) does not appear in other codes around the world\(^3\) where a general principle has been recognised.

1.2 - A Brief Overview of the Full Change from the 1916 to the 2002 Code.

Before I deal specifically with the expression “after updating monetary values”, a quick overview of the provision (art. 884) as a whole and the context in which it appears is in order. The new Code added three provisions to its enrichment law, and modified slightly some provisions in the ‘undue payment’ section.\(^4\) The new Code added art. 884 (the general principle against unjustified enrichment),\(^5\) art. 885 (establishes the general principle against unjustified enrichment).

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1 ‘Parágrafo único’ is a caveat which literally means ‘single paragraph’. It is the technical nomenclature used when an Article (Section) is composed of a single subsection which mostly amounts to a qualifier of the provision in the main article (section). Because such a nomenclature is not used in the English statutes, I preferred not to translate it.

2 All translations throughout this article from Portuguese into English language are my own.

3 See for example the Italian Civil Code, art 2041; the German BGB § 812; the Portuguese Código Civil, art. 473-480; the Québec Civil Code, art. 1493-1493 and also art. 1699; the Netherlands BW art., 6:212; the European Draft Common Frame of Reference DCFR 2009 Book VII, 1-101. This last provision which is the most recent ‘codification project’ amongst the various codifications around the world, reads as follows: Basic Rule: (1) “A person who obtains an unjustified enrichment which is attributable to another’s disadvantage is obliged to that other person to reverse the enrichment”.

4 I will not deal with the few modifications on ‘undue payment’ as they are of no consequence for the purpose of this article unless the need arises to cross-reference to them.

5 Art. 884 is cited in full in the introductory remarks.
circumstances in which the claim is sustainable),\textsuperscript{6} and art. 886 (sanctioning the subsidiarity rule).\textsuperscript{7} The caveat to art. 884 also points to the timing and measure of enrichment where the enrichment consisted of a specific thing and such thing no longer subsists. In terms of art. 884 ‘if the enrichment consisted in a specific thing, and such thing no longer subsists, restitution shall be effected by its value at the time of the demand’.

Article 884 enacts into law a general principle against unjustified enrichment. It fills a gap that was identified in the previous Code by several Brazilian writers.\textsuperscript{8} They were of the view that the reasoning by analogy resorted to in the previous dispensation to solve problems that the erstwhile provisions on undue payment could not address, was indeed an inadequate mechanism. They argued that the procedure was vulnerable to allowing ‘injustice’ to be committed in certain deserving cases.\textsuperscript{9} The enactment of art. 884 also lends credence to the point made by Pontes de Miranda, a prominent Brazilian writer. He once stressed that in cases of unjustified enrichment the legal system should look not only at what occurs with the creditor, but also at what is happening to the debtor’s assets. This sidesteps the thinking that that all cases of enrichment are linked to a ‘payment’.\textsuperscript{10} Indeed, enrichment claims go beyond the case of payment of money. This is exactly what the new Code endeavoured to achieve. This paper argues that it has indeed managed to do this.

2- Descriptive Considerations of Article 884.

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\textsuperscript{6} Art. 885. Restitution is due not only when there has been no causa that justifies the enrichment, but also when such a causa ceased to exist.

\textsuperscript{7} Art. 886. No restitutionary action for enrichment shall be entertained if the law grants to the aggrieved party other means to redress the loss suffered.


\textsuperscript{10} Pontes de Miranda \textit{Tratado das Obrigações}, Vol. 26 (1959) 167.
2.1. ‘Enriched at Another’s Expense Sine Causa’.

The first part of the Brazilian general principle corresponds by and large to the elements recognised in other jurisdictions as well. In order for a claimant to successfully institute an enrichment claim he/she must satisfy three requirements. First, there must be an enrichment. Secondly, such enrichment must have come at another’s expense, and thirdly, there must be an absence of ground for the enrichment (the *sine causa* requirement). The notion of enrichment generally presupposes a ‘transfer’ of assets or benefits from the patrimony of one party to that of another. ‘Transfer’ here is used in a very loose sense, to include both an active and passive ‘transfer’. It encompasses not only an actual ‘transfer of the benefit from one person to another but also an acquisition by ‘omission’, that is to say, the saving of expenses which would have been incurred in the absence of the act about which the complaint was made. It also includes an increase of liabilities on the part of the plaintiff while the defendant decreases his liabilities due to the fact complained about. There are other forms in which a defendant might be said to have been enriched at another’s expense, but ultimately all forms must lead to the fact that the defendant is not entitled to keep that benefit, unless there is a *causa* for its retention. The defendant’s enrichment must be *sine causa*. The concept *sine causa* is understood here as the ‘absence of a legal ground’ which implies that either the ground (*causa*) did not exist when the transaction occurred to sustain the validity of the ‘transfer of the benefit’, or, if it ever existed, it has since ceased to exist (an *actio ob causam finitam*). It is common knowledge that Brazil is a civilian-law jurisdiction. Although civilian-law jurisdictions are not homogenous in their approach to unjustified enrichment, it is nonetheless true that all of them share the negative approach to found a claim in unjustified enrichment. Thus, Brazil is no exception in following that tradition. The enquiry is based on the proposition that every enrichment at another’s expense either has an explanation known to the law (*causa*) or has not. If it has one, then, generally speaking, an enrichment claim is not sustainable. If it has no such explanation, then, the retention of the enrichment would be ‘*sine causa*’. Therefore it must be disgorged to the person from whom it was acquired without legal ground. The requirement ‘at the expense of another’ does not generally create many problems though there are a few issues to be addressed in respect of the so-called ‘corresponding impoverishment’ approach. Normally the correlation that the law requires in this regard translates into the fact that any patrimonial advantage acquired by the defendant must result in corresponding disadvantage suffered by the claimant. This is what elsewhere I

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have termed as the ‘mirror-image gain-loss’. An example is when a payment has been made to one who has made a cession after the cession took place, before the payer is notified of the cession. Another situation is where a debtor has paid a creditor after a guarantor has fulfilled the obligation, but without notifying the debtor. In these cases the value that enters into the assets of the enriched party is the same as the value that left the assets of the impoverished party. However, the soundness of the unqualified ‘gain-loss’ requirement has also been doubted in Brazilian circles.

If all three requisites described above are satisfied, the enrichment must be given up. The measure of enrichment is generally accepted to be calculated from the time the claim is instituted, or at the time a demand is made, should this be antecedent to the institution of the claim itself. According to the caveat to the general principle, if the enrichment consists of a specific thing, the thing itself shall be restored. If it no longer exists, the restoration shall be effected by its value at the time it was demanded. How does monetary deterioration due to inflation find its way in assessing the measure of enrichment? I turn now to analysing this aspect of the provision.

