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INFLATION IN ENRICHMENT CLAIMS: REFLECTIONS ON THE BRAZILIAN CIVIL CODE

Aimite Jorge*

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I. ABSTRACT

Inflation can be one of the risks assumed by the parties to a contract. Notwithstanding, contractual terms may provide for monetary corrections to offset that risk in cases of foreseeable inflation. The same may not hold true, however, for claims based on unjustified enrichment. They may find themselves in the position of innocents because the events that brought about the decline of purchasing power of the currency were unconnected to them. This paper analyses the approach recently favoured in the new Brazilian Civil Code on inflation in enrichment claims. Its focus is on article 884 (headed “*enriquecimento sem justa causa*”), and it argues that while inflation may be taken into account in certain situations of unjustified enrichment claims (whether falling within the category of “undue payment” or that of “unjustified enrichment”), the application of article 884 should not be automatic in all enrichment claims. An automatic application of the general principle may lead to incongruent outcomes.

II. ON ENRICHMENT LAW IN GENERAL

A. *Introductory Remarks*

The recently enacted Brazilian Civil Code of 2002, which came into force in 2003, revised the 1916 Brazilian Civil Code (*The Beviláqua Code*)¹ and added a title to its law of obligations

1. The *Beviláqua* Code largely followed the approach of the French Civil Code, although it was different in many aspects. Consequently, the 1916 Code adhered, as a general rule, to the principle of monetary nominalism. According to this principle, “the nominal identity of money entails an irrefutable presumption of identity of value.” See Ejan Mackaay & Claude Fabien, *Civil Law and the Fight Against Inflation—A Legal and Economic Analysis of the Quebec Case*, 44 LA. L. REV. 719, 722 (1984). Nominalism is a practical concept that “allows agreements to be made and judgments to be awarded for fixed sums which do not need to be subsequently revised.” *Id.* at 722. Therefore, “the certainty or stability of legal relationships, one of the fundamental values of law, is clearly favored.” *Id.* It is necessary, however, to admit that where depreciation of currency exists this stability is acquired at the price of some injustice. The 2002 Civil Code departed from the principle of nominalism and adopted the principle of valorism. In essence, valorism is an approach under

denominated “*Enrichment sine causa*” (articles 884-886). Article 884 enacts a general principle against unjustified enrichment in Brazilian law, which was lacking in the previous Code. The provision of article 884 reads as follows:

A person who is enriched at another’s expense without just cause is obliged to restore what was unduly obtained, after *making monetary correction* (emphasis added).

[Caveat] (*parágrafo único*)²: If the object of the enrichment claim consists of a specific thing, the person who received it is under a duty to give it back, and, if the thing no longer subsists, its restitution shall be effected by its value at the time the demand was made.³

The reflection that follows explores the meaning and implications of adding the expression “after making monetary correction”⁴ to the general principle against unjustified enrichment.⁵

which the extent of a monetary obligation is defined by the value of the currency. For a thorough treatment of the concepts “nominalism” and “valorism”, see ELIAHU HIRSCHBERG, *THE NOMINALISM PRINCIPLE: A LEGAL APPROACH TO INFLATION, DEFLATION, DEVALUATION AND REVALUATION* (Bar-Ilan Univ. 1971); CHARLES PROCTOR, *MANN ON THE LEGAL ASPECT OF MONEY* (7th ed., Oxford Univ. Press 2012); Mackaay & Fabien, *supra*, at 721; ARTHUR NUSSBAUM, *MONEY IN THE LAW* (Foundation Press 1939).

2. “*Parágrafo único*” is a caveat which literally means “single paragraph”. It is the technical term used when an Article (Section) is composed of a single subsection which qualifies as the provision in the main article (section). Because such a nomenclature is not used in the English statutes, I preferred not to translate it.

3. BRAZILIAN CIVIL CODE, art. 884 (author’s translation).

4. Monetary correction, which reflects the valorism theory of money, is provided throughout the new Code, in provisions such as arts. 389, 395, 405, 418, 772, etc. However, it is not the object of this paper to deal with those provisions, as they do not create major problems in practice, the way art. 884 is likely to create.

5. See, e.g., art. 2041 of the Italian Civil Code, § 812 of the German BGB, art. 473-480 of the Portuguese Código Civil, arts. 1493-1496 and art. 1699 of the Québec Civil Code, and art. 6:212 of the Netherlands BW. See also the European Draft Common Frame of Reference *DCFR* 2009 Book VII, 1-101. This last provision reads as follows: “A person who obtains an unjustified enrichment which is attributable to another’s disadvantage is obliged to that other person to reverse the enrichment.”

B. The Adoption of the General Principle against Unjustified Enrichment. A Brief Overview of the Changes from the 1916 Code to the 2002 Code

Before dealing specifically with the expression “*after making monetary correction*,” a quick overview of the provision (article 884) as a whole, and the context in which it appears, is in order. The new Code added three provisions regarding unjustified enrichment, and slightly modified some provisions in the “undue payment” section.⁶ The provisions added are: article 884 (general principle against unjustified enrichment),⁷ article 885 (general circumstances in which the claim is allowed),⁸ and article 886 (subsidiarity rule).⁹ The caveat to article 884 also refers to the timing and measure of enrichment where the enrichment consisted of a specific thing and that thing no longer subsists. According to article 884, “if the enrichment consisted in a specific thing, and such thing no longer subsists, restitution shall be effected by its value at the time of the demand.”

Article 884 enacts a general principle against unjustified enrichment. It fills a gap that was identified in the previous Code by several Brazilian writers.¹⁰ Many writers held the opinion that the reasoning by analogy used in the Brazilian jurisprudence to

6. I will not deal with the few modifications on ‘undue payment’ as they are of no consequence for the purpose of this article, unless the need to make reference to them should arise.

7. See *supra* Part II.A.

8. Art. 885: “Restitution is due not only when there has been no cause that justifies the enrichment, but also when such a ‘cause’ ceased to exist.”

9. Art. 886: “No enrichment action shall be entertained if the law grants to the aggrieved party other means to redress the loss suffered.”

10. See, e.g., SILVIO RODRIGUES, *DOS CONTRATOS E ATOS UNILATERIAS* (Editora Forense 2003); FRANCISCO C. PONTES DE MIRANDA, 43 *TRATADO DE DIREITO PRIVADO* 195 (2d ed., Editora Borsoi 1963); JOÃO MANOEL DE CARVALHO SANTOS, *CÓDIGO CIVIL BRASILEIRO INTERPRETADO* 378-79 (13th ed., Freitas Bastos 1988); Agostinho Alvim, *Do Enriquecimento Sem Causa*, *REVISTA DOS TRIBUNAIS* 259/3 (1957) and *REVISTA FORENSE* 173/47-67 (1957); but see the contrary view expressed by JORGE AMERICANO, *ENSAIOS SOBRE ENRIQUECIMENTO SEM CAUSA: DOS INSTITUTOS DE DIREITO EM QUE SE MANIFESTA A CONDENAÇÃO DO LOCUPLETAMENTO INJUSTIFICADO* 122-26 (Livraria Academica 1933).

solve problems that the provisions of the 1916 code on undue payment could not address was an inadequate mechanism. They argued that the procedure was vulnerable to allowing “injustice” to be committed in certain deserving cases.¹¹ The enactment of article 884 also lends credence to the point made by Pontes de Miranda, a prominent Brazilian writer. He once stressed that in cases of unjustified enrichment the legal system should look not only at what occurs with the creditor, but also at what is happening to the debtor’s assets. This sidesteps the idea that all cases of enrichment are linked to a “payment.”¹² Indeed, enrichment claims go beyond the case of payment of money. This is exactly what the new Code endeavoured to achieve. This paper argues that it has indeed managed to do this.

C. Brief Remarks on Enrichment Liability in General

Before specifically discussing the issue of inflation in unjustified enrichment, a few remarks on liability for unjustified enrichment need to be made. The concept and doctrine of unjust or unjustified enrichment is ancient, but still evolving.

Although there is no single all-encompassing definition for the concept of unjust or unjustified enrichment, the following description is illustrative of what the notion may entail: “enrichment liability is a doctrine stating that if a person receives a benefit (money or other kinds of benefits) through no effort of his own, at the expense of another, the recipient should return what was received to the rightful person, even if such benefit was not obtained illegally.”¹³ How do the nuances of this concept and doctrine operate in different legal systems? Some comparative remarks follow below.

