THE LAWFUL LEGAL ACTS

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Résumé. *Le nouveau Code civil réglemente explicitement trois faits juridiques licites. La chronologie légale mentionne la gestion d'affaire, la répétition de l'indu et l'enrichissement sans cause. Dans des grandes lignes, la nouvelle réglementation ne change pas la physionomie essentielle de la gestion d'affaire, telle comme celle-ci est connue, telle comme celle-ci est traditionnellement connue. Quelques éléments de nouveauté il y a, en ce qui concerne les conditions exigées à la gestion.*

Tout payement suppose une dette. Ce qui a été payé sans être dû, est sujet à la répétition. Celui qui a reçu l'indu doit necessairement le restituer au ***solvens****, qui a paye sans dette.*

Initiallement, l'enrichissement sans cause était une création jurisprudentielle. Le Code civil roumain contient des textes qui représentent des applications de l'enrichessement injustifié. La nouvelle réglementation roumaine mentionne, en détail, les conditions, les effets, les obstacles à l'action in rem verso *et le double plafond de l'indemnité.*

Mots clé: *faits juridiques licites***,** *la gestion d'affaire, la répétition de l'indu, l'enrichissement sans cause, notions, conditions, effets*.

1. PRELIMINARII

Three lawful legal acts have express regulation within the new Civil code. The legal chronology enumerates the management of another's business, the undue payment and the enrichment without just cause. The regulation was waited, welcomed and explicit. Perhaps it would be adequate that the enrichment without just cause was on the first section of the lawful legal act, considering that the question is about an act and at the same time, a fundamental law principle, which also grounds the solutions offered to the management of another's business and undue payment.

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2. **THE MANAGEMENT OF ANOTHER'S BUSINESS**

2.1. NOTION

"The management of another's business exists when a person called manager, without being bound to it, voluntarily and conveniently manages the business of another person called principal, that is not aware of the management or, being aware, is not capable of appointing an agent or taking care in another way of his business" (Article 1330 paragraph 1 Civil code). The text provides the conditions of this lawful legal act. We are in the presence of the management of another's business[1] every time a person called manager, voluntarily and conveniently manages the business of another person called principal, the latter not being aware of the management or, being aware, is not capable of appointing an agent or taking care in another way of his business.

In general lines, the new regulation does not change the physiognomy of the management of another's business as traditional institution of the Romanian law. Novelties – questionable – appear in what concerns some of the conditions requested to the management.

2.2. CONDITIONS OF THE MANAGEMENT OF ANOTHER'S BUSINESS

Article 1330 embodies *the conditions of the management of another's business:* the management of another's interests (1); the intention to work for another (2); the principal's impossibility to take care of his own business (3); the convenience of the management (4).

2.2.1. **The management of another's interests**

2.2.1.1. *The content of the management of another's business*

"The management of another's business exists when a person called manager, without being bound to it, […] manages the business of another person […]". The first condition is represented by the activity of management of the interests of another person. The manager must contract undertakings that are comprised in the activity of managing the interests of another person. The object of the management is currently understood in an extensive manner. On the one hand, the text of the

[1] Under the former Civil code, the management of another's business was defined as "licit legal act consisting of that a person, called manager, concludes out of her own initiative, without being bound to it, legal instruments or performs necessary and useful material acts, to the benefit or interest of another person, called principal" [C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor* (Civil law. General theory of obligations), București, Edit. Hamangiu, 2008, p. 103].

law makes no reference to the types of undertakings that enter within the sphere of the management and, on the other hand, the interests of the principal take multiple and diverse shapes. The sole condition imposed by Article 1330 Civil code is that the acts are convenient.

The new Code did not bring alteration in what concerns the content of the management of business. The filed of the management of business comprises two categories of acts: legal and material acts. The one that performs for another legal acts (the interruption of a prescription, the conclusion of an insurance contract) or material acts (extinguishes a fire, repairs a roof that was destroyed by a storm, assists the victims of a traffic accident) must be indemnified[2].

A few **mentions** in what concerns the legal acts embodied in the content of the management of another's business.

– the manager may conclude *acts of conservation* and *acts of administration.* In general, the acts of conservation and acts of administration (the contract for the performance of repairs, the interruption of a prescription, the renting of a good) enter within the limits of the manager's initiative. This is because the management is grounded on utility and convenience; or, useful are considered the acts that prevent the loss of a right and the acts that improve the patrimony;

– *the acts of disposition do not enter within the sphere of the management.* As it was stated, the acts of disposition may be harmful for the principal: it is normal to repair or even to rent the house of the absent owner; however, it is not normal to sell it[3]. Nevertheless, certain acts of disposition that, in relation to the entire patrimony (not in relation to the goods regarded *ut singuli*), acquire the character of acts of conservation or of administration (for example the selling of perishable goods), preventing an imminent loss;

– the sphere of the management must be understood in its largest meaning, namely that *it is also extended over the performance of personal obligations with patrimonial character,* that are imposed to the principal, according to the law[4] (the example offered by the doctrine is that of the legal obligation of maintenance towards the children, when this obligation is performed by the manager);

[2] The pre-project of reform on the law of obligations and law of prescription provides that the management of another's business also comprises the material acts committed in favor of the principal (Article 1328). We will call him from now on the Catala Project, as its elaboration was coordinated by professor Pierre Catala. The project can be accessed at the web page http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf (page accessed at 5th November 2010).

[3] J. Flour, J.-L. Aubert, E. Savaux, *Droit civil. Les obligations.* 2. *Le fait juridique,* 13e édition, Dalloz, Paris, 2009, p. 15.

[4] Trib. Supr., col. civ, dec. no. 781/23.07.1966, in *Culegere de decizii, 1996,* p. 191. See S. Şerbănescu, *Posibilitatea aplicării principiilor gestiunii de afaceri în actele intervenite pentru neexecutarea obligaţiilor de întreţinere a copiilor minori* (The possibility of enforcing the principles of the management of another's business in the acts occurred for the non-performance of the obligations of maintenance of the minor children), „Revista Română de Drept", no. 5/1968, p. 67–70.

– the legal instruments may be *concluded without representation* or *by representation.* In the first situation, acting in his own name, the manager assumes all the legal consequences of the instruments concluded with the third parties. In the second situation, the manager acts on behalf of the principal; he is not imposed liability in relation to the third parties with which he contracted unless the principal is not obliged to them. Both situations are detailed in Article 136 Civil code.

2.2.1.2. *The manager's initiative*

The new Civil code provides that the manager "*voluntarily manages*" the business of another. The manager "voluntarily" intervenes in another's affairs, that is without being bound to it – which suggests the spontaneous initiative of the manager, the intention of being helpful, of doing another one a service. Thus we exclude the action grounded on a contract or legal provision – other than those regarding the management of another's business. The intention to work for another means, in this context, the absence of the prior assignment and places the manager's conduct outside the institution of agency.

The Civil code establishes two different *situations;* we believe that only the first of the two attitudes mentioned by the law is included in the institution of management of another's business.

In the first legal hypothesis, the principal is not aware of the existence of the management. It goes without saying that there is no consent of the principal, but there isn't his position either; we are in the presence of the management of the interests of another.

In the second case, the principal is aware of the management, but is not capable of appointing an agent or of taking care of his business in another way. The wording of the text leads to the conclusion that the principal is aware of the management, but is not capable of handling his own business and does not entrust this problem to an agent. There is no question of any opposition towards the interference of the manager, but we must consider the tacit mandate, as long as the principal knows and accepts the management.

In the most pure meaning of the management of another's business, it is characterized by the absence of the principal's consent and, so, the absence of his opposition, given the fact that he is not aware of the existence of the interference in his personal affairs. Or, as long as the principal knows that someone else is working for him and is not opposed, the interpretation is that he accepted the management, precisely because he was aware of it, but, for the reasons shown by the law, he could not take care of his own business. If the principal is opposed to the manager's initiative, but the management starts or continues, the tort liability becomes efficacious. Article 987 of the 1865 Civil code was firm and more clear in this respect: "The one that, intentionally, manages the interests of another, without the owner's knowledge […]".

We believe that the wording of Article 1330 paragraph 1 Civil code that aims at defining the management of another's business (by presenting its conditions), operates a mixture that outshines the true physiognomy of this lawful legal act. Only the first of the two legal hypothesis means – in the most rigorous meaning of the legal language – management of another's business. The first thesis of Article 1330 paragraph 1 consists of the management of the interests of another person, totally foreign in relation to the undertakings of the manager, so that she does not have the possibility to express neither her consent, nor her opposition. The second thesis of Article 1330 paragraph 1 brings into the equation a contract of tacit mandate, as long as the principal is aware of the existence of the management and is not opposed to it. The reasons for which the principal, being aware of the management, allows it, make no difference. All the more so, as Article 1331 Civil code provides the manager's obligation to let the principal know about his intervention, and the awareness of the management gives effect to the rules of the mandate. The law only mentions that he "is not capable of appointing an agent or taking care in another way of his business". We believe that the clear text of Article 1330 Civil code 1st thesis was enough, meaning that the principal is not aware of the existence of the management, so that the legal wording would avoid any overlapping of the management with the tacit mandate.

The second thesis from the definition of the management (the principal is aware of the existence of the management, but is not against it) is taken from the French Civil code and the Civil code of Quebec, that establishes the management in both forms – with the knowledge, namely without the knowledge of the principal (Article 1372)[5]. The French doctrine reacted to the provisions of Napoleon's Code, showing that the wording of the legal text is enigmatic: if the principal "is aware and does not preclude, shouldn't we consider that he tacitly gave his consent so that a contract was formed?"[6]. Several attempts of identifying certain situations that would support the French text when the principal knows the manager's intentions and conduct, existed, so that one could conclude that it is management and not mandate: for example, the situation when the principal cannot oppose to the manager's initiative because of the distance between them; or when the management is in fact, an act of devotement – in concrete, the assistance given to a person in danger or the intervention of the citizen that was hurt by the thief that he was following. The author's observation was that it is preferable to bring into question the management of another's business than to resort to the institution of the offer to contract, whose author is the savior, the acceptant being the one assisted.

