

# Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE

## *Negotiorum Gestio* As a Source of Obligation: From Roman Law to Modern Codes

Baha Yiğit Sayın \* 

### Abstract

The legal institution of *Negotiorum Gestio* refers first and foremost to the act of helping or aiding someone in need, typically with the intention of doing good or promoting the well-being of the recipient. This concept has a long history, with roots in Roman law and its diversified influence on modern legal systems. In this article, we explore the evolution of *negotiorum gestio* from its origins in Roman law to its current manifestation in modern civil codes while providing an examination of how the concept has been defined, understood, and applied within Roman law over time as well as of its long journey through out *ius commune* to the modern codification era. Being a strictly Roman law institution, the prevalent incorporation of *negotiorum gestio* into the codes of the 'civil law' jurisdiction as well as its designation as one of the sources for non-contractual obligations under the harmonized rules of 'EU Rome II Regulation' calls for a close-in analysis of this originally Roman concept which will shed light on the degrees of the evolution, transformation and reception it had experienced while helping to make sense of its current state in modern civil law.

### Keywords

Negotiorum Gestio, Actio Negotiorum Directa, Actio Negotiorum Contra, Genuine Negotiorum Gestio, Non-Genuine Negotiorum Gestio, Mandate

\* **Corresponding Author:** Baha Yiğit Sayın (Asst. Prof. Dr.), Koç University, Faculty of Law, Department of Roman Law, Istanbul, Türkiye.  
E-mail: [ysayin@ku.edu.tr](mailto:ysayin@ku.edu.tr) ORCID: 0000-0001-9171-3791

**To cite this article:** Sayın, BY, "Negotiorum Gestio As a Source of Obligation: From Roman Law to Modern Codes", (2023) 73 Annales de la Faculté de Droit d'Istanbul 261. <https://doi.org/10.26650/annaes.2023.73.0009>

## Introduction

*Negotiorum gestio* is a civil law institution originating from Roman law; and amongst the many other private law concepts and relations which find their roots in Roman law, it is arguably one of the most 'Roman'. While *negotiorum gestio* is a part of all modern legal systems which are said to belong to the 'civilian tradition',<sup>1</sup> we do not, for example, see a similar institution in 'Islamic law',<sup>2</sup> or common law, which is said to reject the principal behind *negotiorum gestio*,<sup>3</sup> owing to its 'individualistic' character.<sup>4</sup> This lack of the legal acknowledgement of the 'officious intermeddling' is a facet of common law which had been repeatedly confirmed by precedents.<sup>5</sup>

- 1 For an account of the 'civil law tradition' see Alan Watson, *The Making of Civil Law* (Harvard University Press 1981); Adnan Gürüz, *Hukuk Başlangıcı* (Siyasal Kitabevi 1997); Glenn, H. Patrick, *Legal Traditions of the World* (4th ed, OUP 2010) 137 et seq. For a comparison with common law see, Peter J. Hamilton, 'The Civil Law and Common Law' (1922) 36 (2) *Harvard Law Review* 180-192; Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966-67) 15 (3) *American Journal of Comparative Law* 419-435; Kadir Gürten, 'Roma Hukuku ve İngiliz Hukuku'na Karşılaştırmalı bir Bakış' (2016) 65 (1) *AÜHFD* 183-197.
- 2 There is no institution in Islamic law that can be construed to be the equivalence of '*negotiorum gestio*'. Notwithstanding that Islamic Law does actually define the 'unauthorized' (*fuzuli*) in legal terms as "someone who, without any legal permission, deals with the property of some other person"; it would not be wrong to assert that the benevolent intervention of the *fuzuli* is not recognized as a source of obligation and accordingly lacks any kind of a general principle resembling *negotiorum gestio*'s within the Islamic jurisprudence. It does not matter whether the intervenor is managing the business for the 'principal's interest' or for 'his own benefit'; neither is admitted. The only exception can be the case where someone finds another's 'exposed child', lost property' or 'fugitive slave'. Then, the finder might be entitled to the reimbursement of his 'maintenance expenses' (compare with Turkish Civil Code/TMK art 769); for more on this issue, see Haluk Tandoğan, *Mukayeseli Hukuk ve Hususiyile Türk – İsviçre Hukuku bakımından Vekaletsiz İş Görme* (Ankara Hukuk Fakültesi Yayınları 1957) 10-13; also see *Mejelle* art. 111-113; 365, 368, 1453. Additionally, in certain cases of maritime rescue and salvage, the rescuer/salvager may be granted a remuneration the value of which is to be determined by customs; see İbn Teymiyye, *Küttüb ve Resail ve Feteva*, XXX, 166, 414-415; Buhûti, *Ravdu'l-Murbi*, II, 442-443. The main requirement sought for reimbursement is that the rescuer/salvager did act to be reimbursed, not for the love of God, though it probably would have been more preferable.
- 3 See fe Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1936) 31; R. M. Jackson, *The History of Quasi- Contract in English Law* (Cambridge University Press 1936) 124; Robert Goff & Gareth Jones, *The Law of Restitution* (Sweet & Maxwell 1966) 246-247; Jack Beatson (ed), *Anson's Principles of the English Law of Contract* (28th ed, OUP 2002) 600 et seq; Andrew Borkowski, Paul du Plessis, *Textbook on Roman Law* (3rd ed, OUP 2005) 313. For U.S. Law see, American Restatement (Third) of the Law of Restitution and Unjustified Enrichment, 2011, § 2 (3) which states that "there is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract" and § 2 (4) which declares that "liability in restitution may not subject an innocent recipient to a forced exchange". For the strong claim that in certain instances, such as in cases of 'agency of necessity', 'necessitous intervention' and 'rescue', the prospect for relief appears to be available to the intervenor, albeit as part of piecemeal solutions rather than under a unified doctrine; see, William R. Anson, *Principles of English Law of Contract and of Agency in Its Relation to Contract* (18th ed, OUP 1937) 600; also see Duncan Sheehan, *Negotiorum Gestio: A Civilian Concept in Common Law* (2006) 55 *International and Comparative Law Quarterly* 253-279. It is obvious that while the Roman law concept of '*negotiorum gestio*' is not present within the common law terminology, similar remedies are considered in similar circumstances. Thus, it would not be wrong to state that whilst common law does not categorically acknowledge the Roman law institution of '*negotiorum gestio*', it does adapt the solutions presented within the historical development of '*negotiorum gestio*' in a selective and restrictive manner especially under the jurisprudence and jurisdiction of ecclesiastical and maritime courts owing to the Roman law influence; see Thomas Edward Scrutton, 'Roman Influence in Chancery, Church Courts, Admiralty and Law Merchant' in *Select Essays in Anglo-American Legal History*, Vol. I, (Little, Brown & Company 1907) 233. Lastly, regardless of its position within the common law jurisprudence it is apparent that by art 11 of Rome II Regulation which consider '*negotiorum gestio*' as one of the four non-contractual sources of obligations within the EU jurisdiction, the civil law institution of '*negotiorum gestio*' is nonetheless a part of the 'conflicts of law' of United Kingdom -even after Brexit-; see sec. 11 of The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (<https://www.legislation.gov.uk/uksi/2019/834/contents>) accessed 30 March 2023.
- 4 On the supposed 'individualistic' nature of common law which is said to value the unfettered freedom of the individuals and strive to foster their self-sufficiencies, see Edward W. Hope, 'Officiousness' (1929) 15 *Cornell L. Rev.* 25-27; Peter Birks, 'Negotiorum Gestio and Common Law' (1971) 24 *CLP* 110-112; Reinhard Zimmerman, *The Law of Obligations Roman Foundations of the Civilian Tradition* 11 (OUP 1999) 448.
- 5 For the general principle of common law concerning the work and labour done or money expended by a person in order to preserve or benefit the property of someone else, see *Falcke v Scottish Imperial Insurance Co.* (1886) 34 Ch 234 which

In its long journey to modern law, the essence of the institution of *negotiorum gestio* did transform very little and for thousands of years stayed true to its Roman roots. Today, what we understand from a relation akin a ‘*negotiorum gestio*’, however it may be termed as, is that one person -without authority- manages the business of another while having a motive that is not gratuitous, burdening the other party as a result.<sup>6</sup> A modern comparative review of the duties and rights of the parties to a *negotiorum gestio* shows a conceptual sameness with slight variations in some technical aspects which are felt more in practice -as in the form of Court decisions- then in theory. And notwithstanding the fact that the modern terminology of ‘*negotiorum gestio*’ is abundant, we will be preferring to employ the Roman terminology for the sake of a historical continuum and conceptual unity.

The person managing another’s business might be doing this because: a) he may be willing to help out another under necessity or urgency b) he may be falsely thinking he is managing his business c) he is managing his own business together with another’s d) he may be in bad faith and managing another’s business deliberately, thus committing a tort. In all these cases, since Roman times, there rises a *negotiorum gestio* and both parties assume duties and gain rights against each other. With this study, the historical journey of ‘*negotiorum gestio*’ from Roman law to modern law will be analyzed comparatively while trying to make sense of the commonalities and the discrepancies between both the historical modes of developments and the contemporary legal conceptualizations of ‘*negotiorum gestio*’.

## I. *Negotiorum Gestio* in Roman Law

### A. *Negotiorum Gestio* as A Source of Obligation in Roman Law

In Roman classical law the sources of obligation were mainly divided into contracts and wrongful acts (delicts), as evident in the distinction made by *Gaius* in

---

states that under English law, such acts “do not create any lien upon the property saved or benefitted, nor, even if standing alone, create any obligation to repay the expenditure.” and that “... Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.”; also see *Macclesfield Corp. v. Great Central Ry* (1911) 2 K.B. 528, 104 L.T.R. 728 (C.A.); *Hawtayne v. Bourne*, (1841) 7 M. & W. 595, 599, 151 E.R. 905, 906-907; *Cox v. Midland Counties Ry. Co.* (1849) 3 Ex. 268, 277 -78, 154 E.R. 844, 847-48.

6 On the English terminology of *negotiorum gestio*, see Christian von Bar, Benevolent Intervention in Another’s Affairs in Christin von Bar (ed), *Principles of European Law: Benevolent intervention in another’s affair* (Sellier, 2006) 53-54, 101. Bar prefers the term ‘benevolent intervention in another business’ while at the same time emphasizes that it is far from being a technical and binding, final term. Throughout this article, we use the terms “*negotiorum gestio*”, “intervention in another’s affairs” and “management of another’s business” as well as “*gestor*”, “principal”, “*dominii*” and “*intervenor*”. The choice of terminology or the preferences to switch between Latin and English is not an indication of any substantive doctrine but rather an outcome of the lack of precise corresponding technical terms which will address all the primary and secondary elements of the institution in an encompassing fashion. For more on this issue see Tandoğan, *Vekaletsiz İş Görme* (n 2) 21-24. Also see Louisiana Civil Code (Title V. Chapter 1- Management of affairs <Negotiorum Gestio> art. 2292: ‘There is a **management of affairs** when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances’) which prefers the English translation of the French ‘*gestion d’affaires*’: ‘management of affairs’ while keeping ‘*negotiorum gestio*’ in the title.

his *Institutiones*<sup>7</sup> which was written around the second half of the century.<sup>8</sup> However, this distinction was quite imperfect since there were various other legal relations which burdened their parties with duties & obligations and/or granted them certain rights & privileges. Still, it was not until the Justinian Codification that those 'legal relations' started to be classified differently under the umbrella term of '*quasi*'.<sup>9</sup> In that regard, '*quasi*' was not only used to indicate 'contract like' relations but also to designate some wrongful acts which, although resembling them to a certain extent, were not considered to be delicts; hence the term: '*quasi-delicts*'.<sup>10</sup>

*Negotiorum Gestio* was a part of Roman law since earlier times, however a type of categorization where obligations were divided into 'obligations arising out of contract vs obligations arising out of quasi-contracts' was non-existent in the Roman mind. The Roman *-actiones* system<sup>11</sup> which the whole Roman civil law was based upon, did not think in terms of a binary understanding of *contractus* vs *quasi contractus* (or *delictum* vs *quasi delictum*); neither did the legal literature which followed the praetorian edictal order. It was *Gaius* -and then *Justinian*- who came up with such divisions of actions, contracts and the corresponding obligations.<sup>12</sup> *Gaius* first did, as mentioned above, give the sources of obligations as 'contracts and delicts' in *Institutiones*. However, in a '*Digesta* text<sup>13</sup> referring to 'a work of his',<sup>14</sup> *Gaius* seems

7 *Institutiones*, is an introductory textbook of legal 'institutions' comprising 4 books and written by *Gaius* around 161 CE. For more information on *Institutiones*, see Fritz Schulz, *History of Roman Legal Science* (Clarendon Press 1946) 159 - 165; on the 'institutiones/institutional system' see F. X. Affolter, *Das Römische Institutionen-System* (Adolph Emmerling & Sohn, 1897); Peter Stein, *The Fate of the Institutional System* (Huldigungsband Paul van Warmelo 1984) 218-254. There were several *Institutiones* written by jurists other than *Gaius* (such as *Callistratus*, *Paulus*, *Ulpianus*, *Aelius Marcianus* and *Fiorentinus*) but they all were of later date than *Gaius*'s; for an opposing view see Schulz, *History of Roman Legal Science*, 158 - 159; Schulz considers the *Fiorentinus*'s *Institutiones* to be earlier than the *Institutiones* of *Gaius*.

8 Gai.3.88 (The Institutes of Gaius, Francis de Zulueta tr, Clarendon Press 1946).

9 The term '*quasi*' was not used until after the Justinian Codification. The term '*quasi*', in Hellenized Latin form, was first used in the Greek paraphrase of the *Institutiones* by *Theophilus*; see E.C. Ferrini, *Institutionum Graeca Paraphrasis Theophilo Antecessori*, Vol. 2, (Berlin: Calvary, 1884; reprint. Aalen: Scientia 1967) 3.27.3, 5; 4.5.pr. The terms of '*quasi ex contractu*' and '*quasi ex maleficio*' can be found in the Digest within texts ascribed to *Gaius* (D. 44.7.5.1,4,6), however they are most likely interpolations; see Salvatore Riccobono, 'La Dottrina delle 'Obligaciones Quasi Ex Contractu'' in *Annali del Seminario Giuridico R. Università di Palermo*, Vol. 3-4 (1917) 280-281; Otto Gradenwitz, *Interpolationen in den Pandekten* (Weidmannsche 1887) 113-115; Theo Mayer-Maly, 'Divisio Obligationum' (1967) 2 (2) Irish Jurist new series 375-385; also see Ernst Rabel, Ernst Levy, *Index Interpolationum*, Vol. 3, XXXVII-L (Bohlaus 1929) 355-356.

10 For the etymology of '*quasi*', see Heumann's Handlexicon zu den Quellen des Römischen Rechts (9<sup>th</sup> ed, Gustav Fischer 1926) 481; Oxford Latin Dictionary (2<sup>nd</sup> ed OUP 2012) 1698, Dictionnaire Étymologique de la langue Latine, (New Edition Klincksieck 2001) 552.

11 For a detailed treatment of the Roman *actiones*, see Ernst Metzger, 'Actions' in Ernst Metzger (ed.), *A Companion to Justinian's Institutes* (Cornell University Press 1997) 208-228.

12 For *Modestinus*'s practical, but rather unscientific classification of obligations as 'real, verbal, real and verbal together, consensual, statutory (*lege*), praetorian (*honorariae*), compulsory (*necessitate*) and delictual'; see D. 44, 7, 52.

13 The *Digesta* texts and their English translations are all taken from the 'Digest of Justinian' whose Latin text is edited by Theodor Mommsen & Paul Kruger, and the English translations are edited by Alan Watson; (Digest of Justinian, University of Pennsylvania Press, 1986).

14 *Res cottidiane* (also called as *libri aureorum*). It must be reminded here that there is no certainty about neither the identity of the genuine author of *res cottidiane* nor about the time it was penned. It is possible that the authorship of *res cottidiane* can be attributed to *Gaius* himself while it is also conceivable that a pseudo-*Gaius* from the post-classical period is actually the real author. Modern doctrine tends to favor *Gaius* as the author of *res cottidiane*. For more on this issue see Tony Honore, *Gaius* (Clarendon Press 1962) 68, 96, 115.

to add a third source:<sup>15</sup> “*variis causarum figuris*” (various other causes) which, later, Justinian expounded on and classified into two as ‘quasi-contract’ and ‘quasi-delict’.<sup>16</sup>

As seen, the sources of obligations in Roman law had been diversified over time. Initially, the only sources of obligation acknowledged by Romans were contracts and delicts, however it did not take long before the activity of the praetor did result in new sources being conceptualized, first under the non-scientific and ambiguous term of ‘*variis causarum figuris*’, and then by the incorporation of the -conjunction/adverb- ‘*quasi*’<sup>17</sup> to the terms of ‘contract’ and ‘delict’ respectively.<sup>18</sup>

Thus, the relation that is *negotiorum gestio* was not considered as a separate source of obligation until post-classical period; and there is no evidence claiming otherwise; however, this also does not mean that the concept of *negotiorum gestio* was not a part of Roman law before the post-classical period. On the contrary, since republican times ‘*negotiorum gestio*’ seems to serve as an institution which was resorted to rather frequently for various causes. The reason for this frequency can be explained partly by the lack of ‘agency’ (or to put it differently: direct representation) in Roman Law<sup>19</sup> and partly by the republican aristocratic ideals of *humanitas* (humanity/humane tendency) and *officium amici* (moral duty deriving from familial relationship or mere friendship). The Roman jurists regarded ‘liberty’ in high esteem and accordingly it may be argued that their private law showed a strong individualistic bend.<sup>20</sup> But as liberty required certain borders,<sup>21</sup> individuality was never to be without its limitations.<sup>22</sup> For the Romans, the ethical system standardized by the concepts of *pietas - officium -*

15 D. 44.7.1 pr: “*Obligaciones aut ex contractu nascantur aut ex maleficio, proprio quodam lure ex variis causarum figuris*”. (Obligations arise either from contract or from wrongdoing or by some special right from various types of causes).

16 I Ins. 3.13.2: “...*Sequens divisio in quattuor species deducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio*....” (...A further division separates them into four kinds: for they arise *ex contractus* or *ex quasi contractus*, *ex maleficio* or *ex quasi maleficio*....)

17 For the hypothesis that the term ‘*quasi*’ and the idea behind it were inventions of *Gaius* himself, see Max Radin, ‘The Roman Law of Quasi-Contract’ (1937) 23 (3) *Virginia Law Review* 241, 246-247.

18 The problem here is also related to the translation of the term ‘*quasi contractus*’: if ‘*quasi*’ is taken as a conjunction then the meaning of ‘*quasi contractus*’ would be ‘as if a contract’. However, if ‘*quasi*’ is taken as an adverb then the translation would be akin to ‘almost a contract’. The Turkish translation of ‘*quasi contractus*’ is ‘*sözleşme benzeri*’ which would correspond to the term ‘as if a contract’; see fe Mustafa Dural, ‘Roma Hukukunda Akit Benzerleri -Quasi Contractus-’ (2011) 33 (3-4) *İÜHFHD* 257. Another similar translation observed in Turkish jurisprudence is the term of ‘*quasi* juristic acts’ which is translated as ‘*Hukuki İşlem Benzeri*’; see Kemal Oğuzman, Nami Barlas, *Medeni Hukuk* (28<sup>th</sup> edn, On İki Levha, 2022) 164-165; Necip Kocayusufpaşaoğlu, Hüseyin Hatemi, Rona Serozan, Abdülkadir Arpacı, *Borçlar Hukuku Genel Bölüm*, I (7<sup>th</sup> edn, Filiz 2017) 84. We personally believe the technical difference between the use of *quasi* as a ‘conjunction’ and an ‘adverb’ would lie in the assumption that a relation which is ‘as if a contract’ would share more common characteristics with a genuine contract compared as to a relation which is ‘almost a contract’ and therefore, concur with the translation of ‘*quasi*’ to ‘*benzeri*’ in the context of Turkish Civil Law. Also see Peter Birks, Grant MacLeod, ‘The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone’ (1986) 6 *OJLS* 46-85.

19 For the supposed reasons of this lack of agency in Roman Law, see Zimmerman, *Law of Obligations* (n 4) 47-49; Haluk Emiroğlu, ‘Roma Hukukunda Vekalet Sözleşmesi (Mandat) ve Hukuki İşlemlerde Temsil’ (2003) 52 (1) *AÜHFHD* 101, 109-110; Özcan Karadeniz Çelebician, *Roma Hukuku*, (17<sup>th</sup> edn, Turhan 2014) 265-266.

20 see for instance D.50.17.36.

21 For ‘Liberty’ (*libertas*) in Rome, see Chaim Wirszubski, *Libertas as a Political Ideal* (Cambridge University Press, 1950); Fritz Schulz, *Principles of Roman Law* (Marguerita Wolff tr, Clarendon Press 1936) 140 et seq.

22 Schulz, *ibid* 238; Schulz even goes to claim that ‘Roman individualism is nothing but a legend’.

*humanitas – fides – obsequium* and so forth, was not a philosophical ideal but rather a part of ‘aristocratic’ reality which the legal acknowledgement of relations like ‘*negotiorum gestio*’ helped come to life.

## B. The History of *Negotiorum Gestio*

The early history of *negotiorum gestio* in Roman Law is much disputed since there are various conflicting claims as regards with the legal roots and procedural origins of *negotiorum gestio*.<sup>23</sup> The main controversy is about the relation of *negotiorum gestio* with *ius civile* and *ius honorarium* and the scope of the actions (and *formulae*) deriving from *negotiorum gestio*.<sup>24</sup> The answers to the controversy cannot be given by solely relying on the texts in hand but rather call for an analysis of the Edict’s language and a deduction from its wording. However, in Schulz’s words, “much more important than the technical details is the institution of *negotiorum gestio* as a whole. It is a quite original genuinely Roman creation without parallels in the laws of other peoples not dependent on Roman law”.<sup>25</sup> Still, we believe that giving a historical account of ‘*negotiorum gestio*’ is important regardless of the dispute concerning the early history of ‘*negotiorum gestio*’ and of its *formulae*:

During the 2<sup>nd</sup> century BCE,<sup>26</sup> the promulgation of the *lex Aebutia* reformed the civil procedure by abolishing the defunct *legis actiones* and introducing the already in-practice formulary system as the new civil procedure.<sup>27</sup> It follows that the transformation of the *legal actiones* in to the formulary system gave procedural life to the institution of *negotiorum gestio*.<sup>28</sup> The *praetors*, owing to the authority granted to them via this law, began to insert a clause of *negotiorum gestio* (*clausula de negotiis gestis*)<sup>29</sup> in their edicts through which they regulated the relations between the ‘principal’ (*dominus negotii*) and the ‘intervenor’ (*gestor*), ‘who, ‘judicially’

23 see fe Fritz Schulz, *Classical Roman Law* (Clarendon Press 1950) 620-624; Max Kaser, *Roman Private Law* (Rolf Dannenbring tr, 2<sup>nd</sup> edn, Butterworths 1968) 192-194; Zimmermann, *Law of Obligations* (n 4), 436-438; Hans Hermann Seiler, *Der Tatbestand der negotiorum gestio im römischen Recht* (Böhlau, 1968); Moris Wlassak, *Zur Geschichte der negotiorum gestio* (G. Fischer 1879); Tandoğan, *Vekaletsiz İş Görme* (n 2) 4 n.1-2; Joseph Partsch, *Aus Nahgelassen und Kleineren verstreuten Schriften* (Springer 1931); Alan Watson, *The Law of Obligations in the Roman Republic* (Clarendon Press 1965) 196-203, 206-207; H. Gökçe Özdemir, *Roma ve Türk Hukuklarında Vekaletsiz İş Görme* (Seçkin 2001) 17-27.

24 The reasons for the controversy may be summed up as the facts that the relevant *Corpus Iuris Civilis* (C.I.C.) texts being heavily interpolated and the scarcity of reliable sources outside the C.I.C.

25 Schulz, *Classical Law* (n 23), 624.

26 Sometime between 199 and 126 BCE or even later.

27 Encyclopedic Dictionary of Roman Law (The American Philosophical Society reprint 1991) 547; on *lex Aebutia* in general also see Max Kaser, *Die lex Aebutia* (A. Giuffrè 1950).

28 For the claim that there had been a tradition of praetorian protection in cases like *negotiorum gestio* -probably by an *actio in factum*- preceding the *lex Aebutia*; see Ludwig Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians*, Vol. 1 (Duncker & Humblot, 1908) 52, 54-58.

29 Otto Lenel, *Das Edictum Perpetuum* (B. Tauchnitz, 1927) 101; D. 3.5.1: “*Hoc edictum necessarium est, quoniam magna utilitas absentium versatur, ne indefensi rerum possessionem aut venditionem patiantur vel pignoris distractionem vel poenae committendae actionem, vel iniuria rem suam amittant.*” (This edict is essential, since it is concerned with a matter of great importance to absentees, that they should not, through want of a defense, suffer the seizure or sale of their property, the disposal of a pledge or an action for incurring a penalty, or lose their property unjustly.)



protects the interests of absent persons (*absentis*) against the encroachment of third parties,<sup>30</sup> or takes over the management of an estate that does not appear to have any successors (*hereditas iacens*).<sup>31</sup> In these cases, the *praetor* granted an *actio in factum* both to the *gestor* and the *dominus negotii*. *Actio in factum* was recognized by *ius honorarium* and therefore was a praetorian action but it was not only *ius honorarium* where *negotiorum gestio* did find life; the *ius civile* had also provided a general remedy in the form of the *actio bonae fidei* (*iudicia bonae fidei*)<sup>32</sup>, probably starting as early as the 2<sup>nd</sup> century BCE.<sup>33</sup> The *iudicia bonae fidei* must have had a *formula in ius concepta*<sup>34</sup> and considering the ‘*edictum de negotiis gestis*’ (edict of *negotiorum gestio*)<sup>35</sup>, there must also have been a *formula in ius factum*; hence two *formulae* -for *negotiorum gestio*- one belonging to *ius honorarium* and the other to *ius civile*, existed side by side.<sup>36</sup>

Originally, citizens who left Rome for civil or military service, and then later merchants who left Italy for their business, were given the opportunity to appoint a *procurator*<sup>37</sup> to manage their assets.<sup>38</sup> Starting from the late republican era, the owner of an enterprise or a commercial undertaking could leave a friend, his freedman -or his slave- as an *institor* when he was not present.<sup>39</sup> The *procurator* and the *institor*, in most cases, would be the freedman of the ‘principal’ (*dominus negotii*) owing to the ‘moral and personal bond’ between the freedman and his patron,<sup>40</sup> however, it was also possible for the *procurator* to be a freeborn (*ingenuus*) friend of the ‘principal’ as evident in Cicero’s writings.<sup>41</sup> The *iudicia bonae fidei*, which was applied in such cases, later began to be used against the intervenor/*gestor* (*voluntarius*: the voluntary), who, by spontaneous initiative, managed the business owner’s assets in

30 D.3.5.1.

31 D.3.5.3.6.

32 *Actio bonae fidei* (*iudicia bonae fidei*) was the contractual action of *ius civile* in which through the clause of *ex bona fide* in the *intentio* of the *formula*, the judge was given full authority to decide on the matter according to the principles of *bona fides* (good faith); see Dictionary of Roman Law (n 27) 520.

33 Bülent Tahiroğlu, Belgin Erdoğan, *Roma Usul Hukuku* (Filiz 1989) 34-35.

34 For the list of ‘*actiones bona fidae*’ given by Gaius -which also includes *actio negotiorum gestio*- see Gai. 4.62.

35 Lenel (n 29) 101-15.

36 There is much controversy in the doctrine as to the relationship between these two *formulae* and how they fare against each other; see Vincenzo Arangio-Ruiz, *Il Mandato in Diritto Romano* (Jovene 1949) 29 et seq.

37 *Procurator*, in private law, was the one who administered another’s affair under his authorization (D.3.3.1.pr.). A *procurator* could be in the form of a general manager (*administrator* = *procurator omnium bonorum*) whose activity for the principal might have been unlimited although alienations would be excluded; see Dictionary of Roman Law (n 27) 654.

38 Kerra Tunca Avorel, ‘*Negotiorum Gestio*’nun Şartları’ (1987) 3 (1-4) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 33, 38.

39 The juristic difference between *institor* and *procurator*, if there is any, seems to be about their degree of involvement with the ‘principal’s business; see D. 14.3.5.10. However, even if there were such a difference it was obsolete by the time of Papinian; see D. 17.1.10.5.

40 For the peculiarities of the bond between the patron and the freedman see Henrik Mouritsen, *The Freedman in the Roman World* (Cambridge University Press 2011) 36-65.

41 see fe Cic. pro Caecina 20. 57; pro Quintio 19.62, 28.87; pro Rosc. Amer. 7.19; ad fam. 7.32.1, 12.24, 13.43; Phil. 12.7.18, in Verr. 2.2.24.59, 2.5.7.15.

his absence.<sup>42</sup> The practice of helping out a fellow citizen (or neighbor/friend) on account of ‘*amicita officium*’ and then expect to be compensated on the basis of *fides* agrees with the idealized republican sentiment to such an extent that the claims of the *iudicium bona fides* being contemporary of the *actio in factum* seem also plausible.<sup>43</sup>

Another root of ‘*negotiorum gestio*’ other than the institution of ‘*procurator*’ was the ‘*cura furiosi*’; that is the curatorship over ‘lunatics’ (*furiosi*).<sup>44</sup> Whoever administered the affairs of a lunatic (*furiosi*) had the action of *negotiorum gestio*.<sup>45</sup> *Cura furiosi*, though being a *cura*, was closer to ‘*tutela*’ (tutelage) as regards with its content and character. Accordingly, like *tutela*, *cura furiosi* was not only about the property but also about the person himself.