11. See Alvim, *supra* note 10, at 47-50; PONTES DE MIRANDA, *supra* note 10, at 195.

12. FRANCISCO C. PONTES DE MIRANDA, 26 TRATADO DAS OBRIGAÇÕES 167 (Editora Borsoi 1959).

13. DANIEL P. VISSER, UNJUSTIFIED ENRICHMENT at ch. 1 (Juta 2008).

1. Civil Law Systems

The essence of the civilian approach to unjustified enrichment is to be found in the notion of *sine causa* transfer.¹⁴ *Sine causa* is understood as the “absence of a legal ground”, which implies that either the ground (*causa*) did not exist when the transaction occurred to sustain the validity of the “transfer of the benefit,” or, if it ever existed, it has since ceased to exist (an *actio ob causam finitam*). Civil law countries generally share the “negative approach”¹⁵ as a basis to a claim in unjustified enrichment. “Negative approach” means that it must be proved that there is no *cause* (hence the terminology “*sine causa*” and “unjustified” used in the civilian systems), i.e., a legally recognised ground for the defendant to retain the enrichment “transferred” to him. Put differently, all civilian systems begin from the proposition that all enrichment at another’s expense either has an explanation known to the law (a *causa*) or it does not.¹⁶ Enrichments are ordinarily transferred with the purpose of discharging an obligation or, if there is no such obligation, at least to achieve some other objective

14. “Transfer” here is used in a very loose sense, to include both active and passive “transfer”. It encompasses not only an actual “transfer of the benefit from one person to another”, but also an acquisition by omission, i.e., the saving of expenses that would have been incurred in the absence of the act complained about. It also includes the increase of liabilities on the part of the plaintiff while the defendant decreases his liabilities due to the fact complained about.

15. The opposite of the “negative approach” is the English common-law “positive approach”—based on the “unjust factor”, which is briefly discussed below.

16. Jan G. Lotz (updates by Fritz D.J. Brand), *Enrichment* in 9 THE LAW OF SOUTH AFRICA (LAWSA) § 209d (2d ed., Wouter A. Joubert ed., Butterworths 2005); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 834 (Juta 1990); Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403, 411 (1995); DANIEL P. VISSER, UNJUSTIFIED ENRICHMENT 171-75 (Juta 2008); Jacques Du Plessis, *Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions*, S. AFRICAN L. J. [hereinafter SALJ] 142, 155-59 (2005). Du Plessis observes that although there is unanimity about the absence of legal ground (*causa*) as a requirement for a claim based on the doctrine of unjustified enrichment in civil law in general, in the civil law in general, the meaning and content of that legal ground (*causa*) varies considerably within the civil law family. See *id.* at 157 (where Du Plessis gives French and Dutch examples).

as, for example, making a gift, the satisfaction of a condition, or the creation of a new contract.¹⁷ If these outcomes succeed, then the enrichment is sufficiently explained, i.e., it is obtained *cum causa*. If the enrichment turns out to have no such explanation, it is seen as inexplicable; therefore it cannot be retained.¹⁸ The recipient is not entitled to it and must give it up. Otherwise, its retention would be *sine causa*.

The consensus, however, ends here. Civil law countries drift apart when it comes to defining the measure of the enrichment, and questions like whether it is the object received itself or its value that should be returned, or what should be done if the enrichment ceased to exist, receive different answers. Differences also exist as to the moment of assessment of the enrichment—whether it is the moment the object was received or at *litis contestatio*.

At the risk of oversimplification, it can be said that what we actually find in civil law jurisdictions today is, for convenience sake, what could broadly be called the “Pothier” and the “Glück-Windscheid” schools of thought. The issue sometimes goes down to the structure of enrichment law itself. Those authors who share the idea that enrichment law should emphasise “value received” as the “sole” measure of enrichment (thereby denying implicitly or partially a change of position defence) belong to the Pothier school. The Glück-Windscheid¹⁹ school covers all those who

17. Current Canadian law labels all these situations and others as ‘juristic reasons’ (see *Garland v. Consumer Gas Co.* [2004] SCC 25; (2004) 237 DLR (4th) 385).

18. In South African law, Visser poses the following questions: (1) whether one should only consider the *causa retinendi* or also the *causa dandi*; and (2) how to categorise the notion of *causa* in the face of the recognition that an invasion of rights can give rise to enrichment claims? The same problem arises in cases of contracts discharged by supervening impossibility. VISSER, *supra* note 16, at 173-74.

19. Current adherents of the Glück-Windscheid school align with what was concluded back in time by CHRISTIAN F. GLÜCK, *AUSFÜHRLICHE ERLÄUTERUNG DER PANDEKTEN ad D 12.6 (§ 835)* (Erlangen 1797) and BERNARD WINDSCHEID, *2 LEHRBUCH DES PANDEKTENRECHT § 424* (Rütten & Loening 1887) that loss of enrichment applies both to a *genus* and to a *species*, and, therefore, loss of enrichment can be pleaded in all cases.

defend the idea that enrichment law should concentrate on the value that survives, rather than the value received, save some exceptions.²⁰

Obviously, there are intermediate positions between these two camps. The other school, adopting Pothier's perspective on the field as a whole, tends to deal extensively with *paiement de l'indue* (undue payment) apart from *negotiorum gestio*. Though there is diversity of thought in the Pothier school as to the place of all other enrichment situations²¹ and the requirement of error, the general trend is that the nature of the enrichment claim does not depend on the type of benefit conferred. The Brazilian law of unjustified enrichment, as structured in the new Code, largely follows the approach of the Pothier school.

2. Common Law Systems

Common law countries are not unitary either in their understanding of unjust enrichment.²² While English law generally seeks to determine enrichment liability based on the requirement of "at the expense of the claimant," there is no specific reference in English law that the claimant must have suffered a loss. However, U.S. law, as presented in the new Restatement (Third) of Restitution and Unjust Enrichment,²³ seem generally to have a different approach, which to some extent is closer to some civilian systems, whereby the claimant must show an impoverishment. It also requires a connection between loss and gain. On the other hand, where English law would ask what remedy is to be applied,

20. Among the limitations generally advocated, one would be that a *mala fide* recipient is always liable for value received, and where the enrichment claim arose as part of an (invalid) reciprocal contract, value received is also the right measure.

21. The Brazilian law of enrichment in the new Code has a dual structure: "undue payment" and "enrichment *sine causa*." The same approach is also followed the Dutch Civil Code (BW), using a similar structure, and many other civil law codes (such as the Italian Civil Code).

22. RESTATEMENT (THIRD) OF THE LAW. RESTITUTION AND UNJUST ENRICHMENT at ch. 1 (A.L.I. 2011).

23. *Id.*

U.S. systems seek “an absence of a remedy.” This indicates that American law uses unjust enrichment only where no other remedy can be found. It must also be noted that U.S. legal systems are increasingly using the concept of “absence of justification for enrichment liability.”²⁴ English law, however, continues to employ the approach of inquiring whether the “enrichment was unjust” through the identification of an “unjust factor.” The unjust factors relied on by English courts are generally illegality, mistake, duress, undue influence, total failure of consideration, and miscellaneous policy-based unjust factors such as withdrawal within the *locus poenitentiae*, fiduciary's lack of authority, exploitation of a weakness, and also ignorance and powerlessness.²⁵ U.S. law also uses the “absence of justification approach” which identifies enrichments with no legitimate explanatory basis, without looking to black-letter legal factors. U.S. law, however, knows the concept of disgorgement, which is not prominent in civil law systems. Nevertheless, in the U.S., the requirement of loss is not as stringent as in other civil law jurisdictions. While requiring some loss, the law of unjust enrichment in the U.S. does not limit the measure of the award to the plaintiff's loss. Of course, this also means that this difference is of vital importance in practice because the measure of recovery may vary greatly between different jurisdictions.

24. Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILLANOVA L. REV. 487 (2007); Caprice L. Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, 14 Lewis & Clark L. Rev. 101-32 (2010). The cases: Meyer v. Meyer, 620 N.W.2d 382 (Wis. 2000); The National Bank v. FCC Equipment Financing, No. 10-0837 (Iowa, 2011); Soma v. Zurawski, 772 N.W.2d 724 (Wis. App. 2009).

25. See generally ANDREW BURROWS, THE LAW OF RESTITUTION (3d ed., Oxford Univ. Press 2011); see also ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT §10-20 (Oxford Univ. Press 2012).

III. DESCRIPTIVE CONSIDERATIONS OF ARTICLE 884 OF THE BRAZILIAN CIVIL CODE

A. *Enriched at Another's Expense Sine Causa*

The first part of the Brazilian general principle corresponds by and large to the elements recognized in other jurisdictions as well. In order for a claimant to successfully institute an enrichment claim he/she must satisfy three requirements. First, there must be an enrichment; second, such enrichment must have come at another's expense; and third, there must be an absence of ground for the enrichment (the *sine causa* requirement).

