

Unjustified Enrichment

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A Factual Assessment of the Draft Common Frame of Reference

Edited by

Luisa Antonioli • Francesca Fiorentini

Prepared by the

Common Core Evaluating Group

General Editors of “The Common Core of European Private Law” Project

Mauro Bussani • Ugo Mattei

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Unjustified Enrichment

DCFR, Book VII:
Unjustified enrichment

Summary: 1. Introduction. – 2. Three Cases. – Case 1. – Case 2. – Case 3. – 3. Critical Evaluation. – 3.1. The Taxonomy of Book VII Draft CFR. – 3.2. The Function of Unjustified Enrichment Law. – 3.3. The Function of the DCFR.

I. Introduction

The following contains an evaluation of Book VII (Unjustified enrichment) of the Draft Common Frame of Reference (DCFR).¹ It was written as part of the evaluation carried out by the Common Core of European Private Law group in the context of the *Joint Network on European Private Law* (CoPECL). The explicit aim of this evaluation is to put the black letter rules of the DCFR to the test by applying them to a set of three hypothetical cases. This case law-assessment should focus on the ‘applicability and practicability’ of the draft-rules proposed by the *Study Group on a European Civil Code* and laid down in the DCFR.

In the following, the uniform structure used for the work of the Common Core group is followed.² This structure consists of two parts. In part A, the three cases will be analysed by applying the DCFR at the level of the so-called operative formants (I), descriptive formants (II) and (where possible) meta-legal formants (III).³ When it comes to the descriptive formants, we should be aware of the fact that it is difficult to give an overview of conflicting opinions as one can in national law: the rules of the DCFR were of course not yet put into effect, nor has there until now been much discussion of their substance. Part B contains a critical evaluation of the rules of the DCFR and some further observations on their use. As the observations in part B are applicable to the whole set of rules of Book VII, one can find part B after the discussion of the cases.

¹ Ch. von Bar, E. Clive and H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition* (Munich, Sellier, 2008). The text is also available at <http://www.law-net.eu>.

² See for this method e.g. M. Bussani & U. Mattei (eds), *Making European Law: Essays on the Common Core Project* (Trento, Dipartimento di Scienze Giuridiche, 2000).

³ See for this distinction R. Sacco, *Legal formants: a Dynamic Approach to Comparative Law* (1991) 39 *Am. J. Comp. L.* 1.

Before discussing the three cases, two general remarks have to be made. First, it is important to note that the present authors did not have at their disposal the (draft) comments and illustrations to the provisions of Book VII. What is more, and unlike it is the case with most other parts of the DCFR, the Study Group on a European Civil Code's volume on unjustified enrichment was not yet published at the time this evaluation was written.⁴ This makes it difficult to adequately assess the relevant draft-rules.⁵ Secondly, we like to emphasise that our evaluation is restricted to three cases only. These cases deal with problems that, in our view, are representative for unjustified enrichment law. Each case focuses on the question whether a claim should exist or not; we do not deal with the technical rules on e.g. reversal of enrichment (Chapter 5) and on defences (Chapter 6). As will be shown in section B of this contribution, we believe there is a good reason for this restriction.

2. Three Cases

Case I

Building on another's land

Building contractor City Construction BV contracts with Lars for the building of several shops and houses on a site. Lars is unable to pay the bills. It then turns out that the land on which the shops were built is owned by Lars' brother, Sven. According to rules of property law, Sven has now become owner of the buildings constructed on his land, without having paid for them. Is City Construction entitled to recover damages from Sven on the basis of unjustified enrichment?

I. Operative Rules

Unjustified enrichment law is an area for which it remains hard to find a 'common core' of European private law. The differences in approach found in the major legal systems in Europe (such as England, Germany and France) are great and can, in many instances, be traced back to one fundamental question: on what legal basis may a claim for unjustified enrichment be grounded?

⁴ The DCFR almost literally follow the *Principles of European Unjustified Enrichment Law* as drafted by the Study Group on a European Civil Code (revised version of 27 February 2006) and published at <http://www.sgecc.net>. Publication of these principles, together with comments, in the series on *Principles of European Law* (Sellier, Munich) is announced for March 2010: Stephen Swann and Christian von Bar (eds), *Unjustified Enrichment*.

⁵ There are two sources that elaborate on the choices made in the DCFR: S. Swann, *The Structure of Liability for Unjustified Enrichment: First Proposals of the Study Group on a European Civil Code*, in R. Zimmermann (ed.) *Grundstrukturen eines Europäischen Bereicherungsrecht* (Tübingen, Mohr Siebeck, 2005) 265 ff. and E. Clive, *Unjustified Enrichment*, in A.S. Hartkamp et al (eds), *Towards a European Civil Code*, 3rd edn (Nijmegen, Ars Aequi, 2004) 585 ff.

It may be useful to note at this place that the solution proposed by the drafters of the DCFR does appear to build on a common core extracted from comparative research of national solutions. The underlying legal principles on which the systems base their specific rules are in fact quite similar and may provide a basis for formulating an acceptable model rule (see further under II). The basic rule, laid down in Art. VII.–1:101(1) of the DCFR, therefore, states quite generally:

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

The main elements, therefore, are (i) that there has been an enrichment, which can be (ii) attributed to (iii) another’s disadvantage, and (iv) that qualifies as unjust. This rule is fleshed out in the following provisions of Book VII, however also with a certain degree of abstraction remaining in the wording of the provisions. An explanation for that approach may be that the drafters have sought to find a compromise between the national law approaches, or even elaborate on them in order to find some sort of ‘best solution’, without being tied to any of the taxonomies particular to specific national laws.⁶ This way, emphasis is put on what the systems have in common, regardless of the fact that great differences remain in the manner in which the general principle finds expression in national systems.

The sensibility of this approach may be questioned in light of the still very prominent differences between national rules on unjustified enrichment. As will be seen, the hypothetical claim by City Construction may be successful in one jurisdiction but not in others. We will now first discuss these national approaches before turning to the question how the DCFR would solve this hypothetical case.

A general classification of the way in which national legal systems in Europe deal with questions of unjustified enrichment distinguishes three different categories, or taxonomies.⁷ A number of civil law jurisdictions, including the Netherlands, France, Italy and Spain, draw a distinction between undue payment (*condictio indebiti*) on the one hand, and unjustified enrichment on the other. Germany and England, by contrast, do not recognise a general action of unjustified enrichment but instead recognise several types or categories of unjustified enrichment claims. The underlying basis of these categories, however, differs. Where German law fits in with other civil law systems in which the ground for the claim is sought in the absence of a legal basis (*sine causa*), English law focuses on a positive reason to reimburse for unjustified enrichment and has centred its approach around ‘unjust factors’ such as mistake, duress, failure of consideration and illegality.