The *procurator* of pre-classical times did not act under a contract of *mandatum* (mandate),<sup>46</sup> nor did the *curator* since he was either installed by law or by the authority of the magistrate, not by a private agreement.<sup>47</sup> As the *actio mandate* was not applicable in both of those cases, in order to provide a remedy, two *formulae* (*directa* for the main claim and *contra* for the counter claim) became a part of the praetorian edict in an identical fashion only differing in the identities of the plaintiff and the defendant.<sup>48</sup> The requirement of this *iudicia bonae fidei* was *negotium alteris gestio* (managing the business of another) giving rise to a broader field of application as a result.<sup>49</sup>

Thus, even during early classical law the *negotiorum gestorum* started to cover a wide range of cases. This is an interesting fact as the origin of the ‘*negotiorum gestio*’ seems to be historically connected to the ideas of ‘absence’, ‘good faith’, ‘necessity’ and ‘urgency’ and the praetorian extension of *negotiorum gestio* to a variety of cases is not easy to justify under such an understanding. The ‘urgency’ of

42 See Avorel (n 38) 45-47.

43 See fe Egon Weiss, *Institutionen des römischen Privatrechts* (2nd edn, Verlag für Recht und Gesellschaft 1949) 395; Raymond Monier, *Manuel élémentaire de droit romain*, Vol II (4th edn, Domat Montchrestien 1948) 207-208; Watson, *Law of Obligations* (n 23) 202; Hans Kreller, ‘Das Edikte de negotiis gestis in der Geschichte der Geschäftsbesorgung’ in *Festschrift Paul Koschaker* Vol II (Böhlau 1939) 193 et seq.

44 On the curatorship in Rome see Selda Güneş Ceylan, ‘Roma Hukuku’nda Kayyımlik (*Cura*) Müessesesine Genel Bir Bakış’ (2004) 53 AÜHFD 221-230.

45 and so did the *curator furiosi*; see D.3.5.3.5; and the *curator pupillus*, see D. 3.5.5.2; D. 3.5.14; also see Laurent Waelkens, *Amne adverso: Roman Legal Heritage in European Culture* (Leuven University Press 2015) 245. Waelkens, while reminding that *negotiorum gestio* somehow suggests a coincidental relation, also indicates to the fact that *actio negotiorum gestio* was used for long-term curatorship as well.

46 *Procurator unius rei*, who had to execute a single business was of later creation; see Dictionary of Roman Law (n 27) 654.

47 *Procurator* is different than mandatary in the sense that *procurator -omnim bonorum-* was either appointed under a general authorization or as a *negotiorum gestor* for an absent principal, whereas mandatary was authorized for a certain specific act.

48 Lenel (n 29) 103-196; Kaser, *Private Law* (n 23) 193-194; Zimmerman, *Law of Obligations* (n 4) 437-438; cf Schulz, *Classical Law* (n 23) 621-623.

49 Lenel (n 29) 105. For the claim of interpolation of *absentis to alterius* in D. 3, 5, 3, pr., see Schulz, *ibid* 621; cf Rabel, Levy, (n 9) Vol I, I-XX, 39.



cases like ‘collecting a debt or purchasing a farm for someone else’<sup>50</sup> is flimsy at best and the notion of ‘absence’ in cases like ‘selling someone else’s slave without his knowledge’<sup>51</sup> or ‘managing the affairs of a minor’<sup>52</sup> calls for a different interpretation.

During the end of the 3<sup>rd</sup> century CE, the loss of importance of the distinction between *ius civile* and *ius honorarium* following the end of the formulary procedure resulted in the combination of the actions of *actio in factum* and *actio bonae fidei* which further extended the scope of *negotiorum gestio*.<sup>53</sup> Now *negotiorum gestio* included all juristic relations involving a certain degree of representation except *mandatum* (mandate), *societas* (contract for ordinary partnership) and *tutela* (tutelage).<sup>54</sup>

The *negotiorum gestio* was initially about the ‘judicial’ protection of an absent citizen by another fellow citizen out of a moral duty and the administration of the affairs of someone else by the time of his death.<sup>55</sup> In time, cases varying from; ‘managing a friend’s business - administrating the affairs of someone lacking capacity -becoming surety for someone else’ to ‘performing the obligation of someone else - representing or defending someone else in court’ now all fell under the scope of ‘*negotiorum gestio*’ owing to the ‘*ex bona fide*’ wording<sup>56</sup> within its *formula*. Any kind of ‘non contractual but obligatory relation’ could be the subject of *negotiorum gestio* provided that its prerequisites were met and a specific action (f.e. *actio mandate*, *actio depositum* or *actio tutela*)<sup>57</sup> did not exclude its admissibility. This subsidiary character of *negotiorum gestio* was important as the *actio negotiorum gestio* was utilized in certain cases in order to attain a satisfactory outcome where no other procedural remedy was available.<sup>58</sup>

Lastly, during the reign of *Justinian*, who adhered to the distinction between *negotiorum gestio* and *tutela* and *mandatum*, *negotiorum gestio* was classified as a “*quasi-contractus*” together with *condictio indebiti* (unjustified enrichment); *tutela* (tutelage), *communio indicens* (common ownership), and *legatum* (legacy).<sup>59</sup>

50 D. 3.5.5.4; D. 3.5.21; D. 46.3.34.4.

51 D.3.5.40.

52 D. 3.5.5.2. In the cases of *cura furiosi* and managing the affairs of a *pupillus*, it can be argued that the ‘absence’ of the person is interpreted rather broadly to include the ‘absence of full capacity’.

53 Tandoğan, *Vekaletsiz İş Görme* (n 2) 6.

54 Weiss (n 43) 395-396; in Zimmerman’s words, “it began where the mandate ended” as long as there was no special remedy for the given case; see Zimmerman, *Law of Obligations* (n 4) 439-440.

55 D. 3.5.3.pr: “*Ait praeator: ‘Si quis negotia alterius (absentis?), siue quis negotia quae cuiusque cum is moritur fuerint, gesserit: iudicium eo nomine dabo.*” (The praetor says: “If anyone has managed the affairs of another (an absent?) or has administered what were his affairs at the time of his death, I will grant a trial on this account.)

56 “*intentio quidquid ob eam rem dare facere praestare oportet ex fide bona*”

57 See D. 3.5.31.1.

58 Theo Mayer-Maly, ‘Probleme der *Negotiorum Gestio*’ (1969) 86 (1) ZSS: Romanistische Abteilung, 416, 418.

59 I Ins. 3.27.1-7; also, for the *quasi-contractual* character of *interrogatio iniure* (interrogation before the magistrate), see D. 11.1.11.9.

## C. Requisites for *Negotiorum Gestio* in Roman Law

In Roman law, *negotiorum gestio* was a source of obligation which was neither a delict nor a contract; it could consist of any kind of -legal or factual- acts and did not require any specific formalities. Furthermore, it can be presented as a legal institution that was quite encompassing and inclusive; f.e there were no restrictions on women for being either the *gestor* or the *dominii* as part of a *negotiorum gestio* relationship.<sup>60</sup> It was also possible for a slave to manage the business of someone else as long as the act of the slave did meet the other criteria for the rise of a *negotiorum gestio*. It followed that if the slave was enriched as a consequence of the *negotium* and the earnings were allocated to the estate of the master then, for demands of compensation, additional praetorian actions (*actiones adiecticiae qualitatis*)<sup>61</sup> could be applicable.<sup>62</sup>

In order to speak of *negotiorum gestio* in Roman law, four different conditions had to be present: 'Managing the business of someone else' being the first, the 'lack of a mandate' being the second, the '*gestor* acting for the interest and according to the will of the principal' being the third and the '*gestor* acting with the expectation for reimbursement' being the fourth:

### 1. Managing the Business of Someone Else

The first condition for *negotiorum gestio* was that one person managed the 'business of another' (*negotia aliena*). That is, the *gestor* had to act with the intention to manage another's business (*animus aliena negotio gerendi*: the intention to manage another person's business with the intention of benefiting that other person).<sup>63</sup> Accordingly, if the business was managed under the assumption of someone else, but it was actually the intervenor's own business, there would be no *negotiorum gestio* and the intervenor could not resort to the action of *negotiorum gestio*.<sup>64</sup> On the contrary, if the

60 see D. 3.5.3.1-3. Owing to the peculiarities of Latin language, a masculine noun or adjective will actually cover both genders and thus, unless otherwise stated, in Roman legal texts what is expressed as 'masculine' includes both men and women; for more on this issue see B. Yiğit Sayın, 'Roma'da Kadının Adı: Pagan Roma Kadını üzerine Düşünceler ve Tespitler' in Zeynep Özlem Üskül Engin (ed), *Toplumsal Cinsiyet ve Hukuk 1* (2<sup>nd</sup> edn. On İki Levha 2022) 23-24.

61 Depending on the given circumstances either *actio peculio* or *actio de in rem verso*. For example, see Paul. Sent. 1.4.5 where it is stated if a son-in-power (*filius familia*) or a slave did manage another's business then the applicable action would be *actio de peculio* since the father (*pater*) or master (*dominus*) would be liable to the extent of the *peculium*. The slave's acts of gaining on behalf of the master was also interpreted as a *negotiorum gestio*; see D.11.5.4.1 where Paul states that if a slave -illegally- wins some money from gambling, instead of a noxal action, an *actio de peculio* shall be given against the master because the action arises from *negotiorum gestio*. On the relation between *actio de peculio* and *negotiorum gestio* see, Gökçe Türkoğlu Özdemir, 'Roma Hukukunda Actio de peculio' (2005) 7 (2) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 103, 126-128.

62 see D. 3.5.5.8.

63 Salvatore Riccobono, 'La gestione degli affari e l'azione di arricchimento nel diritto moderno' (1917) 15 (1) Rivista del diritto commerciale e del diritto generale delle obbligazioni, 369, 383-384. Riccobono holds that *animus aliena negotio gerendi* was the indispensable element of classical *negotiorum gestio* and Justinian, by abandoning it, expanded the boundaries of '*negotiorum gestio*', Riccobono, *ibid* 386; see also Salvatore Riccobono, *Scritti Diritto Romano*, Vol II (Giuffrè 1964) 1, 7 et seq; For an opposing view see Partsch, (n 23) 88 et seq.; also see Ernst Rabel, 'Negotium alienum und animus' in *Studi in onore di Pietro Bonfante nel XL anno d'insegnamento* Vol IV (Treves 1930) 279-304, especially 292-295.

64 D. 3.5.5.6. "Si quis ita simpliciter versatus est, ut suum negotium in suis bonis quasi meum gesserit, nulla ex utroque latere

*gestor* was in mistake about the identity of the ‘principal’ or falsely assumed that he was acting under a mandate (*mandatum*) from the ‘principal’, he could still make use of *actio negotiorum directa* or could be exposed to the *actio negotiorum contra*.<sup>65</sup> An *actio negotiorum gestio* seems also possible in presence of other types of mistakes on the *gestor*’s part; such as, f.e. errors regarding the number of the ‘*dominii negotii*’ or the nature of the underlying legal cause.<sup>66</sup> As long as the business managed was objectively a ‘*negotiorum alterius*’, a ‘mistake’ (*error in persona, nomina* or *error in negotio*) did not prevent the rise of a *negotiorum gestio*.<sup>67</sup>

In the case where the *gestor* managed the business of someone else together with his own, thinking that it belonged to ‘somebody else’ entirely, he would be liable to the principal from the portion of the managed business which belonged to the principal.<sup>68</sup> The same holds true where the *gestor*, in good faith, had managed another’s business assuming that it was his own business.<sup>69</sup> Lastly, managing the business of someone else with a purely selfish interest – *sine animus aliena negotio gerendi* – also fell under the scope of *negotiorum gestio* although it is apparent that at first glance an intervention motivated by self-serving goals does not seem to fit into the framework of *negotiorum gestio*.<sup>70</sup> In that regard it must be said that the classicality of the relevant *Digesta* (Digest) texts are highly doubtful, and it is likely that the interpolators’ reason for the admittance of *actio negotiorum gestio* in such irregular cases was the lack of a general action of unjustified enrichment during the classical period;<sup>71</sup> therefore, the action of *negotiorum gestio* was inserted instead.<sup>72</sup> On the other hand, during the reign of Justinian, this approach of the interpolators was indeed the norm owing to the belief that it would be unfair to hold the *gestor* who had acted in the interest of *dominus negotii* accountable for the profits he’d made while the one who had managed someone else’s business for his own benefit would not be burdened with such an obligation.<sup>73</sup>

---

*nascitur actio, quia nec fides bona hoc patitur*” (If anyone has behaved so foolishly as to transact business of his own to do with his own property thinking it to be mine, no action arises on either side, because good faith does not allow it.)

65 D. 3.5.5.1; D. 3.5.5.pr. In the event of an *actio negotiorum gestio*, the *praetor* would designate the ‘real’ principal as the ‘*dominus negotii*’.

66 Özdemir, *Vekaletsiz İş Görme* (n 23) 42-43.

67 Avorel (n 38) 60-61.

68 D. 3.5.5.7; also see D. 3.5.39.

69 D. 3.5.48; on the interpretation of D. 3.5.48 see Mayer-Maly, *Probleme der Negotiorum Gestio* (n 58) 417; Seiler, *negotiorum gestio* (n 23) 26 et seq.

70 D. 3. 5. 5. 5: “Again, if anyone has transacted business of mine not for my sake but for his own profit, Labeo has written that he has transacted his own rather than my business (for a man who comes to it in order to rob is after his own profit rather than my advantage) but nevertheless, in fact to a greater extent, will he too be liable to an action for unauthorized administration”. For the claim that the text is interpolated; see Riccobono, *La gestione degli affair* (n 63) 383-384; For opposing views see Rudolf Moser, *Die Herausgabe des widerrechtlich erzielten Gewinnes, insbesondere unter dem Gesichtspunkt der eigennützigen Geschäftsführung ohne Auftrag* (H.R. Sauerländer & Company 1940) 82-89; also see Rabel, Levy (n 9) I-XX, 39-40.

71 Weiss (n 43) 398; Riccobono, *La gestione degli affair* (n 63) 386.

72 see above I B n 49.

73 see Moser, *Die Herausgabe des widerrechtlich erzielten Gewinnes* (n 70) 88-89; Ernst Zimmermann, *Aechte und unächte*

The classical law deemed the *gestor*'s knowledge of the fact that he was managing the business of someone other than himself as sufficient for a *negotiorum gestio* to manifest. It is highly probable that in classical law the intention to manage another's business (*animus aliena negotio gerendi*) was not a specific, isolated condition for *actio negotiorum gestio*; therefore, the fact that *gestor* took care of someone else's business while being aware it was not his own business, was viewed as enough.<sup>74</sup>

The question of whose sphere the business fell was conceptually connected to the nature of the business and when the nature of the business was uncertain, then intention of the *gestor* would be vital in determining who the business belonged to.<sup>75</sup>

The business managed could consist of a single act or be comprised of a series of acts.<sup>76</sup> It could be any 'legal'<sup>77</sup> or 'factual'<sup>78</sup> acting though it was generally understood in terms of 'juristic acts'.<sup>79</sup> On the other hand, the 'management' must have been done by a positive act; refraining from doing an act or breaching an agreement or any other kinds of violations or negative acts would not constitute a *negotium*.<sup>80</sup>

## 2. Lack of Mandate

A person could be considered 'without a mandate' while managing the business of another if that person had no mandate given by the principal (*dominus negotii*); and was not legally obliged to take care of that person's business;<sup>81</sup> and was not doing it out of a pious or legal duty.<sup>82</sup> In other words, the business must have not been done by virtue of a mandate from the principal, nor in consequence of some legal duty which might be owed to him.<sup>83</sup>

If a mandate had not been given, but the principal knew about the work done and did not object to it, then the provisions of *mandatum* were applied,<sup>84</sup> although it must

*negotiorum gestio: ein Beitrag zum römischen Obligationsrecht* (J. Ricker 1872) 29.

74 Seiler, *negotiorum gestio* (n 23) 95 et seq.

75 Kaser *Private Law* (n 23) 193.

76 Avorel (n 38) 43. In principle, even the business consisted of more than one transaction, it would result with a single obligation, unless "initially the *gestor* took on only one transaction with the intention of getting out on its completion"; see D.3.5.15.

77 f.e. becoming a surety or discharging a debt of someone else; see D. 3, 5, 31, pr; D. 3.5.39.

78 f.e. providing support or medicine or repairing a house; see D. 3.5.34; D. 3.5.10.1.

79 Zimmerman, *Law of Obligations* (n 4) 440; some types of delicts, were also considered as *negotium*, see D. 3.5.5.5.

80 Alberto Burdese, *Manuale di Diritto Privato Romano* (Utet 1966) 575; Avorel (n 38) 42; Seiler, *negotiorum gestio* (n 23) 13. Conversely, in modern law there can be observed some court decisions which invoke *negotiorum gestio* in cases of omission; fe see, CA (*Corte d'Appello*/Court of Appeal Italy) Rome 3 May 1983, Temi rom. 1983; *Bank of Scotland v McLeod Paxton Woolard & Co.* (1998) SLT 258; HR (*Hage Raad*/Supreme Court Netherlands) 10 December 1948, Ned. Jur 1949 no 122, 225.

81 fe if he was not a husband or wife of the person whose business he was managing; see D. 3.5.34.1.

82 fe as a parent; see D. 3.5.33.

83 See Ernest G. Lorenzen, 'Negotiorum Gestio in Roman and Modern Civil Law' (1928) 13 (2) Cornell Law Review 190, 191-194.

84 D. 17.1.6.2.; though not *ipso iure*, see W.W. Buckland, *A Text-Book of Roman Law* (Cambridge University Press 1963)

be mentioned here that the relevant Digest texts concerning the subject are indeed contradictory.<sup>85</sup> This problem lost its importance in the post-classical period owing to the fact that, during the reign of Justinian, the difference between *consensus* and *ratihabitio* had disappeared paving the way for the acknowledgment of *ratihabitio*'s converting *negotium* to *mandatum*.<sup>86</sup> Furthermore, a duty on the *dominii negotii* to give a *ratihabitio* to the *gestor*'s beneficial acts seem to be accepted later in post-classical law as evident from a text in the *Basilica*, which was a Byzantine codification from the early 10<sup>th</sup> century.<sup>87</sup> Later, this *dominii*'s duty of *ratihabitio* to *gestor*'s beneficial acts was re-emphasized by the Pandectists.<sup>88</sup>

As mentioned above, the *gestor*'s act which was done under the false belief that a mandate from the principal was granted, would still give rise to a *negotiorum gestio*; so did the act by the *gestor* where the mandate given by the principal was void. Accordingly, in the case where the *gestor* was acting outside of his authority, a *negotiorum gestio* was nonetheless accepted.<sup>89</sup> Furthermore, if a person was acting under the mandate from a third person other than the 'principal', then, as long as the mandatary intended to act not only in behalf of the mandator, but also in behalf of the 'principal', he might have been a *gestor* with respect to the latter and the rise of a *negotiorum gestio* would have been accepted while any controversy between the *gestor* and the principal would be resolved according to the rules governing *mandatum*.<sup>90</sup>

### 3. *Gestor* Acting for the Interest and according to the Will of The Principal

The *negotiorum gestio* might be seen as a Republican anomaly within the individualistic Roman system where altruism was not one of its main pillars. Thus, it is not surprising that the extension of *negotiorum gestio*, which did curb the autonomy of the individual, was restricted with the requirement of *utilitas gestionis* (useful management). This '*utilitas gestionis* condition' meant that the *gestor* must have acted in the benefit of the principal and only under that condition the *gestor* could have a right of action of *actio negotiorum contraria*.

The *utilitas gestionis* requirement was applied in a casuistic manner without the aid of any specific abstractions or definitions so while some jurists did adopt a narrow

537.

85 For Ulpian's view that ratification always turns the *negotiorum gestio* into a *mandatum*; see D. 50.17. 60; for Scaevola's view which, in such cases, grants the *gestor* an *actio negotiorum gestorum*, see D. 3.5.9.

86 Avorel (n 38) 90.

87 See G. Ernst Heimbach (ed), *Basilicorum*, Vol. II, (Leipzig 1840) XVII. I. IX, 210: "*Quod utiliter gestum est, dominum ratum habere compellitur; et quod ratum habuerit, valet*" "That which has been done usefully (*utiliter*), the *dominii* is compelled to ratify it, and what he has ratified is valid."

88 Karl Bertzel, 'Der Notgeschäftsführer als Repräsentant des Geschäftsherrn' (1959/1960) 158 *Archiv für die civilistische Praxis*, 134.

89 D. 3.5.5. pr.

90 Lorenzen (n 83) 193.

view of the requirement of '*utilitas gestionis*',<sup>91</sup> others did interpret it rather broadly.<sup>92</sup> The difference laid in the definition of '*utiliter*' (useful) and its connection with what is 'necessary' (*necessarius*):<sup>93</sup> Should only the 'strictly necessary' expenses be counted as useful and therefore can then be claimed by the *gestor*? Or can any expense, that is not 'strictly necessary' but also not for the 'sake of pleasure' (*causa voluptatis*),<sup>94</sup> be accepted as 'useful' and therefore 'claimable'?<sup>95</sup> The answer seems to lie somewhere in between: from the cases in the texts it can be deducted that while determining whether an expense was useful or not, the standard of 'reasonableness' was applied.<sup>96</sup> The same type of standard was also employed for the 'necessity' of the intervention itself.<sup>97</sup>

A *negotiorum gestio* would be accepted where the principal was not in a position to look after his affairs and there appeared a reasonable expectation that failure to intervene would result in prejudice to the principal. The will of the principal does not seem to account for much in that regard unless the intervenor did act contrary to the express wishes of the principal.<sup>98</sup> In such cases, as to the question whether the *gestor* could demand the expenses borne for the management of a business that was explicitly prohibited by the *dominii (prohibenti domino)*, there were conflicting ideas on the possibility of reimbursement. Some jurists granted the intervenor an action against the principal to the extent that the expenditure had actually enriched the principal,<sup>99</sup> whereas others rejected to characterize such type of an intervention as a '*negotiorum gestio*' and accordingly denied the action of *negotiorum gestio*.<sup>100</sup> It is apparent that there was not a single, uniform respond in classical law to the problem of '*negotiorum gestio prohibente domini*'. The classical jurists did not resolve the issue in a decisive manner and did give different opinions on separate cases depending

91 see fe D.3.5.9.1.

92 see fe D.3.5.10.

93 On this see Mayer-Maly, Probleme der Negotiorum Gestio (n 58) 423.

94 see D. 3.5.26. pr.

95 Useful or not, if the *dominus negotii* gave his permission (*ratihabitio*: ratification) later, then "*ratihabitio mandato comparator*"; (ratification compares to mandate), see D. 46.3.12.4. Thus, in such a case, the *dominus negotii* did lose his right to later claim that the expenses were not beneficial. For the claim that in classical law *ratihabitio* did not convert *negotiorum gestio* into a *mandatum*, see Seiler, *negotiorum gestio* (n 23) 71; Partsch (n 23) 120; For an opposing view see Türkan Rado, *Roma Hukuku Dersleri Borçlar Hukuku* (Filiz 2006) 174. For the difference between *ratihabitio* and *consensus* in classical law, see Avorel (n 38) 89.

96 "If the *gestor* had not done it, the principal himself should have done it"; see Salvatore Di Marzo, *Roma Hukuku*, (Ziya Umur tr, 2<sup>nd</sup> ed, İÜ Yayınları 1959) 462.

97 The 'reasonableness' of the intervention was to be determined from the principal's point of view; see D. 15.3.3.3.

98 fe the principal could have had explicitly prohibited the act or declared his objection to a particular intervenor.

99 See D. 3.5.5.5.

100 For the view that the *gestor* could have an *actio negotiorum gestio contra*, see Seiler, *negotiorum gestio* (n 23) 29-30, 90-92; also see D. 47.2.81.5, C. 2.18.24.1; for the view that the *gestor* might had an *actio negotiorum gestio utilis* (an *actio utilis* in relation to *negotiorum gestio*), see Benedikt Frese, 'Procurator und Negotiorum Gestio im Römischen Recht' in *Mélanges de droit romain dédiés à Georges Cornil* Vol I (Paris 1926) 367; Di Marzo (n 96) 462; also see D. 17.1.40; for the dominant view that the *gestor* would have no recourse against the principal, see D. 3.5.7.3, D. 3.5.30.4; D. 11.7.14.13; for a general account of the conflicting views, see Avorel (n 38) 99-105; Özdemir, *Vekaletsiz İş Görme* (n 23) 71-75.



on the circumstances of each individual case.<sup>101</sup> Nonetheless, during the Justinian reign, such acts were not considered *negotiorum gestio* as long as the intervenor was informed of the principal's prohibition by a written notice or a notification before witnesses.<sup>102</sup>

The will of the principal was especially important when it did explicitly prohibit the *gestor* from managing the business; however apart from the case where the express prohibition from the principal was disregarded, the principal's wishes and inclinations were not necessary elements of *negotiorum gestio*. In other words, unless it did take the form of an express, explicit prohibition, the will of the principal did not affect the position of the *gestor*.<sup>103</sup> The test of 'reasonableness' could also be employed here, specifically in the context of an 'unreasonable will' of the principal not being considered.

In the case where the *gestor* had disbursed an amount in excess of the express wishes of the principal, the *gestor* could have no recovery for the excessive portion.<sup>104</sup> Accordingly, as mentioned above, where the *gestor* acted against the direct prohibition by the principal, he was liable to the principal.<sup>105</sup> The exceptions of this rule was the case of *actio funeria* and the maintenance/cleaning of public streets. *Actio funeraria* was the 'in factum action' (*actio in factum*) which the praetor granted to a person who did arrange a funeral for someone at his own expense although he was not under any duty to do so.<sup>106</sup> *Actio funeraria* was given against the heir of the deceased person for recovery of expenses and via this action the heir could be held liable on the grounds of his absence or negligence even if he did forbid the burial.<sup>107</sup> *Actio funeraria* was also applicable in cases where the claimant had buried the slave of someone else and then demanded reimbursement of the funeral and burial expenses.<sup>108</sup>

As for the case of cleaning public streets, it was accepted that the tenants could deduct from the rent the expenses they made for keeping the public street outside their accommodations in repair and clean out the open gutters. Since this was a public duty that fall upon every inhabitant; the intention and will of the owner was of no

---

101 For the strong claim that the classical law actions of *negotiorum gestio prohibente domini* was eliminated by the compilers in order to comply with Justinian's thinking, see Seiler, *negotiorum gestio* (n 23) 91.

102 C. 2.18.24. pr-1. It was of no importance whether the business was successfully concluded or not.

103 The principal's wishes might had been contrary to his own interest.

104 D. 3.5.31.4.

105 D. 3.5.7.3.

106 Dictionary of Roman Law (n 27) 343.

107 D. 11. 7. 14. 13; D. 11. 7. 32. pr. For the modern equivalence of the exception of *actio funeria*, see the Spanish Civil Code art. 1894. For *actio funeraria* and modern German Law see Oliver Unger, *Actio Funeraria* (Mohr 2018)| also see Erdal Özsunar, 'Forderungspfandung bei der 'Actio Funeraria' in Murat İnceoğlu (ed), Prof Dr Belgin Erdoğmuş'a Armağan (Der 2011) 197-207.

108 D.11.7.31.1: "*Qui servum alienum vel ancillam spelivit, habet adversus dominum funerariam actionem.*" (If someone has buried somebody else's male or female slave, he can have an action for funeral expenses against the owner).

significance.<sup>109</sup> In the event that the owner had forbade the tenant to disburse such expenses, that prohibition would have no effect on the rise of a *negotiorum gestio* against the owner.

On a last note, it did not matter whether the *gestor*'s efforts were in vain or not, provided that the *gestor* had acted in proper diligence. The fact that the intervention had initially yielded favorable consequences but lost its utility afterwards depending on later events, would not prevent the rise of a *negotiorum gestio*.<sup>110</sup> However, the mere belief of the intervenor that his intervention would be beneficial was not enough.<sup>111</sup>

#### 4. *Gestor* Acting with the Expectation for Reimbursement

The *gestor* interfered with someone else's business and acted with the intention of putting the principal (*dominus negotii*) under debt and demanding future expenses. Therefore, if he had acted with the sole purpose of benevolence or liberality or out of respect for family ties,<sup>112</sup> then there would had been no acknowledgment of any *negotiorum gestio*,<sup>113</sup> and the act in question would had been interpreted 'as a donation'.<sup>114</sup> In case of a dispute on the question whether the intervention was done with the expectation of reimbursement or out of the spirit of liberality, the burden of proof lied within the principal.<sup>115</sup> This requirement for the 'intention to be reimbursed' (*animus recepti*) was later given more emphasis by Justinian, under the influence of the East Roman school.<sup>116</sup>

The idea behind a relation that is *negotiorum gestio* is that the intervenor (*gestor*) is acting in the interests of the principal (*dominii negotii*),<sup>117</sup> while having a motive that is gratuitous, but also not purely altruistic. Therefore, the intervenor might had not been interfering with someone else's business targeting a solely personal gain; but he should also had not been interfering out of an altruistic spirit. Whilst the law provided a venue for a display of Roman altruism and the exercise of civic and moral duties; it also did aim to protect the private interests of persons from uncalled intermeddling of third parties.

109 D. 43.10.3.

110 D. 3.5.9.1. "...ut enim eventum non spectamus, debet utiliter esse coeptum" (for although we do not regard the outcome, the beginning must be beneficial). Fe as in the case of a wounded slave who might had been treated by the *gestor* and did recover for some time but then later died in relation with his injuries.

111 D. 3.5.9.

112 For the cases where the familial ties incorporate a legal obligation see I C (2) n 81,82.

113 Alan Watson, *The Contract of Mandate in Roman Law* (Clarendon Press 1961) 41-42; Rado (n 95) 149; for the case where a person supported his sister's daughter out of natural affection, see D. 3.5.27.1.; for the case where the son fulfilling the debt of his father see C. 2.18.12. In both cases, it was hold that there would be no *negotiorum gestio*.

114 Or in better words: as an act having an '*animus donandi*'; see C. 2.18.12: "*Si filius pro patre suo debitum solvit, nullam actionem ob eam solutionem habet, sive in potestate patris, cum solveret, fuit, sive sui iuris constitutus donandi animo pecuniam dedit....*" (If a son pays a debt for his father, he has no action concerning this payment, whether he was in his father's power when he paid, or when made *sui iuris*, he paid money with an intention to gift.).