The notion of enrichment generally presupposes a "transfer" of assets or benefits from the patrimony of one party to that of another. "Transfer" here is used in a very loose sense, to include both active and passive transfer. It encompasses not only an actual transfer of the benefit from one person to another, but also an acquisition by omission; that is to say, by the saving of expenses which would have been incurred in the absence of the act that triggered the complaint. It also includes an increase of liabilities on the part of the plaintiff while the defendant decreases his liabilities due to the fact complained about.

There are other ways in which a defendant might be said to have been enriched at another's expense, but ultimately all of them must lead to the conclusion that the defendant is not entitled to keep that benefit, unless there is a *causa* for its retention. The defendant's enrichment must be *sine causa*. The concept *sine causa* is understood here as the "absence of a legal ground" which implies that either the ground (*causa*) did not exist at the time of the transaction, or, if it ever existed, it has since ceased to exist (an *actio ob causam finitam*).

It is common knowledge that Brazil is a civil law jurisdiction. Although civil law jurisdictions are not homogenous in their approach to unjustified enrichment, it is nonetheless true that all of them share the negative approach to found a claim in unjustified

enrichment. Brazil is no exception in following that tradition. The enquiry is based on the proposition that all enrichment at another's expense either has an explanation known to the law (a *causa*) or it does not. If it has one, then, generally speaking, an enrichment claim is not sustainable. If it has no such explanation, then, the retention of the enrichment would be *sine causa*. Therefore, it must be disgorged to the person from whom it was acquired without legal ground. The requirement "at the expense of another" does not generally create many problems though there are a few issues to be addressed with respect to the so-called "corresponding impoverishment" approach. Normally, the correlation that the law requires in this regard translates into the fact that any patrimonial advantage acquired by the defendant must result in a corresponding disadvantage suffered by the claimant. This is what elsewhere²⁶ I have termed as the "mirror-image gain-loss." An example is when a payment has been made to one who has made a cession, after the cession took place but before the payor is notified of the cession. Another situation is where a debtor has paid a creditor after a guarantor has fulfilled the obligation, but without notifying the debtor. In these cases the value that enters into the patrimony of the enriched party is the same as the value that left the assets of the impoverished party. However, the soundness of the unqualified "gain-loss" requirement is also doubted in Brazilian circles.

If all three requisites described above are satisfied, the enrichment must be given up. The measure of enrichment is generally accepted to be calculated from the time the claim is instituted, or at the time a demand is made, should this be antecedent to the institution of the claim itself. According to the caveat to the general principle, if the enrichment consists of a specific thing, the thing itself shall be restored. If it no longer

26. See generally Aimate Jorge, *Change of Position in Comparative Perspective* 190-91, 262, 270, 279 (Doctoral thesis, 2009, University of Cape Town).

exists, the restoration shall be made based on the value of the thing at the time of the demand. How does monetary deterioration due to inflation find its way in assessing the measure of enrichment? The following section will analyze this issue.

B. “After Updating the Monetary Values” (Monetary Correction)

The expression “after updating the monetary values” (*feita a atualização de valores monetários*) is somewhat confusing in the context in which it is used and its exact meaning has not yet been fully tested in courts. Article 884 was meant to introduce a general enrichment action as a catch-all provision. Yet the provision speaks of “updating or adjusting monetary values” apparently as a fourth requirement of such a general action. The existence of this element seems to indicate that the enrichment claim provided for under this general action embraces money claims alone and any enrichment that does not fit into the monetary mold would not be considered. This observation may be corroborated by the wording of the caveat to the general claim that follows it and which speaks of “if an enrichment consisted in a specific thing.” This expression appears to be there as the opposite of money in the preceding clause. There is a suggestion in the Brazilian legal literature to the effect that such an expression is related to currency devaluation or inflation in the country as a whole, but the context does not seem to fully support such a broad contention. Carlos Gonçalves who advocates this proposition says that:

[T]he determination that restitution of that which was unduly received be done with “adjustment of monetary values” is due to the fact that jurisprudence has for long manifested that the corresponding monetary value constitutes a mere re-establishment of the value of the currency weakened by inflation, and its calculation is to be computed from the moment the “*payment*” (emphasis added) was made, in order to avoid the enrichment *sine causa* of the debtor, rendering irrelevant any delay that

might have occurred in the institution of the demand.²⁷

Gonçalves, however, does not cite any authority supporting this contention, save a single reference to one court decision,²⁸ and his discussion of this issue appears in a single paragraph of seven lines. He also does not present the facts of that decision (in which, supposedly, such a proposition might have been made). He does not say how the judge updated the monetary values and the criteria he used to do so. Be that as it may, Cláudio Michelin²⁹ has in the meantime also adopted the same view as Carlos Gonçalves, while commenting on article 884 and cross-referencing it to articles 315, 317 and 404 of the Code. Furthermore, the observations of Judge Sena Rebouças in an Appeal Court decision in São Paulo (426.304/1 SP) seem indeed to corroborate Gonçalves and Michelin's interpretation:³⁰

27. CARLOS ROBERTO GONÇALVES, 3 DIREITO CIVIL BRASILEIRO—DE ACORDO COM O NOVO CÓDIGO 588-90 (Editora Saraiva 2004) (author's translation).

28. STJ, REsp 31. 791-MG, 4a. Turma; Rel. Min. Barros Monteiro; DJU, 22/04/2002, p. 212.

29. CLÁUDIO MICHELON, DIREITO RESTITUITÓRIO 242 (Revista dos Tribunais 2006). The author says:

With regard to situation (b) [the situation wherein the value received—which is expressed in money—has suffered a decrease due to currency devaluation. In this case, one must ask whether the obligation to the enriched person also comprises the duty to restore not only the nominal value, but also the real value, i.e. effecting a monetary correction] the provisions of article 884 seem to make an exception to the general rule in the Civil Code. Article 315 of the Civil Code determines that debts (owed) in money must be paid in their nominal value. The automatic monetary correction (not agreed upon) is a consequence that the Code ascribes to the non-performance of a pecuniary obligation, with the aim of preserving the purchasing value correspondent to the nominal value at the time of non-compliance (art. 404). The so-called “nominalism principle” that is opposed to the notion that debts have to be paid by the value of the purchase, admits exceptions, such as the possibility of correction of pecuniary value due to the disequilibrium between performances arising from unforeseen events that have occurred from the time the obligation arose (art. 317). Thus, article 884 makes an exception to the ‘nominalism principle’ because it expressly determines that the value unduly acquired be restored after adjusting the monetary values (author's translation).

30. The whole issue of currency devaluation leading to the assertion of “adjustment according to inflation” is linked to a period of the economic crisis

Masking the inflationary process (alleging or pretending that it does not exist, institutionalizing the tale of a “strong currency,” but which has always been the same weak currency under a different name), also results in hiding the profits that inflation brings to the State as debtor. The process that once was open is now hidden, but it continues to exist. Inflation is lucrative to the extent that it transfers the assets of the creditors to the debtors. Whenever there is inflation and the fact is ignored for whatever reason (by the law or by the courts’ decisions), there is a transfer of assets. The creditor is impoverished (decreasing his credit in real value), and the debtor is enriched (decreasing his debits), to the extent of the inflation. The profit is exactly what the debtor (*in casu*, the depositary) has ceased to pay for a while, postponing his debt without any duty of adjusting it (because in effect, inflation continues), which results in an enrichment *sine causa*, which cannot and must not pass unnoticed by the Judiciary. The institutionalization of a monetary correction (monetary adjustment mechanism) *in judicio* is an instrument of justice through which judges and courts correct the distortions that, in the face of inflation, legal and contractual norms bring to the rights of the parties.

