



*Age Vär*

*LL.M., Assistant of Civil Law,  
University of Tartu*

# The Draft Common Frame of Reference's Regulation of Unjustified Enrichment: Some Observations from Estonia's viewpoint

## 1. Introduction

Questions regarding the harmonisation of private law have evoked several debates in the European Union in the last few decades. These have expanded and become livelier especially in connection with the European Civil Code project.<sup>\*1</sup> The process of harmonisation of European private law also affects Estonia, even in areas not regulated by European Union legislation mandatory for the Member States. Thus, for example, the Principles of European Contract Law<sup>\*2</sup> (PECL) and the UNIDROIT Principles of International Commercial Contracts<sup>\*3</sup> (PICC) played a special role in the drafting of the Estonian Law of Obligations Act<sup>\*4</sup> (LOA).

On 28 December 2007, the European Commission was presented with the Draft Common Frame of Reference<sup>\*5</sup> (DCFR), which comprises the principles, definitions, and model rules of European private law. As the general provisions of the law of obligations in the Draft Common Frame of Reference are based on the PECL<sup>\*6</sup>, it is likely that the need to supplement or amend existing Estonian legislation in light of the general principles set out in the DCFR may more particularly concern the specific provisions of the Law of Obligations Act, among them the provisions pertaining to non-contractual obligations<sup>\*7</sup>, including unjustified enrichment law. With regard to the DCFR, the following functions are given primary emphasis: 1) a model for a political Common

---

<sup>1</sup> Available at <http://www.sgecc.net/pages/en/introduction/index.introduction.htm> (20.08.2008).

<sup>2</sup> The Principles of European Contract Law. Parts I (1995, 1999) and II (1999). O. Lando, H. Beale (eds.). The Hague 2000; part III (2003). O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). The Hague 2003.

<sup>3</sup> Principles of International Commercial Contracts. Rome: UNIDROIT 1994.

<sup>4</sup> Völaõigusseadus. – RT I 2001, 81, 487; 2005, 61, 473 (in Estonian); available in English at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (20.08.2008).

<sup>5</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Interim Outline Edition. München: Sellier 2008. Available at <http://www.law-net.eu/> (21.08.2008).

<sup>6</sup> DCFR (Note 5), pp. 2–27.

<sup>7</sup> P. Varul. The Creation of New Estonian Private Law. – European Review of Private Law 2008 (16) 1, pp. 95–109.

Frame of Reference, envisaged by the European Commission in its Communication document of 2003<sup>8</sup>; 2) an academic text as a model for teaching and research work, aiding in understanding of the similarities of the private law in the jurisdiction of the European union; and 3) a source of inspiration for the legislators of countries in the process of modernising national law.<sup>9</sup>

This article examines the third of the above-mentioned functions and discusses the regulation of unjustified enrichment within the DCFR in comparison with the existing Estonian legislation. The objective of this article is to answer the question of whether and to what extent the DCFR could serve as an inspiration for the amendment, supplementation, or interpretation of Estonian unjustified enrichment law. On account of limitations of space, the article focuses on only some aspects of DCFR unjustified enrichment model rules, among them the prerequisites for claims for the transfer of that which is received without legal basis, the method for reversing enrichment, and the calculation of compensation, and it compares the solutions provided to those of existing Estonian legislation. The article also discusses certain questions regarding delimitation of the rules of unjustified enrichment and *negotiorum gestio*.

## 2. Unjustified enrichment regulation within the Common Frame of Reference and the Estonian Law of Obligations Act

Unjustified enrichment law is a traditional part of the law of obligations in the legal systems of Continental Europe<sup>10</sup>, regulating situations in which one person has received something (i.e., been enriched) to the disadvantage of another person without legal basis. As European directives have almost no regulation on questions related to unjustified enrichment law<sup>11</sup>, the DCFR comprises the first attempt to outline the common principles of unjustified enrichment law in the Member States. The Study Group on a European Civil Code adopted the common principles for unjustified enrichment in Tartu in late 2005, and these are included in Book VII of the DCFR.

### 2.1. Delimiting the unjustified enrichment law from the provisions regarding *negotiorum gestio*

#### 2.1.1. The regulation and prerequisites for application of *negotiorum gestio*

As part of its earlier work, the Study Group on a European Civil Code has developed the common European principles of *negotiorum gestio*<sup>12</sup>, which, similarly to unjustified enrichment law, must fill the gaps that might appear between the rules of violation law and contract law. Regulation of benevolent intervention is included in Book V of the DCFR and applies where a person (the intervener) acts predominantly with the intention of benefiting another (the principal) while lacking the principal's prior consent.<sup>13</sup>

In Estonia, benevolent intervention in another's affairs is governed by Chapter 51 of the Law of Obligations Act which entered into force on 1 July 2002. Before the enactment of the Law of Obligations Act, situations involving benevolent intervention were subject to § 477 of the Estonian SSR Civil Code<sup>14</sup> (CC), laying down

<sup>8</sup> Communication from the Commission to the European Parliament and the Council: A more coherent European Contract Law. An Action Plan. COM(2003) 68 final, 12 February 2003.

<sup>9</sup> DCFR (Note 5), pp. 6–8.

<sup>10</sup> R. Zimmermann. Grundstrukturen des Europäischen Bereicherungsrechts. Mohr Siebeck 2005, p. 21.

<sup>11</sup> As an exception, Directive 97/7/EC lays down the principle that in the case of inertia selling to the consumer, a sender engaged in economic and professional activities has no claims against the consumer. See Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. – OJ L 144, 4.06.1997, pp. 0019–0027.

<sup>12</sup> C. von Bar. Principles of European Law, Benevolent Intervention in Another's Affairs. Sellier 2006.

<sup>13</sup> Article V.–1:101: Intervention to benefit another

(1) This Book applies where a person (the intervener) acts with the predominant intention of benefiting another (the principal) and:

(a) the intervener has a reasonable ground for acting; or

(b) the principal approves the act without such undue delay as would adversely affect the intervener.

(2) The intervener does not have a reasonable ground for acting if the intervener:

(a) has a reasonable opportunity to discover the principal's wishes but does not do so; or

(b) knows or can reasonably be expected to know that the intervention is against the principal's wishes.

<sup>14</sup> Eesti NSV tsiviilkoodeks. – ENSV ÜVT 1964, 25; RT I 2001, 47, 260 (in Estonian).

the obligation to return assets obtained or saved without legal basis. Thus, no separate *negotiorum gestio* law was recognised. This also means that, so far, Estonia has lacked significant amounts of judicial practice regarding the delimiting of unjustified enrichment and *negotiorum gestio*, and the application of the rules pertaining to *negotiorum gestio* depends upon the date of the activity constituting the object of dispute. Namely, according to § 21 of the Law of Obligations Act, General Part of the Civil Code Act and Private International Law Act Implementation Act<sup>\*15</sup>, the provisions of the Law of Obligations Act related to *negotiorum gestio* apply to acts performed after 1 July 2002; § 23 foresees that the provisions of the Law of Obligations Act concerning unjustified enrichment apply in cases of unjustified enrichment occurring after 1 July 2002. Hence, if a person paid costs for the benefit of another prior to the enactment of the Law of Obligations Act and continued to do so after the enactment thereof, a situation could have arisen in which some of the costs must be compensated for pursuant to § 477 of the CC and some of them under the provisions of the LOA (and the application of the Law of Obligations calls for determining whether the situation constituted *negotiorum gestio* or unjustified enrichment).

