Aanvullend Verrijkingsrecht

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Summary

Supplementary enrichment law

1 Introduction

The pivotal question in this book is: what place does unjust enrichment as an independent source of obligations have within the scope of private law and further, what does this mean for the way in which article 6:212 paragraph 1 of the Dutch Civil Code (DCC) requires to be applied? Research was undertaken to find a way to fill in and structure the requirements such that, in principle, all types of enrichment cases could be analysed in a logical way. In this context, consideration was given to the way in which the concept of unjust enrichment can be integrated into the normative framework of the law of obligations. These considerations led to the following four questions:

1. What does the principle that no one may be unjustifiably enriched at the expense of another mean and how is this principle reflected in private law? (para. 2).
2. What is the place and function of the general enrichment action in private law? What is the added value of the general enrichment action in relation to other rules and doctrines in which the enrichment principle plays or could play a significant role? (para. 3).
3. What effect do the place and function of the general enrichment action have on the way in which individual requirements laid down in article 6:212 para. 1 DCC require to be interpreted and implemented? (para. 4-6).
4. What can the general enrichment action add to contract law and tort law respectively? (para. 6-7).

2 The principle of unjust enrichment

Unjust enrichment as an independent source of obligations requires to be clearly distinguished from the principle that no one should be unjustifiably enriched at the expense of another (hereafter: the principle of unjust enrichment). In order to determine the place of the *action* for unjust enrichment within private law, the first part assesses what the content of the *principle* of unjust enrichment is and how this principle is reflected and can be reflected in the overall system of private law. Furthermore, this exercise was also undertaken to gain inspiration for the way in which the application requirements, specified in article. 6:212 para. 1 DCC, have to be interpreted.

It has been outlined that the principle of unjust enrichment is merely one of the various principles of private law and that, as such, this principle may be thwarted by another. Moreover, the principle that no one should be unjustifiably enriched to the detriment of another has an open character in the sense that it states that unjust enrichment must be prevented rather than what, indeed, constitutes unjust enrichment. The openness of the principle of unjust enrichment means that it can absorb entirely different sets of values.

It has been argued that the principle will only have substance and provide relief if it is linked to specific principles of private law. In the first instance, the principle can be related to the principle that property *belongs* to the right holder. Given that a property right belongs to a right holder, a transfer of property requires justification. If a defendant acquires an asset, without any justification, from the plaintiff, the defendant has been unjustly enriched at the expense of the plaintiff. The *sine causa* formula underlies various patrimonial doctrines, such as undue payment.

In the event that, secondly, the principle that no one may be unjustifiably enriched at the expense of another is correlated with standards of conduct, then the principle that no one should profit from their onerous behaviour at the expense of another comes into play. On the one hand, there are rules and doctrines that are directly linked to this principle. On the other hand, the principle that no one should profit from their onerous conduct may help to decide hard cases as a normative principle. Moreover, the principle of unjust enrichment may be the basis for certain standards of conduct such that the principle is reflected in these norms.

Thirdly, the principle of unjust enrichment can be linked to the principle that everyone should bear the burden of their own damage.[14] If this principle is interpreted in a normative way, and is correlated to the enrichment principle, then unjust enrichment occurs if the plaintiff suffers damage that can be said to be within the sphere of the defendant. The legal concept of *negotiorum gestio,* various strict liabilities and liability for lawful government acts fall under this principle.

Finally, the principle that unjustified enrichment must be prevented can be linked to reasonableness and fairness. In economic transactions, countless enrichments and impoverishments, where nothing is wrong, occur all the time. It may however be the case that a person is enriched at the expense of someone else in a way that is outside the normal course of events. This is not *per se* an unjust enrichment however, it is a reason to look critically at the enrichment. This critical consideration is governed by reasonableness and fairness and on the basis of this account requires to be taken of all the circumstances of the case and the principle that unjust enrichment requires to be prevented.

The various conceptions of the principle of unjust enrichment are expressed in different ways in different rules of private law.

The principle of unjust enrichment may be the foundation of a legal rule. The principle that a transfer of property requires justification is, for instance, at the heart of the doctrine of undue payment. The principle of unjust enrichment may also be one of several principles on which particular rules are based. Fraud as a vitiating factor, for example, is an expression of the principle that a person should not profit from their unacceptable behaviour. At the same time, fraud as a vitiating factor can be explained as a principle within the sphere of the doctrine of reliance (*wilsvertrouwensleer*).

The principle of unjust enrichment can also form the basis of a doctrine in a more abstract way. The notion that unjustified enrichment must be prevented is not immediately apparent in the case of strict liability. Nevertheless, strict liability can be linked to the principle of unjust enrichment. It ensures that those who profit from certain activities do not pass the adverse consequences on to others.

Finally, the principle of unjust enrichment may also play a role as a normative – guiding – principle of private law which may assist with the interpretation of the law.