[5] *Code civil,* 110e édition, Dalloz, Paris, 2010, Édition 2011, p. 1647.
[6] J. Flour, J.-L. Aubert, E. Savaux, *op. cit.*, p. 9.

We believe that this approach of identifying certain concrete situations that would be integrated in the text of the French code[7] and justify it, remains artificial. The gesture of helping a person in need is a selfless act or, according to each case, the expression of the legal obligation to help the one found in the situations expressly mentioned in the Criminal code. It is not management of another's business, an additional argument being that, in the situations mentioned, we do not talk about the "fortune" or patrimony of the beneficiary, but about the integrity of his person.

It would remain that, when the principal is aware of the management and does not preclude, the spontaneity of the intervention separates the management from the mandate. Or, the mandate is an agreement, and the knowledge of the management and its toleration (by lack of opposition) evokes precisely the agreement, in this case, tacit. In conclusion, the knowledge of the manager's initiative and the absence of the opposition of the principal can only mean a tacit mandate. On the other hand, the principal's opposition brings about special consequences, regulated in Article 1338 Civil code, with reference to the institution of civil liability. The situation of exception regards the material acts, considering that the mandate has as object the conclusion of legal instruments.

2.2.2. **The intention to manage the interests of another**

The will to work for another is essential in order to characterize the management of another's business. The notion "voluntarily" (Article 1330 Civil code) evokes the intention to interfere in favor of another person. The interference in another's affairs must be deliberate. The new Civil code kept, in similar terms, the wording of the 1865 Civil code that talks about the management "with intention" of another's interests.

We distinguish the following **situations:**

1. *the manager works exclusively in the interest of another,* aiming at avoiding certain expenses in the patrimony of the principal and having the intention of compelling the principal to the reimbursement of the sums spent – it is not management of another's business;

2. *the manager acts, at the same time, in his own interest and in the interest of another person.* The conduct having a mixed interest brings profit also for the principal, from which the manager intends to recover the expenses related to the beneficiary's share. The one who administrates the common good and pays the

[7] Not only the French Civil code, but also the Catala Project refers to the management performed "with the knowledge or without the opposition of the owner of the affair" – the manager being subject, in what concerns the legal and material acts he performs, to the rules of the express mandate that he could have been able to receive (Article 1328). But in a comment to this article it is shown that the gratuity of the mandate results clearly from the fact that the remuneration of the manager does not appear among the obligations of the principal, the utility being the sole condition necessary for the performance of the principal's obligations towards the manager.

necessary sums for its reparation has the position of manager of business in relation to the effects of the acts performed in the interest of another[8]. The French project of the code of obligations explicitly embodied this situation, in Article 1329: "The rules of the management of another's business are also effective when the management is performed not only in the exclusive interest of another, but also in the common interest of another and the manager"; the expenses and losses – it is further mentioned- will be proportionally split among those interested. It is enough a "partial motive" – in other words also the management of another's business[9]; will be management for the effects produced by the intervention of the manager in the business of the other person;

3. *the manager works with the wrong belief that he works for himself*[10] – situation in which we are not in the presence of the management of another's business. Article 1330 paragraph 2 clarifies this hypothesis, providing that "he who, without being aware, works in the interest of another, is not bound by the obligations that by law are imposed to the manager". He is entitled to restitution according to the rules of the enrichment without just cause"[11];

4. *the person that administrates another's business is animated by a liberal intention,* wanting to enrich the principal (the liberal intention must be proven, it is not presumed)[12]. It is the situation expressly mentioned by Article 1330 paragraph 3 Civil code. The presence of *animus donandi* excludes *animus gerandi*[13];

5. *it is not management of another's business if one performs acts/facts for the execution of the obligations he has in relation to the goods of another person* (for example, the acts of administration of the goods of the minor placed under the guardianship of the one that performs them). Article 1330 paragraph 1 states that, it is management when the person acts "without being bound". The practice admitted that it is management, only for what exceeds the legal or contractual obligation, if the liberal intention does not exist[14].

[8] For Romanian jurisprudence on the matter, see V. Terzea, *Codul civil* (Civil code), vol. II (art. 644–1404), Bucureşti, Edit. C. H. Beck, 2009, p. 502–503. If there is a tacit opposition of the co-owners, the act is not opposable to them on the ground of the management of another's business, even if the intervention is convenient.

[9] J. Flour, J.-L. Aubert, E. Savaux, *op. cit*., p. 9.

[10] *Ibidem*, p. 10.

[11] In this situation is also found the one that, believing he is heir on grounds of an heir certificate subsequently annulled, makes a series of reparations to the apparently inherited house, and afterwards realizes that he is not an heir [L. Pop, I.-F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile* (Elementary treatise of civil law. The Obligations), Bucureşti, Edit. Universul Juridic, 2012, p. 350].

[12] C. Hamangiu, N. Georgean, *Codul civil adnotat* (Annotated Civil code)*,* vol. III, Edit. Socec&Co, SAR, p. 502–503.

[13] In respect to the subjective element of the management of another's business, see P. Vasilescu, *Drept civil. Obligații* (Civil law. The obligations), Bucureşti, Edit. Hamangiu, 2012, p. 207.

[14] French Court of Cassation, commercial chamber, 16.11.1976; French Court of Cassation, third civil chamber, 8.06.1977, decisions quoted after J. Flour, J.-L. Aubert, E. Savaux, *op. cit.*, p. 10, 5th note.

2.2.3. **The principal's impossibility of taking care of his own business**

The law does not detail the reasons that prevent the principal from acting himself, appointing an agent or taking care in another way of his business. The mere passivity of the principal is enough in the legal hypothesis of the knowledge of the management. We have already mentioned, the knowledge of the management and the abstention from taking the measures to continue it, means a tacit consent from the part of the principal.

According to Article 1330 paragraph 2, *the person who, without being aware, works in the interest of another, is not bound by the obligations that by law are imposed to the manager.* It is the hypothesis when the person has the mistaken-belief that she acts for herself (for example, the one that considers himself an heir, repairs a good from the inheritance; the will discovered later disinherits him). In this case it is not a management of another's business. In the absence of the intention to voluntarily interfere in the business of another, restitution will follow the rules of the enrichment without just cause.

According to paragraph 3 of Article 1330 Civil code there is no management of business when the one that administrates the business of another person acts with the intention to gratify her. The manager administrates the business of another person with the intention to gratify her. In this hypothesis, the person works with the purpose of bringing a patrimonial gain to another, she does not manage with the intention of recovering the possible expenses.

2.2.4. **The convenience of the management**

In the wording of Article 1330 Civil code, the business of another person need "voluntarily and conveniently" management. "Voluntarily" means the manager's will to interfere for helping another. "Conveniently" is the condition for the validation of the management of another's business and, at the same time, the limit imposed by law to stop the unexpected initiatives to administrate for another.

Leaving aside the traditional line, the legislator gives up the idea of utility and introduces in Article 1330 the request for the *convenience* of the management. The source of inspiration was the recent French doctrine that embodies large discussions on convenience and that states that in the case of management of another's business, the term "utility" has particular connotations. It is offered the example of the one helping a person in danger and during the acts of salvation he suffers damage. This person can be compensated even if his act was not fruitful and the one in danger was not saved. What is relevant from the perspective of the expenses and compensation in the shown opinion is not the *result achieved,* but the *result expected.* In the framework of the management of another's business, it is useful to act even if the action is not useful[15]. In the same idea, the utility of the management will be ascertained – in order to reimburse the expenses and to repair the damage – *in concreto* and not in an abstract manner. The reference point will not be what is usually understood by useful acts of management, but what the manager performed in fact, given the particular circumstances of the case, unless he committed a serious fault that cannot be excused[16]. We notice the fact that Article 1337 paragraph 1 Civil code also compels the principal to expenses and, according to each case, to compensation in relation to the manager "even if the result was not achieved".

We believe that the initiative of the new Civil code to subordinate the management of another's business to the requirement of convenience is questionable. Firstly, we must take into consideration the meaning of the legal terms that are used, making the necessary distinctions. "Convenient" evokes what is done at the right moment, adequate to the situation, circumstances[17], while "useful" means what is of help, necessary, what happens on time, at the convenient moment[18]. These are dictionary terms relevant in the context of the classification of the management, especially since the legal language did not attribute another meaning than the one of the regular vocabulary. Convenience rather suggests that the manager's intervention was at the right moment, than that it was useful. Whereas a useful act is, simultaneously, a helpful act and an act performed at the convenient (right) time. It is of common sense that a conduct is helpful if done at the right time; otherwise, it cannot be helpful. The term "convenient" is too narrow to embody utility; whereas the word "useful" integrates convenience. The management must be advantageous for the principal, it must be helpful, this being the core feature of this lawful legal act, that counts on the spontaneous initiative of the manager.

Secondly, the approach to explain utility by connotations that are foreign to the word "useful" lacks realism. The analysis of the thesis promoted within the French doctrine and aforementioned, allows the conclusion that the attempt to offer the term utility particular connotations in relation to the management of another's business, is interesting. However, this approach is not in tune with the daily reality and the legal reality and is forced: the management must be advantageous for the principal, so it is out of place. Another argument to resort to the term "utility". Even the supporters of convenience accept that, in concrete, convenience may sometimes exclude utility. In this respect, it is offered the example of the person that spontaneously intervenes for another but does not achieve a favorable result; he will be compensated, but as a "reward" for his initiative, not for the result

[15] J. Flour, J.-L. Aubert, E. Savaux, *op. cit.,* p. 16.

