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*Undue Payment in the Polish Code of Obligations of 1933 as Compared with Other Regulations of That Time**

Abstract

The present paper discusses the concept of undue payment as found in the Polish Code of Obligations of 1933. The research is comparative in nature since it also explores the institution in question in other contemporary codes (Code Civil, ABGB, BGB and Obligationrecht), Roman law, and the Polish Civil Code of 1964 (1). The discussion is concerned with the framework of legal provisions on undue payment in the aforementioned sources (2). Furthermore, while applying a framework of the Roman *condictiones* the paper analyses the grounds of the action (3). It presents circumstances which allowed a payor to seek recovery of his payment (4–6) and those which precluded the claim (7). Then the paper gives an illustration of the scope of a payee's liability (8). In his final remarks, the author attempts to assess undue payment as regulated in the Code of Obligations (9).

Key words: private law, civil law, law of obligations, unjust enrichment, law of restitution, undue payment, interwar period law, the Second Polish Republic, Code of Obligations.

Słowa klucze: prawo prywatne, prawo cywilne, prawo zobowiązań, bezpodstawne wzbogacenie, nienależne świadczenie, okres międzywojenny, II Rzeczpospolita, Kodeks zobowiązań.

* Polish text: *Nienależne świadczenie w polskim Kodeksie zobowiązań z 1933 r. na tle porównawczym*, "Cracow Studies of Constitutional and Legal History" 9 (2016), issue 1, p. 67–95.

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1. Introduction

Among the legal professionals the Polish Code of Obligations of 1933[1] has deservedly enjoyed the reputation of an outstanding piece of legislation.[2] It continues to attract a great of deal of interest: both for legal scholars preparing their lectures and courts working on their judgments it remains a favourite quarry of exemplary regulations.[3] Recently the Code has also become the subject of a number of impressive studies.[4] It seems that they treat the Code as a vital source of contract law, but pay little attention to other sources of obligations like unjust enrichment or tort.

This study deals with one of those "forgotten" concepts, i.e. undue payment. It was defined by Roman Longchamps de Bérier, Head of the Code of Obligations Legislative Committee, as "giving, acting or refrain from acting in order to fulfil an obligation which in fact was non-existent".[5] The pertinent provisions of the Code of Obligations will be

[1] Decree of the President of the Republic of Poland of 27 October 1933: Code of Obligations [Kodeks zobowiązań], Dz.U. R.P. [*Official Gazette*] Nr 82, poz. 598). Whenever an Article is mentioned in this text without further reference to the normative act it comes from, e.g. Article 129, it is an Article of the Polish Code of Obligations of 1933 (herafter also as KZ).

[2] U. Ernst, *Polish Civil Code* [in:] *The Max Planck Encyclopedia of European Private Law*, Oxford 2012, vol. 2, p. 1289; L. Górnicki, *Metoda opracowania i koncepcja kodeksu zobowiązań z 1934 roku* [Methodology and the General Idea of the Code of Obligations of 1933], "Acta Universitatis Wratislaviensis" 2008, Prawo, 305, p. 93; G. Jędrejek, *Polski kodeks zobowiązań z 1933 roku. Powstanie, źródła, znaczenie dla europejskiego prawa obligacyjnego* [Polish Code of Obligations of 1933: Origin, Sources, and Significance for the European Law of Obligations], "Roczniki Nauk Prawnych" 2001, vol. 11, issue 1, p. 47; J.S. Petraniuk, *Zarys charakterystyki prawa zobowiązań na tle polskiego systemu prawa cywilnego* [An Outline of the Law of Obligations in the Context of the Polish Civil Law System] [in:] *Synteza prawa polskiego, 1918–1939* [A Comprehensive Handbook of Polish Law, 1918–1939], eds. T. Guz, J. Głuchowski, M. Pałubska, Warszawa 2013, p. 422 and 455; S. Płaza, *Historia prawa w Polsce na tle porównawczym* [A Comparative History of Law in Poland], part 3: *Okres międzywojenny*, [The Interwar Period], Kraków 2001, p. 161.

[3] For example, Court of Appeal in Cracow, Judgment of 11 September 2012, I ACa 757/12; and District Court in Łódź, judgments of 31 March 2014, X GC 635/11, and 13 November 2015, X GC 282/14 (cf. website orzeczenia.ms.gov.pl). Cf. also A. Moszyńska, Z. Naworski, *Rola nauk historycznoprawnych w orzecznictwie współczesnego wymiaru sprawiedliwości* [The Role of Legal History in Contemporary Judicial Decisions] "Krakowskie Studia z Historii Państwa i Prawa" 2015, vol. 8, issue 1, p. 96 ff.

[4] M. Bieniak, *Zasady dobrej wiary i uczciwego obrotu oraz swobody umów w kodeksie zobowiązań oraz zasadach europejskiego prawa umów* [The Principles of Good Faith, "Fair Dealing", and Freedom of Contract in the (Polish) Code of Obligations and in the Principles of European Contract Law], "Studia Prawnicze" 2008 vol. 4 (178), p. 49–58; A. Falkowska, *Szwajcarski kodeks zobowiązań w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w okresie dwudziestolecia międzywojennego* [The Swiss Code of Obligations in the Work of the Polish Codification Committee in the Interwar Period], "Studia Iuridica Toruniensia" 2008, vol. 4, p. 57–67; L. Górnicki, *Metoda opracowania i koncepcja kodeksu zobowiązań z 1934 roku*, p. 79–94; G. Jędrejek, *Polski kodeks zobowiązań z 1933 roku*, p. 47–68, J.S. Petraniuk, *Zarys charakterystyki prawa zobowiązań*, p. 406 ff; A. Stawarska-Rippel, *Kodeks zobowiązań w pierwszych latach Polski Ludowej* [Code of Obligations in the Early Years of the Communist Poland], "Kwartalnik Prawa Prywatnego" 2004, issue 3, p. 697–716.

[5] R. Longchamps de Bérier, *Nienależne świadczenie* [Undue Payment] [in:] *Encyklopedia podręczna prawa prywatnego* [Concise Encyclopedia of Private Law], Warszawa [1936], vol. 2, p. 1075.

presented here from a jurisprudential and a comparative perspective. The latter will include the Napoleonic Code (1804, hereafter CN), the Austrian *Allgemeines Bürgerliches Gesetzbuch* (1811, hereafter ABGB), the German *Bürgerliches Gesetzbuch* (1900, hereafter BGB), the Swiss *Obligationenrecht* (1911, hereafter OR) and a draft *Code des obligations et des contrats franco-italien* (1927, hereafter COFI).[6] At some points references will also be made to Roman Law and the Polish Civil Code of 1964 (hereafter KC).

2. Structural issues

The concept of undue payment is closely connected wih the provision concerning unjust enrichment. The latter was covered in the Polish Civil Code by a general rule which required the restoration of [that which constituted] unjust enrichment (Article 123: "Whoever unlawfully gained a benefit from the property of another person is required to restore to the claimant that benefit in kind, or, if this is not possible, its equivalent in cash"). The rule draws on the regulations of the German and Swiss codes (§812 BGB and Article 62 OR respectively); similar formulas can be found in §1041 ABGB[7] and Article 73 COFI. Although the clause was missing from French and Russian legislation and jurisprudence, they worked out mechanisms that were not dissilmilar.[8]

To codify unjust enrichment, the legislator can either, following the Roman tradition[9] expand it to encompass undue payment (§§812–822 BGB; Articles 62–67 OR;

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[6] These codes were carefully studied by the authors of the Polish Code of Obligations. Besides, some codes were still in force in some parts of Poland in the interwar period, e.g. the CN (Book II and III) in the former Congress Kingdom of Poland, ABGB and BGB in those parts of Poland that used to be incorporated into the Austria-Hungary and Prussia respectively. From 1922 onwards ABGB replaced uncodified Hungarian law on the territory of Spisz and Orawa. Russian law, esp. Part I of Vol. X of the *Digest of Laws of the Russian Empire* (1835) was all the time in force in the east of Poland. Cf. S. Płaza, *Historia prawa w Polsce na tle porównawczym*, vol. III, p. 34 and 160.

7 Recently P. Księżak, *Bezpodstawne wzbogacenie: art. 405–414 KC: komentarz* [Unjust Enrichment: Articles 405–414 KC: a Commentary], Warszawa 2007, p. 21, has denied the existence of a general caluse in Austrian law. In the interwar period §1041 ABGB was regarded as a general rule supporting a legal construct called "profitable use" similar to unjust enrichment. Cf. L. Domański, *Instytucje Kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna* [Institutions of the Code of Obligations: a Theoretical and Practical Commentary. General Part], Warszawa 1936, Issue 3, p. 565; *Uzasadnienie projektu Kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu* [Rationale for the Draft Code of Obligations Taking into Account the Final Version of the Text of the Code], ed. R. Longchamps de Bérier, Commission on Codification, Subcommission on the Law of Obligations, issues 4–6, Warszawa 1936, p. 175 (herafter as *Uzasadnienie*).

[8] W. Lentz, *Bezpodstawne wzbogacenie* [Unjust Enrichment] [in:] *Encyklopedia podręczna prawa prywatnego*, [Concise Encyclopedia of Private Law], Warszawa [1931], vol. 1, p. 108–111.

[9] Cf. M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty (condictio ob rem). Przykład przydatności myśli jurystów rzymskich dla wykładni przepisów kodeksu cywilnego* [The Intended Purpose of the Benefit was not Achieved (*condictio ob rem*): An Example of the Relevance Roman Jurists for the Interpretation of the Provisions of the Civil Code], "Kwartalnik Prawa Prywatnego" 2004, issue 4, p. 1012. He claims that on the whole the Roman action of unjust enrichment corresponds with the modern action of undue payment.

and Articles 405–414 KC[10]) or treat the two as discrete bodies of law (§§1041 and 1432 ff. ABGB; also French doctrine and COFI).[11] In the Polish Code of Obligations unjust enrichment (Articles 123-127) and undue payment (Articles 128–133) are entered separately in Section II: Obligations Arising from Other Sources. Articles 128–130 specify the circumstances justifying a claim for the restoration of an unjustly appropriated benefit; Art. 131 and 132 introduce the exceptions; and, finally, Article 133 contains references to the rules concerning unjust enrichment (§1) and a clause extending the liability of the *accipiens* in case he was aware of irregularity of his dealings (§2). The KZ also indicates that the latter action can only be granted with regard to private transactions; taxes and levies are expressly declared out of bounds.[12]

The Code's separation of the two actions reflects the standpoint of Longchamps de Bérier. He concedes that unjust enrichment and undue payment usually go hand in hand (even if the former results from the latter), yet, he insists, there are also situations when this is not the case. For example, suppose a mail order company (the solvens) sends you a book you have not ordered, asking you to return it in case you do not accept the offer. If you (formally the accipiens) do not accept the offer, the book does not become your property. Enrichment has not taken place, and yet it does not invalidate in the least the solvens's demand that the goods be returned. Alfred Ohanowicz has little patience with this ambiguity. In his view, the goods either become the accipiens's property, a state of affairs that qualifies automatically as enrichment, or, if he does not accept the transfer as a benefit, i.e. there is no co-operation on his part, the performance simply has not taken place. Either of the two authors pauses to dicuss the example of a piano player foregoing to play the instrument on the mistaken belief that he was obliged not to disturb his neighbour. Here, for once, they agree that this uncalled for display of self-restraint constitutes an act of undue payment which does not result in unjust enrichment. Yet it remains a true legal conundrum. The transfer did take place, but it is impossible to make out what exactly the accipiens should or can return to the pianist.[13]

The majority of lawyers believe that in essence undue payment is no different from unjust enrichment. They see in undue payment a variant of unjust enrichment in a situation when the solvens seeks redress for lost benefits he conferred upon the defendant

[10] A. Ohanowicz, *Bezpodstawne wzbogacenie* [Unjust Enrichment] [in:] *System prawa cywilnego* [The System of Civil Law], vol. 3, part 1: *Prawo zobowiązań. Część ogólna* [Law of Obligations: General Part], Ossolineum 1981*,* p. 493. For the opposite view cf. P. Księżak, *Bezpodstawne wzbogacenie*, p. 168; he argues that the two procedural tools (*de lege lata*) are kept apart.