3 The general enrichment action

3.1 Foundation

The general enrichment action can be regarded as one of the consequences of the principle that no one should be unjustifiably enriched at the expense of another. It is however a rather unique consequence. Unlike most other rules that take the enrichment principle into account, the general enrichment action is no more specific than the general principle that no one should be unjustifiably enriched at the expense of another. Article 6:212 para. 1 DCC does not set down any further criteria for determining under which circumstances the defendant has been unjustly enriched at the expense of the plaintiff. With the general enrichment action, the legislator has created a foundation for bringing and resolving enrichment cases that have not otherwise been provided for in private law. Accordingly, the general enrichment action has also been described as the perfection of private law.

The principle of unjust enrichment, therefore, forms the basis of the enrichment action. All the various conceptions of the principle of unjust enrichment can thus play a role in the application of the general enrichment action. However, the principle that no one may be unjustly enriched at the expense of another has not however compelled the inclusion of a general enrichment action in the Dutch Civil Code. The legislator could very well have left this to specific rules. The legislator has regulated various important aspects of enrichment law separately. Undue payment and various rights of recourse are illustrations of this. Moreover, mainstream private law has enough flexibility to prevent or undo unjustified enrichments. The principle

that no one should be enriched unjustifiably at the expense of another may, for instance, play a role in the interpretation of open standards.

In addition to the principle of unjust enrichment, the general enrichment action has, therefore, a second basis: reasonableness and fairness. The general enrichment action may be perceived as an expression of the notion that private law should, as far as is possible, reach acceptable results in the resolution of individual cases. The general enrichment action prevents the existence of gaps in private law. To that extent, the general enrichment action fits into a system of private law in which open standards are also an important feature in the acceptable and appealing resolution of unforeseen conflicts in private law.

Therefore, the general enrichment action has two separate foundations. On the one hand, it is based on the principle that unjustified enrichments must be prevented, and on the other hand, the existence of unjust enrichment as an independent source of obligations relies on reasonableness and fairness and on the pursuit to find acceptable solutions in unforeseen cases.

3.2 Function

The function of the general enrichment action is thus largely determined. It aims to supplement the system of private law and it provides a basis upon which to seek justice in enrichment cases that are otherwise not provided for. From a micro-perspective, the *Einzelfallgerechtigkeit* is satisfied because the general enrichment action makes it possible to take into account the particular circumstances of the individual case.

Equally, the supplementary function can also be seen from a macro-perspective. If a particular enrichment case occurs regularly, then the general enrichment action can offer room for a structural solution that subsequently becomes part of the private law system. Private law can thus be expanded and refined by the general enrichment action. New developments in law or in society are able to continue to have an impact on enrichment law. In the literature, this supplementary aspect is known as the systematic function of the enrichment action. This also influences other doctrines. Given that the general enrichment action can supplement private law, other aspects of private law do not have to be construed in a flexible manner to prevent unjustified enrichment. This is also directly related to the supplementary function of the enrichment action.

The other functions of the general enrichment action can also be attributed to its supplementary nature. The enrichment action can rectify the consequences of a certain rule (this is often referred to as the corrective function) by supplementing the system of private law with liability based on unjust enrichment. Furthermore, the enrichment action can act as a sanction for '*unclean hands*' given that the enrichment action makes it possible, supplementary to tort law, for enrichment claims to be raised based on unacceptable (but not necessarily unlawful) behaviour. In addition to this quasi-delictual function, a quasi-contractual function has been distinguished.

3.3 The supplementary 'power' of the enrichment action

The general enrichment action has four characteristics which, when taken together enable article 6:212 para.1 DCC to supplement the system of private law. Firstly, the general enrichment action is not limited to one type of case. Secondly, the criterion is not defined – the general enrichment action is, as aforementioned, no more determined than the principle that no one may be unjustifiably enriched at the expense of another. Thirdly, article 6:212 para. 1 DCC states that the principle that no one may be unjustifiably enriched at the expense of another is not the only principle that carries weight – thanks to the test of reasonableness, a judge, in any particular case, may assign weight to considerations that argue against liability for enrichment. Fourthly, it is ultimately possible for the judge to adjust the obligation to pay damages, to the correct level, within the scope of the enrichment and the damage. Liability for enrichment arises insofar as this is *reasonable*. Moreover, damages in kind are possible in accordance with article 6:103 of the DCC, even if parties do not invoke it.

4 Determining the law within the law of unjust enrichment

The open character of the general enrichment action means that whenever a person has been enriched at the expense of another, the question can be asked as to whether the enrichment is unjustified and if so, whether and to what extent it is reasonable to assume liability on the grounds of unjustified enrichment. Due to the open character of the general enrichment action, this action can supplement the system of private law. At the same time, the open nature of the enrichment action brings with it the risk that the system of private law is thwarted by the application of the enrichment action, that the existence of the general enrichment action may be detrimental to legal certainty and that unjust enrichment, as an independent source of obligations, may lead to judicial arbitrariness.

This raises the question as to the way in which the jurisprudent should approach the general enrichment action. The starting point is that article 6:212 para. 1 of the DCC requires to be interpreted in a systematic way as much as is possible. The system of private law must be explored thoroughly to find the right solution. Solutions must be found that are in line with the system of private law, in so far as is possible. Further, the various conceptions of the unjust enrichment principle contained in different rules of private law should be extended to unregulated enrichment cases.

