A Guide to the Principles of European Law on Unjustified Enrichment*
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Rather than attempting a comprehensive guide to the Principles on Unjustified Enrichment Law, this paper provides a cursory introduction to the articles contained therein, or at any rate outlines what we currently think we mean them to say. (In the work of the Study Group, as in the case of any other European network of lawyers, one quickly learns to appreciate that it is possible to reach an apparently solid agreement on a particular linguistic formula, only later to discover that this hides a multitude of different interpretations which are intimately tied to national preconceptions and that there is no actual agreement on substance.) Such is the density of the forest which is the law of unjustified enrichment one can hardly be confident that one has all the important trees in one's vision at any one time; one is apt to lose sight of important markers and – especially when tackling three-party situations – inclined to lose one's orientation. This at any rate has been our experience in the (dare one say it, pioneering) programme of the Study Group in formulating European rules.

The reasons for this difficulty are manifold. In the first place, the notion, scope and structure of unjustified enrichment law – even where this is deeply rooted in the legal system – vary so considerably from jurisdiction to jurisdiction within Europe that no consensual starting point immediately presented itself. This is tied to the practical function of unjustified enrichment law as the dustcart of private law, sweeping up problems that other fields of law leave behind. It is difficult enough for a national legal system to shape the boundaries and internal architecture of enrichment law into something coherent. The task is exacerbated in a European perspective – and not merely because of the diverse contours and content of contract law, property law and the like which leave their imprint on the ‘supplementary’ body of law which is enrichment law. Many of the rules of these other fields of private law on which enrichment law is parasitic either fall outside the scope of our project altogether (as is the case with family law, succession law and much of property law) or else remain (or have remained) to be fixed in a final draft (as has been the case for transfer of title, for example, and even sales law). Academics are often accused of constructing ivory towers; if model European rules on enrichment law fall into that architectural category this should be a cause for praise rather than criticism since it is no easy enterprise to build an ivory tower on a missing or shifting edifice. This applies to the working through of illustrative examples as much as the actual formulation of the rules themselves. One has only to consider the comparatively simple case of a

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1 The exact limits of the work on transfer of title have yet to be finalised. However, this will in any case not extend to transfer of property rights in immovables. Nor are leases of immovables – at any rate in so far as they create proprietary or quasi-proprietary rights (i.e. effects vis-à-vis third parties) – within the scope of our project.
completely executed sale of goods which is avoided by one of the parties to appreciate the stumbling blocks. Until one has identified the circumstances in which title to the goods passes and the effect of the avoidance on any transfer of title it is impossible to pigeon-hole precisely the benefit which has accrued to a purchaser still in possession of the goods. That uncertainty is further overshadowed by the issue of interaction of enrichment claims with (potential) rights of vindication. We are blessed in already being able to draw on the general part of contract law in the Principles of European Contract Law (PECL), but even here there are gaps. For instance, they do not purport to address the invalidity of contracts on grounds of lack of capacity. Equally, for better or for worse, the Study Group has sometimes been constrained by solutions already taken in preparing those general rules of contract law. So, for example, our approach in Article 6:103 on illegality as a defence to an enrichment claim broadly reflects that which has been taken in the PECL, where a court is presented with a menu of possible outcomes in terms of enforceability or validity of the contract and invited, given the facts and context of the case, to select the solution most fitting to the rationale for the particular illegality involved. This trades certainty for flexibility. In the light of that it would not have been possible to offer any more precision in fashioning an illegality-based defence to enrichment claims.

Turning to the articles as such, the following purports to do no more than present a smattering of salient propositions. Firstly, we opted for a unitary approach, Article 1:101 setting out a solitary, but comprehensive, basis of claim dependent on the four elements of (a) enrichment, (b) disadvantage, (c) attribution of the one to the other, and (d) absence of legal justification – each of which is elaborated in a following dedicated chapter. The remaining chapters are concerned with (a) the quantum of liability and the mode of satisfaction of that liability, (b) defences and (c) the relationship of enrichment claims or enrichment law with other private law rules or rights and also the status of the rules where there is a public law dimension.

Of course, one could have opened with a chapter on scope of application, elucidating the connections and boundaries of this area of the law with those of contract, tort, etc. However, even if this had been workable – and it may be doubted whether the bustling shoulder-rubbing position of enrichment law in the crowd of private law could ever be articulated in a precise, coherent and convincing manner – it would no doubt have smacked of Begriffsjurisprudenz, setting out what is not enrichment law before explaining what enrichment law is actually all about. It is for this reason of presentation rather than any statement about their importance that the rules in Chapter 7 find themselves posted to the conclusion of the draft.

Equally, it would have been conceivable to adopt a split approach to the field of unjustified enrichment law. This would involve bracketing out the reversal of performances or the return of prestations, leaving these to be resolved by