It is important to correctly establish the concept of monetary correction *in judicio* (or monetary correction as an instrument of justice), peculiar to the law, although it is of economic origins, or emanating from an economic concept. Monetary correction *in judicio* is an inherent mechanism to the inflationary process, and for that reason it is only possible to conceive the non-existence of monetary correction in the absence of inflation. It is not only unacceptable, but even contrary to the notion of good faith, to establish a “nominalistic” principle in time of steep inflation. Also, it is objectionable to implement any other idea that could hamper and curb the enforcement of monetary correction in this time of inflation, for, such “fact would impose the transfer of the above mentioned assets to the benefit of the debtors while harming the creditors.” Yet, the worst that comes from this same situation is the effect of transforming the Judicial Power in the process to be an instrument of windfalls, or, in the best of hypotheses, as an

and its main features are embodied in Lei No. 6.899/81, which deals with judicial deposits. This legislative act is also known as “the law of indexation.”

accomplice of what conventionally is called enrichment *sine causa*. The non-implementation of a monetary correction (adjustment) mechanism is a profound shock to the general ethical sentiment, and consequently, the suggestion to return the same genuine deposit unchanged represents the idea of returning nothing at all. It would lead to an absurd result, economically indefensible and judicially an aberration, which cannot be sustained. For this reason, it must be ensured that the rules on the actualization of values of the sums deposited must be the same as those that are used to update judicial calculus (assessments), i.e., the use of IPC (CPI—Consumer Price Index), in periods in which the government plans above-cited have modified the system of “remuneration” of savings, mandating the implementation of indexes that did not reflect the reality of inflation. In these cases, jurisprudence has acquiesced, admitting a real correction. The correction, as a “ceiling,” is aimed at maintaining the currency at its initial level of acquisitive power, and consequently, it is not an “income.” The devolution of an amount deposited must be corrected (adjusted) from the date of the deposit up to the effective date of receiving such deposits.³¹

Further support for this position can be drawn from the effect that Law No. 6.899/81 (Indexation Decree) may have in the law as a whole. This law is very complex. It contains relevant aspects for unjustified enrichment which will be discussed here.

It has been held in a case reported at *REsp. 12.591.0/SP*³² that “the systematic monetary adjustment of debits arising from judicial decisions—sanctioned by Law No. 6.899/81—constitutes a real legal principle that is applicable to any kind of legal relationships and in all branches of the law.” The court further said that it is well known that the phenomenon of monetary adjustment “is exclusively aimed at maintaining over time the real value of the debt by means of an alteration in its ‘nominal’ (numeric) expression. It does not generate any increase in the value nor does

31. Apelação Cível. REsp 426.304/1 SP. (de Lins. 2a Câmara do extinto Primeiro Tribunal de Alçada Civil de São Paulo, v.u. (june 17.04.91, Relator Juiz Sena Rebouças).

32. REsp 12.591-0/SP (1ª Turma STJ) (18.5.1992) Relator, Min. Demócrito Reinaldo, in *Boletim Adcoas* No. 138.819].

it translate into a punitive sanction. It simply derives from the passage of time under the currency devaluation regime.”

Under the rules sanctioned by such a law in a generally indexed economy,³³ it is said that one must transform any monetary obligations—especially those arising from contractual transactions—into “value-based debts” (*dívidas de valores*) in which the currency serves as a mere indicator of an amount which changes according to pre-established indexes.³⁴ It is to be noted that, in regard to the debts arising from judicial decisions, article 1 of Law 6.899/81 clearly encompasses all pending payments arising from unfulfilled obligations, and it mandates monetary adjustments of any pecuniary debt even in the absence of a specific contractual provision. In the case of a liquidated debt, monetary adjustment is to be undertaken from the time the debtor fell in *mora*, and in all other cases, from the time the judgment was issued. In some instances, i.e., obligations envisaging payment in a foreign currency,³⁵ the operation itself is usually not invalidated, but the clause that stipulates the foreign currency operation is sometimes nullified, although the sum agreed upon still has to be converted

33. It is debatable to what extent the Brazilian economy can still be considered a generally indexed economy, for, over time, many have argued for its des-indexation to some extent. Therefore, the “adjustment of monetary values” under article 884 of the New Civil Code should be put in perspective with time, if it is indeed correct.

34. GUSTAVO TEPEDINO, *TEMAS DE DIREITO CIVIL* 110-11 (3d ed., Editora Renovar 2004). There are official indexes for the adjustment of the monetary value of debts emanating from judicial decision. Law No. 6.899/81 itself was the product of the then-highly inflationary Brazilian economy, under the currency known as “Cruzeiro.” For further details on these indexes and related matters, and especially quotations in foreign currencies, see ARNOLDO WALD, *OBRIGAÇÕES E CONTRATOS* 53 (Editora Saraiva 2006); TEPEDINO, *supra*, at 111-15.

35. This issue is based on Decree No. 23.501 of 27/11/1933. This decree forbade in all internal contracts (contracts within the territory of Brazil) stipulations and payments in gold (it is to be remembered that in 1933 the world still operated under the gold standard) or in other determined currency, other than local currency. This provision originated from the inflation and the cambial imbalances of the time. These imbalances forced the Provisional Government of 1930 to enact such legislation, following the example of other countries. This legislation is still in force, but it has been modified over time and several exceptions are now included in its provisions.

into the national currency. In these cases the problem that often arises is to determine the value date for the conversion, whether it is the stipulation date or the payment date. In either hypothesis, the possibility of an unjustified enrichment can arise. In these situations, the Federal Supreme Court (*Supremo Tribunal Federal* (STF)) has decided that the conversion to the national currency is to be considered from the date of the stipulation (i.e., of the judgment), because, according to the court (Rel. Min. Morreira Alves),³⁶ a conversion based on the date of the payment would result in an unjustified enrichment (inaccurately labelled as *enriquecimento ilícito*)³⁷ of the creditor, who would benefit from the adjustment of the foreign currency during the duration of the contract. The adjustment of a contract to be performed in a foreign currency within the territory of Brazil was considered an invalid act by Article 1 of Decree No. 23.501/33.³⁸ Logically, the appealed decision from the TJRJ (*Tribunal de Justiça do Rio de Janeiro*) was equally founded on the principle forbidding an enrichment *sine causa*, but in that decision, the reasoning of the court regarding unjustified enrichment was based on the position of the other party. According to the TJRJ, the conversion of the sum borrowed through a loan contracted in a foreign currency had to be made from the date of payment, in order to avoid an enrichment

36. Foreign readers should take notice that under Brazilian legal terminology the justice (judge) issuing the judgment is commonly referred to as “Relator” (in brief, Rel.) and the judges or justices at the “Supremo Tribunal Federal” (STF) are referred to as “Ministers” (in brief, Min.).

37. It is not infrequent that some writers interchangeably use “*enriquecimento ilícito*” with “*enriquecimento injustificado*” (*sine causa*). Also, the confusion occasionally appears in some court decisions, like the one referred to here.

38. Decree 857/69 replaced Decree 23.501/33. Decree 857/69 envisaged in its art. 1, that “all contracts, titles and other documents as well as all obligations to be performed in Brazil, would be null and without effect, if they stipulated payment in gold or in a foreign currency, or in any other way restricted or rejected the use of Cruzeiro”. But art. 2 of Decree 857/69 made five exceptions. For further references see Judgment in REsp 1.323.219/RJ (Rel. Min. Nancy Andrighi, 3a. Turma). Other related decisions are: REsp 1.212.847/PR, REsp 804.791/MG, AgRg no Ag 1.043.637/MS, REsp 848.424/RJ e REsp 194.629/SP.

sine causa of the debtor in the face of the devaluation of the national currency while the contract was in operation. Thus, however the issue of “monetary adjustment” is seen, it is obvious that it leaves a windfall to one party in the equation, which though it might ultimately be justified (i.e., it is *cum causa*, because of the application of said Law 6.899/81), it might still be unfair.

Inflation ordinarily is not created by private citizens. It is usually the result of changes in market conditions, and sometimes the effect of government intervention in the economy. How can a provision aimed at all private persons (as well as public bodies) be made dependent upon an action taken by the state (where the state intervenes)? While the above interpretation would be adequate where one party is a public body (e.g., depository institutions such as a bank or the like), stretching that interpretation to cover ordinary private citizens has a penal quality to it, and its universal applicability to any branch of the law is questionable.

