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Condictio causa data causa non secuta *and Development of the Contractual System*

Abstract

In this paper I deal with the relations between one of the basic unjustified enrichment claims in Roman law *condictio causa data causa non secuta* and the development of contract law from Antiquity to modern civil law. Two main issues of my research concern the *condictio* itself and the evolution of contract law from the Roman contractual nominalism to the modern principle of freedom of contract. In the first part of the paper I describe the legal character of *condictio causa data causa non secuta* and fields of its application in Roman law, especially in cases of innominate contracts. The second part of the paper is devoted to Roman contractual nominalism, the achievements of Roman jurists in recognition of new contracts, the contribution made by Medieval lawyers, canonists, *lex Mercatoria* and Roman-Dutch jurisprudence in the 17th century for the general recognition of the *pacta sunt servanda* principle and freedom of contract. I come to the conclusion that as a result of the long-term evolution towards the freedom of contract *condictio causa data causa non secuta* lost its significance in the field of contracts. Already in the oldest civil codes of modern times the scope of application of that *condictio* was narrow and as a rule did not extend to contracts. As a consequence, the need for its further existence was disputed during the preparatory work on the German civil code. In the last two parts of the paper I present the current significance, legal character and fields of application of the *condictio* in German and Polish civil law. As a rule in the contemporary law the *condictio* is not applicable within the framework of contract law.

Keywords: unjustified enrichment, *condictio*, freedom of contract, contractual system.

Słowa kluczowe: bezpodstawne wzbogacenie, *condictio*, wolność umów, reżim kontraktowy.

I. One of the greatest achievements of Roman jurists was their original concept of unjustified enrichment as an independent source of obligation, different from contracts and delicts. Although designations such as 'unjustified enrichment' or 'unjust enrichment' were not yet known in ancient times and the Roman concept of recovery of benefits gained without legal ground was limited in comparison with the modern one, Roman accomplishments in that field are uncontested and form foundations of modern regulations. The most important instrument used by an impoverished person to regain the financial benefits which went from his property to another person's property was a special action called *condictio*. In fact, the restitution was possible in several typical cases which in

the Roman Digest were classified as *condictio indebiti*,[1] *condictio ob rem*[2] (later named *condictio causa data causa non secuta*), *condictio ob turpem causam*,[3] *condictio sine causa*[4] and *condictio ex causa furtiva*.[5] This paper is devoted to *condictio causa data causa non secuta*, which is the Roman equivalent of modern "performance rendered for an intended purpose that has not been achieved". I concentrate only on one particular aspect – its relation to the development of contracts over the centuries, from Antiquity to the contemporary law. The concept of performance rendered for an intended purpose is still known in the contemporary law. In particular, it is regulated expressly in art. 410 § 2 of the Polish civil code, § 812 I sentence 2 of the German civil code and art. 62 subsection 2 of Swiss obligation law. It is known also in Austrian law, where it is derived from § 1435 of ABGB. Despite the significant differences in its practical application between current and Roman law, the Roman roots of the institution are still visible.

In Roman law the *condictio causa data causa non secuta* was applied in cases which could be roughly, without going into details and divergences, brought to the following four element scheme: (1) a performance that as a rule consisted in transfer of ownership (*datio*) was made; (2) the performance was made for an intended purpose which related to a specific future event, effect or state of affairs that was expected to occur (*ut aliquid sequatur*, *ut aliquid fieret*); (3) the purpose was not achieved; (4) the giver was entitled to reclaim the performance. There were many particular cases, described in the sources as *datio ob rem* or *datio ob causam*, where this *condictio* was useful; I mention only the most typical ones:[6]

1) in cases of so called innominate contracts,[7] that means agreements which did not belong to the group of regularly recognized contracts (nominate contracts), where one of the parties made performance in the expectation that he would receive counter-performance, but the other party did not render it;[8]
2) performance on the account of a future marriage, especially dowry, where the marriage did not follow;[9]
3) donation in contemplation of death, where the donor decided to regain it, because his life was no longer in danger or he outlived the recipient[10] or simply changed his mind;[11]

[1] D.12.6, C.4.5.
[2] D.12.4, C.4.6.
[3] D.12.5, C.4.7.
[4] D.12.7, C.4.9.
[5] D.13.1, C.4.8.
[6] Compare the examples collected by A. Söllner, *Der Bereicherungsanspruch wegen Nichteintritts des mit einer Leistung bezweckten Erfolges (§ 812 Abs. 1 S. 2, 2 Halbsatz BGB)*, AcP 1963, no. 163, p. 25 and D. Liebs, *Bereicherungsanspruch wegen Misserfolgs und Wegfall der Geschäftsgrundlage*, "Juristenzeitung" 1978, pp. 698 ff.
[7] The name *contractus innominati* (innominate contracts) is not originally Roman, but was created by glossators.
[8] D.12.4.16 (Cels. 3 dig.); D.12.6.52 (Pomp. 27 ad Q. Muc.); D.12.6.65.4 (Paul. 17 ad Plaut.); D.19.4.1.4 (Paul. 32 ad ed.); D.19.5.5.pr.-2 (Paul. 5 quaest.).
[9] D.12.4.10 (Iav. 1 ex Plaut.); D.12.4.8 (Ner. 2 membr.); D.12.4.7 (Iul. 16 dig.); D.12.4.9pr. (Paul. 17 ad Plaut.); D.22.1.38.pr.-1 (Paul. 6 ad Plaut.); D.12.4.6 (Ulp. 3 disput.); C.4.6.1.
[10] See D.12.1.19pr. (Iul. 1 dig.); D.39.5.1pr. (Iul. 17 dig.), D.39.6.27 (Marc. 5 regur.), D.39.6.35.2-3 (Paul. 6 ad l. Iul. et Pap.); D.39.6.39 (Paul. 17 ad. Plaut.); D.39.6.37.1 (Ulp. 15 ad l. Iul. et Pap.); I.2.7.2; C.4.6.6.
[11] D.39.6.37.1 (Ulp. 15 ad l. Iul. et Pap.); D.39.6.19 (Iul. 80 dig.); D.39.6.39 (Paul. 17 ad Plaut.).

4) donation in which the donor imposed a duty on the recipient (*donatio sub modo*), especially that the given thing had to be used in a particular way, where the recipient did not fulfil the duty;[12]
5) performance made to satisfy a condition reserved in a legal act, e.g. last will, under which the giver was entitled to receive financial benefit, e.g. an inheritance[13] or a bequest (*legatum*),[14] *implendae condicionis causa*, but then did not receive the benefit;
6) performance made in the expectation that the recipient would behave in a particular way, which could be compared to unenforceable counter-performance,[15] especially that he would emancipate a son in power,[16] manumit a slave (*datio ob manumissionem*),[17] travel to Capua;[18]
7) performance given by a man erroneously regarded as a slave in order to obtain freedom (in the case of *liber homo bona fide serviens*[19] or *quasi statuliber*[20]);
8) performance made on the account of the settlement (*transactio*) in order to avoid or end a civil trial (*datio propter transactionem*), where the trial was conducted;[21]
9) performance delivered to a person who was a *falsus procurator* in the expectation that the creditor would approve it, where such an approval did not take place.[22]

Those typical cases of performance made for an intended purpose can be systematized according to various criteria, especially according to the fact whether the purpose referred to the behaviour of the recipient or not, or the financial or non-financial character of the purpose. The purpose of the performance was distinguished from the motive of the giver, because in the case of the unilateral motive of the giver, e.g. a gift to win the friendship of the recipient, the recipient was not obliged to restitution.[23] However, the subject-matter of this paper deals only with the first of the above-mentioned examples of *condictio's* application – innominate contracts and development of the contractual system.