[16] *Ibidem.*

[17] Also see *Dicționarul explicativ al limbii române* (Explanatory Dictionary of the Romanian Language), București, Edit. Univers Enciclopedic, 1998, p. 722.

[18] *Ibidem,* p. 1142.

achieved that does not coincide with the result expected. So, the intention and not the finality of the gesture have relevance. Or, the court of justice has the mission of evaluating to what extent the acts are useful for the principal, contributing to the prevention of a loss or to an added value, with minimum expenses. The absence of the result makes impossible the evaluation (under a patrimonial aspect) of the manager's conduct. We may have that certain situations that are far from being useful are ranked as management of business or even that the physiognomy of this legal institution is deformed[19].

We believe that the traditional solution of the Romanian law should have been kept, utility being the cornerstone of the management of another's business. Utility designates, in the classical meaning of the term, the fact that the management is useful for the principal, its performance avoids a patrimonial loss, with a relatively small effort; the amount of expenses paid is inferior to the value of the imminent patrimonial loss in the absence of these expenses. The old provisions on the matter[20], as well as the explanations of the Romanian legal doctrine and majority jurisprudence[21], converge into showing that a management is useful when it is of help to the principal, namely when the manager's conduct avoided a patrimonial loss or brought an increase of value of the owner's good.

Utility is, in fact, the sole justification of the expenses indispensable for the conservation of the good (necessary expenses) and of the expenses that ensure the increase of growth and economic utility of it (useful expenses[22]). The manager is entitled to recover the necessary and useful expenses. In the absence of the establishment of the condition of utility (only convenience being demanded), the courts will be found in the difficult situation of examining whether the manager's acts were performed at the convenient (right) time, without being necessary to examine if they were also useful. Going to Article 1339 Civil code it is shown that, *per a contrario,* the inconvenient management embodies "acts and expenses that, without being necessary or useful, were made […]". Nevertheless, as we have already shown, "convenient" does not mean "useful", "inconvenient" does not necessarily mean "useless".

[19] Despite the discussions from the French literature, the Catala project established the condition of utility: "The one whose business was managed in a useful way […]". On the other hand, the French Civil code talks about a "well administrated business" (Article 1375) – which means business administrated in an useful manner.

[20] "The owner whose business was well administrated…" – Article 991.

[21] L. Pop, *Drept civil român. Teoria generală a obligaţiilor* (Romanian Civil law. General theory of obligations), Bucureşti, Edit. Lumina Lex, 1998, p. 149; C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor* (Civil law. General theory of obligations), éd. cit., p. 107; R. I. Motica, E. Lupan, *Teoria generală a obligaţiilor* (General theory of obligations), Bucureşti, Edit. Lumina Lex, 2005, p. 144; I. Dogaru, P. Drăghici, *Bazele dreptului civil*, vol. III – *Teoria generală a obligaţiilor* (The grounds of civil law, 3rd volume – General theory of obligations), Bucureşti, Edit. C. H. Beck, 2009, p. 210–211.

[22] M. Mureşan, *Dicţionar de drept civil* (Dictionary of civil law), Cluj-Napoca, Edit. Cordial Lex, 2009, p. 337–339, p. 119.

The convenience of the management is the light of the new Civil code, a matter of fact that is ascertained in relation to the moment the acts/facts of management happened. Article 1337 paragraph 3 Civil code states that: “The necessary or useful character of the acts and expenses is ascertained at the moment the manager performed them”. Therefore, the possible deterioration or destruction of the good due to force majeure or a fortuitous event (for example, the good was further destroyed in an earthquake), will not be relevant.

2.3. THE MANAGER’S OBLIGATIONS

2.3.1. **The obligation to notify**

The obligation to notify the principal about the start of the management, as soon as possible, is imposed to the manager. Being a spontaneous intervention, determined by the imminence of the loss that threatens the principal’s patrimony, it is normal that the manager notifies, out of his own initiative, the owner. Nobody can administer better a business than its owner, so it is normal that the manager perform the necessary tasks so that the one in question could know about the existence of the management. At the same time, the manager, having the initiative of the management, cannot abandon the work until he has the certainty that there are no risks of losses or until the principal, his agent or heirs are able to take it over.

The establishment of this obligation of the manager is welcome. The duty to let the principal know as soon as possible, gives an extra note of responsibility for the manager. Practically, there are two obligations of the manager that form two levers that subsume to the role of discouraging the tempestuous initiative: the obligation to notify (Article 1331 Civil code) and the obligation to continue the management (Article 1332 Civil code).

2.3.1.1. *Continuing the management*

The obligation to continue the management is also known as obligation of perseverance. The justification of this duty is found in the fact that leaving the management exposes the principal to certain damages; or, as long as he acted without the order or disposition of the owner, it is not equitable to abandon a business before ensuring that another one will take it over or that there are no risks. The purpose for which this obligation was settled was to prevent the third parties from getting involved in another’s business, outside the strictly regulated conditions: “The management of another’s business seems linked to altruism and different feelings that inspire him. The pretended altruism is dangerous, it is better not to do anything than to start something and not finish it; in order to discourage this type of altruism, the law imposes the manager an obligation of perseverance. But, altruism in itself is a virtue; the law also grants a series of rights to the manager”[23].

[23] Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations,* 4[e] édition, Defrénois, Paris, 2009, p. 564.

The limit up to which the duty to continue the management is extended is represented either by the absence of any risk for the principal to be caused damages through the abandon of the business, or by the taking over of the management by the principal, his agent or heirs. From this perspective, it was stated under the former regulation, that the manager has a more difficult situation than the agent, because the latter can give up his mandate with a previous notification[24]. The new Civil code seems to make even more difficult and, thus, more responsible the position of the manager since Article 1333 sets forth, in the same idea, the obligation to continue de management by the manager's heirs given the fact that they are the followers of the deceased's personality and the principal shouldn't suffer damages. The heirs are subject to the same conditions the law imposes for their predecessor.

2.3.1.2. *The diligence owed by the manager*

Working for another, the manager will prove the prudence of a good family father[25]. Working for another, the manager will prove the prudence of a good family father[26]. As a rule he will be held liable for the damage caused, regardless of the form or degree of guilt. The inflexibility of the principle is attenuated in paragraph 2 of Article 1334 that allows the judge to make a nuanced ascertainment, taking into consideration the circumstances that imposed the manager's intervention. According to each case, compensation will be granted only for intention or serious fault, if the taking over of the management was dictated by the imminence of damage within the principal's patrimony. The intention and serious fault are defined by Article 16 Civil code that regulates guilt. The law imposes the manager to act as a good owner, or, the intention and serious fault do not characterize the conduct of a good *pater familias.*

2.3.1.3. *The obligation to report*[27]

The manager is bound to give an account of all the acts/facts he performed during the management. He must return to the principal all the goods, all the sums he received on grounds of the management. Of course, until the return, the goods must be conserved in the hands of the manager.

[24] L. Pop, *Drept civil român. Teoria generală a obligațiilor* (Romanian civil law. General theory of obligations), éd. cit., p. 151; I. Dogaru, P. Drăghici, *op. cit.*, p. 214; J. Flour, J.-L. Aubert, E. Savaux, *op. cit.*, p. 19.

[25] The obligation was established as such in Article 998 of the former Romanian civil code, taking after the Napoleon code.

[26] With regard to this obligation, see Ph. Delebecque, F.-J. Pansier, *Droit des obligations*, 1, *Contrat et quasi-contrat,* Paris, Litec, 2006, p. 282.

[27] L. Pop, I-F. Popa, S. I. Vidu, *Drept civil. Obligațiile...* (Civil law. The obligations...), p. 353.

With the occasion of the presentation of the way in which he managed, the manager will return the sums of money or other goods he received during the management and in connection to it. Correlatively, the principal will pay the manager all the necessary and useful expenses, as stated by Article 1337 Civil code. We believe that the goods received on grounds of the management may be subject to the right of retention until the reimbursement of the expenses. This because "the one that is bound to hand over or return a good may keep it until the creditor compensates him for the necessary and useful expenses he made for that good or for the damages the good caused him" (Article 2495 Civil code). If the management is ratified, the effects of the mandate will be produced; the right of retention of the goods received while performing the specific tasks is expressly regulated in Article 2029 Civil code.

> "*The manager that acts for himself is bound in relation to the third parties with whom he contracted, without limiting the right of any of the latter to turn against the principal. When acting on behalf of the principal, the manager is not bound in relation to the third parties with whom he contracted unless the principal isn't compelled to them"* (Article 1336 Civil code).

Paragraph 1 embodies the rules of the *management without representation* (imperfect representation[28]). It is the situation preferred by the third parties that do not have the certainty that the management will be ratified or ascertained as useful, so that they demand the personal commitment of the manger. Practically, the principal does not enter the equation of the contract manager-third party, and thus, the manager is the creditor or debtor for what he agrees for himself. Even if the manager acts in his own name, the right of any of the third parties to turn against the principal is not limited.

Paragraph 2 refers to the *management with representation* (perfect representation[29]), which involves the notification of the third parties, possible contractual partners, of the circumstance that the manager acts on behalf of another person, within the limits confided in him. The effects of the legal act are produced in the person of the one represented and the principal will have to perform all the commitments assumed for him.