2.2 - ‘After Updating the Monetary Values’ (Monetary Adjustment).

The expression ‘after updating the monetary values’ (feita a atualização de valores monetários) is somewhat confusing in the context in which it is used and what it means exactly has not yet been fully tested in courts. Article 884 was meant to introduce a general enrichment action as a catch-all provision. Yet the provision speaks of ‘updating or adjusting monetary values’ apparently as the fourth requirement of such a general action. The use of this element seems to indicate that the enrichment claim provided for under this general action embraces money claims alone and any enrichment that does not fit into the monetary mould is not considered. This observation may be corroborated by the wording of the caveat to the general claim that follows it and which speaks of ‘if an enrichment consisted in a specific thing’ which appears to be there as the opposite of money in the preceding clause. I have highlighted in a footnote above the differences in the wordings of the general actions provided for in the Portuguese and Italian Codes, amongst others, which do not use those words. There is a suggestion in the Brazilian legal literature to the effect that such an expression is related to currency devaluation or
inflation in the country as a whole, but the context does not seem fully to support such a wide contention. Carlos Gonçalves\textsuperscript{12} who advocates this proposition says that

‘the determination that restitution of that which has been unduly received be effected with ‘adjustment of monetary values’ is due to the fact that jurisprudence (court decisions) has for long manifested that the corresponding monetary value constitutes a mere reposition of the value of the currency weakened by inflation, and its calculation is to be computed from the moment the ‘payment’ (emphasis added) was made, in order to avoid the enrichment \textit{sine causa} of the debtor, rendering irrelevant any delay that might have occurred in the institution of the demand’ [my translation].

The author, however, does not cite any authority supporting this contention, save a single reference to one court decision,\textsuperscript{13} and his discussion of this issue appears in a single paragraph of seven lines. Nor does the author tell us what the facts were in that decision in which such a proposition might have been made. He does not say how the judge updated the monetary values and the criteria he used to do so. Be that as it may, Cláudio Michelon\textsuperscript{14} has in the meantime also adopted the same view as Carlos Gonçalves while commenting on the very art. 884 and cross-referencing it to arts. 315, 317 and 404 of the Code. Furthermore, the observations of Judge Sena Rebouças in an Appeal Court


\textsuperscript{13} STJ, REsp 31, 791-MG, 4ª Turma; Rel. Min. Barros Monteiro; DJU, 22/04/2002, p. 212.

\textsuperscript{14} C. Michelon, \textit{Direito Restitutório} (2007) 242. The author says: ‘As regard situation (b) - [at p. 240 – situation in which the value received (which is expressed in money) has suffered a decrease due to currency devaluation. In this case (second case), one must ask whether the obligation to the enriched person also comprises the duty to restore not only the nominal value, but also a reposition of real value, i.e.; a monetary correction] - the provisions of art. 884 seem to make an exception to the general rule in the Civil Code. Art. 315 of the Civil Code determines that debts (owed) in money must be paid in their nominal value. The automatic monetary correction (not agreed upon) is a consequence that the Code ascribes to the non-performance of a pecuniary obligation, with the aim of preserving the purchasing value correspondent to the nominal value at the time of non-compliance (art. 404). The so-called ‘nominalism principle’ that is opposed to the notion that debts have to be paid by the value of the purchase, admits exceptions, such as the possibility of correction of pecuniary value due to the disequilibrium between performances arising from unforeseen events that have occurred from the time the obligation arose (art. 317). Thus, art. 884 makes an exception to the ‘nominalism principle’ because it expressly determines that the value unduly acquired be restored after adjusting the monetary values’ [my translation].
decision in São Paulo (426.304/1 SP) seem indeed to corroborate Gonçalves and Michelon’s interpretation.¹⁵

‘Masking the inflationary process (alleging or pretending that it does not exist, institutionalizing the tale of a ‘strong currency’, but which has always been the same weak currency under a different name), also results in hiding the profits that inflation brings to the State as debtor. The process that once was open is now hidden, but it continues to exist. Inflation is lucrative to the extent that it transfers the assets of the creditors to the debtors. Whenever there is inflation and the fact is ignored for whatever reason (by the law or by the courts’ decisions), there is a transfer of assets. The creditor is impoverished (decreasing his credit in real value), and the debtor is enriched (decreasing his debits), to the extent of the inflation. The profit is exactly what the debtor (in casu, the depositary) has ceased to pay for a while, postponing his debt without any duty of adjusting it (because in effect, inflation continues), which results in an enrichment sine causa, which cannot and must not pass unnoticed by the Judiciary. The institutionalization of a monetary correction [monetary adjustment mechanism] in judicio is an instrument of justice through which judges and courts correct the distortions that, in the face of inflation, legal and contractual norms bring to the rights of the parties.

It is important to correctly establish the concept of monetary correction in judicio (or monetary correction as an instrument of justice), peculiar to the law, although it is of economic origins, or emanating from an economic concept. Monetary correction in judicio is an inherent mechanism to the inflationary process, and for that reason it is only possible to conceive the non-existence of monetary correction if there exists no inflation. It is not only unacceptable and even contrary to the notion of good faith to establish a ‘nominalistic’ principle in time of steep inflation, but also it is objectionable to implement any other idea that could hamper and curb the enforcement of monetary correction in this time of inflation, for, such fact would impose the transfer of the above mentioned assets to the benefit of the debtors while harming the creditors’. Yet, the worst that comes from this same situation is the effect of transforming the Judicial Power in the process to be an instrument of windfalls, or, in the best of hypotheses, as an accomplice of what conventionally is called enrichment sine causa. The non-implementation of a monetary correction (adjustment) mechanism is a profound shock to the general ethical sentiment, and consequently, the suggestion to return the same genuine deposit unchanged represents the idea of returning nothing at all. It would lead to an absurd result, economically indefensible and judicially an aberration, which cannot be sustained. For this reason, it must be ensured that the rules on the actualization of values on the sums deposited must be the same as those that are used to update judicial calculus (assessments), i.e. the use of IPC

¹⁵ The whole issue of currency devaluation leading to the assertion of ‘adjustment according to inflation’ is linked to period of the economic crisis and its main features are embodied in Lei No. 6.899/81 which deals with Judicial deposits. The law is also known as the law of indexation.
(CPI – Consumer Price Index), in the periods in which the government plans above cited have modified the system of ‘remuneration’ of savings, mandating the implementation of indexes that did not reflect the reality of inflation. In these cases, jurisprudence has acquiesced, admitting a real correction. The correction, as a ‘ceiling’, is aimed at maintaining the currency at its initial level of acquisitive power, and consequently, it is not an ‘income’. The devolution of an amount deposited must be corrected (adjusted) from the date of the deposit up to the effective date of receiving such deposits.

