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Estonian Perspective on Cour de Cassation 23 October 2012 (No. 11-12.978)

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1. Classification of Enrichment Claims in Estonian Law

The question of the relationship between contractual and unjust enrichment claims is topical also in the Estonian law, although cases such as decided by Cour de Cassation have not yet emerged in our court practice. In Estonian law, the norms regulating unjustified enrichment can be found in Chapter 52 of the Law of Obligations Act[1] (LOA). In classifying the enrichment claims, Estonian unjustified enrichment law follows the concepts developed in German legal doctrine. This can be explained by the fact that Estonian private law in general is mainly based on the principles characteristic to the Germanic legal family[2] and that the systematics, concepts, and terms of German law have been an important source material for drafters of Estonian civil law.[3] The unjustified enrichment provisions of LOA are modelled after the draft that in 1981 was proposed for reforming unjustified enrichment law in the German Civil Code.[4]

Division 1 of Chapter 52 of LOA (s. 1027) lays down the general principle that a person must transfer to another person that which is received from the other person without legal ground. Section 1027 of the LOA cannot be invoked as a basis of claim because the principle contained in it is further specified in the following three divisions, each of them complementing different branches of law

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1 Võlaõigusseadus – RT I, 31 Dec. 2013, 10 (in Estonian). Available in English at http://www.legaltext.ee/en/andmebaas/ava.asp?m=022.

2 For an overview of how new legislation was drafted and adopted after Estonia regained its independence in 1991, see P. VARUL, 'The Creation of New Estonian Private Law', 1. *European Review of Private Law* 2008, pp. 95–109.

3 H. MIKK, 'Über die Zivilrechtsreform in Estland', in *Grundbuch- und Notartage, 13.-15. Mai 1999* (Tallinn: Justizministerium der Republik Estland, 2000), p. 303.

4 D. KÖNIG, 'Empfehlt es sich, das Bereicherungsrecht im Hinblick auf seine Weiterentwicklung in Rechtsprechung und Lehre durch den Gesetzgebern neu zu ordnen?', in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts. Bd II.* (Bundesminister der Justiz, 1981), pp. 1515–1590. English translation of the König draft is available in R. ZIMMERMANN, 'Unjustified Enrichment: The Modern Civilian Approach', 15. *OJLS (Oxford Journal of Legal Studies)* 1995, pp. 425–429.

(contract law, tort law, and the law of *negotiorum gestio*).[5] This means that Estonian law does not recognize a general enrichment action. Instead, the LOA regulates several specific enrichment claims.

Accordingly, division 2 of Chapter 52 of the LOA (ss 1028–1036) governs reclamation of that which is received as a result of performance of obligations. The law does not refer to what is meant under 'performance', yet it is accepted in legal literature and court practice that performance means deliberate and intentional increase of another's assets with the purpose of performing an obligation.[6] Division 3 (ss 1037–1040) regulates compensation in the event of interference in other person's rights, whereas division 4 (ss 1041–1042) governs compensation of expenditures made for the benefit of other persons.

2. *Absence of Legal Ground* as a Prerequisite for an Enrichment Claim

A common denominator for all unjustified enrichment claims regulated in Chapter 52 of the LOA is the prerequisite that may be called 'absence of legal ground'. This means that enrichment law may be invoked only if someone has made a performance, interfered in other person's rights, or has made expenditures without there being any legal ground for such conduct. That *legal ground* may arise from provisions of law or a court decision[7] but also from a transaction.

An unjustified enrichment claim may exist simultaneously with other types of claims; in that case, the claimant may choose on which basis the claim will be stated.[8] For example, the Supreme Court has found that the claimant is free to choose between a delictual claim for damages and the enrichment claim arising from interference in other person's rights.[9] However, it is recognized in Estonian legal literature and in court practice that the existence of a valid contract between the parties precludes claims based on unjustified enrichment law.[10]

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5 P. Varul, I. Kull, V. Kõve & M. Käerdi, *Võlaõigusseadus III. Kommenteeritud väljaanne* (Tallinn: Juura, 2009), p. 582; T. Tampuu, *Lepinguväliste võlasuhete õigus* (Tallinn: Juura, 2012), p. 73.