The distinction is noticeable not only in what regards the person that bears the effects of the acts concluded with the third parties, but also from the perspective of capacity. In both cases the manager has to have capacity of contracting. If the manager work without representation, it doesn't matter if the principal had or not capacity of exercise at the moment the act was concluded. However, the management with representation presumes not only the manager's capacity, but also that of the principal that becomes creditor or debtor in the legal

[28] Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations*, éd. cit., p. 569.
[29] *Ibidem.*

relationships. Article 1337 paragraph 2 shows that "the principal must perform the obligation brought by the necessary and useful acts which were concluded by the manager on his behalf or in his benefit". Practically, it is difficult to imagine that the third parties with whom the manager will contract, are convinced to contract on the name and in the interest of the principal, in the absence of any agency[30].

2.3.2. **The principal's obligations**

2.3.2.1. *The reimbursement of expenses*

Categories of reimbursable expenses

The reimbursement of the expenses occasioned by the management of another's business will be performed if the conditions settled by Article 1330 paragraph 1 Civil code are cumulatively met. The necessary and useful expenses are subject to reimbursement. The necessary expenses help to conserve the good, being expenses that normally have to be covered by the owner if the good was in his possession. The useful expenses are the sums invested in order to improve the material state of the good, increasing its value; these expenses will be reimbursed within the limit of the increase of value; moreover, the manager will be paid interests from the day of the expenses. The expenses reimbursed to the manager are not considered undue payment, according to Article 1341 paragraph 2 Civil code.

The necessary mention is that if the management is ratified, according to Article 1340, the examination of the convenience and other conditions of the management of business becomes superfluous. We will be dealing with a mandate, and Articles 2025-2026 and Article 2039 will be enforced. The ratification intervenes, normally, for a useful management, but the situation will be simplified, meaning that the conditions of the management will not be checked.

The resistance of the management's beneficiary

"The one that starts or continues a management, knowing or having to know about the resistance of the owner of the business, may only claim the reimbursement of the necessary expenses. In this case, the court, at the request of the owner, may grant a period of time for the performance of the obligation of restitution. In addition to this, the one that ignores the owner's resistance is liable for the damages caused even due to the slightest fault".

We corroborate the text of Article 1338 Civil code with the obligation that Article 1331 imposes to the manager, of notifying as soon as possible the owner about the existence of the management. The manager's initiative is grounded on his good faith in the disinterested administration of another's business. Once the manager knows or had to know due to the circumstances, that the holder of the

[30] P. Vasilescu, *op. cit.*, p. 209.

business is resistant, his opposition must be observed. Thus, the manager acts in bad faith, most probably with the intention of later claiming the necessary or useful expense, or in view of the possible compensation for any damage. The "sanction" is that the manager that ignores the owner's resistance will not be able to obtain more that the necessary expenses (these are the expenses made for the conservation of the good and are presumed to have been made also by the owner). The court may grant a period of time for the reimbursement of the necessary expenses. The ignorance of the manager's position equals the illegal interference, so that the manager will be held liable also for the slightest fault. To be relevant, the principal's position must be justified by factual circumstances.

The inconvenient management

The acts and expenses that, without being necessary or useful, were performed during the management, compel the principal to restitution only to the extent to which they brought him an advantage.

The third party's intervention justifies compensation only if the administration was convenient[31]. The inconvenience[32] of the management of business means the performance by the manager of certain acts/facts that were not necessary or useful. For such undertakings, the principal cannot be bound to return the expenses. If the acts performed during the management were only partly useful or necessary, the expenses will be reimbursed to the manager only to the extent to which they meet the request of convenience[33].

2.3.2.2. *Reparation on damage*

As *novelty we can notice the legal establishment of the obligation to repair the damage of the manager* (damage caused by the administration acts), even if, within a convenient management, the purpose for which he worked was not achieved (Article 1337, paragraph 1). The condition for the payment of compensation in favor of the manager is the absence of his fault in the management. The damage will be repaired, unless it was caused by the manager's fault – for example, the bodily injuries suffered by the manager during the act of management[34] (while saving the principal from an imminent danger).

What will be taken into consideration is the value of the work, the value of the goods and services from the moment when the acts/facts of management

[31] With regard to convenience, as requirement of the management of another's business, see *infra,* comment to Article 1330 Civil code.

[32] When analyzing Article 1330, we mentioned that convenience does not include utility. Therefore, "inconvenient" does not mean what is not necessary and what is not useful. Inconvenience means what doesn't happen at the right moment.

[33] We make reference to the comment on the requirement of convenience.

[34] For judicial practice in this respect, see French Court of Cassation, first civil chamber, decision of 16th November 1955 (Esmein note), quoted after J. Flour, J.-L. Aubert, E. Savaux, *op. cit.,* p. 20.

occurred, regardless of the fact whether at the moment of the payment the principal's goods perished: "the debt-compensation will be ascertained at the moment the claim in liability was brought, if the principal does not want to amicably compensate the manager"[35].

The recent French doctrine is the one pleading for the reparation of the manager's damage even if the administration was convenient, but not necessarily also useful[36]. We believe that the possibility of recovering the damage is placed within a management subject to the condition of utility. The sums consisting of the expenses made and the damage suffered are subordinated to the condition of convenience, even if the purpose of the acts of management was not achieved (for the critic of convenience we make reference to the analysis of Article 1330 Romanian Civil code). The French law (French Civil code – Article 1374 paragraph 2) offers the court the possibility of "moderating" the amount of compensation in case of a defective management, depending on "the circumstances which have led the manager to take over the responsibility of the business". Thus, *in concreto,* the French judge can indemnify the management if he ascertains as convenient an initiative that in the end is useless[37].

2.3.2.3. *The performance of the obligations generated on his behalf or in his benefit (Article 1337 paragraph 2)*

A convenient administration compels the manager to the performance of all duties born on his behalf or in his benefit. The problem of the performance of obligations regards only the necessary and useful management.

The management with representation brings about direct obligations imposed to the represented principal that will be found in direct legal relationships with the third parties.

The management without representation compels the principal only if the third parties choose to demand from him the performance of the obligations, even if the manager is personally obliged. In fact, paragraph 1 of Article 1336 is clear in this respect: even if the manager acts in his own name, the right of any third party to go against the principal is not limited. The ratification of the management brings about the enforcement of the agency's rules, retroactively, from the date the management began.

The necessary and useful character of the acts, namely of the expenses, is ascertained in connection to the date of their performance and not the date compensation was asked (Article 1337 paragraph 3). The solution is natural, as the manager can, for example, make useful reparations to a building that later perishes in a fire.

[35] P. Vasilescu, *op. cit.*, p. 209.
[36] *Ibidem,* p. 15–17.
[37] The Catala Project (Article 1328-2).

The manager has the possibility to claim before the court the registration in the land register of a legal mortgage. At the manager's request, following the expertise, the court may establish the registration in the land register of a legal mortgage, according to the law. The purpose of the mortgage is to ensure the necessary (not the useful) expenses, and the procedure will be that settled for the presidential ordinance.

If the conditions of the management of another's business are not met, and the acts are not ratified, the provisions regarding the unjust enrichment will be enforceable. The new Civil code makes no statement on this matter, however the model of the regulation from the Catala Project (Article 1329-1) may be taken into consideration. Whenever it is proved that the conditions for the unjust enrichment are met, the court may establish, at request, compensation.

2.3.3. **The compensation of the manager**

The issue is not legislatively settled. Obviously, the expenses brought by a convenient management will be reimbursed, but these expenses represent sums that make possible the administration or conduct of the principal's business. The question rests for the work done by the manager. Two conceptions met in the attempt to clarify the gratuitousness of the management, namely to clarify whether gratuitousness is a character of the management's essence or nature. On the one hand, it is considered that absolute gratuitousness is a necessary condition grounded on two major ideas: if the manager will automatically be entitled to remuneration, he could interfere as he pleases in another's business, knowing in advance, that he will receive an income. On the other hand, we can notice that the inconvenient, unnecessary and ill-intentioned intrusion does not entitle to the remuneration of services; moreover, the management of business with a professional character is onerous[38].

It is true that the management of another's business means the rebound of individualism and a contribution to the development of social solidarity. This is all the more so, since it is known that sometimes altruism instigates to indiscretion[39] and philanthropy may become a mask that hides selfish feelings. In reality, benevolence and the onerous title interfere in specific forms, since within the legal life the selfish tendencies and the unselfish ones, influence and condition each other. "Human feelings in themselves are neither pure selfish, nor pure altruistic, but solidary"[40].

[38] The French doctrine is the one making this distinction with arguments of detail. See, O. Căpățână, *Titlul gratuit în actele juridice* (Benevolence within legal acts), Bucureşti, Edit. Rosetti, 2003, p. 62–64.

[39] Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations*, éd. cit., p. 564.

[40] Cornejo, *Sociologie générale,* II, p. 319, *apud* O. Căpățână, *op. cit.*, p. 7.

Even if we would accept that unselfishness remains a character related to the nature and not essence of the management, we must distinguish the situation when the manager receives remuneration from the situation of the employed manager. Between the management and mandate there is a legal closeness, first of all given the fact that both the manager and the agent perform a useful activity in the interest of another person, usually without being remunerated. The differences are noticeable between the two hypotheses, even if both the manager and the agent work unselfishly, out of strictly personal considerations towards the beneficiary[41].

2.3.4. **The ratification of the management**

The mandate has as exclusive object the legal acts. Naturally, the effects of ratification are only applied to the acts ratified by the principal. No matter whether the principal found out about the management from the manager or from a different source, as long as he does not manifest his opposition, he approves *a posteriori* the manager's conduct.

The importance of the act of ratification particularly appears when the request of convenience is not met (according to Article 1330 paragraph 1). If the management of business is considered convenient, the court may impose the principal to pay expenses and/or compensation in favor of the manager, even in the absence of ratification. On the contrary, if the administration of another's business proved inconvenient, the ratification is enough to entitle the manager to expenses and compensation. From this point of view, the act of ratification has the role of a "palliative" in the framework of certain inconvenient acts of management.