However, the fact that the systematic interpretation method is of great importance does not alter the fact that arguments based on reasonableness and fairness can also play a role. Reasonableness and fairness is one of the raisons d'être of the general enrichment action: the supplementary function is based on it. Reasonableness and fairness also occupies an important place in the system of private law. There is also a subtle interaction between the system of private law on the one hand, and reasonableness and fairness,

on the other hand. Reasonableness and fairness will, firstly, require that the enrichment action be both applied in a way that fits with the system of the law and, be in line with cases that are regulated by law because everyone attunes their behaviour to the law. Only if the law does not provide clear direction or if it leads or threatens to lead to unacceptable consequences, do arguments of fairness come into the picture. In the application of the general enrichment action, the system of private law is the starting point. Departure from the system is only permitted on the basis of good arguments. In these circumstances therefore, there is no real contradiction between arguments based on the system of private law on the one hand and arguments based on fairness on the other.

5 The requirements

5.1 Two groups of requirements

It has been outlined that the requirements can be divided into two groups. The enrichment requirement, the damage requirement and the requirement of a causal link between enrichment and damage constitute the first group. Together these determine the potential, factual scope of the application of the general enrichment action. Due to the supplementary role of the enrichment action, these requirements should be interpreted broadly so that potential enrichment cases are not unnecessarily excluded from the unjust enrichment doctrine. It should be borne in mind that these are neutral requirements: if someone has been enriched at the expense of the plaintiff, then liability is by no means a given. Whether liability can be assumed depends on the second set of requirements. Liability on the grounds of unjust enrichment requires that enrichment at the expense of the plaintiff is *unjustified*. Moreover, enrichment liability only arises to the extent that this is reasonable.

The key focus of the enrichment doctrine should be the requirement of unjust enrichment and the requirement of reasonableness. In this way, the starting point that no one should be enriched unjustifiably at the expense of another is embodied by the requirement of unjustifiability. Other principles of private law and other considerations may play a role in the reasonableness test. In this respect, the requirement of reasonableness can be seen as the counterpart of the requirement of unjustifiability. The principle that no one should be enriched unjustifiably at the expense of another is not always a priority in private law.

5.2 Enrichment

The fundamental requirement of article 6:212 DCC is that the defendant has been enriched. It is appropriate in the context of the supplementary role of the enrichment claim that it is interpreted broadly. This has also been applied in case law in the sense that extra customers has been regarded as enrich-

ment and that the renovation of a house may also entail enrichment if the value of the house has not increased.

It has been argued that enrichment, following the prevailing doctrine, should be considered in an objective manner. The subjective preference of the defendant ought not to play a role in determining the enrichment. A subjective enrichment test would limit the liability too much in advance. Undesirable results may be avoided by other requirements. If the defendant does not value the enrichment, this may mean that liability is not reasonable because liability would impose a spending pattern on the defendant.

The view held in the literature that the defendant must subjectively benefit from the – objective – enrichment, has not been followed. It is however the case that, in certain circumstances, it is possible for the defendant to present an enrichment-related defence. If the defendant has obtained something, which normally has an objective value, then the defendant must be able to defend himself successfully by demonstrating that, he has not gained in the particular circumstances of the case. Support for this assertion is to be found in case law.

The requisite enrichment is invariably defined in literature as an *increase in property.* However, in the context of enrichment law, the notion of property is interpreted broadly. The use of another person's right or the receipt of a service could, from this perspective, be perceived as an increase in property.

In this book, this representation has been rejected as incorrect. On the one hand, it could constrain the doctrine of unjust enrichment, if enrichment can only be an increase in property, notwithstanding the fact that this is understood in a broad sense. On the other hand, the definition suggests that the extent of the enrichment could always be determined by an equity reconciliation in which the defendant's equity position prior to the enrichment is compared to the equity position after the enrichment occurred. The example of a service has already shown that this test does not always work: a haircut does not increase assets although it can definitely qualify as an enrichment.

Therefore, inspired by the Draft Common Frame of Reference (DCFR), a *pluralistic* enrichment concept has been defended in this book. Different enrichment types may be accepted as enrichment in the sense of article 6:212 para. 1 DCC as long as the object of the enrichment can be valued in monetary terms or in terms of damages in kind on the basis of article 6:103 DCC. A pluralistic enrichment concept facilitates a possible expansion of enrichment law. Moreover, an appropriate valuation method can be sought for each enrichment type.

Different types of enrichment have been discussed. An enrichment may consist of an increase in assets; the enrichment must then be assessed by an equity reconciliaton. The enrichment can also consist of the receipt of a service or the unauthorised use of another's right. In both cases, the market value of the service or of the use determines the extent of the enrichment. The de facto 'acquisition of a customer database' can also qualify as an enrichment. An unequivocal valuation method cannot be given; the analogous application of article 6:97 DCC provides judges with a broad discretion

in such cases. Finally, the savings in costs and expenses were discussed as enrichment, and the extent of the enrichment is then equal to the saving.

