Chapter 9
Legal Mechanisms Enabling Disgorgement of Profits in Romania

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Abstract The legal instruments affected to the recovery of losses in the Romanian legal system are based on tort and performance restitution (applicable in unjust enrichment, annulment or rescission of contracts, impossibility to perform a contractual obligation and others). Criminal, respectively administrative, liability may be cumulated with tort, and the procedural rules applicable enable the victims to recover the damages incurred within the criminal action frame or by means of separate action. The principles applicable to disgorgement ensued by tort are: the reparation of direct damnum emergens or lucrum cessans entirely. A hypothesis of performance restitution can be completed with a request of paying damages, if the restitution in itself does not cover the entire damage suffered by the claimant, and the defendant meets all the conditions provided by the civil tort.

Keywords Tort • Unjust enrichment • Performance restitution • Recovery of losses • Liability

The legal instruments affected to the recovery of losses are *numerus clausus* in the Romanian legal system and they are based on tort (I), as well as performance restitution (II), applicable in unjust enrichment, annulment or rescission of contracts and others. The restitution may result from the recovery of losses, as well as profits, not all of the instruments entailing disgorgement being grounded on misconduct from the defendant. Presently, all the sources entailing disgorgement of profits/damages are provided in the Civil Code of 2009[1] (the Civil Code); however the recovery mechanisms are limited to *actio de in rem verso*, action for damages and action for restitution, depending on the obligation legal source.

[1]Entered into force on October 1, 2011.

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Tort

The previous Romanian Civil Code of 1864 merely provided six ineffective articles (articles 998 through 1003) for the entire tort system; most of the rules applicable to tort resulted from the doctrine and jurisprudence. Compensation further to tort is governed by several principles that have been developed in case law and obfuscator prior to the entry into force of the Civil Code and that are nowadays regulated *per se*. The principles applicable to disgorgement ensued by tort are[2]: the reparation of direct *damnum emergens* or *lucrum cessans* entirely, predictable and unpredictable at the moment it is done, joint liability of the perpetrators. In order to compensate the victim of an animal attack for the encountered damage, the entire damage must be certain in order to restore the *status quo* prior to the damaging act or deed.[3] In addition, the restitution is based on the specific economic situation of the wrongdoer and the amount that has been rendered may be subject to modification if circumstances alter.

Special rules apply for the "loss of chance" that is covered proportionally with the probability obtaining a profit or avoiding a loss and for moral damages[4] in which the law courts may render nominal reparation (especially in media case law), or render damages valuated according to the specific case circumstances. The act of publishing a creation by a publishing house established by a university through the authorisation of the publisher's company that is part of the university's foundation, without the authors' consent, represents a breach of the author right entailing the liability of the university as well as the obligation for the latter to pay compensation for moral damages.[5] The moral damage is a variety of general damage and also a relatively independent factor in order to trigger a tort action; these specific damages regard the individual moral values of a person.[6] Even though the moral damages cannot be pecuniary determined, damages inflicted have particular forms and the court has the possibility to assess the damage intensity and gravity and in order to rule in favour of compensating the moral damage.[7] Due to the fact that the victim (an underage girl) was hospitalized in several medical unities it was necessary to determine the moment when the victim was infected with HIV in order to trigger the action in damages against the culpable hospital.[8]

Criminal, respectively administrative, liability may be cumulated with tort, and the procedural rules applicable enable the victims to recover within the criminal action frame or by means of separate action the damages incurred.

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[2]Dumitrache in: Nouveau Code Civil Roumain, Traduction commentee (2013), 342.

[3]Supreme Court, Civil Section I, Decision no. 1130 of 21 February 2012.

[4]The literature refers to *pretium doloris*, *pretium affectionis*. See Boroi et al. (2009).

[5]Supreme Court, Civil and Intellectual Property Section, Decision no. 4614 of 13 May 2011.

[6]Supreme Court, Civil and Intellectual Property Section, Decision no. 6416 of 5 October 2007.

[7]Supreme Court, Civil and Intellectual Property Section, Decision no. 1534 of 21 February 2011.

[8]Supreme Court, Civil and Intellectual Property Section, Decision no. 3607 of 3 June 2008.