⁶ Cf. J.M. Smits, *A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference*, (2008) 19 *Stellenbosch Law Review* 179, 184.

⁷ Smits, *o.c.*, (2008) *Stell LR*, 182. See also R. Zimmermann, *Bereicherungsrecht in Europa: Eine Einführung*, in R. Zimmermann (ed), *Grundstrukturen, o.c.*, 23 ff.; D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002).

The hypothetical case of the brothers Lars and Sven finds its origin in Dutch law, where the actual case led to a landmark decision of the Dutch Supreme Court, the *Hoge Raad*, in 1959.⁸ At that point in time, the Dutch Civil Code (or *Burgerlijk Wetboek*) did not contain a general provision on which a claim for unjustified enrichment could be based. The judgment of the *Hoge Raad* proclaimed that a cause of action not based on a specific provision of the Code, such as here a right to the reversal of an unjustified enrichment, would nevertheless be recognised if it was in accordance with the system of the Code and with provisions that did give ground to a legal entitlement of a similar kind.⁹ On the facts of the case, this meant nevertheless that the claim was unsuccessful. Under rules of Dutch property law, a landowner could not be required to return, by the payment of a sum of money, the enrichment which he had enjoyed as a result of the possessor or the lessee of the land having effected attachments to it.¹⁰ As the possessor or lessee did not have an action for unjustified enrichment, the *Hoge Raad* was persuaded that the claimant Quint, a contractor with the lessee, by analogy should also be denied his claim. The only exception, namely where the possessor had acted in good faith and was thus accorded the protection accorded to the bona fide possessor under the Code, did not apply.¹¹ After all, Quint had the opportunity to check the public registry in order to ascertain that the land on which he was building in fact belonged to his contracting party, Hubertus te Poel.

If the case of City Construction and Sven were to come before a Dutch court under the current Civil Code, the outcome of the case is likely to be different, though it still depends on whether it fits in with the general system of the Code. The action for unjustified enrichment now has a legal basis in Art. 6:212 – introduced in the new Dutch Civil Code in 1992 – which provides that ‘a person who has been unjustifiably enriched at the expense of another is obliged, so far as reasonable, to make good the other’s loss, up to the amount of his enrichment.’¹² Though at this general, abstract level, the rule is the same as that of the DCFR, the application of the rule is still dependent on particular provisions of national law.¹³ Arts. 3:121(2) and 7:216(3) of the new Dutch Civil Code explicitly allow the possibility of an action for unjustified enrichment to the possessor or lessee, without the previous requirement of good faith.

⁸ *Quint v. Te Poel*, Hoge Raad 30 January 1959, NJ 1959, 548.

⁹ *Quint v. Te Poel*.

¹⁰ Artt. 658 and 1603 of the former *Burgerlijk Wetboek*, in force until 1992.

¹¹ Art. 659 of the former BW.

¹² Translation taken from E.J.H. Schrage, *Unjustified Enrichment; Recent Dutch developments from a comparative and historical perspective* (1999) XLVI *Netherlands International Law Review* 57, reproduced in J. Beatson and E.J.H. Schrage (eds), *Cases, Materials and Texts on Unjustified Enrichment* (Oxford, Hart Publishing, 2003) 58. Whether official recognition of a general action for unjustified enrichment came with the entry into force of this provision in the new Code, or whether the timeline starts with *Quint v. Te Poel* is a matter of debate; compare J.W.M.K. Meijer, *Ongerechtvaardigde verrijking. Een systematische analyse van het begrip ongerechtvaardigde verrijking, toegepast op kostenverhaal bij bodemsanering* (Den Haag, SDU, 2007) 13. See also E.J.H. Schrage, *Ongerechtvaardigde verrijking en restitutie* (1993) WPNR 6118.

¹³ See further below.

Assuming that – in accordance with *Quint/Te Poel* – this approach can be applied by analogy to the building contractor, it is likely that City Construction’s claim would now be successful. Crucial to this different outcome, it should be stressed, is that the good faith requirement in the relevant provisions of property law has been dropped.

As far as German law is concerned, a different route is followed. Though § 812 BGB may suggest differently, a unified law of unjustified enrichment never developed in German law.¹⁴ Instead, several distinct legal bases exist on which a claim may be brought, found at different places in the second and third book of the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB). The two main categories are *Leistungskondiktion* (where the enrichment is based on performance or transfer without a legal basis) and *Eingriffskondiktion* (the defendant encroaches on the property of the other party).¹⁵

The hypothetical claim of City Construction does not fall into either of these main categories, but finds a solution in one of two other types of restitutionary claims recognised under German law. On the facts of the case, it is arguable that the defendant’s property was improved at the expense of City Construction. A possibility for reimbursement for this type of enrichment exists under specific provisions of the BGB. For example, §§ 951, 946 and 994 BGB, which apply to developments on another’s land,¹⁶ grant to the possessor a claim against the owner for reimbursement of expenditure incurred. Since the provisions, however, only see to *necessary* expenses, they are unlikely to give legal back-up to City Construction’s claim. The outcome of the case, therefore, will be different from Dutch law. The other restitutionary claim recognised in German law, but not applicable here, is where the claimant paid another person’s debt.¹⁷

The divergence between national approaches becomes even more clearly apparent in the comparison with English law. Here, as in German law, no general action for unjustified enrichment is recognised. Instead the focus is on the position of the defendant and an action for unjustified enrichment lies in cases where a claim can be brought under one of the ‘unjust factors’ recognised by the courts.¹⁸ The unjustness in the current hypothetical can be found in a so-called total failure of consideration on the part of Sven. In exchange for the building works carried out by City Construction, Sven has not provided any counter-performance or transfer, him being merely a third party to the contract between his brother and City Construction.¹⁹ Under this model, therefore, the claim would be likely to succeed.

¹⁴ Compare Beatson and Schrage, *o.c.*, 42; B.S. Markesinis, H. Unberath and A. Johnston, *The German Law of Contract*, 2nd edn (Oxford, Hart Publishing, 2006) 27 ff., 33.

¹⁵ Beatson and Schrage, *o.c.*, 42.

¹⁶ *Ibid.*, 50.

¹⁷ § 812 (1) BGB.

