The Rules about Restitution in the Proposal on a Common European Sales Law

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Abstract: Under the point of view of restitution law, the proposal on a Common European Sales Law, Part VII, draws a parallel between terminated and avoided contracts, which is much more convincing that the binary model followed by the Draft Common Frame of Reference (DCFR). It is, however, necessary to make this set of rules consistent with the general principle of unjustified enrichment, which according to European law represents its underpinning. In this article, the author suggests therefore the following corrections: (a) any reference to equity as a ground of restitution, or as a reason to modify or adapt the relevant provisions to the recipient’s good faith, should be avoided; Article 177 of the aforesaid proposal should, therefore, be deleted; (b) on the other hand, a general defence of disenrichment in favour of the recipient in good faith should be provided, although only insofar as he has gained a patrimonial surplus by the terminated or avoided contract (commodum ex negotiatione); (c) Article 173, paragraph 3 of the proposal on a Common European Sales Law should be more openly referred to the effects of termination of contract, and not to restitution, and should therefore be incorporated in Article 8 of the aforesaid proposal; (d) the restitution rules should also govern the effects of the withdrawal, because treating them separately and differently is neither necessary nor useful; (e) as regards performance of service and digital contents, monetary restitution should be provided in the measure of their objective value, instead of referring to the recipient’s saving; (f) when the substitute in kind of the benefit still exists in the recipient’s patrimony, he should not be either obliged or allowed to fulfil his restitutionary obligation by paying the monetary value of that substitute; (g) natural and legal fruits of the good should be totally returned by the buyer only if he was in bad faith; (h) if he was in good faith, on the contrary, he should be exonerated, at least for the positive difference of their value with interests on price; (i) the buyer should be liable for the use of the good also when he was in good faith, even though a defence of disenrichment should be then provided in his favour for the positive difference of its value with the legal interests on price; (j) the seller in good faith should be obliged for compensation of expenditure only insofar as it has made the value of the good rise.

Résumé: En ce qui concerne le droit à réparation, la proposition d’un Droit Commun Européen de la Vente, chapitre VII, fait un parallèle entre la cessation et la nullité du contrat. Ce qui est beaucoup plus convaincant que le modèle binaire suivi par le Projet de Cadre Commun de Référence. Il est toutefois nécessaire d’harmoniser cet ensemble de règles avec le principe général de l’enrichissement sans cause, qui en représente le fondement en droit européen. C’est pourquoi l’auteur suggère dans cet article les corrections suivantes: a. Il faudrait éviter toute référence à l’équité comme fondement de la réparation, ou comme motif de modification ou d’adaptation des dispositions qui concernent la bonne foi du bénéficiaire; c’est pourquoi l’art. 177 de la proposition susindiquée devrait être supprimé; b. D’autre part, il faudrait fournir une protection générale contre l’appauvrissement en faveur du bénéficiaire de bonne foi, sauf seulement cas où il a enrichi son patrimoine par l’effet dela cessation ou de la nullité du contrat (commodum ex negotiatione); c. L’art. 173, paragraphe 3, de la Proposition d’
un droit Commun Européen de la Vente devrait faire plus ouvertement référence aux effets de la cessation du contrat, et pas à la réparation, et devrait ainsi être incorporé à l’art. 8 de la proposition susindiquée; d. Les règles de la réparation devraient également régir les effets de la rétractation, car il n’est ni nécessaire ni utile de les traiter séparément et différemment; e. En ce qui concerne la prestation de services et le commerce électronique, la réparation en espèces devrait s’effectuer sur base de leur valeur objective, plutôt qu’en référence à l’épargne du bénéficiaire; f. Lorsque le remplacement en nature du bénéfice existe toujours dans le patrimoine du bénéficiaire, il ne devrait être ni tenu ni autorisé à remplir son obligation de réparation en payant la valeur monétaire de ce remplacement; g. Les fruits naturels et légaux du bien ne devraient être entièrement restitués par l’acquéreur que s’il était de mauvaise foi; s’il était de bonne foi, au contraire, il devrait être exonéré, du moins pour la différence positive de leur valeur avec les intérêts sur le prix; i. L’acquéreur devrait répondre de l’usage du bien, également s’il était de bonne foi, même si une protection contre l’appauvrissement devait être fournie à sa faveur pour la différence positive de sa valeur avec les intérêts légaux sur le prix; j. Le vendeur de bonne foi devrait être tenu de compenser les dépenses seulement s’il a fait augmenter la valeur du bien.

Zusammenfassung: Unter dem Gesichtspunkt des Rechts auf Rückerstattung zieht der Text des VII. Teils der Machbarkeitsstudie eine Parallele zwischen beendetem und angefochtenem Vertrag, was sehr viel überzeugender erscheint, als das zweigliedrige Modell, dem der Gemeinsame Referenzrahmen folgt. Es ist allerdings notwendig, diese Regelungen im Einklang mit den allgemeinen Prinzipien ungerechtfertigter Bereicherung zu gestalten, die nach europäischem Recht die Grundlage für die Rückerstattungsregeln darstellen. In dem vorliegenden Beitrag schlägt der Autor daher folgende Nachbesserungen vor: a. jeder Verweis auf Billigkeit als Grundlage der Rückerstattung, oder als Grund die relevanten Regelungen wegen der Gutgläubigkeit des Empfängers zu modifizieren oder zu adaptieren, sollte vermieden werden; Article 177 der Machbarkeitsstudie sollte daher gestrichen werden; b. auf der anderen Seite sollte eine allgemeine Einrede der Entreicherung zu Gunsten des gutgläubigen Empfängers eingeführt werden, auch wenn nur insoweit als dieser einen Mehrgewinn durch den beendeten oder angefochtenen Vertrag generiert hat (commodum ex negociatione); c. Article 173, 3. Absatz der Machbarkeitsstudie sollte noch weiter an die Rechtsfolgen der Vertragsbeendigung und nicht an die Rückerstattungsregeln angelehnt sein. Daher sollte Article 173, 3. Absatz in Article 9 der Machbarkeitsstudie verankert werden; d. die Regelungen zur Rückerstattung sollten auch auf die Folgen des Rücktritts angewandt werden, da die Notwendigkeit oder auch nur Möglichkeit für letzteren eigenständige Regelungen zu treffen, nicht ersichtlich ist; e. betreffend Dienstleistungen und digitaler Inhalte sollte eine Rückerstattung in Geld nach Maßgabe ihres objektiven Wertes und nicht nach den Einsparungen des Empfängers geschehen; f. wenn sich das Substitut in Form eines Gewinnes immer noch im Vermögen des Empfängers befindet, sollte er weder verpflichtet noch ihm erlaubt sein, seine Rückerstattungspflicht durch die Leistung des monetären Wertes des Substituts zu erfüllen; g. natürliche und rechtliche Früchte einer Sache sollten, nur soweit der Käufer nicht gutgläubig war, zusammen mit ihr komplett zurückgegeben werden; war er hingegen gutgläubig, sollte er hiervon befreit werden, zumindest in Höhe der positiven Differenz des Wertes der Früchte im Verhältnis zum ihrem Preis; i. der Empfänger sollte für die Benutzung der Sache haftbar sein, auch wenn er gutgläubig war; allerdings sollte dann die Möglichkeit einer Einrede der Entreicherung zu seinen Gunsten für die positive Differenz des Wertes der Sache im
Verhältnis zu ihrem Preis bestehen; j. der gutgläubige Verkäufer sollte nur zum Ersatz von Aufwendungen verpflichtet sein soweit sie den Wert der Sache gesteigert haben.

1. The Parallelism of Avoided and Terminated Contracts from the Point of View of the Law of Restitution

Part VII of the proposal on a Common European Sales Law provides the rules that are applicable to the restitution of performances under a contract that has been avoided or terminated.