Particular cases where tort is applicable include recovering damages incurred form the breach of competition law rules (antitrust law), as well as unfair business conduct (unfair competition), administrative and intellectual property infringements. The usage by an ex-employee of a label that has been registered with OSIM (the national trademarks registrar), knowing that the patentee has been producing under that specific label for a long period of time, is an act of unfair competition and ensues disgorgement of profits.[9] A simple material contact is neither sufficient nor able of causing damages to the author of the intellectual property creation, unless it is of a considerable consistency and gravity in order to affect the author's reputation and honour.[10] When determining the damages encountered by the patentee, the unjust profit obtained by the wrongdoer as well as the revenue that the patentee has been deprived of, due to act of infringement of a patent, are relevant criteria.[11] Until it has been proven that the derived creation is not the translator's fruit of creation, the performed translation is protected as an author's right and ensues disgorgement of profits.[12] The use of a commercial name that is similar or identical with a trademark registered by another can create confusion regarding the background of the products or services of both the entrepreneurs and this could result in a conflict between the two intellectual property rights; in this case, the victim could file an action with the court in order to recover damages.[13]

However, in comparison with the intellectual property infringements practice that has reached an efficient level of applicability, the competition law disgorgement of profits is scarce to none in Romanian judicial practice. Despite the fact that the special law affords the possibility to obtain disgorgement, the practical difficulties in fulfilling the conditions for tort, especially the damage valuation and the direct causality of the damages, have strong dissuasive effect on victims of antitrust conduct. More specifically, the calculation of losses and profit is important and has to be precisely determined in order for damages to be awarded. In addition, the causality between the deed and the damage has to be direct, which triggers a difficulty in principle. The recent entering into force of the vast amendment of the Law on unfair trading practices no. 11/1991[14] reforms the administrative and criminal liability by de-incriminating some of the misconducts. This policy has immediate consequences on tort, as well; the condition that the unjust profit would result from an unjust practice being more difficult to be proven if the illicit behaviour is not provided in a legal norm. Consequently, the successful claims related to unfair practices may even more diminish in the future.

[9] Supreme Court, Civil Section II, Decision no. 240 of 26 January 2012.

[10] Supreme Court, Civil Section I, Decision no. 606 of 3 February 2012.

[11] Supreme Court, Civil and Intellectual Property Section, Decision no. 7041 of 12 June 2009.

[12] Supreme Court, Civil and Intellectual Property Section, Decision no. 963 of 2 February 2007.

[13] Supreme Court, Civil and Intellectual Property Section, Decision no. 3828 of 11 May 2007.

[14] Government Ordinance no. 12/2004 has entered into force on September 5th, 2014.

Tort may be applied for personal wrongdoing or for another person falling into a certain category (parents are liable for the deeds of their children, employers for their employees, teachers for pupils). In the latter, subrogation is availed to the person liable for another, the perpetrator bearing the entire liability. Even though the victims decided to claim damages from the employer of the actual perpetrator, eventually the personal liability prevails, and the wrongdoers must be held personally liable for their actions; the employer has the right to recourse with an actions against the employees (wrongdoers) in order to recover the paid amounts of money.[15]

The recovery of losses and profit is in most of the cases solved by individual claims. Class actions are possible in principle, according to the Code of Civil Procedure of 2013; however in practice the applicability of the Code of Civil Procedure is subject to corroboration with special provisions that have not been enacted in any material. The practice record encompasses odd solutions, seldom made use of and with little success.

In case the liability is sourced from contract but may also be qualified as tort, the representative Romanian doctrine considers that both forms of civil liability – contractual and tort liability – "*are forms of civil liability, being dominated by the fundamental idea of remedying the monetary damage caused by an unlawful and guilty deed",* with the specification that *"the tort civil liability forms the common law of the civil liability, as long as the contractual liability is a liability with special derogatory feature"* but "*there is no difference of essence between the two forms.*"[16]

As a practical matter, cumulating the tort civil liability with the contractual liability means the following situations:

(i) the victim is not entitled, in case of the same unlawful and harmful deed, to obtain two remedies, one based on contractual ground and the other on tort ground, by exceeding the full value of the incurred damage
(ii) the victim is not entitled to initiate a hybrid, mixed legal action, by claiming simultaneously both the rules related to the contractual liability and to the tort liability, in order to benefit by a more favourable regime, since the tort liability is more severe in comparison with the contractual liability, and, finally
(iii) the use of the tort legal action is not admissible after having used the contractual legal action, based on which the remedies have been obtained.[17]

Nonetheless, the overlap between contract and tort is not possible.[18] The differences between the two liability forms for which the cumulus is forbidden refer to the following issues: the capacity of the perpetrator of the unlawful deed; the delay notification sent to the debtor of the indemnification obligation; the value of the remedy; the joint and several feature of the tort liability. The simple act of

[15] Supreme Court, Civil Section I, Decision no. 290 of 20 January 2012.