According to § 1018 of the Law of Obligations Act, *negotiorum gestio* is deemed to be justified if a person (the *negotiorum gestor*) acts for the benefit of another person (the principal) without being granted the right or being obliged by the principal to perform the act and the *negotiorum gestor* has justification for the act, meaning that 1) the principal approves of the act; 2) the act corresponds to the interests and actual or presumed intention of the principal; or 3) in the case of failure to act, the principal's obligation arising from the law to maintain a third party would not be performed in a timely manner or the act is essential in view of the public interest for another reason. If, in the absence of such justification, the *negotiorum gestor* acted for the benefit of another person with the intention of benefiting said person, this constitutes unjustified *negotiorum gestio*.

Both in the common European principles and in Estonian law, the rules of *negotiorum gestio* have priority over unjustified enrichment regulation: *negotiorum gestio* can constitute the legal basis on account of which a person may have received any thing from another.<sup>\*16</sup>

The problems related to the delimiting of unjustified enrichment and *negotiorum gestio* could be characterised on the basis of the following example<sup>\*17</sup>:

In 1999, cohabitants A and B commenced the construction of an annex to the dwelling of B's aunt C with her knowledge and consent, with the purpose of settling in the annex. When B died in 2003, A continued paying expenses related to the annex. In 2004, C denied A access to the annex. A filed a claim against C for compensation of the expenses he incurred and that B had paid (insofar as A is heir to B) for building the annex. In court, it was not established that A and B had ever concluded a contract with C regarding the construction of the annex.

With application of the provisions of the DCFR, pursuant to Articles V.-1:101 and V.-3:101, A would be entitled to compensation for reasonable costs incurred for the purpose of the action, if he and B acted with the predominant intention of benefiting C and they had reasonable grounds for their action, or C approved of the act without such undue delay as would adversely affect the interveners. The first question would thus be whether this case constituted *negotiorum gestio* or whether unjustified enrichment is to be held applicable. For A and B, the purpose of constructing the annex was to ensure a future dwelling. Is this to be deemed acting predominantly in their own interest or predominantly in C's interest (as the activity constituted improving her property)? In the eyes of the judge, this criterion may be too ambivalent.<sup>\*18</sup> If one were to deem A and B to have acted with the predominant intention of benefiting C, the further choice between *negotiorum gestio* and unjustified enrichment law depends on whether the action was reasonable (in this case it probably was, as commencement of the work occurred with the knowledge and consent of C).

Pursuant to Estonian legislation, the proportion of the interest of the parties to an obligation is not a significant factor; even a half wish to do something for the benefit of another is sufficient.<sup>\*19</sup> Thus, *negotiorum gestio* law could be applied here: A and B have done something for the benefit of C, and the action complied with C's interests and actual or presumed intention.<sup>\*20</sup>

<sup>15</sup> Võlaõigusseaduse, tsiviilseadustiku üldosa seaduse ja rahvusvahelise eraõiguse seaduse rakendamise seadus. – RT I 2002, 53, 336; 2005, 39, 308 (in Estonian); available in English at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (20.08.2008).

<sup>16</sup> C. von Bar (Note 12), p. 72; T. Tamppu. Lepinguväliste võlasuhete õigus (Non-contractual Obligations Law). Tallinn: Juura 2007, p. 66 (in Estonian); CCSCd 5.12.2007, 3-2-1-107-07, p. 18. – RT III 2007, 45, 362 (in Estonian); CCSCd 16.06.2008, 3-2-1-54-08, p. 13. – RT III 2008, 30, 205 (in Estonian).

<sup>17</sup> Pursuant to CCSCd 3-2-1-107-07, 5 December 2007. – RT III 2007, 45, 362 (in Estonian).

<sup>18</sup> H. Sprau. Benevolent Intervention in Another's Affairs: Some remarks on the Draft Report Presented by the Study Group on a European Civil Code. – ERA-Forum 2/2006, p. 224.

<sup>19</sup> T. Tamppu (Note 16), p. 45.

<sup>20</sup> In this case, referring the case to a lower court for a new hearing, the Supreme Court still mentioned that the court has yet to determine, whether the case constitutes *negotiorum gestio* within the meaning of § 1018 of the Law of Obligations Act; if not, unjustified enrichment law is to be applied (paragraph 17 of the court judgment).

### 2.1.2. Obligation to transfer pursuant to *negotiorum gestio* and unjustified enrichment law

Pursuant to both the DCFR and the Law of Obligations Act, the *negotiorum gestor* has the obligation to transfer that which is received as a result of his or her acts to the principal<sup>\*21</sup> and has the right to demand compensation for costs that he or she incurs or be released from obligations that he or she has assumed.<sup>\*22</sup> In the above example, A can thus demand that C compensate for the costs incurred in construction (e.g., costs for buying construction materials), on the presumption that A and B did not intend to demand that the principal compensate for costs when beginning to act (see § 1023 (3) of the Law of Obligations Act) or at the time of acting (see DCFR, Art. V.–3:104).<sup>\*23</sup> If A also wants to demand a reward for construction work that he and B performed, he must bear in mind that only a person acting in the course of his or her economic or professional activities has the right to demand a reward for the work performed.<sup>\*24</sup>

Where the action of the intervener is unreasonable and not approved by the principal, Book V of the DCFR does not apply. In such a case, the rights and obligations of the parties must primarily be subjected to unjustified enrichment law. The same applies in cases where the intervener was acting on behalf of another in his or her own interests.<sup>\*25</sup>

Section 1024 (4) of the Law of Obligations Act provides that in the case of unjustified *negotiorum gestio*, the principal shall transfer that which is received as a result of the action to the *negotiorum gestor* pursuant to the provisions concerning unjustified enrichment if the *negotiorum gestor* was *bona fide* (i.e., at the time the *negotiorum gestor* begins to act, that person does not understand and is not required to understand that he or she lacks justification for acting). Thus, if C's obligation of transfer were to be subject to unjustified enrichment law (§ 1042) on the basis of the above example, A would be in a somewhat more favourable position, as neither the DCFR nor the LOA allows avoidance of A's claim for compensation on the grounds that when beginning to construct or at the time of constructing the addition A and B did not intend to demand compensation for costs. A could also file a claim for a reward for the work performed on the grounds that C has, among other things, been enriched by dint of avoiding costs to commission the work. It must nevertheless be considered that also the application of unjustified enrichment law may preclude A's claim for compensation of costs<sup>\*26</sup>, for instance, if it appeared that A and B had failed, on account of circumstances arising from their action, to notify C in time of the intent to incur costs; if C had contested the incurring of the costs in advance; or if building an annex to the dwelling in question had not been in accordance with the law.