Such restitution is conceived by Article 173, paragraph 1 of the aforesaid proposal as the fulfilment of a legal obligation of the party who has received the performance (accipiens, hereinafter the recipient) in front of the party who has rendered it (solvens, hereinafter the giver). The categorization of the subject as a

1 In classical Roman law, the delivery of a good (traditio) could not transfer its property if the obligation that the giver (solvens) intended to fulfil was, in reality, not existing, as when the contract of sale (emptio-venditio) was void and, therefore, lacked a legal basis (iusta causa) of the transfer itself - given that the point has been fiercely disputed from ever, that opinion is, at least, the most reliable one, as elucidated by PUGLIESE, ‘Compravendita e trasferimento della proprietà di diritto romano’, in Vacca (ed.), Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica, Giuffrè, Milano 1991, p. 54. Such rule has been kept by the national laws of continental Europe (like the Austrian one), which have proved themselves more faithful to the tradition of the ius commune: There, the transfer of goods is still produced by the delivery (modus acquirendi) based on an existing obligation of giving, typically created by a contract (titulus acquirendi), or at least on a social or moral duty (naturalis obligatio), but the same rule is also existing, and even a fortiori, in the national laws of Europe where (like in France and in Italy) the transfer of goods is an effect of the simple contract, notwithstanding their delivery (par le seul consentement des parties contractantes: Art. 1138, para. 1 Code civil). Both the Austrian and the French-Italian systems of transferring property require, in fact, the objective existence of a iusta causa, and as far as it is here concerned, this feature of these systems drives to the following consequences: (1) if the giver under a terminated or avoided contract was the owner of the good, he can claim not only for restitution of performance (personal action) but also for his property (real action); (2) in the latter case, the giver can also sue the third, to whom the recipient has eventually delivered the good, because its property has not been transferred to either of them (except a purchase a non domino takes place in favour of the third); (3) the claim for restitution of an undue performance (payement de l'indue of Arts 1376 et seq. Code civil; pagamento dell'indebito of Arts 2033 et seq. Codice civile; Zahlung einer Nichtschuld of ss 1431 et seq. ABGB) is not aimed to transfer the property from the recipient back to the giver but just to oblige the latter to hand over the good back to the former, whether or not he is the owner. Quite different is what happens in German law, where the BGB has accepted Savigny’s theoretical reconstruction of the Roman mancipatio, which culminates in the doctrine of the so-called Abstraktionsprinzip: the delivery of the good agreed by both parties (Einigung und Übergabe) or the entry of the conveyance in the land registry (Auflassung und Eintragung in das Grundbuch) is generally able to transfer property, although the obligation of giving (or the social or moral duty) that the giver intended to fulfil is not existing. As far as it is here concerned, this system of transferring property drives to the following consequences: (1) the giver can claim only for restitution of performance but not for his (transferred) property; (2) because he has no action in rem, the giver cannot generally sue the third, to whom the recipient has eventually transferred the good, except that the third has acquired
source of obligations reflects the civilian tradition, and especially the mighty conceptualization of the Schuldrecht by the German scholarship of usus modernus Pandectarum, but it can be considered as a feature of an existing European law, if the latest decisions of English courts are regarded (as it will be hereinafter elucidated).

It is true that until not long ago the common law of restitution consisted not only of personal rights, or actions in personam, but also of real rights, or actions in rem. The so-called swap litigation has, however, given the impulse to a radical change in the leading case decided in 1994. In fact, the House of Lords clearly held that a successful claimant had not any proprietary right, thus overruling one of the most important precedent about proprietary rights as restitutionary remedies. Although the relationship between property and restitution law is still highly controversial in English scholarship, it should, therefore, be admitted that also in the common law the execution of performances under a contract that has been avoided or terminated triggers a personal right, or action in personam, of the recipient (against the giver), and not a real right, or action in rem, of his.

it not for value (unentgeltlich): In this case, he is liable in the measure of his actual unjustified enrichment (s. 822 BGB); (3) the claim for restitution of an undue performance (Leistungskondiktion of s. 812, para. 1, sentence 1, case 1 BGB) is aimed to transfer the property from the recipient back to the giver. See SACCO, ‘Introduzione al diritto comparato’, 5th edn, in Sacco (ed.), Trattato di diritto comparato, U.T.E.T., Torino 1992, pp. 106 et seq.


3 For an in-depth analysis of comparative law, see SCHLECHTRIEM, Restitution und Bereicherungsausgleich in Europa, I, Mohr-Siebeck, Tübingen 2000, pp. 73 et seq.

4 In this context, the most characteristic institutions of English law have definitely been the constructive trusts and equitable liens, both of them belonging to equity; for a short account, see BIRKS, Unjust Enrichment, 2nd edn, Clarendon Press, Oxford 2005, pp. 180 et seq.; ZWEIGERT & KÖTZ, Einführung in die Rechtsvergleichung, 3rd edn, Mohr-Siebeck, Tübingen 1996, pp. 561 et seq. Constructive trusts give the plaintiff the full equitable proprietary interest, so that he becomes the owner in equity; equitable liens instead give the plaintiff only a security interest, without possession. Remedies provided by both institutes are anyway in rem and can, therefore, be exercised against a third, that is, a creditor or a purchaser from the defendant (although it is to be remembered that purchasers in good faith and for value are generally protected). It is also known that such institutes can be used to trace the benefit that the defendant has received, when it has been transformed in another good or exchanged. See SMITH, ‘Tracing’, in Burrows & Lord Rodger of Earlsferry (eds), Mapping the Law. Essays in Memory of Peter Birks, Oxford University Press, Oxford/New York 2006, pp. 119 et seq.


In this regard, an existing European law of restitution, which, as it will be later discussed, is grounded on the general principle of unjustified enrichment, shall, therefore, be recognized. As the Draft Common Frame of Reference (DCFR), Book VII, illustrates, such European law of restitution embraces not only undue performances but also enrichments that have been acquired through an act of the recipient himself (generally, a wrong).

On the contrary, the law of restitution that has been settled by the proposal on a Common European Sales Law takes into account only contractual performances, and not extra-contractual enrichments - what is obvious, if one considers that the aforesaid proposal is from the beginning aimed to create (not a general law of obligations, but) specifically a contract law.

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10 See supra n. 2.

11 The aforementioned two branches of the law of restitution will, hereinafter, be understood in terms of ‘contractual’ and ‘extra-contractual’ restitution, respectively, although this terminology is definitely not accurate: In the former area, it is, in fact, to be included any undue performance, not only if rendered under a (void or avoided or terminated) contract but even when (as in the ancient condicio causa data causa non secuta) it is not intended to fulfill a debt. In any case, the conception of the law of restitution as a whole is recent in the civilian tradition and does not reflect the historical roots of the relevant rules: If contractual restitution has come down from the system of the Roman condictiones, and from the condicio indebiti particularly, extra-contractual restitution is instead the result of the developments of the action re in rem verso (utilis) in the Middle Ages: see KUPISCH, ‘Arricchimento nel diritto romano, medioevo e moderno’, in Digesto delle discipline privatistiche, Sezione Civile, I, U.T.E.T., Torino 1987, p. 442. In the laws of southern European States, the difference has not faded away and is still perceivable in the drafting of the national civil codes: the Italian one, in particular, has taken into account undue performances (pagamento dell’indebito: Arts 2033 et seq.) and unjust enrichment (azione generale di arricchimento senza causa: Arts 2041-2042) as different sources of obligations: I allow myself to make reference to SIRENA, ‘La ripetizione dell’indebito’ and ‘L’azione generale di arricchimento senza causa’, in Lipari & Rescigno (eds), Diritto civile, with the cooperation of Zoppini, III, Obbligazioni, I, Il rapporto obbligatorio, Giuffrè, Milano 2009, pp. 489 et seq. Thus holding, an Italian legislator just wrote down the developments of French law in the late nineteenth century, when the Cour de Cassation added to the rules on payement de l’indebuda provided by the Code civil a general action de in rem verso, which had not been foreseen (the leading case was decided through the famous arrêt Boudier: Req., 15 Jun. 1892, S. 93.I.281, with a comment of Labbé). The provisions of the German BGB ruling on unjustified enrichment (ss 812 et seq.), on the contrary, mention the case both that it has been originated from an undue performance (durch die Leistung eines anderen) and that it has otherwise arisen (in sonstiger Weise): It is therefore strongly controversial in the scholarship whether the legislator has provided two different legal remedies (s.c. Trennungslehre) or just a single one, even though with manifold diversification (s.c. Einheitslehre): see REUTER & MARTINEK, Ungerechtfertigte Bereicherung, Mohr-Siebeck, Tübingen 1983, pp. 22 et seq.; ZWEIGERT & KÖTZ, n. 4, pp. 538 et seq.