115 Di Marzo (n 96) 462-463; Rado (n 95) 150.

116 Kaser, *Private Law* (n 23) 194.

117 It was possible that the *gestor* was also acting in his own interest in addition to the principal's.

## D. Legal Consequences of *Negotiorum Gestio* in Roman Law

### 1. Rights & Obligations of The Parties

There are two parties in a *negotiorum gestio* relationship. The person whose business is managed in his own interest, that is, the real owner of the business, is the *dominus negotii* (principal), and the person who interferes in someone else's business and manages the business of another without his/her authority is the *negotiorum gestor* (*gestor*).

*Negotiorum gestio* gave rise to an 'imperfectly bilateral *bona fide* obligatory relationship'.<sup>118</sup> The *gestor*'s obligation was to duly complete the *negotium*, and the *dominus negotii*'s obligation was to reimburse the *gestor* for the expenses and losses incurred while performing the work. *Negotiorum gestio* giving rise to 'an imperfectly bilateral obligation' meant that while the *gestor* was always under an obligation, the *dominus negotii* could go under an obligation depending on the circumstances of each given case.<sup>119</sup> It follows that the *actiones* were also bilateral and in correspondence: being *actio negotiorum directa* and *actio negotiorum contraria*.<sup>120</sup>

The main obligation lied with the *gestor*; he was under the obligation to show all attention and care in the management of the business and to finalize the work that he started;<sup>121</sup> even the death of the principal would not have any affect.<sup>122</sup> The *gestor*, who voluntarily intervened with someone else's business, was liable of all his fault (*ex omnis culpa*) although he gained no benefit or profit from the business he managed. Here, the fact that the *gestor* who gains nothing from the *negotiorum* is nonetheless liable *ex omnis culpa* is indeed against the 'utility principle' of Roman law, which adapts the standard of care to the level of benefit gained.<sup>123</sup> The reason for this exception is related to the fiduciary and officious character of '*negotiorum gestio*' as are the other exceptions to the 'principle of utility' such as the *bona fidea* contracts of *depositum* and *mandatum*.<sup>124</sup> The *gestor* had to act as a good *pater* (*diligens pater familias*), that is, he had to act with the least care and diligence that was expected from a Roman *pater*.<sup>125</sup>

118 Barry Nicholas, *An Introduction to Roman Law* (OUP 1962) 228.

119 Kaser, *Private Law* (n 23) 166.

120 In any imperfectly bilateral obligatory relationship the action against the primary obligor would always be the '*directa*', and the action directed against the 'probable' obligor would be the '*contra*'; see Rado (n 95) 64-65.

121 Buckland (n 84) 538; see D. 3.5.20.2 for Paul's view that in the case of the death of the *dominii* (principal), there is no necessity for the *gestor* to enter into new transactions though the *gestor* is required to complete and look after old ones.

122 D. 3.5.3.7.

123 For the utility principle, see D. 50.27.13; D: 13.6.5.2,3; also see Rado (n 95) 29-30.

124 Rudolph Sohm, *The Institutes* (James Crawford Ledlie tr, 3rd edn, Clarendon Press, 1907) 368 - 369.

125 Özdemir, *Vekaletsiz İş Görme* (n 23) 65. The *diligens pater familias* was the standard for *culpa levis* (ordinary negligence); for the various degrees of liability in Roman Law, see Hilal Zilelioğlu, 'Roma Hukukundaki Sorumluluk Ölçütlerine Genel bir Bakış' (1982-87) 39 (1-4) AÜHF 241- 264.

The *gestor*'s liability would be considered lighter provided that the work was done to counter an immediate danger (such as fire and flood) or did involve a certain degree of urgency under conditions where there was a serious threat of damage to the *dominii negotii*.<sup>126</sup> In the event of such circumstances, the *gestor* was only liable of his 'intent' (*dolus*),<sup>127</sup> which, since Justinian times, also included gross negligence (*culpa lata*).<sup>128</sup> On the other hand, if the *gestor* had managed the business against the actual or presumptive will of the *dominii negotii* in a way he did not usually do, the *gestor* was also liable of the 'unexpected circumstances' (*casus fortis*).<sup>129</sup> Any profit as a result of the business would belong to the *dominii*; if there occurred also losses, then the *dominii* had to set off the profit against the loss.

The *dominii negotii* was not the natural obligor in the relationship of *negotiorum gestio*; he could go under an obligation or not depending on the given set of circumstances. The *dominii negotii* had to assume the liabilities duly incurred and refund the expenses which were necessary and/or useful but were not 'only for the sake of pleasure'.<sup>130</sup> On the other hand, if no expenses were borne by the *gestor* then the *dominii negotii* would not go under any obligation and there could be no action against him. The *gestor* was obliged to give an account to *dominii negotii* when the business was finished and to transfer the principal all his gains deriving from the managed business.<sup>131</sup>

In conclusion, the institution of *negotiorum gestio* did compel the principal (*dominii negotii*) to assume the obligations which the *gestor* had incurred in his behalf and to indemnify the *gestor* for certain (utilitarian and necessary) expenses borne in the management of the business. One last thing to remember would be the fact that '*actio negotiorum gestio*' was a *bona fide* action and by virtue of the '*ex bona fide*' clause in its *formula* the judge had a wide latitude during his decision making, which naturally would also extend to the determination of the content of the parties' obligations as well the standards of their liabilities.

## 2. Actions Deriving from *Negotiorum Gestio*

The *negotiorum gestio* would give way to two different actions: *actio negotiorum gestorum directa* and *actio negotiorum contra*.<sup>132</sup> The action that would be directed

<sup>126</sup> Rado (n 95) 174.

<sup>127</sup> D. 5.3.3.9; also see Paul. Sent. 1.4.1; I Ins. 3.27.1.

<sup>128</sup> "*Culpa lata dolo aequiparatur*" (gross negligence is equivalent to intent); see Paul Koschaker, Kudret Ayiter, *Roma Hususi Hukukunun Ana Hatları* (Seçkin, 1977) 197-198.

<sup>129</sup> D. 3.5.10. The specific examples given in the texts are: the *gestor* 'entering into a business deal' for the *dominii* and the 'purchase of newly imported slaves (sing. *novicius*/pl. *novicii*: slaves who very recently lost their freedom) at a sale'.

<sup>130</sup> See I C (3).

<sup>131</sup> He also had to inform the principal of the work he had undertaken.

<sup>132</sup> I Ins. 3.28.1: "*Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum: sed domino quidem rei gestae adversus eum qui gessit directa competit actio, negotiorum autem*

against the *gestor* by the principal would be *actio negotiorum gestorum directa*, as the *gestor* was -always- the primary obligor. Therefore, it would not be wrong to argue that for the Romans the *actio negotiorum gestorum directa*, which was the action of the principal against the *gestor*, was the ‘main action’ directing the ‘main claim’; and it was the principal (*dominii negotii*) who was the natural *actor* (claimant) and the *gestor*, the natural *reus* (defendant).<sup>133</sup>

The *directa* and *contra* actions of *negotiorum gestorum* were both *bona fide* actions,<sup>134</sup> (*iudicia bonae fidei*) meaning that the judge (*iudex*) of an *actio negotiorum gestio* would have been vested with a broad authority owing to the *ex fide bona* clause in the *intentio* (statement of claim) of its *formula*.<sup>135</sup> The *ex bona fide* clause granted the judge the authority to decide in accordance with the principles of *bona fides* (good faith) which enabled him to take ‘good faith’ into consideration while adjudicating a given case.<sup>136</sup> Therefore the judge would have a judicial discretion in deciding on whether f.e the defendant’s (*gestor*) acts were in compliance with good faith or not.<sup>137</sup>

The *dominii negotii* had the *actio negotiorum gestio directa* against the *gestor* and by this action could recover what the *gestor* had acquired including any fruits and/or demand monetary compensation since the *gestor* was obliged to give an account to the *dominus negotii* and to hand over to him all that had been acquired once the work undertaken or business managed was finalized.<sup>138</sup> For example, in the cases where the *gestor* did acquire property or similar assets as a result of the managed business and did not transfer them to the *dominii negotii* after the conclusion of the *negotiorum* or did cause damages to the *domini* while managing his business or did not complete the business, there laid the *actio negotiorum gestio directa* for the *dominii negotii*. Thus, *actio negotiorum gestio directa* was the *dominus*’s safeguard against the *gestor*’s non-fulfilment of such obligations and/or his lack of due diligence. However, unlike the action of mandate -*actio mandate*-, it was not an infaming action meaning that there was no danger for the *gestor* to become *infamis* as a direct consequence of the litigation.<sup>139</sup>

*gestori contraria*” (Thus, if one man has managed the business of another during the latter’s absence, each can sue the other by the action on *negotiorum gestio*; the **direct action** being available to him whose business was managed, the **contrary action** to him who managed it).

133 On the contrary, in modern law, the *gestor*’s claim against the principal conceived of as *actio negotiorum gestorum contra* by Roman law, seems to be the main core of *negotiorum gestio*; for the modern German case, see Samuel J. Stoljar, ‘Negotiorum Gestio’ in Ernst von Caemmerer, Peter Schlechtriem (eds) International Encyclopedia of Comparative Law, Vol. X (Mohr 1984) 66 et seq; Christian Wollschläger, *Die Geschäftsführung ohne Auftrag Theorie und Rechtsprechung* (Duncker & Humblot 1976) 32.

134 see Gai. 4.62; also see Kaser, *Private Law* (n 23) 142-143; for the *iudicia stricti iuris* (strict law actions) see Metzger (n 11) 230 et seq; Gökçe Türkoğlu Özdemir, ‘Roma Medeni Usulünde Formula Yargılaması’ (2005) 7 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 167, 194-196.

135 Erdoğan, Tahiröğlu (n 33) 34-35.

136 Gai. 4.47: “*quidquid ob eam rem Numerium Negidium (NN) Aulo Agerio (AA) dare facere oportet ex fide bona* (... Whatever is required for him to do or to give in accordance with good faith...)”.

137 or whether a certain set of expenses were beneficiary (*utilitas*) or not.

138 D. 3.5.19.4.

139 see Watson, *Law of Obligations* (n 23) 156; Buckland, (n 84) 537; Abdurrahman Savaş, ‘Roma ve Türk Hukukunda

The question whether an *animus aliena negotio gerendi* on the *gestor*'s part was required for the *actio negotiorum gestio directa* in classical law is disputable.<sup>140</sup> If the *gestor* managed another one's business without the awareness that it belonged to someone else other than himself, there laid a *negotiorum gestio directa*.<sup>141</sup> And in the case where the *gestor*, knowingly managed someone else's business for his own benefit, an *actio negotiorum gestio directa* was possible for the *gestor* to return the benefits (and -legal/natural- fruits)<sup>142</sup> to *dominus negotii* and to be held accountable for his management in general.<sup>143</sup> The *gestor*, on the other hand, could only claim his expenses in proportion to the enrichment of the *dominus negotii*. Under the Justinian law, however, there was not much controversy, as even in the case where the *gestor* managed someone's else's business solely for his own benefit, Justinian allowed an *actio negotiorum gestio directa* on the grounds of equity.<sup>144</sup>

The *gestor* had the right to direct an *actio negotiorum gestio contra* to the *dominii* (principal) with which he could demand the reimbursement of his expenses,<sup>145</sup> and/or his release of any debts incurred.<sup>146</sup> He did not have the right to ask for the compensation of the damages that had occurred while managing the principal's business though.

As mentioned above,<sup>147</sup> the successful completion of the *negotiorum* on behalf of the *dominii* was not a requirement for the admittance of *actio negotiorum gestio contra*; provided that the intervention of the *gestor* was necessary and done for the benefit of the principal. The refund of the necessary/beneficiary expenses and liabilities could be demanded by the *gestor* via the *contra* action.

## II. *Negotiorum Gestio* in Modern Continental Civil Law

### A. *Ius Commune* and *Negotiorum Gestio*

*Negotiorum gestio* had its origin in the intervention for the judicial protection of an absent Roman. Its scope of application extended in time and under the reign of Justinian, *negotiorum gestio* included acts that involved benevolent interventions by third parties regardless of the 'absence' of the principal. Apart from that, it was also used for claims

Vekalet Sözleşmesi' (2000) 8 (1-2) Selçuk Üniversitesi Hukuk Fakültesi Dergisi 598.

140 see I C (1).

141 This requirement of 'awareness' was one of the main aspects which differentiated *negotiorum gestio* from the contract of *mandatum*; see Seiler, *negotiorum gestio* (n 23) 54.

142 The technical term *fructus* (fruit/*semere*) includes natural produce of agriculture, off springs of animals and proceeds from mines (hence the term natural fruits), as well as interest and profits gained through legal transactions (legal fruits); see Dictionary of Roman Law (n 27) 478; Özcan Karadeniz Çelebican, *Roma Eşya Hukuku* (5th edn, Turhan 2015) 164 -168.

143 D. 3.5.18.4; C. 2.18.18.

144 Di Marzo (n 96) 463.

145 If the *gestor* had no intention to be reimbursed when managing the business of another than there would be no '*negotiorum gestio*' between the parties and there can be no demand for a refund from the *gestor*; see I C (4).

146 Buckland (n 84) 538.

147 See I C (3) n 102.



for restitution where no other action was available and by virtue of this ‘complementary’ quality, *negotiorum gestio* had found its own place in Justinian’s compilations. Thus, with the rediscovery of Roman law in the 12th century,<sup>148</sup> the institution of *negotiorum gestio* enjoyed its second life, this time in the works of the glossators and post glossators and under the influence of Christianity. The chameleon-like character of *negotiorum gestio* had already been established by the time of the Justinian and it was this flexible and inclusive character of *negotiorum gestio* that eased its transition to modern law.

### 1. *Negotiorum Gestio* in the ‘Early *Ius Commune*’

As mentioned above, one of the more prominent aspects of ‘*negotiorum gestio*’ in post-classical law was the growing emphasis on its ‘restitutionary function’. In the early ‘*ius commune*’,<sup>149</sup> this function of the *negotiorum gestio* became more pronounced as the rationales of *negotiorum gestio*, being peculiar to Roman social and legal dynamics, was now superseded by the tenet of preventing unjustified enrichment at any cost.<sup>150</sup> The remission of sin and the salvation of soul was only possible with the rebalancing of the equilibrium between things as ‘giving everyone their due’ and ‘avoiding any form of theft’ had become the mother of all motives.<sup>151</sup>

The 12th century canonists made extensive use of the ancient Greek philosophical ideas which they combined with Roman law.<sup>152</sup> This combination also enabled the canonists to intertwine concepts taken from Greek philosophy and Roman law, such as ‘reason’ (*ratio*) and ‘equity’ (*aequitas*), with theological concepts such as ‘conscience’, ‘forgiveness’, ‘sin’ and ‘mercy’.<sup>153</sup> Thus, for the canonists, restitution of unjust enrichment became an element of divine justice;<sup>154</sup> only with restitution could the ‘sin’<sup>155</sup> be forgiven.<sup>156</sup>

148 See Ziya Umur, *Roma Hukuku – Tarihi Giriş – Kaynaklar - Genel Esaslar* (Fakülteler Matbaası, 1983) 286-288; Manlio Bellomo, *The Common Legal Past of Europe* (Lydia G. Cochrane tr, The Catholic University of America Press 1996) 58-63; Charles Radding, Antonio Ciaralli, *Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill 2007) 67-69.

149 *Ius commune* is the name given to the uniform system of law which was the result of a long historical process of European legal understanding and in particular of the reception of Roman law. In that regard the term ‘early *ius commune*’ would denote to the period between the 12<sup>th</sup>-16th century; see Francesco Calasso, *Introduzione al diritto commune* (2<sup>nd</sup> edn, Giuffrè 1951); Nils Jansen, ‘*Ius commune*’ in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law Vol. II* (OUP 2012) 1106-1010; Paul Koschaker, *Europa und das römische Recht* (4th edn, Beck 1966); Helmut Coing, ‘The Sources and Characteristics of *Ius commune*’ (1986) 19 (3) *The Comparative and International Law Journal of Southern Africa*, 483-489; Bellomo *ibid* 55.

150 see Wim Decock, *Theologians and Contract Law: The Moral Transformation of the *ius commune* (ca 1500 – 1650)* (Brill, 2012) 514-519; also see Jan Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (GNI, 1996) 20-22, 40-41.

151 See Thomas Aquinas, *Summa theologiae* II-II (Peter Schöffler ed, Mainz 1471), Quaest. 62, art. 2

152 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* Vol 1 (Harvard University Press 1983) 146.

153 James Gordley, *Jurists: A Critical History* (OUP 2014) 99-101. On the familiarity of the glossators with Aristotelean principles, see Hermann Kantorowicz, *Studies in the Glossators of the Roman Law* (Cambridge University Press 1938) 40-41.

154 See Hallebeek (n 150) 53-58.

155 The ‘sin’ being the seventh commandment of ‘not to steal’; see Old Testament (Ex. 20:15).

156 Otherwise, there was ‘no penance but rather pretence’ see *Decretum Gratiani*: C. 14 q. 6 c. 1.

Later, the late scholastics, following Thomas Aquinas, believed that restitution was an act of 'commutative justice' (*iustitia commutative*).<sup>157</sup> And as a matter of commutative justice, a person should be given the opportunity to recover whenever he has been deprived of what belongs to him.<sup>158</sup> Cases of wrongful interference with, and unjustified retention of, someone else's property was conceptualized within the idea of commutative justice.<sup>159</sup> As a consequence, the *negotiorum gestio* was transformed into a highly flexible, yet at the same time unstructured, means of restitution.

The *negotiorum gestio* was now also considered for granting a claim for an enrichment resulting from an unjustified management of another's affairs; probably even in cases where the *dominii* protested. For example, the theoretical scope of the *actio negotiorum gestorum utilis (directa)*<sup>160</sup> was extended to provide remedies to the person, who had constructed a building on someone else's land, against the landowner.<sup>161</sup> It did not matter whether the builder was in good faith or bad faith; the 'unjust' ramification that the landowner had been enriched in expense of the builder was what really mattered and had to be remedied somehow. Thus, in the early *ius commune*, the 'Roman law controversy'<sup>162</sup> regarding the essentiality of the *gestor*'s intention to manage the business of someone other than himself seems to be resolved in favour of a solution in line with the Justinian approach, as the *gestor*'s '*animus aliena negotio gerendi*' was no longer seen as a requirement for the norms of *negotiorum gestio* to be applied to either party - be it the *gestor* or the *dominii* -.

## 2. *Negotiorum Gestio* and the 'Early Natural Law Movement'

Beginning in the 18th century, the nature and the function of *negotiorum gestio* experienced further variations; now it's perception began to be shaped under an 'ideal of help in situations of emergency'.<sup>163</sup> This new paradigm shift had been forced by natural law ideas,<sup>164</sup> which viewed 'contract' to be 'either express or implied by law' and -if implied by law- to be 'either with or without agreement'.<sup>165</sup>

157 See Aquinas (n 151) Quaest. 62, art. 1.

158 See f.e. Domenicus de Soto, *De iustitia et iure libri decem* (Salamanca, 1553) lib. 4, q. 6, a. 5; Ludovicus de Molina, *De iustitia et iure tractatus* (Venice 1614) disp. 315, 724; Leonard Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris 1628) lib. 2, cap. 12, dubs. 16, 18; §cap. 20, dubs. 10–11.

159 Nils Jansen, 'Die Korrektur grundloser Vermögensverschiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny' (2006) 120 ZSS: Romanistische Abteilung, 106.

160 For the differences (or lack thereof) between *actio negotiorum directa* and *utilis* under the *extra ordinem* system see D. 3.5.46.1.

161 By the early glossator Martinus Gossia, see Decock (n 150) 515.

162 See I C (3).

163 See fe Joseph Kohler, 'Die Menschenhilfe im Privatrecht' (1887) 25 Jherings Jahrbucher für die Dogmatik des bürgerlichen Rechts, 47; Ernst Rabel, 'Ausbau oder Verwischung des Systems? Zwei praktische fragen' (1919) 10 Rheinische Zeitschrift für Zivil und Prozessrecht 89, 94 et seq.

164 The term 'early Natural law movement' indicates to the epoch between 17<sup>th</sup> -19 century, where the secularization of the legal thinking was achieved which was to be followed by the redesign and realignment of 'law' as a modern concept coupled with the marginalization of its religious basis.

165 Hugo Grotius, *De Iure belli ac pacis*, (Jean Barbeyrac, Janssonio-Waesbergios eds, Amsterdam 1720) II.X.IX.1, 352:

Under this perception, the institution of ‘*negotiorum gestio*’ had to be adapted into the ‘theory of contract’ and be aligned with the principles that governed contract law.<sup>166</sup> Hence, ‘*negotiorum gestio*’, like the other quasi-contracts, was taken to be a ‘presumed contract’,<sup>167</sup> implied by law.<sup>168</sup> Another parallel development that eased the acceptance of *negotiorum gestio* by natural law thinking was regarding the limits of property right and the validation of ‘someone meeting his own need by means of another’s property’.<sup>169</sup>

Thus, since the end of the 18th century, the idea of ‘altruistic help in emergency situations’ became the new paradigm of *negotiorum gestio* which greatly subordinated, if not eliminated, its restitutionary function.<sup>170</sup> Instead, the issues of remuneration for the *gestor* and his claim for any damages, which were not accepted in Roman law, started to be considered in the context of *negotiorum gestio*.<sup>171</sup> The contractual nature of this new paradigm of *negotiorum gestio* was formulated with the acknowledgment of the *gestor*’s *animus negotia aliena gerendi*, together with the presumed intent of the *domini*, as the *sine qua* condition.<sup>172</sup> Therefore, the consensual element of *negotiorum gestio* was construed from the fictitious meeting of the *gestor*’s *animus* and the actual or presumptive will of the *domini*.<sup>173</sup>

Conversely, the classical Romans never viewed ‘*negotiorum gestio*’ as having elements of ‘tacit consent’, ‘fictitious agreement’, or as being a ‘presumed contract’;

‘. nam negotiorum gestorum actio ex lege civili nascitur: nullum enim habet eorum fundamentorum ex quibus natura obligationem inducit.’ (...since an action for ‘*negotiorum gestio*’ is born from the civil law and has none of those foundations upon which Nature builds an obligation...). The Enlightenment era codes of Prussia and Austria, which were influenced by natural law ideas, include exclusions of *negotiorum gestio*’s admissibility; see the Prussian Allgemeines Landesrecht (1794) §228; ABGB (*Allgemeines bürgerliches Gesetzbuch*) art 1035.

- 166 Nils Jansen, ‘Management of Another’s Affairs without a Mandate (*Negotiorum Gestio*)’ in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law Vol. II* (OUP 2012) 1115.
- 167 Johann Gottlieb Heineccius, Arnoldi Vinnii J.C., *In quatuor libros Institutionum imperialium commentarius academicus, & forensis* Vol 2 (editio novissima, Leyden 1761) 3.28 pr; Johannes de Voet, *Commentarius ad Pandectas* Vol 2, (editio ultima, Leyden 1757) D.44.7.5.
- 168 There was a dispute over the proposition that ‘*negotiorum gestio*’ did involve tacit consent and thereby could be regarded as a contract, however such an approach was rejected based on Roman law texts; see D.2.14.2; D.17.2.4; D.17.1.18; D.17.6.2, D.19.2.13.11. As a result, the approach of ‘tacit consent’ was abandoned in favor of ‘presumed consent’; see Birks, Macleod (n 18) 58-77. The claim that there was a ‘tacit consent’ present in the *negotiorum gestio* rendering it as an ‘implied contract’ was actually a product of common law jurisprudence, namely of William Blackstone; see William Blackstone, *Commentaries on the Law of England* Book III (J.B. Lippincott & Company 1860) 154, 158-166. For a civilian argument as to why ‘*negotiorum gestio*’ could not had been an implied contract, see James Dalrymple Viscount of Stair, *The Institutions of the Laws of Scotland* (D.M. Walker ed/Tercentenary Edition, Yale University Press 1981); D.2.14.2; D.17.2.4; D.17.1.18, D.17.1.6.2; D.19.2.13.11.
- 169 Grotius (n 165) II.II.VI-VII, 191-193; Samuel Pufendorf, *De iure naturae et gentium* (editio nova, Knochius 1694) II.VI.5, 314-315; Cf Aquinas (n 151) Quaest. 66, art.7.
- 170 Jansen, *Negotiorum Gestio* (n 166) 1115.
- 171 Zimmerman, *Law of Obligations* (n 4) 444 – 445; also see Dutch Civil Code art. 6:200 (2) and the Portuguese Civil Code art. 470, 1158/2.
- 172 It must be reminded here that the conceptual attachment of *animus negotia aliena gerendi* to *negotiorum gestio* was perceived since the time of glossators; see Zimmerman, *ibid* 440 fn. 60; also see II A (1).
- 173 E. Ruhfrat, ‘Beiträge zur Lehre von der *Negotiorum Gestio*’ (1849) 32 (2) *Archiv für die civilistische Praxis* 173-199, especially 184 et seq; ‘Einige wichtige Grundsätze der *Negotiorum Gestio*’ (1889) 27 *Jhering Jahrbuch*, 70-152; For opposing views see Robert Joseph Pothier, *Traite des Obligations* 1 (Debure 1764) §114, 136; *Traite du Contrat de Mandat* (Debure 1766) app. *negotiorum gestio*.

on the contrary, it was the lack of consent and a corresponding agreement which differentiated *negotiorum gestio* from all the other contracts,<sup>174</sup> hence the exclusion of '*negotiorum gestio*' from all types of classifications of contracts. The fact that agreement and contract were not conceptually tied to each other in theory had to do more with their Roman way of thinking than their lack of such notions. The concepts and principles used by Aristotle and Thomas had served as luminaries to their own theories and ideologies unlike the Romans who, rather than theorizing philosophical or moral dictums, were more interested in giving opinions on cases by analyzing legal problems much like certain 'jurists of the 19th century'<sup>175</sup> who did disassociate the 'concept of virtue' from their discussions of the essential elements of a contract. The proposition that "every contract required its parties' agreement" was so obvious that there was no specific need to emphasize and no attributable specific legal value to crystallize it.

On the other hand, the contract law of *ius commune*, although being based on Roman law, developed its own principles under the influence of, first, the moral values of Christianity,<sup>176</sup> and then the principles of natural law. It followed that, virtues such as 'communitarian justice', 'equity' and 'equality' were increasingly understood to give the binding force to agreements and in that regard the '*negotiorum gestio*' had to be considered as an expression of such ideals. Later, as mentioned above, during the 19<sup>th</sup> century such virtues were eliminated from the theory of contract paving the way to its abstraction in terms of 'consent', 'agreement' and the 'expression of will',<sup>177</sup> while, at the same time, the answer to the question of why the will of the parties had to be considered as binding, were continuously ignored.<sup>178</sup>

174 D. 44.7.5.pr.

175 Such as Savigny, Windscheid and Puchta of the Historical School.

176 For the influence of the moral theologians on the development of 'contract law' and its categories see; Italo Birocchi, *Causa e categoria generale del contratto, Un problema dogmatico nella cultura privatistica dell'età moderna. Il cinquecento* Vol I (Giappichelli, 1997) 203–269; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991) 69–111; Thomas Duve, 'Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik' in O. Condorelli, F. Roumy and M. Schmoeckel (eds), *Der Einfluss der Kanonistik auf die Europäische Rechtskultur* (Böhlau 2009) 389–408; Klaus Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (J. Schweitzer 1985) 135–148.

177 The French deemed 'contract' to be 'a concord of wills' whilst the German definition was 'a two-sided juristic act (*Rechtsgeschäft*) formed by the declarations of wills (*Willenserklärung*) of both parties'; see Charles Demolombe, *Cours de Code Napoleon* Vol XXIV (A. Durand & Hachette 1868) §12, 11; François Laurent, *Principes de droit civil français* Vol XV (A. Durand, 1875) §423–427, 476–481; Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* Vol III, (Berlin 1840) §134, 258; G. F. Puchta, *Pandekten*, (4th edn, Barth 1844) §49, §54, 70, 79; Bernard Windscheid, *Lehrbuch des Pandektenrechts* Vol I (Frankfurt 1875) §69, 169–170.

178 "A contract was obligatory simply because it was a contract", E. Gounot, *Le Principe de l'autonomie de la volonté en droit privé: contribution à l'étude critique de l'individualisme juridique* (Paris, 1912) 129; as quoted by V. Ranouil, *L'Autonomie de la volonté: naissance et évolution d'un concept* (Presses universitaires de France, 1980) 72 fn 31. For the criticisms see Rudolf von Jhering, *Zweck im Recht*, Vol 1, (3rd edn, Leipzig 1898); Leon Duguit, *Les Transformations générées du Droit privé depuis le Code Napoleon*, (2nd edn, Paris 1920) 72–73, 97–98; Roscoe Pound, 'Liberty of Contract', (1908–09) 18 Yale Law Journal 454–487, especially 457.

The imperative nature and the binding force of a contract was not explained but was taken for granted, giving rise to its definition as the ‘consent of the parties’.<sup>179</sup> Accordingly, the rather obligatory conception of *negotiorum gestio* as a ‘fictitious contract’ did amalgamate it with the category of contractual obligations, albeit in a limited sense. While the *Code Civil* (Code Napoleon) regulated ‘*negotiorum gestio*’ under the title of ‘quasi-contracts’ following ‘contracts’, the German Code and Swiss Code included it as separate titles following ‘mandate’. It had indeed been more than a century since a codification -other than the French- had included the concept of ‘quasi-contracts’. Thus, it would not be wrong to claim that, as of today, the concept of ‘quasi-contracts’ does belong to the shelves of legal history. Still, that does not change the fact that certain aspects of the modern law of *negotiorum gestio* are still grounded on a given connection to the doctrine of ‘quasi-contracts’.<sup>180</sup>

## B. *Negotiorum Gestio* in Modern Civil Codes

The Roman “*negotiorum gestio*” is a part of the modern continental civil law as evident by the fact that it had found its place in every code of the civil law jurisdiction.<sup>181</sup> It is however not surprising that while the *negotiorum gestio* of modern laws shows similar features owing to the common Roman origins, it also differs in some respects as regards with its function and requirements.<sup>182</sup> In that regard, the modes of approach adopted in various civil law countries are essentially based on the French, Austrian, German and Swiss Codes by virtue of their original qualities and being models for other codes. Here, one must also remember that in each jurisdiction the content of *negotiorum gestio*, as well as its field of application, is determined by other sources -such as court decisions- along with the legal codes while the consideration of the relation between the law of *negotiorum gestio* and the law of tort and unjustified enrichment in respond to certain issues is also susceptible to different approaches, in different jurisdictions.