II. The field of application of *condictio causa data causa non secuta* was strictly connected with the limitations of the Roman contractual system and their gradual breaking down over centuries. This *condictio* derived its special significance from the fact

[12] D.39.5.2.7 (Iul. 60 dig.); C.4.6.2; C.4.6.3; C.4.54.1.
[13] D.12.6.65.3 (Paul. 17 ad Plaut.); D.12.4.1.1 (Ulp. 26 ad ed.); D.12.4.2 (Herm. 2 iur. epit.).
[14] D.12.4.1.1 (Ulp. 26 ad ed.); D.12.6.65.3 (Paul. 17 ad Plaut.).
[15] D. Liebs used the phrase *nicht einklagbaren Gegenleistung*; D. Liebs, *Bereicherungsanspruch…*, p. 698.
[16] D.12.4.1pr. (Ulp. 26 ad ed.).
[17] D.12.1.19pr. (Iul. 10 dig.); D.12.4.1pr. (Ulp. 26 ad ed.); D.12.4.3.2-4 (Ulp. 26 ad ed.); D.12.4.5.1-4 (Ulp. 2 disput.); D.19.5.7 (Pap. 2 quaest.); D.40.12.38.1 (Paul. 10 resp.); C.4.6.6; C.4.6.9.
[18] D.12.4.5pr. (Ulp. 2 disput.).
[19] D.12.6.67pr. (Scaev. 5 dig.); D.12.4.3.5 (Ulp. 26 ad ed.).
[20] D.12.4.3.6-9 (Ulp. 26 ad ed.).
[21] D.12.6.65.1 (Paul. 17 ad Plaut.); D.12.4.1pr. (Ulp. 26 ad ed.); D.12.4.3pr. (Ulp. 26 ad ed.); D.12.6.23.3 (Ulp. 43 ad Sab.).
[22] D.12.4.14 (Paul. 10 ad Sab.).
[23] It is illustrated especially in: D.39.5.2.7 (Iul. 60 dig.); D.12.4.3.7 (Ulp. 26 ad ed.); C.4.6.7.

that not every agreement was enforceable in Roman law.[24] There was no freedom of contract principle understood in today's modern sense, so not every agreement which was not contrary to the law or good morals (*boni mores*)[25] was protected at law by means of a procedural complaint (*actio*) which could be used by the aggrieved party to claim counter-performance or damages. The principles *nuda pactio obligationem not parit*[26] (bare agreement does not generate obligation) and *ex nudo enim pacto inter cives Romanos actio non nascitur*[27] (no right of action at law arises from a bare pact) governed the Roman system of contracts. A mere *pactum* (agreement) outside the situations recognized as contracts was not actionable. The Roman *praetor's* promise of *pacta conventa servabo* (I will respect the agreement),[28] which can be considered as the first expression of the *pacta sunt servanda* principle, was never recognized as such in Roman law.[29] Only certain agreements expressly recognized in *ius civile* as contracts were enforceable in the court. Today this particular and essential feature of Roman contract law is described as the principle of contractual nominalism (*numerus clausus* of contracts) and is opposed to the modern freedom of contract.[30] The famous Latin adage *pacta sunt servanda* (the agreements should be kept) was not formulated as such in Roman law and can be referred to the Roman contract law only to a limited degree and with reservations.[31]

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[24] R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town–Wetton–Johannesburg 1990, p. 843; *idem*, *Roman-Dutch Jurisprudence and its Contribution to European Private Law*, "Tulane Law Review" 1992, vol. 66 (6), pp. 1689 ff.

[25] Cf. art. 353[1] of the Polish civil code.

[26] D.2.14.7.4 (Ulp. 4 ad ed.); D.19.5.15 (Ulp. 42 ad Sab.); C.2.3.10.

[27] PS.2.14.1.

[28] Ait praetor: "pacta conventa, quae neque dolo malo, neque adversus leges plebis scita senatusconsulta decreta edicta principum, neque quo fraus cui eorum fiat facta erunt, servabo" (D.2.14.7.7, Ulp. 14 ad ed.), cf. ED.4.10, see O. Lenel, *Das Edictum perpetuum*, Leipzig 1907, pp. 64 ff.

[29] R.A. Momberg Uribe, *The Effect of Change of Circumstances on the Binding Force of Contracts*, Utrecht 2011, pp. 23 ff.; R. Świrgoń-Skok, *Pretorskie pacta conventa servabo jako rzymskie korzenie zasady pacta sunt servanda* ["Preatorian pacta conventa servabo as Roman Roots of the Principle pacta sunt servanda"] [in:] *Pacta sunt servanda – nierealny projekt czy gwarancja ładu* społecznego ["Pacta sunt servanda – Unreal Project or a Guarantee of the Social Order"], eds. E. Kozerska, P. Sadowski, A. Szymański, Kraków 2015, pp. 13 ff.

[30] E. Betti, *Der Typenzwang bei den römischen Rechtsgeschäften und die sogenannte Typenfreiheit des heutigen Rechts* [in:] *Festschrift für Leopold Wenger*, vol. 1, München 1944, pp. 249 ff.; H. Honsell, *Die Rückabwicklung sittenwidriger oder verbotener Geschäfte*, München 1974, pp. 70 ff.; A. Söllner, *Der Bereicherungsanspruch…*, p. 24; B. Schmidlin, *Zum Gegensatz zwischen römischer und moderner Vertragsauffassung: Typengebundenheit* [in:] *Maior viginti quinque annis. Essays in the Commemoration of the Sixth Lustrum of the Institute for the Legal History of the University of Utrecht*, Assen 1979, pp. 111 ff.; *idem*, *Das Nominatprinzip und seine Erweiterung durch die actio praescriptis verbis*, ZRG RA 2007, no. 124, pp. 53 ff.; R. Zimmermann, *The Law…*, p. 843; J. Kranjc, *Die "actio praescriptis verbis" als Formelaufbauproblem*, ZRG RA 1989, no. 107, pp. 434 ff.; M. Talamanca, *Contratto e patto nel diritto romano* [in:] *Le dottrine del contratto nella giurisprudenza romana*, ed. A. Burdese, Milano 2006, pp. 58 ff.; M. Artner, *Agere praescriptis verbis. Atypische Geschäftsinhalte und klassisches Formularverfahren*, Berlin 2002, pp. 11 ff.; L. Zhang, *I contratti innominati nel diritto romano*, Milano 2007, *passim*; M.T. Fögen, *Vom "Typenzwang" des römischen Rechts am Beispiel des Realvertrags* [in:] *Spuren des römischen Rechts. Festschrift für Bruno Huwiler zum 65. Geburtstag*, Bern 2007, pp. 254 ff.; A. Hirata, *I contratti innominati e il cosidetto Lebensrettungsvertrag nel diritto romano*, "Studia Warmińskie" 2014, no. 51, pp. 217 ff.; R. Świrgoń-Skok, *Pretorskie pacta…*, pp. 11 ff.

[31] R.A. Momberg Uribe, *The Effect…,* pp. 23 ff.; R. Świrgoń-Skok, *Pretorskie pacta…*, pp. 13 ff.

This limited number of agreements protected at law was an obstacle to the development of trade and economy, hence was gradually regarded as unsatisfactory. For urgent social and economic needs, the Roman classical jurists tried to expand the field of recognized agreements by granting to some of them (*nova negotia*) the special procedural complaint which enabled the party to demand counter-performance. Although this process did not lead to the recognition of the principle of freedom of contract in Roman law, the number of agreements protected by law increased significantly.