It is thus important to note that pursuant to both the DCFR and the Law of Obligations the *post-factum* approval of the principal makes unjustified *negotiorum gestio* justified — this means that instead of unjustified enrichment law, *negotiorum gestio* will apply, enabling preclusion of the intervener's demand for reward and in some cases the claim for the compensation of costs altogether.

<sup>21</sup> DCFR V.–2:103 (1) and Law of Obligations Act § 1021.

<sup>22</sup> DCFR V.–3:101 and Law of Obligations Act § 1023.

<sup>23</sup> In the litigation underlying the abovementioned example, the court of appeal considered it necessary to mention that "...in a situation where (B) spent all of their resources for creating a home for their family, and this purpose was not realised due to the intention of the defendant, it cannot be presumed that in the case of not reaching a compromise, costs will not be demanded.

<sup>24</sup> DCFR V.–3:102 and Law of Obligations Act § 1023 (2).

<sup>25</sup> C. von Bar (Note 12), p. 102.

<sup>26</sup> LOA § 1042. Requirement to compensate costs

1) A person who incurs costs with regard to an object of another person without a legal basis therefor may demand compensation of the costs to the extent to which the person on whose object the costs are incurred has been enriched thereby, taking into consideration, *inter alia*, the fact of whether such costs are useful to the person and the intent of the person with regard to the object. Determination of the extent of enrichment shall be based on the time when the person with regard to whose object costs are incurred has the object returned or is able to begin to use the increased value of the object in any other manner.

(2) A person who incurs costs has no right of claim provided for in subsection (1) of this section if:

1) the person with regard to whose object costs are incurred demands the removal of improvements made by means of the incurred costs and if the removal of such improvements is possible without causing damage to the improvements;

2) the person who incurs costs fails, due to circumstances arising from the person, to notify the other person in time of the intent to incur costs;

3) the person with regard to whose object costs are incurred has contested the incurring of the costs in advance; the incurring of costs with regard to the object is prohibited arising from law or the contract.

### 2.1.3. Expiry of claims

In the application of Estonian law, the regulation of the expiry of claims pursuant to the General Part of the Civil Code Act (GPCCA)<sup>\*27</sup> is also somewhat different: the claims constitute claims arising from law, where according to the general rule in the case of *negotiorum gestio* the limitation period for a claim for compensatory costs shall be 10 years from the moment when the claim falls due (GPCCA, § 149); in the case of a claim arising from unjust enrichment, however, § 151 foresees a double expiry: the limitation period for a claim arising from unjust enrichment shall be three years from the moment at which the entitled person became or should have become aware of the claim arising from unjust enrichment. In any case, however, a claim arising from cause of unjust enrichment expires no later than 10 years after the unjust enrichment occurred. Hence, if C fails to approve the incurring of costs, A has the right of claim for compensation of costs against C pursuant to § 1042 of the Law of Obligations Act, which A is to file within three years from the time of becoming aware of the claim as such. If C approves of incurring costs, the limitation period for a claim for compensation of costs incurred in *negotiorum gestio* shall be 10 years from the moment when the claim falls due.

## 2.2. Classification of claims arising from unjustified enrichment

### 2.2.1. Different classification options

In the laws of those European countries that regulate unjustified enrichment as a separate area of the law<sup>\*28</sup>, considerable differences occasionally can be seen in the classification of claims. Some legal systems, for instance, differentiate between the performance of an undue obligation (derived from the claim of *conditio indebiti* known in Roman law: the payment of a non-existing debt or the repayment of a debt already paid) and unjustified enrichment (comprising other situations wherein a person had no legal basis for enriching another).<sup>\*29</sup> Claims arising from unjustified enrichment can be classified according to whether enrichment has occurred on the basis of performance or by another method.<sup>\*30</sup> Thirdly, it can be noted that, while Continental European law concentrates on identifying the absence of legal basis, a Common Law lawyer instead seeks justification explaining why the enrichment is unjustified.

Proceeding from the differences listed, there are plenty of people who doubt the possibility of harmonisation of unjustified enrichment law<sup>\*31</sup>, but the existence of differences paradoxically also serves as the argument used to justify the necessity of harmonised principles.<sup>\*32</sup> E. McKendrick has named several reasons supporting the importance of classifying claims: this ensures similar resolution of similar cases, brings out the inconsistencies in existing rules, contributes to greater clarity and understanding of the entire set of rules, and also has economic importance: the solution is easier to find if the structure of the law is clear.<sup>\*33</sup>

The multitude of existing solutions forces the harmoniser of unjustified enrichment principles to either choose one of the existing classifications or introduce a new one. There are supporters of a typologised catalogue of claims (classification of claims on the basis of whether enrichment occurred through performance or another method)<sup>\*34</sup> and also are spokesmen for a unitary approach (a comprehensive general rule followed by more specific provisions)<sup>\*35</sup> — with both resting their case on simplicity and intelligibility.

<sup>27</sup> Tsviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2007, 24, 128 (in Estonian). Available in English at <http://www.legaltext.ee/en-andmebaas/ava.asp?m=022> (20.08.2008).

<sup>28</sup> In this aspect the Nordic Countries (where the answer to this question is negative) differ from other Member States. See in further detail: P. Schlechtriem. *Restitution und Bereicherungsausgleich in Europa I*. Tübingen: Mohr Siebeck 2000, p. 49 ff.

<sup>29</sup> E.g., in French, Dutch, Spanish and Italian law.

<sup>30</sup> E.g., German law; a modernised version of such a division is also followed in Chapter 52 of the Estonian Law of Obligations Act.

<sup>31</sup> W. J. Swadling. *Restitution and Unjust Enrichment*. – A. Hartkamp *et al.* (ed.). *Towards a European Civil Code*. Martinus Nijhoff Publishers 1994, p. 282; the same also E. McKendrick: E. McKendrick. *Taxonomy: Does it Matter?* – D. Johnston, R. Zimmermann, D. Johnston, R. Zimmermann (ed.). *Unjustified Enrichment: Key Issues in Comparative Perspective*. Cambridge University Press 2002, p. 656; also J. Smits. *A European Law of Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference*. – European Private Law Beyond the CFR, Antony Vaquer (ed.). Tilburg 2008. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1103826](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103826) (10.05.2008).

<sup>32</sup> C. von Bar. *The Principles of European Law on Benevolent Intervention in Another's Affairs and on Unjustified Enrichment*. – ERA-Forum 2/2006, p. 213; similarity in substantive solutions is admitted also by other authors. Cf. P. Schlechtriem, C. Coen, R. Hornung. *Restitution and Unjust Enrichment in Europe*. – *European Review of Private Law* 2001/2–3, p. 415.