179 Gordley, *Philosophical Origins of modern contract doctrine* (n 176) 213.

180 Bar, *Benevolent Intervention* (n 6) 55.

181 *Negotiorum gestio* is also determined as one of the sources for ‘non-contractual obligations’ within European Union under the framework of the ROME II Regulation (Council Regulation [EC] No 864/2007 on the law applicable to non-contractual obligations), which applies to situations involving a conflict of laws to non-contractual obligations in civil and commercial matters. Accordingly, the article 2 of the regulation provides clarification on what is meant by ‘non-contractual obligations’: “For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.”; also see art. 11.

182 Amongst the modern civil codes only the Portuguese and the Dutch codes do provide definitions of ‘*negotiorum gestio*’ while the Code Napoleon in art. 1372 speaks of “someone who voluntarily manages the affair of another” (“... volontairement on gère l’affaire d’autrui...”) see Bar, *Benevolent Intervention* (n 6) 54. Portuguese CC art. 464: “*Dá-se a gestão de negócios, quando uma pessoa assume a direcção de negócio alheio no interesse e por conta do respectivo dono, sem para tal estar autorizada.*” (There is a *gestao de negocios* when, without being authorized to do so, a person assumes the direction of another’s business in the interest and for the account of the principal concerned.”; Dutch CC art.6:198:” *Zaakwaarneming is het zich willens en wetens en op redelijke grond inlaten met de behartiging van eens anders belang, zonder de bevoegdheid daartoe aan een rechtshandeling of een elders in de wet geregelde rechtsverhouding te ontlenen*” (*Zaakwaarneming* is the intervention in the furtherance of another’s interest, willfully and knowingly and with reasonable ground, without deriving the authority to do so from a legal transaction or a legal relationship subsisting elsewhere in the law).

## 2. German Law and the German Civil Code (BGB)

The German Civil Code (BGB), extensively regulates ‘*negotiorum gestio*’ (*Geschäftsführung ohne Auftrag*) in the special part of the second Book (Law of Obligations), in the middle of the section of ‘special contracts’ right after the ‘contract of mandate’.<sup>183</sup> BGB, whilst not defining the institution of ‘*negotiorum gestio*’, nonetheless provides a definition of the *gestor* as the one ‘who takes care of the business of another without being mandated by him or otherwise entitled to do so in relation to him’.<sup>184</sup> The Roman influence on the principles governing *negotiorum gestio* in German law is obvious regardless of certain issues where the BGB and/or the German case law and scholarship had diverged from the Roman approach.<sup>185</sup> In modern German law, as in Roman law, if the management of business has for its object the averting of an imminent danger that threatens the principal, then the *gestor* is responsible only for intent and gross negligence,<sup>186</sup> which is a deviation from the general rule of liability as set in article 276.<sup>187</sup> The threat need not to be ‘real’, the fact that the *gestor* reasonably and justifiably holds it to be real may be sufficient although it must be said here that the wording of the relevant article of BGB (art 680) does not explicitly address the issue of the ‘genuineness’ of the threat and the danger it represents.<sup>188</sup> The threat may be directed at the estate or property of the principal however the preservation of his life or limb is also to be considered in terms of *negotiorum gestio* under German law.<sup>189</sup>

On the other hand, if the undertaking of the management of the business is contrary to the ‘actual or presumptive will’ of the principal, and if the *gestor* must have recognized this, he is bound to compensate the principal for any damage arising from his management of the business, even if no fault is otherwise imputable to him.<sup>190</sup> The

183 BGB art 677 - 687.

184 BGB art 677.

185 Fe see BGB art 687/1 which does not admit a *negotiorum gestio* in the case where a person manages the business of another in the belief that it is his own business. Cf D. 3.5.48.

186 BGB art 680; Cf D.3.5.3.9.

187 BGB art 276: “**The obligor is responsible for intention and negligence**, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk....” *English translations of the BGB are taken from the unofficial version on the Federal Ministry of Justice website* ([https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/)) accessed 30 March 2023.

188 See Bettina Limberg et alia (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 6: Schuldrecht - Besonderer Teil III §§ 631-704, Frank L. Schäfer (ed) §§ 677-687 (9th edn, Beck 2023) 680 N.6-7. It is also not clear whether dangers that threaten the relatives of the principal or persons otherwise close to him are to be included; thus, such a qualification -if admitted- needs to be specified. It is only to be followed in the event that the principal is affected by his assets due to a maintenance obligation towards the endangered person and is therefore entitled and obliged under articles 677 et seq; otherwise, the norm of art 680 shall not be applicable, not even analogously, because the foremost requirement of art 677 stated as ‘taking care of the business of another’ would be missing since, in such a case, there exists no management ‘in favor of the principal’. See Hans Theodor Soergel (ed), Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen: BGB, Band 10: Schuldrecht 8 §§ 652-704 BGB, Volker Beuthien (ed), (§§ 652-740) (13<sup>th</sup> edn, Kohlhammer 2012) § 677 N.6.

189 Stoljar (n 133) 160.

190 BGB art 678; compare with D.3.5.3.9; D. 3.5.10.



opposition of the principal is to be disregarded provided that the intervention is of public interest or in cases where failure to act might cause the principal to neglect his statutory duty to furnish maintenance to others.<sup>191</sup>

Under BGB art. 681, the *gestor* is obliged to notify the principal of his intervention as soon as possible and is expected to wait for the principal's decision to the extent that the delay will not prejudice the principal's rights and interests.<sup>192</sup> The *gestor* is also under the duty to give an account to the principal about all types of his activities related to the business, including the rights acquired, the debts incurred, and the measures taken in the course of his intervention.<sup>193</sup>

One of the prerequisites of *negotiorum gestio* in Roman law was 'the *gestor*'s intention to be reimbursed'<sup>194</sup> which we also see as a requirement for *negotiorum gestio* in modern German law.<sup>195</sup> The BGB expects that the act must not be out of a 'pure spirit of liberality',<sup>196</sup> there needs to be an intention to demand reimbursement from the principal.<sup>197</sup> If the management of the business is in the interest of the *dominii* and his actual or presumptive will, the *gestor* can demand his expenses (*Aufwendungen*: outlays)<sup>198</sup> just like a mandatory can.<sup>199</sup> On the other hand, the BGB is silent on the issue of remuneration on the *gestor*'s part and this statutory analogy with mandate (*mandatum*) initially caused some confusion since *mandatum* was initially conceived as an onerous contract in the first draft of BGB,<sup>200</sup> only to be reverted to being a gratuitous contract in the final draft of BGB, as it used to be in Roman law.<sup>201</sup> *Negotiorum gestio*,

191 BGB art 679; compare with D. 3.5.33; D. 3.5.34.1.

192 BGB art 681; the obligation of the *gestor* to notify (*Anzeigepflicht*) is equally accepted in Swiss law despite not being regulated within the Swiss Code of Obligations; see Richard Suter, *Echte und Unechte Geschäftsführung ohne Auftrag nach Schweizerischem Obligationenrecht* (Stämpfli, 1933) 43-44; Jörg Schmid, *Die Geschäftsführung ohne Auftrag Art. 419-4224 OR* (3<sup>rd</sup> edn, Schulthess 1993) N. 453; Urs Lischer, *Die Geschäftsführung ohne Auftrag im schweizerischen Recht* (Helbing & Lichtenhahn 1990) 93; Josef Hofstetter, *Der Auftrag und die Geschäftsführung ohne Auftrag* (2nd edn, Helbing & Lichtenhahn 2000) 26. On the other hand, the failure to comply with the 'obligation to notify' on the *gestor*'s part does not preclude the rise of a *negotiorum gestio* that is 'justified', but rather may give way to the principal's liability for indemnification; see Tandoğan, *Vekaletsiz İş Görme* (n 2) 181; J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 2: Recht der Schuldverhältnisse: §§ 677-704, Roland Wittmann (ed), §§ 677-704 (12th edn, Degruyter 1991) §681 N:3; Jauernig Bürgerliches Gesetzbuch: BGB Kommentar, Heinz-Peter Mansel (ed), §§ 652-704 (15th edn, Beck 2018) § 681 N. 1.

193 See BGB art 666 which lays down the mandatory's 'duty of information and duty to render account'; also see art 681 which states that "the provisions relating to a mandatory in articles 666 to 668 apply to the duties of the voluntary agent (*gestor*) with the necessary modifications".

194 See I C (4).

195 Also see Greek Civil Code art 738.

196 Or as the BGB explicitly lays down 'the act shall not be done with the intention to donate (*Schenkungsabsicht*)'. Compare with C. 2.18.12.

197 BGB art 685.

198 On the meaning of *aufwendung* (outlay) in German law and its translation to English, see John P. Dawson, 'Negotiorum Gestio: The Altruistic Intermeddler II' (April 1961) 74 (6) Harvard Law Review 1073, 1122-1124.

199 BGB art 683.

200 Zimmerman suggests the reasons behind the conception of *mandatum* as an onerous contract as the 'misinterpretation of Ulpian's D. 17.1.6.pr', 'adherence to old Germanic customs' or the "changed perceptions and practices of modern business life"; see Zimmerman *Law of Obligations* (n 4) 420.

201 BGB art 670.

owing to the analogy with *mandatum* also became gratuitous as a result of an editorial oversight.<sup>202</sup> However, this was not the intent of the legislators and in time the confusion seems to be resolved by interpretation. The *gestor* may be allowed by German courts to recover remunerations although this judicial approach does not seem to be adopted unanimously unless the *gestor* has acted in a professional capacity.<sup>203</sup> In determining the amount for which the principal will be liable, the customary rate applicable to the business in question is taken as basis.<sup>204</sup>

As for the claims for outlays, the *gestor* can demand from the principal both his necessary and beneficiary outlays,<sup>205</sup> but the question as to whether the *gestor* may also have a claim for damages is not that easy to answer. And it is once again *negotiorum gestio*'s analogy with *mandatum* which contributes to the confusion here since, as evident from the wording of BGB art. 670, the mandator can only have a claim for the outlays incurred in the course of executing the mandate.<sup>206</sup> Therefore, the mandator's claim for damages could only be realized according to general principles which would require a fault on the part of the debtor. Still, in time, the opinions of modern jurisprudence and the decisions of the German courts did away with the idea of 'fault liability',<sup>207</sup> which, by analogy, also effected *negotiorum gestio*. It follows that, under German law the *gestor* can not only demand his expenses (outlays), but also direct a claim for damages incurred.<sup>208</sup> The BGB also allows the *gestor* to claim the 'statutory interest' on his outlays.<sup>209</sup>

202 Hans Hermann Seiler, 'Über die Vergütung von Dienstleistungen des Geschäftsführers ohne Auftrag' in Gottfried Baumgärtel, Hans-Jürgen Becker, Ernst Klingmüller, Andreas Wacke (eds), *Festschrift für Heinz Hübner* (Degruyter 1984) 240 -241; Wollschläger (n 133) 313. According to Wollschläger, within the practice of the 19th century there was the widely, if not exclusively, recognized principle of the remuneration for *negotiorum gestio*, which the legislators of the BGB also wanted to follow. However, as a result of changing opinions about the remuneration of the mandate and a failure to check the references, the said confusion came about; for an opposing view see Roland Wittmann, *Begriff und Funktionen der Geschäftsführung ohne Auftrag* (Beck 1981) 28 fn 30.

203 BGH 7 (Federal Court of Justice-Seventh Civil Senate), 7 January 1971, NJW 1971, 609; ("..Because the carrying out of this business constitutes an activity which the plaintiff undertakes within the framework of its business, the plaintiff is entitled to require that the usual remuneration be paid for the performance which it has made..."); BGH 7 ((Federal Court of Justice-Seventh Civil Senate) 31 January 1990, BGHZ 111, 308 = NJW 1990, 2524; also see Wollschläger, *ibid*; Helmut Köhler, 'Arbeitsleistungen als 'Aufwendungen'' (1985) 40 (8) *JuristenZeitung* 359, 362; Johann G. Helm, 'Geschäftsführung ohne Auftrag' in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts III* (Bundesanzeiger, 1983) 392-393. Cf Münchener Kommentar § 683 N. 37. On the question of the remuneration of the *gestor* in German law, see in general Florian Loyal, *Die "entgeltliche" Geschäftsführung ohne Auftrag* (Mohr, 2011) 10 et seq; for doctors' unsolicited services and their demands for remuneration in German law see Karl Larenz, *Lehrbuch des Schuldrechts* (12<sup>ed</sup> edn, Beck 1981) 355; Jeroen Kortmann, *Altruism in Private Law* (OUP 2005) 110.

204 Schmid (n 192) N.541; Cf Köhler (n 203) 362 et seq.

205 Münchener Kommentar § 683 N.1. Only expenses beyond reasonable discretion are excluded.

206 BGB art 670: "If the mandatary, **for the purpose of performing the mandate**, incurs expenses that he may consider to be necessary in the circumstances, then the mandator is obliged to make reimbursement."

207 Zimmerman, *Law of Obligations* (n 4), 431-432; also see Klaus Genius, 'Risikohaftung des Geschäftsherrn', (1973) 173 *Archiv für die Civilistische Praxis* 481; Claus-Willhem Canaris, 'Risikohaftung bei schadensgeneigter Tätigkeit im fremden Interesse' (1966) *Recht der Arbeit* 41-51; Cf Heinrich Honsell, 'Die Risikohaftung des Geschäftsherrn' in Manfred Harder und Georg Thielmann (eds), *De iustitia et iure: Festgabe für Ulrich von Lübtow zum 80. Geburtstag* (Duncker & Humblot 1980) 495-499.

208 Wollschläger (n 133) 286 et seq; Wittman (n 202) 81 et seq.; Stoljar (n 133) 40-43.

209 BGB art 256.

The principal is expected to reimburse the ‘outlays’, which are held to be ‘beneficiary’ and ‘necessary’ under an objective assessment by taking into consideration the principal’s interest and either his actual or presumptive will while, in practice, the principal’s interest carries greater weight.<sup>210</sup> The principal is deemed to be benefitting from the intervention provided that the profits accumulated from the business exceeds the expenses and losses incurred.<sup>211</sup>

As for mistakes (*error*) on the part of the *gestor* concerning the identity of the *dominii*, the resolutions of German law are also modelled after Roman law. For example; according to BGB art. 686 if the *gestor* is in error as to the identity of the principal (*dominii*), the actual principal acquires the rights and obligations arising from the management of the business.<sup>212</sup> Also, the managed business shall belong to someone else other than the *gestor*;<sup>213</sup> since, as in Roman law, in the case where the *gestor* manages his own business thinking it belongs to someone else, there would be no *negotiorum gestio*.<sup>214</sup> Furthermore, if the *gestor* manages the business of another in the belief that it is his own, then there would arise no *negotiorum gestio* between the parties,<sup>215</sup> while the *gestor* might be held liable against the principal provided that he knew he was not entitled to manage the business.<sup>216</sup> In such a case of ‘non-genuine’ intervention (*unechte Geschäftsführung ohne Auftrag*)<sup>217</sup> -where the intervenor is knowingly managing the business of someone else solely for his own benefit-, the principal is vested with all the rights that can be enforced against the intervenor under *negotiorum gestio* whilst the rights of the intervenor are limited to the unjustified enrichment of the principal.<sup>218</sup> In other words, even if there is no *animus negotia aliena gerendi* on the *gestor*’s part, the *gestor* will be treated as if he had acted with *animus negotia aliena gerendi*, therefore being subjected to the same duties as the *gestor* of a genuine intervention (*echte Geschäftsführung ohne Auftrag*). The *gestor* is liable of any damages on the principal and is subject to his demand of ‘disgorgement of profits’,<sup>219</sup> while, on the other hand, he may only claim the outlays

210 Münchener Kommentar § 683 N.3-4-5. Obviously improper or superfluous measures shall not be considered to be in the interest of the principal and accordingly may not be claimed.

211 Hein Kötz, ‘Geschäftsführung ohne Auftrag aus rechtsökonomischer Sicht’ in Ulrich Hübner Werner Ebke, Bernhard Grossfeld (eds), *Festschrift für Bernhard Grossfeld zum 65. Geburtstag* (Verlag Recht und Wirtschaft, 1999) 585 et seq.

212 Compare with D. 3.5.5.1.

213 Compare with D. 3.5.5.6

214 see BGHZ 75, 203, 205 = NJW 1980, 178; BGH NJW=RR 1989, 1256 et seq.

215 The principal may hold the *gestor* liable with an action of unjustified enrichment and if the *gestor* is in fault for assuming the business as his own, with an action of tort; see Tandoğan, *Vekaletsiz İş Görme* (n 2) 20.

216 BGB art 687/1-2; *Comp. D. 3.5.6.4*. If the principal goes on to assert claims on the basis of *negotiorum gestio*, then he will also assume a duty to the *gestor* for the return of any enrichment under the provisions of unjustified enrichment.

217 It was Ernst Zimmerman who did come up with the term ‘*unechte Geschäftsführung ohne Auftrag*’ for the case where one person is ‘managing the business of another for his own benefit’; see Zimmermann (n 73) 27.

218 BGB art 687/2.

219 The ‘disgorgement of profits’ is different from the ‘damages claim’ in the fact that the disgorgement of profits aim to restore the benefit gained by an illegal encroachment from an intervenor instead of seeking for compensation for prior losses. For the disgorgement of profits in German law, see Tobias Helm, ‘Disgorgement of Profits in German Law’ in Ewoud Hondius, Andre Janssen (eds) *Disgorgement of Profits: Gain-based remedies throughout the world* (Springer 2015)

incurred in proportion to the enrichment of the principal.<sup>220</sup> The ‘disgorgement of profits’ includes all the gains by the intervenor as a result of his infringement.<sup>221</sup>

Thus, by virtue of art 687/2, the German Law on ‘*negotiorum gestio*’ seems to acknowledge a dichotomy:<sup>222</sup> namely, the ‘genuine intervention in another’s affairs’, which is held to occur in cases where the *gestor* undertakes to manage a business for the benefit of another; and the ‘non-genuine intervention in another’s affairs’, where the *gestor* manages a business that belongs to someone else, for his own benefit.<sup>223</sup> In order for the intervenor to get satisfied under German law, the intervenor must have complied with the principal’s interest and -actual or presumptive- will regardless of whether he was aware of it or had a reasonable chance of its verification.<sup>224</sup> In the eyes of German law the principal’s will is to be taken into account, as unreasonable as it may be. The opposite is also true, that is, the act of the *gestor* may only be beneficiary for the principal to the extent that it conforms with the principal’s wishes.<sup>225</sup> However, it is also argued that, on account of BGB art. 684,<sup>226</sup> the fact that the principal’s wishes conform with the intervention posteriorly will not cause any effect on the act; meaning that the principal cannot give any permission even if the *gestor* interferes for his own benefit; thus, ‘giving permission’ is limited only to the cases where the business is undertaken with the intention of serving the interest of the principal, but in actuality is not in accordance with the principal’s purpose or his interest -which is to determined objectively-.<sup>227</sup>

220-230; Helm, while pointing out that ‘disgorgement of profits’ is explicitly laid down in articles 687/2 in connection with articles of 681 and 667 of the German Civil Code (BGB), also asserts that art. 687/2 is not particularly relevant in practice partly owing to the prevailing opinion that it does not apply to intentional breaches of contract and partly to the fact that the “most important instance where it might apply is already covered by other, more specific claims”. For ‘disgorgement of profits’ in Turkish Law, see Başak Başoğlu, ‘Non-genuine Benevolent Intervention in Another’s Affairs and Disgorgement of Profits Under Turkish Law’ in Ewoud Hondius, Andre Janssen (eds), *Disgorgement of Profits Gain-Based Remedies throughout the World* (Springer, 2015) 253-265.

220 Compare with D. 3. 5. 5. 5.

221 E.g., proceeds from a production infringing someone else’s patent; see Helm (n 219) 219.

222 The same distinction is also observed in Turkish-Swiss Law; see III B.

223 The German scholarship further considers the ‘genuine intervention in another’s affair’ in two separate categories: as being ‘justified’ vs ‘unjustified’, with the ‘justified genuine intervention’ meaning to manage the business of the principal that is mandatory, and/or in the interest of the principal and not prohibited by him whereas ‘unjustified genuine intervention’ occurs when the intervenor manages a business that is either not in the interest of the principal or is prohibited by him. The ‘unjustified genuine intervention’ is burdened with the same duties as the justified intervenor; see BGB art 681/1-2; art. 667; also see Andreas Bergmann, Dieter Reuter, Olaf Werner, Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2 Recht der Schuldverhältnisse §§ 677-704 (Gruyter 2015) 90-95; Bar, *Benevolent Intervention* (n 6) 63; for opposing views see Wollschläger (n 133) 46-47; Helm (n 203) 366.

224 Staudinger/Bergmann (n 223) § 683 N. 1 30.

225 BGHZ 138, 281, 287; Bergmann, § 683(30); Mansel/Jauernig (n 192) § 683 (5); also see Werner Schubert (ed), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Recht der Schuldverhältnisse 2* (Gruyter, 1980) 975.

226 BGB art. 684: “If the requirements of section 683 do not apply, then the principal is obliged to return everything that he obtains as a result of the voluntary agency under the provisions on the return of unjust enrichment. If the principal ratifies the agency, then the voluntary agent is entitled to the claim specified in section 683.”

227 Hans C. Nipperdey, Julius von Staudingers Kommentar zum BGB, II Bd 3 Teil (10<sup>th</sup> edn, Berlin 1943) § 684, N. 9; Ludwig Enneccerus, Heinrich Lehmann, *Lehrbuch des Bürgerlichen Rechts* II (14<sup>th</sup> edn, Mohr, 1954) 683.

In the cases where an actual will is not present and/or a presumptive will is not ascertainable on the principal's part, then the objective utility of the intervention determines its legitimacy,<sup>228</sup> to put it into other words: the actual 'utility' of the act corresponds fictitiously to the presumed will of the principal.

The BGB is one of the few codes, along with the Swiss and Turkish codes,<sup>229</sup> that incorporates the question of the lack of capacity on the part of the voluntary agent,<sup>230</sup> which is yet another indication to the fact that it is indeed the German law where the legal framework of '*negotiorum gestio*' is constructed in the strongest sense.<sup>231</sup> The extensive admission of *negotiorum gestio* by the German law is evident from both its scope of application and the frequency of its employment by the courts.<sup>232</sup> The BGB contains references to *negotiorum gestio* as part of issues of property law,<sup>233</sup> lease<sup>234</sup> and inheritance law.<sup>235</sup> And, notwithstanding that some issues which used to fall under the category of '*negotiorum gestio*' is now addressed with novel, specialized remedies,<sup>236</sup> new types of cases continue to be absorbed into the institution of '*negotiorum gestio*' such as the case of the self-sacrifice of a motorcyclist for evading a crash with a pedestrian (or a cyclist).<sup>237</sup>

## 2. French Law and the French Civil Code (*Code Civil*)

The *Code Civil* (Napoleonic Code), which was drafted nearly a century before BGB,<sup>238</sup> had regulated *negotiorum gestio* (*gestion d'affaires*) as part of its third Book ("Of the different manners by which one acquires property"), and more specifically in its First Chapter ("Of quasi-contracts") of the Fourth Title (extra-contractual obligations), between articles of 1372 and 1375. The Code Civil had undergone an

228 BGHZ 47, 370, 374; BGH NJW-RR 1989, 970; Bergmann, § 683 (31).

229 See Swiss Code of Obligations (*Obligationenrecht/OR*) art. 421, Turkish Code of Obligations (*Türk Borçlar Kanunu/TBK*) art 528. The other codes are the Greek Civil Code (*see* art 735), which was largely influenced by the German Civil Code, and the Italian Civil Code (*see* art 2029).

230 BGB art 682: "If the voluntary agent lacks capacity to contract or is limited in his capacity to contract, then he is only responsible under the provisions on damages for torts and on the return of unjust enrichment."

231 The BGB is also the only code -along with the Estonian Civil Code- which regulates the mistake of the intervener about the identity of the principal; *see* II B (1).

232 Bar, *Benevolent Intervention* (n 6) 73.

233 BGB 994/2.

234 *See* *fe* BGB art 539/1 for the rule that 'the lessee may, under the provisions on agency without specific authorization, demand reimbursement from the lessor for outlays on the leased property'; also *see* art. 581/2; for usufructuary lease *see* BGB art 581/1.

235 *See* BGB 1959/1, 1978/1-3.

236 *Fe* the issue of the right of recourse of a person who had paid someone else's debt is resolved today via a *cessiones legis* (assignment by operation of law) and similar devices instead of *negotiorum gestio*, *see* Zimmerman, *Law of Obligations* (n 4) 447.

237 Christian Von Bar, *The Common European Law of Torts*, Vol. 1 (Clarendon Press 1998) No. 514. For the actual case where a motorcar driver who did crash into a tree in order to evade collusion with a child, was awarded a 'reasonable' compensation *see* BGHZ 38, 270 et seq; for the criticisms *see* Wollschläger (n 133) 305 et seq; Zimmerman *ibid* (n 4) 444; also *see* Rainer Frank, 'Die Selbstaufopferung des Kraftfahrers im Straßenverkehr' (1982) 37/21 *Juristenzeitung* 737-744.

238 In 1804. For a general information regarding the *Code Civil* (Napoleonic Code) *see*, The Code Napoleon, The (1855) 3 (11) American Law Register 641-650.

extensive amendment via Ordinance n° 2016-131 dated 10 February 2016 whilst the norms on *negotiorum gestio*, now regulated within the sections of article 1301, virtually remained unchanged.<sup>239</sup> Furthermore, the use of the term “quasi-contract”, which was the subject of recurring criticisms from the French jurisprudence,<sup>240</sup> also remained in existence following the 2016 amendment.

Notwithstanding some minor variances, the regulation of *gestion d'affaires* within the *Code Civil* shows many commonalities with the German *Geschäftsführung ohne Auftrag*.<sup>241</sup> The one major point of divergence is on the French law's admittance of the so-called “justified *negotiorum gestio*” as the only legitimate type of *negotiorum gestio*. Thus, the French law, unlike the German law, does exclude both ‘the unjustified intervention which lacks reasonable grounds’ and ‘the intervention of a person in another's business for his own benefit’ from its concept of *negotiorum gestio*.<sup>242</sup> Therefore, the actions of an intervenor acting ‘unjustifiably’ or ‘solely for his own benefit’ -*sine animus gerende*- falls outside the scope of *negotiorum gestio* -as long as they are not later ratified-;<sup>243</sup> and the intervenor can be held liable under the provisions of the law of delicts or unjustified enrichment, provided that relevant conditions are met.<sup>244</sup> The presence of ‘*animus gerende*’ on the *gestor*'s part is determined in connection with the ‘necessity’ and ‘utility’ of the intervention; as long as the *gestor* is aware that his act is beneficial to another, he is not presumed to have an intent of acting ‘solely for his own interest’.<sup>245</sup>

Accordingly, a claim for reimbursement will be considered provided the intervention was beneficial for the principal while, in that regard, urgency is generally not required.<sup>246</sup> Additionally, the *gestor*'s acts must both comply with the principal's objective interest and his subjective wishes.<sup>247</sup> The *gestor* has a right to demand reimbursement of his expenditures borne in the interest of the principal as well as indemnification in respect of obligations which he has incurred in the principal's interest. The principal is also under the duty to compensate the *gestor*

239 For a detailed account of the 2016 amendment of the French Civil Code see John Cartwright, Simon Whittaker (eds), *The Code Napoléon rewritten: French contract law after the 2016 reforms* (Hart 2020); Jan Smits, Caroline Calomme, ‘The Reform of the French Law of Obligations: Les Jeux Sont Faits’ (2016) 23 (6) *Maastricht Journal of European and Comparative Law* 1040-1050.

240 See fe Gabriel Baudry-Lacantinerie, Louis Barde, *Traité théorique et pratique de droit civil: des Obligations* III (2<sup>nd</sup> edn, L. Larose 1905) 1040-1041; Paul Frederic Girard, *Manuel Elementaire de Droit Romano* (6th edn, Rousseau 1918) 398-399; Georges Bry, *Principes de Droit Romana* (5th edn, Sirey 1927) 459.

241 Harald Müller, *Der Fremdgeschäftsführungswille: eine kritische Bestandsaufnahme* (Mannheim Univ 1980) 152 et seq; Tandoğan, *Vekaletsiz İş Görme* (n 2) 13-16.

242 Bar, *Benevolent Intervention* (n 6) 61; also see Code Civil art 1301, 1301/5.

243 See Code Civil art 1301/3. Cf BGB 684.

244 Tandoğan, *Vekaletsiz İş Görme* (n 2), 19; also see Code Civil art 1301/5.

245 Maurice Picard, ‘La gestion d'affaires dans la jurisprudence contemporaine’ (1921) 20 *Revue Trimestrielle de droit Civil* 23-32; also see Code Civil art 1301/4; Baudry-Lacantinerie, Barde (n 240) 1045.

246 Jacques Flour, Jean-Luc Aubert, Eric Savaux *Droit civil; les obligations; le fait juridique* (10<sup>th</sup> edn, Dalloz 2003) n. 12-13.