[11] L. Domański, *Instytucje Kodeksu zobowiązań,* p. 543–544 and 565–566; P. Księżak, *Bezpodstawne wzbogacenie*, p. 21 and 24–25; W. Lentz, *Bezpodstawne wzbogacenie,* p. 74–75, 78 and 86; A. Ohanowicz, *Niesłuszne wzbogacenie* [Unjust Enrichment], Warszawa 1956, p. 177; *Uzasadnienie,* p. 175. Domański maintains that Austrian law makes hardly any distinction between unjust enrichment and undue payment. However, that is contradicted by the fact that they are separated in the Code and that each has its own schedule of liabilities. In French jurisdiction there has been a tradional distinction between unjust enrichment that resulted from undue payment (Articles 1235, and 1376–1381 CN) and other cases where the claims are modelled on the Roman *actio de in rem verso*.

[12] In: Supreme Court Judgment Zb.830/34 (in J. Namitkiewicz, *Kodeks zobowiązań. Komentarz dla praktyki* [Code of Obligations: a Commentary for Practical Use], vol. 1: *Część ogólna: art. 1–293* [General Part: Articles 1–293]*,* Łódź 1949, s. 189).

[13] R. Longchamps de Bérier, *Nienależne świadczenie*, s. 1075, A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 59–60 and 249; *idem*, *Bezpodstawne wzbogacenie,* p. 495.

in the belief (*animo solvendi*) that he was fulfilling an obligation, but the obligation did not exist. In all other cases of unjust enrichment the state of mind of the solvens is irrelevant.[14] Intent (*animo solvendi*) would therefore have to be the distinctive feature of undue payment; however, we cannot be too sure as Art. 133, Point 3 which admits some restituition claims for acts performed with no specific intent. The problem did not escape the attention of the commentators. Whereas Ignacy Rosenblüth drew attention to the fact that "the *condictiones* listed in Art. 128–133 do not consist in the enrichment but in the performance's absence of basis", Ludwik Domański argues that undue payment retains its distinctive character only within the law of obligations, while unjust enrichment occurs in many areas of law, e.g. material law, family law, inheritance law, etc.[15]

3. Legal ground in claims for restitution

The legal rules detemining the criteria of admissibility of claims for restitution are usually discussed in connection with the Roman system of *condictiones*. Although contemporary systems of law no longer mirror the classical approach to undue payment, the echoes of the Roman law still resound in today's rules.

In the interwar law publications the *condictiones* were presented within the civil code framework, with the Roman terms in brackets. Ludwik Domański's commentary on the Code of Obligations was the only exception to that rule.[16] He groups the actions in restitution under three heads: a) *condictio indebiti* (recovery of what was paid or delivered to another in error), b) *condictio ob turpem vel iniustam causam* (if the fulfilment of obligation violates a legal or moral norm the claim is deemed invalid); c) *condictio ob causam datorum, sive causa data, causa non secuta, vel finita* (recovery of what was given to another in anticipation of an act providing a legal justification of the transfer or if such an act had existed but became invalid). To round off this typology he adds the fourth heading, *condictio sine causa* (recovery of what was obtained by the accipiens without any legal cause, or grounds recognized by the law).

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[14] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 567 and 573; S. Goldberger, *Niesłuszne zbogacenie w Kodeksie zobowiązań* [Unjust Enrichment in the Code of Obligations], "Głos Adwokatów" 1938, No. 2–4, p. 55; J. Namitkiewicz, *Kodeks zobowiązań,* p. 180, 187–188; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, [Code of Obligations: a Commentary] Kraków 1934, p. 245; *Uzasadnienie,* pp.178 and 182; F. Zoll Jr, *Zobowiązania w zarysie według polskiego Kodeksu zobowiązań* [Obligations According to the Polish Code of Obligations: an Outline], Warszawa 1948, p.114. In this context the Supreme Court Judgment of 15 May 1946, C.II. 92/46 must appear highly controversial (cf. W. Święcicki, *Orzecznictwo powojenne Sądu Najwyższego w sprawach cywilnych: 30 VI 1945 r. – 30 VI 1947 r*. [Postwar judgments in civil cases: 30 June 1945 – 30 June 1947], Łódź 1948, p. 92–94). The dispute was triggered by a defective entry in the Land Registry, which arose from a technical fault in the underlying notary act. The buyer, who was co-owner of the property, was registered as an owner. Although this type of substitution hardly qualifies as a transfer of benefit within the meaning of Article 2, the court treated it as a case of undue payment (unjust enrichment would have been more apt).

[15] L. Domański, *Instytucje Kodeksu zobowiązań*, p.566 and 573; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 245.

[16] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 573 ff.

In this study the *condictiones* will be discussed in the order dictated by the time lapse between the moment of the cessation of the legal cause and the moment of the contested transfer taking place. Articles 128 and 130 deal with situations when the claim was invalid *ab initio*, already at the moment of the transfer, because the legal cause was either totally absent or void. This is the ground covered by the Roman *condictio indebiti, condictio ob turpem causam, condictio ob iniustam causam*, and in a way *condictio sine causa*. Art. 129 brings together two types of circumstances. At the beginning it refers to situations when the legal cause *was* valid at the moment the transfer was performed, but *later* ceased to be valid or its validity was rescinded. This corresponds to the Roman *condictio causa finita*. The second part of Art. 129 deals with situations when the contested transfer occurred while the legal cause, though missing, was expected to materialize or come into force in the future, but eventually failed to do so. This fits in well with the *condictio causa data causa non secuta*.

The term *causa*, which is crucial for these Roman maxims, has long been noted for its multiple meanings.[17] The following three predominated in the interwar Civil Law literature: a/ *causa efficiens*, or the source of obligation, e.g. an affidavit, a tort; b) *causa impulsive*, or a personal motive which gives rise to an obligation (it includes *causa remota*, or a further aim of the obligation); c) *causa finalis*, or the legal basis of the obligation, i.e. the contractual agreement between two or more persons; the performance of the obligation (real contracts); or the disposition to transfer goods or benefits to the possession of another on a gratuitous basis. *Causa finalis* was also treated as *causa proxima*, determining the direct aim or purpose of the obligation. In the case of gratuitous obligations *causa proxima* and *causa remota* were indistinguishable.[18]

The term "legal ground" appears only in Art.129, in which *condictio causa finita* could actually represent *causa efficiens* (e.g. the repeal of a legal norm concerning a certain kind of property transfer). Moreover, in context *condictio causa data causa non secuta* could mean *causa efficiens* or *causa finalis* depending on whether the focus is on the fulfilment of the obligation by the solvens in anticipation of the conclusion of a contract or the reception of the matching obligation respectively. It seems that the former is fully justified. In the circumstances described in Art. 128 and Art. 130 the claim was based on the absence of *causa efficiens* (the parties were not bound by contract, i.e. *condictio indebiti, condictio ob inuistam causam*) or *causa impulsiva* (the contract between the parties envisaged an illegal or immoral outcome, i.e. *condictio ob turpem causam*).

The proper positioning of *condictio sine causa* in the system of condictions is a major problem. Here, we have taken the view that it is not necessary to employ that maxim in the discussion of claims of unjust payment. In cases where the obligation was to be voided Roman law had at its disposal the *condictio ob turpem vel iniustam causam* and *condictio sine causa*, which clinched the system of *condictiones*. The latter was used when none of the other condictions could effectively be used in a case of enrichment that was by all accounts unjust, especially when the legal system offered no *causa* fit for that purpose. It is exteremely difficult to demarcate the domain of *condictio sine causa* or to

[17] J. Sondel lists 27 meanings of "causa" in his *Słownik łacińsko-polski dla prawników i historyków* [Latin-Polish Dictionary for Lawyers and Historians], Kraków 2003.

[18] H. Fruchs, Causa debendi *w Kodeksie zobowiązań* [*Causa debendi* in the Code of Obligation] "Nowy Kodeks Zobowiązań" 1934, No. 24, p. 90–92.

set out how it relates to other condictions. What complicates the problem of *condictio sine causa* even more, apart from its own fuzzy nature, is the history of the condictions in general. Prior to their introduction to Byzantine lawyers their names were unknown to classic Roman law.[19] According to Fryderyk Zoll Sr, the term *condictio sine causa* covered both claims that were invalid *ab initio* as well claims that became invalidated after the initial transaction (which is tantamount to *condictio causa finita*).[20]

In his analysis of the concept of unjust enrichment in Austria and in France Wiktor Lenz notes that *condictio sine causa* has no clear scope and is used as a supplementary remedy, especially in hard cases involving invalid contracts. He also points out that in the legal systems of those countries the border between *condictio indebiti* and *condictio sine causa* is based on the distinction between undue payment *ex personis* and *ex re*. The solvens who transfered the benefit directly to the wrong accipiens (i.e. who was not the legitimate creditor) could take advantage of the *condictio indebiti*. If, however, there was no debt, he could make use of another condiction, for example *condictio sine causa.*[21]

About the extent to which the Polish Code of Obligations shadowed the condictions opinions were divided. Fryderyk Zoll Jr is sure *condictio sine causa* could be discerned in Art. 130.[22] Ludwik Domański goes even further and declares that "the right to demand the restoration of unjust enrichment in Articles 123–127 reflects the *condictio sine causa* in general". On the other hand, Roman Longchamps de Bérier and Ignacy Rosenbluth never even mention that condiction in their commentaries.[23]

Fryderyk Zoll Jr illustrates the application of *condictio sine causa* with a situation when a sum of money changes hands whereby the solvens is convinced that it is a loan while the accipiens thinks it is a gift. Wiktor Lentz invokes the same example as an instance of *condictio indebiti* because *indebitum* presupposes an understanding, shared by both parties, that a transfer of benefits has taken place.[24] It seems, however, that to

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[19] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego* [Roman Law: the Foundations of Private Law], Warszawa 2009, p. 522–523.

[20] W. Lentz, *Bezpodstawne wzbogacenie*, p. 68–69; M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1015 (it applies equally to *condictio causa finita*); F. Zoll Sr, *Pandekta, czyli nauka rzymskiego prawa prywatnego* [Pandecta, or a Compendium of Roman Private Law], vol. 3: *Zobowiązania* [Obligations], Kraków 1910, p. 201–202.

[21] W. Lentz, *Bezpodstawne wzbogacenie*, p. 80 and 91–92.

[22] F. Zoll Jr, *Zobowiązania w zarysie*, p. 115; cf. also A. Fischler, Condictiones *według polskiego Kodeksu zobowiązań* [*Condictiones* According to the Polish Code of Obligations'], "Przegląd Sądowy" 1934, No. 5, p. 140; P. Księżak, Świadczenie niegodziwe [Turpitudinous Benefits], Warszawa 2007, p. 94 (*De lege lata*); *idem*, *Bezpodstawne wzbogacenie*, p. 175 and 198–200, notes the use of *condictio sine causa* in situations when the transfer of the benefit was based on an invalid legal act. He argues that here, unlike those cases that come within the ambit of *condictio indebiti*, the condition of the solvens' misapprehension of the nonexistece of debt is not met. Legal scholarship finds that the boundary betwen the two condictions is all but clear (P. Mostowik, in: *System prawa prywatnego* [The System of Private Law], vol. 6: *Prawo zobowiązań – część ogólna* [Law of obligations – general part], ed. A. Olejniczak, Warszawa 2009, p. 310; A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 219–220).