The requirement of enrichment may lead to various complications. It may be the case that an enrichment can be classified under more than one of the enrichment types. In one particular case, the painting of a house can lead to an increase in assets, however the painting of the house can also qualify as the receipt of a service. The consequence is that potentially more than one valuation method can be applied. It has been argued that the criterion that leads to the most extensive enrichment should be chosen. It should be borne in mind that the other requirements can reduce the liability to the appropriate level, if this is indeed to be adopted.

Another complication is that the receipt of an advantage can be offset by a disadvantage. For example, the defendant may have missed a gift. If this is the case, this must be taken into account in the assessment – the defendant may not be worse off due to the enrichment liability than would have been the case if the enrichment had not taken place. Article 6:100 DCC can be applied analogously: any disadvantages can be deducted from the enrichment 'insofar as this is reasonable'.

If there has been a consideration by the defendant that can be related to enrichment, the situation in which the consideration by the enriched defendant was made in respect of the *impoverished person*, (the source of the enrichment), must be distinguished from the situation where the defendant's consideration was made in respect of a third party. If the defendant's consideration is to the impoverished person, this requires to be deducted from the enrichment. The same applies if the consideration is vis-à-vis a third party, on the understanding that this may only be the case if, at the time the consideration was made, the defendant did not have to take his liability on the grounds of unjustified enrichment into account.

If the enrichment is subsequently reduced, in principle, this must be taken into account. Here too, the rule of thumb is that liability on the grounds of unjust enrichment should not, as a matter of principle, lead to the defendant being worse off than he would have been without liability for unjust enrichment. The starting point is determined by article 6:212 para. 2 DCC. The enrichment is not taken into account if it is reduced by a circumstance that cannot be attributed to the enriched person. Para. 3 provides that the reduction will not be attributed to the enriched person, if the reduction occurred in a period in which he did not have to take liability into account.

If the enrichment has been *increased*, this is essentially a new enrichment. It must be considered whether this extra enrichment leads to liability pursuant to article 6:212 para.1 DCC.

5.3 Damage

Article 6:212 of the Dutch Civil Code was designed as an obligation to pay compensation in the form of damages. The plaintiff must have suffered damage. Although any form of damage may be involved (the delictual enrich-

ment claim may even involve personal injury), as a rule it will be financial loss. Financial loss may consist of the reduction of assets, the increase in the value of liabilities and loss of profit.

The application of the claim may be more complicated in a multi-party relationship. Has the plaintiff suffered damage within the meaning of article 6:212 DCC if he also has a claim against someone other than the defendant in relation to this damage? In the literature, it has been assumed by a few that there is no question of damage because the claim against the third party is part of the assets of the plaintiff. However, it must be kept in mind that a claim against a party other than the defendant does not exclude an enrichment action. If this were not the case, the subsidiarity test would creep into the claim, which would be at odds with the supplementary role of the enrichment action. However, invoking article 6:100 DCC is conceivable. This would only be successful 'to the extent that it is reasonable'.

From the perspective of the supplementary role of the enrichment claim, criticism of the imposition of the requirement for damage can be formulated. This may result in the continuation of the unjust enrichment of the defendant at the expense of the plaintiff at law, even in a case where restitution would in itself be reasonable. To this extent, the damage requirement may leave a 'gap' in private law. Abolition by the legislator requires consideration.

The fact that the damage requirement may cause a gap in private law requires to be qualified in two respects. Firstly, the nature of the ground for liability determines the way in which the required damage is to be interpreted. It has been argued that in an enrichment law context, the concept of the damage sometimes requires to be interpreted more broadly than in the context of, for example, tort law. The tortious act potentially involves compensation for the entire damage resulting from a certain breach of standard, while in the law of unjust enrichment, the intention is that the obligation to pay damages is to undo the unjustified enrichment of the defendant at the expense of the plaintiff. If the defendant has used goods belonging to the plaintiff without authorisation and leaves the goods neatly behind, then the plaintiff does not appear to have suffered any damage if he did not intend to use or exploit the goods. After all, if the actual situation (in which the defendant has used the case) is compared with the hypothetical situation (in which the defendant has not used the case), there is little difference.

The scope of enrichment law, however, allows the comparison with another hypothetical situation, namely one without the unjustified nature of the enrichment. One could think of a case in which someone knowingly uses someone else's goods. The actual situation (in which the defendant made unauthorised use of the goods) can be compared to the situation in which the defendant would have entered into a contract in respect of the use. This test is not, however, always appropriate. If the defendant retains the plaintiff's good after, for example, the formation of a purchase agreement has failed, the test does not work because the defendant was not interested in using the good but in acquiring the good in property.