6 Varul *et al.*, *Võlaõigusseadus III. Kommenteeritud väljaanne*, p. 585; Tampuu, *Lepinguväliste võlasuhete õigus*, p. 78; T. Kivisild & A. Hussar, 'Alusetu rikastumine puudustega pangaülekande puhul Eesti ja Saksa õiguses', 4. *Juridica* 2005, p. 260; Civil Chamber of the Estonian Supreme Court, 20 Dec. 2005, Case 3-2-1-136-05, para. 23; Civil Chamber of the Estonian Supreme Court, 07.06.2011, Case 3-2-1-44-11, para. 34.

7 The Supreme Court has stated that the defendant's enrichment is not unjustified if he has received compensation on the basis of a court decision, Civil Chamber of the Estonian Supreme Court, 9 Jun. 2006, Case 3-2-1-25-06, para. 10.

8 Tampuu, *Lepinguväliste võlasuhete õigus*, p. 74.

9 Civil Chamber of the Estonian Supreme Court, 17.06.2011, Case 3-2-1-47-11, para. 14.

10 Varul *et al.*, *Võlaõigusseadus III. Kommenteeritud väljaanne*, p. 587; Civil Chamber of the Estonian Supreme Court, 5 Dec. 2007, Case 3-2-1-107-07, para. 15.

A Supreme Court judgment from 2008 is instructive in this respect.[11] In that case, the claimant and defendant had concluded a contract under which the defendant was obliged to build and sell to the claimant an apartment. Among other things, the contract did include the specification of all the works concerning the interior design and the list of equipment (with reference to prices) to be installed in the apartment. After the apartment was sold to the claimant, he pointed out that the list added to the contract also included a bathtub, but there was no bathtub in the apartment. Therefore, he requested that the defendant should return the sum equal to the price of the bathtub. In stating his claim, the claimant referred to section 1028 of the LOA and explained that since he had paid for the item he actually did not get, the defendant has been enriched without legal ground. The Supreme Court found that the claimant cannot rely on unjustified enrichment norms in the given situation. Namely, if the claimant had paid to the defendant a sum pursuant to the contract concluded between them, and if this contract is valid, this contract is to be regarded as a legal ground for payment. By not installing into the apartment the items in question, the defendant has breached the contract and therefore the claimant may apply the contractual remedies.[12]

Thus, the existence of a valid contract is regarded as a 'legal ground', which means that the solutions to possible problems between the contract parties are to be found in the contractual regime. This means that the parties who have concluded a contract in freely exercising their private autonomy are bound to the rules of contract. Therefore, one may conclude that if the case of Cour de Cassation 23 October 2012 No. 11-12.978 would be solved under Estonian law, unjustified enrichment law could not be applied since the prerequisite of 'absence of legal ground' is not fulfilled.[13] Moreover, it must be noted that unjustified enrichment law aims at returning that which the defendant has received without legal ground and not at compensating the negative effects in the claimant's property[14] (such as loss of clientele, as in the given case of Cour de Cassation).

Having established that the solution to the problem under question must be found in contract law, it has to be analyzed if and on what basis the loss of clientele can be compensated under Estonian contract law regime.

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11 Civil Chamber of the Estonian Supreme Court, 24 Sep. 2008, Case 3-2-1-62-08.

12 *Ibid.*, para. 9.

13 Even the lack of statutory regulation regarding the type of contract in question does not change the situation: if a particular contract does not meet the characteristics of any specific type of contracts regulated in the law, norms that regulate similar types of contracts are applied on the basis of analogy; see P. Varul, I. Kull, V. Kõve & M. Käerdi, *Võlaõigusseadus I. Kommenteeritud väljaanne* (Tallinn: Juura, 2006), p. 4.