[23] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 573; R. Longchamps de Bérier, *Nienależne świadczenie*; idem, *Zobowiązania* [Obligations], Lwów 1939; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*; However, *Uzasadnienie*, p. 182, treats *condictio indebiti, condictio sine causa* and *condictio ob turpem vel iniustam causam* jointly as actions that could be brought when the legal ground was missing at the time of the transfer.

[24] W. Lentz, *Bezpodstawne wzbogacenie,* p. 99; F. Zoll Jr, *Zobowiązania w zarysie*, p. 116.

resolve the case within the framework of the Polish law of obligations Article 128 would be more appropriate than Article 130, which Zoll Jr associates with *condictio sine causa*. He points out that the solvens and the accipiens in this example cannot be said to have reached an agreement. Consequently, to declare the obligation void (Article 130) would miss the point when in fact there never was an obligation (Article 128). In brief, a case of mutually exclusive claims like the one above is best served by Article 128.

Finally, we should mention some of the remaining condictions known to Roman law. The *condictio causa furtiva* for the recovery of stolen property from the thief had the character of a criminal prosecution; the *condictio possesionis* was an instrument for the restitution of a thing obtained by way of unjust enrichment; and the *condictio scripturae* allowed the debtor to demand the return of the written admission of debt (the chirograph) if the obligation to repay debt was discharged or if the promised loan was not paid out by the solvens. The scope of the Roman condictions was broader than that of the modern concept of unjust enrichment.[25]

4. No legal ground at the time of the transfer of benefits

The Roman equivalents of the provisions of Art. 128 and 130 of the Polish Code of Obligations are *condictio indebiti, condictio ob turpem causam, condictio ob iniustam causam* and possibly *condictio sine causa*.[26] Among the laws that were in force on the territory of the new Polish state before 1918 we can find analogous constructions in the CN (where *condictio indebiti* is described as payment of undue debt, *payement de l'indû*, in Articles 1235 and 1376–1381; *condictio ob turpem vel iniustam causam* is embedded in case-law analogous to Art. 1131)[27], ABGB (§§1431 i 877), BGB (§812); likewise in Swiss law (Art. 62, para. 2 OR) and in COFI (Articles 66–72). The *Digest of Laws of the Russian Empire* does not contain such regulations; the appropriate legal norms were shaped by judicial decisions.[28]

Of the two articles of the KZ, the hypothesis of Article 128 has a broader scope than that of Article 130. Art. 128, para. 1 *in fine* dismisses the existence of an obligation ("he was under no obligation"), while Article 130 deals with cases where the obligation is declared invalid. In other words, the situations covered by Art. 130 are within the scope of Article 128 for the hypothesis of the nonexistence of obligation encompasses the hypothesis of the invadity of obligation.

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[25] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*, p. 523, W. Lentz, *Bezpodstawne wzbogacenie*, p. 103 and 107; A. Ohanowicz, *Niesłuszne wzbogacenie.*, p. 16-17; and M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1013.

[26] Article 128 §1. A person who transferred a benefit to perform an obligation has the right to demand the restoration of the benefit unless at the time of the transfer was under no obligation to the accipiens. §2. A person who performed the obligation before the date it due may not demand restititution. Article 130. The invalidity of he obligation gives rise to the duty of restoration of the obtained benefit unless the obligation became valid after the performance of the obligation.

[27] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 574–575.

[28] *Ibidem*, p. 574; W. Lentz, *Bezpodstawne wzbogacenie*, p. 108–111.

In his report for the legislative committee Roman Longchamps de Bérier argues that the provisions of Art. 130 need a separate head because they have legal consequences that are different in kind from those of Article 132 (where in case of *condictio ob turpem vel iniustam causam* the claim of restitution is ruled out) or Article 131, para. 3 (which lowers the barriers for a restitution claim).[29] This is hardly convincing. Art. 131, para. 3 and Article 132 refer *expressis verbis* neither to Article 128 nor to Article 130. Moreover, the provisions of latter do not anticipate consequences that are different from those of Article 128.

One may wonder if the reason for dividing the condictions between Article 128 and Article 130 is in fact de Bérier's intention to rule out the demand for restoration in situations when "the obligation became valid after the performance of the obligation" (Art. 130 *in fine*). An example which demonstrates the point of such a distinction is the delivery of a gift to make up for the consequences of a flawed contract (Art. 358, para. 2). As Art. 128 refers to the nonexistence of obligation and Article 130 to a vitiated obligation, the final phrase of Art. 130 about convalidation could refer solely to cases within the scope of that article. You can convalidate or put to rights an act which is vitiated, but you cannot amend something that does not exist. At the same time, however, the *Uzasadnienie* concedes that the formula from Article 130 *in fine* is not requisite because in an action for the return of the object of undue payment the defendant can come up with the claim that the restoration, should it be carried out, was not final as long as the initial act of obligation could still be pronounced valid.[30]

a) A nonexistent (void) obligation: *condictio indebiti*

Article 128 gives the right to demand the restoration of undue payment to the person that "at the time of the transfer was under no obligation to the accipiens" (§1 *in fine*). As we have argued earlier, the hypothesis of Article 128 encompasses also cases of invalid obligations from Article 130. Article 128 would then be employed in cases when the transfer was carried out to fulfill the obligation (*animo solvendi*).[31] If we are to take our cue from the Roman jurisdiction this condiction should only be used with regard to benefits conferred within the system of nominate contracts prescribed by law. In all other cases, i.e. when the benefit transfer was based on an innominate contract, the right choice would be the *condictio causa data causa non secuta.*[32]

The meaning of "benefit" (Pol. "*świadczenie*", Ger. "Leistung") in this legal context is very extensive; it includes every description of action or omission to act as well as the

[29] R. Longchamps de Bérier, *Zobowiązania*, p. 223–224.

[30] *Uzasadnienie*, p. 184–185.

[31] For a different view cf. I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 256. He claims that Article 128 was also applied in cases where the benefit was conferred to put the other side under obligation (*animo obligandi*), e.g. by an advance payment. Let's note, however, that such situations are covered by Article 129, while Article 128 clearly refers to *animo solvendi* ("to perform an obligation").

[32] P. Księżak, Świadczenie niegodziwe, p. 9.

contraction of various obligations like issuing promissory notes or warranties, etc.[33] Of all the legal systems under consideration only German law permits *expressis verbis* the plaintiff to avail himself of a condiction even when the obligation has been discharged (§812 II BGB). The functionality of this arrangement appears to be connected with the relatively abstract nature of the German legal procedure.[34] Some legal system, including the CN and COFI, conceptualize the problem of disputed (undue) obligations in terms of payment of debt (as e.g. Article 1235 CN). That shuts out, or makes it very difficult to bring in, the *condictio indebiti*, which covers all kinds of benefits, services or favours, giving rise to the liability for unjust enrichment.[35]

The Polish Code of Obligations makes room for actions based on *condictio indebiti* (Article 128). It can be filed by a solvens if there was no debt in the first place (*indebitum*) or if there was a valid contract but the solvens was not the debtor, the accipiens was not the creditor, and none of them acted as a representative, contractor, *negotiorum gestor*, etc. In the tripartite model invoving a solvens as the apparent debtor, an accipiens as creditor and a third party who is the accipiens' real debtor, the claim for the restitution of undue payment should be directed against the accipiens who received the payment (*expressis verbis* Article 1377 I CN). In French jurisdiction (Article 1377 II KN) the solvens is entitled to pursue his claim against the real debtor if in consequence of payments the latter, acting in good faith, has destroyed the records of the debt history, or – given the subsequent judicial decisions – has let go of the pledge. If the solvens discharged the debt directly to the accipiens for the benefit of a third party under a mistaken belief that he was obliged to do it, he is not permitted to use a condiction to sue the accipiens. He has, instead, the right to bring an action in unjustified enrichment against that third party.[36] Making *condictio indebiti* unavailable to the accipiens has been justified by the fact that he got what – on the basis of an agreement with the third party – he was entitled to. At the same time the solvens carried on doing what he wrongly thought he ought to for the sake of the third party. However, as the benefits did not in fact pass from the solvent to the third party, the restoration claim has to be based on unjust enrichment rather than the *condictio indebiti*. If the roles were altered, i.e. the solvens who was the real debtor passed on the (undue) benefits to an accipiens who was not the true creditor, the condiction would be the proper instrument for the solvens and unjust enrichment for the true creditor.

Condictio indebiti could also be used in cases when there was a debt agreement between the solvens and the accipiens, but the delivered goods or services were different

[33] E.g. the Supreme Court heard a case of conferred benefit which consisted in entering into an obligation by issuing promissory notes (Judgment of 21 September 1934, C.I. 481/34; discussed below in Section 7c).

[34] For a discussion of the significance of claims in unjust enrichment in a system of law which admits abstract juristic acts cf. J. Halberda, *Instytucja niesłusznego zbogacenia w Kodeksie zobowiązań z 1933 r. na tle współczesnych kodyfikacji* [Unjust Enrichment in the Polish Code of Obligations of 1933 in a Comparative Perspective], "Krakowskie Studia z Historii Państwa i Prawa" 2012, vol. 5, issue 4, p. 312–313.

[35] S. Meier, *Restitution in Case of Undue Transfer* [in:] *The Max Planck Encyclopedia of European Private Law*, Oxford 2012, vol. II, p. 1471.

[36] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 575–576; W.Lentz, *Bezpodstawne wzbogacenie,* p. 69, 79, 91, 94; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 258. In the context of the KC, cf. A. Ohanowicz, *Bezpodstawne wzbogacenie*, p. 490.

from those that had been promised.[37] It would likewise be applicable in cases of alternate obligation when the solvens, unmindful of the terms, did not make a choice or delivered the things on both sides of the disjunction (as in the explicit wording of §1436 ABGB), or when the solvens, unaware of the option to substitute a secondary obligation for the primitive one, fulfilled the latter.[38] The undue obligation on the part of the solvens could refer to a part of a discharged obligation. For example, the obligation to pay amounted to 100 zł, but the sum actually paid was 110 zł.

Cases of discharged obligation by a solvens who was unaware of the plea of peremptory exception (except when it enforced a natural obligation) are treated in the Code of Obligations in the same way as cases of nonexistent debt. Furthermore, *condictio indebiti* could also be invoked in a claim born out of a conditional obligation when either the resolutory condition or the suspensive condition came into being before the obligation was discharged (Article 46 §2).

