Chapter 10
Disgorgement of Profits Under Spanish Law

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Abstract Spanish Civil Code rejected the idea of including a general regulation on unjust enrichment. Hence, restitutionary remedies have been usually understood as a by-product of a proper compensation in cases of tort and breach of contract. Spanish private law has set aside unjust enrichment claims, mostly designed by the case law as a subsidiary remedy only available in specific cases. Such particular view of the restitution explains that Spanish private law lacks a general theory on disgorgement. Disgorging profits is just possible in a couple of specific situations statutorily established. In addition, disgorgement is understood as a proxy of compensation in cases in which the asses of damages is unfeasible.

Keywords Unjust enrichment • Implied contracts • Remedies

The Legal Distinction Between Contracts and Torts

The Spanish Civil Code was enacted in 1889 and it followed the model of the French Civil Code of 1804. Like in the French case, the Spanish Civil Code abhorred limitations to the freedom of contract and the freedom of transfer the property rights. There is no duty to transfer the assets by their fair or accurate price. According to the liberal view of the Spanish Code, the market should be the only way of determining the transferability of assets and their price.[1] Under such a way of understanding private relationships within the market, the contract is the best way for conveying assets voluntarily, while torts are the proper means for redressing the involuntary transfers of wealth.

Following the pattern of the French Civil Code, the Spanish Civil Code drafted a system of remedies mostly based in a clear distinction between breach of contract and tort. The former tries to grant to the victim of a breach of contract with the

[1]For a general explanation of the formation of Spanish private law see Vaquer Aloy (2006).

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expectation damages, while the latter is limited to the reliance damages. In other words, remedies for breach of contract intend to leave the victim in the same position he should enjoy if the contract would have been duly performed. Tort remedies aim to compensate to the victim for loss or injury by reverting the victim, as far as possible, to the position before such loss or injury occurred.[2]

Although the most of the parts of the Spanish Civil Code have been modified since its enactment, the aforementioned distinction has remained unaltered. Accordingly, rights as well as remedies for their protection arise under Spanish private law either from a contract or from a tort. Hence, the Spanish Civil Code provides remedies for the protection of contractual rights and general tort remedies as well. The two categories should always fit in the real cases since the scope of the Spanish tort law includes all kind of harms and losses. As was done before by article 1382 of the French Civil Code,[3] the article 1902 of the Spanish Civil Code sets forth the general rule on tort law in very broad and general terms.[4] Tort claim does not require the breach of specific statutory duties or a reckless behavior against particular rights. The tort claim is not restricted to specific situations.[5] Under Spanish law, the tort claim may include any kind of harm or loss suffered by the victim, economic as well as non-economic, with no other limits than those required by the cause-in-fact and the proximate causation (*objektive Zurechnungslehre*) links.

Therefore, in the structure of liabilities and remedies designed by the drafters of the Spanish Civil Code what should not be claimed as a result of a contractual breach, should be protected by a tort claim. The loss should be only the consequence of either a wrongful breach of contract or the causation of harmful consequences by a tortfeasor.

The only exception to the dual system of liability and remedies envisaged by the Spanish Civil Code consists of the regulation of the so-called "quasi-contracts" or "implied-contracts". Spanish Civil Code includes two of them: the management of another business (*negotiorum gestio*) and the payment or collection of undue debts (*indebiti solutio*).

Differently from the remedies designed for breach of contract and tort situations, "quasi contracts" deserved just a restitutionary remedy based on the devolution of, first, what was unduly paid or, second, the payment of what was done without

[2]In the same way that the rest of Civil law systems, Spanish tort law does not apply *punitive or exemplary damages*. Anyway, non-pecuniary damages tend to be higher when the tortfeasor has caused the harm intentionally or the accident has been caused with gross recklessness, slight or scant care. Otherwise, the legal mandate attached to the tort recovery encompasses losses with compensation, without taking into account the tortfeasor's intention. See Gómez Pomar (2000).

[3]Article 1382 of the French Civil Code sets forth that: "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it."

[4]Article 1902 of the Spanish Civil Code sets forth that: "The person who, as a result of an act or omission, causes damage to another by his fault or negligence shall be obliged to repair the damage caused."