12 About the swing from general law of obligations to contract law at the European level, see GRUNDMANN, ‘L’unità del diritto privato. Da un concetto formale a un concetto sostanziale di diritto privato’, 56. Rivista di diritto civile 2010, pp. 505 et seq.
Even disregarding that specific aim, the choice of the proposal on a Common European Sales Law has to be approved from a general point of view, given that it is widely accepted that contractual restitutions should be ruled separately from extra-contractual ones: even though this eventually goes beyond the natural purpose and the field of application of the aforesaid proposal, it should, therefore, be assumed that it implies the opportunity of distinguishing contractual from extra-contractual restitution and that it can drive in this sense the further developments of European law in this field, thus departing from the DCFR.

The opportunity of such a distinction should not, however, mean that both sets of rules do not rely on the same general principle, namely that of unjustified enrichment.

From a different point of view, it is to be considered that the proposal on a Common European Sales Law differs from the DCFR insofar as it takes jointly into account the avoided and terminated contracts, of course by prescribing the restitution of performances by the parties. On the contrary, the DCFR has, in this respect, adopted the German model of separating termination (Rücktritt) and avoidance (Anfechtbarkeit) of contract, thus splitting the area of contractual restitution into two parts, which bear, respectively, the name of ‘restitution’ (Book III, Chapter 3, section 5) and that of ‘unjustified enrichment’ (Book VII).

Following the binary model of the BGB, the DCFR assumes that, when a contract is terminated, its effects are not cancelled or removed but counterbalanced by further, inverted or symmetrical ones: The parties are, therefore, obliged by contract to return the benefits received by performance, so that very revealing is the idea of a contrat synallagmatique renversé or contrat à l’enverse, which has been created by the French scholarship. This is what the DCFR has labelled as ‘restitution’ (Book III, Chapter 3, section 5).

On the other side, the DCFR has ruled under unjustified enrichment the obligations of returning the benefits received by performance of a contract that is void or avoided, considering it as if it had never existed. In addition, this is what (as far as it is here concerned at least, that is, not considering the extra-contractual area) is labelled as ‘unjustified enrichment’ by the DCFR (Book VII).

This splitting of contractual restitution is largely due to the need of conveniently governing the problem of impossibility of specific restitution, particularly when the recipient has acquired a good that is destroyed or has been transferred to another. It is, however, particularly eloquent that this binary model has been

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14 CLIVE, ‘Unjustified Enrichment’, in Hartkamp et al. (eds), Towards a European Civil Code, 3rd edn, Ars Aequi Libri, Nijmegen 2004, pp. 587 et seq. See also supra n. 2.
severely criticized by the German scholarship for its inconsistencies, also after the massive reform of the German BGB (Schuldrechtsreform).

Much more convincing is, therefore, the choice of the proposal on a Common European Sales Law to put on the same level termination and avoidance of contract from the point of view of restitution. Given that the aforesaid proposal has made the unhappy choice not to take into account the voidness (or nullity) of contract at all, however, it remains uncertain whether the same rules on restitution are applicable to performances under a void contract, too.

An indication to the negative answer can be found in the Catala reform project of the French Code civil, which, as far as it is here concerned, has drafted a set of rules on restitution (from Articles 1161 to 1164–1167) both for the case of avoidance (annulation) of contract and for that of its termination (résolution). From the point of view of restitution law, both of them have, therefore, been considered jointly under the concept of ‘removal’ of contract (anéantissement du contrat).

From the point of view of the law of restitution, there is, however, no convincing reason to consider the nullity of the contract as separated. The rationale of a specific regime of contractual restitution shall be seen in the fact that performances to be returned are mutual, and therefore, given that a bilateral contract is at stake, the same regime should concern not only the termination and the avoidance of contract but also its nullity.

Furthermore, it is questionable that there is a real need or even only the opportunity to shutter a specific set of rules on restitution because of withdrawal from contract, referred to in Article 44 of the proposal on a Common European Sales Law: From the here relevant point of view, after all, withdrawal is not different from termination of contract and could, therefore, be ruled in the same way, eventually introducing some (minor) specific differentiations.

2. The General Principle of Unjustified Enrichment as Underpinning

Even though it has not been mentioned by the proposal on a Common European Sales Law at all, the general principle of unjustified enrichment is to be recognized as the basis of the here considered set of rules.

16 With particular regard to ss 346 et seq. BGB (old version), see above all VON CAEMMERER & MORTUUS REDHIBETUR, ‘Bemerkungen zu den Urteilen BGHZ 53,144 und 57,137’, in Festschrift für Karl Lorenz zum 70. Geburtstag, Beck, München 1973, pp. 621 et seq.
20 See also supra n. 4.
Differently from the Roman *condictio indebiti*, which has historically represented the starting point of contractual restitution in European *ius commune*, the recipient’s obligation is not based on the fact that the giver’s performance has been rendered by mistake but on the fact that it has enriched the former without a legal basis, given that the contract has been avoided or terminated.\(^{21}\) Likewise, in this respect, the proposal on a Common European Sales Law reflects an already existing European law of restitution.

In the developments of continental *ius commune*, the extremely complicated system of *condictiones* of the post-classical period of Roman law converged into the single *condictio sine causa generalis*. The *sine causa* element thus imposed itself not only as the most important *condiction* among the others but also as the core of all admitted *condictiones*.\(^{22}\) It has then been one of Savigny’s merits to conceptualize the ground of the action in terms of an unjustified enrichment.\(^{23}\)

As it is well known, the approach of English law has traditionally been quite different, given that a claim against the recipient has been granted only if there was a specific unjust factor that affected the payment, the most typical of such unjust factors being a mistake of the payer on his liability to pay.\(^{24}\) The difference with the lack of legal basis approach has had little relevance when a valid contract has been executed, because under both points of view the payment was obviously not to be given back.\(^{25}\) However, when the contract is void and has been executed by both

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\(^{22}\) KUPISCH, n. 11, pp. 433 *et seq.* Even though the most ancient national codes, like the French one (Art. 1376), still bear a trace of the ancient rule of the *condiction indebiti*, based on the mistake of the payer, this requirement has been eliminated from the case law through interpretation: for references, see SCHLECHTRIEM, n. 3, pp. 112 *et seq.*


\(^{24}\) In this regard, see MEIER, *Irrtum und Zweckverfehlung: Die Rolle der unjust-Gründe bei rechtsgrun-