III. What did the *condictio causa data causa non secuta* have to do with that? Well, the traditional view in the Romanist literature regards this *condictio* as one of the means of protection of the above-mentioned innominate contracts.[32] A strict connection between this *condictio* and innominate contracts is emphasized in the literature.[33] They were reciprocal agreements in which one party obliged himself to give something or to do something for the other party in the expectation that the other party would give or do something for him. The agreements were brought to the structures *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*.[34] The problem was that the disappointed party who first performed did not have any procedural means to elicit the counter-performance. For a long time the only one remedy used to protect the party was the right to claim restitution of the performance already made by means of *condictio causa data causa non secuta*.

A survey of the sources of Roman law proves that the range of non-contractual agreements enforceable in the court was not restricted to the innominate contracts and was not so strictly connected with the *causa data causa non secuta* as it is often assumed. In fact, Marcus Antistius Labeo, who died at the beginning of the 1st century, granted juridical protection to some new agreements (*nova negotia*) which were not recognized as contracts. Labeo created the concept of *contractus as ultro citroque obligatio*.[35] It is

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[32] V. Arangio-Ruiz, *Istituzioni di diritto romano*, Napoli 1949, p. 361; B. Biondi, *Istituzioni di diritto romano*, Padova 1960, p. 320; B. Nicolas, *An Introduction to Roman Law*, Oxford 1962, p. 230; W.W. Buckland, *A Text-Book of Roman Law*, Cambridge 1963, p. 545; P. Bonfante, *Istituzioni di diritto romano*, Torino 1966, p. 518; H. Honsell, *Die Rückabwicklung…*, pp. 70 ff.; P. Fuentenseca, *Derecho privado romano*, Madrid 1978, p. 290; G. MacCormack, *The condictio causa data causa non secuta* [in:] *The Civil Law Tradition in Scotland*, ed. R. Evans-Jones, Edinburgh 1995, pp. 253 ff.; A. Söllner, *Der Bereicherungsanspruch…*, pp. 24 ff.; R. Zimmermann, *The Law…*, p. 532 ff. and pp. 843 ff.; J. Iglesias, *Derecho romano*, Barcelona 1999, p. 289; J.D. Harke, *Römisches Recht*, München 2008, p. 189.

[33] A. Söllner, *Der Bereicherungsanspruch…*, pp. 24 ff.; B. Kupisch, *Arrichimento nel diritto romano, medievale e moderno* [in:] "Digesto delle Discipline privatistiche. Sezione civile" 1987, no. 1, p. 429; *idem*, *Ungerechtfertigte Bereicherung. Geschichtliche Entwicklungen*, Heidelberg 1987, p. 13; R. Zimmermann, *The Law…*, pp. 843 ff.; N. Jansen, *Die Korrektur grundloser Vermögensverschiebungen als Restitution?*, ZRG RA 2003, no. 120, p. 112; W. Mossakowski, *Instytucja bezpodstawnego wzbogacenia (condictiones)* ["Institution of Unjustified Enrichment (condictiones)"], "Forum Iuridicum" 2004, no. 3, p. 94; J.D. Harke, *Römisches Recht*, p. 189.

[34] D.19.5.5pr. (Paul. 5 quaest.).

[35] The most important source for this concept is D.50.16.19 (Ulp. 11 ad ed.). For details see: A. Burdese, *Sul riconoscimento civile dei c.d. contratti innominati*, "Iura" 1985, no. 36, p. 21; A. Kremer, *Kontrakty nienazwane w prawie rzymskim w świetle kazuistyki* ["Innominate Contracts in Roman Casuistry"], Kraków 1991, pp. 48 ff.; F. Gallo, *Synallagma e conventio nel contratto. Ricerca degli archetipi della categoria contrattuale e spunti per la revisione di impostazioni moderne. Corso di diritto romano*, vol. 1, Torino 1992, pp. 83 ff.; C.A. Cannata, *Der Vertrag als zivilrechtlicher Obligierungsgrund in der römischen Jurisprudenz der klassischen Zeit* [in:] *Collatio iuris romani. Etudes dèdiès à H. Ankum*, Amsterdam 1995, pp. 62 ff.; T. Dalla Massara, *Alle origini della causa del contratto. Elaborazione di un concetto nella giurisprudenza*

not clear what should be understood by *ultro citroque obligatio*, because in the Romanist literature this phrase referred either to the nature of the legal bond between the parties or to the nature of the legal act which created the relation. According to the first view this phrase signified reciprocity of obligation, by which each party is obliged towards the other,[36] while the second view places more emphasis on the mutual nature of the 'act' of the parties in order to enter into obligation than on the obligation itself.[37] For my purpose it is not necessary to solve the dispute whether *ultro citroque obligatio* referred more to 'obligation characterized by reciprocity' or 'the act that generated reciprocal obligation'. Much more important is the conclusion that Labeo granted procedural protection to mere agreements that were binding on the basis of sole consent (*solo consensu*) despite the fact that they were not recognized as contracts in *ius civile*, especially consensual contracts.

Labeo was in favour of an open catalogue of contracts[38] and postulated to use the action for enforcement of an obligation, which he called *agere praescriptis verbis*[39] or *actio civilis in factum*,[40] in two basic types of agreements, not recognized as contracts yet, but that could be classified as *ultro citroque obligatio*. First, where the agreement was similar to a recognized contract but contained an element which was alien to this contract, which excluded its classification as that contract. Second, where the agreement consisted of elements of several different contracts and therefore could be classified as neither of them.[41] In fact, already in Labeo's times there were atypical agreements in which one of the parties could claim counter-performance regardless of the fact whether the

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classica, Padova 2004, p. 111; L. Zhang, *I contratti…*, p. 146 ff.; B. Schmidlin, *Das Nominatprinzip*…, pp. 53 ff.; M. Golecki, *Synallagma. Filozoficzne podstawy odpowiedzialności kontraktowej w klasycznym prawie rzymskim* ["Synallagma. Philosophical Bases of Contractual Liability in Classical Roman Law"], Toruń 2008, pp. 122 ff.

[36] M. Kaser, *Gaius und die Klassiker*, ZRG RA 1953, no. 70, p. 160; A. Burdese, *Sul riconoscimento…*, p. 21; G. MacCormack, *Contractual Theory and the Innominate Contracts*, SDHI 1985, no. 51, p. 136; M. Talamanca, *La tipicità ei contratti romani fra "conventio" e "stipulatio" fino a Labeone* [in:] *Contractus e pactum. Tipicità e libertà negoziale nell'esperienza tardo-repubblicana*, ed. F. Milazzo, Napoli 1990, pp. 96 ff.; *idem*, *Contratto e patto*…, pp. 50 ff.; T. Dalla Massara, *Alle origini…*, p. 115; *idem*, *Sul responsum di Aristone in D.2.14.7.2 (Ulp. 4 ad ed.): l'elaborazione del concetto di causa del contratto* [in:] *Le dottrine del contratto nella giurisprudenza romana*, ed. A. Burdese, Milano 2006, pp. 310 ff.; B. Schmidlin, *Das Nominatprinzip*…, pp. 74 ff.

[37] H.P. Benöhr, *Das sogennante Synallagma in den Konsensualkontrakten des klassischen römischen Rechts*, Hamburg 1965, pp. 10 ff.; L. Zhang, *I contratti…*, p. 156. This understanding of *ultro citroque obligatio* is supported by M. Golecki, *Synallagma…*, pp. 186 ff., p. 202.