Further support for this position can be drawn from the effect that Law No. 6.899/81 (Indexation Decree) may have in the law as a whole. This law is very complex, but we are only interested in those aspects that are relevant to unjustified enrichment. It has been held in a case reported at *REsp. 12.591.0/SP*\(^\text{16}\) that ‘the systematic monetary adjustment of debits arising from judicial decisions – sanctioned by Law No. 6.899/81 – constitutes a real legal principle that is applicable to any kind of legal relationships and in all branches of the law’. The court in that decision further held it to be well known that the phenomenon of monetary adjustment ‘is exclusively aimed at maintaining over time the real value of the debt by means of an alteration in its ‘nominal’ (numeric) expression. It does not generate any increase in the value nor does it translate into a punitive sanction. It simply derives from the passage of time under the currency devaluation regime’.

Under the rules sanctioned by such a law in a generally indexed economy,\(^\text{17}\) it is said that one must transform any monetary obligations – especially those arising from contractual transactions – into ‘debts in values’ (dívidas de valores) in which the currency serves as a mere indicator of an amount which changes according to pre-established indexes.\(^\text{18}\) It is to be noted that, as regards the debts arising from judicial decisions, art. 1 of Law

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\(^{16}\) *REsp 12.591-0/SP* (1ª Turma STJ) (18.5.1992) Relator, Min. Demócrito Reinaldo, in *Boletim Adcoas* No. 138.819

\(^{17}\) It is debatable to what extent Brazilian economy can still be considered as a generally indexed economy; for over time many have argued for its des-indexation to some extent. Therefore the ‘adjustment of monetary values’ under art. 884 of the New Civil Code should be put in perspective with time, if it is indeed correct.

6.899/81 clearly encompasses all pending payments arising from the unfulfilled obligations, and it mandates monetary adjustments of any pecuniary debt even if there exists no specific contractual provision. In the case of a liquid debt, monetary adjustment is to be undertaken from the time the debtor fell in mora, and in all other cases, from the time the judgment was issued. In some instances, obligations undertaken envisaging payment in a foreign currency, the operation itself is normally not invalidated, but the clause that stipulates the foreign currency operation is sometimes considered null and void although the agreed upon sum between the parties in such agreements still has to be converted into the national currency. In these cases the problem that often arises is to determine the value date for the conversion, whether it is the stipulation date or the payment date. In either hypothesis, there arises the possibility of an unjustified enrichment. While the Federal Supreme Court (Supremo Tribunal Federal (STF)) in such issues has decided that the conversion to the national currency is to be considered from the date of the stipulation (i.e. of the judgment), because, according to the court (Rel. Min. Morreira Alves) a conversion based on the date of the payment would result in an unjustified enrichment (inaccurately labelled as ‘enriquecimento ilícito’) of the creditor who would benefit from the adjustment of the foreign currency during the duration of the contract, having as basis an invalid act, which is expressly proscribed by Decree No. 23.501/33. Logically, the appealed decision from the TJRJ (Tribunal de Justiça do Rio de Janeiro) was equally founded on the principle forbidding an enrichment sine causa, but there it was seen from the position of the other party. According to the TJRJ the conversion of the sum borrowed through a loan contracted in a foreign currency had to be made from the date of payment, in order to avoid an enrichment sine causa of the

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19 This issue is based on Decree No. 23.501 of 27/11/1933. This decree forbade in all internal contracts (contracts within Brazil) stipulations and payments in gold (it is to be remembered that in 1933 the world still operated under the Gold standard) or in other determined currency, other than local currency. This precept originated precisely because of the inflation and the cambial imbalances of the time. These imbalances forced the Provisional Government of 1930 to enact such legislation following the example of other countries. This legislation is still in force but it has been modified over time and several exceptions are now made to its provisions.

20 Foreign readers should take notice that under Brazilian ‘legal nomenclature’ the justice (judge) issuing the judgment is commonly referred to as ‘Relator’ (in brief: Rel.) and the judges or justices at the ‘Supremo Tribunal Federal’ (STF) are referred to as ‘Ministers’ (in brief: Min.).

21 It is not infrequent that some writers interchangeably use ‘enriquecimento ilícito’ with ‘enriquecimento injustificado’ (sine causa). The confusion occasionally appears also in some judgments, such as in the judgment referred to here.
debtor in the face of the devaluation of the national currency while the contract was in operation.\footnote{See generally Jurisprudência Brasileira 70/74-78.} Thus, however the issue of ‘monetary adjustment’ is seen, it is obvious that it leaves a windfall to one party in the equation, which though it might ultimately be justified (i.e. it is \textit{cum causa}, because of the application of the said Law 6.899/81), it might still be unjust.

Inflation ordinarily is not created by private citizens, but it is usually the result of changes in market conditions, and sometimes the effect of government intervention in the economy. How can a provision aimed at all private persons at large (as well as public bodies) be made dependent upon an action taken by the state (where the state intervenes)? While the above interpretation would be adequate where one party is a public body (e.g. depository institutions such as a bank or the like), stretching that interpretation to cover ordinary private citizens has a penal quality, and its universal applicability to any branch of law is questionable.