\(^{25}\) According to SCHLECHTRIEM, COHEN & HORNUNG, ‘Restitution and Unjustified Enrichment in Europe’, *European Review of Private Law*, p. 334 *et seq.*, the difference between both legal traditions tends then to evaporate and, at the end, to reduce itself to a question of the onus of proof. See already SCHLECHTRIEM, n. 3, p. 135, fn. 390. For a strong criticism, compare, however, ZIMMERMANN, ‘Bereicherungsrecht in Europa: eine Einführung’, in Zimmermann (ed.), *Grundstrukturen eines Europäischen Bereicherungsrechts*, Mohr-Siebeck, Tübingen 2005, pp. 32 *et seq.*, fn. 96, who points out that in the nineteenth century the English approach has logically led to the consequence that only the existence of an obligation can be pleaded by the recipient as a defence. On the contrary, the civilian approach has ever admitted that restitutionary claim is to be denied whenever the defendant invokes a legal ground of its enrichment and particularly a moral duty (the *naturalis obligatio* of the Roman tradition). In his opinion, the difference remains, therefore, relevant.
parties, the two approaches radically diverge: If, in the civil law, there is generally not a good reason to deny each giver’s restitutionary claim,\(^{26}\) the doctrine of consideration leads the traditional common law to the opposite rule (no restitution when a void contract has been performed by both parties), unless some specific unjust factor of the enrichment exists, like duress or fraud. This traditional view of the common law has been, however, recently upset by the aforementioned swap litigation:\(^{27}\) Given that such a contract was void (because it was concluded by a local authority ultra vires),\(^{28}\) the House of Lords has, in fact, decided that performances should be reciprocally given back by the parties.\(^{29}\) Even though their Lordship intended to hold that restitution needs a mistake by the payer, and identified the rational of their decision in the abrogation of the old rule according to which a mistake of law is not relevant (\textit{error iuris non excusat}),\(^{30}\) it could have been boldly stated by authoritative scholars that swap litigation put an end to the piecemeal recognition of unjust factors in English law of restitution and marks the indisputable reception of the genuine civil law approach, based on the lack of legal basis.\(^{31}\)

English swap litigation marks, therefore, the definitive birth of a European law of unjustified enrichment, based on Pomponius’ famous sentence that

\(^{26}\) Exceptions are, however, existing. The most important case is when performance is immoral (\textit{contra bonos mores}) both for the giver and for the recipient: Restitution is then barred (\textit{in pari causa turpitudinem melior est condicio possidentis}). See as an instance Art. 2035 \textit{Codice civile}. A similar role is generally played in the common law of restitution by illegality: See SWADLING, ‘The Role of Illegality in the English Law of Unjust Enrichment’, in Johnston & Zimmermann (eds), \textit{Unjustified Enrichment. Key Issues in Comparative Perspective}, Cambridge University Press, Cambridge 2001, pp. 289 et seq.; DANNEMANN, \textit{Illegality as Defence against Unjust Enrichment Claims}, infra, pp. 310 et seq.

\(^{27}\) See also supra n. 1.


\(^{30}\) This rule of the \textit{ius commune} was for the first time followed by Bilby \textit{v.} Lumley (1802), 2 East 469, 102 ER 448. See ZIMMERMANN & HELLWEGE, \textit{Error iuris non excusat und das law of restitution: Zur Karriere einer gemeinrechtlichen Maxime in der Welt des common law}, in Hübner & Ebke (eds), \textit{Festschrift für Bernhard Groißfeld zum 65. Geburtstag}, Verlag Recht und Wirtschaft, Heidelberg 1999, pp. 1371 et seq.

proclaims that *aequum est neminem cum alterius detrimento fieri locupletiorem*.  

From his hand, the Court of Justice of the European Union has several times stated that (restitution of) unjust enrichment is a general principle that is common to the legal systems of the Member States.  

If so, it is then to be pointed out that the general principle of unjust enrichment identifies the point of reference for the interpretation of the here considered set of rules, which shall be amended or integrated where diverging without a rational justification from its underpinning.

Such a problem arises first of all about Article 173, paragraph 3 of the proposal on a Common European Sales Law, which provides that, where the contract has been terminated for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed or where the price for what has been done remains payable, unless the nature of the contract is such that part performance is of no value for one of the parties.

If literally interpreted, in fact, and taking into account its location, the provision seems to provide that performances shall not be returned to each giver in the mentioned cases, what would be definitely contrary to the general principle of unjustified enrichment.

Despite its literal formulation, the provision is, however, to be interpreted in the sense that it does not exclude that the giver has the right to have back what the other party has acquired through his undue performance nor that the recipient has a defence against such a claim (*soluti retentio*). It limits instead the temporal effects of termination of contract, providing that, as far as it is here concerned, it operates irretrospectively, or *ex nunc*, that is, from the day when it has been declared, and not retrospectively, or *ex tunce*, that is, also for the time before.

It follows that, provided that the effects of termination of contract do not extend to the past, Article 173, paragraph 3 of the proposal on a Common European Sales Law is not inconsistent with the general principle of unjust enrichment, which implies that no restitution shall be made, insofar as a legal basis of the transfer between the patrimonies of the parties exists. If such an interpretation is approved, on the other hand, the location of the provision is inappropriate and misleading, as it

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32 D. 12, 6, 14. In a slightly different linguistic formulation, the norm is repeated in D. 50, 17, 206: *'Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem'*. For details, see ZIMMERMANN, 1990–1996, n. 2, pp. 852 et seq.

33 ECJ, Grand Chamber, 16 Dec. 2008, C-47/07, *P. Masdar (UK) Ltd v. Commission of the European Communities*: 44. According to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss; […] 47. Given that unjust enrichment, as defined above, is a source of non-contractual obligation common to the legal system of the Member States, the Community cannot be dispensed from the application to itself of the same principles where a natural or legal person alleges that the Community has been unjustly enriched to the detriment of that person.
should have been included in the *sedes materiae* of termination of contract and its effects,34 not in that of restitution.

Another possible inconsistency with the principle of unjustified enrichment could be found in Article 174, paragraph 6 of the proposal on a Common European Sales Law, providing that, in a case of digital content that is not supplied in exchange for the payment of a price, no restitution shall be made.

Generally speaking, the supply of digital content is, in fact, a benefit that, although not material, should be returned, notwithstanding the absence of a price.

2.1 Equity versus Corrective Justice in the Law of Restitution, Particularly Regarding the Recipient in Good Faith

According to a view that is largely accepted,35 the principle of (restitution of) unjust enrichment is an expression of that form of justice that, following the conceptualization by Aristotle, is qualified as corrective (as regards compensation for damage and restitution), or also as commutative (mostly as regards contract),36 and that is opposed to distributive justice.37

In fact, the remedies that are based on the principle of unjust enrichment are not aimed to a better distribution of wealth among citizens, on the assumption that the recipient has less need or merit to enrich himself than the giver (distributive justice). Their purpose is instead to cancel a patrimonial transfer that occurred without a legal basis, so that the benefit that has flown from the giver’s patrimony into that of the recipient can return from the latter to the former (corrective or commutative justice).

Precisely for this reason, Article 177 of the proposal on a Common European Sales Law is not to be approved, providing that the recipient’s restitutionary obligation may be modified (by the judge?) to the extent that its performance would

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34 It is also questionable that the proposal on a Common European Sales Law has actually divided into three blocks the rules on termination of contract, which are provided first in general (Art. 9), second about the breach of the seller’s obligations (Arts 115 et seq.), and finally about the breach of the buyer’s obligations (Arts 135 et seq.): Such fragmentation cannot, however, be considered rational, and in any case, it certainly does not facilitate the knowledge of applicable law.


be grossly inequitable. Such provision does, indeed, make European law of restitution jump back to the trouble of a hundred years ago and is anyway dangerous for its general implications.

First, even beyond the objection founded on the principle of separation of powers, which, in itself, could be not much telling from the point of view of the common law, it cannot be unsaid that Article 177 of the proposal on a Common European Sales Law seems to evoke a judge’s power of correcting legislative law that, if taken seriously, potentially leads to unacceptable consequences, appearing to be even more intrusive than, in classical Roman law, the ius honorarium of aequitas was.