<sup>33</sup> E. McKendrick (Note 31), pp. 632–637.

<sup>34</sup> P. Schlechtriem. *Europäisierung des Bereicherungsrechts*. 2002, p. 20. Available at <http://www.ejcl.org/74/art74-3.PDF> (15.04.2008).

<sup>35</sup> E. Clive. *Unjustified Enrichment*. – A. Hartkamp *et al.* (ed.). *Towards a European Civil Code*. Kluwer Law International 2004, p. 587.

### 2.2.2. Classification of claims arising from unjustified enrichment within the DCFR

Book VII of the DCFR has decided in favour of the unitary model, introducing first the basic rule<sup>\*36</sup>, followed by qualifying provisions regarding the elements of unjustified enrichment, the content and extent of claims against enrichment, defences (disenrichment), and relations to other legal rules. There is thus no classification according to the types of enrichment. This has been justified with the wish to follow the structure applied with regard to the principles of violation law assembled in Book IV, and for the purpose of avoiding excess, the text as a whole was kept relatively lean.<sup>\*37</sup> By leaving enrichment attributable to performance and the enrichment attributable to another's disadvantage undifferentiated, an attempt is made to avoid the situation where one and the same situation would be resolved differently in different legal systems on account of consensual variance regarding the definition of performance.<sup>\*38</sup> Additional prerequisites to the basic rule are laid down in the following rules, which are to be interpreted by the party that is the applicant.

The classification of DCFR claims has already occasioned certain criticism from the above-mentioned economic standpoint: it has been found to constitute not principles but very abstract technical regulations with a structure and logic not readily understood by national judges or lawyers.<sup>\*39</sup>

### 2.2.3. Classification of claims arising from unjustified enrichment within the Law of Obligations Act

In Estonia, obligations arising from unjustified enrichment are governed by the Law of Obligations Act of 1 July 2002, which is significantly more thorough than the provisions of the Estonian SSR Civil Code, formerly in force<sup>\*40</sup>: all told, Chapter 52 of the Law of Obligations Act comprises 16 sections in four divisions. A recognisable model for systematising the provisions of Chapter 52 of the Law of Obligations Act is the scheme applied for reforming unjustified enrichment law in the German Civil Code, which was never applied in practice in Germany.<sup>\*41</sup>

Division 1 of Chapter 52 includes a general provision (§ 1027) laying down the rule that a person shall transfer to another person, on the bases of and to the extent provided for in that chapter, that which is received from that another person without legal basis. The claims contained in the following sections can be classified according to whether enrichment has occurred by way of performance (performance condition — Division 2) or not (non-performance condition — Divisions 3 and 4).

Division 2 of Chapter 52 governs reclamation of that which is received as a result of performance of obligations, divided into the general composition (§ 1028) and specific cases: reclamation of what is transferred to a third party at the order of the obligee or person believed to be an obligee (§ 1029), reclamation of that which is transferred to a third party for performance of a contract entered into for the benefit of the third party (§ 1030), and reclamation of that which is transferred to a new obligee in the case of waiver of claims (§ 1031).

The sections in Division 3 discuss compensation in the event of violation of rights (violation condition, § 1037) and the specific cases thereof — disposal of an object by a person not so entitled (§ 1037 (2)), disposal without charge by an unentitled person (§ 1040), and performance of an obligation in favour of a person not entitled to accept performance (§ 1037 (4)).

Division 4 governs compensation for costs (performance of an obligation of another person, in § 1041, or incurring of costs with respect to an object of another person, in § 1042) incurred for the benefit of other persons.

It has been noted that the structure of Chapter 52 of the Estonian Law of Obligations Act is in compliance with the main elements of the European unjustified enrichment law and is very progressive.<sup>\*42</sup> If one were to add that, as mentioned above, several authors find that the differences regarding the classification of claims and terminology do not prevent reaching substantively similar resolutions in unjustified enrichment cases in different legal systems<sup>\*43</sup>, it may be deduced that the Estonian legislator has no need to take the DCFR as a model for restructuring the rules related to unjustified enrichment.

<sup>36</sup> DCFR VII.-1:101: Basic rule. (1) A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment.

<sup>37</sup> C. von Bar (Note 32), pp. 216–217.

<sup>38</sup> S. Swann. A Guide to the Principles of European Law on Unjustified Enrichment. – ERA-Forum 2/2006, p. 236.

<sup>39</sup> C. Wendehorst. The draft principles of European unjustified enrichment law prepared by the study group on a European civil code: A comment. – ERA-Forum 2006/2, p. 259.

<sup>40</sup> Section 477 of the Civil Code laid down the obligation of returning assets obtained or saved without legal basis, and § 478 listed assets not subject to returning.

<sup>41</sup> R. Zimmermann. Unjustified Enrichment: The Modern Civilian Approach. – Oxford Journal of Legal Studies 1995 (15) 3, pp. 425–429.

<sup>42</sup> P. Schlechtriem. The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe. – Juridica International 2001 (VI), p. 21.

<sup>43</sup> See Note 32.

## 2.3. Prerequisites for a claim arising from unjustified enrichment in the DCFR as compared with the provisions of the Law of Obligations Act

The tests for an unjustified enrichment claim comprise four elements pursuant to the DCFR: when enrichment is unjustified, enrichment, disadvantage, and enrichment that is attributable to disadvantage of another (chapters 2, 3, and 4 of Book VII). Pursuant to Estonian law, the specific prerequisites for every single claim are dependent upon what claim (condition) it constitutes, or on the way in which someone has been enriched on account of another.

### 2.3.1. When enrichment is unjustified

In the first test — concerning when enrichment is unjustified — it is presumed that enrichment of a person to the disadvantage of another person is unjustified unless the enriched person was entitled to the enrichment by virtue of a contract or other juridical act, a court order, or a rule of law (see VII.–2:101 (a)) or unless the disadvantaged person consented freely and without error to the disadvantage (VII.–2:101 (b)). Therefore, if D has transferred money to E's account pursuant to a valid contract, the circumstance does not constitute unjustified enrichment, even if D performed the transfer by mistake, having no intention to transfer the money to E but instead wishing to set off E's claim with her own claim against E. The DCFR does not foresee the application of unjustified enrichment provisions even when D performed a money transfer to E's account knowingly and without error, without being under obligation to do so by virtue of a contract, rule of law, or court order.