14 Civil Chamber of the Estonian Supreme Court, 13 Dec. 2006, Case 3-2-1-124-06, para. 14.

3. Contractual Claim for Compensation

3.1. Type of Contract

In order to determine which set of norms of the Estonian contract law should be applied, we first need to qualify the contract that in the case description is referred to as 'franchise contract'. The Estonian LOA has a special chapter dedicated to franchise contract (ss 375–378 of the LOA). However, according to section 375 of the LOA, franchise contract is defined as a contract by which the franchisor undertakes to grant to another person (the franchisee) a set of rights and information that belongs to the franchisor for use in the economic or professional activities of the franchisee, including the right to the trade mark, commercial identifications, and know-how of the franchisor. The distribution agreement between SFR and the franchisee in the Cour de Cassation case does not seem to fit into this definition, and thus, those norms cannot be applied to their relationship.

The contract between SFR and the franchisee could rather be qualified either as an agency contract or a contract of commission. An agency contract is defined in section 670(1) of the LOA as follows: 'By an agency contract, one person (the agent) undertakes, in the interests of and for the benefit of another person (the mandator), to negotiate or enter into contracts in the name and on account of the mandator independently and on a permanent basis. The mandator undertakes to pay a fee to the agent therefor.' Thus, the characteristic performance of the agent is to carry out negotiations or concluding contracts in the name and on account of the mandator independently on a permanent basis.

The contract of commission, by contrast, is defined in section 692(1) of the LOA. By a contract of commission, one person (the commission agent) undertakes to enter into a transaction in the commission agent's own name and on account of another person (the principal), above all to sell an object belonging to the principal or buy an object for the principal (the commission object). The principal undertakes to pay the commission agent a fee (commission) therefor. Here, we see that the characteristic performance of the commission agent is to conclude contracts (including sales contracts) in his own name but on account of the principal. However, if the activity of the commission agent with respect to the principal is of a permanent nature, certain provisions of the agency law are applied to the relationship between a principal and a commission agent as well (s. 692(3) of the LOA). Thus, the provisions of the agency contract regulating the agency fee, non-competition clause, right to compensation for termination of contract, and compensation for damage caused by termination of contract are applied to a contract of commission as well.[15] It has to be stressed that all those provisions of the agency regulation are partly mandatory even in

15 See also VARUL *et al.*, *Võlaõigusseadus III. Kommenteeritud väljaanne*, pp. 163–164.

business-to-business (b2b) transactions: according to section 688(5) of the LOA, any agreements entered into before the termination of an agency contract that preclude or restrict the right of an agent to a termination-of-contract compensation or compensation for damage are void. Similar provisions restricting party autonomy with the aim of protecting the agent can be found in sections 682 (6), 686(2), and 689(6) and in section 687 of the LOA.

As the activity of the franchisee with respect to the SFR in the Cour de Cassation case was of permanent nature, the aforementioned agency law provisions will be applicable irrespective of whether the contract would be qualified as an agency contract or a contract of commission. Moreover, those protective provisions would most likely be applied by analogy even if the contract between the franchisee and SFR would be qualified neither as an agency nor as a contract of commission but rather as a different distribution contract (that is, if the franchisee has acquired the goods from SFR and sells them in his own name and on his own account, thus bearing all the economic risks). This is the view taken in German law[16] and it is quite common to use German legal practice as an argument for construing Estonian law. The Estonian Supreme Court has clearly stated that the laws of other states and international practice can be used to construe domestic Estonian law, stressing that:

> Although we cannot automatically transplant foreign case law, we can use the analogous laws and practices of other states as a comparative tool to construe the meaning and purpose of Estonian law. […] Most of all, this applies to questions for which we do not yet have established case law but in other countries such well-established practices exist. It concerns states that have a fairly similar legal system, most of all the Member States of the European Union and primarily the states that belong to the Continental-European law family.[17]

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16 See M. Martinek, F.J. Semler, S. Habermeier & E. Flohr, *Handbuch des Vertriebsrecht* (3. Auflage, München: C.H. Beck, 2010), s. 15, no. 17; H. Oetker, *Kommentar zum Handelsgesetzbuch (HGB)*, (3. Auflage, München: C.H. Beck, 2013), s. 89b HGB, nos 60–67.