A second nuance is that the law of obligations offers an opening in those cases in which the requirement for damages stands in the way of enrichment liability.[61] If the defendant infringes the plaintiff's portrait right and thereby generates an additional profit of € 1,000,000, it is possible that an obligation is adopted on the basis of article 6:1 of the DCC. It must then be examined whether the liability, on the basis of the *Quint/Te Poel* formula, fits into the system of the law and is in line with the cases provided for in the law. If a spy violates a contractual duty of confidentiality, then contractual enrichment claims would also be possible on the basis of the supplementary effect of reasonableness and fairness according to article 6:248 paragraph 1 DCC.

The fact that the action for unjust enrichment is construed as a claim for damages also has attractive aspects. The legal rules applicable to damages provide the defendant with defences that are more defined than relying on the requirement of reasonableness. It has been argued that the defendant may invoke *inter alia* the attribution of benefits, own fault and judicial moderation.[64] However, the effect of these doctrines may be different in the context of a claim based on unjust enrichment than in the context of, for example, a claim based on a tortious act. This is because the nature of the enrichment liability differs greatly from liability based on tort.

Furthermore, article 6:103 DCC offers the judge far-reaching possibilities to reach a balanced result. Although generally the judge can only award damages in kind if this is sought by the plaintiff, it is argued in this book that the judge also has the scope to do so in the context of article 6:212 para.1 DCC, even if this has not been sought by the plaintiff. After all, the enrichment action only promises damages 'insofar' as this is reasonable. Furthermore, article 6:103 DCC Code can support the supplementary role of the enrichment claim because this provision can increase the possibilities of resolving hard cases. If the plaintiff erects a building on the defendant's ground as a result of which the defendant is unjustifiably enriched at the expense of the plaintiff, and if monetary compensation would impose a spending pattern on the defendant which would compromise his autonomy, then, as has been argued, it is possible for the judge to grant the plaintiff a right of removal. This right provides the plaintiff with a negotiating position vis-à-vis the defendant.

5.4 Causal link

Liability based on unjust enrichment requires that the enrichment of the defendant has been at the expense of the plaintiff. Since it is required that the plaintiff has suffered damage, this requirement may be formulated in such a way that there requires to be a link between the enrichment of the defendant and the loss suffered by the plaintiff.

This requirement has been interpreted broadly both in parliamentary history and by the judiciary. There must be in one or another way a link between the defendant's enrichment and the plaintiff's damage. This requirement is not only met if there has been a direct transfer of assets

between the plaintiff and the defendant. The connection may also exist in the event of an indirect transfer of assets, whereby enrichment via the assets of a party other than the impoverished plaintiff (a third party) ended up in the assets of the enriched defendant. Moreover, there are indications that there may also be sufficient causal connection if there has been no shift of assets whatsoever however, the enrichment of the defendant at the expense of the plaintiff, has arisen in a different way.

This broad interpretation is justified. Article 6:212 para. 1 DCC was indeed intended for cases in which the defendant has been enriched at the expense of the plaintiff in a manner not provided for elsewhere in private law. If the general enrichment action is limited to, for example, only direct transfers of assets or only direct and indirect transfers of assets, then certain cases of unjustified enrichment are categorically excluded from the scope of the application of the general action for unjust enrichment. The views expressed in the literature that advocate a stricter causal relationship have all been rejected. A broad interpretation of the causal relationship fits with the supplementary role of the general enrichment action. The 'wheat must be separated from the chaff' within the framework of the requirement that the enrichment is unjust and the reasonableness requirement. It is however the case that, the 'looser' the link between the enrichment and the impoverishment, the less likely it is that an enrichment qualifies as an *unjustified enrichment*.

5.5 Unjust

Liability based on unjust enrichment requires that the enrichment enjoyed by the defendant at the expense of the plaintiff is unjust. In considering whether the enrichment of the defendant at the expense of the plaintiff qualifies as unjust enrichment, a distinction should be made between cases where there is a transfer of assets between the plaintiff and the defendant and cases where this is not the case.

5.5.1 Enrichment resulting from a transfer of assets

If the enrichment of the defendant at the expense of the plaintiff has arisen as a result of a shift of assets, in the sense that assets of the plaintiff have been transferred to those of the defendant, there must be justification for this. If the justification is lacking, then there is unjust enrichment. Given that a property right is something that *belongs* to the right holder in a legal sense, there should be justification for a transfer of assets; otherwise there is unjust enrichment. This justification may be a legal act, a contract, a statutory provision, the system of private law or another ground such as, the will of the impoverished plaintiff.

If the defendant derives his enrichment from a contract, a distinction requires to be made between the case where the defendant derives this enrichment from a contract with the plaintiff and the case where the defendant derives his benefit from a contract with a party other than the plaintiff.

If the defendant is enriched by virtue of a contract with the plaintiff, then there is no unjust enrichment if the agreement extends to that enrichment. The action for unjust enrichment then has no purpose, because in the law of contract sufficient *checks and balances* have been accounted for to achieve an acceptable result. Consideration may be given to vitiated consent, the judicial power to amend in the event of unforeseen circumstances and the additional and limiting effect of reasonableness and fairness. In a bilateral contractual relationship there is only room for an enrichment claim if the enrichment that has occurred between the contracting parties is not legitimised by the agreement. An exceptional case is that, if in the execution of the agreement an advantage unintentionally remains with one of the parties at the expense of the other party. In that case there may be unjust enrichment provided this concerns an unintended advantage.