247 Tim W. Dornis, ‘The Doctrines of Contract and Negotiorum Gestio in European Private Law: Quest for Structure in a No Man's Land of Legal Reasoning,’ (2015) 23 *Restitution Law Review* 79.



for any harm which he has suffered as a consequence of the management of the principal's business.<sup>248</sup>

Another difference that can be observed between the statutory regulations in the German and French Codes is the recognition of the 'duty to continue the intervention'. Whilst the BGB does not refer to such a duty in its textual wording,<sup>249</sup> the French Code explicitly lays down the *gestor's* duty to continue his management of another's affairs until the principal<sup>250</sup> is able to take care of his affairs himself.<sup>251</sup> If the *gestor's* fails to fulfill his 'duty to continue the intervention', then he will be liable towards the principal unless a force majeure had prevented him to continue or his continuation of the intervention entertains the risk of a serious personal loss.<sup>252</sup>

The standard of care of the *gestor* is what the Roman law expected from 'a good pater' (*diligentia boni patris familias*) -now reasonable person-, which is the type of prudent administration envisioned for 'reasonable' persons.<sup>253</sup> However, such a standard of care is not absolute, and the French courts do have the authority to lessen this duty of care in regard with the circumstances of the given case.<sup>254</sup>

All in all, the confirmation of the social interest in encouraging everyone to help others outweighs other certain considerations in French law and accordingly, it is accepted that the *gestor* can claim expenses not only for the intervention that are necessary for the interests of the principal but also for the ones that are only beneficial for the *gestor*.<sup>255</sup> And although the *gestor's* demands for remuneration does not constitute an essential element of his entitlement, his loss of time might be treated as recoverable expenses.<sup>256</sup>

### 3. Austrian Law and the Austrian Civil Code (ABGB)

The Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch/ABGB*), which was officially published on 1 June 1811 and was in force by 1 January 1812, dates from

248 Code Civil art 1301/2.

249 For the view that rejects of such a duty in German law, see Benjamin Schmidt, *Die berechtigte Geschäftsführung ohne Auftrag: Eine Untersuchung der Voraussetzungen des gesetzlichen Schuldverhältnisses der §§ 677 ff. BGB* (Duncker & Humblot 2008) N. 439 et seq; Michael Martinek, Uwe Theobald, 'Grundfälle zum Recht der Geschäftsführung ohne Auftrag, 1. Teil: Die Grundstrukturen der Geschäftsführung ohne Auftrag' (1997) 7 *Juristische Schulung* 617; Loyal (n 203) 110-111.

250 or in the case of his death, his heir; compare with D. 3.5.3.7.

251 Code Civil art 1301/1.

252 Marcel Planiol, Georges Ripert, *Traité pratique de droit civil français* Vol 7 (2<sup>nd</sup> edn, Durand 1954) no. 730.

253 Code Civil art 1374/1. The term of "as a good father" had been removed from French law with the No. 2014 - 873 law on "Substantive Equality between Women and Men" (*LOI n° 2014 - 873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*) and been replaced with 'reasonable/reasonably' (*raisonnables/raisonnablement*).

254 Code Civil art 1374/2; also see *fe Civ.* 16.11.1955 J.C.P. (*Juris-classeur périodique*) 1956.II.9087.

255 Tandoğan, *Vekaletsiz İş Görme* (n 2) 15.

256 F.H. Lawson, A.E. Anton, L. Neville Brown, *Amos & Walton's Introduction to French Law* (3<sup>rd</sup> edn, Clarendon 1967) 194.

the same period as the Napoleonic Code. As mentioned above,<sup>257</sup> the ABGB, being a product of the age of enlightenment, was deeply influenced by natural law ideas.<sup>258</sup> Thus, it is expected that the institution of *negotiorum gestio*, which is basically the intermeddling in another's affairs, had been regulated in a rather restrictive manner within the ABGB.<sup>259</sup> Provisions on *negotiorum gestio* are placed in the second Part ("Of the law of patrimony"), Second Division ("Of the personal patrimonial rights") and the 22<sup>nd</sup> Chapter ("Of agency and other modes of management"). References to *negotiorum gestio* within Austrian civil law is also observed as part of 'law of property';<sup>260</sup> and matters of lease.<sup>261</sup>

Under Austrian law, *negotiorum gestio* is 'justified' only in the case of providing 'emergency aid'; in principle, all types of other interventions are either 'unjustified' or subjects of the law of unjustified enrichment – or law of torts if the circumstances call for it.<sup>262</sup> If the intervention by the *gestor* is deemed to be exceptionally 'beneficial' to the principal then a *negotiorum gestio* is admitted, albeit an 'unjustified' one. The ABGB considers the 'unjustified *negotiorum gestio*' solely from the standpoints of 'liability for damages' and 'reimbursement of expenditures'.<sup>263</sup> The *gestor* is responsible for all the consequences of his acts which are not necessary and do not confer a superior benefit to the principal. There is no explicit rule within the ABGB that disqualifies or mitigates the liability of the *gestor* who intervenes in case of necessity.<sup>264</sup>

Thus, the *gestor* can demand indemnification where his intervention amounts to rescuing another from emergency or where his intervention is predominantly beneficial for the principal.<sup>265</sup> The elements of 'necessity' and 'utility' is determined from the principal's perspective,<sup>266</sup> whereas the *gestor*'s concurrent self-interest is generally not a bar to indemnification unless he has acted solely in his own interest.<sup>267</sup> However, in cases where an 'urgent necessity' is lacking, the claim to reimbursement of expenditure may depend on whether the intervention was in the end successful or not.<sup>268</sup>

257 See II A (2) n 165.

258 See fe ABGB art 16 which, more than 200 years ago, defined the modern understanding of 'human dignity' while, at the same time, prohibiting slavery and serfdom.

259 Ernst Swoboda, *Bereicherung, Geschäftsführung ohne Auftrag, versio in rem nach österreichischem Recht, mit Ausblicken in das deutsche Recht* (Leuschner & Lubensky, 1919) 52 et seq.

260 See ABGB art 336, 392.

261 See ABGB art 1097.

262 See OGH (Supreme Court of Justice) 4 December 1968, JBl 1969, 272; confirmed by OGH 18 March 1997, SZ 70/48.

263 Bar, *Benevolent Intervention* (n 6) 60; Franz-Stefan Meissel, *Geschäftsführung ohne Auftrag – zwischen Quasikontrakt und aufgedrängter Bereicherung* – (Manz 1993) 110 et seq.

264 Compare with D.3.5.3.9, BGB art 680 and the Swiss Code of Obligations (*Obligationenrecht/OR*) art 420/3.

265 ABGB art 1036-1037.

266 As it is the case in German, French and Swiss laws. For an Austrian Supreme Court of Justice (OGH) decision concerning *negotiorum gestio* with a reference to BGB art. 677, see Austrian OGH 106 JBl 256, 257 (1984) (decision of 21 April 1982)

267 Austrian OGH RdW 2003, 259, 261 (decision of 18 July 2002); Meissel (n 263) 66-67; Peter Apathy et al (eds), ABGB (4th edn, LexisNexis 2014) § 1035(5).

268 ABGB art 1037.

In cases of emergency there is an assumption that if the specific circumstances had been known to the principal, he would have approved the management, which legitimizes the rise of an obligatory tie between the *gestor* and the principal. The danger must be real in a concrete sense, the *gestor*'s point of view and any presumption on his part is immaterial. The *gestor* might only demand the reimbursement of the expenses which were essential in the aversion of the danger. The outcome of the *gestor*'s intervention is not relevant in that regard as long as he did exercise due diligence.<sup>269</sup>

#### 4. Swiss Law and the Swiss Code of Obligations (OR)

The influence of Roman law and the *ius commune* on the Swiss law of *negotiorum gestio* is fully felt in terms of both the obsolete 'Swiss Code of Obligations of 1881'<sup>270</sup> and the current 'in force' version of 1912.<sup>271</sup> The Swiss Code of Obligations (*Obligationenrecht*: OR) is the 5<sup>th</sup> part of the Swiss Civil Code (*Schweizerisches Zivilgesetzbuch/ZGB*) and entered into force on 1 January 1912, together with the ZGB. The provisions on *negotiorum gestio* in Swiss law can be found within the OR between articles 419-424.<sup>272</sup> The rights and obligations of the *gestor* is regulated between articles 419-422, while the position of the principal is addressed between articles 422-424.<sup>273</sup>

Swiss OR art 419 contains the basic norm on *negotiorum gestio*, which burdens the *gestor* with the duty to manage the business he undertakes in accordance with the interests of the principal and in compliance with his assumed will. Any person who conducts the business of another 'without authorization' is obliged to do so in accordance with his best interests and presumed intention; while 'without authorization' does correspond to the lack of any contractual or statutory duty on the *gestor*'s part.<sup>274</sup> The lack of a duty - be it contractual or statutory - on the *gestor*'s

269 Lorenzen (n 83) 119.

270 The 1881 Swiss Code of Obligations was influenced by the Dresdner Draft and in return influenced the draft of the German Civil Code which would be adapted in 1885 and become effective by 1900. Swiss law has generally been considered to belong to the Germanic tradition. For more on this issue see Pascal Pichonnaz, 'Switzerland' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (2<sup>nd</sup> edn, Elgar 2012) 852-859; M. Walter Young, 'Eugene Huber ve İsviçre Medeni Kanununun Ruhü', Jale Güral (tr) (1949) 6 AÜHFD 162-180; Ivy Williams, *The Sources of Law in the Swiss Civil Code* (OUP 1923).

271 In the draft Swiss Code of Obligations (2020) the 'genuine and justified *negotiorum gestio*', is considered to be one of the 'sources of obligation'; see the Draft Swiss Code of Obligations (2020) art 74-78; for the Draft Swiss Code of Obligations (2020) see Claire Huguenin, Reto Hilty (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil = Code des obligations suisse 2020* ((Schultess 2013). The draft acknowledges 'genuine and justified *negotiorum gestio*' as the only legitimate one and subjects the other types to the provisions of 'unjustified enrichment' and 'torts', thereby restricting the scope of the application of '*negotiorum gestio*'.

272 Also see the Zurich Civil Code (1853-1855) art 1206-1215.

273 Since the Turkish Civil Code (*Türk Kanuni Medenisi*) and the Code of Obligations (*Borçlar Kanunu*) were received -or rather translated- from the Swiss law and the current state of '*negotiorum gestio*' under Turkish law will be considered separately in the next chapter, we restrict ourselves in this section to merely laying down the main aspects of *negotiorum gestio* within the Swiss Code of Obligations.

274 Claire Huguenin, *Obligationenrecht – Allgemeiner und Besonderer Teil*, (Schultess 2014) N. 1613; also see Heinrich Honsell, Nedim Peter Vogt, Wolfgang Wiegand (eds), *Basler Kommentar zum Schweizerischen Privatrecht*,

part might not be sufficient though unless the *gestor* is also aware of his lack of duty himself. Whereas the Swiss academia seems to be unanimously critical of such a qualification,<sup>275</sup> there are indeed ‘two Federal Court decisions’<sup>276</sup> where the *gestor*’s awareness of his ‘lack of authority’ is deemed to be a prerequisite for the rise of a ‘*negotiorum gestio*’.<sup>277</sup>

Under Swiss law, as in Roman law, the *gestor* is under an *omnis culpa* liability which may decrease or increase subject to circumstances.<sup>278</sup> If the *gestor* has acted in order to avert imminent damage to the principal then his liability is to be judged more leniently, however if he acted against the express or otherwise recognizable will of the principal, then his liability will increase making him liable of unexpected circumstances.<sup>279</sup>

The Swiss Code of Obligations do acknowledge the division between ‘genuine’ and the ‘non-genuine’ *negotiorum gestio* as evident by the wordings of articles 422 and 423.<sup>280</sup> The *gestor*’s claim under an action of ‘genuine *negotiorum gestio*’ is dependent on his acting in the principal’s interest.<sup>281</sup> Additionally, the *gestor*’s acts must both

Obligationenrecht I, Art.1-529 OR, Rolf H Weber, Geschäftsführung ohne Auftrag: Art. 419-424 (6th edn, Helbing & Lichtenhahn 2015) §419 N.7. In the event that the *gestor* is authorized by a third person other than the principal, there seems to be a controversy on whether ‘*negotiorum gestio*’ shall be applicable in such cases; for the view that gives the *gestor* the alternatives of either resorting to the third person via the actions of unjustified enrichment or to the principal via the *negotiorum gestio contra*, see Bruno von Büren, *Schweizerisches Obligationenrecht Besonderer Teil (Art. 184-551)* (Schulthess, 1972) 332; Cf Hermann Alfred Hagenbüchli, *Die Ansprüche des Geschäftsführers ohne Auftrag und ihre Voraussetzungen* (Diss. Univ. Zürich. 95 S.8, Davos, 1926) 50-51 for the rejection of the applicability of *negotiorum gestio* in those cases.

275 Fe see Hagenbüchli (n 274) 51; Suter (n 192) 20; Lischer, (n 192) 35; Claire Huguenin, Christine Chappuis, ‘Schweizer Obligationenrecht 2020 Art 73-78’ in Claire Huguenin, Reto M. Hilty (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil* (Schulthess 2013) Art 74, N. 3.

276 see BGE (*Bundesgerichtsentscheid*/Swiss Federal court decision) 75 II 225 (1949) for the decision where the Federal Court hold that in order for a ‘*negotiorum gestio*’ to rise, it is necessary for the *gestor* to know that he is managing the business of another while having no valid authority to do so (“*Just as business management implies the awareness of managing the affairs of others, it also presupposes that the “manager” knows that he does not have a mandate for this purpose*”); and BGE 99 II 131 (1973) for the decision where the Federal Court maintains that a specific will targeting ‘to manage the business of another without having any authority’ is required for a valid *negotiorum gestio*. For an account of the decisions and their criticisms, see Hüseyin Can Aksoy, ‘Vekaletsiz İş Görende İş Vekaletsiz Olarak Görme Bilinci Aranmalı mıdır?’ (2017) 75 Ankara Barosu Dergisi 91, 110-114.

277 For a similar understanding in Turkish law, see the dissenting opinion in the Court of Cassation’s Decision on the Unification of Judgments (*Yargıtay İçtihadı Birleştirme Kararı*) E. 1958/15, K. 1958/7, T. 4.6.1958: “*Borçlar Kanununun vekaleti olmadan başkası hesabına tasarrufla iş yapan iş sahibi hesabına işi yaptığını bilmeli ve bu sıfatla hareket etmelidir...*” ( ...In the ‘management of another’s affair’ within the Code Of Obligation the one who manages the business of someone else without authority shall be aware that he is managing the business on behalf of the principal and accordingly shall act in this capacity...)

278 OR art 420.

279 OR art 420/2-3.

280 Jolanta Kren Kostkiewicz, Stephen Wolf, Marc Amstutz, Roland Fankhauser (eds) OR Kommentar: Schweizer Obligationenrecht, Roger Rudolph §§ 419-424 (ed), (3rd edn, Orell Füssli 2016) Art. 419, 1165 et seq; Kurt Aeby, *Die Geschäftsführung ohne Auftrag nach Schweizerischem Recht*, (Universität Zurich 1928) 37. For the academic sub-division (good faith, non-genuine intervention vs bad faith, non-genuine intervention) of the ‘modern *negotiorum gestio*’ within Swiss jurisprudence, see Schmid (n 192) N. 9-10; Weber (n 274) Art 419(2); Eva Maissen, Claire Huguenin, Reto M. Jenny (eds.), Claire Huguenin, Markus Müller-Chen, Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 2: Art. 319-529 OR (3<sup>rd</sup> edn, Schulthess 2016) Art. 419 (2-4).; for the Turkish jurisprudence see Fikret Eren, *Borçlar Hukuku Özel Hükümler*, (4<sup>th</sup> edn, Yetkin 2017) 843-844; Azra Arkan Akbıyık, *Gerçek Olmayan Vekaletsiz İş Görme* (Alfa 1999) 15-16; Ümmühan Kaya, *Vekaletsiz İş Görme* (Yetkin 2020) 39-49. Also see III B (1).

281 BGE 86 II 18, 25 (decision of 19 January 1960); Schmid (n 192) N. 68. The intervention might also be beneficial for

comply with the principal's 'objective interest' and 'subjective will';<sup>282</sup> and if the will is not ascertainable -either explicitly or implicitly- then both the presumptive will and the objective utility of the act will be considered jointly.<sup>283</sup> The ratification by the principal turns the *negotiorum gestio* into mandate and accordingly, the provisions of mandate apply retrospectively.<sup>284</sup>

On the other hand, if the *gestor* had the opportunity to inquire about the actual will of the principal but refrained from doing so, then he will not be able to resort to the provisions of *negotiorum gestio*.<sup>285</sup> It is indeed imperative that the *gestor* consults with the principal prior to his intervention and the only exception seems to be the case where the principal is unreachable.<sup>286</sup> Thus, it is, basically, the principal's individual will and his subjective preferences that determine the legitimacy of the *negotiorum gestio* and whether the *gestor* will eventually be reimbursed or not.<sup>287</sup>

### III. *Negotiorum Gestio* in Turkish Civil Law

#### A. *Negotiorum Gestio* in the Turkish Code of Obligations

The modern Turkish Republic is a civil law country whose 'private law system'<sup>288</sup> is mostly based on Roman law by virtue of the reception of Swiss Civil law during the early, formative years of the Republic.<sup>289</sup> Thus, it is not surprising that the institution of '*negotiorum gestio*' had found a place in the 'abolished' 818 numbered Code of Obligations (BK): as part of the Second Division 'Various Types of Contract' (*Akdin*

the *gestor* himself; as long as the intervention benefits the principal, the fact that the *gestor* is also benefitting from his own intervention does not prevent the rise of a *negotiorum gestio*; see Huguenin (n 274) N. 1620; Hugo Oser, Willhelm Schönenberger, Kommentar zum Schweizerischen Zivilgesetzbuch, V. Band: Das Obligationenrecht, 3. Teil: Art. 419-529 (2<sup>nd</sup> edn, Schultheß & Co 1945) Art. 419 N. 13; von Büren (n 274) 330; Heinrich Honsell, *Schweizerisches Obligationenrecht, Besonderer Teil*, (9th edn, Stämpfli 2010) 344.

282 Rudolph (n 280) Art 419 (6).

283 Suter (n 192) 39-40; Hagenbüchli (n 274) 65-67; Lischer (n 192) 54; also see Hermann Becker (ed), Kommentar zum schweizerischen Zivilgesetzbuch, Band VI Obligationenrecht II Abteilung: Die einzelnen Vertragsverhältnisse Art. 184-551 (Stämpfli 1934) Art. 419 N. 1 for the view that holds the principal's will to be paramount in the case of a conflict between the subjective will and the objective utility.

284 OR art 424. For the retrospectivity see Suter (n 192) 90; Nipperdey (n 227) § 684, N. 8.

285 The same outcome is valid for the case where the principal could have acted himself; see Rudolph (n 280) Art 419 (6).

286 Eugen Bucher, *Obligationenrecht: Besonderer Teil* (3rd edn, Schulthess 1988) § 14 II 3a; Weber (n 274) Art 419/13.

287 Dornis (n 247) 6.

288 The law that will be discussed in this section is primarily the Turkish 'civil law'. Matters pertaining to public law (such as Criminal law, Procedural law, Constitutional law, law of taxation and administrative law) will not be considered. On a general account of Turkish law see Tuğrul Ansay, Don Wallace, Işık Önay (eds), *An Introduction to Turkish Law* (7<sup>th</sup> edn, Kluwer 2020).

289 The 'Turkish Civil Code' (*Türk Kanuni Medenisi/TMK*) and the 'Code of Obligations' (*Borçlar Kanunu/BK*) were both translated from the French versions of the Swiss Civil Code and (the first two parts of) Swiss Code of Obligations respectively, see Arzu Oğuz, 'Role of Comparative Law in the Development of Turkish Civil Law' (2005) 17 (2) *Pace International Law Review* 380-381. On the translation itself, see Ruth A. Miller, 'The Ottoman and Islamic Substratum of Turkey's Swiss Civil Code' (2000) 11 (3) *Journal of Islamic Studies* 335-361, esp. 338-339. Miller labels the Turkish translation of the Swiss Civil Code as 'loose' in light of the considerable number of changes observed in the Turkish version. On the difficulty of the task of translating the trilingual Swiss Civil Code to a fourth language: Turkish, see Esin Örcüü, 'One into Three: Spreading the Word, Three into One: Creating a Civil Law System', (2015) 8 (2) *Journal of Civil Law Studies* 388-397.

*Muhtelif neveleri*),<sup>290</sup> within the 14<sup>th</sup> Title, -following the 13<sup>th</sup> title of ‘agency’- under the heading of ‘*Vekaleti olmadan başkası adına tasarruf* (disposition on behalf of someone else without a mandate)’ between articles 410-415; nearly identical to its place in the Swiss Code of Obligations.<sup>291</sup> Furthermore, the location of ‘*negotiorum gestio*’ in the Code of Obligations did remain unaltered after the promulgation of the new Code that replaced the old one,<sup>292</sup> as part of the Second Division, now termed as ‘Special Types of Obligatory Relations’ (*Özel Borç İlişkileri*), within the 10<sup>th</sup> Title, -following the 9<sup>th</sup> title of ‘agency relations’- under the heading of “*Vekaletsiz İş Görme* (managing a business without mandate)”, now between the articles of 526-531.<sup>293</sup> The rights and obligations of the *gestor*, as well as his liabilities, are laid down in the articles 526-527 whereas the situation of the principal is regulated between articles of 529-531. It is not only the code of obligations that address ‘*negotiorum gestio*’, but other codes and/or legislations also include references to it.<sup>294</sup>

## B. Types of *Negotiorum Gestio* in Turkish Civil Law

The Turkish Code of Obligations (*Türk Borçlar Kanunu*/TBK) follows the German and Swiss codes in acknowledging interventions that are solely for the benefit of the intervenor as instances of ‘*negotiorum gestio*’ per the wording of article 530 which states that even if the intervention was not carried out with the best interests of the principal in mind, he is nonetheless entitled to appropriate any resulting benefits.<sup>295</sup> Accordingly, there can be mentioned two main types of ‘*negotiorum gestio*’ under Turkish law: as genuine and non-genuine.<sup>296</sup> Furthermore, Turkish academia, in line with their German and Swiss counterparts, treat genuine interventions under the dichotomy of ‘justified’ vs ‘unjustified’ while non-genuine interventions are deemed

290 For the criticisms of ‘*negotiorum gestio*’ not being a part of the ‘First division of ‘General principles’ see Eren (n 280) 844; H. Kübra Ercoşkun Şenol, ‘Gerçek Olmayan Vekâletsiz İş Görmenin Sistematik Açından Borçlar Kanunundaki Yeri ve 2020 İsviçre Borçlar Kanunu Tasarısı’ndaki Durum’ (2018) 22 (4) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 37, 38-41.

291 In the in-force Swiss Code of Obligations, the section on ‘*Negotiorum gestio*’ is located in the Second Division of (Special Contractual Relations) - 14th title -following the 13th title of ‘agency contract’-, under the heading of ‘Agency without authority’, between articles 419-424.

292 The 1926 dated, 818 numbered ‘Code of Obligations’ (*Borçlar Kanunu/BK*) was replaced with the ‘new’ 2012 dated, 6098 numbered ‘Turkish Code of Obligations’ (*Türk Borçlar Kanunu/TBK*).

293 The original Turkish term for ‘*Negotiorum Gestio*’ as ‘*vekaleti olmadan başkası adına tasarruf*’ was the subject of criticisms within the Turkish academia; see Özdemir, *Vekaletsiz İş Görme* (n 23) 78; Tandoğan, *Vekaletsiz İş Görme* (n 2) 21. Thus, after the promulgation of the new Code (TBK) on 2012, the primary change concerning ‘*negotiorum gestio*’ within the TBK was about its name. The proposed name of “*vekaleti olmadan başkasının işini görme*” by Tandoğan had actually become the legal term corresponding to “*negotiorum gestio*” in Turkish law.

294 Fe see TMK art 25/III, art 801-802, art 995; TBK art 630/2; also see the 5846 numbered Law on Intellectual and Artistic Works (*Fikri ve Sanat Eserleri Kanunu*/FSEK) art. 70 and the 6769 numbered Industrial Property Law (*Sınai Mülkiyet Kanunu*) art 151/2; also see III B (2).

295 Cf OR art 432/1; BGB art 687/2. On an account of the terminology of *negotiorum gestio* in Turkish-Swiss law see Arkan Akbyık (n 280) 15-21; Tandoğan, *Vekaletsiz İş görme* (n 2) 21-24.

296 Eren (n 280) 829, 834, 842-843; Rona Serozan, Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm* (Filiz 1992) 488; Cevdet Yavuz, Faruk Acar, Burak Özen, *Türk Borçlar Hukuku: Özel Hükümler* (10<sup>th</sup> edn, Beta 2012) 639; Ece Baş Süzül, *Gerçek Olmayan Vekâletsiz İş Görme ve Menfaat Devri Yaptırımı* (On İki Levha 2015) 15-16; also see Mustafa Alper Gümüş, *Borçlar Hukuku Özel Hükümler II* (3<sup>rd</sup> edn, Vedat, 2014) 225-228.



to be either as ‘good-faithed’ or as ‘bad-faithed’ depending on the existence of *animus negotia aliena gerendi* on the intervenor part.<sup>297</sup> Swiss-Turkish civil law departs from the German approach and follows the solutions of older *ius commune* for the application of the rules of ‘non-genuine *negotiorum gestio*’ does not depend on fault, and therefore does not need an *animus negotia aliendi gerendi*, under Swiss-Turkish law. Lastly, while the ‘genuine’ *negotiorum gestio* includes all lawful acts, juristic or not,<sup>298</sup> the ‘non-genuine’ *negotiorum gestio*, on the other hand, is acknowledged to be akin to a ‘tortious act’.<sup>299</sup>

It is true that the institution of ‘non-genuine *negotiorum gestio*’ shares many similarities with ‘tort’ and ‘unjustified enrichment’,<sup>300</sup> and in certain cases of ‘non-genuine *negotiorum gestio*’, compensation based on claims of unjust enrichment or tort might also be available.<sup>301</sup> In that regard, the qualification of a legal relation as an ‘non-genuine *negotiorum gestio*’ is indeed important as it is more advantageous to go for *negotiorum gestio* than to assert tort or unjustified enrichment in court.<sup>302</sup> In that regard, one important difference between the actions of ‘*negotiorum gestio*’ and ‘unjustified enrichment’ shall briefly be reminded here: Unlike the action of unjustified enrichment, the action of *negotiorum gestio* does not necessarily require any ‘enrichment’ on the *gestor*’s part.<sup>303</sup>

In the case of a ‘*negotiorum gestio*’ claim, the principal will be able to demand ‘all the benefits’ that the *gestor* has obtained through the intervention whereas, with the alternative course of actions, the principal can only demand compensation for the damages suffered.<sup>304</sup> “All the benefits” corresponds to the net income earned by

297 See II B (1) n 223; for the view which considers the genuine *negotiorum gestio* to be the only valid type, see Wittmann (n 202) 63; Schmid (n 192) N.162; also see Arkan Akbıyık (n 280) 20-25. For the view that sees the classification of non-genuine *negotio gestorum* as good faithed vs bad faithed as ‘irrelevant’ see; Hüseyin Avni Göktürk, *Borçlar Hukuku İkinci Kısım: Akdin Muhtelif Nevileri* (Güney 1951) 526; Necip Bilge, *Borçlar Hukuku Özel Borç Münasebetleri* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 1971) 330-331; Theo Guhl, Anton K. Schnyder, Alfred Koller, Jean N. Druey, *Das Schweizerische Obligationenrecht - mit Einschluss des Handels und Wertpapierrechts* (9th edn, Schulthess 2000) § 49 N. 46; Serap Helvacı, Gülşah Sanem Aydın, ‘Kişilik Hakkı İhlalinden Doğan Vekâletsiz İşgörmeye Kusurunun Bir Şart Olarak Aranıp Aranmayacağı Sorunu’ (2017) 23 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 265, 284-285.

298 Eren (n 280) 829.

299 Haluk Tandoğan, *Borçlar Hukuku Özel Borç İlişkileri* Vol 2 (5th edn, Vedat 2010) 677; Aydın Zevkliler, Emre Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri* (12nd edn, Turhan 2013) 630; Yavuz, Acar, Özen (n 296) 646.

300 It is accepted that the claims deriving from a ‘genuine *negotiorum gestio*’ shall not compete with the claim of unjustified enrichment, as the relation between the *gestor* and the *principal* is compelled by law and therefore justified. Still, by virtue of TBK art 529/2, which regulates that ‘in cases where the *gestor*’s expenses are not reimbursed, he has the right of repossession in accordance with the provisions governing unjust enrichment,’ the norms of ‘unjustified enrichment’ seem to constitute a complementary role in the wake of the principal’s failure to reimburse the expenses of the *gestor*; see Kemal Oğuzman, Turgut Öz, *Borçlar Hukuku Genel Hükümler* Vol II (10th edn, Vedat 2013) 341.

301 fe in the case where the act of the *gestor* infringes the absolute rights of the principal, the claims of tort and *negotiorum gestio* will both be available; see Schmid (n 192) N.466.

302 Yavuz, Acar, Özen (n 296) 646; especially if the element of ‘impoverishment’ is regarded as the ceiling for demands of reimbursement; see Oğuzman, Öz (n 300) 323, 341; also see Aksoy (n 276) 108-109; Başoğlu (n 209) 257. Another advantage would be the difference in prescriptive periods, see Schmid (n 192) N.1309.

303 Hüseyin Hatemi, ‘Türk Hukukunda Gerçek Olmayan Vekâletsiz İş Görme Kurumuna İlişkin Düşünceler’ in Nami Barlas, Abuzer Kendigelen, Suat Sarı (eds), *Prof. Dr. M. Kemal Oğuzman’ın Anısına Armağan* (Seçkin 2000) 388.