Not all actions could take advantage of *condictio indebiti*; the exclusions were subject of specific regulations. So for instance the claim for the recovery of a payment discharged before it fell due, i.e. prematurely, or before a reciprocal payment by the other party, is declared not actionable in Article 128 §2. Analogous regulations can be found in the legal systems of other countries (cf. Art. 1186, para. 2 CN; §1434 *in fine* ABGB; §813 II BGB; and Art. 411, point 4 of the Civil Code). The rationale for this restriction is clear to see – the debtor would have to fulfill his obligation in due course anyway. The only exception form this rule – known also to Austrian, French and German law – is the premature payment by a solvens who lacks the capacity to enter into legal agreements.[39]

The exclusion of the claim for the recovery of undue payment described in Art. 128, para. 2 does not apply to situations when the discharge of obligation was obtained by deceit, threat or the solvent was a victim of exploitation (Articles 39–43). In these circumstances the claimant could resort to the *condictio indebiti* unless – and that was the only exception – the time for the discharge of the obligation had run out. Then the only course of action left to the solvens is to file a claim for damages (Article 134 ff).[40]

b) An invalid obligation – condictio ob turpem vel iniustam causam

As we have said earlier, the cases obligations rendered invalid (Article 130) are subsumed under the hypothesis of the nonexistence of obligation (Article 128). The absence of obligation at the moment of transferring the benefit gives rise to the duty of returning whatever was obtained (Article 130 *in principio*). In Roman law the party disadvantaged by following through on an invalid agreement has a choice of three condictions, *ob turpem causam*, *ob iniustam causam*, and, possibly, *sine causa*. The first and the second

[37] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 576, adds that the transfer of another benefit by the debtor acting with the consent of the creditor results in the extinguishment of the obligation (Article 207 *in principio*).

[38] W. Lentz, *Bezpodstawne wzbogacenie,* p. 100.

[39] *Ibidem*, s. 100; *Uzasadnienie*, p. 183–184. Under Polish law the payment of debt by a minor was effective (see below, Section 7 a).

[40] L. Domański, *Instytucje Kodeksu zobowiązań,* p. 577.

constitute a subset of *condictio causa data causa non secuta*, in which it does not matter whether the purpose was achieved or not.[41]

According to KZ the duty of restitution lapses if "the obligation after being discharged has become valid" (Article 130 *in fine*). The examples can be found in specific regulations, eg. the defect of legal incapacity can be cured by the confirmation of the contract by a person with legal authority to act on behalf of the minor (Article 53) and the defects of an *ad solemnitatem* formula by the performance of a donation (Article 358, para. 2).

Article 130 is connected with the provision of Article 56 that "contracts contrary to public order, an act of law, or good customs are invalid". However, Article 132 restricts the right of action to a solvens who is guilty of illegal or immoral conduct. To sum up: the solvens could resort to *condictio ob turpem vel iniustam causam* (Article 130) only when the transfer of benefits had no legal justification because the obligation was invalid under Article 56 and at the same time the situation was not covered by the hypothesis of Article 132.

In Roman law the *condictio ob turpem causam* is used to allow the solvens to recover benefits from an accipiens whose continued possession of them would violate the values of morality, equity and decency, and would thus be unacceptable. KZ takes the same line in cases involving the restitution of a conferred benefit whose aim was to induce the accipiens to the omission of an illegal act.[42] Although there would be nothing wrong with the solvents' intention nor the act itself, handing out rewards for *not* committing illegal acts "offends our moral sense and undermines the legal order [and so] makes the whole contract serve an immoral aim".[43] Exceptionally, the claim for recovery can be allowed if the benefit changed hands on the understanding that there existed no obligation. Such a situation is described in Article 131, point 3: "if in order to get approval of a request that is right and proper an applicant gives a bribe to an official who has given him to understand that without it he would have to wait for a decision that may never come".[44] The question whether the bribe achieved its purpose or not is in this case immaterial. However, KZ denies the use of the condiction *ob turpem causam* to a solvent who acted with an illegal or immoral intention, for example a giver who bribed an official on order to get a licence, or who paid rent for premises used for prostitution and illegal gambling.

In Roman law the *condictio ob iniustam causam* applies in situations where the retention of the benefit by the accipiens would be wrong, but not on account of immorality or breach of good customs. The most common examples when this condiction was granted included the reclamation of a marital gift, a prize in an illegal game, and proceeds of usury.[45]

Article 130 treats the claim for the recovery of undue payment – comparable to the Roman *condictio ob iniustam causam* – in a situation where the solvens discharged his

[41] P. Księżak, Świadczenie niegodziwe, p. 11; M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1015.

[42] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*, p. 522–523; P. Księżak, Świadczenie niegodziwe, p. 14.

[43] R. Longchamps de Bérier, *Nienależne świadczenie*, p. 1079.

[44] *Ibidem*, p. 1079.

[45] F. Zoll Sr, *Pandekta*, p. 200. On the difficulties of establishing the scope of that condiction, cf. P. Księżak, Świadczenie niegodziwe, p. 21.

part of an obligation (agreement, legal act) that was nonexistent, invalid, or possibly defective. Here are some specific examples illustrating the range of its applications:

- the contract was invalid because its object or purpose was contrary to public order, the law,[46] good customs; or it demanded things impossible to perform (Article 56); or the required, validity-conferring formalities were not complied with (Article 109)[47] as a result of false show or lack of good faith vitiating the promise (Articles 31–34) or the admission of a person in a state of unconsciousness or under a disability;
- the legal act was invalidated because the declaration of will (affidavit) was vitiated – it was was obtained by deceit, threat or the solvent was the victim of exploitation (Articles 39–43);[48]
- the legal act was incomplete – it was in need of confirmation, for example by a person with legal authority to act on behalf of the minor who entered into the agreement (Article 53) represented by a person without power of attorney (Article 101).[49]

5. Invalid legal ground – *condictio causa finita*

For our discussion of the *condictiones* we have assumed a single criterion, namely the point in time at which the performance took place. In those discussed so far the legal justification was nonexistent already at the moment of payment (transfer of the benefit). The following analyses will focus on two remaining variants – the legal ground ceased to be valid as the performance was taking place, or, the cessation occurred afterwards (Article 129 *in principio*). The latter includes the situation when the legal ground was expected to come into being in the future, but failed to materialize (Article 129 *in fine*)[50].

The provisions of Article 129 *in principio* corresponds to the Roman *condictio causa finita* (*condictio ob causam finitam*) and analogous regulations in ABGB (§§921, 1435 and 1447), BGB (§812) and OR (Article 62, para. 2). In French law the condiction was

[46] In 1936 the Supreme Court ruled in a case brought by a tenant who wanted to recover that part of his payment that exceeded the ceiling set down in legislation imposing caps on rent levels (Supreme Court Judgment of 30 November 1936, C.III. 51/35 (in: J. Namitkiewicz, *Kodeks zobowiązań*, p. 188–189).

[47] Z. Fenichel, *Nieważność umowy z braku formy piśmiennej (notarialnej) a odpowiedzialność stron* [Contract Invalidity Due to the Absence of Formal (Notarized) Agreement and the Problem of Liability], "Przegląd Notarialny" 1937, No. 11, p. 8; A. Fischler, Condictiones *według polskiego Kodeksu zobowiązań*, p. 141. It was the factor of actual facts of the case that bore down on the ruling of the Supreme Court of 21 January 1947, C.II 513/46 (in: W. Święcicki, *Orzecznictwo powojenne Sądu Najwyższego*, p. 158–161).

[48] According to Wiktor Lenz it is not important whether the invalidation came about through a revocation or a judicial decision, or whether it took place before or after the transfer of the benefit; what matters is that that works backwards, and clears up the field *ex tunc* from the outset (cf. W. Lentz, *Bezpodstawne wzbogacenie*, p. 101–102). This interpretation, representative of the interwar consensus, is not shared by contemporary jurists who have hardly any doubt in assigning this case to the sphere of *condictio causa finita* (cf. P. Księżak, *Bezpodstawne wzbogacenie*, p. 182–184 and 187; and P. Mostowik [in:] *System prawa prywatnego*, p. 303).

[49] J. Namitkiewicz, *Kodeks zobowiązań*, p. 190–191.

[50] Article 129. A person may demand the restitution of a transferred benefit when the legal ground fell away or did not materialize because the envisaged purpose of the benefit was not achieved.

reconstructed by judicial decisions *per analogiam* to Articles 1376–1381 CN. The Digest of Laws of the Russian Empire does not accord it the status of a separate instrument.[51]

Article 129 *in principio* is applied in cases when the legal ground existed at the moment of the transfer of the benefit (*causa preaterita*), but was later knocked out (*causa finita*). Thus the *condictio causa finita* may be invoked when the benefit was transferred on the basis of:

- a legal norm which was later invalidated;[52]
- a judgment ordering enforcement which did not become final, but was changed before coming into force (the same applies to administrative decisions);[53]
- a conditional contract when the resolutory condition was met.[54] The difference in the application of *condictio causa finita* and *condictio indebiti* is determined by the sequence of events (transfer of the benefit and the fulfilment of the condition). The former is applicable when the performance of the obligation took place before the condition came into being whereas the latter is used when the sequence was reversed (and consequently the obligation was invalidated prior to the performance);
- a contract was cancelled (no matter whether the cancellation was to include all obligations *ex tunc* or merely those that were still pending, *ex nunc*), for example if an advance payment for future expenses was provided prior to the cancellation and a simultaneous claim for the recovery of the outstanding balance of the advance sum, or if an advance payment was followed by a cancellation or dissolution of the contract without recognizing the prepaid sum as discharged obligation;[55]

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[51] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 574 and W. Lentz, *Bezpodstawne wzbogacenie,* p. 108–111.

[52] A. Ohanowicz, *Bezpodstawne wzbogacenie,* p. 491. Ludwik Domański distinguishes two types of legal ground of obligations: a/ direct (e.g. a contract), and b/ indirect (e.g. a statute). He maintains that the *condictio causa finita* is usually invoked in connection with the falling away of the indirect legal ground (when for example the parties had made a preliminary agreement for sale of a part of a plot of land but a new law came into force that prohibited a parcelling of real property as envisaged by the contract), while the *condictio causa data causa non secuta* is more appropriate for cases where the direct legal ground is invalidated. Cf. L. Domański, *Instytucje Kodeksu zobowiązań,* p. 578.

[53] P. Księżak, *Bezpodstawne wzbogacenie*, p. 185; W. Lentz, *Bezpodstawne wzbogacenie*, p. 81, 92; A. Ohanowicz, *Bezpodstawne wzbogacenie*, p. 492; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 260.

[54] P. Księżak, *Bezpodstawne wzbogacenie*, p. 184; W. Lentz, *Bezpodstawne wzbogacenie*, p. 80–81 and 100–101; A. Ohanowicz, *Bezpodstawne wzbogacenie*, p. 491. In his list I. Rosenblüth (in: J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz.*, p. 260) adds also the case of non-occurrence of the suspensive condition; however, for W. Lenz this situation calls for *condictio causa data causa non secuta* rather than *condictio causa finita*.

[55] P. Księżak, *Bezpodstawne wzbogacenie*, p.182–184 and 188; P. Mostowik [in:] *System prawa prywatnego*, p. 305; A. Ohanowicz, *Bezpodstawne wzbogacenie*, p. 491; J.S. Petraniuk, *Zarys charakterystyki prawa zobowiązań*, p. 449; and I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz.,* p. 260. In its Judgment of 17/25 March 1925, C.59/25, the Warsaw Court of Appeal ordered the restitution of the sum paid in advance under contract for the sale of real property in a situation where the contract could not be made effective without an official permission (cf. *Orzecznictwo Sądów Polskich*, 1926, item 340, p. 361–363). The judgment was based on the rules of the Digest of Laws of the Russian Empire.