[16] Stștescu and Bîrsan (2009), 135–136.

[17] Stștescu and Bîrsan (2009), 140; Pop (1998), 356.

[18] Zamsa (2013).

inserting the possibility of supplementing the circulation of a publication in the initial contract cannot represent sufficient basis in order to consider that the act of not publishing a new circulation is a predictable damage at the time of the execution of contract.[19] However, unpredictable damage is to be disgorged in case of tort.

Performance Restitution

Following the model of the Quebec Civil Code, the new Romanian Code sets a distinct chapter/title named Performance Restitution, at the end of the Book V (Obligations). Under this title (art. 1635–1649), the Romanian Code establishes the general rules governing the performance restitution, regardless the cause generating the restitution. These provisions in the Civil Code represent the main legislation (*ius commune*), applicable whenever no special law concerning restitution is in place, or in addition of an insufficient special law provision. As a rule, the right of restitution belongs to the person that performed the disbursement – subject to restitution, or to another person entitled by the law (pursuant to article 1636 Civil Code) which is, by force of law, the creditor of the restitution from the very moment generating the restitution. When a debt has been paid further to the issuance of a court order and afterwards a different court order invalidates the act that represented the grounds for the enforcement order, the payer is entitled to disgorgement due to the fact that the nullity has retroactive effect and the payment has become undue.[20]

The institution of the performance restitution does not overlap the hypothesis of the damages caused by a civil tort. In case of tort, damages are granted whereas in case of restitution, no misconduct is taken into consideration. Nonetheless, a hypothesis of performance restitution can be completed with a request of paying damages, if the restitution in itself does not cover the entire damage suffered by the claimant and the defendant meets all the condition provided by the civil tort. For example, in case of contract rescission there are three possible solutions rendered by the court: cancelation of the contract, performance restitution (thereby granted) and the payment of the damages.

Each one of these measures obeys – partially or entirely – to specific rules:

- annulment of the contract follows the art. 1549–1551 of the Civil Code in respect to the conditions implied for annulment or rescission, by case, and the art. 1639 of the Civil Code (ruling the performance restitution) in respect with the effects of the annulment, if a disbursement is already obtained
- payment of the damages follows the rules of tort in respect to the conditions (illicit deed, damage, direct causality between the deed and the damage, the guiltiness of the defendant) and to the rules applicable for repairing the damage.

[19] Supreme Court, Civil and Intellectual Property Section, Decision no.7982 of 23 November 2007.

[20] Supreme Court, Civil Section I, Decision no. 917 of 22 February 2013.

In article 1638 of the Civil Code it is stipulated that the disbursement performed or enforced based on a contract annulled for illegal or immoral cause is always subject to restitution. Traditionally, in this situation it is applicable the *nemo propriam turpitudinem allegans* principle. Thus, the Romanian Civil Code has chosen, among the several mechanisms used by other law systems, to apply the principle of *restitution in integrum,* considering that the scope of the action in annulment of a contract is the restitution.[21]

Restitutions may only be enforced for legally binding disbursement and the restitution may have the form of a good (asset), tangible or intangible property, whenever the good was obtained:

(a) with no legal basis or unrightfully*:* in case of breaching the promise to marry (article 268), in the cases of contract termination (as mentioned in art. 1321: term expiry, waiver of contract, non-performance of the obligation etc.); in case of an unjust enrichment (art. 1345–1348) etc. There cannot apply a waiver of tort.
(b) by mistake*:* in case of the payment not due at the date of disbursement (art. 1341–1344);
(c) based on a contract terminated with retroactive effect*:* as an effect of annulment (art. 1254) or resolution (article 1554) of a contract;
(d) in case of an impossibility to perform the contractual obligation*:* hypothesis issued in art. 1634, as a result of occurring a force majeure or fortuity case situations;
(e) in case of a future event that cannot occur if the contract is affected by such condition precedent (art. 1407 par. 4).