304 Başoğlu (n 209) 256-259; Honsell, *Schweizerisches Obligationenrecht*, (n 281) 348.

the *gestor* via his intervention. And the net income amounts to the value established after deducting the expenses incurred by the *gestor* from the total gross income which includes interest.<sup>305</sup>

Furthermore, the claim for ‘disgorgement of profits’ (*kazanç devri*),<sup>306</sup> unlike the claim for unjustified enrichment (*sebepsiz zenginleşme*), allows the demand of the earnings gained by the *gestor* with the help of his subjective skills which may correspond to a value that is well above the market value of the business.<sup>307</sup>

### 1. Genuine *Negotiorum Gestio*

The genuine *negotiorum gestio* is the typical case of someone -without any authority- managing another’s business in his (the principal’s) interest and not in violation of his will.<sup>308</sup> These are the cases in which the principal is managing another’s business apparently for the benefit of the principal, where the principal himself would have managed his business in the same manner. Eg interventions such as ‘breaking into the neighbor’s home in order to extinguish a fire’ or ‘taking someone who had been in a traffic accident to the hospital’ or ‘having repaired the neighbor’s defective wall which was about to collapse’, are acts of ‘genuine *negotiorum gestio*’. There is no doubt that the principal would have acted to extinguish the fire in his house or would have tried to go to the hospital himself; therefore, it is positive that the act by the *gestor* is done for the interest of the principal and in line with his presumptive wishes. This genuine *negotiorum gestio* is also a ‘justified’ one as the principal’s will -together with his interests- align perfectly with the intervening act of the *gestor*.

The ‘unjustified’ genuine *negotiorum gestio* on the other hand, would be the case where the intervention by the *gestor* does not satisfy the actual or presumptive will of the principal either because the intervention is against the express wishes of the principal or because there is no real urgency for the *gestor* to intervene; thus, rendering the act of the intervention ‘unnecessary’.<sup>309</sup> This type of intervention where the good-willed intervenor is acting for the benefit of the principal when in reality there is no use or need for the intervention itself, is also styled as ‘*nichtgebotene* (unnecessary)’, ‘*irregulare altruistische* (irregular altruistic)’ and ‘*unerwünschte* (unwanted)’ in the Swiss-Turkish academia.<sup>310</sup>

305 Arkan Akbıyık (n 280) 47; Tandoğan, *Vekaletsiz İş Görme* (n 2) 197-198.

306 For ‘disgorgement of profits’, see II B (1) n 219.

307 Aksoy (n 276) 109.

308 Eren (n 280) 831; Guhl/Koller/Schnyder/Druey (n 297) § 49 N. 38, Tandoğan, *Özel Borç İlişkileri* (n 299) 676.

309 For the view that sees ‘unjustified genuine *negotiorum gestio*’ as being essentially ‘non-genuine’, see Tandoğan, *Vekaletsiz işgörme* (n 2) 71; Eraslan Özkaya, *Vekâlet Sözleşmesi ve Kötüye Kullanılması*, (3<sup>rd</sup> edn, Seçkin 2013) 1085; Sera Reyhani Yüksel, ‘Hekimin Vekâletsiz İş Görmeden Doğan Sorumluluğu’ (2015) 21 (2) Marmara Üniversitesi Hukuk Fakültesi Dergisi Özel Sayı: Mehmet Akif Aydın’a Armağan, 793, 801-802; Yavuz, Acar, Özen (296) 641; Baş Sützel (n 296) 35 et seq. The majority view seems to acknowledge ‘unjustified genuine *negotiorum gestio*’ either as grounds for unjustified enrichment or as an act of delict; see Gümüş (n 296) 228; Wittmann, (n 202) 170; Staudinger/Wittmann, N. 5-6; Schmid (n 192) N. 167.

310 Arkan Akbıyık (n 280) 16.

Thus, the ‘justified’ and ‘unjustified’ qualifications of a genuine *negotiorum gestio* is directly related to the will of the principal. In both the ‘justified’ and ‘unjustified’ types of ‘genuine *negotiorum gestio*’ the *gestor* is intervening for the benefit of the principal while their contrast lies in the symmetry between the intervention and the ‘will of principal’, or its lack thereof. If the intervention by the *gestor* is deemed to be in accordance with the actual and presumptive will of the principal, then the intervention is accepted to be a ‘justified’ one.<sup>311</sup> Conversely, if the principal did forbid the act or the act itself is ‘unnecessary’, then the intervention is ‘unjustified’. Turkish-Swiss law establishes the main criteria for a ‘justified, genuine *negotiorum gestio*’ as the ‘lack of an explicit prohibition from the principal regarding the intervention’ and ‘the necessity of the act in question’, thus diverging from German law where the ‘general’ condition for an ‘*echte Geschäftsführung ohne Auftrag*’ is deemed to be that the intervention complies with the will and ‘interest’ of the principal.

The principal’s presumptive will is no longer relevant if the principal explicitly forbids the intervention. In the face of such a prohibition, the *gestor* is expected to comply with the prohibition as long as the prohibition is ‘valid’<sup>312</sup> and has been done in good-faith.<sup>313</sup> Thus, under Turkish law, the relationship between the *gestor* and the principal will be termed as an “unjustified *negotiorum gestio*” regardless of whether the *gestor*’s intervention benefits the principal or not, provided that the *gestor* violated the principal’s prohibition and intervened nonetheless.

The relationship that emerges as a result of the intervention by the *gestor* concerns the internal relationship between him and the principal. However, in the case that the *gestor* enters into a legal transaction with a third party for the principal, there rises a dual relationship: the first being the internal relationship (*Innenverhältnis*) between the *gestor* and the principal; and the other being the external relationship (*Außenverhältnis*) that is the result of the *gestor*’s transaction with a third party.<sup>314</sup> The rule is that the provisions of *negotiorum gestio* only regulates the interests between the principal and the *gestor*; therefore, a legal transaction that the *gestor* has made with a third party for the principal, does not bind the principal due to the *gestor*’s lack of ‘authority to represent’.<sup>315</sup> However, the unconditional and categorical acceptance of such an outcome is claimed by some to lead to unfair and contradictory results and accordingly, it is further argued that in certain cases, the authority arising from the internal relationship (*Innenverhältnis*) shall be given *-in externum-* legal effects.<sup>316</sup>

311 see III B (1) n 223.

312 By ‘valid’, not being *contra leges* (against law) and/or *contra bonos mores* (against good morals) is meant.

313 Yavuz, Acar, Özen, (n 296) 641; Gümüş (n 296) 229.

314 Kemal Oğuzman, Turgut Oz; *Borçlar Hukuku Genel Hükümler* I (17<sup>th</sup> edn, Vedat 2019) N. 766; Schmid (n 192) N. 406 et seq; Staudinger/Bergmann (n 223) §§ 677 N. 217.

315 Oser, Schöenberger (n 281) Art. 419 N. 3; Bucher (n 286) 256; Schmid (n 192) N. 409-410; Wittmann (n 202) 145 et seq; Larenz (n 203) 448.

316 Kaya (n 280) 190-191; Schmid (n 192) N.419; Fritz Baur, ‘Zur dingliche Seite der Geschäftsführung ohne Auftrag’ (1952)

The tendency to give external effects to the internal relation within *negotiorum gestio* is mostly a product of German scholarship.<sup>317</sup> The Swiss-Turkish academia does not seem keen on embracing such an approach although in the case of emergencies, the admittance of a third person, whose intervention directly benefits the principal, might be considered.<sup>318</sup>

## 2. Non-Genuine *Negotiorum Gestio*

The non-genuine *negotiorum gestio* is the case of someone unjustifiably managing another's business, for the benefit of himself or a third party. The intervention is not done for the benefit of the principal therefore this type of intervention is also called '*İş Gasbı*' (*Geschäftsanmaßung*/encroachment on someone else's business).<sup>319</sup> In practice, it is mostly the absolute rights such as real rights, personal rights and intellectual and industrial rights which are often prone to infringement as part of a 'non-genuine' *negotiorum gestio* while the answer to the question whether relative rights can also be the infringed in terms of an 'non-genuine' *negotiorum gestio* seems to be disputable.<sup>320</sup>

Cases where someone lives in another's house without any permission; or for instance rents that house to a third party or gives the coat of someone else to dry cleaning assuming it is his own; or any kind of copyright infringements are all deemed to be instances of 'non-genuine *negotiorum gestio*'.<sup>321</sup>

However, there seems to be a dispute on the further classification of the cases that fall under the category that is termed as non-genuine *negotiorum gestio*. The points of divergences are about the requirement of 'bad faith' on the *gestor*'s part and whether 'good faith' interventions which are not malicious in nature and mostly arise out of erroneous assumptions shall also be considered as being 'non-genuine'. For instance, amongst the cases given above, the one with 'the dry-cleaning of someone else's coat' might be given as an example of 'good faith, non-genuine *negotiorum gestio*' while the rest are obvious cases of 'bad faith, non-genuine *negotiorum gestio*'. However, unlike the BGB, where the good-faith interventions are explicitly excepted from

7 (11) *JuristenZeitung*, 1952, 328-329; compare with Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds.), *DCFR (Principles, Definitions and Model Rules of European Private Law)*, Interim Outline ed (2008) 1285-1288, Art V – 3:106: "(1) The intervener may conclude legal transactions or perform other juridical acts as a representative of the principal in so far as this may reasonably be expected to benefit the principal. (2) However, a unilateral juridical act by the intervener as a representative of the principal has no effect if the person to whom it is addressed rejects the act without undue delay",

317 Kaya (n 280) 193-196.

318 On the efforts to provide a remedy to such situations see Kaya (n 280) 192-196.

319 Hans Reichel, 'Geschäftsführung ohne Auftrag und Vertretung ohne Vertretungsmacht' (1929/30) 26 (13) *Die Schweizerische Juristen-Zeitung* 199.

320 Gümüş (n 296) 244; Arkan Akbıyık (n 280) 29-33; Baş Süzel (n 296) 55 et seq; Staudinger/Wittmann, 687 N. 6 et seq; also see Mansel/Jauernig (n 192) § 687 N. 10 et seq.

321 Arkan Akbıyık (n 280) 15, 20,76-101.

the effects of ‘*negotiorum gestio*’,<sup>322</sup> neither the OR nor the TBK include such an exempting provision leading to a conflict concerning the legal consequences of a ‘good faithed, non-genuine *negotiorum gestio*’. The main aspect of controversy is about the obligations of the good-faithed intervenor: Will the good-faithed intervenor be compelled to disgorge the profits or will the principal’s claim of ‘disgorgement of the profits’ (*kazanç devri*) be only restricted against the bad-faithed intervenor? Although some scholars argue that both the good-faithed and bad-faithed intervenor may be subjected to the ‘claim of disgorgement of the profits’,<sup>323</sup> the majority view holds ‘*gestor*’s bad faith’ to be a necessary condition for the principal’s claim of ‘disgorgement of profits’.<sup>324</sup> It follows that the legal consequences of a good-faithed intervention will be based on the institution of ‘unjustified enrichment’ rather than on ‘*negotiorum gestio*’.<sup>325</sup>

In determining bad faith, the criterion is the *gestor*’s awareness of the fact that the work undertaken is against the law. The *gestor* is also assumed to be in bad faith if he is in a position to be aware of the unlawfulness of his intervention. The burden of proof falls on the principal; he can demand the disgorgement of the profits obtained by the *gestor* by proving bad faith. On the other hand, the *gestor*, who does not know and does not need to know that he is intervening in someone else’s business, is deemed to be good-faithed. In such a case of good-willed intervention, there is no ‘*İş Gasbî*’ (*Geschäftsanmaßung*) but ‘*İşe Karışma*’ (*Geschäftseinmischung*/interference in someone else’s business).<sup>326</sup>

The flexible character of *negotiorum gestio* is apparent also in Turkish law as evident by the variety of fields that the norms of “*negotiorum gestio*” is applied to. As aforementioned, the complementary character of *negotiorum gestio* in issues of restitution was already established in Justinian law and then was re-emphasized during *ius commune*. In modern Turkish law, this complementary character is more prevalent when it comes to cases that involve ‘non-genuine *negotiorum gestio*’. It is

322 see BGB 687/1.

323 See fe Ahmet Esat Arsebük, *Borçlar Hukuku I-II* (3rd edn, Güney 1950) 542; Kemal Tahir Gürsoy, *Borçlar Hukuku Akdin Muhtelif Nevileri* (Ankara, 1955) 143; Hüseyin Avni Göktürk, *Borçlar Hukuku, İlkinci Kısım Aktin Muhtelif Nevileri* (Ulus 1951) 526; also see Andreas von Tuhr, Hans Peter, *Allgemeiner Teil des Schweizerischen Obligationenrechts*, (3rd edn, Schulthess 1984) 524, N. 46; Honsell, *Schweizerisches Obligationenrecht* (n 281) 347.

324 Hatemi, Serozan, Arpacı (n 18) 495; Eren (n 280) 842; Gümüş (n 296), 246; Baş Süzöl (n 296) 43; Aksoy (n 276) 105; Arkan Akbıyık (n 280) 38-42; Ercoşkun Şenol (n 290) 40-41; also see the draft of Swiss Code of Obligations 2002, art. 69 which states that anyone who encroaches on the legally protected interests of another and thereby makes a profit must reimburse the beneficiary in whole or in part, unless he can prove that he neither knew nor should have known about the intervention in the interests of others.

325 Gümüş (n 296), 252; Aksoy (n 276) 109-110; Hayriye Şen Doğramacı, ‘Bir Borç Kaynağı Olarak Vekâletsiz İşgörmeye’ in Şebnem Akipek Öcal et al (eds), *Medeni Kanun’un ve Borçlar Kanunu’nun 90. Yılı Uluslararası Sempozyumu: 1926’dan Günümüze Türk-İsviçre Medeni Hukuku* Vol. II (Yetkin 2017) 1501; Utku Saruhan, *Gerçek Vekâletsiz İşgörmeye* (Yetkin 2018) 51; Hans Nipperdey, *Staudinger’s Kommentar zum Bürgerlichen Gesetzbuch und dem Einführungsgesetze*, II. Band 3. Teil, (10<sup>th</sup> edn, Berlin 1941) §§ 677 ff. N. 42, 46, 49; Weber (n 274) Art. 419-424 N. 10; Lischer (n 192) 71-72; Larenz (n 203) 453; Martinek, Theobald (n 294) I, 615; Mansel/ Jauernig (n 192) § 687 N. 4; Dieter Medicus, Stephan Lorenz, *Schuldrecht II Besonderer Teil* (18<sup>th</sup> edn, Beck 2018) § 59 N. 3.

326 Lischer (n 192) 15; Eren (n 280) 843.

generally accepted that there shall be three different conditions for the extension of the application of a ‘non-genuine’ *negotiorum gestio*, which means that in a case where an unlawful intervention takes place, in order to resort to the norms of ‘*negotiorum gestio*’ three conditions have to be present, namely; ‘consideration of set-off’ – ‘a genuine need for *restitutio in integrum* (restoration to the former position)’ and ‘a certain degree of evidentiary difficulty to substantiate the claim of ‘damages’.<sup>327</sup>

In a case involving an non-genuine *negotiorum gestio*, the main legislative norm is the TBK art 530 and in the lack of an applicable special rule or regulation, it is the TBK art 530 that is to be applied.<sup>328</sup> It is also asserted that, in line with the Swiss academia, the TBK art 530 (and the OR art 440) constitutes ‘a legal basis’ (*Recchtsgrundverweisung/Hukuki temel*) in terms of the application of non-genuine *negotiorum gestio* to certain other fields of private law as opposed to the idea that it is only *negotiorum gestio*’s legal effect of ‘disgorgement of profits’ that is to be considered (as a *Recchtsfolgenverweisung*) in its complementary application.<sup>329</sup>

Under Turkish law, non-genuine *negotiorum gestio* is applicable as ‘a legal basis’ (*Recchtsgrundverweisung*) to a variety of cases, ranging from instances of infringement of ‘personality rights/intellectual property rights’<sup>330</sup> and of violations of ‘statutory/contractual non-competition covenants’<sup>331</sup> to matters involving ‘unfair competition’<sup>332</sup>– the ‘bad faith possessor’s duty to replevin’<sup>333</sup> – ‘lease’<sup>334</sup> and ‘simple partnership’.<sup>335</sup>

327 Schmid (n 192) N.1243.

328 for the claim that, the reason behind including ‘*negotiorum gestio*’ to various different legislations and codes, despite having a general norm as TBK art. 530, is the conviction that TBK art. 530 was deemed to be statutorily insufficient and practically underutilized see Baş Süzöl (n 296) 271.

329 Baş Süzöl (n 296) 272-273; Huguenin et al (n 280) Art. 423, N.23.

330 For infringement of personality rights and the ‘disgorgement of profits’ as a sanction see TMK art. 24-25, especially art. 25/3 which establishes that in the case of infringement of personality rights there will be claims for general & special damages and satisfaction for handing over profits in accordance with the provisions governing agency without authority; Cf SCC art 28a/3; also see Baş Süzöl (n 296) 273-290; Arkan Akbıyık (n 280) 77-81; BGer (*Bundesgericht*/Federal Supreme Court of Switzerland)133 III 153; Yarg. 4. HD (*Court of Cassation 4<sup>th</sup> Civil Chamber*), 7.2.2002, 10199/1371. For the infringement of intellectual property rights, see FSEK art. 70/3, which regulates that the person whose moral rights are damaged may also demand disgorgement of profits in addition to compensation; also see 6769 numbered *Sınai Mülkiyet Kanunu* (Industrial Property Law) art 151/2; also see, Kübra Yıldız, ‘SMK Hükümleriyle Karşılaştırmalı Olarak FSEK Kapsamında Gerçek Olmayan Vekâletsiz İş Görme’ (2020) 6 Ticaret ve Fikri Mülkiyet Hukuku Dergisi 154 - 171.

331 Cf TBK art 396/3, 446; also see Arkan Akbıyık (n 280) 93-94; Baş Süzöl (n 296) 326-341.

332 See Arkan Akbıyık (n 280) 86-93; Baş Süzöl (n 296) 312-326; Cf Turkish Commercial Code (*Türk Ticaret Kanunu*/TTK) art 56/1.

333 Arkan Akbıyık (n 280) 81-84; Baş Süzöl (n 296) 341-345; also see TMK art 995: “*Hyiniyetli olmayan zilyet, geri vermekle yükümlü olduğu şeyi haksız alıkoymuş olması yüzünden hak sahibine verdiği zararlar ve elde ettiği veya elde etmeyi ihmal eylediği ürünler karşılığında tazminat ödemek zorundadır*” (A person possessing a thing in bad faith must compensate the rightful owner for any damage resulting from such wrongful possession, as well as for any fruits he or she collected or neglected to collect), which is stated to be a ‘special’ norm excluding the general norm of TBK art 530; see Arkan Akbıyık (n 280) 39; Tandoğan, *Vekâletsiz İş Görme* (n 2) 316.

334 Baş Süzöl (n 296) 345 et seq.

335 See TBK art 630/2 where it is hold that if a partner of a simple partnership who lacks management authority conducts business on the partnership’s behalf or if a managing partner exceeds his management authority, the provisions governing ‘agency without authority’ shall apply.



It is also asserted that certain cases of 'emergency medical treatment' by health professionals might be interpreted as a special application of '*negotiorum gestio*'.<sup>336</sup> In cases where there exists no contractual relationship and the medical intervention is performed without the patient's consent, especially due to an emergency intervention, the legal relationship between the physician/hospital and the patient falls within the scope of the *negotiorum gestio*.<sup>337</sup> In that regard, there might be two possibilities where the liability of the physician/hospital arising from the medical intervention is based on *negotiorum gestio*: the first, being the case where the patient is unconscious and there is a real medical urgency for the intervention; the second being the case where the medical intervention in line with the patient's original consent needs to be expanded for urgent reasons while the patient is unconscious or simply not in a condition to give the consent for the expansion of the intervention.<sup>338</sup>

## C. Elements of *Negotiorum Gestio* in Turkish Civil Law

### 1. Genuine *Negotiorum Gestio*

#### a. Managing the Business of Someone Else

The first condition under Turkish law for a genuine *negotiorum gestio* to rise is that there shall be a managed 'business' which belongs to someone other than the person managing that business. The management may equally involve juristic or non-juristic acts.<sup>339</sup> Furthermore, managing a business shall involve positive acts, negative acts do not constitute the act of 'managing a business' in terms of *negotiorum gestio*.<sup>340</sup> Also, the 'management of business' corresponds to 'real', effective acts; to merely undertake the 'business' in question or take charge of preparatory actions does not constitute to its 'management' and therefore does not -yet- constitute a relation that may be termed as a '*negotiorum gestio*'.<sup>341</sup> The *gestor* does not need to manage the business in person and may choose to use an assistant or vicarious.<sup>342</sup>

336 See Reyhani Yüksel (n 309) 794; Nilay Şenol, 'Hekimin Tazminat Sorumluluğu (Hekimin Hukuki Sorumluluğu)' in Aysun Altuntaş, İpek Sevda Söğüt, Hamide Bağçeci (eds), II. Ulusal Sağlık Hukuku 'Tıbbi Müdahalenin Hukuki Yansımaları' Sempozyumu (Seçkin 2014) 120; Zariye Şenocak, *Özel Hukukta Hekimin Sorumluluğu* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1998) 103; Seçkin Topuz, 'Acil Tıbbi Müdahalede Bulunan Hekimin Hukuki Sorumluluğu' (2008) 3 Erciyes Üniversitesi Hukuk Fakültesi Dergisi 293, 294-295; Ferhat Canbolat, 'Kamu Hastanesinde Yapılan Tıbbi Müdahalede Hekimin Özel Hukuktan Doğan Sorumluluğunun Dayanağı' (2009) 80 TBB Dergisi, 156, 167; also see Andreas Spickhoff, *Medizinrecht*, (3<sup>rd</sup> edn, Beck 2018) BGB § 680 N. 1; Erwin Deutsch, Andreas Spickhoff, *Medizinrecht* (7<sup>th</sup> edn, Springer 2014) 130; Adolf Laufs, Bernd-Rüdiger Kern, Martin Rehborn, *Handbuch des Arztrechts* (5<sup>th</sup> edn, Beck 2019) § 20 N. 89.

337 Kaya (n 280) 379.

338 Kaya (n 280) 379-380; Reyhani Yüksel (n 309) 799; Deutsch, Spickhoff (n 306) N. 431; Mehmet Ayan, *Tıbbi Müdahalelerden Doğan Hukuki Sorumluluk* (Kazancı 1991) 61; Hasan Tahsin Gökcan, *Tıbbi Müdahaleden Doğan Hukuki ve Cezai Sorumluluk* (Seçkin 2013) 1000.

339 Gümüş (n 296), 227; Bucher (n 286) 256.

340 Tandoğan, *Özel Borç İlişkileri* (n 299) 678; Bilge (n 297) 326.

341 Kaya (n 280) 166.

342 Eren (n 280) 832.

As mentioned, the business needs to belong to someone else; if someone manages his own business believing it belongs to someone else, there will be no *negotiorum gestio*. The criterion here will be the link between the managed 'business' and the 'interest' of someone other than the *gestor*. As long as the managed business predominantly serves the interest of the principal then the rise of a *negotiorum gestio* will be admitted. The mere fact that the intervention also serves the interest of the *gestor* is immaterial to the extent that the 'interest' of the principal remains the foremost objective.<sup>343</sup>

### b. Lack of Mandate

The other condition for a genuine *negotiorum gestio* is that there needs to be no valid mandate on the part of the *gestor*. In that regard, it does not matter if there had been a valid mandate before: the mandate might have expired or have been terminated/invalidated for some reason;<sup>344</sup> or the *gestor* might be overstepping the legal boundaries of the current mandate he is initially given, in all those cases, the *gestor* will be deemed to be lacking a mandate.<sup>345</sup> The *gestor* shall also be under no legal duty to intervene.<sup>346</sup>

There is indeed a technical difference between 'lacking a valid mandate' and 'having no authority to represent' (*yetkisiz temsil*).<sup>347</sup> First of all, the *gestor* of *negotiorum gestio* is an -indirect- 'agent' by law (*ex lege*).<sup>348</sup> Secondly, while lacking a valid mandate only concerns the internal relation between the *gestor* and the principal, the case of 'having no authority to represent' concerns their external relation. Furthermore, you may only lack the 'authority to represent' (*temsil yetkisi*) in matters related to judicial acts, whereas any kind of act might be the subject of *negotiorum gestio*.<sup>349</sup>

343 Gümüş (n 296) 228; Staudinger/Bergmann (n 223) § 677 N. 39, 177; Hofstetter (n 192) 237; Oser, Schönenberger, (n 281) Art. 419, N. 13; von Büren (n 274) 330.

344 The Turkish Court of Cassation does apply the norms of *negotiorum gestio* to cases which involve invalid 'contracts for hire of work' (*eser sözleşmesi*); see the decision of the 'General Assembly of the Court of Cassation' (*Yargıtay Hukuk Genel Kurulu/YHGK*) dated 18.03.2015 and numbered 2182/1047. The same approach is observed in the decisions of the German Federal Court; see BGHZ 39, 87, Urt. v. 31.01.1963-VII ZR 284/6. Furthermore, the Turkish Court of Cassation does consider all the 'additional works' not agreed upon as part of the terms of contract for 'hire of work' as subjects of a '*negotiorum gestio*'; see decision of 15th Civil Chamber of Court of Cassation dated 21.03.2019 and numbered 3896/1292, dated 11.2.2019 and numbered 4381/523; and of the 23th Civil Chamber of Court of Cassation dated 26.9.2019 and numbered 7126/3885. For the criticisms see Kaya (n 280) 285-287.

345 If there is a valid agency contract between the parties and the *gestor* did overstep the limit of the given mandate then there rises no '*negotiorum gestio*' since by virtue of TBK art 505 which regulates the agent's 'duty to comply with the principal's instructions', it is the TBK art 505 that is to be applied, not the norms of '*negotiorum gestio*'.

346 Cf I Ins.3.27.1.

347 See TBK art 46: "Bir kimse yetkisi olmadığı hâlde temsilci olarak bir hukuki işlem yaparsa, bu işlem ancak onadığı takdirde temsil olunamırlar." (Where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless he ratifies the contract).

348 Yavuz, Acar, Özen (n 296) 643.

349 For more on this, see Şener Akyol, *Türk Medeni Hukukunda Temsil* (Vedat 2009) 459-460; Adem Yelmen, 'Yetkisiz Temsil' (2015) İnönü Üniversitesi Hukuk Fakültesi Dergisi: Special Issue 429, 431-432; Lischer (n 192) 121.

### c. *Animus negotia aliena gerendi*

It is sufficient for the *gestor* to have the motive and will to manage the business for the benefit of others; he does not need to specifically know the identity of the principal, nor needs to have any prior connection with him. The principal may even not exist in time of the intervention.<sup>350</sup> The main condition here is that the *animus negotia aliena gerendi* is present from the beginning of the intervention; thus, in the case of a dispute about whether the *gestor* intervened for his own interest or not, the exact time when the intervention has begun will be taken into consideration. The burden of proof lies with the principal.

### d. Necessity

Lastly, the intervention of the *gestor* shall be ‘necessary’ for the principal. Every intervention that is in the ‘best interests’ of the principal is also ‘necessary’ from him as expressly laid down in the TBK art. 529/1.<sup>351</sup> Furthermore, if the principal is in no position to defend his rights or if he is in special need of assistance then the *gestor*’s intervention will be deemed as necessary.<sup>352</sup> For the assessment of the necessity of an intervention, the standard course of action expected from a reasonable and prudent person is to be considered.

## 2. Non-Genuine *Negotiorum Gestio*

The conditions for a non-genuine *negotiorum gestio* to rise are mostly similar with the genuine *negotiorum gestio*. With a non-genuine *negotiorum gestio*, as it is in a genuine *negotiorum gestio*, there shall be a business managed which shall belong to someone else other than the *gestor* and the *gestor* who is managing the business shall be lacking a ‘valid’ mandate.<sup>353</sup> The *gestor* shall also not be acting out of any legal duty on his part.

The main difference between the genuine and non-genuine types of *negotiorum gestio* concerns the real motive of the *gestor*; as for an intervention to be termed as ‘non-genuine’, the *gestor* shall be managing the business solely for his own benefit,

350 Such is the case of managing the business of a company that is still in the stage of its establishment; see von Büren, 331.

351 TBK art 529/1: “İşsahibi, işin kendi menfaatine yapılması halinde, işgörenin, durumun gereğine göre zorunlu ve yararlı bulunan bütün masrafları faizizle ödemek ve gördüğü iş dolayısıyla üstlendiği edimleri ifa etmek ve hakimın takdir edeceği zararı gidermekle yükümlüdür.” (Where the intervention was in the best interests of the principal, he is obliged to reimburse the *gestor* for all expenses that were necessary or beneficial and appropriate in the circumstances -plus interest-, to release him to the same extent from all obligations assumed and to compensate him at the judge’s discretion for any other damage incurred). For the view which sees ‘being necessary’ as more than ‘being beneficial’, see Honsell, *Schweizerisches Obligationenrecht* (n 281) 344; Hofstetter (n 192) 261; for the view which asserts that the intervention shall also be of urgent nature, see Bucher (n 286) 258; Weber (n 274) Art. 419 N. 13.

352 Huguenin (n 274) N. 1627.

353 Since the ‘non-genuine’ *negotiorum gestio* is akin a tort, the lack of a valid mandate will equal to having no legal right to intervene, and thus an act of unlawfulness, as there is no justifying valid legal cause for the intervention itself; see Eren (n 280) 844; Gümüş (n 296), 245; CfD. 3.5.5.5

without any regard or consideration for the interest of the principal. A genuine *negotiorum gestio* exists when the *gestor* is managing the business of another with an intention to benefit him. On the other hand, if the *gestor*'s actions -willingly or unwillingly- do not target to benefit the principal then what we have is a non-genuine *negotiorum gestio*.