– a prenuptial agreement which specified the amount and the terms of the dowry transferred from the bride's parents upon her marrying, but the marriage that was later dissolved. [56]

The only debatable issue here was right choice of condiction in the case of contract concellation when the accipiens' performance became objectively (i.e. without his fault) impossible (Article 267). For, it can be argued, if the accipiens' termination of an agreement had *ex nunc* consequences, the *condictio indebiti* had no grip. Instead, the claim is to be matched with *condictio causa finita* or *condictio causa data causa non secuta* (which of them is up for debate). Ludwik Domański illustrates his argument with this example of a termination of lease: one month after signing the contract the tenant (the solvens), who had paid his rent in advance, decided to give notice because of faults or damage (e.g. a fire) that made the premises untenantable (Article 376). In his opinion, it was a case of *condictio causa data causa non secuta* because the landlord (the accipiens) was unable to pass on the benefit, a nonperformance which preconditioned the action of the tenant (the solvens). If the premises are damaged, the purpose of the transfer of benefits, i.e. allowing the tenant to make use the premises (Article 370), cannot be accomplished. The logic of this argument is based on the identification of the *causa* in the wording of the condiction with the aim or purpose (*causa finalis*) of the accipiens' performance and not its legal ground (*causa efficiens*), i.e. the contract.[57]

Other authors take a different view, which appears more convincing. They match the cases where the performance was frustrated after the contract had been made through no fault of either party with *condictio causa finita*. They insist that the *causa* should be construed as *causa efficiens,* i.e. the termination of the contract, and not a cancellation, which implies that the object or purpose of the mutual transaction became subsequently unattainable. They point out that the key word in Article 267 para. 1 is "wygasa" ("is extinguished"), and that cannot refer to anything but the contract, i.e. the *causa efficiens*. Consequently, the solvens is entitled to claim the recovery of the benefit he had transferred before the contract was found non-binding. If, however, the price was sent to the buyer, but the seller ran out of stock and was not able to deliver, Roman Longchamps de Bérier would grant the buyer the right to invoke *condictio causa finita.*[58] Contemporary doctrine took great care to distinguish between situations where a contractual obligation became impossible to perform through no fault of either side from a move, available to a party to a contract, to cancel it and to demand restitution of the benefits already rendered if the other party deferred the reciprocal delivery as agreed (Article 250ff). In the latter case the failure to perform constitutes a breach of contract giving the non-breaching party the right to seek redress in the courts. Under Article 129 *in fine* the claim for recovery could proceed in accordance with the instrument of unjust enrichment, focused on the accipiens' liability (Article 127). In case of claims connected with the cancelation

[56] F. Zoll Jr, *Zobowiązania w zarysie,* p. 115.

[57] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 578–579.

[58] R. Longchamps de Bérier, *Nienależne świadczenie*, p. 1077; J. Namitkiewicz, *Kodeks zobowiązań*, p. 189; *Uzasadnienie,* p. 182.

of the contract (Article 250 ff.) the solvens is entitled to seek the restitution of all his contractual contributions as well as damages for delay.[59]

6. The purpose of the benefit transfer proved elusive – *condictio causa data causa non secuta*

If a benefit was transferred in the expectation of attaining a certain goal and that goal was not attained, the action for the recovery of the transferred benefit should invoke the provision of Article 129 *in fine*. It corresponds to *condictio causa data causa non secuta* (*condictio causa data non secuta*, *condictio ob causam datorum*, *condictio ob rem datorum*). In Roman law it does not matter why the *causa* lapsed.[60] Of the legal codes that were in force in Poland in the interwar period only the German BGB includes the *condictio causa data causa non secuta* in §812 (likewise OR Article 62, para. 2). Elsewhere the claim for recovery of undue payment in the same circumstances is a matter of judicial decision based on case law (*per analogiam* with Articles 1376–1381 CN and §1435 ABGB). The claim is not recognized by Russian law.[61]

The authors of the interwar period insist that the condiction cannot be granted unless the parties explicitly and forcefully specified the purpose of the benefit in the text of the agreement (for example in the form of a condition). A specific, personal objective (whether a *causa impulsiva* as in the Polish term "pobudka" (a direct motive, or urge to act) or a long-term goal, *causa remota*) does not count unless it is mentioned in the contract with an emphasis that leaves no doubt about its importance.[62]

Present-day consensus favours the interpretation that *causa* in that condiction means *causa efficiens*, applicable for example in the case of contracts that were cancelled. Cases of prepayment or inducement to act in a certain way are exemplary of *condictio causa data causa non secuta*: here the benefit changes hands although the parties are

[59] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 579; R.Longchamps de Bérier, *Nienależne świadczenie*, p. 1077. Similarly Articles 493–495 with reference to the Civil Code of 1964. Where the non-performance of the obligation was not due to fault and the situation was not covered by a *lex specialis*, the claimant should look to *condictio causa finita* (P. Mostowik [in:] *System prawa prywatnego*, p. 305).

[60] F. Zoll Sr, *Pandekta*, p. 198.

[61] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 574; P.Księżak, *Bezpodstawne wzbogacenie*, p. 22; and W.Lentz, *Bezpodstawne wzbogacenie*, p. 111.

[62] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 578–580. Similarly I. Rosenblüth; he suggests that to make the personal objective of the contract fully effective it would have to be included among *essentiale negotii* of the contract. Roman law treats purpose as one of the special arrangements of a transaction (*accidentalia negotii*); the indispensable *essentialia* are the name of the goods, their quantity and price. It seems that Rosenblüth's remark put him among those who were in favour of greater explicitness and clarity in the articulation of purpose in the text of contracts (cf. I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 261). Meanwhile Wiktor Lentz, after analyzing the provisions of the German law, takes the opposite view (W. Lentz, *Bezpodstawne wzbogacenie*, p. 102): the purpose (goal) of a contract should be plain to see, although it does not have to be stated in the text *expressis verbis*. It is sufficient for it to be connected with the judicial act as its essential element; at the same time, however, the belief (state of mind) of one party that the other party enters into the agreement in order to achieve a particular aim is not enough. Cf. also J. Namitkiewicz, *Kodeks zobowiązań*, p. 190.

not bound by an obligation, i.e. the giver does not act *solvendi causa*.[63] Interwar jurists (cf. Note 62: L. Domański, W. Lentz, J. Namitkiewicz, and I. Rosenblüth) stressed the importance of the intended purpose mentioned in the contract, yet their examples hardly differ from those used today (e.g. advance payment or acknowledgement of the receipt of loan). The apparent discord is a matter of approach: from their perspective the contract is essentially an agreement about the purpose (goal) of the transfer of benefits. Here are some of the typical situations which, in their opinion, could be handled with the use of the condictions:

- in Roman law the mere threat of using *condictio causa data causa secuta* puts pressure on the other party of an innominate contract (with no right of action) to make them deliver;[64]
- the benefit was transferred together with an offer which was not accepted by the offeror;[65]
- an advance payment had been made in the expectation of entering into a contract, an event that did not materialize;[66]
- benefits were transferred under a conditional contract, but the suspensive condition was not fulfilled;[67]
- a receipt of loan had been given to the lender, but the loan was not paid out; or, a document confirming the performance of an obligation had been handed out, but the obligation was not discharged;[68]
- a dowry had been established and paid out, but the planned marriage was cancelled. French, Austrian and German laws are very clear about the liability and the restitution of all that had been handed over for the sake of a marriage that eventually did not take place (Article 1088 CN, §1247 ABGB, and §1301 BGB);[69]
- the benefit was transferred to the accipiens for his advantage, but he spent it on something that had not been envisaged by the parties to the agreement; benefits were transferred to induce the accipiens to do something, e.g. to appoint an heir, which he then failed to do; a donation had been made, accompanied by a *sub*

[63] P. Mostowik [in:] *System prawa prywatnego*, p. 307; M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1019–1020 and 1026.

[64] A. Kremer, *Kontrakty nienazwane w prawie rzymskim w świetle kazuistyki* [Innominate Contracts in Roman law from the Perspective of Casuistry], Kraków 1993, unpublished doctoral dissertation, Jagiellonian Library, Dokt.71/93, p. 38; P. Księżak, Świadczenie niegodziwe, p. 9; M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1016–1017; F. Zoll Sr, *Pandekta*, p. 199.

[65] J. Namitkiewicz, *Kodeks zobowiązań*, s. 190; A. Ohanowicz, *Bezpodstawne wzbogacenie*, p. 492.

[66] J. Namitkiewicz, *Kodeks zobowiązań;* M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1019.

[67] W. Lentz, *Bezpodstawne wzbogacenie*, p. 100. For a different view cf. I. Rosenblüth (in: J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 260) who believes that this case justifies the use of *condictio causa finita*.

[68] A. Ohanowicz, *Bezpodstawne wzbogacenie*, p. 492; *Uzasadnienie*, p. 183; F. Zoll Sr, *Pandekta*, p. 199. For a different view cf. I. Rosenblüth (in: J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 260) who matches this case with *condictio causa finita*.

[69] Cf. the Supreme Court Judgment of 28 October 1938, C.II 826/38 (the marriage did not takeplace due to the death of the bride). L. Domański, *Instytucje Kodeksu zobowiązań,* p. 596; P. Księżak, Świadczenie niegodziwe, p. 9; W. Lentz, *Bezpodstawne wzbogacenie,* p. 81 and 92; M. Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1018; F. Zoll Jr, *Zobowiązania w zarysie*, p. 115; F. Zoll Sr, *Pandekta*, p. 199. W. Dajczak, T. Giaro, F. Longchamps de Bérier (*Prawo rzymskie*, p. 523) suggest the use of *condictio sine causa*.

modo obligation, which the donee failed to satisfy; a donation *mortis causa* had been made, but the donor outlived the donee; a conditional heir or legatee fulfilled his obligations, but in spite of that his name was struck off the will or was prevented from entering upon the inheritance.[70]

7. Exclusion of claims for restitution

The provisions of the KZ, especially Articles 131 and 132,[71] set forth the situations where claims for restitution of conferred benefits could be barred, even if, in the light of Articles 128–130, they may appear undue. The exclusion of such claims was buttressed further by Articles 88–89 (on interest) and 128 para. 2 (cf. point 4 a).

Articles 131 and 132 deal for the most part with benefits that can be claimed back under the provisions of Articles 128 i 130 *in principio*, i.e. cases where the legal ground was missing from the very beginning. Originally they were to be put immediately after Article 128, but their ultimate placement is due to the fact that in some cases Article 131, point 2 could also apply to a benefit exposed to claims based on *condictio causa finita* (Article 129 *in principio*) – although the legal ground was invalidated, the moral obligation remained.[72]

a) Natural (imperfect) obligations

Natural obligations form a heterogeneous group whose individual elements have in common two interlocking determinants: the solvens is denied the right of action for the restitution of the benefits already conferred, and the accipiens has the right to retain the benefits (*soluti retention*). The term is of Roman orgin (*obligatio naturalis*) and has been incorporated into Romance legal systems (CN). German-speaking literature makes a distinction between liability and indebtedness, but finds claims not based on positive law unenforceable. In the German legal system the type of obligation upon they rely is regarded as imperfect ("unvollkommene Verbindlichkeit"). It seems that Polish jurists

[70] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*, p. 522; M.Sobczyk, *Zamierzony cel świadczenia nie został osiągnięty*, p. 1019; F. Zoll Sr, *Pandekta*, p. 199.

[71] Art.131. The claim for restitution of a benefit is barred: 1) if the right to bring action for the recovery of debt is denied by statute or because of the statute of limitation has expired; 2) if the conferred benefit complies with a moral duty, expectations of decency or custom; 3) if the person transferring the benefit willingly knew he was not obliged to do, unless he reserved for himself the right to claim the benefit back, the transfer was done under duress, or it was a legal act prohibited by law or whose purpose is turpitudinous.

Art. 132 §1. Whoever pays another person willingly for the carrying out of an act that is illegal or violates good manners, or in order to induce him to carry out such an act, has no right to claim the return of what he paid.

§ 2. Likewise a person who fulfilled an obligation by carrying out a legal act with a turpitudinous purpose if the turpitude was on his side has no right to bring action for recovery.

