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

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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

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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’, we do not, for example, see a similar institution in ‘Islamic law’, or common law, which is said to reject the principal behind negotiorum gestio, owing to its ‘individualistic’ character. This lack of the legal acknowledgement of the ‘officious intermeddling’ is a facet of common law which had been repeatedly confirmed by precedents.

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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, Mucakheseli Hukuk ve Hüsusiye Türk – İsviçre Hukuku bakımından Vekaletlisiz İş Göröme (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, Kütüb ve Resail ve Fetева, XXX, 166, 414-415; Buhârî, 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 for 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.


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. 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

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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”, “*domini*” 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, Vekâletsiz 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 which was written around the second half of the century. 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’. 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’.

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- 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. Gaius first did, as mentioned above, give the sources of obligations as ‘contracts and delicts’ in Institutiones. However, in a ‘Digesta text referring to ‘a work of his’, Gaius seems

7 *Institutiones*, is an introductory textbook of legal ‘institutions’ compromising 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 Romische Institutionen-System* (Adolph Emmerling & Sohn, 1897); Peter Stein, *The Fate of the Institutional System* (Huldigingsbundel Paul van Warmelo 1984) 218-254. There were several Institutiones written by jurists other than Gaius (such as Callistratus, Paulus, Ulpius, Achill 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 ‘Obligationes Quasi Ex Contractu’ in Annali del Seminario Giuridico R. Universite 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 Interpolatum*, Vol. 3, XXXVII-L (Bohlau 1929) 355-356.


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: 15 “varii causarum figuris“ (various other causes) which, later, Justinian expounded on and classified into two as ‘quasi-contract’ and ‘quasi-delict’. 16

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 ‘varii causarum figuris’, and then by the incorporation of the -conjunction/adverb- ‘quasi’ 17 to the terms of ‘contract’ and ‘delict’ respectively. 18

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 19 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. 20 But as liberty required certain borders, 21 individuality was never to be without its limitations. 22 For the Romans, the ethical system standardized by the concepts of pietas - officium -

15 D. 44.7.1 pr: “Obligationes aut ex contractu nascuntur aut ex maleficio, proprio quodam lure ex varis 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 deductur: 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 malificio....)
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 ‘süzleme 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) IÜHFD 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 (28th edn, On Iki Levha, 2022) 164-165; Necip Koçayusufçueroğlu, Hüseyin Hatemi, Rona Serozan, Abdülkadir Arpacı, Borçlar Hukuku Genel Bölüm, 1 (7th 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 (Mandatum) ve Hukuki İşlemlerde Tensil’ (2003) 52 (1) AÜHFD 101, 109-110; Özcan Karadeniz Çelebicivan, Roma Hukuku, (17th 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*. 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*. 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”. 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 2nd century BCE, 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. It follows that the transformation of the *legal actiones* in to the formulary system gave procedural life to the institution of *negotiorum gestio*. The *praetors*, owing to the authority granted to them via this law, began to insert a clause of *negotiorum gestio* (*clausula de negotiis gestis*) in their edicts through which they regulated the relations between the ‘principal’ (*dominus negotii*) and the ‘intervenor’ (*gestor*), ‘who, ‘judicially’

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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.


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 committenda actionem, vel inuria ren suam amiant.” (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,30 or takes over the management of an estate that does not appear to have any successors (hereditas iacens).31 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)32, probably starting as early as the 2nd century BCE.33 The iudicia bonae fidei must have had a formula in ius concepta34 and considering the ‘edictum de negotiis gestis’ (edict of negotiorum gestio)35, there must also had been a formula in ius factum; hence two formulaes -for negotiorum gestio- one belonging to ius honorarium and the other to ius civile, existed side by side.36

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 procurator37 to manage their assets.38 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.39 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,40 however, it was also possible for the procurator to be a freeborn (ingenuus) friend of the ‘principal’ as evident in Cicero’s writings.41 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

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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 Erdoğanuş, 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 formulaes 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 (administratore = procurator omnium bonorum) whose activity for the principal might had been unlimited although alienations would be excluded; see Dictionary of Roman Law (n 27) 654.
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 Quinctio 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. 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.