The principal's ratification represents a unilateral act consisting of the manifestation of will to accept the management of business. The ratification covers the legal acts concluded by the manager and is independent of the compliance with the conditions provided by Article 1330 Civil code. By means of the ratification, the effects of the mandate will be retroactively produced. The ratification is express or tacit.

Once the ratification intervenes, the principal will be compelled to perform all the obligations assumed by the manager on his behalf or in his interest. He will return the necessary expenses, the useful expenses, as well as the interests due for the sums paid for the management, from the day of their performance. In his turn, the manager will fulfill his obligation to report, this time the rules of the contract of mandate being enforced. The manager will notify the principle everything he worked during the interference and will return him all the goods he received, even if they were not owed to the principal (Article 2019, Article 2039 Civil code).

[41] *Ibidem,* p. 56.

3. THE UNDUE PAYMENT

3.1. NOTION

Article 1341 embodies the notion of undue payment, its conditions and situations in which payment is owed. Within the legal language *payment* designates the voluntary execution of any positive or negative obligation, regardless of its nature[42]. The ground of payment is clearly indicated by Article 1469 Civil code: any payment involves a debt. *Per a contrario,* the one that pays what he does not owe, has the right to restitution, according to Article 1341 paragraph 1 Civil code. *The undue payment (payment of indebt) represents the lawful legal act that brings about a legal relationship of obligations on the grounds of which the one who received an unduly payment (*accipiens *– the debtor) is compelled to make restitution to the one that made it (*solvens-*creditor).* The new Civil code[43] regulates the notion from the perspective of the payer; the former Civil code defined it from the perspective of the receiver of the payment.

In what concerns the *legal nature*, the undue payment is placed in the proximity of other institutions, such as the enrichment without just cause or the civil non-contractual liability. Under the former regulation, the doctrine and jurisprudence of our country sometimes operated a closeness that at times reached overlapping, between the undue payment and other legal institutions or situations; the arguments being presented with details within the papers on the matter[44]. Within the new Civil code, the undue payment is an autonomous source of obligations, without the possibility of confusion. It justly makes the distinction between the three sources of obligations placed under the aegis of the lawful legal act: the management of another's business, the undue payment and the enrichment without just cause. In fact, the 5th book that represents a true "Code of obligations" enumerates the three notions, separately, among the lawful acts to which the law grants legal effects. Between the three lawful acts there are elements of similitude, but also important differences.

[42] With regard to the definition, regulation and legal nature of payment, see L. Pop, *Tratat de drept civil. Obligațiile,* vol. I [*Regimul juridic general sau Ființa obligațiilor civile* (Treatise of civil law. The obligations. 1st volume. The general legal regime or the Existence of civil obligations)], București, Edit. C. H. Beck, 2006, p. 446–449.

[43] Within a doctrinal definition, the undue payment is the legal licit act that consists of the performance of a person, by error, of a service to which she was not compelled and without the intention of paying for another. The performance of the payment, as material fact, must be doubled, in general also by its intentional element: *the solvens* is necessary to make the payment with the firm intention of extinguishing a [L. Pop., I.-F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile* (Elementary treatise of civil law. The Obligations), ed. cit., p. 358, p. 360].

[44] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor* (Civil law. General theory of obligations), éd. cit., p. 116–117; I. Dogaru, P. Drăghici, *op. cit.*, p. 358–359; V. Terzea, *op. cit.*, p. 507–508.

3.2. CONDITIONS OF THE UNDUE PAYMENT[45]

Article 1341 new Civil code embodies the conditions of the undue payment: the performance of a payment (a); the intention to discharge a debt (b); the absence of the debt (c).

3.2.1. **Performance of a payment**

"The one who pays […] is entitled to restitution". The payment represents the ground of restitution, for the reasons shown in the law. The one who pays, voluntarily executes his obligation. According to Article 1469 paragraph 2 of the new Civil code, he pays a sum of money or performs the service that represents the object of the obligation.

3.2.2. **Intention to extinguish a debt**

The person that pays has the intention to discharge a debt. The debt is the ground and purpose of payment (Article 1469 paragraph 1 new Civil code: "The obligation is discharged through payment…"). If the payment is made with another title – generosity, expenses owed for the management of business, we will not deal with an undue payment. The presence of *animus solvendi* is presumed by the first paragraph of Article 1341 paragraph 3 Civil code: "payment was made with the intention to discharge a personal debt".

3.2.3. **Absence of debt**

The wording "without being owed" evokes the absence of any debt. Paragraph 3 of Article 1241 generally excludes the discussion on the possibility to pay for another, establishing the presumption that payment is made with the intention of discharging a personal debt. The legal presumption is relative.

The absence of debt may be identified on several levels:

1. *the absence of the legal relationship that legitimates payment* (the undue payment has an absolute or objective[46] character). In other words, the debt that was aimed to be discharged does not exist between the persons in question. Despite the fact that the one who paid believed that he owes, the debt is imaginary (the debt has already been discharged at the date of payment, or, it has never existed). It takes no relevance whether the two are connected by a legal relationship of obligations that has another object (for instance, another payment);

2. *the person that received the payment is not the creditor of the one who paid* (the undue payment has a subjective or relative character[47]). The payment

[45] P. Vasilescu, *op. cit.*, p. 211.
[46] See J. Flour, J.-L. Aubert, E. Savaux, *op. cit.*, p. 24–26.
[47] *Ibidem,* p. 25–26.

must be made to the creditor or the person authorized by the court to receive it[48]. In this case of undue payment, the debt exists, the one who paid is debtor, but he paid to another person than the holder of the claim (for example, when the creditor dies, the debtor pays to the one he wrongly considers the heir);

3. *the payment is made to the creditor by another person than his debtor* (subjective payment[49]). For example, at the debtor's decease, the debt is paid by the one that wrongly considers himself the heir. By means of exception, restitution is not possible when the creditor received the payment with good-faith and gave away the title of claim or the claim's guarantees, the prescription period being reached (article 1342 paragraph 1). The solution for the latter case is provided by Article 1342 paragraph 2- the regress against the true debtor.

3.2.4. **The error**

The error is the one that places in the mind of the one who pays the idea of a valid and current debt to the *accipiens. The solvens* is of good-faith; the error deforms, as it was said, the belief that there is a "chargeable obligation that would justify a payment. The source of the error doesn't matter, and it is useless to search whether it is an error of law or of fact. Thus, will be payment of the indebt also if the *solvens* believes himself debtor on grounds of a convention, of a tort or of another legal provision that he misinterpreted"[50].

The condition of the error is not expressly mentioned within the new Civil code. The error of the payer results in the lack of cause that grounded the payment. Thus, the error must be determining and must belong only to the *solvens* (the error of accipiens doesn't matter)[51].

3.3. SITUATIONS IN WHICH WE ARE NOT DEALING WITH UNDUE PAYMENT

It does not represent undue payment, in the meaning of Article 1341 Civil code, what was paid out of generosity or management of business. When payment is not owed, the action is not subject to restitution. Article 1341 paragraph 2 Civil code mentions two cases in which restitution is out of question. The phrase can

[48] Art. 1475 C. civ.

[49] J. Flour, J.-L. Aubert, E. Savaux, *op. cit*., p. 25.

[50] P. Vasilescu, *op. cit*., p. 212. On the contrary, payment remains owed and valid when the error refers only to the date when it is due. The debtor that made a payment before its maturity can bring an action for restitution only if he proves that he was mislead or forced to pay in adcance.

[51] L. Pop. I.-F. Popa, S. I. Vidu, *Drept civil. Obligațiile* (Civil law. The obligations), ed. cit., p. 361–362.

only be exemplificative, as the situations shown cannot close the category of the hypotheses in which payment cannot be considered undue[52].

The civil code mentions ***three hypotheses in which payment is not subject to restitution***. Two of them are found in Article 1341 paragraph 2, and the last in Article 1471: the *payment was made out of generosity* (obviously, the intention to gratify excludes repetition since the debtor did not intend to discharge a debt); the *payment represents the expenses made by the manager during the management of business or the compensation to which he is entitled, according to the law, for the damage suffered* (in this case, for the expenses and compensation, the ground of payment is the management of business); the *payment aimed at discharging a natural obligation*[53]*,* which can only be fulfilled voluntarily.

In what concerns the last situation, the Civil code provides that the natural obligations that were voluntarily discharged, are not subject to restitution. Within the doctrine, the expression "natural obligation" doesn't have a unitary meaning. Sometimes it is drawn a clear distinction between the natural obligations (of conscience) and the obligations not endowed with an action before the court, other times they are reunited within the same notion.

Natural obligations are found within the classification of obligations according to the criterion of sanction, into perfect obligations (protected by offensive means) and natural obligations (whose sanction consists in defensive legal means)[54]. In a subdivision of the French legal literature and doctrine, natural obligations are subdivided into imperfect obligations (aborted and namely, degenerated) and duties of conscience. Regardless of the subcategory in which we are found, the imperfect obligations and the duties of conscience have in common a series of legal effects. The main effect is the impossibility to return the payment made on the ground of the natural obligation, if the debtor executed it voluntarily. The defensive means the creditor who received the payment may resort to, is the exception that derives from Article 1471 Civil code. This is not the place to analyze the legal nature of natural obligation. We only outline the fact that, on this subject a series of controversies were born and crystallized in the end into three theories – the classical theory, the modern theory and the neoclassical theory[55]. What we keep in mind in the context of the lawful legal act is that the payment that derives from the free execution of a natural obligation (imperfect or of conscience)

[52] In a more adequate provision, the Catala Project conveniently states: "If it is proved that the payment was made with a liberal intention, for the payment of a natural obligation *or for any other reason* (s.n.)" (Article 1330 paragraph 2).