The *gestor* falsely thinking he is managing his own business is obviously serving his own interest and this subjectively benevolent but objectively selfish intention is precisely what separates the 'genuine *negotiorum gestio*' from the 'non-genuine'. The *gestor*'s intention might be based on an erroneous assumption which in turn taints his intention, resulting in a lack of *animus negotia aliena gerendi* on his part; or the *gestor*'s intention might be based on plain bad faith targeting to unjustly profit over the principal. Both of those cases fall under the category of 'non-genuine' *negotiorum gestio*, the former as being 'good-faithed' and the latter as being 'bad-faithed'. Accordingly, in Turkish law, the *gestor* having an *animus negotia aliena gerendi* is a requirement only for instances of 'genuine *negotiorum gestio*'; not for 'non-genuine *negotiorum gestio*' as can be seen in the decisions of the Turkish Court of Cassation.<sup>354</sup>

Thus, for non-genuine interventions, the question whether the *gestor* is intervening with bad faith is vital; if the intervention is malicious, then the bad faith of the *gestor* will be taken into consideration, and he will be subjected to the principal's claims of disgorgement of profits in addition to his claim of damages. As for the probability of competing claims of 'disgorgement of profits' and of 'loss of profits' (*lucrum cessans*) or 'actual loss' (*damnum emergens*), there seems to be differing solutions for each case: F.e, in the event of the competing claims of 'disgorgement of profits' and the 'loss of profits', the principal may not claim damages for 'loss of profits' together with 'disgorgement of profits'. If the 'damages' is limited to the 'loss of profits', then either the 'loss of profits' or the 'disgorgement of profits' should be claimed as they both target to remedy the same loss. If the principal's loss of profits exceeds the gained profits of the intervener, then the principal shall claim for 'loss of profits' instead of 'disgorgement of profits'.<sup>355</sup>

354 See fe Court of Cassation's Decision on the Unification of Judgments (*Yargıtay İçtihadı Birleştirme Kararı*) dated 04.06.1958 and numbered 15/7: "...hakiki vekaletsiz tasarruflun kanuni şartları arasında, iş görenin başkasının işini gördüğü iradesiyle hareket etmiş olması durumu varsa da hükmi vekaletsiz tasarrufla böyle bir şart aranmaz." (... Although the fact that the *gestor* has acted with an *animus negotia aliena gerendi* constitutes a statutory prerequisite for a genuine *negotiorum gestio*, no such condition is required for a non-genuine *negotiorum gestio*.). Also see Yavuz, Acar, Özen (n 296) 641; Tandoğan, *Vekaletsiz İş Görme* (n 2) 171-172; Zevkliler, Gökayla (n 299) 653.

355 Başoğlu (n 209) 258. On the other hand, especially in matters involving intellectual property infringements, it can be argued that the two remedies are indeed different from each other and in that regard, neither their theoretical justifications nor their objectives do resemble each other. The remedy of lost profits (*lucrum cessans*) is intended to restore the patentee to his former position prior the infringement, while disgorgement may target different purposes such as discouraging infringement, reclaiming the wrongful gains of the infringer, and enticing prospective users of patented technology to negotiate for a license; For more on the comparison of the claims of 'Loss of Profits' vs 'Disgorgement of Profits' in terms of intellectual property law, see Christopher B. Seaman, Thomas F. Cotter, Brian J. Love, Norman V. Siebrasse, Masabumi Suzuki, *Lost Profits and Disgorgement, Patent Remedies and Complex Products: Toward a Global Consensus* (Cambridge

However, in the case of the claim for the damages for actual loss (*damnum emergens*), there is no obstacle to prevent the principal from claiming both the disgorgement of profits and the compensation for damages since, in most cases, the gained profits will not correspond to the actual loss of the principal.<sup>356</sup>

On the other hand, if the intervention is not malicious, then the rules of unjustified enrichment will be applied. In that regard, ‘the *gestor*’s bad faith’ is argued to be a prerequisite for ‘non-genuine *negotiorum gestio*’; and, thus, a subjective requirement for the remedy of the ‘disgorgement of profits.’<sup>357</sup>

## D. Legal Consequences of *Negotiorum Gestio* in Turkish Civil Law

### 1. Genuine *Negotiorum Gestio*

#### a. Obligations and Liabilities of the *Gestor*

The *gestor*, first and foremost, is under the duty to manage the business in accordance with the interest and the actual or presumptive will of the principal.<sup>358</sup> If the interest of the principal contradicts his ‘will’ -either actual or presumptive-, then the ‘will’ of the principal prevails and the *gestor* shall manage the business in line with the wishes of the principal.<sup>359</sup> The *gestor* is under a ‘duty of care’ -similar to the ‘duty of care’ foreseen in the law of ‘agency’,<sup>360</sup> which also includes the duties of ‘loyalty’ and ‘confidentiality’.<sup>361</sup> In the case of the *gestor* intervening as a requirement of his profession or in exchange of a remuneration then the standard of care will elevate accordingly.<sup>362</sup> The *gestor* is also obliged at the principal’s request, which may be made at any time, to give an account of his activities and to return anything received as a result for whatever reason including the reimbursement of interests, if there are any.<sup>363</sup>

As for the *gestor*’s duty to continue the intervention (*Fortführungspflicht*), the majority view of Turkish-Swiss law rejects such a duty on the *gestor*’s part.<sup>364</sup>

University Press 2019) 50-51; for Turkish law see Yıldız (n 330) 157 et seq; Baş Sützel (n 296) 292 et seq.

356 The contrary is not impossible; fe the *gestor* might have managed the business of the principal in such a way that the principal may have experienced loss from one operation while, owing to the *gestor*’s intervention, might have profited from a rival operation which is also owned by him.

357 Eren (280) 845; Arkan Akbiyık (n 280) 38; as a subjective element.

358 See TBK art 526.

359 Hofstetter (n 192) 263; Huguenin (n 274) N. 1650; Maissen, Huguenin, Jenny (n 280) Art. 419, N. 18.

360 See TBK art 506; although the *gestor*’s duties of loyalty and confidentiality shall be judged more leniently in *negotiorum gestio* compared with ‘agency’.

361 Tandoğan, *Vekaletsiz İş Görme* (n 2) 192.

362 Schmid (n 192) N.433; Guhl, Koller, Schnyder, Druey (n 297) § 49 N. 11-12; Lischer (n 192) 94. For an opposing view see Loyal (n 203) 260-261.

363 See TBK art. 530.

364 Tandoğan, *Vekaletsiz İş Görme* (n 2) 184-185; see also TBK art 512: “The principal and the agent may, at any time, unilaterally terminate the contract with immediate effect. However, a party doing so at an inopportune juncture must

The only exception might be the case where the interruption or termination of the intervention carries the risk of causing damages to the principal and that risk is a direct consequence of the intervention. Then, the *gestor* shall be deemed to be under a duty -albeit restricted- to continue the intervention.<sup>365</sup>

In the case of an error on the *gestor*'s part regarding the necessity of the intervention and/or the will of the principal; the question whether that error will have any effect depends on the stage when the *gestor* errs. In other words, if the *gestor* is in error about his intervention's necessity or the will of the principal before assuming to manage the business then, as mentioned before,<sup>366</sup> there rises a - 'genuine' but unjustified- *negotiorum gestio*. On the other hand, if the *gestor* started to manage the business and then during his management errs in determining the genuine will of the principal and the degree of the necessity of his intervention, then it might be argued that there has risen a valid *negotiorum gestio* between the parties, but the *gestor* is in violation of his 'duty of care'.

If the *gestor* violates his obligations and causes any damages to the principal, he will be held responsible, as by law, the *gestor* is under the 'liability of fault' (*omnis culpa*);<sup>367</sup> meaning that he will be liable of 'ordinary negligence' (*culpa levis*) together with 'gross negligence' (*culpa lata*), fraud and intent (*dolus*).<sup>368</sup> There shall be a causation between the intervention and the damage, where the *gestor* intervened in order to avert imminent damage to the principal, his liability is judged more leniently.<sup>369</sup> The threat of danger may involve bodily harm or pecuniary damage; or the act in question may pose a threat against the moral values of the principal such as honor, reputation or personal dignity. The threat of danger must be 'real' and 'present'.<sup>370</sup>

Conversely, where the intervention is carried out against the express or otherwise recognizable will of the principal, the *gestor* additionally becomes liable of 'unexpected circumstances' (*casus fortis*) unless the prohibition by the principal is neither immoral nor illegal and/or the *gestor* can prove that the 'unexpected circumstances' would have occurred even without his involvement.<sup>371</sup>

The article 112 of the Turkish Code of Obligations which lays down the general norm on 'liability from contracts' appears to be the only applicable provision to

---

compensate the other for any resultant damage."

365 Schmid (n 192) N. 441; Suter (n 192) 35-36.

366 See III B (1).

367 See TBK art 527/1: "Vekâletsiz işgören, her türlü ihmâlınden sorumludur." (The *gestor* is liable of any negligence).

368 Cf D. 3.5.10; also see fe the *rationale* of TBK art 115.

369 TBK art 527/1. In the event that the principal is at a 'contributory fault' in the emergence of the danger or the damage itself, such a matter shall also be taken into consideration when determining the liabilities of the parties.

370 Tandoğan, *Vekâletsiz İş Görme* (n 2) 214-215; Schmid (n 192) N. 470; Staudinger/Bergmann (n 223) §680 N. 9; Suter, (n 192) 52; Manfred Wandt, *Gesetzliche Schuldverhältnisse: Deliktsrecht, Schadensrecht, Bereicherungsrecht* (9<sup>th</sup> edn, F. Vahlen 2019) §5 N. 68.

371 TBK art 527/2.



be resorted to in the absence of a special regulation.<sup>372</sup> It follows that for matters related to f.e. ‘prescriptive period’, ‘liability for the actions of the assistants’ (*culpa in eligendo*), and ‘presumption of *culpa*/fault’, the general solutions also apply to *negotiorum gestio* to the extent that they are appropriate and pertinent.<sup>373</sup>

The *gestor* is more-or-less free in choosing the means to manage the business as long as his general course of action is in line with the express or presumptive wishes of the principal.<sup>374</sup> Lastly, where the *gestor* lacks the capacity to contract, he is liable for his actions only to the extent that he is enriched; or, if there is any alienation in bad faith by the *gestor*, then to the extent of the alienated enrichment.<sup>375</sup>

### **b. Obligations and Liabilities of the Principal**

The principal, on the other hand, is under the duties to reimburse the necessary, useful and appropriate expenses incurred by the *gestor*, to release the *gestor* from the debts he has undertaken and compensate for the losses incurred.<sup>376</sup> The ‘receivable’ expenses shall both be necessary and appropriate to see the business done and must be proportionate to the interests of the principal.<sup>377</sup> Elements of necessity and eligibility are determined from an objective standard, in line with the principal’s presumptive will and the intended consequences while the value and amount of the expenses should be determined according to the time period that they are incurred, and any subsequent price changes shall not be taken into account.<sup>378</sup> The claim for expenses becomes due and payable as soon as they are incurred; so do the claims for interest.<sup>379</sup>

The type of expenses that do not provide any benefit to the principal or inconsistent with his interests/instructions or are plain unreasonable, shall not be reimbursed by the principal. Furthermore, expenditures of the *gestor* borne in the course of an unlawful or immoral business shall also not be the subjects of any reimbursement claims on the *gestor*’s part.<sup>380</sup>

372 TBK art 112: “*Borç hiç veya gereği gibi ifa edilmezse borçlu, kendisine hiçbir kusurun yüklenemeyeceğini ispat etmedikçe, alacaklının bundan doğan zararını gidermekle yükümlüdür.*” (When an obligor fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault.)

373 Gümüüş (n 296), 234-235; Aeby (n 280) 49, 96; George Gautschi, Berner Kommentar zum schweizerischen Zivilgesetzbuch, das obligationrecht, 2. Abteilung, Die einzelnen Verlagsverhältnisse, 5. Teilband, Kreditbrief und Kreditauftrag, Mäklervertrag, Agenturvertrag, Geschäftsführung ohne Auftrag, Art. 407-424 OR (Stampfli 1964) art 419-424 N.5a-c.

374 Staudinger/Bergmann (n 223) § 677 N. 17, § 683 N. 1.

375 TBK art 528. The *gestor*’s liability in tort is reserved.

376 TBK art 529; Cf OR art 422/1.

377 Weber (n 274) Art. 422, N. 6; Schmid (n 192) N. 44; Pierre Tercier, Pascal G. Favre, Damien Conus, *Les Contrats spéciaux* (4<sup>th</sup> edn, Schulthess 2009) N. 5995.

378 Tandoğan, *Vekaletsiz İş Görme* (n 2) 272; Schmid (n 192) N. 45, 498; also see Yarg. 15. HD., E. 2011/4482 K. 2012/1875, T. 26.3.2012; E. 2012/1828 K. 2012/6953, T. 8.11.2012; E. 2006/2268 K. 2007/2383, T. 12.04.2007 (Turkish Court of Cassation (*Yargıtay*) decisions of 15th Civil Chamber of Court of Cassation (*Hukuk Dairesi*/HD) dated 26.03.2012 and numbered 4482/1875; dated 08.11.2012 and numbered 1828/6953; dated 12.04.2007 and numbered 2268/2383)

379 Schmid (n 192) N. 46-47; Tercier, Favre, Conus (n 377) N. 5987; Gautschi (n 373) Art. 422, N. 6; Hofstetter (n 192) 206.

380 Tandoğan, *Vekaletsiz İş Görme* (n 2) 144; Gautschi (n 373) 59.

The principal is also obliged to compensate the *gestor* at the judge's discretion for any damages incurred, and in that regard no fault is required on the principal's part.<sup>381</sup> The 'damages' may comprise both tangible and intangible losses.<sup>382</sup> The judge might unilaterally burden the principal or opt for allocating the liabilities between the parties. The claim of the compensation for the damages becomes due and payable the moment the damage has occurred.<sup>383</sup> As for the *gestor*'s claim for remuneration, the majority view maintains that remuneration may be demanded provided that the work done by the *gestor* is the type of regular work undertaken as a matter of profession.<sup>384</sup> However, this shall also not mean that demands for remuneration is restricted only for professionals.<sup>385</sup>

In the event of the *gestor* not being satisfied over his demands for reimbursement, he is vested with the 'right of removal' (*Wegnahmerecht*) under the provisions of the institution of 'unjustified enrichment', as laid down in the article 529/2 of the TBK.<sup>386</sup> However, in order for the *gestor* to validly exercise his right, first and foremost, the principal shall be under no legal obligation to reimburse the *gestor*'s expenses. Therefore, it is only for expenses which are deemed to be 'unreasonable', 'unnecessary' or 'not beneficial', that the *gestor* may resort to this right.<sup>387</sup> It does not matter whether or not the removal of the installation is beneficial to the *gestor*, the *gestor* may choose to exercise his 'right of removal' regardless.<sup>388</sup> On the other hand, if the removal will have a detrimental effect on the value of the thing, then the *gestor* shall not be admitted the 'right of removal'.<sup>389</sup>

Another remedy that the *gestor* might resort to in case of the principal's non-performance is the 'right of retention', as laid down in article 950 of the Turkish Civil

381 It is asserted that this 'strict liability' of the principal is based on the 'principle of equity'; see Eren (n 280) 839; Yavuz, Acar, Özen (n 296) 645.

382 Schmid (n 192) N. 54, 63; Tandoğan, *Özel Borç İlişkileri* (n 299) 682; Cf KTK (*Karayolları Trafik Kanunu/Highway Traffic Law*) art 90.

383 Schmid (n 192) Art. 419-424 OR, Art. 422, N. 58.

384 By analogy with TBK art 502/3: "... Sözleşme veya teamül varsa vekil, ücrete hak kazanır." (Remuneration is payable where agreed or customary.); also see Haluk Tandoğan, 'Vekaletsiz İşgörenin Ücret Talebi' (1955) 12 AÜHFD 384-391; Hofstetter (n 192) 206; Pierre H. Engel, *Contrats de droit Suisse* (2nd edn, Stampfli 2000) 530. The Swiss draft Code of Obligations (2020), in its article 75/2, expressly regulates the principal's duty to reimburse the *gestor*'s demand for remuneration on the condition that the *gestor* has undertaken the type of regular work undertaken as a matter of his profession. While this provision sheds light on the controversy regarding the *gestor*'s remuneration, it also provides a blanket refusal to demands of remuneration for anyone intervening in a non-professional capacity; see Huguenin, Chappuis (n 275) Art. 75 N. 7.

385 Köhler (n 203) 363-364.

386 TBK art 529/2: "İşgören, yapmış olduğu giderleri alamadığı takdirde, sebepsiz zenginleşme hükümlerine göre ayırıp alma hakkına sahiptir." (Where the agent's expenses are not reimbursed, he has the right of removal in accordance with the provisions governing unjust enrichment). Compare with TBK art 80/III.

387 Tandoğan, *Vekaletsiz İş Görme* (n 2) 286-287, 298-301; Oser, Schönerberger (n 281) Art. 422 N. 9; Schmid, (n 192) N. 500; Hagenbüchli, (n 274) 76-77; Huguenin, Chappuis (n 275) Art. 76 N. 15; Weber (n 274) Art. 422 N. 7; Maissen, Huguenin, Jenny (n 280) Art. 422 N.8; Cf Arkan Akbıyık (n 280) 58 fn 239.

388 Tandoğan, *Vekaletsiz İş Görme* (n 2) 290-291; Kenan Tunçomağ, *Türk Borçlar Hukuku, Genel Hükümler I* (6<sup>th</sup> edn, Sermet 1976) 642; Özdemir, *Vekaletsiz İş Görme* (n 23) 631.

389 Turgut Öz, *Öğreti ve Uygulamada Sebepsiz Zenginleşme* (Kazancı, 1990) 165-166; Tandoğan, *Vekaletsiz İş Görme* (n 2) 288-289. Schmid (n 192) N.501; Aeby (n 280) 93.

Code (TMK). The *gestor*, in order to secure his claims arising out of the *negotiorum gestio*, might exercise his ‘right of retention’ over the immovables and negotiable instruments which are gained as a consequence of the managed business.<sup>390</sup> The *gestor* may continue to retain such goods until his demands for compensation of damages and/or reimbursement of expenses are satisfied.<sup>391</sup>

### c. Prescriptive Period and the Effect of ‘Approval’

There is no provision in the TBK regarding the prescriptive period for the claims of both the principal and the *gestor*. Additionally, Turkish Civil law lacks a unitary approach to prescriptive periods concerning obligations, unlike what is recently observed within the European regulatory endeavors.<sup>392</sup> The ‘genuine *negotiorum gestio*’ is deemed to be a ‘quasi-juristic act’ (*hukuki işlem benzeri*) in Turkish Law; and thus, the claims of the *gestor* and the principal are subject to a 10-years long prescriptive period;<sup>393</sup> which is the general prescriptive period for claims.<sup>394</sup> However it is also argued that for ‘certain claims’<sup>395</sup> deriving from *negotiorum gestio*, the 5-years long prescriptive period laid down in the art. 147 of the TBK is to be applied.<sup>396</sup>

A genuine *negotiorum gestio*, be it justified or unjustified, can subsequently be accepted by the principal; that is, the principal might consent to the business managed by the *gestor* and accordingly give his approval.<sup>397</sup> In the case of the principal’s approval, the provisions governing agency become applicable retrospectively (*ex tunc*).<sup>398</sup>

In the 808 numbered ‘abolished’ Code of Obligations, the term used instead of ‘approval/approbation’ (*uygun bulma*)<sup>399</sup> was ‘ratification’ (*icazet*), which became a

390 Tandoğan, *Vekaletsiz İş Görme* (n 2) 292 et seq; Schmid (n 192) N.551; Özkaya (n 309) 1096 - 1097.

391 Tandoğan, *Vekaletsiz İş Görme* (n 2) 292-293; Özdemir *Vekaletsiz İş Görme* (n 23)127-128; also see Suter (n 192) 111-112.

392 Such as the ‘Draft Common Frame of References (DCFR)’ or the ‘Draft Swiss Code of Obligations (2020)’.

393 Tandoğan, *Özel Borç İlişkileri* (n 299) 683; Yavuz, Acar, Özen (n 296) 645; Hofstetter (n 192) 196; Engel (n 384) 50; Bucher (n 286) 261; Tercier, Favre, Conus (n 377) N. 6008; Schmid (n 192) N. 83; Miassen, Huguénin, Jenny (n 280) Art. 419, N. 22, Art. 422, N. 9.

394 TBK art 146: “*Kanunda aksine bir hüküm bulunmadıkça, her alacak on yıllık zamanaşımına tabidir.*” (All claims are subject to a ten years prescriptive period unless otherwise provided by law).

395 Such as claims deriving from periodic payments and claims which are in connection with ‘work carried out by tradesmen and craftsmen’ or ‘purchases of retail goods’.

396 Yavuz, Acar, Özen (n 296) 645; Tandoğan, *Özel Borç İlişkileri* (n 299) 484; cf TBK art 147/5.

397 TBK art 531: “*İşahibi yapılan işi uygun bulmuşsa, vekâlet hükümleri uygulanır.*” (Where the managed business is ‘subsequently approved’ by the principal, the provisions governing agency become applicable).

398 However, it also follows that the principal’s approval shall not prejudice third persons, nor shall it adversely affect their acquired rights prior to the approval; see Tandoğan, *Vekaletsiz İş Görme* (n 2) 254-255; Bilge (n 297) 332.

399 The original term proposed in the first draft was ‘*onama*’ (assent) however, since it is not only the *gestor*’s legal transactions that can be accepted by principal the term ‘*uygun bulma*’ (approval/approbation) was instead inserted by the subcommittee; see report of Justice Committee (*Adalet Komisyonu*), E. 1/499 K. 21, 2009, p. 41. As for the English term for ‘*uygun bulma*’, we do not see any technical differences between ‘approval’ and ‘approbation’ even when their Latin roots -*approbatio/approbo*- are comparatively considered. Thus, they are more or less the same term, expressing the same act, with ‘*approbo*’ having a more positive tone. Both of these terms may be found in Cicero’s writings and if we need to make a distinction between them, then it may be argued that ‘*approbo*’ mostly involve ‘positive acts’ not susceptible

subject of criticisms within the academia due to the differences between the legal effects of 'approval' and 'ratification'.<sup>400</sup> With *negotiorum gestio* there is indeed no pending relation between the principal and the intervenor to be ratified; the acceptance of the *gestor*'s intervention by the principal does neither constitute an 'offer to contract' nor does lead to the formation of a 'contract of mandate';<sup>401</sup> thus, what the principal exercises for accepting the *gestor*'s business, is his 'right to approve', not the 'right to ratify'.<sup>402</sup>

The 'right to approve' is a 'right effective in changing legal relations' (*Gestaltungsrecht - yenilik doğuran hak*),<sup>403</sup> therefore a unilateral declaration of intent by the principal, either explicitly or implicitly, is sufficient for the valid exercise of the 'right to approve'. The 'right to approve', similar to all other types of 'rights effective in changing legal relations', shall be exercised without any conditions, and cannot be reverted once asserted.<sup>404</sup>

## 2- Non-Genuine *Negotiorum Gestio*

### a. Obligations and Liabilities of the *Gestor*

In cases of non-genuine *negotiorum gestio*, the *gestor* is deemed to be under a substantial degree of responsibility against the principal. The principal has the right to obtain the benefits arising from the works performed by the *gestor* for his own benefit.<sup>405</sup> The principal's benefit may correspond to revenues from various sources, such as the income obtained by the *gestor* over the sale of the goods produced by the unfair use of the patent right of the principal, or the earnings from the sale or lease of the principal's property, or etc.

The right of the principal to demand the 'disgorgement of the profits' is a personal right (*in personam*); not a real one (*in rem*); thus, restitution shall be demanded via the course of action that would be valid for the replevin of the assets that comprise the profits.<sup>406</sup> As mentioned above, the 'profits' do correspond to the 'net' income which is the value arrived at after subtracting the expenses from the sum of gross income and interest.

to speculations, while '*approbatio*' could also mean 'acquiescence'; see fe Cic. Brut. 49.185; Cic. Off. 1.28.98; Cic. Or. 71.236. However, those etymological variances do amount to minor substantial deviations.

400 For the criticisms, see Yavuz, Acar, Özen (n 296) 647; Gümüş (n 296) 232; for the differences between *ratihabitio* vs *consensus* in classical Roman law see Avorel (n 38) 89.

401 Huguenin (n 274) N. 909; Hofstetter (n 192) 249, 253.

402 Yavuz, Acar, Özen (n 296) 647.

403 Hüseyin Hatemi, Rona Serozan, Abdülkadir Arpacı, *Borçlar Hukuku: Özel Bölüm* (Filiz 1999) 496; Yavuz, Acar, Özen (n 296) 647; Gümüş (n 296), 232; also see Hofstetter (n 192) 253; Lischer (n 192) 11. The 'right to approve' is also a 'right that modifies legal relations' (*Andernde Gestaltungsrechte/Değiştirici yenilik doğuran hak*).

404 Vedat Buz, *Yenilik Doğuran Haklar* (Yetkin 2005) 50, 57 et seq.

405 TBK art 530/1

406 Eg in the case of a movable: via an agreement on a real contract followed by the delivery of possession; in the case of an immovable, via registry at the Land registry and in the case of claim, via the 'assignment of claim'.

The principal cannot demand from the *gestor* more than the income he has earned as a result of the managed business; he also cannot claim that more income would be generated if the *gestor* had shown the necessary standard of care. That is because, by virtue of TBK art. 530, the sole statutory duty imposed on the ‘*gestor* intervening for his own benefit’ is ‘non-interference’; the intervenor is not under any degree of the ‘duty of care’.<sup>407</sup> The principal may request only the incomes that the *gestor* derived from managing the principal’s business. In other words, the *gestor* cannot be asked to return the earnings obtained from sources other than the business belonging to the principal.<sup>408</sup>

The *gestor* is also under the duty to provide information to the principal about the work performed and, in particular, to submit the documents related to the managed business.<sup>409</sup> The *gestor*, owing to the wrongfulness of his intervention, is also liable to the principal of any kind of damages that he may incur, including damages occurring under unexpected circumstances.<sup>410</sup> The *gestor* can avoid liability if he can prove that the damages would have occurred even without his involvement.

### **b. Obligations and Liabilities of the Principal**

The principal may enrich as a consequence of the *gestor*’s intervention; if that is the case, then the principal is under the duty to reimburse the expenses of the *gestor* in proportion to his enrichment.<sup>411</sup> Therefore, in such a case, the principal deducts the expenses incurred by the *gestor* from the gross income derived from the managed business. At the end of this deduction, the *gestor* is obliged to return only the net income to the principal, as he is reimbursed for his expenses.<sup>412</sup> If there is no enrichment on the principal’s part, then the *gestor* cannot demand reimbursement from the principal for the expenses incurred.<sup>413</sup> With a non-genuine *negotiorum gestio* the content of the *gestor*’s demand for reimbursement of his expenses is interpreted rather narrowly as compared with a genuine one,<sup>414</sup> owing to its general consideration as an ‘unlawful intervention’.<sup>415</sup> Likewise, the principal is under the legal duty to release the *gestor* from the debts he has undertaken for the business, to the extent of the *gestor*’s enrichment. On the other hand, if there is no enrichment on the *gestor*’s part, then there is no need to release the *gestor*.

---

407 Hofstetter (n 192) 215.

408 Eren (n 280) 847.

409 The *gestor* shall be asked to produce documents in the proof of his expenses. Cf TBK art 508/1.

410 TBK art 527/2.

411 TBK art 530.

412 Huguenin (n 274) N. 2183.

413 For opposing views see Gautschi (n 373) art. 423 N.11b and Lischer (n 192) 104 who argue that only ‘necessary expenses’ might be claimed; also see Gümüş (n 296) 240.

414 See Tandoğan, *Vekaletsiz İş Görme* (n 2) 298-299.

415 Accordingly, in a non-genuine *negotiorum gestio* the *gestor* lacks the ‘right of retention’.

The 'Turkish Code of Obligations' (TBK) does not grant the *gestor* the right to demand compensation for the damages incurred while managing the business of the principal -for his own benefit-. Thus, while the TBK grants such a right to the *gestor* who manages the principal's business for the benefit of the principal (genuine *negotiorum gestio*),<sup>416</sup> the *gestor* who manages the principal's business for his own benefit (non-genuine *negotiorum gestio*) is understandably deprived from demanding the restitution of his damages incurred during his tortious intervention.<sup>417</sup> Here, the *gestor* intervenes unlawfully and maliciously, infringing an absolute right of the principal and gaining a benefit as a result. It would indeed be unthinkable to admit the perpetrator of a tortious act to demand compensation from his blameless victim.<sup>418</sup>

### c. Prescriptive Period and the Effect of 'Approval'

The 'non-genuine *negotiorum gestio*' is acknowledged to be akin a tort, therefore the time limit for the principal's claim for 'disgorgement of profits' against the *gestor* is 2 years which is the prescriptive period for 'torts' within the TBK art. 72/1 and for claims of 'unjustified enrichment' within the TBK art. 82.<sup>419</sup> The prescriptive period of 2 years commences from the date the principal learns of the intervention and of the ensuing profits.

There may be two different exceptions to the 2 years long prescriptive rule; the first, being the case where the *gestor*'s invention is subject to a longer statute of limitation since the intervention also constitutes an offence under criminal law;<sup>420</sup> the second, being the case where the *gestor*'s infringement of the principal's absolute rights also constitutes a breach of a contract that is already effective between them.<sup>421</sup>

Lastly, as for the approval of 'non-genuine *negotiorum gestio*', the majority view maintains that 'a non-genuine *negotiorum gestio*' is not susceptible to 'approval', although the issue seems far from resolved.<sup>422</sup> The argument here lies in the fact that

416 See TBK art 529/1.

417 See TBK art 530.

418 Eren (n 280) 850.

419 Tandoğan, *Özel Borç İlişkileri* (n 299) 683; Yavuz, Acar, Özen (n 296) 647. For the view that characterizes the difference between the 2 years prescriptive period foreseen for the bad faith *gestor* and the 10 years period anticipated for the altruistic/good faith *gestor* as 'unjust and unfair' see Gautschi (n 373) Art. 423, N. 8d; Honsell, *Schweizerisches Obligationenrecht* (n 281) 335 et seq. In that regard it is argued that both the bad faith/selfish *gestor* and the good faith/altruistic *gestor* shall be subjected to the same prescriptive period of 10 years. For a decision of the Court of Cassation which applies the 10-year prescriptive period of the abolished, 808 numbered TBK's art. 414, to a case of *negotiorum gestio*, see II B (4) n 277.