[72] *Uzasadnienie*, p. 185.

have for the most part used the term "zobowiązanie naturalne" which is equal to the natural obligation (positive law has taken no notice of it).[73]

Before the Polish system came into force in the interwar period natural obligations were recognized in all mature legal systems that existed in Poland except the Russian Imperial law. Their enforcement depended on two legislative techniques. The first one is associated with the CN, which declares in Article 1235 that the voluntary fulfilment of a natural obligation does not justify a claim for repayment based on *condictio indebiti*. The identification of specific cases of natural obligations is left to case law and legal scholarship.

The other method can found in codes of the German branch of law (ABGB, BGB) and in KZ. They do not proclaim a general rule as in Article 1235 CN, instead they list the specific unactionable ("nicht einklagbare") natural obligations. So §1432 ABGB disallows claims for the recovery of a payment of debt beyond the statute of limitations, a debt which is invalid only because of defective form, a debt which is hard to match with a claim. The provisions of the German Civil Code mention the following imperfect obligations: debts after the statute of limitations (§222 II BGB), a reward for "information about an opportunity" to be used for the conclusion of marriage (§656 BGB), debts and obligations that arose from games and betting (§762 and §764 BGB), and "compliance with a moral duty or the rules of social propriety" (§814 BGB).

According to KZ "a benefit is not recoverable 1) if the right to bring a claim for the recovery of debt is denied by statute, or the debt has been found time-barred; 2) if the conferred benefit complies with a moral duty, [expectations of] decency or custom" (Article 131, points 1–2). The hypothesis of Point 1 encompasses the following examples:

- payment of time-barred debt (as in §1432 ABGB; §222 II BGB; Article 63 OR; Article 411, point 3 KZ; French case law). An error in the application of the statute of limitation does not matter, i.e. a payment made on the erroneous assumption that the debt was still owed cannot be claimed back;[74]
- payment of debt that could not be recovered in court because of the expiry of the limitation period (explicitly in §1432 ABGB)[75] or because of its nature, i.e. it involved obligations from games and betting (Article 610 §1; §762 BGB, and also Austrian, French, and Swiss legislation);[76]

[73] The Supreme Court held that "there is hardly any difference between a natural obligation and one which is barred by statute" (Supreme Court Judgment of 6 April 1936 (C.II. 2845/35, *Orzecznictwo Sądów Polskich*, 1936, item 148, p. 129–130). Cf. also L. Domański, *Instytucje Kodeksu zobowiązań*, p. 581–582; Z. Fenichel, *Zobowiązania niezupełne (naturalne) w Kodeksie zobowiązań* [Imperfect (Natural) Obligations in the Code of Obligations], "Nowy Kodeks Zobowiązań" 1936, Nos. 16–17, p. 62.

[74] The statute of limitation was taken into account when it was pleaded by the debtor, and the court was not in a position to bring it up ex officio (Article 273). Cf. L. Domański, *Instytucje Kodeksu zobowiązań*, p. 576, 582, 584; Z. Fenichel, *Zobowiązania niezupełne*, p. 75; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 263–264.

[75] The courts would not admit the plea of ignorance of the preclusion. Cf. L. Domański, *Instytucje Kodeksu zobowiązań*, p. 582.

[76] All the commentors point out that a claim for the recovery of a benefit conferred out of fear – connected with the misapprension that the law does enforce obligations from games and betting – that the other side may go to court to enforce payment. Having said that, it should be possible to bring action for the recovery of a benefit conferred under the misapprehension that the game or bet was lost. In the latter case the

– the so-called contracts for difference (*Differenzgeschäfte*), or in today's terminology forward contracts (Article 611; §764 BGB)[77]; debts arising from loans to purchase alcohol;[78] debts reduced through a bankruptcy or creditor arrangement procedure.[79]

The source of duties mentioned in Article 131, point 2 are "the injuctions of religion, morality, honour and decency, that is standards of behavior generally accepted in society at large and among friends and acquaintances". The examples under this rubric were similar to those found in §1432 ABGB, §814 BGB, Article 63 OR and in the constructions of the French case law.[80] Among the benefits representing moral obligations or expectations of decency are maintenance and alimony payments in cases not covered by the law, e.g. to concubines,[81] relatives,[82] as well as all every description of dependents (indigents, the chronically ill, the elderly, other people's children).[83] As a rule the recovery of benefits given away to those categories of persons could not be claimed back unless it was done on behalf of a third party without authorization (cf. Articles 115–121). At the same time, the recipient of this form of support was not entitled to claim its continuation if the provider decided to cut it.

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recovery is justified not by the outcome of the game or bet, but by the fact that there was no reason for the payment to have been made, not even natural obligation. Cf. Z. Fenichel, *Zobowiązania niezupełne*, p. 66; J. Namitkiewicz, *Kodeks zobowiązań*, p. 191–192; *Uzasadnienie*, p. 186; L. Domański, *Instytucje Kodeksu zobowiązań*, p. 583; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 263.

[77] Z. Fenichel, *Zobowiązania niezupełne*, p. 67.

[78] Cf. Article 9 of the Act of 21 March 1931 imposing restrictions on selling serving and consuming alcoholic beverages (*Dz.U.R.P.* 1931, No. 51, item 423). Cf. Z. Fenichel, *Zobowiązania niezupełne*, p. 67; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 263.

[79] Article 171 and the Decree of the President of the Republic of Poland of 24 October 1934: Bankruptcy Law (Dz.U.R.P., No. 93, item 834); and Article 20, para 1, point 3 and the Decree of the President of the Republic of Poland of 24 October 1934: Settlement Procedures Law (Dz.U.R.P., No. 93, item 836).

[80] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 584; *Uzasadnienie*, p. 187.

[81] Benefits conferred on a concubine do not qualify for recovery. But on what ground? I. Rosenblüth (in: J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 264) places them in the category of moral obligations (Article 131, point 2). Other commentators agree about the legal consequences (recovery is out of the question), but differ widely about the legal qualification. So L. Domański would have such claims dismissed on the basis that the purpose of the transaction was incompatible with good manners (Article 132, para.1). The Supreme Court's refusal to grant a condiction in this case was justified by the solvens' taint of turpitude (Supreme Court Judgment of 21 September 1934, C.I. 481/34, *Orzecznictwo Sądów Polskich*, 1935, item 135; cf. also in 7c below). It seems, however, especially in the light of the Supreme Court's judgment that the treatment of the claim for recovery may be decided on a case by case basis; i.e. it may depend on whether the benefit was conferred to induce the accipiens to become a concubine (a case of turpitude, as in the ruling mentioned above) , or whether it was transferred because the recipient was a concubine (a case of compliance with an extralegal duty).

[82] So, for example, the Supreme Court held that a "father in law who provided free maintenance for his son in law may not bring a claim in unjust enrichment for the recovery of his expenses, if he provided the maintenance in a free and voluntary manner in the spirit of moral duty, as a father in law towards his son in law, and not in order to obtain an appropriate recompense". More precisely, "the claimant… provided the defendant… in the course of a year with breakfasts, dinners, teas and suppers to the tune of 75 złotys per month". Cf. Supreme Court Judgment of 18 August 1937, C.I. 2368/36, *Orzecznictwo Sądów Polskich*, 1927, item 705, p. 658–659.

[83] Z. Fenichel, *Zobowiązania niezupełne*, p. 63, 66.

Other situations affected by the bar of Point 2 include donations to charity, churches and religious institutions; presents offered to others on various occasions; Christmas or financial year end bonuses and gifts given to employees.

The benefits described in Article 131, point 2 – for example the maintenance and alimony payments – could be higher then the statutory ones, but that did not open the door to prospective claims. The law is equally firm in barring claims for recovery of benefits transferred on the mistaken assumption that it is legally enforceable obligation. An exception to that rule is the situation where claimant acted under the erroneous belief that the child who received the benefit was his own.[84] In accordance with Article 355, para 3 regulations concerning donations, including formal requirements *ad solemnitatem* and claims for the recovery of donated property do not apply to the provisions of Article 131, point 2.[85]

The treatment of natural obligations vitiated by a defective *ad solemnitatem* formula differs from country to country. In Austria §1432 ABGB in no uncertain terms bars the recovery of a benefit conferred in fulfilment of an invalid contract on account of defective form *ad solemnitatem*, by declaring such a transaction an act of natural obligation.[86] Similarly in French law: a donation *inter vivos* signed in private, which was not enforceable until the donor's death, becomes a natural obligation, and if the will is found invalid it is because the required form was not complied with. Moreover, obligations incurred by a minor and not confirmed by his legal guardian are treated as natural obligations. A condition cannot be used to challenge the fulfilment of this type of obligation.[87]

On the ground on German, and also Polish law, the abovementioned obligations are not regarded as natural, but void *ab initio*. In effect, the conferred benefits can be recovered. De Bérier's *Uzasadnienie* finds the BGB system more convenient because it checks the expansion of the realm of natural obligations and thus prevents them from interfering with the enforcement of specific statutory regulations of legal procedure and legal capacity. With regard to the legal status of minors the authors of the KZ take the view that a minor cannot assume a legally binding obligation, but can pay a debt owed by somebody else, "if a minor had money to spend, he did well paying off a debt rather than wasting it".[88]

b) Knowledge of an obligation not owed

A claim for the recovery of a benefit cannot be granted to a person who transferred it while he knew he was not obliged to do it (Article 131, point 3 *in principio*; §1432 *in fine* ABGB; §814 BGB; Article 63 OR, and Article 411, point 1 KC). The lawmakers' reasoning behind this provision is that if the solvens knew he was under no obligation to

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[84] W. Lentz, *Bezpodstawne wzbogacenie,* p. 100; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 264.

[85] A. Fischler, Condictiones *według polskiego Kodeksu zobowiązań,* p. 143; Z. Fenichel, *Zobowiązania niezupełne*, p. 77.

[86] Z. Fenichel, *Nieważność umowy*, p. 8–9 (in practice §1432 ABGB was applied in disputes concerning donations, wills, and marital property; and *Uzasadnienie*, p. 187.

[87] R. Longchamps de Bérier, *Nienależne świadczenie*, p. 1077.

[88] *Uzasadnienie*, p. 184, 186.

the person to whom he transferred benefits, he was acting gratuitously, and the benefits are gifts to donee. Their advice to the claimant was "to put up with the consequences and stop pestering the courts with his vexatious claims for recovery".[89] As a result, the claim of undue payment could be brought only by a solvens who transferred the benefit by mistake, under the misapprehension that there was an obligation that he had to fulfill.[90]

Crucial to the rejection of the claim is the solvens' positive awareness that there is no obligation (on him); the law is not interested in whether it was possible for him to get informed on this point or whether there were doubts about it. Nor does it matter whether the misapprehension represents a mistake of fact law or mistake of law. This is clearly stated in §1431 ABGB; other legal systems judicial decisions and academic doctrine gradually came to the same conclusion (in France, Germany, Poland[91], and – after some misgivings – in Switzerland). Roman law, and later also German law, insist that the solvens' mistake be exculpable. This requirement has been waived in Austrian, Swiss and Polish law.[92]

The burden of proving that the solvens was aware of the absence of an obligation – i.e. did not act under misapprehension, which would deprive him of the right to bring a claim for recovery – usually lies with the accipiens (so in Austrian, German, Polish,[93] and Russian law).

The solvens is required to prove that a/ he completed the transfer of the benefit, b/ it was undue; which allowed the law to presume that c/ the act was performed under mistake. The role of the accipiens is to refute that claim by proving that the solvens was not under mistake and well aware of the lack of obligation, i.e. was acting *animo donandi*. The solvens' knowing error is treated as a negative (exclusionary) condition of the admissibility of the action in recovery.