[53] With regard to the classification of obligations into civil and natural, see C. Munteanu, O. Ungureanu, *Drept civil. Partea generală* (Civil law. General part), Edit. Universității „Lucian Blaga" din Sibiu, 2011, p. 98.

[54] The classification is analyzed with details, with a consistent bibliography, in L. Pop, *Tratat de drept civil*, vol. I [*Regimul juridic general sau ființa obligațiilor civile* (Treatise of civil law. 1st volume, The general legal regime or existence of civil obligation)],ed. cit., p. 80–88.

[55] *Ibidem,* p. 85–87.

is not bound to restitution. Being a legal relationship that has in its structure also the sanction[56], the exception of a due payment is the defensive means invoked by the one who received the payment.

3.4. EFFECTS OF UNDUE PAYMENT

3.4.1. **The action for restitution**

The undue payment generates a relationship of obligations in virtue of which *accipiens* is bound to return what he unduly received. If the payment regarded a certain good, the action for restitution is not subject to prescription[57], having the character of an action for recovery.

The rules observed by the restitution of the undue payment are embodied in Article 1635-1649 Civil code (which refer to the restitution of services) and Article 1342-1343 Civil code.

The problem of the services performed on ground of a null legal instrument

Following the establishment of the absolute nullity of the legal instrument, by means of court decision, the services performed will be returned. Until the entry into force of the Civil code it was believed that restitution is based on the enrichment without just cause[58]. The cancellation of the instrument means the disappearance of the fundament of services so that each party must return the service she received. The exception is given by the contracts having successive performance, in what concerns the services already executed that can no longer be returned (the rent, for example). However, in the case of the synallagmatic contracts when the parties executed the obligations before the decision of nullity was passed, the condition of the increase of one of the patrimonies correlatively to the decrease of the other patrimony is not met. For this reason it was considered that the ground of restitution is the undue payment[59]. The provisions of Article 1341 Civil code (The person that pays without owing has the right to restitution) corroborate with Article 1254 Civil code ("The null contract is considered to never have been concluded […]") and with Articles 1639-1647 Civil code that mention

[56] The structure of the civil obligation brought about the delimitation of two concepts: authors that state the tripartite structure (subject, object, content) and authors that argue four elements: the three aforementioned plus, the sanction of the civil obligation.

[57] M. Nicolae, *Tratat de prescripție extinctivă* (Treatise of extinctive prescription), Bucureşti, Edit. Universul Juridic, 2010, p. 1163.

[58] E. Lupan, I. Sabău-Pop, *Tratat de drept civil român*, vol. I (*Partea generală*) [Treatise of Romanian civil law. 1st volume (General Part)], Bucureşti, Edit. C. H. Beck, 2006, p. 275; G. Boroi, *Drept civil. Partea generală. Persoanele* (Civil law. General part. The persons), 4th edition, reviewed and revised, Bucureşti, Edit. Hamangiu, 2010, p. 269; M. Mureşan, P. Ciacli, *Drept civil. Partea generală* (Civil law. General part), Cluj-Napoca, Edit. Cordial Lex, 2000, p. 190; O. Ungureanu, *Drept civil. Introducere* (Civil law. Introduction), 8th edition, Bucureşti, Edit. Hamangiu, 2007, p. 253.

[59] G. Boroi, *op. cit.*, p. 269.

among the causes of restitution, distinctly, the cancellation of the legal instrument with a retroactive effect.

The new Civil code no longer mentions expressly the error of the solvens, as a condition of existence of the undue payment, as the 1865 Civil code did. Payment may be made by error (for example, payment is made by a person that wrongly considers herself the debtor of another person), and in other situations payment has nothing to do with the error – for example, the restitution of services on ground of the synallagmatic null contract, when both parties have fulfilled their obligations before nullity was passed.

Payment received with good-faith by the creditor

"Restitution is no longer possible when, following the payment, the one who received it with good- faith gave away the title of claim or the claim's guarantees, allowing the prescription period to be reached. In this case, the one who paid has a right to turn against the true debtor, on the ground of legal subrogation to the rights of the paid creditor".

The text of the Article 1342 paragraph 1 embodies *the factual situations that represent true reasons for inadmissibility of the action for restitution* (paragraph 1), as well as the solution in hand for the one who received the payment with good-faith (paragraph 2). These are novel provisions in comparison to the former regulation; covering different practical situations they are welcome.

The person that made the payment (other than the real debtor) cannot obtain satisfaction by means of the action for restitution, when *the creditor to whom she paid, animated by good-faith, gave away his title of claim or the claim's guarantees, allowing the period of prescription to be reached* (Article 1342 paragraph 1). In fact, it is the situation of the one who, considering that he received the payment from the true debtor, did not keep the title of claim. If he was bound to return the payment in the situation created, he would be exposed to certain damage: no longer being in possession of this title of claim, he could not satisfy his requests from the true debtor. The sole reasonable situation is the inadmissibility of the action for restitution, if he was of good-faith when he received the payment. If the one who received the payment was of bad-faith, he will not benefit of the legal text, the sanction being the restitution.

The creditor's abandonment of the guarantees of his claim after the payment was performed is assimilated to the renunciation of the title of his claim[60]. Moreover it also denotes the belief that he received the payment he was owed, so that, in his vision (of the creditor), it is no longer justified to keep the proofs of payment.

[60] See, French Court of Cassation, first civil chamber, decision of 31 October 1989, in *Recueil Dalloz*, 1991, *Sommaires commentés*, nº. 332.

The provisions of Article 1341 Civil code are grafted on the third hypothesis of undue payment. Within the equation we find the true creditor and a payer that is not the debtor of the first. Normally, when the debt is missing, payment is returned. But not when the requests of Article 1342 paragraph 1 Civil code are cumulatively met, these are provisions of protection of the creditor of good-faith.

From a technical point of view, the payer can turn against the true debtor by means of the mechanism of the legal subrogation to the creditor's rights. Article 1593 Civil code provides that "Anybody who pays for the debtor can be subrogated to the creditor's rights, however, without being able to acquire more rights than the latter" (paragraph 1), and "subrogation may be legal and conventional" (Paragraph 2). Article 1342 paragraph 2 Civil code embodies a case of legal subrogation to the creditor's rights.

Restitution of anticipated payment

"What the debtor paid before the expiry of the suspensive term can no longer be recovered unless the payment was made because of deception or duress. Moreover, it is subject to restitution also the payment made before the fulfillment of the suspensive condition".

The two situations regulated by Article 1343 of the new Civil code are associated to the two modalities of obligations – the term (a) and the condition (b).

a. *payment before the expiry of the suspensive term is not undue payment.* The obligation of payment exists but is not demandable before this term that equals maturity. Therefore, the anticipated payment represents a valid payment and not an undue one. Article 1414 Civil code settles the effect of the suspensive term: what was voluntarily and knowingly executed before the expiry of the term is not subject to restitution. The debtor's act of paying the debt means the renunciation to the benefit of the term[61], and the renunciation of the term brings about the anticipated chargeability of the claim (Article 1418 Civil code). By means of exception, what was paid in the circumstances of a consent affected by deception or duress (the payer no longer being aware, but in an error caused by schemes or duress), will be returned. Payment is valid only if it is made knowingly.

b. *payment made before the fulfillment of the suspensive condition is subject to restitution.* The fulfillment of the suspensive condition affects the efficacy of the obligation according to Article 1400 Civil code. The obligation is formed but not born, so that the debtor does not owe anything. It is possible that the obligation in question will not exist in the future, if the condition is not fulfilled. Naturally, the debtor who pays in advance is entitled, at request, to restitution, as payment equals an undue payment.

[61] L. Pop, *Tratat de drept civil. Obligațiile,* vol. I [*Regimul juridic general* (Treatise of civil law. The obligations. 1st volume. General legal regime)], ed. cit., p. 156; M. N. Costin, M. C. Costin, *Dicționar de drept civil* (Dictionary of civil law), 2nd edition, București, Edit. Hamangiu, 2007, p. 946.

3.4.2. **Rules applicable to restitution**

The restitution of the undue payment is made in accordance with the provisions of Articles 1635-1649.

The aforementioned legal texts lead to the rules applicable to the undue payment. The main obligation is imposed to the one that received what he was not owed, and he will be bound to return the good/goods that made the object of the payment. In this meaning we find the provision that "The restitution of services takes place every time someone is bound by the law to return the goods received without right or out of error […]" – Article 1635 paragraph 1 Civil code. The right to restitution belongs to the one that made the payment or to another person entitled (the payer's agent) – Article 1636 Civil code. Restitution is made in kind or by means of equivalent.

The debtor of the obligation of restitution of payment has a different regime depending on whether he was aware or not about the undue character of the payment. He is of good-faith when he received a payment he thought he was owed.

When the *accipiens is of good-faith*, Article 1641 Civil code that settles the following rules, will apply: if the good integrally perished or was alienated, the smallest value between those that the good had at the date of destruction or alienation, will be returned; if the good perishes without his fault, he will be discharged of debt, however he will have to yield the compensation from the insurance or the right to this compensation; the debtor of restitution will pay the value of using the good if this use was the main object of the service or when the good was susceptible of rapid deterioration because of his nature; he will keep the fruits of the good subject to restitution but he will bear the expenses caused by the production of fruits; in what concerns the expenses regarding the good: the receiver of good-faith has the right either to the value of the materials and labor, or to the increase of value brought to the immovable through those expenses (according to Article 581 Civil code); both him and the payer will bear the costs of restitution proportionally with the value of the service that is returned.