[38] It is proved by the fact that in D.18.1.80.3 (Lab. 5 post. a Iav. epit.) he used the phrase *aliud genus contractus*. See C.A. Cannata, *Der Vertrag…*,pp. 59 ff.; L. Zhang, *I contratti…*, p. 160; M. Golecki, *Synallagma…*, p. 166.

[39] D.18.1.50 (Ulp. 11 ad ed.); D.19.5.19pr. (Ulp. 31 ad ed.), see L. Zhang, *I contratti…*, pp. 82 ff.; M. Golecki, *Synallagma…*, pp. 167 ff.

[40] D.19.5.1.1 (Pap. 8 quaest.); D.19.5.1.2 (Pap. 8 quaest.), see: F. Gallo, *Synallagma…*, vol. 2, pp. 63 ff.; R. Santoro, *Actio civilis in factum, actio praescriptis verbis e praescriptio*, "Studi Sanfilippo" 1983, vol. 4, pp. 706 ff.; A. Szymańska, *Actio civilis in factum – actio preaescriptis verbis w responsach Labeona*, "Studia Iuridica" 2003, no. 41, p. 294; C.A. Cannata, *Der Vertrag…*, pp. 65 ff.; B. Schmidlin, *Das Nominatprinzip*…, pp. 78 ff.; M. Golecki, *Synallagma…*, p. 167. It is disputed if Labeo knew *actio praescriptis verbis*, which is suggested by Ulpian several times (D.19.5.17.1 (Ulp. 28 ad ed.); D.19.5.20pr. (Ulp. 32 ad ed.); D.19.5.20.2 (Ulp. 32 ad ed.), because it is unclear if the phrase was really formulated by Labeo, see: J. Kranjc, *Die actio…*, pp. 450 ff.; F. Gallo, *Synallagma…*, vol. 1, pp. 207 ff.; C.A. Cannata, *Der Vertrag…*, p. 65; L. Zhang, *I contratti…*, pp. 123 ff.

[41] D.19.5.1.1-2 (Pap. 8 quaest.); D.19.5.17.1 (Ulp. 28 ad ed.).

first performance had already been made. This fact proves that the *condictio* was not the only remedy used to protect the atypical agreements.

Another important step in the recognition of new agreements was taken by Aristo, who lived at the turn of the 1st and 2nd century. According to Aristo's concept of contract a party to the atypical agreement could claim counter-performance provided that he made his own performance. Contrary to Labeo's doctrine on the one hand those agreements were not binding on the basis of sole consent, but on the other hand they were not confined to the cases similar to the recognized contracts. The concept of Aristo was essential for the recognition of the category of innominate contracts understood as agreements in which action for counter-performance was only admissible provided that the claimant rendered his own performance.[42]

After the recognition of right to claim counter-performance by a party to an innominate contract the party who first performed was sufficiently protected by an action for counter-performance; however, *condictio* remained as an alternative remedy that provided the party with a right of withdrawal from the contract. The right to withdraw from an innominate contract could be exercised on account of a simple change of mind and did not have to be justified in any way. That right was called *ius paenitendi* and could be exercised until the other party offered the counter-performance. This was a peculiar feature of innominate contracts not applicable within the system of nominate contracts.

IV. After the rediscovery of the Roman Digest in the 11th century the evolution of the law of contract moved from the old Roman principle *ex nudo pacto non oritur actio* to the principle *ex nudo pacto oritur actio* (naked agreement generates an action) which was finally fully recognized by protagonists of natural law (*ius naturale*) in the 17th century. Many different factors contributed to the change of the principle.

Glossators used the term *pactum* to describe all agreements between two or more parties aimed at creating obligations and made distinctions between unenforceable agreements (*pacta nuda*, naked pacts) and enforceable ones (*pacta vestita*, pacts which are clothed).[43] Over the centuries the vast majority of pacts became *pacta vestita*. It turned out that in trade practice the Roman rule was insufficient. Already by the end of the Middle Ages, the international *lex Mercatoria* had abandoned the Roman principle (*ex pacto etiam nudo agunt mercatores*, *et numularii inter se*).[44] As a result, every informal agreement had, for all practical purposes, become legally binding.[45]

Another major factor in this development was the canon law. In the Middle Ages contracts were usually confirmed by oath, and for that reason breach of contract involved breach of a pledge of faith, which amounted to the sin of perjury. However, before God there is no difference between an informal promise and one confirmed by oath, between

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[42] On the nature of the contracts see D. Liebs, *Bereicherungsanspruch*..., p. 698.

[43] A. Söllner, *Die causa im Kondiktionen- und Vertragsrecht des Mittelalters bei Glossatoren, Kommentatoren und Kanonisten*, ZRG RA 1960, pp. 216 ff.; H. Dilcher, *Der Typenzwang im mittelalterlichen Vertragsrecht*, ZRG RA 1960, pp. 270 ff.; R. Zimmermann, *Roman-Dutch Jurisprudence*…, p. 1690; R.A. Momberg Uribe, *The Effect*..., pp. 24 ff.

[44] Baldus, *Commentaria ad D.17.1.48,1 § Quintus Mucius*, Lugundi 1552.

[45] R. Zimmermann, *The Law*…, p. 540; *idem*, *Roman-Dutch Jurisprudence*…, p. 1690; R.A. Momberg Uribe, *The Effect*..., p. 25.

a simple lie and perjury.[46] In the Decretals of Pope Gregory IX there is a sentence *pacta quantumcunque nuda, servanda sunt* (even naked pacts should be kept)[47] which is regarded as the direct root of the maxim *pacta sunt servanda*.[48] Therefore, the informal promises had to be kept in the same manner as an oath. In the course of the 14th century it became the prevailing opinion among canonists that all informal contractual agreements were directly enforceable.[49] However, one should remember that canon law was not normally applicable *in foro civili*.

Finally, general recognition of the maxim *pacta sunt sevanda* was one of the greatest achievements of the 17th century Roman-Dutch lawyers:[50] *moribus nostris ex nudo pacto non solum exceptionem, sed actionem competere constat* (in our customs a naked pact generates not only an exception but also a procedural complaint).[51] Hugo Grotius wrote that *fides* formed the basis for justice, hence promises had to be kept, regardless of whether they were made in a specific form or not.[52] Grotius based his view on texts from the Digest and Cicero's *De Officiis* and stated that in terms of natural law all pacts were binding, extending the justification of such a principle to the fact that even God "would be acting against His nature, should He not keep His promises".[53] From about the 18th century onwards the rule *ex nudo pacto oritur actio* prevailed. The principle that all pacts must be binding was accepted by Dutch courts and received in other European states[54] with its famous expression in art. 1134 of the French Code civil: "contracts legally formed have the force of law for the parties who made them".

V. Recognition of the principle *pacta sunt servanda* made the entire concept of innominate contract redundant,[55] because all lawful contracts became binding and protected at law. However, the process of the disappearance of innominate contracts as they were understood in Roman law took centuries.

The medieval lawyers referred the *condictio causa data causa non secuta* to their originally elaborated complex doctrine of *causa* with its division into various types of

[46] A. Söllner, *Die causa*…, pp. 240 ff.; R. Zimmermann, *The Law*…, p. 542; Ł.J. Korporowicz, *Pacta sunt servanda w prawie kanonicznym* ["Pacta sunt servanda in Canonical Law"] [in:] *Pacta sunt servanda – nierealny projekt*…, pp. 117 ff.; W. Uruszczak, *Znaczenie średniowiecznej kanonistyki dla prawa zobowiązań* ["Meaning of the Medieval Canon Law for the Law of Obligation"] [in:] *Ex contractu, ex delicto. Z dziejów prawa zobowiązań* ["Ex contractu, ex delicto. The History of the Law of Obligation"], eds. M. Mikuła, K. Stolarski, Kraków 2012, pp. 15 ff.