[5]It is not a remedy attached to a specific and typified taxonomy of cases or protected interests. See Pantaleón Prieto (1991). See also Wagner (2006).

a previous order or assignment. In any case, the restitution is limited to the real advantage provided as a consequence of the management or the payment done outside a contractual relationship.

Legal scholars agree on the exceptional nature of the «quasi contracts». They are uncommon means of recovery in specific situations that cannot be applied analogically.[6] They are exceptions to the general idea according to which the explanation of the transfer of assets has to do only either with valid contracts or with the compensation due to torts.

The Case of the Unjust Enrichment. Restitutionary Versus Compensatory Remedies

The legal system should enhance enrichments and all of them are fair, unless they have been obtained as a consequence of a void or invalid contract or as a consequence of a wrong. If the contract is invalid or it has been not duly performed, contractual remedies will arise. If there is no contractual relationship between the tortfeasor and the victim, redresses in case of tort will apply. There is no place, at least in theory, for a third way of imposing liability, a *tertium genus*, concerned with unfair attributions of assets. Everyone benefitted at another's expense is committing either a breach of contract or a tort.

In fact, by introducing the requirement of a valid "causa", a legal ground that gives validity to the contract,[7] the Spanish Civil Code is widening the realm of the contractual remedies. Each and every transfer should correspond with a valid and legal ground.[8] Contracts as well as the transfer of assets made by virtue of them are valid only to the extent that they correspond with a legal ground. Contracts made against mandatory rules or pursuing illegitimate goals will be void because of the unfairness of its "causa". The necessity of a legal ground for a valid contract introduces into the scope of the contractual remedies situations that otherwise would be covered by the traditional doctrine of the unjust enrichment.

However, Spanish private law has traditionally faced problems when dealing with situations that have two common features: First, they imply a transfer of assets; and second, they are neither contract nor tort. Such situations can arise from a different

[6]Díez-Picazo (2007), 113–114.

[7]According to article 1261 of the Spanish Civil Code: "There is no contract unless the following requirements are present: (1) Consent of the contracting parties; (2) A certain object which is the subject matter of the agreement; (3) Cause of the obligation established."

[8]The Spanish legal regime follows the pattern given by the French Civil Code. See among others Visser (2006); Gordley and von Mehren (2006), 555. There is nothing in the Spanish contract law like the German *Abstraktionsprinzip*. Then, cases in which someone becomes the owner of something as the result of an invalid contract are much less frequent than in Germanic legal systems. See Zweigert and Kötz (1996), 538–567.

set of situations. Some of them come up as a consequence of the breach of fiduciary duties. Some are consequences of the unauthorized use of a thing or right vested to another. Some, finally, refer to enrichments obtained by chance, like some kinds of encroachment.

All of them have in common that someone has got some enrichment. Since such a transfer of assets has been made beyond or independently of the performance of a specific contract, compensatory remedies based on expectation damages are not an accurate redress. Since such enrichment is not a consequence of a wrongful action, the situation cannot be dealt with as a tort. However, since the enrichment has been obtained without a legal ground it can be deemed as unjust or unjustified and a restitutionary remedy should apply.

Hence, despite the absence of a general regulation of the unjust enrichment in the Civil Code, Spanish case law has traditionally considered the victim of an unjust enrichment entitled to relief.[9] The claim is subject to three requirements:

(a) Firstly, the absence of a legal explanation that allow the defendant to retain the enrichment. In such cases, the enrichment cannot be considered as unjust or unfair and therefore there is no reason to give it back to the plaintiff.
(b) Secondly, the absence of any contractual or tort remedy that can redress the wrong. It means that the unjust enrichment claim is subsidiary, as it is usually referred by the Spanish case law. There is place for an unjust enrichment claim only in cases in which there is no other relief based on contractual or tort remedies.
(c) Thirdly, the victim is entitled to claim only for the loss he had suffered. The defendant's enrichment should correspond with the loss suffered by the plaintiff, who is entitled to claim exactly for the amount of his loss.