420 see TBK art 72/2: "*Ancak, tazminat ceza kanunlarının daha uzun bir zamanasını öngördüğü cezayı gerektiren bir fiilden doğmuşsa, bu zamanasını uygulanır.*" (However, if the action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim)

421 Eren (n 280) 850.

422 Arkan Akbıyık (n 280) 52; Gümüş (n 296), 232; Eren (n 280) 850; Hofstetter (n 192) 251; Lischer (n 192) 110. For opposing views see Yavuz, Acar, Özen (n 296) 647; Tandoğan, *Vekâletsiz İş Görme* (n 2) 250; also see Huguenin (n 274) N. 2194. Gautschi (n 373) Art. 419, N.11; Suter (n 192) 83-84; Oser, Schönenberger (n 281) Art. 424, N.1, 2; the contrary argument is based on the construction of *gestor*'s approval as being akin a 'private law punishment'.



approval brings about the application of the provisions governing agency and under the rules of agency it is impossible for the principal to approve the actions of the selfish intervenor.<sup>423</sup> It does not matter whether the *gestor* is acting with good faith or not.<sup>424</sup> However, certain decisions from the Turkish Court of Cassation indicate that the principal might indeed subsequently approve the managed business of the *gestor*;<sup>425</sup> although in the case of the bad faith *gestor* managing the business *sine animus negotia aliena gerendi*, it is also argued that there exists no ‘business’ for the principal to approve.<sup>426</sup>

## Conclusion

“*Negotiorum gestio*” is a uniquely Roman creation originating from roots that were peculiar to the legal and social dynamics of Rome. It was one of the sources of obligation since republican times although was not classified as such until the period of Justinian. The reason for this had more to do with the Roman’s general lack of interest towards definitions & categorizations than a theoretical rejection of *negotiorum gestio* as a valid source of obligation.<sup>427</sup>

Starting from pre-classical law, the institution of *negotiorum gestio* covered a wide range of cases due to the activity of the *praetor* in general and the *ex bona fide* wording within its *formula* in specific. Accordingly, the legal boundaries of *negotiorum gestio* were never clearly drawn, even in classical law. And although the modern confusion surrounding the sources owes its debt to the interpolations by the compilers, still, it is also apparent that would have had there been no interpolation of any kind, the confusion would still linger since the expediently flexible character of *negotiorum gestio* was too obvious for the jurists to ignore. It is rather indicative that Justinian, who saw legal restoration and innovation as the act of harmonization by adding, cutting, or classifying for the sake of clarity (and the elimination of the ancient confusions) did not do much to reform, modify or crystallize ‘*negotiorum gestio*’, leaving the problems and contradictions of classical law unresolved.<sup>428</sup>

Later, jurists of *ius commune* emphasized the flexibility of *negotiorum gestio* which, since pre-classical law, had a lot to do with its place within the *ius pretorium*

423 At most, the principal might opt to waive the rights and claims he holds against the *gestor*.

424 Eren (n 280) 850; Arkan Akbiyık (n 280) 52.

425 For relevant Turkish Court of Cassation decisions, see decisions of 15th Civil Chamber of Court of Cassation (*Yargıtay Hukuk Dairesi*) dated 18.01.2001 and numbered 5729/290; of the 3th Civil Chamber of Court of Cassation dated 20.12.2005 and numbered 13997/14128; and of the 4th Civil Chamber of Court of Cassation, dated 04.07.1975 and numbered 7761/8709; also see decisions of the General Assembly of the Court of Cassation (*Yargıtay Hukuk Genel Kurulu/ YHGK*) dated 02.11.1968, and numbered 4-977/718; dated 03.06.1964 and numbered 182/392; dated 29.01.1964 and numbered 95/89.

426 Huguenin (n 274) N. 897; Lischer (n 192) 110 et seq.

427 On this disinterest see Schulz, *Principles of Roman Law* (n 21) 40 et seq.

428 Özdemir *Vekaletsiz İş Görme* (n 23) 27.

and its *bona fides* character. In the beginning of the age of codification, with the incorporation of new facets in the forms of 'restitution' and 'ideal of help', *negotiorum gestio* had already become something of a "legal chameleon".<sup>429</sup> Under the modern paradigm, the 'civil' law on *negotiorum gestio* may include acts of all kinds; with the only exception being 'legal acts concerning strictly personal rights'.<sup>430</sup> In today's practice, the types of business that the *gestor* can undertake is broadly categorized as: the payment of another's debt or liability – supply of necessaries – preservation of as well as improvement on another's property or estate – medical intervention and rescue of another's life and/or limb.<sup>431</sup>

Thus, it is apparent that the subsidiary/complementary nature of *negotiorum gestio* was not confined to Roman law -nor to the *ius commune-* and had been translated to modern law quite successfully. This success is especially remarkable given the uniquely Roman roots of the institution of *negotiorum gestio*. It was a universal and timeless need to find equitable remedies to cases which did not fall under the category of either 'contract' or 'tort'; and the legal framework laid by the Roman jurisprudence did serve and continues to serve as the basis for the many historical and contemporary manifestations of *negotiorum gestio*: The modern 'rights' & 'obligations' as well as the liabilities of both the *domini* and *gestor* are historically linked to the facts within the *formulae* of the actions of *negotiorum gestorum directa/contra*; as are the prerequisites for the juristic admittance of 'negotiorum gestio'. Furthermore, the categorical dichotomy of 'genuine' and 'non-genuine' *negotiorum gestio* also finds its origins in the Justinian law while certain modern exceptions or modifications to the degree of parties' liabilities are also of Roman law origins.

It indeed seems highly probable that which started naturally as an isolated practice amongst well off Roman citizens, was first procedurally acknowledged and then juristically furthered and expanded. And while values such as *fides*, *amicitia* and *officium* had served as the moral pillars for the foundation of *negotiorum gestio*, for the jurists it had evolved to become a subsidiary source of obligation in cases where no other recourse was available. The modern *negotiorum gestio* is actually a product of this later development and this complementary flexibility of the institution have already become its natural and indispensable element as evident by its common place within the modern codes of the civil jurisdiction as well as the vaguely encompassing scope of the article 11 of Rome II.<sup>432</sup>

---

429 Jansen, *Negotiorum Gestio* (n 166) 1116; the phrase 'legal chameleon' belongs to Jansen.

430 As the acts concerning 'strictly personal rights' cannot be performed via a representative.

431 Stoljar (n 133) 177.

432 Art 11 *negotiorum gestio*: "1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.."

**Peer-review:** Externally peer-reviewed.

**Conflict of Interest:** The author has no conflict of interest to declare.

**Financial Disclosure:** The author declared that this study has received no financial support.

---

## Bibliography

### *Books and Articles*

- Aeby K, *Die Geschäftsführung ohne Auftrag nach Schweizerischem Recht*, (Universitat Zurich 1928)
- Aksoy H C, ‘Vekaletsiz İş Görende İşi Vekaletsiz Olarak Görme Bilinci Aranmalı mıdır?’ (2017) 75 Ankara Barosu Dergisi 91
- Anson R W, *Principles of English Law of Contract and of Agency in Its Relation to Contract* (18th ed, OUP 1937)
- Arangio-Ruiz V, *Il Mandato in Diritto Romano* (Jovene 1949)
- Arkan Akbıyık A, *Gerçek Olmayan Vekaletsiz İş Görme* (Alfa 1999)
- Avorel K T, ‘Negotiorum Gestio’nun Şartları’ (1987) 3 (1-4) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 33
- Ayan M, *Tıbbi Müdahalelerden Doğan Hukuki Sorumluluk* (Kazancı 1991)
- Baş Süzel E, *Gerçek Olmayan Vekâletsiz İş Görme ve Menfaat Devri Yaptırımı* (On İki Levha 2015)
- Başoğlu B, ‘Non-genuine Benevolent Intervention in Another’s Affairs and Disgorgement of Profits Under Turkish Law’ in Ewoud Hondius, Andre Janssen (eds), *Disgorgement of Profits Gain-Based Remedies throughout the world* (Springer, 2015)
- Beaton J (ed), *Anson’s Principles of the English Law of Contract* (28th ed, OUP 2002)
- Becker H (ed), *Kommentar zum schweizerischen Zivilgesetzbuch, Band VI Obligationenrecht II Abteilung: Die einzelnen Vertragsverhältnisse Art. 184-551* (Stampfli 1934)
- Bellomo M, *The Common Legal Past of Europe* (Lydia G. Cochrane tr, The Catholic University of America Press 1996)
- Bergmann A, Reuter D, Werner O, *Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2 Recht der Schuldverhältnisse §§ 677-704* (Gruyter 2015)
- Berman H J, *Law and Revolution: The Formation of the Western Legal Tradition* Vol 1 (Harvard University Press 1983)
- Birks P, *An Introduction to the Law of Restitution* (Clarendon Press, 1936)
- ‘Negotiorum Gestio and Common Law’ (1971) 24 CLP 110
- Birks P, MacLeod G, ‘The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone’ (1986) 6 OJLS 46
- Borkowski A, du Plessis P, *Textbook on Roman Law* (3rd ed, OUP 2005)
- Bucher E, *Obligationenrecht: Besonderer Teil* (3rd edn, Schulthess 1988)
- Buckland W W, *A Text-Book of Roman Law* (Cambridge University Press 1963)
- Burdese A, *Manuale di Diritto Privato Romano* (Utet 1966)

- Buz V, *Yenilik Doğuran Haklar* (Yetkin 2005)
- Canaris C W, 'Risikohaftung bei schadensgeneigter Tätigkeit im fremden Interesse' (1966) *Recht der Arbeit* 41
- Cartwright J, Whittaker S (eds), *The Code Napoléon rewritten: French contract law after the 2016 reforms* (Hart 2020)
- Ceylan S G, 'Roma Hukuku'nda Kayımlık (Cura) Müessesesine Genel Bir Bakış' (2004) 53 *AÜHFD* 221
- Dainow J, 'The Civil Law and the Common Law: Some Points of Comparison' (1966-67) 15 (3) *American Journal of Comparative Law* 419
- Dawson J P, 'Negotiorum Gestio: The Altruistic Intermeddler II' (April 1961) 74 (6) *Harvard Law Review* 1073
- Decock W, *Theologians and Contract Law: The Moral Transformation of the ius commune (ca 1500 – 1650)* (Brill, 2012)
- Di Marzo S, *Roma Hukuku*, (Ziya Umur trs, 2nd ed, İÜ Yayınları 1959)
- Dornis T W, 'The Doctrines of Contract and Negotiorum Gestio in European Private Law: Quest for Structure in a No Man's Land of Legal Reasoning,' (2015) 23 *Restitution Law Review* 79
- Dural M, 'Roma Hukukunda Akit Benzerleri -Quasi Contractus-' (2011) 33 (3-4) *İÜHFD* 257
- Emiroğlu H, 'Roma Hukukunda Vekalet Sözleşmesi (Mandatium) ve Hukuki İşlemlerde Temsil' (2003) 52 (1) *AÜHFD* 101
- Enneccerus L, Lehmann H, *Lehrbuch des Bürgerlichen Rechts II* (14th edn, Mohr, 1954)
- Ercoşkun Şenol H K, 'Gerçek Olmayan Vekâletsiz İş Görmenin Sistemik Açısından Borçlar Kanunundaki Yeri ve 2020 İsviçre Borçlar Kanunu Tasarısı'ndaki Durum' (2018) 22 (4) *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 37
- Eren F, *Borçlar Hukuku Özel Hükümler* (4th edn, Yetkin 2017)
- Frese B, 'Procurator und Negotiorum Gestio im Römischen Recht' in *Mélanges de droit romain dédiés à Georges Cornil Vol I* (Paris 1926)
- Gordley J, *Jurists: A Critical History* (OUP 2014)
- Gordley J, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991)
- Goff R, Jones G, *The Law of Restitution* (Sweet & Maxwell 1966)
- Gökcan H T, *Tıbbi Müdahaleden Doğan Hukuki ve Cezai Sorumluluk* (Seçkin 2013)
- Guhl T, Schnyder A K, Koller A, Druey J N, *Das Schweizerische Obligationenrecht - mit Einschluss des Handels und Wertpapierrechts* (9th edn, Schulthess 2000)
- Güriz A, *Hukuk Başlangıcı* (Siyasal Kitabevi 1997)
- Gürten K, 'Roma Hukuku ve İngiliz Hukuku'na Karşılaştırmalı bir Bakış' (2016) 65 (1) *AÜHFD* 183
- Gümüş M A, *Borçlar Hukuku Özel Hükümler II* (3rd edn, Vedat, 2014)
- Gradenwitz O, *Interpolationen in den Pandekten* (Weidmannsche 1887)
- Hagenbüchli H A, *Die Ansprüche des Geschäftsführers ohne Auftrag und ihre Voraussetzungen* (Diss. Univ. Zürich. 95 S.8, Davos, 1926)
- Hallebeek J, *The Concept of Unjust Enrichment in Late Scholasticism* (GNI, 1996)
- Hamilton P J, 'The Civil Law and Common Law' (1922) 36 (2) *Harvard Law Review* 180

- Hans Theodor Soergel (ed), *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen: BGB, Band 10: Schuldrecht 8* (13th edn, Kohlhammer 2012)
- Hatemi H, 'Türk Hukukunda Gerçek Olmayan Vekaletsiz İş Görme Kurumuna İlişkin Düşünceler' in Nami Barlas, Abuzer Kendigelen, Suat Sarı (eds), Prof. Dr. M. Kemal Oğuzman'ın Anısına Armağan (Seçkin 2000)
- Hatemi H, Serozan R, Arpacı A, *Borçlar Hukuku: Özel Bölüm* (Filiz 1999)
- Helm J G, 'Geschäftsführung ohne Auftrag' in Gutachten und Vorschläge zur Überarbeitung des Schuldrechts III (Bundesanzeiger, 1983)
- Helvacı H, Aydın G S, 'Kişilik Hakkı İhlâlinden Doğan Vekâletsiz İşgörmede Kusurun Bir Şart Olarak Aranıp Aranmayacağı Sorunu' (2017) 23 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 265
- Hofstetter J, *Der Auftrag und die Geschäftsführung ohne Auftrag* (2nd edn, Helbing & Lichtenhahn 2000)
- Honsell H, 'Die Risikohaftung des Geschäftsherrn' in Manfred Harder und Georg Thielmann (eds), *De iustitia et iure: Festgabe für Ulrich von Lübtow zum 80. Geburtstag* (Duncker & Humbolt 1980)
- Honsell H, Vogt N P, Wiegand W (eds), *Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht I, Art.1-529 OR* (6th edn, Helbing & Lichtenhahn 2015)
- Honsell H, *Schweizerisches Obligationenrecht, Besonderer Teil* (9th edn, Stämpfli 2010)
- Hope E W, 'Officiousness' (1929) 15 Cornell L. Rev. 25
- Helm T, 'Disgorgement of Profits in German Law' in Ewoud Hondius, Andre Janssen (eds) *Disgorgement of Profits: Gain-based remedies throughout the world* (Springer 2015)
- Huguenin C, Hilty R (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil = Code des obligations suisse 2020* ((Schulthess 2013).
- Huguenin C, *Obligationenrecht – Allgemeiner und Besonderer Teil* (Schultess 2014)
- J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 2: Recht der Schuldverhältnisse: §§ 677-704 (12th edn, Degruyter 1991)
- Jackson M R, *The History of Quasi- Contract in English Law* (Cambridge University Press 1936)
- Jansen N, 'Die Korrektur grundloser Vermögensverschiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny' (2006) 120 ZSS: Romanistische Abteilung, 106.
- Jansen N, 'Ius commune' in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law Vol. II* (OUP 2012) 1106
- Jansen N, 'Management of Another's Affairs without a Mandate (Negotiorum Gestio)' in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law Vol. II* (OUP 2012) 1115
- Jauernig Bürgerliches Gesetzbuch: BGB Kommentar, Heinz-Peter Mansel (ed), §§ 652-704 (15th edn, Beck 2018)
- Kantorwicz H, *Studies in the Glossators of the Roman Law* (Cambridge University Press 1938)
- Karadeniz Çelebican Ö, *Roma Eşya Hukuku* (5th edn, Turhan 2015)
- *Roma Hukuku*, (17th edn, Turhan 2014)
- Kaser M, *Roman Private Law* (Rolf Dannenbring tr, 2nd edn, Butterworths 1968)
- Kaya Ü, *Vekaletsiz İş Görme (Özel Uygulama Hali: Acil Tıbbi Müdahaleler)* (Yetkin 2020)

- Kohler J, 'Die Menschenhilfe im Privatrecht' (1887) 25 Jherings Jahrbucher für die Dogmatik des bürgerlichen Rechts, 47
- Kortmann J, *Altruism in Private Law* (OUP 2005)
- Koschaker P, *Europa und das römische Recht* (4th edn, Beck 1966)
- Koschaker P, Ayiter K, *Roma Hususi Hukukunun Ana Hatları* (Seçkin, 1977)
- Kreller H, 'Das Edikte de negotiis gestis in der Geschichte der Geschäftsbesorgung' in Festschrift Paul Koschaker Vol II (Böhlhaus 1939)
- Larenz K, *Lehrbuch des Schuldrechts* (12nd edn, Beck 1981)
- Lenel G, *Das Edictum Perpetuum* (B. Tauchnitz, 1927)
- Limberg B et alia (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 6: Schuldrecht - Besonderer Teil III (9th edn, Beck 2023)
- Lischer U, *Die Geschäftsführung ohne Auftrag im schweizerischen Recht* (Helbing & Lichtenhahn 1990)
- Loyal F, *Die "entgeltliche" Geschäftsführung ohne Auftrag* (Mohr, 2011)
- Lorenzen E G, 'Negotiorum Gestio in Roman and Modern Civil Law' (1928) 13 (2) Cornell Law Review 190
- Maissen E, Huguenin C, Jenny R M (eds.), Claire Huguenin, Markus Müller-Chen, Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 2: Art. 319-529 OR (3rd edn, Schulthess 2016)
- Martinek M, Theobald U, 'Grundfälle zum Recht der Geschäftsführung ohne Auftrag, 1. Teil: Die Grundstrukturen der Geschäftsführung ohne Auftrag' (1997) 7 Juristische Schulung 617
- Mayer-Maly T, 'Divisio Obligationum' (1967) 2 (2) Irish Jurist new series 375
- 'Probleme der Negotiorum Gestio' (1969) 86 (1) ZSS: Romanistische Abteilung, 416
- Metzger E, 'Actions' in Ernst Metzger (ed.), *A Companion to Justinian's Institutes* (Cornell University Press 1997)
- Medicus D, Lorenz S, *Schuldrecht II Besonderer Teil* (18th edn, Beck 2018)
- Meissel F S, *Geschäftsführung ohne Auftrag – zwischen Quasikontrakt und aufgedrängter Bereicherung* – (Manz 1993)
- Mitteis L, *Römisches Privatrecht bis auf die Zeit Diokletians* Vol. 1 (Duncker & Humblot, 1908)
- Monier R, *Manuel élémentaire de droit romain*, Vol II (4th edn, Domat Montchrestien 1948)
- Mouritsen H, *The Freedman in the Roman World* (Cambridge University Press 2011)
- Nanz K P, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (J. Schweitzer 1985)
- Nicholas B, *An Introduction to Roman Law* (OUP 1962)
- Nipperdey H C, Julius von Staudingers Kommentar zum BGB, II Bd 3 Teil (10th edn, Berlin 1943)
- Oğuz A, 'Role of Comparative Law in the Development of Turkish Civil Law' (2005) 17 (2) Pace International Law Review
- Oğuzman K, Öz T, *Borçlar Hukuku Genel Hükümler I* (17th edn, Vedat 2019)
- *Borçlar Hukuku Genel Hükümler II* (10th edn, Vedat 2013)
- Oser H, Schöenberger W, Kommentar zum Schweizerischen Zivilgesetzbuch, V. Band: Das Obligationenrecht, 3. Teil: Art. 419-529 (2nd edn, Schultheß & Co 1945)



- Öz T, *Öğreti ve Uygulamada Sebepsiz Zenginleşme* (Kazancı, 1990)
- Özdemir H G, *Roma ve Türk Hukuklarında Vekaletsiz İş Görme* (Seçkin 2001)
- Özkaya E, *Vekâlet Sözleşmesi ve Kötüye Kullanılması* (3rd edn, Seçkin 2013)
- Patrick G H, *Legal Traditions of the World* (4th ed, OUP 2010)
- Partsch J, *Aus Nahgelassen und Kleineren verstreueten Schriften* (Springer 1931)
- Puchta G F, *Pandekten* (4th edn, Barth 1844)
- Rabel E, 'Negotium alienum und animus' in *Studi in onore di Pietro Bonfante nel XL anno d'insegnamento Vol IV* (Treves 1930) 279
- Rabel E, 'Ausbau oder Verwischung des Systems? Zwei praktische fragen' (1919) 10 *Rheinische Zeitschrift für Zivil und Prozessrecht* 89
- Radding C, Ciaralli A, *Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill 2007)
- Radin M, 'The Roman Law of Quasi-Contract' (1937) 23 (3) *Virginia Law Review* 241
- Rado T, *Roma Hukuku Dersleri Borçlar Hukuku* (Filiz 2006)
- Riccobono S, 'La gestione degli affari e l'azione di arricchimento nel diritto moderno' (1917) 15 (1) *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 369
- Saruhan U, *Gerçek Vekâletsiz İşgörme* (Yetkin 2018)
- Savaş A, 'Roma ve Türk Hukukunda Vekalet Sözleşmesi' (2000) 8 (1-2) *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 598
- Schmid J, *Die Geschäftsführung ohne Auftrag Art. 419-424 OR* (3rd edn, Schulthess 1993)
- Schmidt B, *Die berechtigte Geschäftsführung ohne Auftrag: Eine Untersuchung der Voraussetzungen des gesetzlichen Schuldverhältnisses der §§ 677 ff. BGB* (Duncker & Humblot 2008)
- Schulz F, *History of Roman Legal Science* (Clarendon Press 1946)
- -- *Principles of Roman Law* (Marguerita Wolff tr, Clarendon Press 1936)
- *Classical Roman Law* (Clarendon Press 1950)
- Seiler H H, *Der Tatbestand der negotiorum gestio im römischen Recht* (Böhlau, 1968)
- Seiler H H, 'Über die Vergütung von Dienstleistungen des Geschäftsführers ohne Auftrag' in Gottfried Baumgärtel, Hans-Jürgen Becker, Ernst Klingmüller, Andreas Wacke (eds), *Festschrift für Heinz Hübner* (Degruyter 1984)
- Serozan R, Arpacı A, *Borçlar Hukuku Özel Bölüm* (Filiz 1992)
- Sheehan D, 'Negotiorum Gestio: A Civilian Concept in Common Law' (2006) 55 *International and Comparative Law Quarterly* 253
- Smits J, Calomme C, 'The Reform of the French Law of Obligations: Les Jeux Sont Faits' (2016) 23 (6) *Maastricht Journal of European and Comparative Law* 1040
- Sohm R, *The Institutes* (James Crawford Ledlie tr, 3rd edn, Clarendon Press, 1907)
- Spickhoff A, *Medizinrecht* (3rd edn, Beck 2018)
- Stoljar S J, 'Negotiorum Gestio' in Ernst von Caemmerer, Peter Schlechtriem (eds) *International Encyclopedia of Comparative Law*, Vol. X (Mohr 1984) 66
- Suter R, *Echte und Unechte Geschäftsführung ohne Auftrag nach Schweizerischem Obligationenrecht* (Stampfli, 1933)

- Swoboda E, *Bereicherung, Geschäftsführung ohne Auftrag, versio in rem nach österreichischem Recht, mit. Ausblicken in das deutsche Recht* (Leuschner & Lubensky, 1919)
- Şen Dođramacı H, 'Bir Borç Kaynađı Olarak Vekâletsiz İşğörme' in Şebnem Akipek Öcal et al (eds), *Medeni Kanun'un ve Borçlar Kanunu'nun 90. Yılı Uluslararası Sempozyumu: 1926'dan Günümüze Türk-İsviçre Medeni Hukuku Vol. II* (Yetkin 2017)
- Şenol N, 'Hekimin Tazminat Sorumluluđu (Hekimin Hukuki Sorumluluđu)' in Aysun Altuntaş, İpek Sevda Söğüt, Hamide Bağçeci (eds), *II. Ulusal Sağlık Hukuku 'Tıbbi Müdahalenin Hukuki Yansımaları' Sempozyumu* (Seçkin 2014)
- Tahirođlu B, Erdođmuş B, *Roma Usul Hukuku* (Filiz 1989)
- Tunçomađ K, *Türk Borçlar Hukuku, Genel Hükümler I* (6th edn, Sermet 1976)
- Tandođan H, *Mukayeseli Hukuk ve Hususiyle Türk – İsviçre Hukuku bakımından Vekaletsiz İş Görme* (Ankara Hukuk Fakültesi Yayınları 1957)
- *Borçlar Hukuku Özel Borç İlişkileri Vol 2* (5th edn, Vedat 2010)
- 'Vekaletsiz İşğörenin Ücret Talebi' (1955) 12 AÜHFD 384
- Türkođlu Özdemir G, 'Roma Hukukunda Actio de peculio' (2005) 7 (2) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 103
- 'Roma Medeni Usulünde Formula Yargılaması' (2005) 7 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 167
- Umur Z, *Roma Hukuku – Tarihi Giriş – Kaynaklar - Genel Esaslar* (Fakülteler Matbaası, 1983)
- von Bar C, 'Benevolent Intervention in Another's Affairs' in Christin von Bar (ed), *Principles of European Law: Benevolent intervention in another's affair* (Sellier, 2006)
- von Büren B, *Schweizerisches Obligationenrecht Besonderer Teil (Art. 184-551)* (Schulthess, 1972)
- von Savigny F C, *System des heutigen Romischen Rechts III* (Berlin 1840)
- von Tuhr A, Peter H, *Allgemeiner Teil des Schweizerischen Obligationenrechts* (3rd edn, Schulthess 1984)
- Watson A, *The Law of Obligations in the Roman Republic* (Clarendon Press 1965)
- *The Contract of Mandate in Roman Law* (Clarendon Press 1961)
- *The Making of Civil Law* (Harvard University Press 1981)
- Weiss E, *Institutionen des römischen Privatrechts* (2nd edn, Verlag für Recht und Gesellschaft 1949)
- Wittmann R, *Begriff und Funktionen der Geschäftsführung ohne Auftrag* (Beck 1981)
- Windscheid B, *Lehrbuch des Pandektenrechts Vol I* (Frankfurt 1875)
- Wlassak M, *Zur Geschichte der negotiorum gestio* (G. Fischer 1879)
- Wollschläger C, *Die Geschäftsführung ohne Auftrag Theorie und Rechtsprechung* (Duncker & Humblot 1976)
- Yavuz C, Acar F, Özen B, *Türk Borçlar Hukuku: Özel Hükümler* (10th edn, Beta 2012)
- Yıldız K, 'SMK Hükümleriyle Karşılaştırmalı Olarak FSEK Kapsamında Gerçek Olmayan Vekâletsiz İş Görme' (2020) 6 Ticaret ve Fikri Mülkiyet Hukuku Dergisi 154
- Yüksel S R, 'Hekimin Vekâletsiz İş Görmekten Dođan Sorumluluđu' (2015) 21 (2) Marmara Üniversitesi Hukuk Fakültesi Dergisi Özel Sayı: Mehmet Akif Aydın'a Armađan, 793

- Zevkliler A, Gökyayla E, *Borçlar Hukuku Özel Borç İlişkileri* (12nd edn, Turhan 2013)
- Zilelioğlu H, 'Roma Hukukundaki Sorumluluk Ölçütlerine Genel bir Bakış' (1982-87) 39 (1-4) AÜHFD 241
- Zimmerman R, *The Law of Obligations Roman Foundations of the Civilian Tradition I* (OUP 1999)
- Zimmermann E, *Aechte und unächte negotiorum gestio: ein Beitrag zum römischen Obligationsrecht* (J. Ricker 1872)

### ***Classical Sources***

- Aquinas T, *Summa theologiae* II-II (Peter Schöffer ed, Mainz 1471)
- Cicero, Selected Works (Michael Grant trs, Penguin 2004)
- Cicero, On Government (Michael Grant trs, Penguin 1994)
- Cicero, Selected Letters (DR Schakleton Bailey trs, Penguin 1986)
- Cicero, On Duties (EM Atkins ed, MT Griffin trs, Cambridge University Press, 1991)
- de Molina L, *De iustitia et iure tractatus* (Venice 1614)
- de Soto D, *De iustitia et iure libri decem* (Salamanca, 1553)
- Grotius H, *De Iure belli ac pacis* (Jean Barbeyrac, Janssonio-Waesbergios eds, Amsterdam 1720)
- Lessius L, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris 1628)
- Pufendorf S, *De iure naturae et gentium* (editio nova, Knochius 1694)

### ***Roman Law Sources & Dictionaries***

- Corpus Iuris Civilis I-III, Kruger P, Mommsen T, Kroll W, Schoell R (eds), (Weidmann, 1889)
- The Codex of Justinian, (ed) Frier B W, Fred H Blume (trs), (Cambridge University Press, 2016)
- Dictionnaire Étymologique de la langue Latine, (New Edition Klincksieck 2001)
- The Digest of Justinian 1-4, Mommsen T, Kruger P (eds), Alan Watson (trs), (University of Pennsylvania Press, 1985)
- Encyclopedic Dictionary of Roman Law (The American Philosophical Society reprint 1991)
- Gaius Institutiones, de Zulueta F (trs), (Oxford, Clarendon Press, 1946)
- Heumann's Handlexicon zu den Quellen des Römischen Rechts (9th ed, Gustav Fischer 1926)
- Oxford Latin Dictionary (2nd ed OUP 2012)
- Pauli Sententiae (Pubblicazioni della Facoltà di giurisprudenza dell'Università di Padova, 1995)
- Rabel E, Levy E, Index Interpolatum, Vol. 3, XXXVII-L (Bohlaus 1929)

### ***Electronic Resources***

- <https://www.legislation.gov.uk/uksi/2019/834/contents>
- [https://www.gesetze-im-internet.de/englisch\\_bgb](https://www.gesetze-im-internet.de/englisch_bgb)
- <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32007R0864>