In order to capture the possible meaning of the words ‘updating the monetary values’, one must analyse the provision as a whole. It says that ‘whoever has been enriched at another’s expense without just cause shall restore what he has unduly acquired, after updating the monetary values’. The provision states a general principle and does not refer exclusively to money claims; though its final part speaks of ‘monetary values’; it refers to any enrichment acquired \textit{sine causa}, be it a monetary benefit or a money worth benefit, or any kind of benefit from which the recipient enriches himself at another’s expense. The caveat (parágrafo único) that follows the provision also indicates that if ‘updating monetary values’ were to refer to currency inflation, it would be incongruent with an enrichment consisting in a specific thing for which the calculation of the value of the enrichment, if the thing has been lost or no longer exists, is to be considered from the time the demand is made (\textit{litis contestatio}), and not when the thing was acquired by the defendant. This assertion that the enrichment generally is to be considered from the time of the \textit{litis contestatio} is well entrenched in Brazilian law for, as Pontes de Miranda once put it, ‘what is given in the case of unjustified enrichment is not the value of the thing at
the time that the enrichment occurred, but the value of the defendant’s enrichment as it enriches him at the time the action is brought’. The same author elaborated on this view by adding the following example in respect of a specific thing: ‘If the thing had remained in the hands of the claimant would be valued at ‘a’, but while it remains with the defendant its value is now ‘a+x’, then the value to be restored to the claimant is ‘a+x’, save in the cases provided for under art. 966 of the Civil Code 1916’. Article 966 which constitutes an exception in Pontes de Miranda’s analysis, provided as follows: ‘To the fruits, accessions, improvements and deteriorations that have occurred to the thing given in an undue payment, shall apply what is provided for under arts. 510-519 (of the 1916 Code)’. These provisions have not changed that much under the new Code. Rodrigues Filho Eulámpio exemplifies the application of the then art. 966 with reference to a São Paulo court decision reported and commented upon at TJSP, RT 613/96 in which decision it appears that a disputed salary was fixed in a first instance court decision. On appeal, the Court of Appeals reduced the quantum to a lower sum, and of course ordered the immediate restitution of the excess. The loser tried to launch an appeal for a monetary correction of the quantity returned but the court held the appeal to be inadmissible.

The example given by Pontes de Miranda does not detract from the general proposition that in an enrichment claim the measure of the enrichment is calculated from the time of the institution of the action, save exceptions. In this example he is dealing with an existing thing which is still held by the defendant, and while remaining with the defendant, its value has changed from x to y. Because it is the thing itself to be restored, the proposition does not create any problem. If it is no longer the thing to be restored, but its value, and the holder had notice at the time that it might have been lost, then the measure can indeed be (a+x) for in such a case the defendant will be precluded from denying the claim because he has knowledge that the thing belonged to another. From

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24 The new Civil Code in art. 878 provides the following: ‘Aos frutos, acessões, benfeitorias e deteriorações sobrevindas à coisa dada em pagamento indevido, aplica-se o disposto neste Código sobre o possuidor de boa-fé ou de má-fé, conforme o caso’. [To the fruits, accessions, improvements and deteriorations that have occurred to the thing given in an undue payment, shall apply what is provided for in this Code about the good faith or bad faith possessor, as the case might be].
this it can indeed be seen that in some situations of enrichment liability it matters whether the thing received was a fungible or a non-fungible.

In any event, the words ‘after updating the monetary values’ added to the general principle seem to me to reflect the old notion of enrichment liability adopted in the 1916 Civil Code which only considered ‘undue payment’ and made the whole field look as if it were dependent upon a payment, as earlier said. Indeed that seems to be the message that those words are conveying; that is to say the general principle of enrichment *sine causa* is seen as if it could only emanate from a performance through payment of money. If that is indeed the meaning to ascribe to the general principle, then, if it is not a limited vision of the field as a whole, it might be another oversight in the drafting style. The later possibility is probably the correct interpretation since no one today holds the restricted view about a general enrichment action that is evident in the first possibility. The Italian provision (art. 2041 of the *Codice Civile*) by which the Brazilian drafters were inspired does not mention any balancing of monetary values in such a fashion. The provision there reads:

‘*General cause of action for unjustified enrichment*. A person who has enriched himself without cause at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss. If the enrichment consists of a special thing, the person who received it is bound to return it in kind if it is still in existence at the time of the demand’. 27

In my opinion it would have been better not to attach the words ‘updating monetary values’ to the general enrichment principle, but to have inserted a separate clause dealing with the issue. Each case could have been dealt with according to its merits, but with the benefit of having a clear indication in the Code of a clause authorizing such mechanism,

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26 Note that similarly to the Brazilian art. 884 of the CC 2002, the Italian art. 2041 says ‘*senza giusta causa*’.

27 This Italian general principle is then followed by the subsidiarity rule in art. 2042 which provides: ‘*Ancillary character of action*: An action for unjustified enrichment cannot be instituted if the person injured can exercise another action to obtain compensation for the injury suffered’. For details on the subsidiarity rule under Italian law see my separate publication on this topic to appear soon (NB. At the time of writing this paper the referred ‘separate publication’ was still under consideration by the Editors of the *Columbia Law Review*, New York. Exact reference will be provided in due course. The manuscript is obtainable from the writer).
avoiding in this way the danger of an excessive exercise of discretionary powers by the courts.

A further problem arising from the fact that those words were attached to the general enrichment principle becomes evident from the fact that the structure adopted for the enrichment law in the Civil Code clearly separates ‘undue payment’ – the *condictio*-claim – from the ‘general enrichment claim’ (the *versio*-claim). Under such a scheme, where a ‘*condictio*-claim’ (undue payment) applies’, the ‘*versio*-claim’ (the general principle) does not apply. If that is not the case, why were they separated, and the ‘undue payment’ clauses precede the general enrichment clauses? But when one looks at the practical application of ‘adjustment of monetary values’ which is in the general enrichment clause, it is being applied to ‘undue payment’ factual scenarios alike, and even beyond. The above-cited quotation in *REsp. 12.591.0/SP* illustrates this fact. For this reason, I think that it would have been better if the general principle were placed earlier in the structure of the Code, rather than after the heading on ‘undue payment’.


Can Change-of-position (Loss of Enrichment) be a defence in circumstances of monetary inflation under Brazilian enrichment law? *Prima facie*, Brazilian law does not directly recognise change-of-position (loss of enrichment) as a defence to unjustified enrichment claims, save perhaps an application by analogy of art. 238 of the new Civil Code which deals with impossibility of performance in cases of obligations to give a *certa res* (certain thing). Art.238 reads as follows: ‘If the obligation is to restore a certain thing, and this thing, without the debtor’s fault, is lost before the transfer (tradictio), the creditor shall suffer the loss, and the obligation will be terminated, save his rights up to the date of the loss’. This provision does not appear in the law of unjustified enrichment. I have discussed elsewhere in my