Therefore, under Spanish law, restitution is conceived as a subsidiary remedy limited to the amount of the impoverishment unduly suffered by the claimant. In addition to the lack of a legal ground, to qualify the enrichment as unjust, it has to amount to the loss that the plaintiff aims to recover.

Unjust Enrichment Mirrors Claimant's Losses. The Problem of Disgorgement

Under Spanish law, unjust enrichment refers to restitution, that is to say, to the act of giving back what was unduly earned or obtained. The unjust enrichment claim also works when the defendant has saved something that otherwise he should pay. The key issue is, in any case, that the plaintiff has experienced a loss or has lost a benefit and that both can be deemed as unfair or unjustified. From the point of view of the

[9]See Schlechtriem (2000). For a general explanation of the Spanish cause of action for unjust enrichment see Díez-Picazo (1988).

defendant, the unjust enrichment claim can be based on an unduly increase of his assets (*lucrum emergens*) as well as in an unfair saving of a due payment (*damnum cessans*). In both cases, the unjust enrichment doctrine compares the current plaintiff and defendant assets with those assets that each of them would have in absence the unjust conveyance of assets.

The unjust enrichment claim may follow situations in which the plaintiff has given something to the defendant expecting some kind of activity by the latter. Being the activity not carried out, the plaintiff is entitled to be recovered. Usually, the best way for recovering will be the restitution *in natura*. Without such restitution, the defendant would retain with no legal ground the assets given by the plaintiff. When specific restitution (*in natura*) is not possible, monetary relief should apply.

Payments of another's debts per mistake or investments in another's projects may also entail an unjust enrichment claim. The frustration of contracts for conveying ownership rights as a consequence of the application of rules governing the protection of the third parties' good faith is also an unjust enrichment case. In all of these cases, the legal system usually entitles the plaintiff with a right to enter as a surrogate in an alien legal relation.

In any case, it is generally understood that the claim of action for unjust enrichment requires that the plaintiff suffered an impoverishment that corresponds to the equivalent enrichment gained by the defendant.

In addition, the unjust enrichment doctrine asks for the proof of the causation link between the enrichment and the impoverishment. The latter should be the consequence of the former. What the plaintiff done or how much he did pay should correspond with the amount the defendant earned or obtained. The burden of proof rests on the plaintiff, and his cause of action is limited to the extent that his impoverishment equals the benefit unduly obtained by the defendant. The exact amount of the claim will be quantified according to the *Saldotheorie*: the calculation should deduct the costs made by the defendant that the plaintiff ought to face in case he would obtained the same benefit that he is claiming for by the unjust enrichment doctrine.

The relationship between the enrichment and the impoverishment poses a real problem in cases in which the wrongdoer has made an unduly use of another's right or legal position. In such cases, the wrongdoer may have obtained some benefits that do not correspond with a real loss experienced by the rightholder. Giving up the profits illegally or wrongly obtained when the plaintiff has not suffered losses is something that does not fit with the purpose traditionally attached to the unjust enrichment claims under Spanish law.

When the Profits Amount to Damages

When a wrongdoer makes profit by using another's right, the rightholder is entitled to claim for redress. Under Spanish law, the problem in such cases is to identify the kind of remedy that can be claimed. Since there is no contract between the wrongdoer and the rightholder, con contractual remedies apply. At the same time,

since there are no losses, neither tort nor unjust enrichment doctrines give to the rightholder a clear way for protecting his legal position. What these situations have in common is the existence of an unduly obtained benefit, although it does not correspond to any loss suffered by the plaintiff.

In spite of the aforementioned limitations, it seems clear that when someone is legally vested with a right, specifically a property right, the legal system is attributing to the rightholder the entire economic content of the right and the freedom to decide how to use and to invest it. Then, the rightholder should be entitled to get back the benefits obtained by profiting his right without or beyond his consent.

Under Spanish law such situations have been solved statutorily. A handful of legal provisions set forth that the rightholder is entitled to receive the profits unduly obtained by the wrongdoer that used or took advantage of the plaintiff's rights. This is the case in the article 9.3 of the Spanish Freedom of Speech Act.[10] The provision allows the plaintiff to receive the profits earned by the publisher of false or illegitimate obtained information. The article 140 of the Spanish Intellectual Property Act[11] establishes the same principle regarding the violation of copyrights. In the same way, the article 43 of the Spanish Trademark Act[12] also allows the rightholder to get compensated according to the profits obtained by the offender.