¹⁸ That this is still the predominant opinion was most recently confirmed in *Deutsche Morgan Grenfell Group Plc v. Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 AC 558. See generally on unjustified enrichment in English law: *Goff and Jones on Restitution* (London, Sweet & Maxwell, 2007); G. Virgo, *The Principles of the Law of Restitution* (Oxford, OUP, 2006); P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, OUP, 2005).

¹⁹ Total failure of consideration is not limited to the contractual context and a more accurate description may therefore be ‘failure of the basis of the transfer’; compare Beatson and Schrage, *o.c.*, 296 ff. It is, however, still a limited category and it should not be confused

Turning to the DCFR, it can be seen that the solution adopted there seeks to blend the approaches found in national systems in an intricate way. On the one hand a general, abstract rule is taken as a starting point (Art. VII.–1:101, cited above); on the other hand, the content and practical application of this rule is given further substance through a list of ‘circumstances in which an enrichment is unjustified’ (Art. VII.–2:101). A general right to claim reimbursement for unjustified enrichment, thus, is combined with a list of specific instances in which enrichment is deemed unjust, reminiscent of the ‘unjust factors’ approach found in English law.²⁰ The factors adopted are much more abstract, however, and it is not altogether clear how these rules would affect the outcome of individual cases.

In the hypothetical discussed here, City Construction’s claim seems to fulfil at least three criteria: there is an enrichment in the form of an ‘increase in assets’ on Sven’s part (Art. VII.–3:101 (1) sub a DCFR), to the detriment of City Construction, and with a sufficient connection between them. More problematic is the requirement that the enrichment was ‘unjust’. Prima facie, a case may be made for the enrichment to have been unjustified, as none of the factors listed in Art. VII.–2:101 applies to suggest differently. However, an important caveat must be made: the DCFR explicitly excludes from its application issues relating to ownership of immovable property (see Art. I.–1:101 (2) (f)). As seen above, such rules were decisive in solving the case under Dutch and under German law. With the DCFR not giving further guidance, the outcome of the case will therefore remain dependent on the application of rules of national law.

II. Descriptive Formants

An explanation for the diversity of national approaches to unjustified enrichment may be the residual nature of this particular area of the law, i.e. the fact that it is often invoked only in instances where the core parts of the law of obligations (contract and tort) do not provide a satisfactory solution.²¹ With its function to fill gaps in national laws, and gaps in different legal systems naturally occurring in different instances, the divergence of national rules is but a logical consequence. Important to realise, however, is that the underlying principle steering the law of obligations, including the rules on unjustified enrichment, is a common principle shared by all of the legal systems under consideration. It is the principle that no one should be enriched at another’s expense, already present in Roman law.²² This common principle may, where appropriate, form the basis for further development of the law of unjustified enrichment in Europe.

with the general ‘lack of *causa*’ principle that underlies Dutch and German law on unjustified enrichment.

²⁰ Compare Smits, *o.c.*, (2008) Stellenbosch Law Review 184.

²¹ Smits, *o.c.*, (2008) Stell LR 182-3; J. Gordley, *Foundations of Private Law* (Oxford, OUP, 2006) 417.

²² Pomponius, *Digest* 50, 17, 206.

In light of the divergence between existing regimes, as well as the reservations made with regard to the abstract nature of the DCFR's provisions on unjustified enrichment,²³ common sense suggests that it may yet be too early for an attempt at harmonisation of this area of European private law, letting alone whether there is in fact a need for it. The question regarding the basis of the doctrine of unjustified enrichment and the proper approach to be adopted – e.g. one resting on the *sine causa* requirement or one that takes 'unjust factors' as its lead-is of great importance, nevertheless. It is not only fundamental to potential future attempts at harmonisation of national laws, but also to the internal development of the doctrine in national systems. In this respect, we would say, the greatest challenges are yet to be found. In addition to this, two further remarks may be made.

First, the prime arena for the debate is currently in English law, where a struggle between different approaches can be observed in judicial opinion and in legal scholarship. Peter Birks, shortly before his death in 2004, famously reconsidered his stance on the matter, advocating the civilian *sine causa* approach.²⁴ In his opinion, the so-called swap cases²⁵ – in which a restitutionary award followed from the courts' decision that the swap contracts under consideration were void-had pushed the law of unjustified enrichment in a new direction to which the civilian model fitted much better than the traditional 'unjust factors' approach. This suggestion, however, has so far not been taken up in the case law, with the House of Lords most recently affirming the 'unjust factors' approach in *Deutsche Morgan Grenfell*.²⁶ Arguably, apart from practical considerations relating to the facts of the case,²⁷ it is not 'the right time' for English law to make such a drastic departure from established doctrine.²⁸ Seeing that a different starting point in an enquiry on unjustified enrichment may make a substantial difference to the outcome of a case, it is perhaps wise to have a period of reappraisal of the existing approach before making radical decisions. The comparative law debate in light of the DCFR may in this respect provide inspiration.

Secondly, a point on the classification of unjustified enrichment claims. In Dutch law, which otherwise relies on a general basis for unjustified enrichment, a separate part of the Civil Code contains specific rules on undue payment (the *condictio indebiti*).²⁹ The DCFR does not make such a distinction but opts for a general regime for all types of claims. It may be, and is in any case a point for consideration, that there is no longer a need to deal with undue payment separately. The separate treatment in the Code appears to be a historical accident rather than a conscious decision: from Roman times onwards, this was the type of restitutionary claim laid down in codifications,

²³ See above.

²⁴ Birks, *o.c.*

²⁵ *Hazell v. Hammersmith & Fulham LBC* [1992] 2 AC 1, which was followed by a string of cases, including also *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 AC 349.

²⁶ See above. For commentaries, see Tariq A Baloch, *The Unjust Enrichment Pyramid* (2007) 123 LQR 636; Birke Häcker, *Still at the Crossroads* (2007) 123 LQR 177.

²⁷ Häcker, *o.c.*, 182.

²⁸ *Deutsche Morgan Grenfell*, Lord Walker at [155].

²⁹ Artt. 6:203-211 BW.

with other actions developing only later in the case law.³⁰ On the other hand, there is a good argument in favour of holding on to a separate treatment of undue payment: this claim is the paradigm case of unjustified enrichment. In any legal system, one knows how to deal with it whereas the boundaries of other restitutionary claims are much less clear (see below, sub B).