In the Law of Obligations Act, enrichment is deemed to be unjustified if it has occurred without legal basis (in § 1027); what exactly is deemed to be this legal basis precluding the application of unjustified enrichment law proceeds from judicial practice — for instance, a valid contract<sup>\*44</sup>, *negotiorum gestio*<sup>\*45</sup>, a court judgment<sup>\*46</sup>, or legislation.<sup>\*47</sup>

In the case of **performance condition**, the Law of Obligations Act does not lay down a single rule providing that enriching another person without legal basis freely and without error would preclude the claim against unjustified enrichment.<sup>\*48</sup> In the theoretical discourse, the common view is that a person knowingly enriching another person without legal basis should not have the right of recourse pursuant to the principle of good faith.<sup>\*49</sup> Here it could be asked whether the transferor's knowledge about the absence of legal basis could not be laid down in Estonian legislation *expressis verbis* as the basis for refusal of returning that which has been transferred, as provided in the DCFR. One supporting argument could be that, according to the *negotiorum gestio* regulation of the Law of Obligations Act, the claim against unjustified enrichment is precluded in the case of unjustified *negotiorum gestio* in bad faith — i.e., if the *negotiorum gestor* was or had to be aware that he or she lacked justification for acting on behalf of another (LOA, § 1024 (4)) and the principal does not approve of the action. An answer to this question could be sought through the following example:

Buyer A enters into an unattested written preliminary contract with seller B to purchase a flat in Tallinn and pays the agreed advance payment. Pursuant to the law, the preliminary transfer contract for an immovable must be concluded in a notarially attested form, and thus the contract concluded between A and B is void because of failure to adhere to a formal requirement.

This constitutes a performance condition: person A has completed a performance<sup>\*50</sup> with respect to B without legal basis, as the contract is void. If the law precluded A's claim for compensation in the case that A was aware of the contract being void, it may be asked how this can be adequately determined and how the burden of proof has been apportioned. This might entail a situation wherein A's claim may depend upon A's person: can A demand a refund of the advance payment if A is a citizen of a foreign country who does not speak Estonian and is unaware of Estonian legislation? If A, however, constantly does business in Estonia and uses the services of an Estonian advocate's law office, is the claim then precluded? What about the case in which A is an Estonian citizen but lacks juridical special knowledge? Would A have a claim if lacking the juridical

<sup>44</sup> CCSCd 3-2-1-46-07, 16 May 2007. – RT III 2007, 21, 176 (in Estonian).

<sup>45</sup> CCSCd 3-2-1-91-06, 1 November 2006. – RT III 2006, 40, 343 (in Estonian); CCSCd 3-2-1-107-07 (Note 16) and 3-2-1-54-08 (Note 16).

<sup>46</sup> CCSCd 3-2-1-25-06, 9 September 2006. – RT III 2006, 24, 221 (in Estonian); CCSCd 3-2-1-107-04, 19 October 2004. – RT III 2004, 27, 296 (in Estonian).

<sup>47</sup> ACSCd 3-3-1-56-04, 30 November 2004. – RT III 2004, 35, 363 (in Estonian).

<sup>48</sup> It has, however, been laid down that the recipient who was or had to be aware of circumstances constituting unjustified transfer, can not rely on no basis for enrichment (LOA § 1035 (1)).

<sup>49</sup> T. Tampuu (Note 16), p. 75.

<sup>50</sup> A performance is understood as the knowing and purposeful increasing of foreign assets. See P. Schlechtriem. *Võlaõigus. Eriosa* (Law of Obligation. Specific part). Tallinn: Juura 2000, p. 214 (in Estonian).

knowledge in circumstances where the newspapers had written a lot about the fact that the preliminary contract for purchasing an immovable asset must be in a notarially attested form?

The aim of this line of thought is to demonstrate that the transferor's awareness of the absence of legal basis can in practice be difficult to prove if more objective criteria have not been laid down.

Applying the provisions of the DCFR, the buyer could still demand a refund of the advance payment paid pursuant to a void contract, as the DCFR deems enrichment to be unjustified also in the case where it occurs for a purpose which is not achieved or with an expectation which is not realised, if the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation and if the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.<sup>51</sup> As A made advance payment with the purpose of becoming the owner of the flat in the future, the purpose was not realised and B could reasonably be expected to agree to refund the advance payment.

The principle described here was laid down in the original text of the draft legislation of the Law of Obligations Act<sup>52</sup> but was deleted from the act as passed by the Riigikogu. Thus, laying down the transferor's awareness in the Law of Obligations Act as a prerequisite precluding claim against unjustified enrichment would not be justified without addition of a provision comparable to Article VII.-2:101 (4) of the DCFR, as otherwise this could lead to an unjust solution with respect to the transferor. In specific situations it would be more purposeful to rely on the principle of good faith, established in the general part of the Law of Obligations Act.<sup>53</sup>

In the event of a claim filed for redress of **violation of the right of another person**, the awareness of the person knowingly enriching another person concerning the lack of legal basis serves as a circumstance precluding the claim for compensation in Estonian legislation: § 1037 (1) LOA establishes that a person who violates the right of ownership, another right, or the possession of an entitled person by disposal, use, consumption, accession, confusion, or specification thereof without the consent of the entitled person or in any other manner (i.e., a violator) shall compensate the entitled person in the amount of the usual value of anything received through the violation.

In the event of **incurring costs for the benefit of other persons**, there is some reference to the awareness of the person enriching another person in § 1042 (2) 2) LOA: the claim for compensation of costs incurred with regard to an object of another person depends on whether the person incurring costs has notified the other person in time of the intent to incur costs, and if not, whether the failure to notify was due to circumstances arising from the person incurring costs (see LOA, § 1042 (2) 2)). It thus follows that a person who was aware of not having a legal basis for enriching the other person and who failed to report his or her intent may remain without the right to claim compensation.

Example: O buys a used car and has it repaired. It later emerges that the car had been stolen from P. Accordingly, P demands the car back, and O can demand the compensation of costs pursuant to § 1042. His claim is precluded if, prior to having the car repaired, he learned that the car had been stolen and, in consequence of circumstances arising from himself, failed to notify the actual owner of the car.

If incurring costs for the benefit of another consists of performing an obligation of that person, the performer's awareness of the absence of legal basis means a wish to benefit the other person, and therefore one first must assess whether this constitutes *negotiorum gestio* and whether the action is justified or unjustified.

Example: D believes that her child broke the spectacles of E's child in school and compensates E for the amount necessary to buy new glasses. It then becomes clear that it was F's child who broke the glasses.

As in the latter example D had no intent to benefit F, this does not constitute *negotiorum gestio*.<sup>54</sup> D has a claim for compensation against F pursuant to unjustified enrichment rules, because F has been released from the obligation to compensate E for the cost of the glasses.

<sup>51</sup> DCFR VII.-2:101 (4). At the same time, the DCFR does not foresee a limitation for the right of recourse of that which is transferred in case the expected purpose was not realised due to circumstances arising from the transferor themselves.