If the defendant is enriched by a contract with a person other than the impoverished plaintiff, then the starting point must be that the agreement has implications for third parties in terms of enrichment law. The contractual counterparty of the enriched has, as is the case for anyone, an entitlement to his assets and he can therefore dispose of these assets vis-à-vis the rest of the world. This implies that the contract between the defendant and his counterparty (a third party), arising from which the defendant derives an advantage, in respect of this advantage, is regarded as a ground for justification, a legitimation, against the impoverished plaintiff.

Departure from this principle is only possible if the third-party implications of enrichment law reasoning is absent or if there are special circumstances. The latter is prompted by the fact that the *checks and balances* of contract law do not apply to such a multi-party relationship. In this regard, the general enrichment action can supplement contract law.

If the defendant derives his benefit from a statutory provision or the system of the law, whether or not the enrichment is unjustified, depends on the scope of the law. If the law does not aim to legitimise the transfer of assets, then there is, subject to the existence of a different justification, an unjustified enrichment. If the law does extend to cover the transfer of assets, there is no unjustified enrichment because the law justifies the transfer.

However, this book defends the view that enrichment may also be unjustified if the law from which the defendant derives his enrichment is intended to justify it. This is the case if the law leads to enrichment of the defendant at the expense of the plaintiff, which is unacceptable according to standards of reasonableness and fairness. The proposition is that the action of enrichment should be able to rectify the law, if the law leads to unacceptable results, by virtue of its supplementary nature. Although case law from the Supreme Court contains a number of minor indicators for this assertion, such a flexible approach cannot yet be inferred from case law.

The various conceptions of the principle of unjust enrichment may play a role both in respect of the question as to whether the enrichment-related third-party implications of the contract should be breached and in the question of whether the enrichment action should rectify the law. In particular,

this could include the principle that a person should not benefit from his or her onerous and unacceptable behaviour and the principle that enrichment, which falls outside the normal course of events, should be viewed critically. Special circumstances may make an enrichment that has *prima facie* legitimacy unjustified.

5.5.2 Enrichment without transfer of assets

If the defendant's enrichment has arisen in a different way than by a shift in assets, the mere absence of a justification cannot lead to the conclusion that the defendant's enrichment at the expense of the plaintiff is unjustified. In that case, no assets which *belong* to the plaintiff have flowed into the defendant's property. There is no shift in assets on which to base the determination of unjustification. Therefore, the test to determine whether the enrichment is unjustified works differently if there is no shift of assets.

If the enrichment did not arise from a shift of assets, the starting point has to be that the enrichment of the defendant at the expense of the plaintiff is not unjustified. Just as everyone has to bear their own damage, everyone can keep the enrichments they accrue. This principle can only be departed from if there are special circumstances that make the enrichment unjustified. A positive criterion is added to the negative criterion of the absence of a justification: in the circumstances of the particular case, there must be a reason for regarding the defendant's enrichment as unjust enrichment. The approach is inspired by the '*unjust factors* approach', although the English approach differs completely from the one defended here.

In the interpretation of the criterion, connection can be sought with the various conceptions of the principle of unjust enrichment. If the enrichment arose from an event that resembles a transfer of assets, the *sine causa* approach can be applied analogously. If the defendant has benefited at the expense of another party from his unacceptable conduct, this may be an indication that his enrichment is unjustified. The same applies if the defendant reaps the benefits of activities the negative consequences of which are partly borne by the plaintiff. Finally, if the enrichment is outside the normal course of events, it requires to be examined critically whether or not the enrichment, in view of the particular circumstances of the case, may be regarded as unjust enrichment.

5.6 Reasonableness

If the defendant has been unjustly enriched at the expense of the plaintiff, it has not yet been established that the defendant is liable for the damage related to the enrichment. Liability on the grounds of unjust enrichment arises only to the extent that it is reasonable. The principle that no one should be unjustly enriched at the expense of another is not always at the top of the private law agenda. Sometimes other considerations take precedence.

The requirement of reasonableness corresponds with the action for unjust enrichment that, due to its supplementary role, is open in character. Since the action for unjust enrichment is intended for enrichment cases that are not otherwise provided for, the requirement of reasonableness allows the judge to take into account all arguments that argue against liability on the grounds of unjust enrichment. The requirement for reasonableness is an alternative to other demarcation or delimitation methods that are more categorical in nature. Furthermore, the court also has the scope to adjust the degree of liability to the appropriate level. On the one hand, the judge may set the obligation to pay damages at a lower amount than the lowest amount of enrichment and damage. On the other hand, the judge may consider that only compensation in kind can be awarded. The judge can be creative in this respect. It has been argued that under certain circumstances it is conceivable that the court will give the plaintiff a right of removal to undo the unjust enrichment.