[47] Decretals of Gregory IX (1234) 1.35.1.

[48] R. Zimmerman, *Roman-Dutch Jurisprudence*…, p. 1691; W. Uruszczak, *Znaczenie*..., p. 17; cf. Ł.J. Korporowicz, *Pacta*..., p. 115.

[49] R. Zimmermann, *The Law*…, p. 543; R.A. Momberg Uribe, *The Effect*..., p. 25.

[50] R. Zimmerman, *Roman-Dutch Jurisprudence*…, pp. 1691 ff.

[51] Simon van Groenewegen, *Tractatus de legibus abrogatis et inusitatis in Hollandia*, Cod.2.3.10, Lugduni Batavorum 1664.

[52] Hugo Grotius, *De iure belli ac pacis*, 2,11,1, Amsterdam 1642.

[53] R.A. Momberg Uribe, *The Effect*..., p. 26; D. Makiłła, *Pacta sunt servanda – grocjuszowski koncept prawnonaturalnego ładu w społeczeństwie* ["Pacta sunt servanda – Grotius' Concept of Natural Order in Society"] [in:] *Pacta sunt servanda – nierealny projekt*…, pp. 47 ff.

[54] R.A. Momberg Uribe, *The Effect*..., pp. 26 ff.

[55] Cf. B. Kupisch, *Arrichimento*…, p. 247.

causa.[56] They said that the *condictio* could be brought where the expectation of an event was the *causa finalis* of the person who gave something, but not where the expectation was *causa impulsiva* or *causa efficiens*.[57] *Condictio causa data causa non secuta* was assigned to *causa finalis* because of the necessity to fix the purpose of the performance.[58] *Causa impulsiva* was not the cause but some motive of an act.[59] As a practical result of their doctrine the *condictio* was not available where a person gave a gift merely hoping that the recipient would use it in a certain way and, what is more important, was not applied in the field of nominate contracts.[60]

Despite the evolution towards the freedom of contract principle the notion of innominate contracts was still significant in the Middle Ages. Medieval lawyers made a distinction between withdrawal from an innominate contract since its purpose was not achieved (*capite causae non secutae*) and because of a simple change of mind (*ex capite poenitentiae*).[61] The party who first performed was able to withdraw from an innominate contract on account of a simple change of mind until he received counter-performance, irrespective of the attitude of the other party.[62] If the *condictio* was brought on account of the fact that the person who had first performed then changed his mind, one often spoke of *condictio ex paenitentia* rather than *condictio causa data causa non secuta*.[63] The former *condictio* was just a subspecies of the latter.[64]

Since in the course of time gradually more and more agreements had become contracts, there was no need any more to protect the party who had first performed by the right to demand restitution of his own performance. The action for counter-performance was a much more sufficient remedy than the right to claim restitution, because it allowed the party to achieve that which he expected when the contract was concluded. Nevertheless, even in the 17th century the party to an innominate contract could choose between a contractual claim and *condictio*.[65] *Ius paenitendi* could be explained on account of the fact that the person who first performed had not yet himself received the counter-performance.

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[56] According to this doctrine, for parties to enter into a contract that the law will respect, they must have done so for one of two *causae*, or reasons: either to receive something in return or out of liberality, see J. Gordley, *The Jurists: A Critical History*, Oxford 2013, pp. 48 ff.; *idem*, *The Philosophical Origins of Modern Contract Doctrine*, Oxford 1991, pp. 49 ff. On *causa* generally A. Söllner, *Die causa*…, pp. 182 ff.

[57] A. Söllner, *Die causa*…, pp. 195 ff.; J. Gordley, *The Philosophical Origins*…, p. 53.

[58] A. Söllner, *Die causa*…, p. 196; J. Gordley, *The Philosophical Origins*…, p. 53; F.L. Schäfer [in:] *Historisch-kritischer Kommentar zum BGB, Band III, Schuldrecht: Besonderer Teil, Teilband II*, Mohr Siebeck 2013, p. 2596.

[59] A. Söllner, *Die causa*…, pp. 197 ff., pp. 204 ff.; J. Gordley, *The Philosophical Origins*…, p. 54.

[60] A. Söllner, *Die causa*…, pp. 211 ff.; F.L. Schäfer, *Historisch-kritischer Kommentar*..., p. 2596.

[61] R. Zimmermann, *The Law*…, p. 858.

[62] *Ibidem*.

[63] Bartolus, *Commentaria ad D.12.4.5* (*Si pecuniam*): "In contractibus innominatis, si ex una parte impletur, ex alia non: propter casum cessat condictio ob causam, quasi non sequuta: sed habet locum ex paenitentia".

[64] R. Zimmermann, *The Law*…, p. 844, note 68.

[65] This possibility was stressed by W.A. Lauterbach "In contratibus innimonatis […] in arbitrio est dantis, an actione praescriptis verbis ad contractum implendum, an vero […] ad datum repetentum agree velit" (W.A. Lauterbach, *Collegium theoretico-practicum*, Lib. XII, Tit. IV, Tab. Ad IX).

VI. Owing to the general recognition of the freedom of contract principle in the 18th century *condictio causa data causa non secuta* lost its significance in the field of contracts. Already in the oldest civil codes of modern times the scope of application of that *condictio* was narrow and as a rule did not extend to contracts. Code civil of Maximilian III Joseph (*Codex Maximilianeus Bavaricus Civilis*), enacted in the Duchy of Bavaria in 1756, described the *condictio causa data causa non secuta* as a remedy by means of which the claimant sought restitution of a thing from the recipient or his heirs for want of cause (*aus Mangel der Ursach*) for which the thing was given.[66] The code rejected expressly the right to withdraw from the contract both in cases of nominate contracts and innominate ones,[67] therefore this *condictio* could not be used on the basis of such a withdrawal.[68] At that time *ius paenitendi* lost its significance in the field of contracts.[69]

Prussian Landrecht (General State Laws of the Prussian States)[70] of 1794 laid down a rule that where a party to a contract gave or did something on the basis of the contract and the other party did not fulfil his obligation, the provisions on contractual liability had to be applied.[71] Since such a situation was not governed by unjustified enrichment law, there was no place for *condictio causa data causa non secuta* here. However, in cases outside the field of contracts the remedy was perfectly applicable[72] and the code contained detailed provisions on different reasons for the frustration of the purpose of the performance. There was no provision which specified the non-contractual cases where the right to reclaim performance was recognized, apart from the general rule that the purpose was to be achieved by the recipient.[73]

VII. During the work on one common civil code for the united Germany the need for the further existence of *condictio causa data causa non secuta* was disputed. The view was presented that because the category of innominate contract fell away the entire concept of that *condictio* became redundant, therefore its incorporation in the code would lead to a misleading impression that it had to be applied also to reciprocal contracts where the counter-performance was not rendered. Nevertheless, the codification commission came to the conclusion that although the field of application of that *condictio*

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[66] CMBC IV, 13 § 7.

[67] The code defined innominate contract as an agreement which did not have its legal name and whose content was not defined by law (CMBC IV, 12 § 1), so this notion received a different understanding from that which it had in Roman law.

[68] "Die Reue heu zu Tag in Contractibus innominatis sowenig, als in nominatis mehr Platz greiffe, so folgt von selbst, dass die auch die gegenwärtige Klag um blosser Reue willen nicht angestellt warden könne" (CMCB IV, 13 § 7, see also IV, 12, § 1).

[69] B. Kupisch, *Arrichimento*…, p. 247.