When the *accipiens is of bad-faith,* he is subject to different rules taking into consideration Article 1642 Civil code: if he destroyed or alienated the good with bad-faith, he will return the biggest value between those the good had at the date of destruction or alienation; if the good perished without his fault, he will pay its value unless he proves that the good would have perished even if it was in the possession of the creditor of the restitution; he will be compelled to pay the value of using the good; he will return the fruits he acquired or could have acquired; the expenses for the production of fruits will be compensated; in what concerns the expenses regarding the good: the receiver of bad-faith or the receiver who the cause of restitution is attributed to, has the right either to half of the value of the materials and work or to half of the increase of value brought to the immovable (following Article 582 Civil code).

The deterioration or decrease of value of the good, both equaling a partial loss, entitle to compensation of the one who made the undue payment. By means of exception, the debtor will not be compelled to compensation if the loss is owed to the normal use of the good, according to its nature. When the cause of restitution is attributed to the creditor, the good will be returned in the condition it was found in the moment the action was introduced, the creditor not having the right to compensation. The exception from these provisions regards the case when the debtor is guilty of the condition in which the good is found (Article 1643 Civil code).

The prescription of the right to action for restitution of services grounded on the act of undue payment starts to flow at the date when the creditor of the obligation of restitution found out about the fact that the payment was not owed and about the person of the debtor of the obligation of restitution (Article 2528 paragraph 2 Civil code).

4. **THE ENRICHMENT WITHOUT JUST CAUSE**

4.1. NOTION

The fact that the enrichment without just cause is placed in the chapter dedicated to the lawful licit act, as well as the content of the regulation of the new Civil code, entitle us to state that the doctrinal definitions promoted under the former Civil code are still appropriate.

The enrichment without just cause is to an equal extent, a traditional *principle* of civil law, of profound Roman origin and a *lawful legal act.* Generally, nobody is allowed to enrich in the detriment of another, in the absence of a just ground. Article 1165 Civil code places the enrichment without just cause among the sources of obligations. *The enrichment without just cause consists of the increase of a person's patrimony correlatively to the patrimonial loss suffered by another person.* The effect of this lawful act gives birth to a legal relationship on grounds of which the debtor (the enriched one) is bound to return to the creditor (the impoverished one) the value with which he enriched.

Terminologically, we talk about the justness of the cause, namely of the ground of the enrichment and correlative impoverishment. The cause is certainly not referred to, as element that structures the civil legal act. The overlapping of language was noticed in the Romanian literature on the matter that has already started to use synonym expressions (for example, "the enrichment without legal title"[62], "the enrichment without just ground"[63]), in order to maintain the stringency of the legal language and to avoid possible confusions.

[62] I. Deleanu, *Ficțiunile juridice* (Legal fictions), București, Edit. All Beck, 2005, p. 319.
[63] I. Dogaru, P. Drăghici, *op. cit.*, p. 226 and next.

Before the new Civil code there was no legal text of principal dedicated to the enrichment without just cause, being recognized only its legal applications. As it was eloquently underlined, "the institution of enrichment without just title – conventional or legal – is autonomous, and the *actio de in rem verso* is a veritable original action, enough for itself; both are jurisprudential and fictional constructions, outside the norms of positive law, in order to fill – maybe questionable – the gaps of law"[64]. The new Civil code offers the first regulation of this lawful act, and recognizes its rank of autonomous source of civil obligations. The ground of the enrichment without just cause was differently placed during the times, either on the ground of the equity that must govern the civil law, or on the zone of "abnormal management of another's business", or among the torts, or of the risk of the activities that generate profit or of the patrimonial equilibrium[65].

4.2. CONDITIONS. EFFECTS

In a sole phrase, Article 1345 new Civil code states both the *conditions* (A) and the *effects of the enrichment without just cause* (B).

4.2.1. **Conditions of the enrichment without just cause**

The conditions of this lawful legal act are the following: the enrichment (a); the impoverishment (b); the correlation enrichment-impoverishment (c); the absence of the just cause (d); the good-faith of the enriched one (e).

a. *The enrichment*[66]. It involves a patrimonial advantage gained by the defendant to the detriment of the plaintiff. The modalities in which the enrichment of the defendant may take place are either *the increase of the patrimonial assets* (the acquisition of a new patrimonial element – the entry of a good or claim in the patrimony, improvements brought to the plaintiff's fund, the execution of a work on another's land), or *the maintenance of the patrimonial assets* (avoiding an expense to which the plaintiff was compelled), or *the diminution of the patrimonial debts* (the discharge of a debt of the defendant, the situation in which the merchant provides the merchandise on credit to another person in need, so that the parents are exempted from fulfilling

[64] I. Deleanu, *Ficțiunile juridice* (Legal fictions), éd. cit., p. 319.

[65] For details on those theories, see J. Flour, J.-L. Aubert, E. Savaux, *op. cit*., p. 39–41; Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations*, éd. cit., p. 579–580; I. Deleanu, *Ficțiunile juridice* (Legal fictions), éd. cit., p. 316–319.

[66] See C. A. Păun, *Definirea condițiilor economice ale acțiunii* de in rem verso *în dreptul românesc* (The definition of the economic conditions of the action de in rem verso within the Romanian law), "Revista Română de Drept Privat", no. 5/2007, p. 60–70.

the obligation of maintenance and get richer, correlatively to the sums spent by the merchant[67]).

Within the minority opinion[68], doctrinal and jurisprudential, it was ascertained that we are in the presence of the enrichment without just cause also when the advantage gained has a moral character. In this respect, it is quoted the situation of the child that gains moral advantages to the detriment of the persons that offered him education without remuneration from the parents. In this case, of relevance is the fact that the fee for the child's education was not paid – so, an avoided expense. We are reserved in what concerns the inclusion of moral advantages in the meaning of the term of enrichment; the absence of the patrimonial element removes from the equation the damage of a patrimony (and so, the possibility of ascertaining "the extent of the patrimonial loss" mentioned by Article 1345 new Civil code), correlatively to the patrimonial increase of another patrimony. And in the case, the amount of the fee represents an economic loss, not an extra-patrimonial one, so that it brings the problem of a pecuniary advantage, not a moral one.

b. *The impoverishment* may take place through the diminution of the patrimonial active or the increase of the patrimonial passive (for example, the performance of certain expenses for the conservation of the immovable that after the separation is attributed to another heir – expenses that are not returned) of the one entitled to restitution.

c. *The correlation enrichment-impoverishment.* A patrimony is enriched to the detriment of another, but this fact does not necessarily involve the causality specific to the relationship cause-effect. It suffices the sole cause or the common origin of the two phenomena, the enrichment and the impoverishment. The correlation of the two phenomena is considered direct, if the transfer of value is done without the interposition of a third, and indirect, if the value that enriches transits at first the patrimony of a third[69].

d. *The absence of the legitimate ground.* "Legitimate ground" or "just cause" are for example, the court decision or the legal act on grounds of which the increase of the patrimony of one persons takes place, correlatively to the decrease

[67] Civil tribunal Bar-le-Duc, decision of 5 of January 1943 in "Dalloz critique", 1944.18 and the French Court of Cassation, first civil chamber, decision of 15 of March 1972, in Bull. civ. I, no 88 and in "Semaine Juridique", Édition Générale, 1972. IV. 109. The decisions are quoted after J. Flour, J.-L. Aubert, E. Savaux, *op. cit.*, p. 42, note 6.

[68] G. Marty, P. Raynaud, *Droi civil. Les obligations,* tome 1 (*Les sources*), 2e édition, Sirey, Paris, 1988, no. 292, quoted after J. Flour, J.-L. Aubert, E. Savaux, *op. cit*., p. 43, note 2 and the decisions mentioned at note 2.

[69] For the first hypothesis we have the example of the majority situations: improvements brought to the property of another, the performance of a service in another's favor – all without the intention of gratifying. The correlation is indirect for example, when the brother and sister live together, and the sister buys on credit, products neccesory for the common life – see J. Flour, J.-L. Aubert, E. Savaux, *op. cit*., p. 44–45 and note 1 from p. 45.

of another's patrimony; the law, acquisitive prescription or possession of good-faith. On the other hand, Article 1346 new Civil code mentions the situations that justify enrichment.

e. *The good-faith of the enriched one* grounds the action for restitution. If the enriched one is at fault, we are placed on the ground of non-contractual liability. The good-faith of the enriched one determines the extent of the obligation of restitution that will not surpass the effective enrichment, namely the value the impoverished one was deprived of. The enriched one of bad-faith commits an unlawful act that brings about his civil non-contractual liability and will be compelled to fully repair the damage. He will eventually return the value of the impoverishment, regardless of the value of his enrichment.

4.2.2. **The effects of the enrichment without just cause**

Actio de in rem verso

This lawful act generates a relationship of obligations on grounds of which the enriched one becomes debtor of the obligation of restitution, whose creditor is the impoverished one. The double limit or double ceiling that encloses the claims of the impoverished one is mentioned in Article 1345 Civil code: "within the limits of his own enrichment" means to the extent of the patrimonial growth from which the enriched one benefited, even if the impoverishment is greater (the good-faith that grounds the patrimonial growth explains why the enriched one is not bound to pay the legal interest or to return the fruits); "to the extent of the patrimonial loss", even if the enrichment was greater (if the value of the enrichment is greater than the damage of the plaintiff, restitution will be determined by the smaller value, otherwise the plaintiff will enrich without cause). Restitution is governed by the rules embodied in Article 1639 Civil code, particularized to the specific of the enrichment without just ground.