A related question is how the basic rule, such as the one proposed in the DCFR, relates to restitutionary provisions found in other areas of law, e.g. the ones that occur with termination of contract (on which see Art. III. – 3:511 ff. DCFR). They are probably best regarded as a *lex specialis* to the general provision and as such the primary source to revert to in the instances that they cover.

III. Meta-legal Formants

The use that will be made of the provisions of Book VII is highly influenced by the function of the DCFR. The DCFR is not a fully-fledged legal system as we are familiar with at the national level. Instead, it serves several other purposes.³¹ First, the European Commission can use it as a building block when revising the present *acquis* or when drafting new rules. Secondly, it can be used as an academic text for legal science and teaching. Thirdly, the DCFR can be a source of inspiration for the national courts, the European Court of Justice and for national legislators. All these functions imply it is a 'tool box': it is a non-binding instrument³² that, where appropriate,³³ can be used by others. Whether this will in fact be the case, depends on the persuasive authority of its provisions: without legislators and courts actually using the DCFR, it will remain dead letter. It should be questioned whether the present structure and provisions of Book VII can optimally fulfil this function. We will come back on this in part B (Critical evaluation).

Case 2

Mistaken payment

Insurance company Global Life pays money to Mrs. Colonster, widow of Mr. Colonster, upon her deceased husband's life insurance policy. Shortly after the payment, it turns out that the policy had lapsed and the insurance company had not been obliged to pay. Global Life claims back the money on basis of unjustified enrichment. Is the company entitled to recover on that basis?

³⁰ Compare Ulpian, *Digest* 12, 6, 1.

³¹ Draft Common Frame of Reference, *o.c.*, 6 ff. See in more detail J.M. Smits, *The Draft Common Frame of Reference, Methodological Nationalism and the Way Forward* (2008) 4 ERCL 270 ff.

³² Communication on European Contract Law and the Revision of the *Acquis*: the Way Forward, COM (2004) 651 final, OJ EC 2005, C 14/6, 6.

³³ Communication 2004, *o.c.*, 3.

I. Operative Formants

Mistaken payment can be described as the paradigm case of the law of unjust enrichment. In any jurisdiction, one finds rules on how to deal with it, regardless the extent to which other restitutionary claims or even a general claim for unjust enrichment are recognised in that jurisdiction.

Before trying to decide the hypothetical on basis of the DCFR, it seems useful to discuss how the case would be solved in some of the existing European jurisdictions. As we have already shown in our discussion of hypothetical I, civil law jurisdictions typically recognise a separate action for undue payment (*condictio indebiti*). Thus, in France, the *paiement de l'indu* (arts. 1235 and 1376 ff. Code Civil) and in Italy the *pagamento dell'indebito* (art. 2033 ff. Codice Civile) are the most common restitutionary claims. The same is true in the Netherlands, where art. 6:203 (1) Burgerlijk Wetboek provides the clear rule that 'anyone who has given a thing to another without legal ground is entitled to reclaim it from the recipient as a performance which was not due.' Hypothetical 2 would easily fit the conditions of these provisions. Thus, in Dutch law one would reason that the insurance company can claim back the money if there is no good ground for the payment. This is rather obvious in this case: it is not likely that the payment was intended as a gift. Any other reason for paying than the company's mistaken belief it had to pay on basis of the life insurance does not exist.

In German law, the mistaken payment is a typical case of the *Leistungskondition* ('performance condition'), a case where the claim is brought to recover the performance from the other party. This *Leistungskondition* is laid down in § 812 s. 1 BGB: 'A person who obtains something by performance by another person (...) without legal cause is bound to give up to him.' In the hypothetical, the legal ground for performance does not exist and Global Life is entitled to recover the payment. This would only be different if the insurance company knew it was not bound to perform, but still did so (§ 814 BGB).³⁴

An interesting question is whether the impoverished person had to be in error about the fact that performance was due. In the hypothetical, Global Life was clearly in error, but if this would have been less clear, civil law jurisdictions differ as to the outcome. In German and Dutch law, this is of no importance: the benefit can always be reclaimed unless the impoverished party actually knew it did not have to perform (cf. § 814 BGB). The Austrian ABGB (§ 1431) on the other hand explicitly holds that a mistake of the plaintiff when transferring the money is needed. In France, this is a disputed question.³⁵

In English law, the case of mistaken payment has always received its own treatment, separate from other types of unjustified enrichment.³⁶ The action *for money had*

³⁴ See on German law e.g. J. Beatson and E. Schrage (eds.), *Casebooks on the Common Law of Europe: Unjustified Enrichment* (Oxford, Oxford University Press, 2003) 42 ff. and M.J. Schermaier, 'Performance-Based' and 'Non-Performance Based' Enrichment Claims: The German Pattern ERPL (2006) 363 ff.

³⁵ See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon Press, 1998) 547.

³⁶ See Beatson and Schrage, *o.c.*, 255 ff. for more details.

and received lies for the recovery of money paid by mistake. In common law, the restriction has long been that one could not recover money paid under a mistake of law: if the defendant believed he was entitled to the money and the plaintiff thought he had to pay because of his wrong perception of the law, no claim was possible. This has changed with the decision of the House of Lords in *Kleinwort Benson*:³⁷ mistake of law is now also a ground for restitution. The hypothetical would count as a case of mistake in fact and there is little doubt that Global Life can recover the paid sum. The hypothetical even finds its origin in English law.³⁸ The prevailing English approach of identifying an unjust factor³⁹ does imply, however, that Global Life needs to show there is a specific unjust factor such as mistake.⁴⁰

This overview of how national jurisdictions deal with hypothetical 2 reveals that the case is not only a common one, but also the archetype of a successful restitutionary claim: any existing legal system knows how to decide it. This leads us to the question how the DCFR will deal with the case of mistaken payment.

In the system of the DCFR, no distinction is made between undue payment and other types of unjustified enrichment. All requirements of the basic rule of art. VII. – 1:101 (1) DCFR⁴¹ have to be met before a claim can be successfully brought: apart from the enrichment of the defendant, this enrichment should be unjustified, the claimant should suffer a disadvantage and there should be a sufficient connection between the enrichment and the disadvantage (so-called ‘attribution’). Only in that case, the disadvantaged person is to reverse the enrichment. The DCFR follows the German approach in holding that mistake is no requirement for a successful action (cf. art. VII. – 2:101 (1) sub b).