In order to capture the possible meaning of the phrase “updating the monetary values,” one must analyse the provision as a whole. It says that “whoever has been enriched at another’s expense without just cause shall restore what he has unduly acquired, after updating the monetary values.” The provision states a general principle and does not refer exclusively to money claims, although its final part speaks of “monetary values.” It refers to any enrichment acquired *sine causa*, be it a monetary benefit or any kind of a benefit whereby the recipient enriches himself at another’s expense. The caveat (*parágrafo único*) that follows the provision also indicates that if “updating monetary values” were to refer to currency inflation, it would be incongruent with an enrichment consisting in a specific thing—for which the calculation of the value of the enrichment, if the thing has been lost or no longer exists, is made at the time when the demand is made (*litis contestatio*), and not the moment when the thing was acquired by the defendant. This assertion—that the enrichment generally is to be considered from the time of *litis contestatio*—is well

entrenched in Brazilian law, because, as Pontes de Miranda once said: “what is given in the case of unjustified enrichment is not the value of the thing at the time the enrichment occurred, but the value of the defendant’s enrichment as it enriches him at the time the action is brought.”³⁹ The same author elaborated on this view by adding the following example in respect of a specific thing:

If the thing had remained in the hands of the plaintiff its value would now be ‘*a*’, but because it remained in the hands of the defendant, its value is now ‘*a+x*’, then the value to be restored to the claimant is ‘*a+x*’, save for the cases that fall under article 966 of the Civil Code of 1916.⁴⁰

Article 966, which constitutes an exception in Pontes de Miranda’s analysis, provided as follows: “The provisions of articles 510-519 shall apply to the fruits, accessories, improvements and deteriorations of the thing given in undue payment.”⁴¹ These provisions have not changed that much under the new Code.⁴² Rodrigues Filho Eulámpio⁴³ exemplifies the application of the then article 966 by referring to a São Paulo court decision⁴⁴ in which it appears that a disputed salary was fixed in a decision by a lower court. On appeal, the Court of Appeals reduced the quantum to a lower sum, and of course ordered the immediate restitution of the excess. The losing party tried to launch an appeal for a monetary correction of the quantity returned, but the court held the appeal to be inadmissible.

39. PONTES DE MIRANDA, *supra* note 12, at 176.

40. *Id.* at 177.

41. Article 966, BRAZILIAN CIVIL CODE of 1916.

42. The new Civil Code, in art. 878, provides the following: “The provisions of this Code dealing with good faith or bad faith possession also apply, as the case may be, to fruits, accessories, improvements and deteriorations of the thing given in undue payment” (*Aos frutos, acessões, benfeitorias e deteriorações sobrevindas à coisa dada em pagamento indevido, aplica-se o disposto neste Código sobre o possuidor de boa-fé ou de má-fé, conforme o caso*).

43. RODRIGUES FILHO EULÁMPIO, *CÓDIGO CIVIL ANOTADO* 838 (3d ed., Editora Síntese 2001).

44. The decision is reported and commented upon at TJSP, RT 613/96.

The example given by Pontes de Miranda does not detract from the general proposition that in an enrichment claim, the measure of the enrichment is calculated from the time of the institution of the action, save some exceptions. In this example he is dealing with an existing thing which is still held by the defendant, and while remaining with the defendant, its value has changed from x to y . Because what ought to be restored is the thing itself, the proposition does not create any problem. However, if what ought to be restored is not the thing itself, but its value, and the holder had notice at the time that the thing might have been lost, then the measure can indeed be $(a+x)$, for in such a case the defendant will be precluded from denying the claim because he had knowledge that the thing belonged to another. Therefore, in some circumstances of unjustified enrichment liability, the fungible or non-fungible character of the thing might be relevant.

In any event, the words “after updating the monetary values” added to the general principle seem to reflect the old notion of enrichment liability adopted in the 1916 Civil Code, which only considered “undue payment” and made the whole field look as if it were dependent upon a payment, as earlier stated.⁴⁵ Indeed, that seems to be the message that those words are conveying; that is to say, the general principle of enrichment *sine causa* is seen as though it could only emanate from a performance through payment of money. If that is the meaning ascribed to the general principle, then, if it is not a limited vision of the field as a whole, it might be an oversight of the drafting team. The latter is probably an accurate explanation, because no one today adopts the restrictive view that makes up the first possibility of interpretation. The Italian provision (article 2041 of the *Codice Civile*) that inspired the Brazilian drafters does not mention any sort of balancing of monetary values. The provision there reads:

45. *Supra* Part II.B.

General cause of action for unjustified enrichment. A person who has enriched himself without cause⁴⁶ at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss. If the enrichment consists of a special thing, the person who received it is bound to return it in kind if it is still in existence at the time of the demand.⁴⁷

In this author's opinion it would have been better not to attach the words "updating monetary values" to the general enrichment principle, but to have inserted a separate clause dealing with the issue. Each case could have been dealt with according to its merits, but with the benefit of having a clause in the Code authorizing such mechanism, thus avoiding the danger of excessive exercise of discretionary powers by the courts.

A further problem that can arise from the fact that those words are attached to the general enrichment principle becomes evident from the fact that the structure adopted for the unjustified enrichment law in the Civil Code clearly separates "undue payment" (the *condictio*-claim) from the "general enrichment claim" (the *versio*-claim). Under such a scheme, where a *condictio*-claim (undue payment) applies, the *versio*-claim (the general principle) does not. If that is not the case, why were they separated, and why do the undue payment clauses precede the general enrichment clauses? When one looks at the practical application of "adjustment of monetary values", although this phrase is used in the general enrichment clause, adjustments are applied to scenarios that fall under the concept of "undue payment," and even beyond. The above-cited quotation in *REsp. 12.591.0/SP*⁴⁸ illustrates this fact. For this reason, it would have

46. Note that similar to Brazilian art. 884 of the Civil Code of 2002, Italian art. 2041 says "*senza giusta causa*" ("without a just cause").

47. This Italian general principle is then followed by the subsidiarity rule in art. 2042 which provides: "*Subsidiary character of action*: An action for unjustified enrichment cannot be instituted if the injured person can exercise another action to obtain compensation for the injury suffered."

48. *REsp. 12.591-0/SP* (1ª Turma STJ) (18.5.1992) Relator, Min. Demócrito Reinaldo, in *Boletim Adcoas* No. 138.819]: "The systematic

been better if the general principle would have been placed earlier in the structure of the Code, rather than after the heading on “undue payment.”

IV. CHANGE OF POSITION (LOSS OF ENRICHMENT) DEFENCE AND INFLATION

Can change of position (loss of enrichment) be a defence in circumstances of monetary inflation under Brazilian enrichment law? *Prima facie*, Brazilian law does not directly recognise change of position (loss of enrichment) as a defence to unjustified enrichment claims, save perhaps an application by analogy of article 238 of the new Civil Code, which deals with impossibility of performance in cases of obligations to give a *certa res* (a specific thing). Article 238 reads as follows: “If the obligation is to restore a certain thing, and this thing, without the debtor’s fault, is lost before the transfer (*traditio*), the creditor shall suffer the loss, and the obligation will be terminated, save his rights up to the date of the loss.” This provision does not appear in the law of unjustified enrichment. I have discussed elsewhere⁴⁹ that, because the caveat to article 884 of the new Civil Code already provides a solution where the thing has been lost (i.e., “it must be restored by its value”), article 238 does not seem to apply to claims arising under article 884 because, if it were otherwise, the mechanism provided for in article 884 would be rendered redundant.⁵⁰ There are, however, subtle manifestations of a change of position defence in the formulation of some provisions of the Code.⁵¹ The issue of monetary adjustment in unjustified enrichment law may indeed constitute another subtle manifestation of the need of a change-of-

monetary adjustment of debits arising from judicial decisions—sanctioned by Law No. 6.899/81—constitutes a real legal principle that is applicable to any kind of legal relationships and in all branches of the law” (author’s translation).

49. See Jorge, *supra* note 26, ch. 4.

50. *Id.*

51. See Jorge, *supra* note 26, at 158-278.

position (loss of enrichment) defence. This proposition will be discussed below.⁵² For the time being, however, it is enough to say that in loss of enrichment situations, the defendant is saying: “I do not have the enrichment I once had anymore.” In contrast, in situations of monetary correction, the plaintiff, by asking for the monetary value to be adjusted, or by having it done by the court *mero motu*, is really saying that “the defendant has, in fact, more than he seems to have.” If the defendant indeed has more than he seems to have, on what ground is the plaintiff entitled to that “extra amount”?