17 Civil Chamber of the Estonian Supreme Court, 21 Dec. 2004, Case 3-2-1-145-04, paras 23 and 39. In this case, the Estonian Supreme Court used the German Law on Public Limited Companies (*Aktiengesetz*) – and the case law based on it – to construe the regulation of the takeover of shares in the Estonian Commercial Code. The possibility of using comparative case law as a tool for construing Estonian Civil Law has been stated also in the decisions of the Civil Chamber of the Estonian Supreme Court, Case 3-2-1-4-06, 30 Mar. 2006, para. 24 and Case 3-2-1-103-08, 9 Dec. 2008, para. 20.

The same position has been taken in the Estonian legal literature.[18] Thus, as the regulation of the agency contract and the contract of commission in the Estonian LOA are mainly modelled after the respective provisions in the German Commercial Code (*Handelsgesetzbuch*),[19] it can be predicted that the construction of the Estonian distributorship law would follow the same path as taken in Germany. This means that the protective provisions of agency law – including the compensation in case of termination of the contract – are most probably applied to all kinds of distribution contracts.[20]

3.2. Right of Agent to Compensation for Termination of Contract

We have now established that section 688 of the LOA providing for a termination-of- contract compensation can be applied to the relationship between SFR and the franchisee irrespective of the precise qualification of the distribution contract in the given case. Under section 688 of the LOA, an agent has the right to receive separate compensation upon termination of an agency contract if four cumulative conditions are met. The first condition for the compensation claim is the fact that the agent has created business relationships with new clients for a mandator or significantly extended the existing business relationships of the mandator. Second, the mandator must have significantly benefited from such business relationships even after termination of the agency contract. The third condition is that due to the termination of the agency contract, the agent loses the right to an agency fee that, had the contract continued, the agent would have been entitled to on contracts that were already entered into or would have been entered into in the future with persons who, as a result of the activities of the agent, entered into a permanent business relationship with the mandator for entry into contracts that were usually negotiated or entered into by the agent. Fourth, payment of the compensation must be justified taking into consideration all the circumstances. The burden of proof for all those four conditions lies, in principle, with the agent.

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18 See P. Varul, I. Kull, V. Kõve & M. Käerdi, *Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne* (Tallinn: Juura, 2010), p. 9, K. Sein, 'Estland – ein Versuchsfeld für das Europäische Privatrecht? Estnische Erfahrungen mit der Anwendung der Prinzipien des vereinheitlichten Europäischen Privatrechts', 1. *Zeitschrift für Gemeinschaftsprivatrecht* 2013, p. 13 and I. Kull, 'Eesti tsiviilõiguse allikate tugev ja nõrk kohustuslikkus', 7. *Juridica* 2010, p. 469.

19 Varul *et al.*, *Võlaõigusseadus III. Kommenteeritud väljaanne*, p. 120. The chapter on agency contract also implements the EC Commercial Agency Directive (Council Directive 86/653/EEC of 18 Dec. 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. OJ L 382, 31/12/1986, pp. 17–21).

20 Should the Estonian court practice take the opposite view, then there is no compensation mechanism for the loss of clientele for the distributor/franchisee – neither contractual nor based on unjust enrichment law.