In the case of undue payment, the requirement of enrichment is easily met. Art. VII. – 3:101 (1) makes clear that any increase in assets counts as an enrichment. This is a very broad definition; if applied to the hypothetical, the enrichment simply lies in the fact that Colonster received payment from Global Life. The requirement of disadvantage (art. VII. – 3:102 (1)) is the corollary of this: in case of undue payment, the disadvantage is with Global Life that did not have to perform *vis-à-vis* the other party. Also the requirement of attribution is laid down in the DCFR: art. VII. – 4:101 mentions several instances where there is a sufficient connection between enrichment and disadvantage. In the case of two parties – as in the case under review here – this requirement will again be met quite easily: Colonster is enriched by the transfer of an asset by Global Life (the case mentioned sub a in art. VII. – 4:101).

Given that three of the four requirements for unjustified enrichment are easily met in hypothetical 2, the true evaluation of whether an action should be available has to take place in the context of the fourth requirement: the enrichment should be unjustified. Art. VII. – 2:101 reads:

³⁷ *Kleinwort Benson Ltd. v. Lincoln City Council* [1999] 2 AC 349.

³⁸ *Kelly v. Solari* (1841) 9 M & W 54; 152 ER 24.

³⁹ See below.

⁴⁰ Cf. J. Edelman, *The Meaning of ‘Unjust’ in the English Law of Unjust Enrichment* (2006) ERPL 312.

⁴¹ Reproduced above, A.1.

- (1) An enrichment is unjustified unless:
- (a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law; or
 - (b) the disadvantaged person consented freely and without error to the disadvantage.
- (2) If the contract or other juridical act, court order or rule of law referred to in paragraph (1) (a) is void or avoided or otherwise rendered ineffective retrospectively, the enriched person is not entitled to the enrichment on that basis.
- (3) However, the enriched person is to be regarded as entitled to an enrichment by virtue of a rule of law only if the policy of that rule is that the enriched person is to retain the value of the enrichment.
- (4) An enrichment is also unjustified if:
- (a) the disadvantaged person conferred it:
 - (i) for a purpose which is not achieved; or
 - (ii) with an expectation which is not realised;
 - (b) the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation; and
 - (c) the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.’

This provision makes very hard reading for anyone without a solid knowledge of the restitution law of several European jurisdictions. As discussed in the context of hypothetical 1, when it comes to the requirement of ‘unjustified’, the European restitutionary landscape is divided in two. On the one hand, we find most continental jurisdictions that ask whether there is a good reason for a party retaining the enrichment it received. On the other hand, there is English law, that is not interested in finding a good reason for a party to keep the benefit, but looks instead for a reason why the enrichment is unjustified. This unjust factors approach (made famous by Peter Birks⁴²) requires the claimant to give a specific reason for this unjustness of the enrichment (such as mistake in the hypothetical).⁴³

Art. VII. – 2:101 DCFR seems to follow the English approach: it mentions factors that make the enrichment unjustified. Still, the drafting technique is more complicated. The provision mentions factors that make the enrichment justified (s. 1: ‘unjustified unless’) as well as factors that make the enrichment unjustified (s. 4). The list of factors is of a highly abstract character, which makes it difficult to establish where the common case of mistaken payment fits in. Apparently, the way of reasoning should be to investigate first whether undue payment is a case listed in section 1 sub a or b. Now that this is not the case, the enrichment through the payment can be qualified as unjustified. But it is not impossible that the situation could also fall under section 4:

⁴² P. Birks, *An Introduction to the Law of Restitution* (Oxford, Oxford University Press, 1985). Birks famously changed his mind in 2003, accepting the civil law approach of ‘no basis’ as the better one. See also above, A.1.

⁴³ See Edelman, *o.c.*, 309 ff. and S. Hedley, ‘Unjust’ at *Common Law: So Many Concepts, So Little Clarity* (2006) ERPL 399 ff.

it is clear that if one receives a payment without a valid ground (as Colonster did in this case), she can assume to have accepted to reverse it. As a consequence, the enrichment is to be transferred to the disadvantaged person (art. VII. – 5:101).

II. Descriptive Formants

Unlike it is the case with other types of unjustified enrichment (cf. hypothetical 1), the case of unjust payment has received a similar treatment in most European jurisdictions. Despite differences in taxonomy,⁴⁴ the outcome of the case is quite similar across Europe. If one compares the national solutions with the DCFR, the most striking thing is that the DCFR has not carved out a separate place for undue payment. Instead, there is the list of rather abstract factors of art. VII. – 2:101. We find it hard to see what guidance this list can offer in practice. More important is that the aim of giving a list of unjust factors seems to be undone when these specific factors are supplemented with a more open-ended case. Section 4 sub c of art. VII. – 2:101 offers such a more general category by stating that there is an action for unjustified enrichment if an enrichment is conferred and the enriched person could reasonably be assumed to have accepted that the enrichment must be reversed in the circumstances of the case.⁴⁵ It seems to us that the extra requirement of this provision that the enrichment is conferred for a purpose which is not achieved or with an expectation which is not realised (and the enriched person knows about this) will not offer a real limitation in practice. Interestingly, the chosen formulation comes close to the idea of a ‘quasi-contract’, for long the basis of an action for unjustified enrichment in English law.⁴⁶

Clive explains that undue payment is deliberately not mentioned separately in the DCFR. The draft explicitly rejects the argument that there is no point in complicating the rules for such a simple case by submerging it to more general rules which have to cater for unusual cases: ‘this argument is unattractive in the context of a new code. It is normally better to begin at a general level and proceed to particular cases which may require special treatment. Moreover, it will be unduly optimistic in assuming that all cases involving repetition of the undue will be simple cases.’⁴⁷ In the view of the drafters, any other view would lead to ‘an awkwardness in the law’ and to difficulties in separating the two.⁴⁸

What to think of this ‘unitary’ approach? There is every reason to be critical about it. If the DCFR were indeed a ‘code’, as Clive suggests, it would make sense to try to create a coherent system for rules on unjust enrichment (although even then it seems strange not to accept a separate place for undue payment, a category that any Euro-

⁴⁴ On taxonomy, see also J. du Plessis, *Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Jurisdictions* (2005) 122 *South African Law Journal* 39 ff.

⁴⁵ Clive, *o.c.*, 597 explains the genesis of this article, but it seems to us that the end result is not successful.

⁴⁶ *Moses v. Macferlan* (1760) 2 Burr. 1005.

⁴⁷ Clive, *o.c.*, 588.

⁴⁸ Clive, *o.c.*, 588.

pean lawyer would immediately recognise). In reality, a source of inspiration should offer model rules that can be easily transposed into existing jurisdictions. The way in which Book VII is now drafted makes this very difficult: any other solution but to accept the set of rules as a whole seems not feasible.