<sup>52</sup> Draft LOA § 1136 (1) laid down that upon transferring something not for performing an obligation but for the purpose of causing the recipient to act in a certain way, that which is received can be demanded to be returned in the event of non-occurrence of the intended behaviour, if the recipient understood or ought to have understood the transferor's such intention. Section 1132 (2) 2) of the draft laid down that the right to demand the return of that which is received does not exist if the recipient could reasonably presume that the person wanted the recipient to keep that which is received regardless of absence of legal basis for the abovementioned circumstances. See draft Law of Obligations Act (116 SE I), <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=991610001&login=proov&password=&system=ems&server=ragne11> (10.08.2008) (in Estonian).

<sup>53</sup> LOA § 6. Principle of good faith: (1) Obligees and obligors shall act in good faith in their relations with one another. (2) Nothing arising from law, a usage or a transaction shall be applied to an obligation if it is contrary to the principle of good faith.

<sup>54</sup> LOA § 1018 (2): A case where a person has no desire to act for the benefit of another person is not deemed to be *negotiorum gestio*.



### 2.3.2. Enrichment and disadvantage

The second prerequisite, enrichment, has been defined more precisely in the DCFR than in the Law of Obligations Act: it consists of increase in assets or a decrease in liabilities of a person, receiving a service or having work done, or use of another's assets (Art. VII.–3:101 (1)). According to the drafters of the DCFR, they knowingly left the concept of assets undefined; this may, in addition to physical things, also comprise rights, including personality rights, as well as legal positions of commercial value.<sup>\*55</sup>

The third prerequisite is disadvantage, constituting an opposite situation to enrichment, a so-called reflection. This constitutes a new term introduced by the study group<sup>\*56</sup>, which shall be discussed alongside enrichment.

The concept of enrichment within the ambit of the Common Frame of Reference does not so much denote the comparison of the difference or net value of the financial situation of the parties to the obligation as it concentrates on the movement of objects<sup>\*57</sup> — thus simplifying the filing of claims on the basis of mutual annulled contracts, if the annulment occurs after performance of mutual obligations. Evaluating only the economic effect would mean that receipt of an object that is worthless or demands large expenses could not be deemed to be enrichment; neither would it constitute enrichment in that case when a service has been performed for a person who has not requested it.<sup>\*58</sup>

In Estonian legal literature, enrichment is defined as obtaining monetary benefit, which may consist of receiving something, being relieved of something, or saving something, whether through an unjustified performance, via unjustified intervention into rights, or by other means.<sup>\*59</sup> The Law of Obligations Act has not defined the concept of enrichment (or of disadvantage). It employs the expression 'that which is received', which can be interpreted similarly to the language of the DCFR: this could be property or possession, legal status arising from an entry in the land register<sup>\*60</sup>, a claim or other right<sup>\*61</sup>, avoidance of costs<sup>\*62</sup>, release from obligations, etc.

The pointing out of **service as a form of enrichment** in the DCFR deserves separate comment. Pursuant to Article VII.–3:101 (1) (b), unjustified enrichment also occurs in a situation where a person has received a service without legal basis, both in the case of the parties not having entered into a contract for provision of services and in the case of having entered into a contract that is void.<sup>\*63</sup>

As is mentioned above, the Law of Obligations Act does not define 'that which is received' and therefore does not include direct reference to receiving a service as a separate form of enrichment. According to the provisions applying to contracts for provision of services (LOA, Part 8), 'service' can refer to performing a mandate as well as performing work (manufacture or alteration of a thing or obtaining of a different result).

A situation in which a person has provided a service for another but the parties have never entered into a contract can be deemed to be *negotiorum gestio* or unjustified enrichment, depending on whether the provider of the service has the intent to benefit the other person.

The situation would be less clear if the parties had entered into a contract but the contract is void. In its § 1042, the Law of Obligations Act lays down valid claims for compensation for costs incurred with relation to an object of another person and could therefore, logically, also refer to applicability in the event of void contracts for provision of services. At the same time, the structure of Chapter 52 of the Law of Obligations Act must be kept in mind here: performance of a void contract constitutes a performance, governed by Division 2 of said chapter, and thus § 1042 is not applicable. Arguments can be found in Estonian legal discourse in favour of provisions addressing *negotiorum gestio*: application of the provisions on *negotiorum gestio* would yield a fairer result with regard to claims for compensation of costs, as the law on *negotiorum gestio* contains several specific provisions addressing non-contractual liability for damage, which protect the interests of a person justifiably acting for the benefit of another person and foresee the increased liability of a *negotiorum gestor* acting in bad faith. In addition, the application of *negotiorum gestio* provides better protection for the principal, as in the event of unjustified *negotiorum gestio* performed in bad faith the *negotiorum gestor* does not have a claim for compensation.<sup>\*64</sup>

<sup>55</sup> S. Swann (Note 38), p. 242.

<sup>56</sup> This term was thus the most difficult to translate when translating the DCFR unjustified enrichment provisions into Estonian, as there is no such concept in Estonian legal terminology.

<sup>57</sup> S. Swann (Note 38), p. 241.

<sup>58</sup> E. Clive (Note 35), p. 590.

<sup>59</sup> T. Tampuu (Note 16), p. 59.

<sup>60</sup> CCSCd 3-2-1-129-05, 1 December 2005. – RT III 2005, 43, 426 (in Estonian)..

<sup>61</sup> E.g., a privatisation voucher (CCSCd 3-2-1-119-06, 28 November 2006. – RT III 2006, 45, 378; in Estonian).

<sup>62</sup> CCSCd 3-2-1-33-07, 2 May 2007. – RT III 2007, 20, 163 (in Estonian); CCSCd 3-2-1-107-07 (Note 16).

<sup>63</sup> In the case of void contracts on the provision of services the application of *negotiorum gestio* is precluded. See C. von Bar (Note 12), p. 110.

<sup>64</sup> T. Tampuu (Note 16), pp. 42–43 and p. 67.

On the other hand, the following example could serve as a reminder of a nuance in differentiation between *negotiorum gestio* and unjustified enrichment — the question of reward:

K does not know that his neighbour, elderly lady L, is of restricted active legal capacity and has been assigned a guardian by the courts. L turns to K, asking him to remove the large trees on her lot and promising to pay her 3000 Estonian kroons for doing so. Nothing in L's behaviour refers to her mental condition. The trees are healthy and viable, and there is thus no actual need for cutting them down; L justifies the request with the wish to allow more sunshine on her lot.

In application of the law on unjustified enrichment, K has the opportunity to demand a reward for the work performed, even if cutting down trees does not constitute K's economic or professional activity. If one were to apply the *negotiorum gestio* law, it is, correspondingly, relevant whether K's activity is approved by L's guardian. In the absence of approval, pursuant to § 1024 (4), that which is received shall be transferred pursuant to the provisions concerning unjustified enrichment, so the outcome would be the same. If, however, L's guardian approves of K's activity, the latter can be deemed to be justified *negotiorum gestio* and K has the right to demand compensation for costs; it is not, however, possible to file a claim for reward, even though these terms had been agreed upon.