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28 REsp. 12.591-0/SP (1ª Turma STJ) (18.5.1992) Relator, Min. Demócrito Reinaldo, in *Boletim Adcoas* No. 138.819] - ‘The systematic monetary adjustment of debits arising from judicial decisions – sanctioned by Law No. 6.899/81 – constitutes a real legal principle that is applicable to any kind of legal relationships and in all branches of the law’ (emphasis added).
doctoral thesis\textsuperscript{29} that because the caveat to art. 884 of the new Civil Code already provides a solution where the thing has been lost, i.e. ‘it must be restored by its value’, art. 238 does not seem to apply to claims arising under art. 884 because if it were otherwise, the mechanism provided for in art. 884 would be rendered redundant.\textsuperscript{30} There are however subtle manifestation of a change of position defence in the formulation of some provisions of the Code. I have also discussed some of those subtle manifestations in my thesis. For present purposes, it is my view that the issue of monetary adjustment in unjustified enrichment law may indeed constitute another subtle manifestation of the need of a change-of-position (loss of enrichment) defence. I will discuss this proposition below. For the time being, however, it is enough to say that in loss of enrichment situations the defendant is saying ‘I do not have anymore the enrichment that I once had’. In contrast, in situations of monetary correction the plaintiff, by asking for the monetary value to be adjusted, or by having it done by the court \textit{mero motu}, is really saying that ‘the defendant has in fact more than he seems to have’. If the defendant has indeed more than he seems to have, on what ground is the plaintiff entitled to that ‘extra amount’?

4. - Subtle Messages Emanating From the Brazilian Formulation of Enrichment Liability.


No one doubts now that a general principle is a welcome development. By sanctioning a general principle, the Brazilian legal system has made it easier for the claim to be raised without undue complications. The formulation followed, however, seems problematic. Adding the expression ‘after updating monetary value’ impacts not only in the measure of recovery, but also on the timing of its assessment and the interlinked issue of interest in money. To what extent is an unjustified enrichment claim amenable to be adjusted?

\textsuperscript{29} See Aimite Jorge, \textit{Change of Position in Comparative Perspective} (University of Cape Town, 2009) chapter 4.

\textsuperscript{30} See generally chapter 4 of my doctoral thesis ‘\textit{Change of Position in Comparative Perspective}’ (University of Cape Town, 2009).
Does the new provision sanction a dual interest regime in enrichment claims (if interest is at all claimable), or does it sanction only one regime? I discuss these questions later.

### 4.2. - What does the Brazilian Approach and Experience Tell Us?

The general manifestation of the unjustified enrichment doctrine under current Brazilian law is to some extent similar or analogous to many other civilian-law jurisdictions, especially those following the “Pothier School”, varying only in some nuances. But there are at least two important aspects in which Brazilian law is very peculiar and such aspects relay noteworthy messages to other jurisdictions. The first message that can be extracted from the Brazilian formulation of the unjustified enrichment doctrine is that in whatever way a legal system tries to ward off loss of enrichment as an objective defence in its enrichment law, the system will still need to address the issue. If it cannot do so directly it will do so by analogy. If a system gives way to a general enrichment action, it is bound to establish not only mechanisms to protect vulnerable receivers, but also to specify to what extent its enrichment law will delimit the right of recovery in ‘borderline’ cases. Omitting a general enrichment defence and relying on analogy is however problematic. That is because the approach may lead to the conception of an enrichment doctrine which is too restrictive and that leaves aside many deserving cases in the attempt to protect the integrity of the principle as enshrined in the code.

The need for a change of position defence becomes even stronger if that system also places emphasis on the concept of good faith throughout its private law. That is exactly what happens under current Brazilian enrichment law because the notion of good faith permeates the civil code at large. Hence the subtle manifestations of loss enrichment defence we observe in the Brazilian enrichment law.

The second important message emanating from Brazilian enrichment law is the need to establish the real place and the consequences of inflation within enrichment liability. Generally under private law most legal systems adhere to the ‘nominal value principle’,
and this principle *prima facie* constitutes an ‘obstacle’ to adapt say, a contract, on the basis of regular inflation unless the parties have agreed to do so. While on the one hand, the creditor normally ought to bear the risk of depreciation, an appreciation of the value of the currency would seem to be empathetic to the debtor. The situation, however, might be different where such inflation is no longer ordinary in so far as contract law in general is concerned. Here we encounter two trends of thought, (in some legal systems), one adhering strictly to the ‘nominal value principle’ while the other advocating adjustment rules. Each of them advances different reasons to sustain their contention. Those adhering to the general application of the nominal principle usually contend that it would be contrary to the ‘criterion’ of reasonableness and equity, if, for example, the judge were to adapt a contract in random occurrences (i.e.; in the case of one plaintiff), where many other people in the society will equally be affected by the same ‘exceptional inflation’. However, where regular inflation affects a long term contract, there is a tendency to consider exceptional cases and allow some judicial intervention to adjust the contract. The underlying idea for such adjustment is that it would be unreasonable if a disproportionately inflationary advantage simply fell into the lap of one of the contracting parties. To avoid that ‘unjust’ outcome, some theorists think that the ‘disturbed contractual equilibrium should always be restored’. These considerations, however, fall mostly within contract law, though their ambit can have ramifications beyond that field.

What exactly is the position under unjustified enrichment law in which the parties to the claim may not necessarily be linked by an underlying contract denoting voluntary assumption of risks? Can monetary inflation qualify as a form of change-of-

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31 See for example art. 6:111 of the Principles of European Contract Law. To the same effect is art. 6:258 of *Burgerlijke Wetboek, BW* (new Dutch Civil Code) and to some extent also art. 6: 260, BW. In the Dutch legal doctrine, for instance, A.S. Harkamp (*Asser’s Handleiding tot de Beoefening van het Nederlands Bürgerlijk Recht, Verbinstenissenrecht, Algemene Leer der Overeenkomsten* (2005) n. 338 (as cited by Mirella Peletier “Common Core of European Private Law – Change of Circumstances – Dutch Report” (Research Offices, Supreme Court of The Netherlands) http://www.unexpected-circumstances.org/Dutch%20report%20nov.%2006.doc (last accessed 19 April 2009)), remarks that in reverse cases in respect of the influence of appreciation of immovable property on marriage settlements, the Dutch Supreme Court disregarded the nominal value principle on the basis of unforeseen circumstances. In order words, it adjusted the value taking into account appreciation or depreciation of the currency. Harkamp refers here to cases reported at HR 10 January 1992, NJ 1992, 651; HR 15 September 1995, *NJ* 1996, 616; HR 12 June 1987, *NJ* 1988, 150. (HR=Hoge Raad)

position/circumstances? If so, how would it operate? What difficulties are there proving or disqualifying this potential head of the defence?