As regards the law of restitution, in particular, Article 177 of the proposal on a Common European Sales Law ends up giving the impression that the principle of unjust enrichment is based on equity and is, therefore, aimed at correcting the rigour of the ius strictum through an extrinsic modification of its rules: In that way, however, unjustified enrichment is pushed away from corrective to distributive justice, thereby nourishing a misconception that has been a reason of so much suspicion against that institution and has especially culminated in the so-called subsidiary rule of Article 2042 codice civile and of French case law by the Cour de Cassation; due to a slow but admirable effort of scholarship, this suspicion has been, however, abandoned, at least in perspective, and it would be really disappointing if it should rise again on the field of European law.

A similar consideration applies to Article 175, paragraph 2, letter (b) of the proposal on a Common European Sales Law, which takes properly into account the recipient’s bad faith. The reference to fairness is, therefore, quite inappropriate and is nothing else than a generic evocation of a need of justice, which is not only irrelevant as regards the prescriptive meaning of the provision but also potentially dangerous. At least in a broad sense, all laws may be justified on the need of equitable rules!

Therefore, it is certainly desirable that Article 175, paragraph 2, letter (b) of the proposal on a Common European Sales Law is radically rethought in accordance to the rationale that characterizes it, namely the protection of the recipient in good faith. Even though the provisions of the proposal on a Common European Sales Law about law of restitution did not mention good faith (in a subjective sense) at all, Article 177 of the aforesaid proposal properly considers this state of mind, by referring to the case that the recipient did not cause, or lacked knowledge of, the ground for avoidance or termination.

The significance of the recipient’s good faith (in a subjective sense) is a feature of all rules on unjust enrichment, which expresses the need of a protection of the recipient’s reliance on the enrichment that he has achieved, so that he is not compelled to a liquidation of his own patrimony in order to fulfil his restitutionary obligation. Since such expectation is worthy of being protected only when it is reasonable, European law of restitution generally does not justify the recipient when his good faith depends on gross negligence or when he has been notified the proceedings by the giver: This is the meaning of Article 174, paragraph 5 of the proposal on a Common European Sales Law, which literally makes reference to cases where the
recipient could be expected to have known of the ground of avoidance or termination and is, therefore, treated as if he had knew it (i.e., as if he were in bad faith).

Although the need to protect the recipient’s good faith is definitely to be approved, it should, nevertheless, be satisfied not through an upset of the foundation of unjust enrichment, which cannot, but at the end, compromise the rationale and the effectiveness of the law of restitution, but allowing the recipient a defence of disenrichment.\footnote{See supra n. 4.} From this point of view, the detachment of the proposal on a Common European Sales Law from the model of the DCFR is absolutely deplorable.

3. The Object of the Recipient’s Main Obligation: Specific and Monetary Restitution

As it is clearly suggested by the literally interpretation of Article 173, paragraph 1 of the proposal on a Common European Sales Law, the object of the recipient’s restitutory obligation consists of the benefit itself that he got from the giver.\footnote{The proposal on a Common European Sales Law has not determined the place where such obligation shall be fulfilled, especially the place where the recipient shall deliver the good back to the giver. This is true also for the DCFR but differently from the proposal on a Common European Sales Law; no lack is to be seen there: The case falls, in fact, under general rules that govern place of performance of non-contractual obligations, provided by Art. III.-2:101. See STUDY GROUP ON A EUROPEAN CIVIL CODE, Principles of European Law – Unjustified Enrichment, in von Bar & Swann (eds), Sellier, München 2010, p. 446.} The ‘what’ standing out in that provision corresponds in fact to the \textit{erlagtes Etwas} that the German scholarship derives from section 818, paragraph 1, sentence 1 BGB.

The same rule had been already foreseen by the DCFR in the case that the enrichment consists of a transferable asset (Article VII-5:101(1)), whereas, in the case that it consists of a non-transferable asset instead (Article VII-5:102(1)), restitution shall be made in money.

Article 173, paragraph 1 of the proposal on a Common European Sales Law, if compared to those provision of the DCFR, is easier and more elegant in its wording but also more appropriate from a theoretical point of view: According to the tradition of national civil codes, it puts in evidence that specific restitution is a general and primary rule and that monetary restitution is instead a special and subsidiary rule.\footnote{As already suggested, instead, Art. VII.-5:101 and Art. VII.-5:102 DCFR put specific and monetary restitution on the same level, each of them being characterized by the nature, transferable and non-transferable, respectively, of the benefit that shall be given back.} As it will be elucidated below, monetary restitution is, in fact, provided only if and when returning the benefit in kind to the giver is either impossible or too costly for the recipient.

Likewise arguing from Article 174, paragraph 1 of the proposal on a Common European Sales Law, it is to be held that, when the benefit is still existing in the recipient’s patrimony, and therefore, it shall be definitely returned in nature to the giver, it is not generally relevant that its price has changed from the time when
it has been acquired by the recipient: No compensation for such a possible difference shall be granted either to the giver (supposing that the benefit is now cheaper than at the time of its undue delivery to the recipient) or to the recipient (supposing that the benefit is now more expensive than at the time of its undue delivery to the recipient).

If the benefit particularly consists of fungible goods, the recipient shall, therefore, give back to the giver the same quantity of goods having the same quality (tantundem eiusdem generis), whatever their price actually is; if it consists of money, he shall give back the same sum, even though its value has decreased in the meanwhile because of currency depreciation.

The rule is, however, different when specific restitution is impossible, either because, according to its nature, the benefit is not able of being specifically returned (as it consists of a service or a digital content) or, though it is able, because it is not existing in the recipient’s patrimony any longer (as it has been destroyed or transferred to another). 41

According to Article 174, paragraph 1, sentence 1 of the proposal on a Common European Sales Law, the recipient shall then pay a sum of money, which is equal to the objective value of the benefit he has acquired from the giver through his performance. 42 The case occurs when the infungible good received by the recipient does not exist any longer (e.g., because it has been destroyed or has been consumed) or is not available to the recipient any longer (e.g., because it has been transferred to another). In this case, the object of the restitution obligation is no longer made up of the benefit in nature (specific restitution) but of an equivalent sum of money (monetary restitution).

A similar solution is laid down by Article 174, paragraph 1, sentence 2 of the proposal on a Common European Sales Law, when, although possible, specific restitution would cost the obliged recipient an unreasonable effort or expense: It is then remitted to the recipient himself to decide whether to give back the benefits in nature or to pay for its objective value.

The case occurs when the infungible good received by the recipient, although still existing, can be removed from its patrimony and returned to the giver, only by bearing a cost that is equal or even higher than its objective value; 43 the case also

41 The latter case regards only infungible goods. The obligation to give back a fungible good is, instead, generic and, therefore, remains still even if property is lost. In case the restitution in nature would cause unreasonable effort or expense to the recipient, Art. 174, para. 1, sentence 2 of the proposal on a Common European Sales Law is, however, applicable (see infra in the text).
42 The model of such provision is that of s. 818 II BGB. A similar rule is, however, provided by other European civil codes, especially by Art. 1379 Code civil and by Art. 2037 Codice civile.
43 The official comment to Art. VII.-5:101 (2) suggests, however, that, in order to establish that the costs of transfer would be unreasonable, not only physical or economic or marketable characteristics of the thing should be taken into account but also the uniqueness of the asset due to its almost entirely sentimental value (such as love letters) or to its artistic nature. See STUDY GROUP ON A EUROPEAN CIVIL CODE, n. 39, p. 447.
occurs when the fungible good received by the recipient no longer exists or is no longer available and the recipient, in order to purchase it from another, should bear a cost that is equal or even higher than its objective value. In this case, the object of the restitution obligation is always made up by the benefit in nature (specific restitution), but the recipient has the right to extinguish it by paying an equivalent sum of money (monetary restitution); due performance is, therefore, specific restitution, but the debtor (i.e., the recipient obliged to restitution) may discharge his obligation by rendering another performance (i.e., monetary restitution).