[70] The original name is: *Allgemeines Landrecht für die Preußischen Staaten*.

[71] ALR I, 16 § 199: "Was Rechtens sey, wenn aus einem geschlossenen Vertrage einer der Contrahenten etwas gegeben oder geleistet hatl hiernächst aber die Erfüllung des Verteges von Seitem des Adern nicht stattfindet, is gehörigen Orts bestimmt (Tit. V § 360). In turn the relevant provision stipulated that kann der Versprechende durch eigne Schuld dem Andern das Versprochene nich geben oder leisten, so muß er für das Interesse nach Verhältniß seiner eintretenden Verchuldung haften" (§ 277 ff.).

[72] ALR I, 16 § 200: "Ist, außer dem Falle eines Vertrages, etwas in Rücksicht eines durch den Empfänger zu erfüllenden Zwecks gegeben oder geleistet worden, so muß der Empfänger in der Regel diesen Zweck erfüllen, oder das Empfangene zurückgeben".

[73] ALR I, 16 § 200.

was much smaller than in Roman law it did not lose its significance in modern law. To prove that thesis there were several examples of its modern application mentioned, particularly the case of dowry given on the account of a future marriage when the marriage did not follow.[74]

The German civil code (BGB), enacted in 1896, makes a fundamental distinction between two groups of claims: condictions due to undue performance (*Leistungskondiktionen*) and condictions due to other transfers of property without legal ground – so called non-performance condictions (*Nichtleistungskondiktionen*), known also as an enrichment 'by other means'.[75] Performance (*Leistung*) is understood here as every conscious, intentional increase in another's property.[76] The German concept of unjustified enrichment is a product of the Pandectist School of the 19th century strongly influenced by the sources of Roman law and various *condictiones* worked out by Roman lawyers.[77] German law has taken over from Roman law *condictio indebiti*,[78] *condictio sine causa*,[79] *condictio ob causam finitam*,[80] *condictio causa data causa non secuta*,[81] and *condictio ob turpem causam*.[82] The non-performance condictions or 'enrichment by other means' refer to infringement (*Eingriff*), expenditure (*Verwendung*), and recourse (*Rückgriff*).[83]

Condictio causa data causa non secuta is incorporated in § 812 I sent. 2 of the German civil code. According to that provision the duty to give the performance back exists if the result intended to be achieved in accordance with the contents of the legal transaction does not occur. The significance and peculiarity of this *condictio* in German law is very controversial, it is even described as 'historisches Überbleibsel' and 'Fremdkörper'.[84] Even the need for its further existence is contested.[85] The *condictio* covers the cases where the performance is made because of the expectation that a specific event or effect

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[74] Protocol of the codification commission of the German civil code, vol. II, pp. 692 ff.

[75] On this distinction see G. Dannemann, *German Law of Unjustified Enrichment and Restitution. A Comparative Introduction*, Oxford 2009, pp. 21 ff.

[76] See: BGHZ 58,184,188; D. Medicus, *Bürgerliches Recht*, Köln–Berlin–München 2004, p. 465; H. Brox, W.D. Walker, *Besonderes Schuldrecht*, München 2006, p. 470.

[77] About achievements of the Pandectist School in the field of unjust enrichment see F.L. Schäfer, […] *Historisch-kritischer Kommentar*..., pp. 2601 ff.

[78] § 812 1 (1) of the German civil code (BGB): "who obtains something as a result of the performance of another person (*condictio indebiti*) or otherwise (*condictio sine causa*) at his expense without legal grounds for doing so is under a duty to make restitution to him".

[79] *Ibidem*.

[80] § 812 1 (2): "This duty also exists if the legal grounds later lapse (*condictio ob causam finitam*) or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur (*condictio causa data causa non secuta*)".

[81] *Ibidem*.

[82] § 817.

[83] B.S. Markesinis, W. Lorenz, G. Dannemann, *The Law of Contracts and Restitution: A Comparative Introduction* [in:] *The German Law of Obligations*, vol. 1, Oxford 1997, pp. 714 ff.; K. Larenz, C.W. Canaris, *Lehrbuch des Schuldrechts*, vol. 2, München 1994, pp. 127 ff.; D. Medicus, *Bürgerliches Recht*, pp. 233 ff.

[84] This is the opinion of the leading German expert in unjustified enrichment law E. von Caemmerer, *Bereicherung und unerlaubte Handlung* [in:] *Festschrift für Ernst Rabel*, Tübingen 1954, pp. 333 ff.; cf. D. Liebs, *Bereicherungsanspruch...,* p. 697; M. Lieb [in:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 5, Schuldercht. Besonderer Teil III*, München 2007, p. 1308.

[85] G. Dannemann, *German Law*..., pp. 45 ff.; A. Röthel, *Die Kondition wegen Zweckvefehlung*, "Juristische Ausbildung" 2013, no. 12, p. 1246.

will occur in the future, in particular that the recipient will render counter-performance to which he is not legally obliged.[86] Its basic task is to enable the giver to claim restitution of his own performance if the expectation is not fulfilled, because in such a situation the claim for counter-performance does not exist and the recipient does not have the basis for keeping the good received any longer. As long as it is open whether the intended purpose will occur or not the recipient is entitled to retain the performance.[87] The purpose of the performance should be fixed by the parties or at least communicated to the recipient and accepted by him, so there should be some kind of arrangement between the parties, but it cannot generate enforceable obligation, otherwise the provisions on breach of the contract are applicable instead of *condictio*.[88] At the same time the expectation for the sake of which the performance is made cannot be a simple unilateral motive of the giver, but it must be known and approved by the recipient, which means that the recipient is completely aware that he is given the performance only because of the expectation of the future event and especially that it does not have the feature of donation.[89] Any express agreement on restitution of the performance in case the future effect does not occur is not necessary, because the restitution is provided by the law itself.[90] There are many different cases where the *condictio* is still applied in German law; the majority of them correspond to the cases of its application in Polish law, as I present below.[91] However, they do not refer to a situation where the purpose consists in a valid obligation, especially contractual, imposed on the recipient.

These remarks do not mean that the *condictio* has nothing to do at all with contracts and cannot arise against the background of a valid contract. Although it is very controversial in literature, in German case law the *condictio* is exceptionally referred to a situation where the purpose of the giver is inferred from the additional purpose of the contract, different from the counter-performance.[92] It is possible namely that besides the counter-performance, which is the basic purpose of the reciprocal contract, the contract envisages an additional purpose (*über die Leistung hinaus ein weitergehender Erfolg*, *Zusatzweck*), for example that the buyer will use the purchased item only in

[86] D. Liebs, *Bereicherungsanspruch*…, pp. 699 ff.; K. Larenz, C.W. Canaris, *Lehrbuch*…, pp. 150 ff.; G. Dannemann, *German law*…,pp. 45 ff.; A. Röthel, *Die Kondition,* pp. 1246 ff.; E. Pinzger [in:] *Beck'sche Kurzkommentare, Band 7, Palandt, Bürgerliches Gesetzbuch*, München 2004, pp. 1191 ff.; O. Mühl, W. Hadding [in:] *Soergel Kommentar zum Bürgerlichen Gesetzbuch, Band 5/1, Schuldrecht IV/1*, Stuttgart 2007, p. 1196, pp. 1142 ff.; H. Brox, W.D. Walker, *Besonderes Schuldrecht,* pp. 464 ff.; D. Medicus, *Schuldrecht II. Besonderer Teil*, München 2006, pp. 244 ff.

[87] M. Lieb, *Münchener Kommentar*…, p. 1309; G. Dannemann, *German Law*…, p. 45; E. Pinzger, p. 1191; O. Mühl, W. Hadding, *Soergel Kommentar*…, p. 1143.