Another root of ‘negotiorum gestio’ other than the institution of ‘procurator’ was the ‘cura furiosi’; that is the curatorship over ‘lunatics’ (furiosi). Whoever administered the affairs of a lunatic (furiosi) had the action of negotiorum gestio. 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), nor did the curator since he was either installed by law or by the authority of the magistrate, not by a private agreement. 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.

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.
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’ is flimsy at best and the notion of ‘absence’ in cases like ‘selling someone else’s slave without his knowledge’ or ‘managing the affairs of a minor’ calls for a different interpretation.

During the end of the 3rd 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. Now negotiorum gestio included all juristic relations involving a certain degree of representation except mandatum (mandate), societas (contract for ordinary partnership) and tutela (tutelage).

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. 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 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) 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.

Lastly, during the reign of Justinian, who adhered to the distinction between negotiorum gestorium and tutela and mandatum, negotium gestorium was classified as a “quasi-contractus” together with condictio indebiti (unjustified enrichment); tutela (tutelage), communia indicens (common ownership), and legatum (legacy).

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 prateor: ‘Si quis negotia alterius (absentis?), siue quis negotias quae eiuscumque 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 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 operet ex fide bona”
57 See D. 3.5.31.1.
59 I Ins. 3.27.1-7; also, for the quasi-contractual character of interrogatio inuire (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.\(^{60}\) 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)\(^{61}\) could be applicable.\(^{62}\)

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).\(^{63}\) 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.\(^{64}\) On the contrary, if the

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\(^{60}\) 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 (2nd 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 peculium 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 Türküoğlu 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. Riccobone 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.\textsuperscript{65} 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 ‘domini negotii’ or the nature of the underlying legal cause.\textsuperscript{66} 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.\textsuperscript{67}

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.\textsuperscript{68} The same holds true where the gestor, in good faith, had managed another’s business assuming that it was his own business.\textsuperscript{69} 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.\textsuperscript{70} 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;\textsuperscript{71} therefore, the action of negotiorum gestio was inserted instead.\textsuperscript{72} 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.\textsuperscript{73}

\textit{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.)

\textsuperscript{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’.

\textsuperscript{66} Özdemir, Vekaletsiz İş Görme (n 23) 42-43.

\textsuperscript{67} Avorel (n 38) 60-61.

\textsuperscript{68} D. 3.5.5.7; also see D. 3.5.39.

\textsuperscript{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.

\textsuperscript{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 affari (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.

\textsuperscript{71} Weiss (n 43) 398; Riccobono, La gestione degli affari (n 63) 386.

\textsuperscript{72} see above I B n 49.

\textsuperscript{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.\(^\text{74}\)

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.\(^\text{75}\)

The business managed could consist of a single act or be comprised of a series of acts.\(^\text{76}\) It could be any ‘legal’\(^\text{77}\) or ‘factual’\(^\text{78}\) acting though it was generally understood in terms of ‘juristic acts’.\(^\text{79}\) On the other hand, the ‘management’ must had 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.\(^\text{80}\)

\section*{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;\(^\text{81}\) and was not doing it out of a pious or legal duty.\(^\text{82}\) In other words, the business must had not been done by virtue of a mandate from the principal, nor in consequence of some legal duty which might be owed to him.\(^\text{83}\)

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,\(^\text{84}\) although it must

\(^{74}\) 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 (Uet 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 (Hoge Raad/Supreme Court Netherlands) 10 December 1948, Ned. Jur 1949 no 122, 225.

\(^{81}\) f.e. 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, ‘Negotiourum 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.\(^{85}\) 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.\(^{86}\) 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\(^{th}\) century.\(^{87}\) Later, this domini’s duty of ratihabitio to gestor’s beneficial acts was re-emphasized by the Pandectists.\(^{88}\)

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.\(^{89}\) 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 had been be a gestor with respect to the latter and the rise of a negotiorum gestio would had been accepted while any controversy between the gestor and the principal would be resolved according to the rules governing mandatum.\(^{90}\)

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 utilas gestionis (useful management). This ‘utilas gestionis condition’ meant that the gestor must had 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

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\(^{85}\) 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, valebat” “That which has been done usefully (utiiter), the dominii is compelled to ratify it, and what he has ratified is valid.”.