3.1 The Assessment of the Objective Value of the Benefit

The proposal on a Common European Sales Law has not generally provided a definition of monetary value under Article 174 nor has it fixed the criteria by which it shall be assessed.

Such definition can be, instead, found in Article VII-5:103 DCFR, according to which the monetary value of an enrichment is the sum of money which a provider and a recipient with a real intention of reaching an agreement would lawfully have agreed as its price. This provision is, however, not fully convincing.

Even though it shall be assessed in objective terms, and making thus reference to the market, it is to be considered that the here concerned monetary value does not necessarily match average prices or rates but the sum of money that the recipient should have paid in order to get the benefit from that very giver and, therefore, the market price that that very giver would have required to transfer the benefit to the recipient, notwithstanding the existence of more or less favourable alternatives on the market. In fact, the principle of unjust enrichment requires the recipient to give back no more and no less than the benefit that he has acquired from that very giver, and this should be held not only when restitution is specific but also when it is monetary.

As a contract of sale was entered into between the parties (and it has been later avoided or terminated), the sum of money that the giver would have required to transfer the benefit to the recipient, and therefore the latter should have paid to get that benefit on the market, is precisely equal to the price that has been agreed between them. This rule has also an explicit finding in Article VII-5:102(3) DCFR, which provides that where the enrichment was obtained under an agreement which fixed a price or value for the enrichment, the enriched person is at least liable to pay that sum if the agreement was void or voidable for reasons which were not material to the fixing of the price. However, contrary to what is immediately after provided by Article VII-5:102(4) DCFR, the same rule should apply not only where the fixed price is lower than the average market price but also when it is higher:44 As it has been already elucidated, this is, in fact, consequent to the principle of unjust enrichment.

44 I allow myself to make reference to SIRENA, ‘L’azione generale di arricchimento senza causa’, n. 11, p. 575.
but, at the end, also to the principle of private autonomy, since an obligation of contracting at the average price would otherwise be imposed to the giver. 45

Precisely in accordance with the principle of private autonomy, it shall, nevertheless, be admitted that, when the contract has been avoided, the assessment of the monetary value according to the price fixed by the parties cannot be binding for the one of them whose consent was defective (or who was incapable). 46 This party may, therefore, make reference to average prices or rates instead: If it is the recipient, he will do so, when these rates or prices are lower than those fixed by contract; if it is the giver instead, he will do so, when they are higher.

There is no reason why a different criterion should be followed in order to assess monetary restitution when the benefit does not have a material nature, that is, when it consists of a service or a digital content. Paragraphs 3 and 4 of Article 174 of the proposal on a Common European Sales Law, which make literally reference to the amount the consumer saved by receiving the service (paragraph 3) or the consumer saved by making use of the digital content, respectively (paragraph 4), shall be interpreted in the sense that the saving by the recipient is equal to the sum of money that he should have paid to get the benefits from the giver, and according to Article 174, paragraph 1 of the aforesaid proposal, it is, therefore, equal to the objective value of this benefit.

At the end, although it has already been provided by Article VII-5:103(1) DCFR, the reference to the recipient’s saving as a criterion for assessing monetary restitution proves itself as questionable and ultimately inappropriate. Likewise, in this respect, it would, therefore, be simpler and more correct making reference to the objective value of the benefit.

Paragraph 2 of Article 174 of the proposal on a Common European Sales Law expressly provides that the monetary value of goods is the value they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date. The solution is, however, not convincing.

According to the general principle that is to be recognized as the underpinning of the here concerned set of rules, this value should be assessed when the recipient has enriched himself at the expense of the giver, that is, when the contract has been avoided or terminated. Article 174, paragraph 2 of the proposal on a Common European Sales Law should, therefore, be accordingly amended, in the sense that, assessed the objective value at the day when the contract has been avoided or terminated, the sum of money should be re-evaluated until the day of payment, thus taking into account currency depreciation.


46 **STUDY GROUP ON A EUROPEAN CIVIL CODE, n. 39, p. 463.**
3.2 The Restitution of the Substitute of the Benefit

Article 174, paragraph 5 of the proposal on a Common European Sales Law considers the case in which the recipient has exchanged the benefit he had acquired from the giver with a substitute in money or in kind.

Such substitute generally consists of the price that the recipient has obtained by selling the good to another. Precisely because it has been obtained in exchange of the benefit traded by the recipient, the price has, in fact, been conceived by civilian tradition as a substitute of the benefit in the recipient’s patrimony: By making reference to the idea of a real subrogation, it has, thus, been admitted that the same price takes the place of the benefit also in the recipient’s restitutionary obligation (*pretium succedit in locum rei*). The rule has generally been implemented in national civil codes. 47

It should be noted that, especially where the good the recipient has acquired from the giver is either infungible or, even though fungible, it is traded only on a restricted market, the price obtained from its sale does not necessarily match its objective value. If the price obtained by the recipient is lower, it shall be allowed to the giver to claim instead the monetary value of the benefit (but only if the recipient was in bad faith); if the price obtained by the recipient is higher, it shall be allowed to the recipient himself to choose to return instead the monetary value of the benefit (but only if he was in good faith).

This is an elective concurrence of a remedy based on the general principle of unjust enrichment (monetary value of the benefit) and a different remedy for restitution (substitute of the benefits exchanged), the latter deriving from the *actio negotiorum gestorum directa* that is foreseen in the sources of Roman law. 48 A similar

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47 Article 1380 Code civil; Art. 2038 c.c. (Alienazione della cosa ricevuta indebitamente). The rule provided by s. 816 BGB is more general, because it is applicable whenever a thing has been transferred from a person not entitled (Verfügung eines Nichtberechtigten).

48 In D. 3, 5, 48 (49), Africanus states that, when the good, which has been transferred by its illegitimate possessor to a third, is destroyed, the previous owner may claim for payment of the price through an *actio negotiorum gestorum directa* against the illegitimate possessor. However, in D. 12, 1, 23, Africanus decides such a case by allowing the previous owner to sue the illegitimate possessor in good faith through a *condictio sine causa*. Coordination between the two fragments was already discussed at length by CUJACII, ‘Ad Africanum tractatus VIII, Ad L. ult. de negot. gest.’, in CUJACII (ed.), Opera ad parisiensem fabristianam edizione, Tomus quartus, Prati 1837, pp. 270 et seq.; later, it gave rise in the pandectistic literature to a fierce opposition between VON JHERING, ‘In wie weit muß der, welcher eine Sache zu leisten hat, den mit ihr gemachten Gewinn herausgeben?’, in id., Abhandlungen aus dem Römischen Recht, Leipzig 1844, and WINDSCHEID, Zwei Fragen aus der Lehre von der Verpflichtungen wegen ungerechtfertigter Bereicherung, Leipzig 1878, reprinted in id., ‘Gesammelte Reden und Abhandlungen’, in Oertmann (ed.), Leipzig 1901, pp. 301 et seq., to which von Jhering replied: *Ist der ehemalige gutgläubige Besitzer einer fremden Sache verpflichtet, nach deren Untergang dem Eigentümer derselben den gelösten Preis herauszugeben? Ein Beitrag zur Lehre von den Grenzen des Eigenthumesschutzes*, in Jherings Jahrb., Bd. 16, 1878, pp. 230 et seq. The contrast was then solved in the development of European law by admitting a choice between both remedies, as elucidated in the text supra. I allow myself to make reference to SIRENA, *La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto*, Giappichelli, Torino 1999, pp. 115 et seq.
solution is anyway followed also by the common law at least since the nineteenth century, when courts have decided that the plaintiff may claim not only for the objective value of the lost good because of its conversion, alleging a tort as a cause of action, but also for the price obtained by the defendant,\(^\text{49}\) being such action for money had and received based on a quasi-contract as a cause of action.\(^\text{50}\) Of course, the plaintiff cannot exercise both remedies, but he has to choose one of them.\(^\text{51}\)

When the recipient has exchanged the benefit in bad faith, that is, when he knew of the ground for avoidance or termination, Article 174, paragraph 5, sentence 1 of the proposal on a Common European Sales Law provides that the giver may choose to claim the substitute in nature or its monetary value (instead of the monetary value of the benefit itself); the same rule applies when the recipient has exchanged the benefit in good faith, but his ignorance of the ground for avoidance or termination was due to negligence, that is, when he could be expected to have known of such a ground. The giver’s possibility to choose between the substitute in kind and its monetary value is, however, not to be approved.