V. SUBTLE MESSAGES EMANATING FROM THE BRAZILIAN FORMULATION OF ENRICHMENT LIABILITY

A. *General Remarks*

No one doubts today that a general principle is a welcome development. By sanctioning a general principle, the Brazilian legal system has made it easier for the claim to be raised without undue complications. The formulation followed, however, seems problematic. Adding the expression “after making monetary correction” impacts not only the measure of recovery, but also the timing of its assessment and the interlinked issue of interest in money. To what extent is an unjustified enrichment claim amenable to adjustment? Does the new provision sanction a dual interest regime in enrichment claims (if interest is at all claimable), or does it sanction only one regime? These issues are addressed below.⁵³

B. *What Does the Brazilian Approach and Experience Tell Us?*

The general manifestation of the unjustified enrichment doctrine under current Brazilian law is, to some extent, similar or analogous to many other civil law jurisdictions, especially those

52. See *infra* Part V.B.

53. See *infra* Part V.C.

following the “Pothier School,” varying only in some nuances. However, there are at least two important aspects in which Brazilian law is very peculiar and such aspects relay noteworthy messages to other jurisdictions. The first message that can be extracted from the Brazilian formulation of the unjustified enrichment doctrine is that in whatever way a legal system tries to ward off loss of enrichment as an objective defence in its enrichment law, the system will still need to address the issue. If it cannot do so directly, it will do so by analogy. If a system gives way to a general enrichment action, it is bound to establish not only mechanisms to protect vulnerable receivers, but also to specify to what extent its enrichment law will delimit the right of recovery in “borderline” cases. Notwithstanding, omitting a general enrichment defence and relying on analogy is problematic. That is because the approach may lead to the conception of an enrichment doctrine which is too restrictive and leaves aside many deserving cases in the attempt to protect the integrity of the principle as enshrined in the code.

The need for a change of position defence becomes even stronger if that system also places emphasis on the concept of good faith throughout its private law. That is exactly what happens under current Brazilian enrichment law, because the notion of good faith permeates the civil code; hence, the subtle manifestations of loss of enrichment defence we observe in the Brazilian enrichment law.

The second important message emanating from Brazilian enrichment law is the need to establish the real place and the consequences of inflation within enrichment liability. Generally, in their private law, most legal systems adhere to the “nominal value principle,” and this principle, *prima facie*, constitutes an obstacle to adapt, say, a contract, on the basis of regular inflation, unless the parties have agreed to do so. While, on the one hand, the creditor normally ought to bear the risk of depreciation of the currency, an

appreciation of the currency seems to favour the debtor.⁵⁴ The situation, however, might be different if inflation is no longer ordinary in so far as contract law in general is concerned. Here we encounter two trends of thought (in some legal systems), one adhering strictly to the “nominal value principle,” while the other advocates adjustment rules. Different reasons are advanced to sustain each contention. It ought to be remembered that, according to the nominalist theory, the extent of monetary obligations is independent of the functional value of money, especially its purchasing power. Equally important is the fact that nominalism favors stability of transactions and offers courts a cushion for expediency. It is impossible to account for every fluctuation in the purchasing power of money. Another difficulty in adopting full-fledged valorism and abandoning nominalism is the possible question as to whether a change in the purchasing power of money

54. See, e.g., PRINCIPLES OF EUROPEAN CONTRACT LAW, art. 6:111. To the same effect is article 6:258 of *Burgerlijk Wetboek* (the new Dutch Civil Code) [hereinafter BW], and, to some extent, article 6:260 BW. In Dutch legal doctrine, Hartkamp, for instance, remarks that in reverse cases regarding the influence of appreciation of immovable property on marriage settlements, the Dutch Supreme Court disregarded the nominal value principle on the basis of unforeseen circumstances. ARTHUR S. HARTKAMP, *ASSER'S HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT, VERBINTENISSENRECHT, ALGEMENE LEER DER OVEREENKOMSTEN* n. 338 (2005), cited in Mirella Peletier, *Common Core of European Private Law – Change of Circumstances – Dutch Report* (Research Offices, Supreme Court of The Netherlands), available at <http://www.unexpected-circumstances.org/Dutch%20report%20nov.%2006.doc> (last visited September 28, 2013). In other words, the court adjusted the value, taking into account appreciation or depreciation of the currency. Hartkamp refers here to cases reported in HR 10 January 1992, *NJ* 1992, 651; HR 15 September 1995, *NJ* 1996, 616; HR 12 June 1987, *NJ* 1988, 150. For a detailed discussion of the issue in Québec, see Mackaay & Fabien, *supra* note 1. Other informative sources in a historical perspective may be the following: John P. Dawson & Frank E. Cooper, *The Effect of Inflation on Private Contracts: United States, 1861-1879*, 33 MICH. L. REV. 852 (1935); John P. Dawson, *The Effect of Inflation on Private Contracts: Germany, 1914-1924*, 33 MICH. L. REV. 171 (1934); PROCTOR, *supra* note 1 (who discusses, among other aspects, the impact of the decision in *Sempra Metals* on the right to interest and the nominalism principle); HIRSCHBERG, *supra* note 1; John Swan, *Damages, Specific Performance, Inflation and Interest*, 10 REAL PROPERTY REPORT 267 (1980) (Can.) and Duncan Wallace, *Inflation and Assessment of Construction Cost Damages*, 98 L.Q.R. 406 (1982) (Can.).

not originating from credit expansion or contraction should be taken into account.⁵⁵ Thus, those adhering to the general application of the nominal principle usually contend that it would be contrary to the “criterion” of reasonableness and equity if, for example, the judge were to adapt a contract in random occurrences (i.e., in the case of one plaintiff), even though many other people in society will equally be affected by the same “exceptional inflation.” However, where regular inflation affects a long-term contract, there is a tendency to consider exceptional cases and allow some judicial intervention to adjust the contract. The underlying idea for such adjustment is that it would be unreasonable if a disproportionately inflationary advantage simply fell into the lap of one of the contracting parties. To avoid that “unjust” outcome, some theorists think that the “disturbed contractual equilibrium should always be restored.”⁵⁶ These considerations, however, fall mostly within contract law, though their ambit can stretch beyond that field.

What is the position under unjustified enrichment law, in which the parties to the claim may not necessarily be linked by an underlying contract denoting voluntary assumption of risks? Can monetary inflation qualify as a form of change-of-position/circumstances? If so, how would it operate? Are there any difficulties in proving this potential aspect of the defence?

The appendage of “monetary correction” to the general principle against enrichment *sine causa* in the new Brazilian Civil Code⁵⁷ indicates that the issue transcends the ambit of contractual obligations. Such an appendage to the general principle was unfortunate, as mentioned earlier, because this appendage throws

55. Friedrich Kessler, *Book Review: Money in the Law*, 40 COLUM. L. REV. 175, 176 (1940).

56. A few examples of case law leaning in this direction can be found in Dutch law: HR 12 June 1987, *NJ* 1988, 150; HR 30 January 1991, *NJ* 1992, 191; HR 15 September 1995, *NJ* 1996, 616 (all Dutch cases cited here are taken from Peletier, *supra* note 54, at 6).

57. Brazilian Civil Code, art. 884 (2002).

the general principle into confusion. But the disapproval of the appendage does not necessarily mean that the issue should not feature within the doctrine of unjustified enrichment. Mention was made earlier that the drafters of the Civil Code should have done so in a separate provision. What is the message that can be extracted from inflation in the context of unjustified enrichment?

The general process of inflation can give rise to a multitude of different problems. For the purpose of this paper the most salient problems would be revalorization and discharge.⁵⁸ Once again, it can be seen that there is a need to know how the enrichment came about. While revalorization (of a currency), in this context, presupposes a debt that must be paid or repaid in certain monetary units and, thereby, the possibility of adjustment, discharge of the obligation indicates that the claim arises from a contract and there are underlying cost variations.⁵⁹ When inflation is seen from the perspective of discharging a contractual obligation, the concept presupposes a voluntary agreement between the parties, and inflation might be seen as one of the risks voluntarily assumed. When looking at things from the perspective of revalorization, the concept does not necessarily presuppose a contract between the parties. It may also entail a unilateral act.

The issue straddles several areas: third party claims, risk assumption, and termination or modification of contracts, among others. Apparently, in cases of devaluation there is ordinarily no problem of impossibility to restore the benefit received, nor is there any issue of bad faith. The receiver is ready to restore the benefit received, the only problem being that the “purchasing power” of the money has diminished. Restoring the “money” in the same units as received corresponds numerically with restoring the

58. Ewoud Hondius & Hans Christoph Grigoleit, *Part III—The Case Studies* in UNEXPECTED CIRCUMSTANCES IN EUROPEAN CONTRACT LAW 216-17 (Ewoud Hondius & Hans Christoph Grigoleit eds., Cambridge Univ. Press 2011; published as part of THE COMMON CORE OF EUROPEAN PRIVATE LAW series).

59. See, e.g., Ian F.G. Baxter, *Depreciation of Money*, 52 CANADIAN BAR REVIEW 577 (1974); Mackaay & Fabien, *supra* note 1.

“value received,” but value-wise, it actually corresponds to the “value remaining.” On what basis, then, can the plaintiff claim the restoration of the “actual value” (adjusted value), without leaving the defendant worse off, as a result of having received an undue/unjust gain? In these cases, why should the loss be shifted from an innocent and “mistaken or unmistaken” party to an innocent party who neither made a mistake nor brought about the event that led to the decline of the value?