\(^{89}\) D. 3.5.5. pr.

\(^{90}\) Lorenzen (n 83) 193.
view of the requirement of ‘utilitas gestionis’,\textsuperscript{91} others did interpret it rather broadly.\textsuperscript{92} The difference laid in the definition of ‘utiliter’ (useful) and its connection with what is ‘necessary’ (\textit{necessarius}):\textsuperscript{93} Should only the ‘strictly necessary’ expenses be counted as useful and therefore can then be claimed by the \textit{gestor}? Or can any expense, that is not ‘strictly necessary’ but also not for the ‘sake of pleasure’ (\textit{causa voluptatis}),\textsuperscript{94} be accepted as ‘useful’ and therefore ‘claimable’?\textsuperscript{95} 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.\textsuperscript{96} The same type of standard was also employed for the ‘necessity’ of the intervention itself.\textsuperscript{97}

A \textit{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.\textsuperscript{98} In such cases, as to the question whether the \textit{gestor} could demand the expenses borne for the management of a business that was explicitly prohibited by the \textit{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,\textsuperscript{99} whereas others rejected to characterize such type of an intervention as a ‘\textit{negotiorum gestio}’ and accordingly denied the action of \textit{negotiorum gestio}.\textsuperscript{100} It is apparent that there was not a single, uniform respond in classical law to the problem of ‘\textit{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

\begin{footnotesize}
\textsuperscript{91} see fe D.3.5.9.1.
\textsuperscript{92} see fe D.3.5.10.
\textsuperscript{93} On this see Mayer-Maly, Probleme der Negotiorum Gestio (n 58) 423.
\textsuperscript{94} see D. 3.5.26. pr.
\textsuperscript{95} Useful or not, if the \textit{dominus negotii} gave his permission (\textit{ratihabitio: ratification}) later, then “\textit{ratihabitio mandato comparator}”; (ratification compares to mandate), see D. 46.3.12.4. Thus, in such a case, the \textit{dominus negotii} did lose his right to later claim that the expenses were not beneficial. For the claim that in classical law \textit{ratihabitio} did not convert \textit{negotiorum gestio} into a \textit{mandatum}, see Seiler, negotiorum gestio (n 23) 71; Parths (n 23) 120; For an opposing view see Türkan Rado, Roma Hukuku Dersleri Böüşar Hukuku (Filiz 2006) 174. For the difference between \textit{ratihabitio} and \textit{consensus} in classical law, see Avorel (n 38) 89.
\textsuperscript{96} “If the \textit{gestor} had not done it, the principal himself should have done it”; see Salvatore Di Marzo, Roma Hukuku, (Ziya Umur tr, 2\textsuperscript{nd} ed, İÜ Yayınları 1959) 462.
\textsuperscript{97} The ‘reasonableness’ of the intervention was to be determined from the principal’s point of view; see D. 15.3.3.3.
\textsuperscript{98} fe the principal could have had explicitly prohibited the act or declared his objection to a particular intervenor.
\textsuperscript{99} See D. 3.5.5.5.
\textsuperscript{100} For the view that the \textit{gestor} could have an \textit{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 \textit{gestor} might had an \textit{actio negotiorum gestio utilis} (an \textit{actio utilis} in relation to \textit{negotiorum gestio}), see Benedikt Fresse, ‘Procurator und Negotiorum Gestio im Römischen Recht’ in \textit{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 \textit{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, \textit{Vekaletsiz İş Görme} (n 23) 71-75.
\end{footnotesize}
on the circumstances of each individual case. 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.\footnote{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.}

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.\footnote{C. 2.18.24. pr-1. It was of no importance whether the business was successfully concluded or not.} 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.\footnote{The principal’s wishes might had been contrary to his own interest.} Accordingly, as mentioned above, where the gestor acted against the direct prohibition by the principal, he was liable to the principal.\footnote{D. 3.5.31.4.} The exceptions of this rule was the case of actio funeraria and the maintenance/cleaning of public streets. Actio funerari 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.\footnote{D. 11. 7. 14. 13; D. 11. 7. 32. pr. For the modern equivalence of the exception of actio funeraria, 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 Erdoğan’a Armağan (Der 2011) 197-207.} 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.\footnote{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).} 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.\footnote{D. 3.5.7.3.}

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
significance. 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. However, the mere belief of the intervenor that his intervention would be beneficial was not enough.