The appendage of ‘monetary adjustment’ to the general principle against enrichment *sine causa* in the new Brazilian Civil Code$^{33}$ indicates that the issue transcends the ambit of contractual obligations. I mentioned earlier that such an appendage to the general principle was unfortunate, as it throws the general principle into confusion. But my disapproval of the appendage does not necessarily mean that the issue should not feature within the enrichment doctrine. I highlighted earlier that the drafters of the Civil Code should have done so in a separate provision. What does inflation really tell us in such contexts?

The general process of inflation can give rise to a multitude of different problems, and for our purposes the most salient of these would be two distinct issues, namely, that of revalorization and that of discharge. Once again we see here that there is a need in an enrichment context to know how the enrichment came about. While revalorization (of a currency) in our context presupposes a debt that must be paid or re-paid in certain monetary units and thereby the possibility of adjustment; discharge of the obligation, on the other hand, tells us that the claim arises from a contract and there are underlying cost variations. When inflation is seen from the perspective of possibly discharging the contract, the concept presupposes a voluntary agreement between the parties, and inflation might be seen as one of the risks voluntarily assumed. When it is seen from the perspective of revalorization, the concept does not necessarily presuppose a contract between the parties. It may also entail a unilateral act.

The issue straddles several areas: third party claims, risk assumption, termination or variation of contracts, among others. Apparently in the cases of devaluation there is ordinarily no problem of impossibility to restore the benefit received, nor is there any issue of bad faith. The receiver is ready to restore the benefit received, the only problem being that the ‘purchasing power’ of the money has diminished. Restoring the ‘money’ in

$^{33}$ New Brazilian Civil Code art. 884.
the same units as received corresponds ‘numerically’ with restoring the ‘value received’, but value-wise, it actually corresponds to the ‘value remaining’. On what basis can then the plaintiff claim the restoration of the ‘actual value’ (adjusted value), without leaving the defendant worse off, as a result of having received an undue/unjust gain? In these cases, why should the loss be shifted from an innocent and ‘mistaken or unmistaken’ party to an innocent party who neither made a mistake nor brought about the event that led to the decline of the value?

The message that can be distilled from the Brazilian enrichment law (the new enrichment sine causa under art 884 of the new Civil Code as discussed above) is that a situation of hyper-inflation can result in involuntary enrichment of one party at the expense of another. The issue, however, is complicated to be addressed within the enrichment doctrine, because the act enriching one party and correspondingly impoverishing the other is ordinarily not done by the parties themselves, but by a third party which is generally the government, or outside events such as market turmoil in times of global recession or conflicts. From the perspective of the parties such an occurrence (currency devaluation) is more akin to a supervening event outside their control. Both parties would seemingly be in the position of two innocents. Can then the rule which says that ‘as between two equally ‘innocent’ parties, the position of the defendant is the better’, apply to such cases? What would be the implications of such application?

Thus far it is prima facie a moot point in South African law as well as in English and American laws whether monetary inflation can qualify as a relevant change-of-position for enrichment law. Such a situation would be more common where there are steep currency fluctuations or devaluation, or a total collapse of the currency such as it

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34 Note however for English law that a dictum by Lord Roskill in National Carriers Ltd v Panalpina (Northern) Ltd [1981] 1 AC 675, 712 refers to ‘inflation’ as one of the ‘circumstances in which the doctrine of frustration has been invoked, sometimes with success, sometimes without’. So it is not very clear whether inflation falls within the former or within the latter group of circumstances.

35 Note equally some nuanced references to discharge of contract for inflation in Arthur Corbin, Contracts, § 1360. He says that the ‘difference in value between the gold and paper currencies could have been taken into account in action for damages’ thereby suggesting the possibility of discharging the contract. (References to gold and paper currencies are made in relation to the Gold Standard which used to regulate international exchange and which is more commonly known as the Breton Wood system). For related issues on the Gold Standard and possible unjust enrichment in currency devaluation in USA, see Perry v US 294 U.S. 300.
happened in Brazil in the 1980s-1990s, or the current hyper-inflation in Zimbabwe. In the assessment whether inflation should be considered as a potential head of change-of-position, a distinction must then be made between different degrees of inflation: slight inflation, severe or acute inflation and a total collapse of the currency. Although the last two might be considered speculative in some economies, we have a living example – Zimbabwe - where it cannot be said that that inflation is acute or severe, but rather has resulted in a total collapse of the currency. It is not unimaginable that the judiciary might be called upon to decide enrichment cases in these circumstances. Where the claim arises from a ‘functioning’ contract, the contract itself might provide for payment to be ‘index-linked’, but this only works if the inflation is somewhat predictable and manageable, and the remedy is to be founded in contract. Where the inflation is so extreme as to amount to a total collapse of the currency, an ‘index-linked’ approach by the parties themselves may not work. The contract is simply ‘defunct’ and performance should simply amount to near-impossibility, thus discharge might be the logical outcome. It is more likely that in cases of extreme inflation, or total collapse of the currency, such effects on contracts and other private law matters would be dealt with by legislation and the questions raised here would not need to be resolved by the courts applying the common-law principles. But should such legislation be wanting, there would still be room for judicial pronouncement and, in my view, the change-of-position defence would be available in the circumstances. The same rationale presented in the question as to whether change-of-position should be available to public authority in the ‘disaster version’, as discussed in chapter five of my doctoral thesis, would mutatis mutandi apply in these cases.

4.3. - ‘Updating Monetary Value’ and Interest on Money.

Corollary to ‘adjustment of monetary values’ in the unjustified enrichment doctrine is another important incidental question: that of interest on money. This question, though incidental only, is of great significance because it may influence the whole conception of

36 G.H. Trietel Frustration and Force Majeure (1994) 277 (§§ 6-041 to 6-042). See also once again the Brazilian discussion above and the adoption of the ‘indexed-system’ in the years 1980s-1990s.
37 Aimite Jorge Change of Position in Comparative Perspective (University of Cape Town, 2009) 288-292.
the enrichment law. Is interest on money recoverable under current Brazilian enrichment doctrine? If it is not, that is the end of the matter. However, if it is, then the following ramifications arise: If interest is due on a sum of money that must be restored, it is obvious that such interest is more likely regarded as a fruit of the principal sum. That being the case, it must also be assumed that such interest is to be earned from the time of the receipt of the money, or at least from the time of litis contestatio. Then, for example, if it is assumed that in an undue payment claim the restoration of interest is no less due than the restoration of the principal, the further question that needs to be asked is whether there are two different regimes for the recoverability of interest in enrichment claims under Brazilian law. Or to frame the question another way, one would ask the following subsequent questions: (i) Is interest recoverable on a claim based on undue payment – the condicio version – or not? If it is, from what sum? (ii) Is interest recoverable in a claim based on enrichment sine causa or not? And; (iii) if the answer to (ii) is in the affirmative, what consequences does the recoverability of interest have on the calculation of the measure of enrichment under art. 884?