The test of the reasonableness requirement is not of the same nature as the test in respect of whether a given rule is in the particular case unacceptable by standards of reasonableness and fairness. Reasonableness does not only stand in the way if liability on the grounds of unjust enrichment is unacceptable. Reasonableness precludes the assumption of enrichment liability on the grounds of unjust enrichment, insofar as, in the particular case, there are other considerations of private law that outweigh the undoing of the unjust enrichment of the defendant. The requirement of reasonableness can best be seen as a fundamental requirement for liability for unjust enrichment. If liability on the grounds of unjust enrichment is not reasonable, then no liability arises.

The interpretation of the reasonableness requirement is largely determined by the system of private law and the principles underlying it. Liability for unjust enrichment cannot be reasonable, for example, if liability on the grounds of unjust enrichment would be at odds with the autonomy of the defendant, with freedom of contract, with the *paritas creditorum* principle,[102] with considerations of consumer protection, with considerations of third party protection[104] or with the balancing of interests underlying a specific statutory regulation.Systematic arguments therefore, play a major role in the explanation of the reasonableness requirement. However, it should be borne in mind that the reasonableness requirement might also offer scope for other types of arguments.

If it is accepted that the requirement of reasonableness is fundamental, then this has consequences for the moment at which the enrichment claim arises. If liability is first, at moment t not reasonable (for example because liability would lead to a forced spending pattern) but later, at moment t + 1, it is (for example because the enrichment has now become liquid), then an obligation only arises on the grounds of unjust enrichment at that later time, in other words, some time after the moment the unjust enrichment arose. The limitation period as referred to in Article 3:310 para. 1 DCC therefore only begins to run, at the earliest, at this later moment. It must be assumed,

however, that irrespective of the later starting point of the limitation period, liability for unjust enrichment which took place more than twenty years ago is not reasonable. The long term specified in article 3:310 para. 1 DCC gives colour, therefore, to the requirement of reasonableness.

6 Supplement to Contract Law

It has been argued that the supplementary role has consequences for the way in which the criteria of article 6:212 para. 1 DCC requires to be interpreted. However, the supplementary role of the general enrichment action can also be considered from the perspective of a specific area of law or a specific doctrine. This is the perspective taken in the third part. The extent to which the general enrichment action can successively supplement contract law and tort law and further, how the considerations of contract law and tort law affect the application of article 6:212 para. 1 DCC has been investigated.

Two ways have been distinguished in which the action for unjust enrichment can supplement the rules of contract law in a two-party relationship.

In the first place, liability on the grounds of unjust enrichment can act as a substitute for an absent contract.[109] This would be for cases in which no contract has been concluded, or in cases where this is in doubt, however, one party has obtained an advantage at the expense of another party that would generally be the basis for a contract. It has been illustrated that, in this context, the action for unjust enrichment may play a significant role in the slipstream of various doctrines.

Secondly, liability for unjust enrichment may arise if there is an agreement between the parties however one of the parties, unintentionally, benefits from an advantage at the expense of another party as a result of a *side effect* of a specific rule or set of rules of private law. The enrichment claim supplements the contractual remedies, although, as has been pointed out, the same can be achieved with the supplementary effect of reasonableness and fairness.

For both categories discussed, the rules and principles underlying the law of contract can affect the assessment of claims based on unjust enrichment. Furthermore, in both categories, enrichment liability can, in different cases, provide a middle ground between regular contractual liability and no liability at all. The fact that the action for unjust enrichment can supplement contract law means that the rules of this area of law do not need to be interpreted in an unnecessarily flexible way in order to avoid unjust enrichment. This is an illustration of the general enrichment action operating like a valve.

The enrichment claim can also supplement contract law in a multi-party relationship.[112] It concerns a possible enrichment claim by the defendant against the plaintiff while they are not in a contractual relationship with each other. Unlike in a two-party relationship, the possibility of reverting to reasonableness and fairness is generally absent in such a multi-party relationship. After all, subject to one exception, reasonableness and fairness only

applies if some sort of legal relationship already exists (cf. article 6:2 and 6:248 DCC). Reasonableness and fairness is not an independent source of obligations. In this respect, the general enrichment action supplements contract law.[113] Two types of third-party enrichment should be distinguished.

If the defendant is indirectly enriched at the expense of the plaintiff, without the defendant deriving his benefit from any contract, then the enrichment, provided there is a transfer of assets, will be unjustified. This does not establish liability automatically. Liability may be rejected on the basis of the reasonableness requirement. This may be the case, for example, if liability is at odds with the defendant's autonomy, if the plaintiff, without good reason, fails to hold his direct contractual partner liable, if liability on the grounds of unjust enrichment would conflict with the *paritas creditorum* or if liability would conflict with a specific statutory provision.

If the defendant is indirectly enriched at the expense of the impoverished, while the defendant derives his benefit from a contract with a party other than the impoverished plaintiff, then the starting point is that the enrichment is not unjust as the enrichment is justified by the contract. The contract has third-party effect.