III. Meta-legal Formants

See above, at case 1, for some general remarks.

Case 3

Supplying goods or services without a contract

Bruni Ltd. is in need of new office space. Michelle GmbH has several buildings available and after having inspected some of them, Bruni tells Michelle it intends to rent the building at King's Bridge 28. Before any formal contract is concluded, Michelle repairs doors and windows of the building and undertakes several other works. Bruni, having told Michelle that in order to conclude the formal contract it would need the approval of its board, makes use of the building for two months. Then, Bruni informs Michelle it has found other rental space and prefers to go there. Michelle claims compensation for the two months use of the building by Bruni.

I. Operative Formants

Starting work or supplying goods or services in the expectation that a formal contract will be concluded, is a well-known case in many legal systems.⁴⁹ The case is an interesting one in view of the different treatment it has received around Europe: both unjustified enrichment and contract have served as a basis for liability of the party that benefited from the work of the other. In a typical case, A has done work for B, which was intended to be remunerated at market rates,⁵⁰ but for one reason or another there is no binding contract and B refuses to pay. Such a situation can arise for several reasons. It could be that the parties did not make a formal contract or were acting during negotiations. It could also be that the contract was void or the party performing simply *thought* a contract would be concluded. Before looking at the DCFR, we will give some examples of how such a case is decided in national jurisdictions.

Under English law, the problem is known as that of anticipated contracts. The leading case is *British Steel v. Cleveland Bridge and Engineering*.⁵¹ The plaintiff (British Steel) negotiated with the defendant (Cleveland Bridge) about the supply of steel

⁴⁹ See for more details e.g. Beatson and Schrage, *o.c.*, 194 ff., Steve Hedley, *Implied Contract and Restitution* (2004) Cambridge LJ 444 ff. and J.M. Smits, *The Principle of Unjust Enrichment and Formation of Contract: The Importance of a Hidden Policy Factor* (2006) ERPL 423 ff.

⁵⁰ Cf. Hedley, *o.c.*, 444-445.

⁵¹ [1984] 1 All ER 504 (QB).

nodes. During the negotiations, a letter of intent was issued by Cleveland Bridge asking British Steel to start the work and, while the parties were still negotiating, almost all the nodes were delivered but not paid for. British Steel then claimed payment, in the absence of a contract, on basis of the reasonable value of the nodes. Robert Goff, J. found reason to allow payment, but not on basis of a contract: the parties were still negotiating and it was impossible to say with any certainty what the terms of the contract would have been. The proper reason for allowing the claim was that both parties expected a formal contract to eventuate:⁵²

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

English law would thus base liability on unjustified enrichment.⁵³ Much earlier, Scots law had already gone the same path.⁵⁴ The other solution would be to base the decision in the law of contract. Hypothetical 3 is actually based on a Dutch case, where contract was indeed found to be the basis for compensating the 'enriched' party. The district court held there was a contract because, in the circumstances of the case, the performing party could rely on the other party to have agreed to the contract. The Dutch Supreme Court⁵⁵ approved of this and found a contract to be available even though it was very clear to the performing party that there was no approval of the board on the other side.

These cases illustrate how the principle against unjustified enrichment can be accommodated as a restitutionary claim in one jurisdiction and as a contractual claim in another.

How would the DCFR deal with the case of supplying goods or services without a contract? It seems to us that this is precisely the type of case dealt with in section 4 of art. VII. – 2:101. According to this provision, the enrichment is unjustified if three requirements are met. First (sub a), the disadvantaged person (Michelle) needs to have conferred the enrichment for a purpose which is not achieved or with an expectation which is not realised. We assume that Michelle did anticipate that Bruni would rent

⁵² [1984] 1 All ER 504, at 511, per Goff, J.

⁵³ Also see *Regalian Properties plc v. London Docklands Development Corporation*, 1995 1 WLR 212, where the claim was denied, and for an early example, compare *Mathieson Gee (Ayrshire) Ltd. v. Quigley*, 1952 SC 38.

⁵⁴ *Watson v. Shankland* (1871) 10 M 142, a case decided by the Court of Session. The facts and decision are reproduced in Beatson and Schrage, *o.c.*, 78 ff.

⁵⁵ *WGO v. Koma*, Hoge Raad 27 January 1984, NJ 1984, 545. Also the Dutch case of *Katwijk v. Westdijk* (Hoge Raad 18 April 1969, NJ 1969, 336) falls into this category: the decision of the *Hoge Raad* that no compensation was allowed was highly criticized in legal doctrine.

the premises and is thus disappointed in its expectations. Second (sub b), the enriched person (Bruni) knew or should have known of this expectation of Michelle. Third (sub c), the enriched person (Bruni) accepted or could reasonable be assumed to have accepted that the enrichment must be reversed in the circumstances of the case. This is where the main balancing issue lies: can Bruni indeed have been expected to accept the reversal of the enrichment? The factors relevant for this decision are not indicated in the provision (or elsewhere in the DCFR). We will show below (in part II) that several elements play a role in answering this question.

II. Descriptive Formants⁵⁶

If goods are supplied or services are performed, there is often an irreversible situation: one party received a benefit that can no longer be ‘undone’ and the only way to do justice is then to allow compensation to the other party. As we saw sub I, both the principle against unjust enrichment and the argument that parties had actually intended to provide compensation (a more contract-like way of reasoning) can be used to reason in favour of compensation. We believe it is insightful that each court in the two similar cases found a different basis for allowing the claim. Each of these courts thus emphasised an important aspect of this type of cases. The English court emphasised the aspect of unjustified enrichment: one party performed at the benefit of another party who did not do anything in return. The Dutch court put emphasis on the contract it found present in the circumstances of the case: even though there was no real consent, reasonable parties *should have* agreed to compensation for the work done in view of the reliance of one party and the work done on basis of that reliance.