These are the most prominent examples of disgorgement of profits under Spanish private law. Regarding them, three issues should be highlighted:

(a) First, all the legal provisions that foresee disgorgement attach it to intentional wrongs affecting property rights. Then, it seems that no disgorgement should follow to pure negligence.
(b) Second, since such disgorgements are provided by specific statutes, it seems clear that, under Spanish law, disgorgement is a specific remedy that is only feasible when a legal provision allows the plaintiff to ask for wrongdoer's profits.
(c) Third, and most relevant, the mentioned examples are legally qualified as cases of damages, and the profits unduly obtained by the wrongdoer are used as a basis for quantify the compensation that the victim of a false information or a violation of the copyright or of a trademark is entitled to claim for. The legal cases of disgorgement are presented, in fact, as a mean of calculating damages instead of as a specific case of unjust enrichment.

Hence, there is no general principle of disgorging profits under Spanish private law, and the specific legal provisions deal with disgorgement cases as damages. Disgorgement is just a way for calculating damages in cases in which the absence

[10]Ley Orgánica 1/1982, de 5 de mayo, de protección civil del honor, la intimidad personal y familiar y la propia imagen.

[11]Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual.

[12]Ley 17/2001, de 7 de diciembre, de Marcas.

of a loss or injury suffered by the victim makes him very difficult to prove the extent of the compensation he is entitled to receive. They are statutory torts cases and damages are statutorily established.

There is a dogmatic critique to this situation. The mentioned legal provisions, at the end, blur the distinction between restitution and compensation. Spanish legal scholars have largely stand for the categorization of disgorgement within the scope of the unjust enrichment doctrines and they are reluctant to conceived disgorgement as compensation remedy.[13] Dealing disgorgement as unjust enrichment would make clear its restitutionary nature. At least in theory, nothing prevents the victim of such statutory torts from claiming for higher damages than those calculated according to the profits obtained by the wrongdoer. Then it seems accurate to distinguish restitution from compensation and to place disgorgement within the scope of the unjust enrichment doctrines, though the profits to be disgorged do not correspond with claimant's losses.[14]

It is generally understood among legal scholars[15] that the solution provided by the article 32 of the Spanish Unfair Competition Act[16] suits technically much better with the goals pursued by the disgorgement remedy as a mere restitutionary way of redress. The article allows the victim of an unfair competition activity to claim for disgorging profits obtained by the wrongdoer in addition to damages, provided that they can be assessed.

Final Remarks

Spanish private law does not have a general principle on disgorgement. In fact does not have a general regulation on unjust enrichment, neither. Restitution is a remedy enclosed in the general compensatory remedies in case of breach of contract or tort.

The traditional category of the "quasi contracts" is exceptional and case law has made a very restrict interpretation of the legal provisions regarding such category. They have not been understood as a general mean of allowing claims for unjust enrichment. At its turn, unjust enrichment itself has been traditionally considered subsidiary to claims for breach of contract or tort. The few legal provisions that allow disgorging profits acknowledge the remedy as a substitute of the damages that otherwise should pay the wrongdoer. Disgorgement is statutorily understood as a proxy of compensation.

[13] See Basozabal Arrue (1998).

[14] "As a general rule, damages are based on loss to the claimant and not on gain to the defendant", Peel (2011). Thus, the normal field of disgorgement seems to be the unjust enrichment doctrine rather than damages.

[15] See Massaguer Fuentes (1999).

[16] Ley 3/1991, de 10 de enero, de Competencia Desleal.

Probably because of the abovementioned reasons, disgorgement has been traditionally seen as an elusive institution, a last legal response to difficult cases. A better understanding of the disgorgement remedy could make it more common in cases in which the legal system tries to promote the benefits of a legal position to its rightholder. A broader concept of disgorgement could apply the principle in all cases of wrongdoing in which the wrongdoer has taken advantage of the wrong. For instance, in cases compensating the possession of another's property or as a way for assessing the compensation for breach of contract.

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