The prescription of the right to action for the restitution of the services grounded on the enrichment without just cause start to flow at the date when the impoverished one knew about the fact of the enrichment without just cause and the person of the enriched one (Article 1528 paragraph 2 Civil code).

The justified enrichment

"*The enrichment is justified when it results: from the performance of a valid obligation; from the non-performance by the injured one of a right against the enriched one; from an act performed by the injured one in his personal and exclusive interest, on his risk or, according to the circumstances, with the intention to gratify"*.

The ground or cause of the enrichment designates, in this framework, *the legal title that legitimates the patrimonial increase and the correlative impoverishment.* The enrichment has a just ground when it results from hypothesis such as those given as examples in Article 1346 Civil code: *the performance of a valid obligation* (a);

the non-performance by the injured one of a right against the enriched one (b); *an act performed by the injured one in his personal and exclusive interest, on his risk or, according to the circumstance, with the intention to gratify* (c).

a. *the performance of a valid obligation.* As examples, we mention some cases in which, executing a valid contract, enrichment is not justified:

– *the obligation results from a contract that is concluded between the enriched and the impoverished one.* The obligations born from the valid contracts must be discharged according to *pacta sunt servanda.* The contracts of benevolence bring a patrimonial growth grounded on the legal act (the donation); the contracts for value may bring an advantage for one of the parties – for example, the sale was made at an advantageous price for the seller, but restitution will not be imposed as long as lesion is not invoked;

– *the obligation results from a contract concluded between the enriched one and a third party.* While executing the contract concluded with the tenant, the entrepreneur performs works of improvement of the building that eventually benefit to the landlord (on the ground of the rental agreement, the reparations being imposed to the tenant). The insolvability of the tenant does not entitle the entrepreneur to file an action against the landlord, invoking the enrichment without just cause. "The enrichment" of the landlord is grounded on a contract, and the legal situation born from the rental is opposable to the third entrepreneur, and it doesn't grant him rights or obligations[70].

b. *from the non-performance by the injured one of a right against the enriched one.* It is, for example, the case of the debtor that due to the effect of the extinctive prescription is discharged of debt. His enrichment is "justified" by the legal provision regarding prescription. The passivity of the creditor that does not value his right of claim within the period provided by the law, will be sanctioned with the impossibility to recover, before a court of justice, his claim.

c. *from an act performed by the injured one in his personal and exclusive interest, on his risk or, according to the circumstance, with the intention to gratify.* ***The first hypothesis*** refers to the interest of the injured one that through his actions enriches another person. The expenses made in the personal interest of the injured one, being profitable to him, have simultaneously brought also a patrimonial advantage to another person, cannot be claimed from the latter. It is the case of the one that spends on improving his own land, the works being profitable also to the neighboring land. The enrichment of the owner of the neighboring land does not impoverish the one who initiated the works and benefited from the investment

[70] For the example quoted see, Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations*, éd. cit., p. 585–586. The discussions were occasioned by the case *Patureau-Mirand*, the opposite solution being reached: the enrichment of the landlord was justified by invoking the opposability of the contract concluded between the entrepreneur and the tenant, towards the landlord and by ignoring the principle of subsidiary. The insolvability was considered a factual impediment that opens the path for the entrepreneur to act against the landlord.

made; the case of the usufructuary that performs works of improvement to the good that benefit him, but that due to the circumstances, increase the value of the good belonging to another. In fact, in the aforementioned hypotheses the one that acts in his own interest assumes the risk that the result of his conduct benefits also a third person. ***The second hypothesis*** regards the acts of generosity that operate the transfer of values from a patrimony to another. In the phrase of a prestigious author[71], the legal life itself takes places between two opposite poles – egoism and altruism. Around one or the other, gravitates any manifestation of will aimed to produce legal effects. The selfish feelings resonate with the onerous title, while the expressions of altruism are the acts of benevolence. Regardless of the *inter vivos* or *mortis causa* character, the acts performed with the intention to gratify have as major repercussion the impoverishment of the disposer, correlatively to the enrichment of the receiver. The patrimonial growth of the gratified one is justified by the liberal intention.

Conditions of restitution

Within the obligation relationship generated by the enrichment without just cause, the debtor is the enriched one, and the creditor the impoverished one. Paragraph 1 of Article 1347 Civil code imposes the condition that *the enrichment subsists at the date the action was filed.* This is so because from the date of the enrichment until the date the action was filed, the enrichment may vary or may disappear. If the enrichment ceased before the action was filed, due to reasons free from the defendant's will (for example the building was completely destroyed after a natural calamity), the legal relationship extinguishes. It is admitted that the temporal moment in relation to which the growth and the decrease of the patrimonies is evaluated is the moment the action was introduced[72]. Under the rule of the requirement of convenience, the two correlative phenomena are ascertained in relation to the date the action was filed. The principle of equity imposes that the enrichment and impoverishment are reevaluated, to see whether they varied from the moment of the legal act. As it was stated, it is an application of the theory of unforeseeable and an exception from the principle of the monetary nominalism[73]. The compensation has the nature of a debt of value[74].

[71] O. Căpăţână, *op. cit.,* p. 7. "Altruism does not represent other than a derived form of selfishness, a feeling created under the influence of education in the life of the individual and a "product of history" in the evolution of mankind […]. Both feelings coexist in our souls as primary feelings or different origin, and none of them is subordinated to the other".

[72] Before the alteration brought by the law of enforcement, the new Civil code embodied in Article 1347 paragraph 2 the provision that, in relation to the same date (the date the action was filed) it is also ascertained the extent of the enrichment and of the patrimonial loss.

[73] L. Pop, I.-F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligaţiile* (Elementary treatise of civil law. The obligations), ed. cit., p. 375.

[74] J. Flour, J-L Aubert, E. Savaux, *op. cit.*, p. 59.

Article 1347 embodies the situation in which it is proved that *the enriched one was animated by bad-faith.* We enter the zone of the non-contractual liability leaving the sphere of the lawful legal acts. The presence of bad-faith, and thus, the change of the ground of the enrichment place the extent of the obligation to restitution at the date when the patrimonial growth was registered by the defendant. It is an exceptional situation in relation to the rule embodied in paragraph 2 of Article 1347. The damage will be integrally repaired, even if the enrichment disappeared until the action was brought before the court. The restitution will be made with priority in kind (Article 1639 Civil code). If this is not possible, restitution will be made by equivalent.

The subsidiary character

The subsidiary character of the action for restitution usually appears as a distinct condition of the enrichment without just cause. Given the framework of the conditions of this lawful legal act, it was stated that the subsidiary character of the action for restitution seems to be, to a great extent, the consequence of the requirement that the enrichment and impoverishment do not have a just ground[75].

The new Civil code uses the terminology of "subsidiary character" showing in Article 1348 that restitution is not allowed if the injured one has the right to another action to obtain what he is owed[76]. In reality, it is not about the subsidiary character of the *actio de in rem verso,* but about the impossibility of its use whenever the injured one has in hand another means or the available means can no longer be used due to legal obstacles. The indirect enrichment, in certain conditions, would open the path of an *actio de in rem verso* against the third party.

The action for restitution grounded on the enrichment without just cause cannot be admitted if the injured one has the right to another action to recover what he is owed. For this reason, it is stated that *actio de in rem verso* has a subsidiary character. When the injured one can resort to another legal ground (contract, tort) in order to recover what he is owed, the action for restitution grounded on the enrichment without just cause cannot be admitted. In this hypothesis, the reasons for which *actio de in rem verso* cannot be used represent situations of inadmissibility. The subsidiary character (using the code's terminology) takes into consideration the obstacle-situations that imperatively impose to the plaintiff the use of another action that the law allows him. There are cases when the plaintiff prefers the action specific to the enrichment without just cause before another action that is either precise, or paralyzed by an exception the defendant can invoke. If *actio de in rem verso* will substitute another procedural means (another action),

[75] M. Mureşan, *Dicţionar de drept civil* (Dictionary of civil law), ed. cit., p. 373.

[76] Within the old Romanian literature it was shown that the fact of disposing of several actions for the satisfaction of a right is natural, and thus, that condition is arbitrary. In this respect, see I. Rosetti Bălănescu, Al. Băicoianu, *Drept civil român. Studiu de doctrină şi de jurisprudenţă* (Romanian civil law. Study of doctrine and jurisprudence), Edit. Socec & Co, S.A.R., 1943, p. 116.

we would assist to the “embezzlement” of the legal provisions or of the contractual clauses depending on the plaintiff’s interest.

We mention the *situations in which the action grounded on the enrichment without just case is inadmissible:* a. the impoverished – plaintiff can resort to another action against the enriched one – for example an action derived from a contract – however, for certain reasons, he prefers the action born from the enrichment without just cause (the latter cannot replace the action grounded on the contract[77] or tort); b. the plaintiff could have resorted to another legal way against the enriched one but that can no longer be received as prescription or other such obstacles intervened; it cannot be resorted, as substitute, to the action born from the act of the enrichment without just cause, otherwise the legal provisions regarding the mentioned impediments will be breached; c. the plaintiff can bring an action against another person than the enriched one. It is the case of the indirect enrichment, when the value reaches the patrimony of the enriched transiting the patrimony of a third. It is considered that the action derived from the enrichment can be filed only if, in advance, the normal action was filed but paralyzed by a “factual” obstacle (for example the insolvability of the third).

[77] The French jurisprudence admitted the action from the enrichment without just case when the plaintiff was not able to prove the existence of a contract of mandate between the parties. The action was rejected because of the impossibility of proving the mandate became admissible if, subsidiary, the enrichment without just cause was (see F. Buy, *L’essentiel de la jurisprudence civile. Obligations, 83 grands arrêts commentés,* Paris, Gualino, 2009, p. 139).