The principles governing the restitution are set in art. 1639–1649 of the Civil Code. We emphasize that there are many sources of restitution, albeit only one set of rules and principle for restitution, regardless the source.

As a general rule, the restitution operates in nature (allowance in kind) or by equivalent (payment of an amount of money), according to article 1637. In particular, the value of the restitution depends on many aspects, following article 1639–1649 of the Civil Code:

– the good or bad faith of the *accipiens* (the recipient of disbursement, thereby being deemed as debtor of the restitution),
– the nature of the good (asset), object of the disbursement: immovable good/property or personal estate
– the material possibility of restitution of the asset (depending if the good perishes fortuitously or not)
– the legal possibility of restitution of the asset (the good has already been transferred to a third person by the time of restitution, depending if the third party is in good or bad faith). The revocative court order of the dispossession

[21] Dumitrache in: Nouveau Code Civil Roumain, Traduction commentee (2013), 356.

for public purposes, issued after the registration of damages and the effective payment of damages, is null and void if the proprietorship (right) has already been transferred from the expropriated person to the state.[22]

Unjust Enrichment

Unjust enrichment represents the particular application of restitution where special rules apply, in addition to the general rules. The Romanian case law and literature avail to the person that has suffered an unjust diminishment of patrimony *actio de in rem verso* against the person that profited thereof. The representative civil doctrine has always considered the legal institution of unjust enrichment in the chapter on the origins of the obligations and presents it as "*another lawful legal act considered by the unanimity of the legal literature as origin of the obligations and established as such by the judicial*" and defines it as "*being the legal act whereby the assets of a person are increased by using the assets of another person, there being no legal ground for such event*."[23]

Even though there are no available statistics of existing unjust profits or their recovery, it is self evident that most of the practice in tort and *negotiorum gestio*, as well as in infringements of competition law, unfair competition practices, intellectual property rights, or for victims of criminal deeds are resolved by disgorgement of profits or damages, by case.

The former Romanian Civil Code enacted at 1864 that was vastly based on the Napoleon Code regulated solely applications of the legal institution of unjust enrichment, providing the restitution obligation for the one that increased its assets by decreasing the assets of another person (possession – art. 484 of the Civil Code, artificial confusion of immovable assets – art. 494 of the Civil Code, undue payment – art. 997 of the Civil Code, deposit agreement – art. 1618 of the Civil Code etc.). That Civil Code did not regulate disgorgement of profits or the disgorgement of damages as a principle, in a legal text with general value. Despite the lack of legal specific provisions, the practice was unequivocally decided on the application of the theory of action de *in rem verso* and *neminem laedit* in order to recover profits or damages, by case.

The actual Civil Code entered into force on October 1st 2011 regulates the legal situations occurred subsequent to that date and it remedies this legislative gap, by expressly establishing of such institution in article 1345 and the pursuant of the Civil Code. The rule applied is however the same as the theory applied prior to the enactment of the Civil Code, i.e. whenever it is established a legal relationship whereby the person that suffers an unjust decrease of its patrimony (assets) is entitled to recover its loss by a specific action – *actio de in rem verso* – against the

[22] Supreme Court, Civil Section I, Decision no. 491 of 6 February 2013.

[23] Stștescu and Bîrsan (2009), 117–119.

person that benefits from an increase of patrimony (assets) and the disgorgement of profits is due within the limits of such increase. It results that the legal institution of unjust enrichment represents a source of obligations whose applicability to the Romanian law system is beyond any doctrinal or jurisprudential dispute.