If one considers that in many cases falling within the undue payment (- the condicio- version of the enrichment claim) there is no special agreement between the parties regarding recovery, it should also be assumed that there might be no recovery of interest. That is so because the sum ‘owing’ on undue payment is not a commercial loan. Even if it were considered analogously as a loan (‘a mutuum’), the proviso dealing with ‘o mútuo’, arts. 586-592, do not attract interest except where the mutuum falls within the provisions of art. 591 in terms of which a ‘mútuo’ given for economic finality attracts interest.  

38 For example art. 878 of the Brazilian Civil Code may implicitly be said to consider interest as a fruit, for the article provides that “to the fruits, accessions, improvements and deteriorations accrued to the thing given in undue payment apply the provisions of this code dealing with a good faith or a bad faith possessor, as the case may be.” (Emphasis added).

39 Other provisions of the Code making reference to interest are art. 591 referred to in note 40 below; arts. 297, 389, 395, 404, 405, 406, 407, 552, 677, 833, etc.

40 Article 591 reads: “If a loan (mutuum) is given for economic aims, interest is presumed, and such interest may not exceed the rate referred to in art. 406 (of the Code) on annual capitalization, otherwise it will be subject to reduction” [Destinando-se o mútuo a fins econômicos, presumem-se devidos juros, os quais, sob pena de redução, não poderá exceder a taxa a que se refere o art. 406, permitida a capitalização anual].” [If a loan (mutuum) is given for economic aims, interest is presumed, and such interest may not exceed the rate
In this view of the non-recoverability of interest on undue payment the assumption that I am making is that if the party received the money in good faith believing it was his own, then he must also be free to deal with his money as he deems fit. Were it otherwise there would be a danger that the defendant who has not been earning interest on the money that he received will be subject to an obligation to make restoration beyond the extent of his enrichment. This would be equivalent to imposing liability on the back of the people. Put differently, if I had no agreement with you for the receipt of your money, I cannot be bound to pay you interest on that sum, because I am not your investor. A probable exception to this, if the receiver is in good faith, is where the money was directly deposited in an interest bearing account.

Meanwhile, if the word ‘fruits’ in art. 878 of the Code is understood to also encompass ‘interest’, as it indeed would appear to do (unless ‘thing given in undue payment’ excludes money, which does not make sense), then the defendant equated to *mala fide* possessor can (or will) be liable to the extent he was enriched by the ‘fruits’, even if they might have been consumed. Should, however, a defendant under a claim falling within such provision be equated to (or assumed to be) a *bona fide* possessor, he might not be liable even to the extent that he was enriched by the ‘fruits’ which he gathered and consumed in good faith. I reiterate once again that the provision clearly says that ‘to the fruits, (...) accrued to the thing given in undue payment apply the provisions of this Code dealing with a good faith or a bad faith possessor, as the case may be’. Here we clearly see that the Brazilian Legislature by framing art. 878 (in so far as the consequences of the accrued fruits to ‘a thing received in undue payment’ are concerned) to analogously differentiate a defendant who is a *bona fide* possessor from a *mala fide* possessor, directly indicates that the maxim ‘*bona fide possessor facit fructose perceptos et consumptos...

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41 The Brazilian Civil Code drafters manifest here an authentic fidelity to Roman law, because interest was not payable on *mutuum* in Roman law as it was considered a gratuitous loan normally between friends. In fact the drafters clearly distinguish two types of loans: the ‘comodato’ (arts. 579-585) and ‘mútuo’ (arts. 586-592). ‘Comodato’, according to the Code (art.579) is the loan of non-fungible objects, while ‘mútuo’ is conceived as the loan of fungible objects (art. 586). The borrower in the case of ‘mútuo’ is ‘obliged to restore to the lender what he received from him in an object of the same nature, quality and quantity’.

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suos\textsuperscript{42} would indeed apply to such cases. This, in turn, implies by inference that a defendant who is equated to a \textit{bona fide} possessor under art. 878 of the Brazilian Civil Code indeed has the defence of change of position (or loss of enrichment) as far fruits are concerned. That would also imply that the same defence which is applicable to the ‘fruits’ is also applicable to the ‘principal thing’. But let us stick for the time being to the question of interest in the enrichment law as a whole.

What about a case falling within the \textit{actio de in rem versio} aspect of the claim? Does it attract interest and, if so, why? The circumstances giving rise to such a claim may vary from case to case, and there appears to be no unanimity about the contours of the claim. Nonetheless, the provisions of the Brazilian Civil Code (arts. 884-886) are silent. For this reason any conclusion to the effect that an interest is claimable must be drawn either by inference or by cross-referencing to other provisions of the Code. Nonetheless, based on the general principle of law, ‘\textit{prima facie}’ interest seems to be claimable in unjustified enrichment law besides the principal sum.\textsuperscript{43} But this is a mere general inference. According to art. 404 of the Code, ‘losses and damages’ in obligations payable in money are to be paid adjusting their monetary values in accordance with official indexes regularly established. The payment encompasses ‘interest, expenses and lawyer’s emoluments, without prejudice for the “conventional sentence” [da pena convencional]’. And according to article 405 of the Code ‘interest on \textit{mora} runs from the “initial citation”’ i.e. from the moment of the issue of judgment\textsuperscript{44} (in some cases it is probably from the moment of first notification). These two provisions, however, cannot be said to apply to an enrichment \textit{sine causa}, because art. 404 speak of ‘losses and damages’. This clearly indicates it is not applicable to enrichment claims because an unjustified

\textsuperscript{42} Translated the maxim means ‘The \textit{bona fide} possessor makes the fruits gathered and consumed his own’.

\textsuperscript{43} For comparative insight see the new Article VII-5:104 of the European Union DCFR (Draft Common Frame of Reference) a project of Study Group of the European Civil Code Project presented to the European Commission on 18 December 2008. Art. VII-5:105 there reads: ‘Reversal of the enrichment extends to the fruits and use of the enrichment if the enriched person is in bad faith at the time that the fruits or use are obtained’.