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[89] R. Longchamps de Bérier, *Zobowiązania*, p. 226.

[90] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 587; and I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 259. "The error must accompany the transfer of the benfit and indicate that there exists an obligation which is being fulfilled", cf. Supreme Court Judgment of 5 July 1935, C.II. 600/35, *Orzecznictwo Sądów Polskich*, 1936, item 301, p. 280–281. In another ruling the Supreme Court held against a tenant who claimed a reimbursement of overpaid rent, as he had not been acting under mistake at the time of payment. Cf. Supreme Court Judgment of 16 February 1937, C.II 2507/36, *Orzecznictwo Sądów Polskich*, 1937, item 727, p. 679–680.

[91] Cf. Supreme Court Judgments of 28 October 1938, C.I. 1642/37 (in: J. Namitkiewicz, *Kodeks zobowiązań*, p. 193) and of 18 July 1952, C.809/15 (in: S. Breyer et al., *Prawo cywilne z orzecznictwem, literaturą i przepisami związkowymi: praca zbiorowa* [Civil Law with Judicial Decisions, Literature, and Trade Law], vol. 1, Warszawa 1958, p. 221).

[92] P. Księżak, *Bezpodstawne wzbogacenie*, p. 20, 22 and 210; J. Namitkiewicz, *Kodeks zobowiązań*, p. 193; I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 265; and F. Zoll Sr, *Pandekta*, p. 196. Following §814 BGB German law rules out the use of condiction as soon as it is found that the solvens was not sure about the existence of doubt. In its judicial practice the Polish Supreme Court took a different line and held, following the ABGB, that the nature of the solvens' error is immaterial (i.e. whether it is exculpable), even to the extent of clear negligence. To justify its approach the court drew on the Roman maxim *Lege non distinguente nec nostrum est distinguere* [Where the law does not distinguish, neither should we distinguish.] Cf. Supreme Court Judgment of 29 August 1934, C.II. 811/34, *Nowy Kodeks Zobowiązań*, 1934, item 478, p. 503-504.

[93] Cf. Supreme Court Judgment of 30 November 1936, C.III 51/35 (in: J. Namitkiewicz, *Kodeks zobowiązań*, p. 189). Cf. also L. Domański, *Instytucje Kodeksu zobowiązań*, p. 576; R. Longchamps de Bérier, *Nienależne świadczenie*, p. 1077.

French law which, following into the footsteps of Roman law, treats the mistake as appositive condition of admissibility of a condiction. That, of course, results in shifting the burden of proof in the lawsuit. In marked contrast to other legal codes, the CN sets forth the following conditions of admissibility of a *condictio indebiti*: a) the payment was discharged; b) it was undue, c) the performance was carried out under mistake (Articles 1376–1377 CN). Now it is the solvens who has to demonstrate that he acted under a misapprehension. Switching the burden of proof gives rise to extraordinary difficulties in the presentation of evidence for it requires the solvens to make out a case that he was unaware of the absence of an obligation. Faced with such an accumulation of negativities the courts tried to be liberal in their assessment of the occurrence of the mistake; sometimes it was enough to demonstrate that the solvent had doubts about the existence of the obligation.[94]

The Polish Code of Obligations in Article 131, point 3 granted the solves – in exceptional circumstances – the right to bring a claim for recovery even if he was aware that the obligation did not exist. The conditions are formulated as follows:

– he transferred the benefits not of his accord. Here the admissibility of the claim for recovery resulted *a contrario* from the initial part of the provisions of Article 131. For example, in the course of an execution against the property of an alleged debtor, a certain sum of money was seized (the official enforcement is treated as a solvens' own act) and the judgment of an appellate court, or an enforceable judgment of a court of the first instance, was enforced , but then due to some extraordindary legal procedures, the debtor obtained a favourable judgment;[95]
– if at the time of the transfer he reserved for himself the right to claim the benefit back, which, however, could be justified if the solvens was sure that he did transfer the beneft but was not yet able to prove it, or when the solvens did not know if the debt was enforceable; if a requisite condition was satisfied; or if his representative had already transferred the benefit. Or, anxious to avoid the negative consequences of falling onto arrears, he discharged the obligation, at the same time reserving the right to claim back the transferred benefits should new circumstances justifying a repudiation of the obligation come to light. Ludwik Domański points out that the admission of exclusion clauses in obligations concerning the transfer of benefits shows due respect for the freedom of contract.[96]
– if the transfer took place under duress – both psychological (threats, Article 41) and legal coercion. For example, when the solvens paid another person's debt to avoid the auctioning of his own assets in somebody else's possession; if the solvens paid another person's debt to avoid the seizure under execution mistakenly directed against his own property;[97]

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[94] Similarly under Swiss law (Article 63 I OR). Cf. W. Lentz, *Bezpodstawne wzbogacenie*, p. 78; J. Namitkiewicz, *Kodeks zobowiązań*, p. 192; *Uzasadnienie*, p. 187.

[95] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 576, R. Longchamps de Bérier, *Nienależne świadczenie*, p. 1078; and I. Rosenblüth [in:] J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz*, p. 257.

[96] L. Domański (*Instytucje Kodeksu zobowiązań*, p. 588) points out that a condiction could be brought if the event mentioned in the exclusion (but only that event) did occur. Cf. also R. Longchamps de Bérier, *Nienależne świadczenie*, p. 1078; *Uzasadnienie*, p. 187.

[97] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 589; R. Longchamps de Bérier, *Nienależne świadczenie*, p. 1078.

– if the transfer of benefits was part of a transaction prohibited by law or whose purpose is morally odious. No doubt the legislators included this exception to the rule of non-recovery under this heading to block attempts at circumventing the law by voluntary performance of agreements that are illegal or immoral.[98] The use of a condiction (here *condictio ob turpem vel iniustam causam*) is still possible if there is no proof of moral turpitude on the part of the solvens (i.e. a situation not covered by Article 132).

c) Moral turpitude – *in pari delicto*

Article 132 bars the claim for recovery of a solvens whose conduct was tainted with moral turpitude. Whereas the hypothesis of paragraph 1 of Article 132 refers to a solvens who willingly paid his part of the deal in return for the performance of an act that was illegal, violated good manners, or was intended to induce the accipiens to commit such an act, the hypothesis of paragraph 2 refers to a solvent who fulfilled an obligation with a turpitudinous purpose (*causa impulsiva, causa remota*), and in the litigation has to bear the taint of turpitude.[99] As the latter hypothesis encompasses also the cases covered in paragraph 1, it need not have been included in the KZ. It was done so because, we are told, it covers "the exceptionally drastic cases".[100] This is plainly unconvincing as the provisions of either paragraph have the same legal consequences and the cases described in paragraph 1 are covered by paragraph 2.

Roman law is clear about not allowing a party implicated in wrongdoing to take advange of the law to press its claim, i.e. *nemo auditur turpitudinem suam allegans*. This maxim forbids the admission of a claim for recovery from a solvens whose case is founded on an illegal or immoral act. When both parties are equally culpable for a wrong (*in pari causa*), the courts would not get involved and uphold the *status quo*, in accordance with the maxim *in pari turpitidine melior esse debet causa possidentis*.[101] Alternately, the law could react to that situation by ordering the seizure of the contested benefit. The latter solution has the backing of Article 168 of the Lwów Committee Draft: "Whether the object of the transfer is seized, depends on the provisions of public law, which the presiding judge should never lose sight of" (*in fine*).[102] The regulations of

[98] J. Namitkiewicz, *Kodeks zobowiązań*, p. 192; *Uzasadnienie*, p. 187–188.

[99] It could be the case of a solvens transferring a benefit under a sham contract of sale whose true purpose is to protect a property from seizure or to cover up a donation agreement. Cf. for example the Supreme Court judgments of 11 May 1946, C.II. 574/45 (in: S. Breyer, *Prawo cywilne z orzecznictwem*, p. 222; W. Święcicki, *Orzecznictwo powojenne*, p. 90–92) and of 21 September 1934, C.I 481/34 (in: J. Namitkiewicz, *Kodeks zobowiązań*, p. 194) respectively.

[100] *Uzasadnienie*, p.189.

[101] W. Dajczak, T. Giaro, and F. Longchamps de Bérier, *Prawo rzymskie*, p. 522; P. Księżak, Świadczenie niegodziwe, p. 15–16.

[102] L. Domański, *Instytucje…*, p. 591. In accordance with Article 412 KC the court can order the seizure of the object transferred knowingly so that in return the other party of the agreement would perform an act prohibited by law or an act with a turpitudinous purpose. In the earlier version of this rule, which was in force until 1990, the seizure was enacted *ex lege*, and the relevant judgment was merely declaratory.

Article 132 were hardly a novelty. Similar rules could be found in ABGB (§1174), BGB (§817), the French body of law, OR (Article 66) and COFI (Article 27, para. 2).[103]

The corresponding Austrian norm – based on the generally accepted interpretation of §1174 ABGB – rules out an action for the restitution of a benefit that was delivered to achieve something that was either impossible or prohibited. Nevertheless, a claim for recovery could be allowed when, even though the basic agreement was unlawful, there was nothing illicit about the counter-performance that was to complete the deal. In practice it means that under Austrian law it is possible to bring claims for the recovery of usurious interest, an advance payment for brokering a marriage, money lost by playing at cards, etc. §1174 *in fine* also grants the right to claim for the recovery of a benefit transferred in order to prevent a wrongdoing.[104]

The German BGB allows a claim for restitution "if the purpose of performance was determined in such a way that the recipient, in accepting it, was violating a statutory prohibition or public policy" (§817 *in principio* BGB). In Poland, the assessment of whether the accipiens' action was tainted with moral turpitude had to involve court rulings about the purpose of the performance. The effect of letting the Supreme Court influence the interpretation of the provisions of that subsection of the Code can be seen in the following judgment: "… §814 KC [the exclusion of a condiction when the benefit was transferred in the belief that no obligation was owed, J.H.] cannot be applied to usurious interest as it is strictly forbidden to extort it or to receive it…". The justification, it is worth noting, focuses not on the solvens knowingly making a payment that is not due, but on the accipiens obtaining benefits that are prohibited by law. In other words, if the purpose of the performance (in this case usury) violates a statutory prohibition, the benefit has to be given back by the recipient (cf. §817 KC).[105] However, the taint of turpitude precludes the solvent's claim unless – given some exceptional circumstances – the performance consisted in entering into an obligation, e.g. the issuing and handing over of a promissory note rather than paying in cash (§817 *in fine* BGB)[106].

The Polish legislator, as the wording Article 131 point 3 *in fine* makes clear, does not rule out the claim for recovery by a solvens whose performance does not come within the purview of Article 132, i.e. a solvens aware that he owed no obligation resulting from an unlawful or immoral act, but was not at fault on account of turpitude. In that case the claim for recovery could be based on Article 130 (shadowing the Roman *condictio ob turpem vel iniustam causam*), i.e. if the obligation was intended by one of the parties to

[103] P. Księżak, Świadczenie niegodziwe, p. 25–64; *Uzasadnienie*, p. 188.

[104] W. Lentz, *Bezpodstawne wzbogacenie*, p. 92–93.

[105] Cf. Supreme Court Judgment of 27 November 1936, C.III. 774/36, *Orzecznictwo Sądów Polskich*, 1937, item 158, p. 138–139. Interestingly, the judges used the abbreviation "k.c." (Civil Code) for the BGB which provided the basis for settling that dispute. It may be noted as well that on the date of the judgment the provisions it refers to were no longer in force. They had been repealed on 1 July 1934, as the new Code of Obligations came into force.