In our view, it is vital to see that in each of these cases – and despite the qualifications given by the courts – the elements of enrichment, reliance and ‘implied’ consensus can *individually* not be the foundation for the obligations of parties. On the one hand, mere reliance (‘contractual expectation reasoning’, as Burrows calls it⁵⁷) to legitimise the decision is not convincing as reliance as such can never be enough. If British Steel would only have negotiated, relying on a contract to be concluded, but would not have supplied the nodes, the court would certainly have denied the action. Thus, the argument that Cleveland Bridge *benefited* from the work done by British Steel, in combination with its reliance, is what stood at the basis of the obligation. On the other hand, mere enrichment of the party for whose benefit performance took place is not enough either: it needs to be supplemented with some reliance on being paid for, usually flowing from the pre-contractual dealings of the parties. If, in hypothetical 3, Michelle would simply have let Bruni make use of the building for two months, there would have been no need to compensate. The true reason for allowing a claim in these cases therefore lies in a combination of elements. They are ‘in between’ cases that cannot be fully explained by contract law – that has for a goal to protect the, in these cases non-existent, consensus – nor by specific restitutionary

⁵⁶ The following is based on Smits, *o.c.*, 423 ff.

⁵⁷ A. Burrows, *Understanding the Law of Obligations; Essays on Contract, Tort and Restitution* (Oxford, Hart Publishing, 1998) 96.

claims. It is the cumulative impact⁵⁸ of both reliance and benefit that explains why an obligation should arise: the party that has received a benefit would be unjustifiably enriched if a contract would not be found to exist. The principle that unjustified enrichment should be prevented thus plays a role as a policy factor in reasoning that there is a contract. What is qualified as a restitution case in one legal system can be a contract case in another.

III. Meta-legal Formants

See above, at hypothetical 1, for some general remarks.

It is well established around Europe how to deal with the case of supplying goods or services without a contract. Any national system would be able to find a just outcome, making use of the factors mentioned in II, above. When drafting European rules, one would expect these factors to be made explicit: in particular if one drafts rules that have to derive their authority from the fact that parties, legislators or courts have to *choose* these rules, it is essential that they are made as informative (and thereby as attractive) as possible. One of the ways in which they could be made attractive is by offering progressive solutions to relatively 'new' cases such as the one described in hypothetical 3. Information about how to solve this type of cases is often difficult to find in national jurisdictions. At the moment, the DCFR does not contain many of these progressive alternatives; the common case described here could do with a more elaborate treatment in the DCFR.

3. Critical Evaluation

In the above, we already made several critical remarks about Book VII of the DCFR. In this section, we will summarise this criticism by making three different points. First, the question of taxonomy is discussed. Secondly, it is questioned whether the DCFR fully grasps the function of the law of unjustified enrichment. Finally, we look into the function of the DCFR and what this function brings with it for dealing with restitutionary claims.

3.1. The Taxonomy of Book VII Draft CFR

According to the drafters, the model rules contained in the Draft CFR are based on a comparative analysis of the laws of the member states and of the European Union.⁵⁹ It is suggested that in case of diverging solutions, the Draft CFR takes a middle road.⁶⁰ It is difficult to assess what this middle road consists of as long as the comments to the

⁵⁸ See for this term also S.M. Waddams, *The Relation of Unjust Enrichment to other Concepts*, in E.J.H. Schrage (ed.), *Unjust Enrichment and the Law of Contract* (The Hague, Kluwer Law International, 2001) 422.

⁵⁹ Draft CFR, *o.c.*, 12.

provisions are not available. However, on basis of the text of the provisions we can conclude several things about the system of unjustified enrichment as such.

First, if compared with national systems of enrichment law,⁶¹ it is clear that the Draft CFR does not follow any of the existing national taxonomies. It turns away from the two-tier structure in civil law jurisdictions of undue payment (*condictio indebiti*) on the one hand (cf. arts. 1376-1381 Code Civil, 2033-2040 Codice Civile and 6:203 Dutch BW) and other enrichment claims on the other. The German distinction between the *Leistungskondiktion* and the *Nichtleistungskondiktion*⁶² is not followed either. Instead, the DCFR offers an integrated system in which all enrichment claims are governed by a set of uniform requirements.⁶³ There is one exception: the restitutionary effects of avoidance and termination of contracts are laid down in the arts. III. – 3:511 ff. These provisions repeat⁶⁴ that a party is entitled to claim restitution of benefits conferred under the contract before avoidance or termination.

We doubt that this ‘new’ taxonomy of the DCFR is an attractive one. According to one of the drafters, the aim of the rules is ‘to lead the reader gently into the subject, leaving complex qualifications and refinements until later’.⁶⁵ When reading the present draft, we are not at all certain this will be the impression of the reader. One reason for this was already explained above (see hypothetical 2): as far as we know, any European legal system has a separate place for undue payment. Not to mention undue payment as a separate category in a text that should derive its authority from others using it seems unwise.

Secondly, we must criticise the very broad playing field for unjust enrichment: in the DCFR, any increase in assets or decrease in liabilities counts as enrichment (art. VII. – 3:101). This means that enrichment is not a normative concept: any change in someone’s financial position as a result of the act of another can count as an enrichment. A contracting party that was delivered a good is seen as an enriched party (as is the party that received the price). Even the house-owner who is confronted with graffiti painted on her walls is enriched in the terminology of the DCFR.⁶⁶ Although we do see that a legal text should to some extent contain technical rules, this use of the term enrichment seems far apart from what even most lawyers would consider as enrichment.

⁶⁰ Draft CFR, *o.c.*, 12: ‘as far as there are differences between the underlying values in individual jurisdictions, or between the Member States’ laws and EC law, the DCFR mediates between them and takes a balanced position.’

⁶¹ For overviews, see D. Visser, *Unjustified Enrichment in Comparative Perspective*, in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 969 ff. and D. Visser, *Unjustified Enrichment*, in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar, 2006) 767 ff.

⁶² See for an overview e.g. J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, (Oxford, Oxford University Press, 2006) 420.

⁶³ Swann, *o.c.*, 275.

⁶⁴ Cf. arts. 9:307-309, 4:115 and 15:104 PECL.

⁶⁵ Clive, *o.c.*, 587.

⁶⁶ Clive, *o.c.*, 591.

Thirdly, the DCFR adopts the approach of identifying factors that make the enrichment either justified or unjustified (art. VII. – 2:101). Apart from the complicated drafting technique and the abstract character of these factors, we question whether this is the best way of structuring this area of the law. The unjust factors approach is heavily criticised in English law; in 2003, Peter Birks explicitly adopted the continental approach of only allowing a claim in case of enrichment without a legal basis.⁶⁷ The continental approach has the advantage that it adopts the uniform criterion of whether there is a legal ground for the defendant to retain the benefit. The unjust factors approach lacks this unified structure: the factors are very different.⁶⁸ We agree with Zimmermann's remark that 'it is hardly conceivable that a legal system engaged with the task of rationally reorganizing its law of unjustified enrichment should take its lead from English jurisprudence.'⁶⁹ The continental approach, moreover, appears to have the support of the European Court of Justice, as evidenced by its recent case law.⁷⁰ According to the Court: 'legal redress for undue enrichment, as provided for in the majority of national legal systems, is not necessarily conditional upon unlawfulness or fault with regard to the defendant's conduct'; on the other hand, 'in order for an action for unjust enrichment to be upheld, it is essential that there be no valid legal basis for the enrichment'.⁷¹ It makes sense, not least from a viewpoint of applicability (see point 3 below), to reconsider the provisions of the DCFR with this in mind.