The message that can be distilled from the Brazilian enrichment law (the new enrichment *sine causa* under article 884 of the new Civil Code, as discussed above) is that a situation of hyper-inflation can result in involuntary enrichment of one party at the expense of another. The issue, however, is complicated when addressed within the unjustified enrichment doctrine, because the act enriching one party and correspondingly impoverishing the other is ordinarily not done by the parties themselves, but by a third party, generally the government.⁶⁰ From the perspective of the parties, such an occurrence (currency devaluation) is more akin to a supervening event outside their control. Both parties would seemingly be innocent. Can a rule favouring the defendant apply to such cases where both parties are innocent? What would be the implications of such an application?

Thus far, it is *prima facie* a moot point in South African law, as well as in English⁶¹ and American⁶² law, whether monetary

60. Inflation is normally the product of government action, but, in the long run, events such as market turmoil in times of global recession, conflicts, or wars, may also lead to inflation. See the example of Germany, which borrowed heavily for the war effort during World War I, and the resulting effect after the Versailles Treaty, when the country had to pay reparations of billions of dollars in gold, leading to the uselessness of the *Reichsmark* and the introduction of the *Rentenmark* in 1924. See generally GERMAN HYPERINFLATION 1922/23: A LAW AND ECONOMICS APPROACH (Wolfgang Chr. Fischer ed., Eul Verlag 2010) [hereinafter GERMAN HYPERINFLATION].

61. In English law, note, however, that a dictum by Lord Roskill in *National Carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] 1 AC 675, 712 refers to inflation as one of the “circumstances in which the doctrine of frustration has been invoked, sometimes with success, sometimes without.” So, it is not very

inflation can qualify as relevant for the “change of position” defense to unjustified enrichment claims. Such a situation would be more common where there are steep currency fluctuations or hyperinflation, or total collapse of the currency, as happened in Germany in 1923⁶³ and Hungary in 1948,⁶⁴ or a near total collapse of the currency, such as the Brazilian “triple digit inflation”⁶⁵ of the 1980s-1990s, or the recent hyper-inflation in Zimbabwe. In assessing whether inflation should be considered as a potential basis for change-of-position, a distinction must be made between different degrees of inflation: slight inflation, severe or acute inflation, and a total collapse of the currency. Although the last two might be considered speculative in some economies, we have had a recent example, that of Zimbabwe, where it could not be said that inflation was acute or severe, but rather that it resulted in total

clear whether inflation falls within the former or within the latter group of circumstances.

62. Note, equally, some nuanced references to discharge of contract for inflation in ARTHUR L. CORBIN, CORBIN ON CONTRACTS 488 (§1360) (1962). He says that the “difference in value between the gold and paper currencies could have been taken into account in action for damages” thereby suggesting the possibility of discharging the contract (references to gold and paper currencies are made in relation to the “gold standard” which used to regulate international exchange, and which is more commonly known as the “Breton Wood system”). For related issues on the Gold Standard and possible unjust enrichment in currency devaluation in the U.S.A., see *Perry v. United States*, 294 U.S. 330 (1935).

63. See generally GERMAN HYPERINFLATION, *supra* note 60.

64. PIERRE L. SIKLOS, WAR FINANCES, HYPERINFLATION AND STABILIZATION IN HUNGARY 1938-1948 (MacMillan & St. Martin Press 1991).

65. A basic look at the data in Brazilian statistics in the 1980-1990s offers briefly the following picture: In the second half of the 1980s, and the beginning of 1990s, yearly inflation in Brazil reached the four digit level, with month-to-month inflation reaching 40%. Inflation, however, declined from a peak of 6,821.3% in the early 1990s to 375% within twelve months, on the back of seemingly more coherent macroeconomic policies anchored on a social contract. The launch of the *Plano Real* in July 1994 saw inflation, which had risen to 4,922%, decline to 33% within a year. In the second half of the 1990s, average inflation remained below 10%. It reached its lowest point in December 1998 at 1.65%. Today Brazil boasts, on average, of inflation below 6%. In September 2013, the recorded inflation rate was at 5.86% (See generally the 2013 edition of the IBGE (Brazilian Institute of Geography and Statistics), IBGE2013, BRASIL EM NUMEROS, BRAZIL IN FIGURES (IBGE 2003), also available at: http://biblioteca.ibge.gov.br/visualizacao/periodicos/2/bn_2013_v21.pdf).

collapse of the currency. It is not unimaginable that the judiciary might be called upon to decide enrichment cases in these circumstances. Where the claim arises from a “functioning” contract, the contract itself might provide for payment to be “indexed.” However, this only works if the inflation is somewhat predictable and manageable, and the remedy is contractual. Where the inflation is so extreme as to amount to a total collapse of currency, an indexation based on criteria pre-established by the parties may not work. The contract is simply “defunct”; performance amounts to near-impossibility, and thus, discharge might be the logical outcome.

It is more likely that in cases of extreme inflation, or total collapse of the currency, such effects on contracts and other private law matters will be dealt with by legislation and, therefore, the questions raised here would not need to be resolved by the courts based on default principles.⁶⁶ But should such legislation be wanting, there would still be room for judicial pronouncement and, therefore, the change-of-position defence would be available in these circumstances.

C. “Updating Monetary Value” and Interest on Money

A corollary to “valorism” in the unjustified enrichment doctrine is another important question: that of interest on money. This question, though only incidental for the purpose of this paper, is of great significance because it may influence the whole conception of unjustified enrichment law. Is interest on money recoverable under current Brazilian enrichment doctrine? If it is not, that is the end of the matter. However, if it is, then the following ramifications arise: If interest is due on a sum of money that must be returned, it is obvious that such interest is more likely

66. GUENTER H. TREITEL, *FRUSTRATION AND FORCE MAJEURE* 277 (Sweet & Maxwell 1994). *See also supra* note 65.

to be regarded as a fruit⁶⁷ of the principal sum. That being the case, it must also be assumed that such interest is to be earned from the time of receipt of the money,⁶⁸ or at least from the time of *litis contestatio*. Then, for example, if it is assumed that in an undue payment claim the restoration of interest is no less due than the restoration of the principal, the further question that needs to be asked is whether there are two different regimes for the recoverability of interest in enrichment claims under Brazilian law. Or, to frame the question another way, one would ask the following subsequent questions: (i) Is interest recoverable on a claim based on undue payment—the *condictio* version—or not? If it is, from what sum? (ii) Is interest recoverable in a claim based on enrichment *sine causa* or not? And, (iii) if the answer to (ii) is in the affirmative, what are the consequences that the recoverability of interest will have on calculating the measure of enrichment under article 884?

If one takes into consideration the fact that in many cases falling within the ambit of undue payment (the *condictio*-version of the enrichment claim) there is no special agreement between the parties regarding recovery, one should also assume that interest might not be recoverable. That is so because the sum owed on the basis of undue payment is not a commercial loan; even if it were considered a loan (*mutuum*) by way of analogy, the provisions dealing with “*o mútuo*” (articles 586-592) do not attract interest, except where the *mutuum* falls within the provisions of article 591,⁶⁹ which provides that a “*mútuo*” given for economic purposes attracts interest.⁷⁰

67. For example, art. 878 of the Brazilian Civil Code may implicitly be said to consider interest a fruit, for the article provides that: “The provisions of this Code dealing with good faith or bad faith possession, as the case may be, also apply to fruits, accessories, improvements and deteriorations of the thing given in undue payment.”

68. Other provisions of the Code making reference to interest are art. 591 and arts. 297, 389, 395, 404, 405, 406, 407, 552, 677, 833, etc.

69. Article 591 reads: “If a loan (*mutuum*) is given for economic purposes, interest is presumed to accrue, and such interest may not exceed the rate referred

In taking this view (of the non-recoverability of interest on undue payment), the assumption being made in this paper is that if the party received the money in good faith, believing it was his own, then he must also be free to deal with his money as he deems fit. Were it otherwise, there would be a danger that the defendant, who has not been earning interest on the money that he received, will be bound to make restoration beyond the extent of his enrichment. This would be equivalent to imposing additional liability on people without their knowledge. Put differently, if B had no agreement with A for the receipt of A's money, B cannot be bound to pay interest to A on that sum, because B is not A's investor. A probable exception to this, if the receiver is in good faith, would be if the money were directly deposited in an interest bearing account.