Conditions for the successful filing of *actio de in rem verso* are (i) factual and (ii) legal:

Factual conditions: (a) the increase of the assets or the defendant's enrichment, which can consist in: the obtaining of an asset, rendering of work or services etc.; (b) the decrease of the assets or claimant's impoverishment, which can consist in: the exit of certain valuables of the patrimony, making of expenses not reimbursed, performance of activities or services not having been paid etc.; (c) there should be a direct connection between the defendant's enrichment and the claimant's impoverishment, which means that both of them should have a joint cause or origin, irrespective whether the same result from the deed of the impoverished person, of the enriched person, of a third person or of a fortuitous event, it being sufficient that the enrichment and the impoverishment have a joint cause – an act or event. Also, in spite of the fact that the increase or decrease conditions are factual conditions of the institution of unjust enrichment they should be understood as a matter of law. Therefore, these factual conditions of the unjust enrichment shall also be fulfilled when the increase or decrease of the assets results indirectly, pursuant to the same act or event.[24]

Legal conditions:

(a) the absence of a legitimate cause of the increase of assets of a person to the detriment of another, the legitimate causes of the enrichment being deemed: the existence of an agreement, court decision etc.[25] For instance, in case of a *negotiorum gestio*, the *gestor* can act both in his personal interest as well as in the interest of another person and the ratification of the *negotiorum gestio* retroactively converts it into a mandate contract.[26] Under article 1346 of Civil Code, examples of just enrichment are provided, with the scope to determine the unjust ones by means of *per a contrario*: the performance of a valid obligation, failure in exerting a right by the impoverished person, the execution of a voluntary act of impoverishment, such as gratification of another.
(b) the absence of any other legal mean for recovering the incurred loss; to this effect, it is discussed the subsidiary feature of *actio de in rem verso*. In case the claimant has the action based on agreement, tort or another origin of obligations, the action based on unjust enrichment cannot be initiated.[27]

[24]To the same effect please refer to Pop (1998), 144–145; Stștescu and Bîrsan (2009), 119.

[25]The Romanian case law has assimilated the absence of the legitimate cause and the hypothesis of exceeding the contractual framework between the parties. Decision no. 5197/2004 of the High Court of Cassation and Justice, the Commercial Section provides "*The co-existence possibility of the unjust enrichment and contractual relationship*".

[26]Supreme Court, Civil Section I, Decision no. 271 of 20 January 2012.

[27]To the same effect Pop (1998), 145; Stștescu and Bîrsan (2009), 120.

The Co-existence Possibility of Unjust Enrichment and Contractual Relationship

Upon mentioning the first legal condition of the initiation of *actio de in rem verso*, we specified that the Romanian case law has assimilated the absence of the legitimate cause and the hypothesis of exceeding the contractual framework between the parties. The preeminent case where this matter has been solved in this sense is Decision no. 5197/2004 of the High Court of Cassation and Justice, the Commercial Section, which, in the context of the existence of a construction agreement between the parties, admitted *actio de in rem verso* for recovering the costs by performance of required additional works not specified upon contracting. This case has been noticed by the relevant legal writings and commented distinctly by several important civil law authors, just because of the fact that it "broke" and rendered peculiar a certain tradition and automatism in the field of preventing any *actio de in rem verso* in the hypothesis of the existence of an agreement: "*the practice of the Supreme Court approved the admissibility of an action based on the unjust enrichment principle, initiated by the constructor against the beneficiary, having as object the ordering of the latter to pay the additional repair work, besides those representing the subject of the construction agreement and of the additional works . . . .It has also been held that such repairing, additional and un-contracted works have been required since, if absent, the works representing the subject of the construction agreement could no longer be performed, fact which would have caused the failure to complete and deliver the objectives, on the contractual term provided therefore . . . It has been concluded that the only way to recover the amounts related to the additional repairing works consisted in initiating a legal action based on the unjust enrichment principle, by considering that the works had been performed on the decision ruling date, so that, given that the beneficiary accepted and thereafter, confirmed the works performance, it was groundless to retain that the contractor could benefit by the conclusion of a new procurement agreement, for recovering the value thereof*."[28]

Based on such hypothesis, there is no contradiction between the existence of a contractual relationship and the admission of *actio de in rem verso*, since the institution of unjust enrichment represents the legal ground of the recovery of the expenses made for the performance of additional works not provided by the parties upon the execution of the agreement, fact which is equivalent to exceeding of the initial contractual framework. As long as the necessity of the performance of additional works is admitted, it is obvious that the constructor incurred a loss and the beneficiary enjoyed a profit; given that this situation is not findable in the contractual provisions agreed by the parties and that it is not covered by the initially stipulated price, the sole settlement manner consists in the application of the mechanism of *actio de in rem verso*. Therefore, the subsidiary feature of *actio de in rem verso* is not ignored, as long as the unjust enrichment does not constitute a ground that might be overlapping with the contractual ground of the costs recovery. In such hypothesis, the claimant does not enjoy the contractual legal action for recovering

[28] Deak (2006), 213.

the costs, as long as the additional and compulsory performed works required for the performance of the object of the agreement have not been stipulated in the agreement.