Had K known or had to have known about L's restricted active legal capacity, there would not be the obligation to transfer that which is received from L upon application of the law on *negotiorum gestio*. Unjustified enrichment regulation, as already mentioned, does not expressly preclude K's claim in the case of K acting in bad faith, but this gap could be filled here with the application of the principle of good faith.

That the above-mentioned problems are nothing unique to Estonian law is also supported by the fact that the question regarding legislation applicable to void contracts for provision of services has also been discussed in the approaches of German jurists and German judicial practice.<sup>65</sup> The subject is, however, relatively new in Estonia — after all, before 1 July 2002 there was no need to distinguish between *negotiorum gestio* and unjustified enrichment.

This leads to the viewpoint that, in determination of the applicable legislation in the event of services being provided on the basis of void contracts, the DCFR with its soon-to-be published comments could be most useful reference material for shaping Estonia's approach.

### 2.3.3. Attribution

The fourth prerequisite is the attribution of a person's enrichment to another's disadvantage. Pursuant to the DCFR, enrichment is attributable to another's disadvantage in particular where an asset of that other is transferred to the enriched person by that other, a service is rendered to or work is done for the enriched person by that other, the enriched person uses that other's asset, especially where the enriched person infringes the disadvantaged person's rights or legally protected interests, an asset of the enriched person is improved by that other, or the enriched person is discharged from a liability by that other (Art. VII.–4:101). An enrichment may be attributable to another's disadvantage even though the enrichment and disadvantage are not of the same type or value (Art. VII.–4:107).

The list established in Article VII.–4:101 actually matches the types of claims distinguished under Estonian law (see section 2.2.3 of this paper). Attribution of enrichment on one hand and disadvantage on the other denotes a situation defined as 'enrichment on behalf of another' in the case of all claims against enrichment in Estonian law.<sup>66</sup> No such prerequisite is expressly provided in the Law of Obligations Act, but it can be seen to proceed from both Estonian legal theory<sup>67</sup> and judicial practice: The Supreme Court has, for instance, noted that "pursuant to the meaning of § 1037 (1) LOA, the violator must acquire assets to the disadvantage of the tortfeasor — i.e., receive assets that by law should have been received by the tortfeasor".<sup>68</sup>

## 2.4. Reversal of enrichment

### 2.4.1. Transfer or compensation

Pursuant to Article VII.–5:101 (1) and (2) of the DCFR, enrichment must be reversed by transferring the asset to the disadvantaged person; if a transfer would cause the enriched person unreasonable effort or expense, he or she must pay monetary compensation instead of transferring the asset. One could ask whether it should be

<sup>65</sup> C. von Bar (Note 12), pp. 145–147.

<sup>66</sup> Such a definition was wished to be avoided, as it comprises disadvantage and attribution — the prerequisites that are attempted to be distinguished. See C. von Bar (Note 32), p. 218.

<sup>67</sup> T. Tampuu (Note 16), p. 59.

<sup>68</sup> CCSCd 3-2-1-46-07, 16 May 2007, p. 11. – RT III 2007, 21, 176 (in Estonian).

necessary to repeat in the unjustified enrichment regulations of the DCFR what has already been established in Article III.–3:302 (3) (a) and (b) of Book III, laying down that performance of non-monetary obligations cannot be enforced where performance would be unlawful, impossible, or unreasonably burdensome or expensive for the debtor.

Article VII.–5:101 (4) of the DCFR also establishes that, to the extent that the enriched person has obtained substitute in exchange, the substitute is the enrichment to be reversed if the enriched person is in good faith at the time of disposal or loss and the enriched person so chooses (point a) or if the enriched person is not in good faith at the time of disposal or loss, the disadvantaged person so chooses and the choice is not inequitable (point b). The wording of the article does not expressly specify what is meant by 'substitute' in the DCFR — different forms of compensation or also objects received upon entry into an exchange contract.

Similarly to the DCFR, the regulation of the Law of Obligations Act is primarily aimed at returning that which is received in kind; if this is impossible, the recipient shall compensate in the amount of the usual value thereof as of the time when the right to reclaim was created (§ 1032 (2)). In the concurrence of Chapter 52 and the general provisions of the Law of Obligations Act, compensation can be considered in the stead of transfer if performance of the obligation is unreasonably burdensome or expensive for the party so obliged (§ 108 (2) 2)). Pursuant to the second sentence of § 1032 (1) LOA, in the event of the destruction or consumption of, damage to, or seizure of the transferred object, the transfer of that which is acquired in compensation for said object may be demanded (what is meant is, for instance, compensation for damage and insurance indemnities), but if the recipient has substituted the object in exchange for another object, for instance, the transferor's claim shall not be extended thereto, in contrast to what is suggested in the DCFR. In case the recipient offers to substitute monetary compensation for the transfer of an object, this is deemed to be substitution (§ 89 LOA) and its acceptability depends upon whether the transferor agrees to it.

The solution offered by the regulations of the DCFR and the Law of Obligations Act can be compared with the following example:

A purchases a tractor from B. In a while, A purchases another tractor from C at a better price and trades in the tractor purchased from B for a car. B annuls the contract after A has performed the trade.

One can conclude that, pursuant to the DCFR, A must transfer the car if B demands it. Under the Law of Obligations Act, however, B can only demand the money, and, if A has no money to pay, A can offer the car to B by way of substitution. The solution offered by the DCFR is insufficiently flexible in the event that A would rather pay the money but B does not agree to this. The regulation in the Law of Obligations Act puts A in a more difficult situation in the case when A has no money and B refuses substitute performance.

## 2.4.2. Approval of disposal

If the enriched person has transferred the object received without legal basis, then, pursuant to Article VII.–5:101 (3), this constitutes a situation in which the enriched person is no longer able to transfer the asset in kind and has to pay its monetary value to the disadvantaged person. Upon disposal of an object in good faith, without charge, to a third person, the recipient may have a defence regarding disenrichment (Art. VII.–6:101), and the transferor has a claim against the third person pursuant to Article VII.–4:103, paragraph 2 of which establishes that a claim can be filed against a third person in particular in the event of disenrichment.

Pursuant also to Estonian law, a claim for transfer appears against a third party if the recipient transfers that which is received to a third party without charge and if compensation cannot be obtained from the recipient (§ 1036); the wording of the act does not expressly indicate that the impossibility of obtaining compensation should be confined to the case of reversal of enrichment. It is indicated in legal discourse that future judicial practice shall determine whether § 1036 shall be applied also if the performer of the disposal is insolvent. The wording of the DCFR allows one to presume that the insolvency of the performer of the disposal fails to justify the transferor's claim of unjustified enrichment and that the claims of the creditors of the insolvent debtor should be satisfied pursuant to the provisions of bankruptcy law. In any event, this is among the questions in consideration of which Estonian jurists and applicants of the law could make good use of the publishing of thorough DCFR comments.