There are, however, cases in which the rationale of third-party effect is absent. This may be the case if the defendant's counterparty has other people's assets at his disposal, if the contractual counterparty of the enriched was not authorised to dispose of his own assets due to bankruptcy or if the defendant received an advantage from his contractual counterparty which was intended for the plaintiff in some way. In addition, there are cases in which the rationale of third-party effect is indeed present, however due to special circumstances, it is necessary to depart from this as a starting point. This may be the case, for example, if the contract from which the enriched party derives his benefit is unbalanced or objectionable or if the enriched party has acted dishonestly.

At the same time, a number of cases of third-party enrichment have been identified and discussed that are more complex in nature and consequently fall outside the scheme. Not all cases of unjustified enrichment can be captured in a preconceived scheme.

7 Supplement to Tort Law

The general enrichment action can also supplement tort law. The potential need to supplement tort law lies mainly in the fact that the system of tort law is a relatively closed system. Mainstream tort law is limited by the codified sources of obligations: liability arises if there is an attributable tort or if the requirements of any of the sources of strict liability codified in the law have been met. If the defendant should bear the plaintiff's damage according to standards of reasonableness and fairness, however the case cannot, not even by adopting a broad interpretation, be classified under one of the codified sources of strict liability, then it seems that the injured party has to bear his

own damage, even though there appears to be good arguments for the liability of the defendant. In a number of such cases article 6:212 para. 1 DCC may fulfil a supplementary role.

The supplementary power of the enrichment claim is founded on two structural differences with delictual liability. In the first place, the application of the general enrichment action does not test whether the *conduct* is unlawful, but whether the *enrichment* of the defendant at the expense of the plaintiff is unjustified. It has been argued that various circumstances can play a significant role in this respect. One of these circumstances is the nature of the conduct. It may be that the conduct of the defendant is not serious enough for the assumption of unlawfulness in the sense of article 6:162 para. 2 DCC, while the nature of the conduct does mean that the enrichment enjoyed by the defendant at the expense of the plaintiff has an unjustified character.

Secondly, the scope of liability on the basis of unjust enrichment is more limited than liability on the basis of tort. Where liability on the basis of tort potentially covers the entire damage of the plaintiff, liability on the basis of unjust enrichment is capped at the lowest amount of enrichment and damage and, moreover, liability may not exceed what is reasonable. Because liability on the grounds of unjust enrichment is less far-reaching, there is scope for assuming liability earlier. Delictual enrichment liability can be a middle ground between, potentially, full liability and no liability whatsoever.

The supplementary role of the enrichment action is illustrated with various examples. If the defendant is enriched at the expense of the plaintiff through unacceptable conduct, this can lead to the conclusion that the defendant has been unjustifiably enriched, even if this action is not unlawful or if there is doubt about this. If the defendant enriches himself at the expense of the plaintiff by infringing a legal provision, then the infringement of the law may make the enriching of the defendant at the expense of the plaintiff unjustified, even if the law does not serve to protect the interests of the plaintiff and the Langemeijer correction does not apply or does not seem to apply. A minimum requirement is that the violation of the law is the key to success. Under certain circumstances, an unjustified enrichment may also exist if the defendant has benefited from the breach of contract of the contractual counterparty of the impoverished plaintiff, without this benefit qualifying as unlawful conduct.

It has been argued that a supplement to the doctrine of hazardous negligence could also be considered. These are cases in which the defendant's company's activities are profitable, while at the same time they create a danger that is not unlawful and that cannot be classified under one of the codified sources of strict liability. Under certain circumstances, the defendant could be liable on the basis of unjust enrichment, up to a maximum of the amount of the profit, for the damage sustained by the plaintiff that is causally related to those activities. Unjust enrichment may occur if, on the one hand, it is not sufficient to say that the damage belongs to the 'normal risks of life' of the plaintiff while it can be argued that the damage should be seen as an expense that should be attributed to the defendant's activities. This can

for example be the case if it concerns the realisation of an unknown danger of a new and profitable technology.

It is also possible to think of a profitable activity that creates such a small danger that the activity is not unlawful towards a particular person, but where the law of large numbers means that the very limited danger will occasionally materialise. In the case of new technology and the very low risk, I believe that the person who has created the danger should bear the damage caused, rather than the person who has fallen victim to the realisation of the danger. However, the liability of the plaintiff is always – in the absence of fault and a source of regular delictual liability – limited to the amount of the profits he has received as a result of the activity.

The supplementary role does not necessarily only lead to an expansion of liability law. The fact that the law of unjust enrichment can supplement tort law can also further refine tort law. Because unjust enrichment may function as a source of delictual liability, it may not be necessary to take a broad view of the established rules of tort law in order to prevent the defendant from being unjustly enriched at the expense of the plaintiff. In this sense, the general enrichment action can also act like a valve for tort law.

8 Conclusion

In this book it is argued that the general enrichment action has a supplementary role and that this influences the interpretation of the requirements of article 6:212 para. 1 DCC. Within certain limits, the enrichment requirement, the damage requirement and the required causal connection require to be interpreted broadly. The emphasis must be on the unjustifiability and reasonableness requirements. In this book, the principles of the supplementary enrichment law are outlined, while at the same time, attention is paid to circumstances that may justify departure from these principles.