[88] M. Lieb, *Münchener Kommentar*…, p. 1310; K. Larenz, C.W. Canaris, *Lehrbuch*…, p. 151; A. Röthel, *Die Kondition,* p. 1246; E. Pinzger, *Beck'sche Kurzkommentare,* p. 1191; O. Mühl, W. Hadding, *Soergel Kommentar*…, p. 1142; H. Brox, W.D. Walker, *Besonderes Schuldrecht*, pp. 464 ff.; D. Medicus, *Schuldrecht II.*…, pp. 245 ff.

[89] A. Söllner, *Der Bereicherungsanspruch*..., pp. 20 ff.; M. Lieb, *Münchener Kommentar*..., p. 1310; K. Larenz, C.W. Canaris, *Lehrbuch*..., pp. 151 ff.; E. Pinzger, *Beck'sche Kurzkommentare,* p. 1191; O. Mühl, W. Hadding [in:] *Soergel Kommentar zum Bürgerlichen Gesetzbuch*, Band 5/1, Schuldrecht IV/1, Stuttgart 2007, p. 1142; H. Brox, W.D. Walker, *Besonderes Schuldrecht*, p. 466.

[90] M. Lieb, *Münchener Kommentar*…, p. 1310.

[91] E. Pinzger, *Beck'sche Kurzkommentare,* p. 1192; O. Mühl, W. Hadding, *Soergel Kommentar*…, pp. 1146 ff.; K. Larenz, C.W. Canaris, *Lehrbuch*…, pp. 152 ff.

[92] K. Larenz, C.W. Canaris, *Lehrbuch*…, pp. 153 ff.; D. Medicus, *Schuldrecht II.*…, p. 245.

a specific way[93] or someone made a donation for a scientist to let him finance his research.[94] In the case where the additional purpose is not achieved the claim for restitution can be exceptionally allowed.

VIII. In Polish law the performance rendered for a specific purpose that has not been achieved is covered by art. 410 § 2 of the civil code. The contemporary concept of this institution is to a considerable extent different from the Roman one, but its ancient roots are still visible. The Latin name *condictio causa data causa non secuta* is still used in case law and in the literature of civil law.[95] The most important difference between Roman law and civil law in that field is the result of the evolution of contract law and elimination of the innominate contracts as they were understood in Roman law. This *condictio* is not applicable within the scope of contract law. When a party to contract fulfils his contractual obligation he can demand counter-performance. This party is entitled to withdraw from the contract only if the premises of withdrawal envisaged in art. 491–493 of the civil code are met. When he takes advantage of this right he is obliged to return to the other party all that he received from the latter under the contract and may demand not only restitution of his own performance but also compensation for any damage caused by non-performance of the other party's obligation (art. 494 c.c.). The right to claim the performance back after the withdrawal from the contract is not an unjustified enrichment claim and is not exercised by means of *condictio causa data causa non secuta.* Apart from that the right to withdraw from a contract may be stipulated in the contract itself and if the entitled party exercised it the contract is deemed not to have been concluded; in consequence whatever the parties have already provided should be returned (art. 395 c.c.). These rules on the consequences of withdrawal from the contract do not belong to unjustified enrichment law either, but they are specific solutions in the contract law.[96]

Generally, the purpose of the performance can refer to any future event or effect not prohibited by law.[97] In case law and the doctrine of civil law it is stressed that the *condictio* is not applicable where the purpose which the giver tries to pursue stems from the provisions of a contract concluded with the recipient. However, it is applied in cases where the purpose of the performance was to receive the equivalent performance from

[93] M. Lieb, *Münchener Kommentar*..., pp. 1310 ff.; E. Pinzger, *Beck'sche Kurzkommentare,* p. 1191; O. Mühl, W. Hadding, *Soergel Kommentar*..., pp. 144 ff.

[94] K. Larenz, C.W. Canaris, *Lehrbuch*..., p. 153.

[95] It is mentioned in almost all judgements and works in the footnotes of this article.

[96] Judgement of the Polish Supreme Court of 26.03.2002, II CKN 806/99; cf. A. Ohanowicz, *Bezpodstawne wzbogacenie (1981)* ["Unjustified Enrichment (1981)"] [in:] *idem*, *Wybór prac* ["Selected Works"], ed. A. Gulczyński, Warszawa 2007, pp. 1054 ff.; W. Serda, *Nienależne świadczenie* ["Undue Performance"], Warszawa 1988, p. 86; P. Mostowik [in:] *System prawa prywatnego*, t. 6: *Zobowiązania. Część ogólna* ["System of Private Law", vol. 6: "Obligations. General Part"], Warszawa 2006, pp. 266 ff.

[97] Judgements of the Polish Supreme Court of: 17.03.2011, IV CSK 344/10; 13.10.2011, V CSK 483/10; 21.04.2016, III CNP 18/15; 16.06.2016, V CSK 581/15; A. Ohanowicz, *Niesłuszne wzbogacenie* ["Unjust Enrichment"] [in:] *idem*, *Wybór prac* ["Selected Works"], pp. 837 ff.; *idem*, *Bezpodstawne wzbogacenie*, p. 1032; W. Serda, *Nienależne świadczenie*, pp. 92 ff.; E. Łętowska, *Bezpodstawne wzbogacenie* ["Unjustified Enrichment"], Warszawa 2000, pp. 98 ff.; P. Mostowik, *Bezpodstawne wzbogacenie*, "Studia Prawa Prywatnego" 2007, no. 2, p. 84; P. Księżak, *Bezpodstawne wzbogacenie. Art. 405– 414 KC* ["Unjustified Enrichment. Art. 405–414 of the Polish Civil Code"], Warszawa 2007, p. 191; *idem*, *Kodeks cywilny. Komentarz* ["Civil Code. Commentary"], ed. K. Osajda, Warszawa 2016, note 89 to art. 410.

the recipient who was not obliged to render the performance and the purpose was not achieved.[98] Moreover, the purpose of the performance should be fixed by the parties in a so called agreement as to the basis of performance,[99] which itself is not a contract and cannot be a simple motive.[100] In other words, there should be a meeting of wills, which in itself is not a contract and does not create enforceable obligations, from which it results that the recipient receives the performance only for the sake of the expected purpose.

There are three typical groups of such cases:

- First group: pre-performance (*przedświadczenie*), where the performance is made on the account of an expected future legal relationship which then does not arise, e.g. on the account of a future contract which against the expectation is not concluded[101] or a contract which is not concluded in a prescribed form in expectation that the form will be observed,[102] performance made at the same time when the offer is given to the recipient.[103]
- Second group: inducement (*skłanianie*), where the performance is made to induce the receiver to a specific behaviour to which he is unable to commit himself or does not want to be legally obliged,[104] e.g. gratuitous services or a gift in expectation that the recipient will institute the giver his heir[105] or that the recipient will marry the giver[106] or will stay with him in concubinage.[107] Where those expectations turn out to be false the giver can reclaim his performance.
- Third group: purposeful use (*celowe użycie*), where on the basis of the agreement the recipient should use the performance in a particular way,[108] e.g. he

[98] See judgements of the Polish Supreme Court of: 17.01.2002, III CKN 1500/00; 21.06.2011, I CSK 533/10; 13.10.2011, V CSK 483/10; 15.04.2015, IV CSK 456/14; 21.04.2016, III CNP 18/15; 16.06.2016, V CSK 581/15; W. Serda, *Nienależne świadczenie*, pp. 93 ff.; P. Mostowik, *Bezpodstawne wzbogacenie*, p. 84; P. Księżak, *Bezpodstawne wzbogacenie*, p. 191; *idem*, *Kodeks*…, note 89 to art. 410.