If the substitute in kind is still existing in the recipient’s patrimony, it derives from the general principle of unjustified enrichment that he is exclusively liable for its restitution in nature and may not be obliged by the giver to pay instead its monetary value.\(^\text{52}\) As it is provided by Article VII-5:101(4)(b) DCFR, the giver should, therefore, be entitled to choose between the substitute in kind and the monetary value of the benefit.\(^\text{53}\)

Only if restitution of the substitute is not possible in nature, the recipient may be obliged to its monetary restitution, according to the general rule of Article 174, paragraph 1, sentence 1 of the proposal on a Common European Sales Law.

\(^{49}\) Lamine v. Dorrell (1705) 2 Ld. Raym. 1216; Moses v. Macferlan (1760) 2 Burr. 1005, where Lord Mansfield could memorably state, 1012: ‘the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money’.\(^\text{50}\) In general, V. BEATSON, ‘The Nature of Waiver of Tort’, in id. (ed.), The Use and Abuse of Unjust Enrichment, Oxford University Press, Oxford 1991, pp. 206 et seq.; HEEMAN, Action for Money Had and Received, Beck, München 1996, especially pp. 187 et seq. The parallelism between waiver of tort and management of the affairs of another has been noted by STOLJAR, ‘Negotiorum gestio’, in Schlechtriem (ed.), Int. Enc. Comp. Law, X, Restitution – Unjust Enrichment and Negotiorum Gestio, Mohr-Siebeck, Tübingen/The Hague/Boston/London 1984, pp. 173 et seq.; SIRENA, 1999, n. 48, pp. 129 et seq.

\(^{51}\) Such rule was elaborated by Lord Mansfield in the famous case Hambly v. Trott (1776) 1 Cowp. 371. It has been followed by courts and seen with favour, as the House of Lords did in United Australia Ltd. v. Barclays Bank Ltd. [1941] A.C. 1. On the point, V. CLERK & LINDSELL, On Torts, 9th edn, London 2006, pp. 1951 et seq.

\(^{52}\) See also supra n. 1.

\(^{53}\) The aforementioned Art. VII-5:101(4)(b) DCFR requires in addition that the giver’s choice is not inequitable. This further requirement is, however, superfluous, because the rule is generally provided by Art. 174, para. 1, sentence 2 DCFR.
When the recipient has instead exchanged the benefit in good faith, that is, he did not know (and could also not have known) the ground for avoidance and termination, Article 174, paragraph 5, sentence 2 of the proposal on a Common European Sales Law provides that he himself may choose to return the substitute or its monetary value (instead of the monetary value of the benefit). The recipient’s possibility to choose between the substitute in kind and its monetary value is, however, not to be approved, too.

For the reasons just examined, the recipient (in good faith) should, in fact, be entitled to choose between the substitute in kind and the monetary value of the benefit.

As already said, only when restitution of the substitute is not possible in nature, or it would cause unreasonable effort or expense, the recipient should be allowed to return its monetary value, according to Article 174, paragraph 1, sentence 1 of the proposal on a Common European Sales Law.

4. The Problem of the Recipient’s Disenrichment, Particularly as regards Failed Bilateral Contracts

As already noted, the law of restitution provided by the proposal on a Common European Sales Law does not expressly allow a defence of disenrichment in favour of the recipient in good faith, even though such a defence has been likely disguised under the inappropriate provision of Article 177.54

Moving from the experience of national laws, it shall be noted that this lack of defence is not only inappropriate from a systematic point of view but also negative for socio-economic reasons.

When the benefit is still existing in the recipient’s patrimony, his reliance on the definite acquisition of the benefit received by the giver does not deserve any specific protection from the point of view of the law of restitution: The principle of unjust enrichment requires, in fact, that he is obliged to give that benefit back.

When the benefit is not existing in the recipient’s patrimony any longer, on the contrary, the need to protect the recipient in good faith stems from the fact that, being reasonably confident that the benefit he has acquired from the giver has definitively enriched himself, and ignoring his obligation to give it back, he could have disposed of it, by consuming it, as an instance, or transferring it to another. It would, therefore, be not rational that the recipient was now compelled to a forced liquidation of his own patrimony in order to raise the money necessary for monetary restitution.55

For this reason, the national laws have generally come to accept that the recipient in good faith shall give back not the benefit that he has acquired from the

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54 See supra n. 21.
55 See STUDY GROUP ON A EUROPEAN CIVIL CODE, n. 39, pp. 175 and 449 et seq.
giver but (only) his remaining enrichment: so, he can fulfil the restitutionary obligation without affecting his own patrimony.\textsuperscript{56}

In other words, national laws generally provide a defence of disenrichment in favour of the recipient in good faith. This solution has been expressly transposed in Article VII-6:102 DCFR.

As it has been mainly noted by the German scholarship,\textsuperscript{57} the mutual exchange of performance that characterizes bilateral contracts, and that of sell particularly, requires, however, that the field where this defence may be raised is greatly compressed and, in any case, adapted to the specific factual situation.

Let us assume that the good delivered to the buyer is not yet existing (e.g., destroyed because of unforeseeable circumstances or force majeure). If the buyer in good faith might raise the defence of disenrichment without any limitation, a paradoxical result would be produced, because he could always claim for the full restitution of price by the seller but without giving back anything from his side.\textsuperscript{58}

By entering into a bilateral contract, the recipient has accepted to bear the sacrifice of the performance that he has promised in order to achieve in return the other party’s counter-performance: It is, therefore, rational that the enrichment on which he can reasonably rely on does not consist of the full monetary value of benefit received but only of the eventual positive difference between its value and that of the performance that was or should have rendered in exchange.

If the buyer in good faith has purchased a good worth 50, paying a price of 30, his good faith is relevant only in order to the positive difference of 20, which represents the enrichment that he acquired through the conclusion of the contract (commodum ex negotiatione). Consequently, terminated or avoided the contract, the buyer will be allowed to raise the defence of disenrichment only in the measure of 20 and will be obliged to give back in money the remaining value of the good (30), of course being allowed to set off against this obligation that of the seller to give back the price of 30, if already paid.

If the buyer has purchased in good faith a good worth ten, paying a price of 70, the contract is not favourable for him, so that there is no consequent enrichment in his patrimony that shall be protected. He will, therefore, be obliged to give back in money the entire value of the good (ten), of course being allowed to set off

\textsuperscript{56} In German law, the defence of disenrichment has been provided by s. 818 III BGB in general terms. It is, however, now undisputed in the decisions of the Bundesgerichtshof that the provision is to be read in the sense that the enriched person can raise it only when is in good faith. See REUTER & MARTINEK, n. 11, 519.


\textsuperscript{58} For a wider comparative analysis, see SCHLECHTRIEM, n. 3, pp. 403 et seq. More recently, V. MOSSLER, \textit{Bereicherung aus Leistung und Gegenleistung}, Mohr-Siebeck, Tübingen 2006, passim.
against this obligation that of the seller to give back the price of 70, if already paid. If so, the seller will be at the end obliged to give the remaining 60 back.