The purpose of the compensation is to compensate for the future profit that he would have gained due to his efforts but which is now impossible because of the termination: upon termination, the agent loses the possibility of gaining profit by concluding contracts with his previous clientele.[21] Thus, the main idea of the compensation under section 688 of the LOA is to compensate the agent for the loss of clientele. Therefore, the fact that the Estonian law does not provide for an unjust enrichment claim[22] in such circumstances becomes understandable: the same result can be achieved via a contractual compensation claim. We also see that one of the conditions of the contractual compensation claim – namely, the second one – makes the claim of compensation dependent on the enrichment of the principal.

The described compensation mechanism is based on Article 17(2) of the EC Commercial Agency Directive. Under Article 17(1) of the Directive,[23] the Member States should make a choice between the indemnity system of Article 17(2) (modelled after the German law) and the compensation system of Article 17(3) (modelled mostly after French law).[24] Paradoxically, it seems that the Estonian legislator has implemented both systems: the indemnity system in section 688(1) of the LOA and the compensation system in section 688(3) of the LOA. Namely, under section 688(3) of LOA, payment of a termination-of-contract compensation[25] does not preclude or restrict the right of an agent to demand compensation for damage caused to the agent by the termination of the agency contract. Such damage is presumed to exist if an agent does not receive the agency fee that the agent would have earned had the agency contract continued, while at the same time the mandator gained substantial income due to the activities of the agent. Such damage is also presumed to exist if the agent was unable to amortize expenses that the agent incurred due to performance of the agency contract and following the instructions provided by the mandator. Section 688(3) of the LOA means that the claims of the agent under sections 688(1) and 688(3) can be asserted cumulatively.

The fact that – at least according to the wording of the law – those two claims can be asserted cumulatively makes it extremely difficult to calculate the sum that the agent is entitled to. Until now, there is no jurisprudence on the calculation of the compensation under section 688 of LOA. It is clear, though,

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21 VARUL *et al.*, *Võlaõigusseadus III. Kommenteeritud väljaanne*, p. 149.

22 See above at Ch. 2.

23 According to Art. 17(1) of the Directive, Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with para. 2 or compensated for damage in accordance with para. 3.

24 Report on the application of Art. 17 of Council Directive on the co-ordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC), COM(96) 364 final, 1, 5.

25 That is the compensation under s. 688 (1) of the LOA.

that both claims are in some way or another proceeding from the loss of profit of the agent due to the termination of the contract and the benefit or enrichment of the principal. The agent is entitled to compensation only if he has brought to the principal new customers or increased business with existing customers.

3.3. Exclusion of Agent's Compensation Claim

It must be stressed that in certain cases the compensation of the agent for the loss of clientele is excluded. According to section 688(4) of the LOA, an agent does not have the right to a termination-of-contract compensation or compensation for damage specified if: (1) the agency contract is cancelled by the agent, except in the case where the reason for cancellation is a circumstance dependent on the mandator or the age or state of health of the agent that does not enable the agent to continue the activities thereof; (2) the agency contract is cancelled by the mandator due to the culpable behaviour of the agent; (3) after termination of a contract, the mandator and the agent enter into an agreement pursuant to which the agent is substituted by a third party who pays a fee to the departing agent in an amount equal to the termination-of-contract compensation and compensation for damage to which the agent would otherwise be entitled; or (4) acting as an agent was an ancillary activity of the agent.

In the given Cour de Cassation case, the contract was neither cancelled by the agent, he did not receive a compensation form a substituting third party nor was his activity an ancillary one. However, it is, under the described circumstances of the case, possible that the agency contract was terminated due to the culpable behaviour of the agent. Therefore, the outcome of the case under Estonian law would depend on whether the breach of contract of the franchisee was culpable or not. If the franchisee failed to meet his quota that he owed to SFR due to his fault, he will not be entitled to compensation. If, however, there was no fault on his part and the sole reason of his breach of contract were unforeseeable circumstances outside his control,[26] he would, in principle, be able to claim compensation.

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26 It could be argued that, e.g., unexpected rescission of the market could constitute such circumstances.