[106] *Uzasadnienie*, p. 188–189. This provision was needed to handle cases where the German legal systems recognizes abstratct juristic acts. So, in the case of a contract with a turpitudinous purpose – under which the claimant transferred property rights and issued promissory notes for the benefit of the defendant who was to become his lover – the Supreme Court, acting on the basis of the CN, held that it was no longer possible to recover the real property and, secondly, that the latter transaction intended to produce an obligation which was tainted could have any legal consequences (Supreme Court Judgment of 21 September 1934, C.I. 481/34, *Orzecznictwo Sądów Polskich*, 1935, item 135, p. 114).

achieve a morally odious outcome then – in accordance with Article 56 – it was invalid, which in turn opened the way for a claim for the recovery of the transferred benefit following Article 130, but only for the solvens not tainted with turpitude (as stipulated by Article 132, para. 2). For example, this condition could be used by a solvens who offered a benefit to an accipiens in order to induce him to obey the law or dissuade him from committing acts prohibited by law.

If Article 132 was left out, the obligations listed there (e.g. an agreement to perform an act prohibited by law) and regarded invalid *ex lege* (Article 56), could nevertheless be enforced with the help of a condiction. This would have been possible because – following Article 130 – the invalidity of the agreement opened the way for bringing a claim for the recovery of a transferred benefit. This argument shows that Article 132 which blocks that path to a solvens *in pari causa* is in fact indispensable. It can be argued further that just as under Roman law it was possible with the help of *condictio causa data causa non secuta* to compel the other side to perform unactionable innominate contracts so it should be possible for a promisee to use the condition to make the promisor to deliver – now suppose the promisor were a hitman and the job was to kill.

However, Article 132 could not be invoked to fend off a claim for compensation. Yet, in a situation when both the giver and the recipient are equally at fault (*in pari delicto*), but the guilt or disgrace (*turpitudo*) of one party was caused by the unscrupulous conduct of the other party, the former (the victim) is granted the claim for damages against the latter.[107]

d) Interest

Provisions setting certain limits to claims for the recovery of interest can be found in Articles 88 and 89. So Article 88 denies relief to a debtor who willingly paid undue interest and wants to recover the sum of money in question or to have it set off against the principal.

[107] This is illustrated by the Supreme Court Judgment of 26 November 1926, C. 168/26, *Orzecznictwo Sądów Polskich*, 1937, item 334. The claim concerned the recovery of real estate sold under an invalid contract. The property was priced in German marks which constituted a violation of the Currency Act of 20 November 1919 (Dz.U.R.P., 1919, No. 91, item 492) and made the contract invalid. The court held that the claim should be granted because even though the seller knew of the currency law the buyer had planned to acquire the property in a fraudulent manner. Similarly in the Supreme Court Judgment of 29 January 1927, C. 44/26, *Orzecznictwo Sądów Polskich*, 1927, item 400, p. 458–459; but differently in the judgment of 12 May 1923, C. 159/22 (the latter in: Z. Lisowski (ed.), *Kodeks cywilny obowiązujący na ziemiach zachodnich Rzeczpospolitej Polskiej* [The Civil Code in Force in Western Poland], Poznań 1933, p. 324). Cf. also a Supreme Court ruling which bars the claim for "the recovery of payment provided for in Article 132, para. 1, in the case of defrauding under the pretence of casting magic spells (a criminal offense which falls within the scope of article 264 of the Criminal Code). The co-operation of the plaintiff in such acts, though contrary to good manners and prohibited by law if from penal sanction (Article 23 §3 of the Criminal Code), stemmed from her superstitious belief and lack of education and were only a means to carry out hre fraudulent designs and obtain the sum of 600 złotys" (Supreme Court Judgment of 17 August 1937, C.II. 431/37, *Nowy Kodeks Zobowiązań*, 1938, No. 17, p. 67). For a more detailed account, cf. P. Księżak, Świadczenie niegodziwe, p. 96–105.

Similar rules appear in the Austrian and German legal systems (§813 II BGB). However, as Wiktor Lentz points out, drawing on German law, discounted interest rates presuppose the existence of debt. Consequently, in a situation where payment had been made before the obligation came into being, because the suspensive condition was still pending, it should be possible to bring a claim for the recovery of interest payments.[108]

8. Limits of the accipiens' liability

The Polish Code of Obligations firmly upholds the principle of restitution of undue payment in Article 133,[109] cross-referenced to Article 123 on unjust enrichment.[110] Generally, the rules governing restitution in cases of undue payment and unjust enrichment are the same; in the German and the Swiss system it is the consequence of the two instruments being treated jointly. Austrian law, however, distinguishes between two types of liability, one connected with misappropriation ("use for the benefit of another"), the other with undue payment (§§1041 i 1432 ABGB).[111] Unlike the Austrian provision for misappropriation, the KZ limits the liability of the enriched person to the extent the benefit of use still remains.[112] In this respect the Polish Code follows the German and the Swiss model. Elsewhere (Austria, France) the liability of the recipient is not limited to the net value of the enrichment.[113]

In their application of the unjust enrichment law the courts as a rule relieved the accipiens from the obligation to repay that part of the enrichment which he had spent on his day-to-day living expenses, but upheld his liability for benefits (property) that had been diminished by use or had deteriorated. The accipiens, it was pointed out, should have known the risks and responsibilities of taking possession without a legally binding title.[114]

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[108] W. Lentz, *Bezpodstawne wzbogacenie*, p. 92, 100; *Uzasadnienie*, p. 183.

[109] Art. 133 §1. A person who obtained an undue payment is obliged to restore it in accordance with provisions concerning unjust enrichment.

§2. If the recipient of benefit knew it was not owed he is also liable for damages.

[110] Cf. Supreme Courtt Judgment of 13 May 1953, C.387/53 (in: S. Breyer, *Prawo cywilne z orzecznictwem* p. 223). L. Domański maintains that "Para. 1 of Article 133 of te Code of Obligations treats obtaining undue payment as unjust enrichment" (L. Domański, *Instytucje Kodeksu zobowiązań*, p. 597). However, this statement is at least imprecise: the Code of Obligations enjoins the use of provisions concerning unjust enrichment in cases of recovery of undue payment. This does not mean that the two concepts lose their distinctness.

[111] This was the result of the disappearance of one phrase from §1041 *in media parte* ABGB – "even though later the benefit came to nothing" – from the provisions concerning *condictio indebiti*.

[112] For a different view cf. A. Ohanowicz, *Niesłuszne wzbogacenie,* p. 178. Pointing to the separation of unjust enrichment and undue payment in the KZ, he argues that it is possible to bring a claim for the recovery of undue payment even in situations where the accipiens was not enriched. However, this view was isolated.

[113] S. Meier, *Restitution in Case of Undue Transfer*, p. 1472. A different view with regard to Austrian law, cf. W. Lentz (Note 117).

[114] Cf. Supreme Court Judgments of 1 April 1954, 2.C.47/54, and 1 April 1953, 1.C.131/53 (in: S. Breyer, *Prawo cywilne z orzecznictwem*, p. 223).

That said, it should be noted that the KZ, like the systems of law, expands the ambit of the accipiens' liability if he accepts a benefit in bad faith (Article 133, para. 2). By doing this the legislators affirm the general rule that an accipiens who knowingly acquires benefits he is not owed cannot expect relief from the courts. Austrian and Swiss courts applied stricter liability whenever they saw there had been good reasons for the accipiens to be in doubt (following §1437 ABGB and Article 64 OR).[115] Meanwhile, for Polish and German courts bad faith meant positive knowledge of the wrongdoing, and not just negligent ignorance. The burden of proving it, in accordance with Article 133, para. 2, lay with the solvens. Art. 133 para. 2 was always applied in cases *condictio ob turpem vel iniustam causam*: the accipiens, who was at fault on account of turpitude could not plead ignorance of the law, and his bad faith was presumed.[116]

Roman law treats an accipiens guilty of bad faith with great severity, no better than a thief. Austrian and French law (§§335 and 1437 ABGB[117]; Articles 1378–1379 CN respectively) treat an accipiens guilty of bad faith on a par with a possessor in bad faith and therefore liable for "the capital as well as the fruits", diminution, deterioration or loss by accident of the property or assets in question. An analysis of Article 127 in connection with Article 133 indicates that KZ too makes the accipiens in bad faith liable for any loss, even if caused by a fortuitous event. The German code limits the liability, or the scope of restitution, to those losses, including uncollected fruits or interest on a loan, that happened through the accipiens' fault or negligence.[118] So, taking into account both the presumptions and the scope of stricter liability of the accipiens in bad faith, the authors of the Polish Code of Obligation took the middle road of moderation, more lenient than the Austrian model and stricter than the German one.

The provisions concerning the restitution of unjust enrichment could also be applied in cases of undue payment that did not result in unjust enrichment (like the case of the mail order company mentioned above). Roman Longchamps de Bérier was alone in discerning that special case. His solution was to require the recipient to make restitution in kind and to pay the expenses: if the object in question was affected by use, the contract and the concomitant obligation to pay did come into being (the acceptance of the offer can be inferred from the offeree's conduct). If, however, if the object was lost while being delivered, no contract was created and the risk of loss must be borne by the offeror (cf. Article 69).[119]

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[115] P. Księżak, *Bezpodstawne wzbogacenie*, p. 14; and W. Lentz, *Bezpodstawne wzbogacenie,* p. 107.

[116] L. Domański, *Instytucje Kodeksu zobowiązań*, p. 598.

[117] W. Lentz, *Bezpodstawne wzbogacenie*, p. 93: The provision of § 1437 ABGB describing the effects of the accipiens' good and bad faith refers literally to *condictio indebiti* only, but it is by general consent extended, by general consent, to the remaining condictions.

[118] W. Lentz, *Bezpodstawne wzbogacenie*, p. 107; *Uzasadnienie*, p. 189–190.

[119] R. Longchamps de Bérier, *Zobowiązania*, p. 229.

9. Conclusion

There is a widespread *consensus* among legal scholars that the authors of the Polish Code of Obligations of 1933 looked for inspiration to the Swiss Obligationenrecht.[120] This analysis of the functioning of the concept of undue payment in the KZ and in some contemporary European legal systems confirms Paweł Księżak's thesis of the KZ's indebtedness to the German BGB and the Swiss OR in that field.[121] Yet the KZ does not copy the solutions of these two codes of law. The most important difference is the separation of unjust enrichment and undue payment; and there are more differences on the level of specific regulations. In contrast to German law, the KZ does require that the solvens' error justifying the use a condiction has to be an exculpable. In contrast to the OR, the solvens is not required to prove that he was unaware of the nonexistence of the obligation at the time he transferred the benefit. There are even more dissimilaries between the KZ and Napoleonic Code, the KZ and the Austrian ABGB; they are due chiefly to the structure of the older codes. In particular, each of them handles the obligation to restore the object of undue payment in a markedly different way – here the Polish approach draws on the BGB and the OR.

Finally, any comparison of the current Polish Civil Code with its predecessor would show how remarkably similar they are. For the most part the present-day regulations follow those of the KZ. Probably the most significant departure from the old code is the replacement of the exclusion of condiction (Article 132 KZ) by the action of forfeiture of the object of transfer tainted with moral turpitude (Article 412 KC). The fact that Code of Obligations of 1933 has undergone no substantial revision in the course of subsequent reforms of civil law is the best proof of its outstanding merit.

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[121] P. Księżak, *Bezpodstawne wzbogacenie*, p. 33.

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