In the conditions of the hypothesis of the application of the unjust enrichment principle while an agreement between the parties exists, with its limits exceeded, the jurisdictional body must assess the de facto and de jure situation through reference to the content of the agreement submitted to it (respectively, to analyze the clauses thereof and to verify whether there is an applicable mechanism for considering the additional works) and to the effective performed works (for estimating whether the contractual framework has actually been exceeded). As regards this issue, we stress that the existence of an agreement as an impediment for the application of the unjust enrichment principle contemplates the existence, under legal form, of an agreement valid and efficient from legal point of view.

Therefore, in case one of the parties has limited its liability, by a clause, with respect to the occurrence of the necessity of additional works, such clause shall be part of the agreement and shall prevent the application of the unjust enrichment principle solely to the extent such liability limitation clause has been validly assumed. According to the legal writings, any liability limitation clause is valid in the Romanian civil law solely insofar the party benefiting by the liability limitation had not previously breached, in bad faith (namely, deliberately) or by gross negligence, its obligations related to the liability limitation.[29] Same solution is sustained further to the applicability of the principle *nemo propriam turpitudinem allegans*, i.e. the beneficiary of the liability limitation clause is not entitled to claim it, in case the fault is ascertained or, more serious, its misrepresentation, in connection with the circumstances of such clause activation.

This category also includes the obligation to inform the co-contractor upon the conclusion of the agreement. In case the party failed to fulfil accordingly such obligation to inform and to make available to the adverse party all data required for outlining the performance obligation, e.g. certain works, the clause whereby the party limits its liability related to additional works can no longer receive the legal efficiency and the value of the additional works can be recovered by way of *actio de in rem verso*.

The effects of unjust enrichment:

(a) the enriched person (the defendant) is bound to disgorge to the impoverished person the value of his benefits. He shall be bound to pay legal interests solely if he acted in bad faith; this situation involves differences in the doctrine solely with respect to the legal ground for granting interest (i) by application, through analogy with the undue payment, the case of the bad faith creditor (art. 994 of the Civil Code 1864) or (ii) by the triggering of the tort liability of the defendant.[30]

[29]To the same effect Stștescu and Bîrsan (2009), 338.

[30]Pop (1998), 146.

(b) the impoverished person (the claimant) is entitled to obtain disgorgement solely in the value of his impoverishment, and also in the hypothesis in which the enriched person (the defendant) acted in bad faith; the claimant shall obtain interests, as well.[31] The disgorgement is limited on a two tier level, i.e. the enrichment upper level and the impoverished lower level.

The Civil Code in force brought to this instrument for disgorgement of profits (*actio de in rem verso*) several amendments deemed to improve the conditions and to expedite the process. Due to the fact the Civil Code is not retroactively enforceable; the case law grounded on it is yet scarce and is difficult to assess at this moment its impact on the jurisprudence. Also, the doctrine has commented little on the new legislation that regulates *actio de in rem verso* in the same fashion as the judicial practice and scholars have interpreted the Roman law principle applied prior to the current Civil Code. A novelty of the Civil Code, the non compliance of fiduciary obligations may lead to contractual liability and, in subsidiary to unjust enrichment applicability.

Conclusion

In conclusion, the disgorgement of profits/damages is duly regulated in the Civil Code, being functionally applicable, including the class action instrument. The mechanisms availed to disgorgement creditors vary depending on the nature of their title/receivable. Tort entails different rules than unjust enrichment and contractual restitutions (in case of rescission or annulment). In practice, the most convenient mechanism pertains to performance restitution, the conditions being more lenient than for recovery pursuant to tort.

Due to the little time lapsed from the entry into force of the Civil Code in 2011 (and – in regard to class action – of Code of civil Procedure of 2013), a proper impact assessment in jurisprudence of the newly regulated institutions such as *actio popularis* is unlikely. In respect with the newly regulated instruments (unjust enrichment and performance restitution), since they are the result of prior stable and unequivocal practice in law courts and in accordance with the scholar opinions, it is improbable that it might have different result than the already established practice in these regards.

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