In the case that the transfer of an object to a third person has been performed by an intervener in the rights of that person, both the DCFR (VII.–4:106) and the Law of Obligations Act (§ 1037 (2)) provide the possibility of the entitled person approving of the disposal and thus renouncing the thing involved.

Example: A steals B's car and sells it to C. B can demand C's return of the car or approve of A's disposal and demand the transfer of the money received for the car.

If a violator transfers the object to a third party without charge, that third party shall transfer what is received to the entitled person even if the right of disposal is valid (§ 1040).

### 2.4.3. Calculation of compensation

The basis for calculation of the amount of compensation for that which is received in the DCFR is as follows: pursuant to Article VII.–5:103, the monetary value of an enrichment is the sum of money which a provider and recipient with a real intention of reaching an agreement would lawfully have agreed as its price.

Pursuant to Estonian legislation, if it is impossible to deliver that which is received and in the event of violation of rights, the recipient shall compensate for the usual value (LOA, § 1032 (2) and § 1037 (1)) thereof, which, pursuant to the second sentence of subparagraph 65 of the General Part of the Civil Code Act, is the average local selling price (market price) of the object. In the case of disposal of an object by a violator for a charge, the agreed charge shall be deemed to be the usual value unless the entitled person proves that the value of the object is higher or the violator proves that the value of the object is lower than the agreed charge (§ 1037 (3)).

In its handling of a claim for compensation, the definition used in the DCFR converges with contract law applicable in the case of unjustified performance; whether this is justified remains questionable. This also complicates the determination of price, especially if the contract between the parties is void because of misrepresentation or threat. It proceeds from paragraphs 3 and 4 of Article 5:102 that a price fixed in a void contract is not applied so as to increase liability of the recipient beyond the monetary value of the enrichment, but, as is apparent from Article VII.–5:103, the monetary value still calls for assumptions regarding the real intention of the parties. If the parties disagree on the compensation payable or never entered into a contract in the first place, it would probably be difficult to ascertain what their real intention could have been. Therefore it would be more purposeful to use more objective criteria.

In the event of so-called imposed enrichment (i.e., the person did not consent to the enrichment), Article VII.–5:102 (2) (a) of the DCFR foresees that the enriched person is not liable to pay more than any saving.

This can be compared with § 1042 (2) of the Law of Obligations Act, establishing that a person who incurs costs with regard to an object of another person has no right of claim if the person with regard to whose object costs are incurred has contested the incurring of the costs in advance. This does not apply for necessary expenses (going toward preserving an object or to protect it against full or partial destruction) — reimbursement of these can be demanded pursuant to § 88 of the Law of Property Act<sup>69</sup>. The DCFR thus does not distinguish as to the purpose of the expenses, but it might be presumed from the existing wording that what is meant is necessary expenses and not expenses the purpose of which is to increase the beauty or comfort of a thing.

## 2.5. Fruits

Article VII.–5:104 of the DCFR establishes that reversal of enrichment extends to the fruits and use of the enrichment or, if less, any saving resulting from the fruits or use; however, if the enriched person obtains the fruits or use in bad faith, reversal of the enrichment extends to the fruits and use, even if the saving is less than the value of the fruits or use. The wording of the DCFR article leads to the conclusion that it constitutes a principle by which an enriched person who is in good faith must transfer the benefit (fruits and use) actually received because of enrichment, whereas the liability of an enriched person who is in bad faith also comprises the fruits and uses that person might have received in consequence of enrichment.

This principle does not expressly proceed from the wording of the relevant provisions (sentence 1 of § 1032 (1) and also § 1035 (3) 1)) of the Law of Obligations Act, but, following the example of the DCFR, the act could also more clearly distinguish between these two situations.

When calculating the amount of fruits, Estonian judicial practice proceeds from the concept of usual value<sup>70</sup>; with regard to Article VII.–5:104 of the DCFR, the question arises of whether the calculation of fruits should proceed from the same criterion foreseen for the calculation of the price of the object (i.e., proceeding from the presumed intention of the parties to the obligation, not the market price). If this is so, it gives rise to another question: that of whether this approach is justified in practice. I dare to claim that, with regard to determining the value of the object and of the fruits thereof, Estonian unjustified enrichment law provides a better and simpler solution than the DCFR.

<sup>69</sup> Asjaõigusseadus. – RT I 1993, 39, 590; 2007, 24, 128 (in Estonian); available in English at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (20.08.2008).

<sup>70</sup> CCSCd 3-2-1-136-05, 20.12.2005, p. 26. – RT III 2006, 2, 19 (in Estonian).

### 3. Conclusions

As the DCFR was presented to the European Commission only at the end of 2007, comprehensive analyses related to the model rules of unjustified enrichment have not yet been published, for obvious reasons. The existing approaches that were available for use in preparation of the present article take a rather critical stance toward the model rules — they question the necessity of the separate regulation of unjustified enrichment altogether or at least question the necessity for such detail in this regulation, be it for the reason that it constitutes residual law or because of the excessively abstract and technical nature of the model rules developed thus far.<sup>\*71</sup>

The purpose of this article was to compare certain aspects of the unjustified enrichment regulation within the DCFR and the Estonian Law of Obligations Act. The assessment concluded that for the Estonian legislator the DCFR's unjustified enrichment model rules with their soon-to-be-published comments could prove helpful in addressing several questions in supplementing legislation and interpretation by means of judicial practice — for instance, in tackling the questions of law applicable to void contracts for provision of services, delimitation of *negotiorum gestio* and unjustified enrichment, or disposal of an insolvent debtor without charge. In addition, attention has been drawn to situations wherein the regulation of the Law of Obligations Act offers a more readily obtainable solution — for instance, determining the amount of compensation payable by the enriched person and determining the value of fruits derived from the object.

There is no need for restructuring of Chapter 52 of the Law of Obligations Act according to the example of the classification of unjustified enrichment claims in the DCFR. With regard to different types of enrichment, the Estonian legislator has considered it important to distinguish the regulation of prerequisites for claims from that addressing the extent of compensation (the performer's awareness of the lack of legal basis, as discussed in section 2.3.1, above, with consideration of additional prerequisites in compensating for the costs incurred addressed in section 2.4.3). Crossing over to a unitary approach would entail using rules with a more complex structure, establishing a multitude of exceptions, and making exceptions to those exceptions. In comparison of the provisions in question, a certain discontinuity of the DCFR text became evident, in failure to indicate whether the three functions of the DCFR should apply to the entire text or to its parts separately — the unjustified enrichment regulation occasionally repeats principles already included in Book III of the DCFR (as discussed in this paper's section 2.4.1).

Nonetheless, the DCFR undoubtedly plays an important role in teaching and research work in Estonia and elsewhere, as it evokes discussions regarding European private law, which delve into topics such as the existence of common elements and the scope of unjustified enrichment law.

---

<sup>71</sup> See J. Smits (Note 31) and C. Wendehorst (Note 39).