3.2. The Function of Unjustified Enrichment Law

The drafters consider the DCFR as a coherent system in itself: they have tried to create a legal system that is as consistent as a national jurisdiction. Within that system, the place for unjust enrichment is clearly defined. The question is whether this is completely in line with the role that the law of unjust enrichment often plays.⁷²

We believe that restitution law differs in one important aspect from other parts of the law of obligations. While contract law and tort law are more or less coherent sets of rules, the law of unjust enrichment is much less coherent. As Gordley puts it: the law of restitution does not rest on a coherent principle, but on 'the need in disparate cases to fill the gaps left by other branches of the law.'⁷³ The traces of this *residual* character of restitution law can be found in all major jurisdictions. In Germany, the typology of two types of enrichment claims is for example not seen as exhaustive: there are other cases in which restitutionary claims should be allowed and it is difficult to structure

⁶⁷ P. Birks, *Unjust Enrichment* (Oxford, Oxford University Press, 2003) 87 ff.

⁶⁸ See S. Meier, *Unjust factors and legal grounds*, in D. Johnston and R. Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002) 37.

⁶⁹ R. Zimmermann, *Unjustified Enrichment*, (1995) 15 *Oxford Journal of Legal Studies* 416.

⁷⁰ Case C-47/07 *Masdar (UK) Ltd v. Commission* [2008] ECR I-9761, approving Case T-333/03 *Masdar (UK) Ltd v. Commission* [2006] ECR II-4377.

⁷¹ *Ibid.* at [45]-[46].

⁷² See in more detail Smits, *o.c.*, (2008) *Stellenbosch Law Review* 179.

⁷³ Gordley, *o.c.*, 417.

these other cases in a consistent way. English law struggled for a long time with finding a proper place for the various enrichment claims. And in many jurisdictions there is an enduring struggle about the extent to which the enrichment action is a subsidiary one vis-à-vis contractual claims and claims in tort.⁷⁴ These are in our view signs of the unclear place of unjustified enrichment in private law as a whole. It fills the gaps left open by other branches of the law.⁷⁵

If an important function of enrichment law is to correct and to supplement the other sources of obligations, will it then be possible to harmonise this area of the law? This is dependent on what we mean by harmonisation. If harmonisation means that existing national legal systems are replaced by a binding European code, it is certainly possible to carve out a proper place for enrichment law. In a well worked out system of obligations, the supplementing role of the enrichment claim can be properly defined – as it is now reasonably well defined in most national jurisdictions. But such full harmonisation is not the aim of the Draft CFR. As we saw before, the Draft CFR will primarily be used as a toolbox for new European legislation, as source of inspiration for national courts and legislators or as an optional code. In all these varieties, the so-called *multi-layered structure* of European private law will be reinforced: present efforts towards the harmonisation of private law do not lead to an elimination of national jurisdictions, but to a continuous *living together* of European and national rules. This prompts the need to think about which rules serve a certain purpose better at the European or at the national level. If large parts of enrichment law serve the function of correcting and supplementing the existing law of obligations, this function is in our view best fulfilled at the national level.⁷⁶ The way in which the principle against unjustified enrichment is applied is so dependent on the internal structure of a national legal system (the way in which the sources of obligations communicate with each other) that it is almost impossible to have one ideal set of European principles. Stephen Swann employs the wording of ‘constructing a castle in the air’ as long as there are no common foundations underlying the European law of obligations.⁷⁷

Does this mean one should not incorporate rules on unjustified enrichment in the CFR? This would go too far. There certainly is a need to deal with the restitutionary effects of avoidance and termination of contracts (now laid down in the arts III. – 3:511 ff.). But outside of this area, the CFR should not offer a fully-fledged self-contained and self-referential⁷⁸ legal system on restitution as we know in national legal systems. In view of the function of the CFR as a *toolbox* for European and national legislators and courts, it should be enough to state the principle against unjustified

⁷⁴ Cf. H.J. van Kooten, *The Structure of Liability for Unjustified Enrichment in Dutch Law, with References to German, French and Italian Law*, in Zimmermann (ed.), *Grundstrukturen, o.c.*, 221 ff.

⁷⁵ This also explains why it is difficult to find a normative base for unjustified enrichment: see Jennifer M. Nadler, *What right does unjust enrichment law protect?*, (2008) 28 OJLS 245 ff.

⁷⁶ The obvious exception concerns rules that relate directly to the restitutionary effects of avoidance and termination of contracts. Another possible exception concerns restitutionary claims in European competition law.

⁷⁷ Swann, *o.c.*, 268 ff.

⁷⁸ P. Legrand, *Against a European Civil Code* (1997) 60 MLR 45.

enrichment. Interested parties can then use this principle as an *argument* whenever necessary. This means it is too early to draft detailed rules.

3.3. The Function of the DCFR

Finally, we repeat that the success of the DCFR is completely dependent on its use: without the European and national legislator and courts using it as a source of inspiration or contracting parties using it as an optional instrument, it will remain dead letter.⁷⁹ It is the persuasive authority of its provisions that provides the DCFR with authority.

We question whether the present structure and provisions of Book VII can optimally fulfil this function. As it is not likely that this part of the DCFR can function as an optional instrument freely chosen by the parties themselves, the drafters should have focused on offering an attractive set of rules that can be of use for legislators and courts. We have shown in the above that the present set of rules is not the best one to conceive of. A successful source of inspiration should offer model rules that can be easily transposed into existing jurisdictions. The way in which Book VII is now drafted makes this very difficult: any other solution but to accept the set of rules as a whole seems not feasible.

⁷⁹ Also see N. Jansen, *The Authority of the DCFR*, in W. Micklitz and F. Cafaggi (eds), *After the Common Frame of Reference: What Future for European Private Law?* (Cheltenham, UK; Northampton, MA, US, Edward Elgar, 2010), chap. 8.