5. The Object of the Recipient’s Supplementary Obligation: Restitution of Natural and Legal Fruits

Article 173, paragraph 2 of the proposal on a Common European Sales Law provides that the recipient is obliged to return (not only the benefits that he has acquired from the giver but also) any natural and legal fruits. The provision is certainly rational, but only insofar as it complies with the general principle of unjust enrichment, which proves itself to be its underpinning.\(^{59}\)

A preliminary remark is that natural and legal fruits shall be returned to the giver of the benefit only if they have been created by his own initiative; if, on the contrary, they have been created by an autonomous initiative of the recipient, such fruits have not been subtracted to the giver and shall not, therefore, be returned to him. If, as an instance, civil fruits are made up by the rent of the thing acquired by the recipient, they should be returned to the giver only if the contract of lease had been concluded by the giver himself (before delivering the good to the recipient, of course); if, on the contrary, such a contract has been concluded by the recipient, according to the principle of unjustified enrichment, there is no reason why he should return such legal fruits to the giver, as they have been created by himself.\(^{60}\)

If the restitution of fruits shall be monetary, it should be granted to the recipient in good faith a defence of disenrichment, which protects his reliance on the positive difference between the value of the fruits that has been acquired by himself and that of the fruits that has been acquired by the other party.\(^{61}\) In the case that, for example, the contract was terminated for a breach of the seller, the buyer in good faith should not return any natural or legal fruits of the good, unless in the measure of legal interests on price that shall be paid by the seller.

Where the recipient is in bad faith instead, he should certainly return the full value of the fruits, even for the part where it is possibly higher than that of the fruits he has lost. The same solution should apply where the good faith of the recipient depends on his negligence or when he has been notified the proceedings or the notice of termination by the giver.

5.1 Payment for Use and of Interests

Article 175 of the proposal on a Common European Sales Law provides that the buyer is obliged to pay for use of the good when he is in bad faith or when it would be otherwise inequitable that he used it freely (paragraph 1), and if so, on the other hand, the seller is obliged to pay interests on the price (paragraph 2).

\(^{59}\) See supra n. 2.

\(^{60}\) SIRENA, 1999, n. 48, pp. 130 et seq.

\(^{61}\) See supra n. 4.
Both paragraphs of Article 175 of the proposal on a Common European Sales Law are, however, unnecessarily complicated, also from a literal point of view, and are inconsistent not only with the principle of unjust enrichment but also with the general rule that is provided by Article 173, paragraph 2 of the aforesaid proposal.

First, it is to be pointed out that the deliberate omission of a reference to the recipient’s good faith is inappropriate here, because it creates a remarkable complication both in wording and in conceptual understanding of these provisions, which is contrary to some of the basic aims of the proposal on a Common European Sales Law. The cases referred to under letters (a) and (b) of Article 175, paragraph 1 of the aforesaid proposal could have been more simply and significantly meant by a simple reference to the recipient’s bad faith, which, as has already come out from Article 174, paragraph 5 of the aforesaid proposal, may be comprehensive (albeit with some effort) also of the case in which he caused the ground for (avoidance or) termination of contract.62

Even more important, it is not rational that the recipient in good faith has been exonerated from paying for the use of the benefit: Such rule is, in fact, definitely inconsistent with the general principle of unjust enrichment and particularly with the specific rule of Article 173, paragraph 1 of the proposal on a Common European Sales Law. On the contrary, it would have been rational and according to both the general principle and the aforementioned specific rule that, although in good faith, the recipient should pay for such use; on the other side, he should have been allowed to raise a general defence of disenrichment but only in the measure that has been already discussed.63

Even less convincing is that, when the buyer is not obligated to pay for the use of the good, the seller has been exempted from the payment of interest on the price, even when he is in bad faith. Let us assume that the use of the sold good has an objective value of 50 and that the interests on the paid price amount to 80 if the contract has been terminated for breach of the seller; according to Article 175, paragraph 1 of the proposal on a Common European Sales Law, the buyer would not be obliged to pay 50, but, on the other hand, Article 175, paragraph 2 would then not allow him to claim 80 for interests on the paid price.64 As a result, the seller would enrich himself of the difference of 30 without any good reason.

As already noted more generally, the attempt to stem the irrationality of such solutions leveraging a general fairness clause appears highly questionable on

62 The problem of whether, from the law of restitution point of view, the breach of contract that give rise to its restitution may be levelled on the party’s bad faith has been largely debated by Italian doctrine; for a summary, see SIRENA, ‘La ripetizione dell’indebito’, n. 11, pp. 506 et seq. and, more in depth, CASTRONOVO, ‘La risoluzione del contratto nella prospettiva del diritto italiano’, Europa e diritto privato 1999, pp. 833 et seq.

63 See supra n. 4.

64 Literally, Art. 175 (2)(b) makes, however, reference to the case where the recipient gave cause for the contract to be avoided and not to be terminated.
theoretical grounds and also uneasy on practical grounds: Solutions would always be unpredictable and could also be differently managed by courts.\footnote{See supra n. 21.}

As a starting point, it is to be pointed out that the avoidance or termination of the contract shall not put the recipient, even in good faith, in a better position than he would have had, if the contract had not been concluded. As a rule, therefore, the buyer shall pay for the use of the good and the seller shall pay interests on price.

These results are clearly supported by Article 173, paragraph 1 of the proposal on a Common European Sales Law, which obliges the recipient to return any natural and legal fruits, as a general rule. Traditionally, in fact, interests have been considered as civil fruits. It must, however, be admitted that, if the recipient is in good faith, his reliance on the enrichment achieved by entering into a contract is worthy of being protected by a defence and, in this sense, clearly speaks of Article VII-5:104 DCFR, particularly its second paragraph.

However, while Article VII-5:104 DCFR deals with any restitution, including extra-contractual, the rules provided by the proposal on a Common European Sales Law refer only to performance rendered under bilateral contracts: As it has been already elucidated,\footnote{See supra n. 4.} the reliance of the recipient in good faith deserves to be protected within the limits in which the avoided or terminated contract creates, in his patrimony, a surplus (\textit{commodum ex negotiatione}).

If the use of the good is worth 50 and the interests on price are of 30, it would then be unfair that the buyer, being in good faith, could not pay anything. He will rather have to return 30, being allowed to set off against this obligation that of the seller to give back interests of 30.

6. The Giver’s Obligation: Compensation for Expenditure

Article 176 of the proposal on a Common European Sales Law provides that, if the buyer has incurred costs on goods or digital content, he has a right to compensation (paragraph 1); if he was in bad faith, however, such a compensation is limited to necessary expenditure (paragraph 2).

A rule on compensation for expenditure is not to be found in the DCFR, where it is absorbed by the general defence of disenrichment provided by Article VII-6:101. The solution followed by the proposal on a Common European Sales Law is, however, preferable, first of all because it is not rational that the recipient in bad faith is denied any compensation for expenditure on goods or digital content he has now to give back to the seller.

As the underpinning of the rule is the general principle of unjustified enrichment, expenditure shall be compensated only when it has been useful, that is to say when it has made the value of the good increase or has anyway created a

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saving in favour of the seller. A more severe rule, which would extend compensation also to a non-useful expenditure, could not be justified from the point of view of the law of restitution (whose cause of action is unjustified enrichment) but only from that of compensation for (reliance) damages (whose cause of action is tort).

If the seller was in good faith, it must be held that full compensation for expenditure should be granted to the buyer only when it has been necessary; when it has been (not necessary but still) useful, on the contrary, an exception of disenrichment should then be allowed to the seller, so that he would be liable only in the measure where the value of the good has increased because of expenditure or there has been a saving in his favour.

\[67\] In this context, it is not meaningful to wonder whether the cause of a restitutionary remedy can be the tort instead of the unjustified enrichment, as advocated by BIRKS, 'Unjust Enrichment and Wrongful Enrichment', *Texas Law Review* 2000–2001, pp. 1767 et seq.; id., *The Foundations of Unjust Enrichment: Six Centennial Lectures*, Wellington 2002, 25 et seq. The case of a 'wrongful enrichment' is, in fact, not concerned here.