Meanwhile, if the word "fruits" in article 878 of the Code is understood to also encompass "interest," as it would appear to do (unless "thing given in undue payment" excludes money, which does not make sense), then the defendant equated to a *mala fide* possessor can be liable to the extent he was enriched by the "fruits," even if they might have been consumed. Should, however, a defendant under a claim falling within such provision be equated to (or assumed to be) a *bona fide* possessor, he should not be liable, even to the extent that he was enriched by the "fruits" he

to in article 406 (of the Code) on annual capitalization, otherwise it will be reduced" (*Destinando-se o mútuo a fins económicos, presumem-se devidos juros, os quais, sob pena de redução, não poderá exceder a taxa a que se refere o art. 406, permitida a capitalização anual*). BRAZILIAN CIVIL CODE, art. 591 (2002).

70. The Brazilian Civil Code drafters manifest here an authentic fidelity to Roman law, because interest was not payable on *mutuum* in Roman law as it was considered a gratuitous loan, normally concluded between friends. In fact, the drafters clearly distinguish two types of loans: the *comodato* (arts. 579-585) and *mútuo* (arts. 586-592). *Comodato*, according to the Code (art. 579), is the loan of non-fungible objects, while *mútuo* is conceived as the loan of fungible objects (art. 586). The borrower in the case of *mútuo* "has the obligation to restore to the lender a thing of the same nature, quality and quantity as received. BRAZILIAN CIVIL CODE, art. 586 (2002).

gathered and consumed in good faith. I reiterate that the provision clearly says that “[t]he provisions of this Code dealing with good faith or bad faith possession, as the case may be, also apply to fruits, accessories, improvements and deteriorations of the thing given in undue payment.” It is clear that the Brazilian Legislature, by framing article 878 (in so far as the consequences of the accrued fruits to “a thing received in undue payment” are concerned) to analogously differentiate a defendant who is a *bona fide* possessor from a *mala fide* possessor, directly indicates that the maxim “*bona fide possessor facit fructose perceptos et consumptos suos*”⁷¹ would indeed apply to such cases. This, in turn, implies by inference that a defendant who is equated to a *bona fide* possessor under article 878 of the Brazilian Civil Code has the defence of change of position (or loss of enrichment) in regard to the fruits. That would also imply that the defence which is applicable to the “fruits” is also applicable to the “principal”. For the time being, the question of interest in enrichment law as a whole will be addressed.

What about a case falling within the *actio de in rem versio* aspect of the claim? Does it attract interest and, if so, why? The circumstances giving rise to such a claim may vary from case to case, and there appears to be no unanimity about the contours of the claim. Nonetheless, the provisions of the Brazilian Civil Code (articles 884-886) are silent. For this reason, any conclusion that interest is claimable must be drawn either by inference or by cross-referencing to other provisions of the Code. Nonetheless, *prima facie*, interest seems to be claimable in unjustified enrichment law.⁷² According to article 404 of the Code, “losses and damages”,

71. Translated, the maxim means “The *bona fide* possessor makes the fruits gathered and consumed his own.”

72. For comparative insight, see art. VII-5:104 of the European Union DCFR (Draft Common Frame of Reference). Art. VII-5:105 there reads:

(1) Reversal of the enrichment extends to the fruits and use of the enrichment or, if less, any saving resulting from the fruits or use.

in case of monetary obligations, are to be paid after adjusting their monetary values in accordance with official indexes regularly established. The payment encompasses “interest, expenses and lawyer’s fees, without prejudice to contractual penalties.” According to article 405 of the Code “interest on *mora* accrues from the ‘initial citation’”⁷³ (in some cases, it is probably from the moment of first notification). These two provisions, however, cannot be said to apply to enrichment *sine causa*, because article 404 speaks of “losses and damages.” This clearly indicates it is not applicable to enrichment claims, because an unjustified enrichment claim is about gains obtained at another's expense without grounds and not “losses or damages” suffered. “Losses and damages” presuppose contractual or delictual (tort, or civil liability) claims. Likewise, article 405 cannot be said to apply because a defendant in an unjustified enrichment claim is not presumed to be *in mora* for the payment of money until he has notice of his delay. Until then, the defendant must be able to rely on the money that he received as being absolutely his. By inference, however, article 405 casts some light on the issue. If interest on *mora* runs from the initial citation, it is implied that from the moment the defendant has notice interest starts to accrue. By implication, this can be extended to an enrichment claim. If, under the enrichment *sine causa* doctrine, the measure of enrichment is calculated from the time of *litis contestatio* (or *litis pendente*), that also means that from that moment the defendant has notice of the claim. Any money “retained *sine causa*” is due from that moment as a debt,

(2) However, if the enriched person obtains the fruits or use in bad faith, reversal of the enrichment extends to the fruits and use even if the saving is less than the value of the fruits or use.

73. “Initial citation” is used in a wider sense. In some contexts it would appear that “initial citation” is strictly equated with “court judgment”, as “citation” seems to refer to a judge’s pronouncement. However, if being put *in mora* were to be understood in that sense alone, it would be too restrictive, even contradictory in some cases. A defendant who has been notified that he owes a sum of money is certainly put *in mora* from that moment if he knows that the money is not his to keep, even if the court decides so only at a future date.

unless the defendant has a recognised defence.⁷⁴ It can analogously be said that from the moment of *litis contestation* the defendant is put in *mora*, and therefore interest would start to accrue, and the sum owed from that moment is the base value (the principal sum) for calculating the interest.

Article 884 provides, however, that the amount to be restored is “known” only “after adjusting monetary values.” If the principal sum is not known until “monetary values have been adjusted,” can it really be said that the defendant has been put in *mora* for that unknown value of the debt? Put differently, if monetary adjustment is to be undertaken, from what date does interest start to accrue and based upon what principal sum? Is the “pre-adjusted value” of the principal taken into consideration for calculating the interest, or the “adjusted value”?

In any event, it is worth noting that the idea of a sum held *sine causa* being susceptible to adjustment according to the level of inflation implicitly embodies a nuanced conception of that sum being analogously considered a commercial loan (*a mutuum*). On this assumption, one might say that interest would accrue as of right, unless the parties “agreed” otherwise. If it does not accrue as of right, then it might be dependent on other factors. Policy considerations might be a candidate here.

If the measure of enrichment is considered as the “value received”, and this value is only “known” with certainty when the sum of money has been adjusted according to the rate of inflation over a given period, there is no “exact amount” to calculate interest on until the adjusted sum is determined. In such cases incongruence can arise between the sum claimed (the amount by which the defendant has been enriched) as “principal value”, and the sum that will serve as a basis for the calculation of interest. For example, if B is enriched *sine causa* at the expense of A for the sum of \$R 50.000 on January 29, 2008 and by January 31, 2009

74. Obviously, if “initial notice” is equated to court judgment, whichever defence the defendant might have had is of no consequence after judgment.

there is a 50% inflation of the currency with the result that the real value of the sum owed (\$R 50.000) has now become \$R 75.000, by the time judgment is passed, a simple interest of 20% on the principal amount owed from 29 January 2008 to 31 January 2009 would amount to \$R 10.000. If, on the other hand, the principal sum for the calculation of interest is now considered \$R 75.000, a simple interest of 20% on that sum is \$R15.000, if calculated per annum. However, interest may not be due before the date of the determination of the value (the day the judgment is issued), because there is no principal amount to serve as a basis for the calculation of interest. If the rate of 20% interest is levied on the \$R 75.000 now owed, it may not be applicable retrospectively to the date of *litis contestatio* (the date the claim arises), because no such amount was owed on January 29, 2008. The defendant was never put in *mora* on that date as owing the sum of \$R 75.000. Interest is ordinarily due either *ex lege*, *ex contractu* or *ex mora*. If none of these aspects apply, as a matter of principle, it becomes difficult to levy interest on a sum of money to be paid. One must then find ways to justify the imposition of interest on that sum of money.

In essence, accepting that the “final” proof of the extent of enrichment is only established after “adjusting the monetary values” would be equivalent to saying that any sum to be awarded as interest will be assessed as a “pre-judgment” interest, if it started to accrue from the time of receipt of the money. As a matter of principle, a dilemma emerges. On one hand, it can be said that whenever a defendant receives money and keeps it for a reasonable time, there is a presumption that he is earning ‘fruits’, and therefore he is being enriched *sine causa* with the plaintiff’s money. On the other hand, it is also uncertain whether the defendant is actually earning any interest, and, therefore, it is uncertain that he is being enriched. Consequently, in the face of uncertainty, to allow relief in any case where actual enrichment has

not been proved is inconsistent with the fundamental principle of unjustified enrichment.