[99] More about the agreement see: judgements of the Polish Supreme Court of: 17.01.2002, III CKN 1500/00; 21.06.2011, I CSK 533/10; P. Księżak, *Bezpodstawne wzbogacenie*, p. 193; *idem*, *Kodeks*…, note 95 to art. 410.

[100] Judgement of the Polish Supreme Court of 15.04.2015, IV CSK 456/14; P. Mostowik, *Bezpodstawne wzbogacenie*, p. 85; P. Księżak, *Bezpodstawne wzbogacenie*, p. 192.

[101] Judgements of the Polish Supreme Court of: 8.03.2007, III CZP 3/07; 13.10.2011, V CSK 483/10; A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 836; *idem*, *Bezpodstawne wzbogacenie*, p. 1031; E. Łętowska, *Bezpodstawne wzbogacenie*, p. 99 ff.; P. Mostowik, *Bezpodstawne wzbogacenie*, p. 84; P. Księżak, *Bezpodstawne wzbogacenie*, pp. 193 ff., *idem*, *Kodeks*…, note 97 to art. 410.

[102] P. Księżak, *Bezpodstawne wzbogacenie*, p. 194; *idem*, *Kodeks*…, note 97 to art. 410.

[103] A. Ohanowicz, *Niesłuszne wzbogacenie*, p. 836; W. Serda, *Nienależne świadczenie*, p. 98; E. Łętowska, *Bezpodstawne wzbogacenie*, p. 99; P. Mostowik, *Bezpodstawne wzbogacenie*, pp. 84 ff.; P. Księżak, *Bezpodstawne wzbogacenie*, p. 194; *idem*, *Kodeks*…, note 97 to art. 410.

[104] Judgement of the Supreme Court 13.10.2011, V CSK 483/10; W. Serda, *Nienależne świadczenie*, p. 101; E. Łętowska, *Bezpodstawne wzbogacenie*, p. 106; P. Księżak, *Bezpodstawne wzbogacenie*, p. 195; *idem*, *Kodeks*…, note 99 to art. 410.

[105] P. Księżak, *Bezpodstawne wzbogacenie*, pp. 195 ff.

[106] *Ibidem*, p. 196.

[107] On this topic see my article *Rozliczenia między stronami związków partnerskich na podstawie przepisów o bezpodstawnym wzbogaceniu* ["Settlements between Cohabitants on the Basis of Unjustified Enrichment Law"], "Kwartalnik Prawa Prywatnego" 2015, no. 2, pp. 381 ff. with further literature mentioned there.

[108] Judgment of the Polish Supreme Court of 17.06.2009, IV CSK 48/09; judgement of the Court of Appeal in Katowice of 29.03.2017, I Aca 1026/16.

should allocate the money received to cover the costs of learning or studying or the object of donation should be used in a specific way. However, it is contested whether in the case of purposeful use this *condictio* can be applied, because some scholars argue that the case should be governed by contract law.[109]

In its recent case law the Polish Supreme Court has applied the *condictio causa data causa non secuta* to the performance made on the basis of preliminary contract (*umowa przedwstępna*) where the final contract (so called promised contract) was not concluded.[110] It often happens that a party renders a whole or partial performance on the account of the final contract before the conclusion of the final contract, so if against the expectation the conclusion does not take place he seeks restitution. According to the Polish Supreme Court before the final contract there is no valid obligation to render performance on its basis but only the arrangement as to the basis of the performance; as a result if the final contract is not concluded the purpose of performance is not achieved, which entitles the giver to restitution.[111] In other words, preliminary contract is regarded here only as an arrangement as to the legal basis of the performance not as a source of obligation; for that reason the aggrieved party can claim restitution of his performance by means of *condictio causa data causa non secuta* not on the grounds of contractual liability.

The last example of performance made on the basis of only preliminary contract is not obvious. The solution to this problem depends on the legal assessment of the obligation to render performance before the conclusion of the final contract. There are many different views on the legal character of the obligation.[112] In some cases the Supreme Court has come to the conclusion that the obligation is perfectly enforceable, so both parties are obliged to fulfil their other duties before they fulfil the essential obligation to conclude the final contract.[113] This view is shared by some scholars.[114] If one adheres to this point of view the application of *condictio causa data causa non secuta* will not be possible, because this *condictio* is admissible only where the recipient is not obliged to counter-performance.

IX. This short paper leads to the conclusion that the meaning and scope of application of *condictio causa data causa non secuta* is strictly connected with the development of the doctrine of contract, especially the increasing range of agreements which in the course of

[109] Against its application see: E. Łętowska, *Bezpodstawne wzbogacenie*, pp. 106 ff.; P. Mostowik, *Bezpodstawne wzbogacenie*, p. 85; *idem* [in:] *System*…, p. 308; P. Księżak, *Bezpodstawne wzbogacenie*, p. 192; *idem*, *Kodeks*…, note 91 to art. 410.

[110] Judgments of the Polish Supreme Court of: 30.01.2004, I CK 129/03; 25.03.2004, II CK 116/03; 8.03.2007, III CZP 3/07; 3.02.2016, V CSK 312/15; 15.11.2016, III CNP 9/16.

[111] Judgment of the Polish Supreme Court of 15.11.2016, III CNP 9/16.

[112] The views are presented briefly by M. Krajewski, *Umowa przedwstępna* ["Preliminary Contract"] [in:] *System prawa prywatnego*, t. 5: *Prawo zobowiązań. Część ogólna* ["System of Private Law", vol. 5: "Law of Obligation. General Part"], ed. E. Łętowska, Warszawa 2006, pp. 772 ff.; J. Grykiel [in:] *Kodeks cywilny. Komentarz*, ed. M. Gutowski, Warszawa 2017, notes 138 ff. to art. 390; *idem*, *Uprawnienia wierzyciela z umowy przedwstępnej w razie jej niewykonania lub nienależytego wykonania przez dłużnika* ["Rights of a Creditor from a Preliminary Contract in the Case Where the Contract Was Not Fulfilled or Was Improperly Fulfilled by a Debtor"], Legalis 2017, chapter no. IX.

[113] Judgements of the Polish Supreme Court of: 12.01.1960, 1 CO 40/59; 10.10.2008, II CSK 215/08.

[114] M. Krajewski [in:] *System*, pp. 774 ff.; J. Grykiel [in:] *Kodeks cywilny*…, notes 138 ff. to art. 390.

centuries have become contracts. In Roman law, where the contract law was governed by the rule *ex nudo pacto non parit actio*, that *condictio* was an essential remedy that protected the party who did not receive the counter-performance expected from the other party. However, already in ancient law the number of agreements protected by an action to claim counter-performance was still increasing. In late classical law the party to an innominate contract could choose whether to claim the counter-performance or only restitution of his own performance. Further development of the doctrine of contract led to the general recognition in the 17th century of the *pacta sunt servanda* principle and freedom of contract. This principle made the *condictio causa data causa non secuta* redundant in the field of contracts. Protection by means of the contractual remedy was perfectly sufficient. Already *Codex Maximilianeus Bavaricus Civilis* and the Prussian *Landrecht* excluded the right to claim one's own performance by means of *condictio* where the parties were bound by a valid contract. In modern civil codes the *condictio* is admissible only in non-contractual relationships. However, the examples of German *Zusatzweck* or Polish *celowe użycie* and performances on the basis of preliminary contract prove that the separation of the *condictio* and contract is not easy and uncontested.

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