\textsuperscript{44} I am of the view that ‘initial citation’ is used in a wider sense. In some contexts it would appear that ‘initial citation’ is strictly equated with ‘court judgment’ as ‘citation’ seems to refer to a judge’s pronouncement. However, if to be put \textit{in mora} were to be understood in that sense alone it would either be too restrictive or even contradictory in some cases. A defendant who has been notified as owing a sum of money is certainly put \textit{in mora} from that moment if he knows that the money is not his to keep and the court decides so only at a future date.
enrichment claim is about ‘gains obtained at another’s expense without valid ground’ and not about ‘losses or damages’ suffered. ‘Losses and damages’ presuppose contractual or delictual (tort, or civil responsibility) claims. Likewise, art. 405 cannot be said to apply because a defendant in an unjustified enrichment claim is not presumed to be in mora for the payment of money until such time he has notice to the contrary. Until then, the defendant must be able to rely on the money that he received as absolutely his. By inference, however, art. 405 cast some light on the issue. If interest on mora runs from the initial citation,\(^{45}\) that implies that from the time the defendant has notice interest starts to accrue. By implication, this can be extended to an enrichment claim, because if under the enrichment sine causa doctrine the measure of enrichment is calculated from the time of ‘litis contestatio’ (or litis pendente), that also means that from that moment the defendant has notice of the claim and any money ‘being retained sine causa’ is now due as if it were a debt, unless the defendant has a recognised defence.\(^{46}\) It can analogously be said that from the moment of ‘litis contestatio’ the defendant is put in mora, and therefore interest would equally start to accrue, and the sum ‘owed’ from that moment is the base value (the principal sum) for calculating interest.

Article 884 provides however that the amount to be restored is “known” only ‘after adjusting monetary values’. If the principal sum to be restored is not known until ‘monetary values have been adjusted’, can it really be said that the defendant has been put in mora for that “unknown value” of the “debt”? Put differently, if monetary adjustment is to be undertaken, from what date does interest start to accrue and based on what principal sum? Is it the ‘pre-adjusted value’ or the ‘adjusted value’ that is the principal amount for calculating interest on the sum due?

In any event, it is worth noting that the idea that a sum held sine causa is susceptible to be adjusted according to the level of inflation implicitly embodies a nuanced conception of that sum being analogously considered as a commercial loan (a mutuum). On this assumption, one might say that interest would accrue as of right, unless the parties

\(^{45}\) I use ‘initial citation’ in its wider sense described above.

\(^{46}\) Obviously if ‘initial notice’ is equated to court judgment, whatever defence the defendant might have had is of no consequence after judgment.
'agreed’ otherwise. If it does not accrue as of right, then it might be dependent on other factors. Policy considerations might be a candidate here.

If the measure of enrichment is considered as the ‘value received’ and such value is only ‘known’ with certainty after the value of the money has been adjusted according to the rate of inflation at a given period, there is no ‘exact amount’ on which to calculate interest until such adjusted sum is determined. In such cases there arises incongruence between the ‘sum claimed’ as the amount by which the defendant has been enriched as ‘principal value’, and the sum on which the interest is to be calculated. For example, if ‘B’ is enriched sine causa at the expense of ‘A’ for the sum of $R 50,000 on the 29th January 2008 and by 31st January 2009 there is a 50% inflation of the currency with the result that the real value of the sum owed ($R 50,000) has now become $R 75,000 by the time judgment is passed, a simple interest of 20% on the principal amount owing from 29 January 2008 to 31 January 2009 would amount to $R 10,000. If, on the other hand, the principal sum for the calculation of interest is now considered $R 75,000, a simple interest of 20% on that sum is $R 15,000 if calculated per annum. Interest may also not be due before the date of the determination of the value (the day the judgment is issued), because there is no principal amount to serve as the basis for the calculation of the interest. If the rate of 20% interest is levied on the $R 75,000 now owing, it may not be applicable retrospectively to the date of litis contestatio (the date the claim arises), because no such amount was owing on the 29 January 2008. The defendant was never put in mora on that date as owing the sum of $R 75,000. It is plain in law that interest is ordinarily due either ex lege, ex contractu or ex mora. If none of these aspects apply, in principle it becomes difficult to levy interest on a sum of money to be paid. One must then find ways to justify why interest should be due on that sum of money to be paid.

In essence, if we accept that the ‘final’ proof of the extent of enrichment is only established after ‘adjusting the monetary values’, we are effectively saying that any sum to be awarded for interest will be assessed as a ‘pre-judgment’ interest if it started to run from the time of receipt of the money. At the level of principle we encounter a dilemma. On one hand, we are saying that ‘whenever a defendant receives money and keeps it for a
reasonable time, there is a presumption that he is earning ‘fruits’ with that money and therefore he is being enriched \textit{sine causa} with our money. On the other hand, it is also plain that we are not certain that the defendant is actually earning any interest and therefore being enriched. Consequently, in the face of uncertainty to allow relief in any case where actual enrichment is not yet proved is inconsistent with the fundamental principle of unjustified enrichment.

\textbf{APPENDIX.}\
Original text in Portuguese with English Translation of the New Provisions on Enrichment \textit{Sine Causa} in the Brazilian Civil Code of 2002 - \textbf{Articles. 884-886}.\
(My own translation).

\textbf{CAPÍTULO IV (CHAPTER IV).}\
\textbf{Do Enriquecimento Sem Causa (On Enrichment \textit{sine Causa}).}

\textbf{Art. 884.} Aquele que, sem justa causa, se enriquecer à custa de outrem, será obrigado a restituir o indevidamente auferido, feita a atualização dos valores monetários. Parágrafo único. Se o enriquecimento tiver por objeto coisa determinada, quem a recebeu é obrigado a restituí-la, e, se a coisa não mais subsistir, a restituição se fará pelo valor do bem na época em que foi exigido.

\textit{Art. 884.} \textit{He who, without just cause, is enriched at another’s expense, is obliged to restore what was unduly obtained, after ‘updating (or adjusting) the monetary values.}

\textit{Caveat (parágrafo único): If the object of the enrichment claim consists in a specific thing, he who has received it is under a duty to restore it, and, if the thing no longer subsists, its restitution shall be effected by its value at the time it was demanded.}
Art. 885. A restituição é devida, não só quando não tenha havido causa que justifique o enriquecimento, mas também se esta deixou de existir.

Art. 885. Restitution is due not only when there has been no causa that justifies the enrichment, but also when such a causa ceased to exist.

Art. 886. Não caberá a restituição por enriquecimento, se a lei conferir ao lesado outros meios para se ressarcir do prejuízo sofrido.

Art. 886. No restitutionary action for enrichment shall be entertained if the law grants to the aggrieved party other means to redress the loss suffered.