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, then there would had been no acknowledgment of any negotiorum gestio, and the act in question would had been interpreted ‘as a donation’. 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. 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.

The idea behind a relation that is negotiorum gestio is that the intervenor (gestor) is acting in the interests of the principal (dominii negotii), 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, 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 dominis 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”. 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. It follows that the actiones were also bilateral and in correspondence: being actio negotiorum directa and actio negotiorum contraria.

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; even the death of the principal would not have any affect. 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. 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 depositium and mandatum. 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.

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.
125 Özdemir, Vekaletsiz İş Göreme (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) AÜHFD 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.\textsuperscript{126} In the event of such circumstances, the gestor was only liable of his ‘intent’ (dolus),\textsuperscript{127} which, since Justinian times, also included gross negligence (culpa lata).\textsuperscript{128} 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 fortii).\textsuperscript{129} 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 negoti 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’.\textsuperscript{130} 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 dominiiis negotii when the business was finished and to transfer the principal all his gains deriving from the managed business.\textsuperscript{131}

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.\textsuperscript{132} The action that would be directed

\textsuperscript{126} Rado (n 95) 174.
\textsuperscript{127} D. 5.3.3.9; also see Paul. Sent. 1.4.1; I Ins. 3.27.1.
\textsuperscript{128} “Culpa lata dolo aequiparatur” (gross negligence is equivalent to intent); see Paul Koschaker, Kudret Ayiter, Roma Hususi Hukukunun Ana Hatları (Seçkin, 1977) 197-198.
\textsuperscript{129} 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/plt. novicii: slaves who very recently lost their freedom) at a sale’.
\textsuperscript{130} See I C (3).
\textsuperscript{131} He also had to inform the principal of the work he had undertaken.
\textsuperscript{132} 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 (*domini negotii*) who was the natural *actor* (claimant) and the gestor, the natural *reus* (defendant).133

The *directa* and *contra* actions of *negotiorum gestorum* were both *bona fidea* actions,134 (*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*.135 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.136 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.137

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.138 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 *domini 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.139

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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 Erdömuş, Tahiroğlu (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.\(^\text{140}\) 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.\(^\text{141}\) 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)\(^\text{142}\) to dominus negotii and to be held accountable for his management in general.\(^\text{143}\) 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.\(^\text{144}\)

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,\(^\text{145}\) and/or his release of any debts incurred.\(^\text{146}\) 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,\(^\text{147}\) 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

\(^{140}\) Vekalet Sözleşmesi’ (2000) 8 (1-2) Selçuk Üniversitesi Hukuk Fakültesi Dergisi 598.

\(^{141}\) 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, 148 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*’, 149 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. 150 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. 151

The 12th century canonists made extensive use of the ancient Greek philosophical ideas which they combined with Roman law. 152 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’. 153 Thus, for the canonists, restitution of unjust enrichment became an element of divine justice; 154 only with restitution could the ‘sin’ 155 be forgiven. 156

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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 12th-16th century; see Francesco Calasso, *Introduzione al diritto commune* (2nd 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.


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


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 pretense’ *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).157 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.158 Cases of wrongful interference with, and unjustified retention of, someone else’s property was conceptualized within the idea of commutative justice.159 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)160 was extended to provide remedies to the person, who had constructed a building on someone else’s land, against the landowner.161 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’162 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’.163 This new paradigm shift had been forced by natural law ideas,164 which viewed ‘contract’ to be ‘either express or implied by law’ and -if implied by law- to be ‘either with or without agreement’.165

157 See Aquinas (n 151) Quaest. 62, art. 1.
158 See f.e. Domenicus de Soto, De iustitia et iure libri decem (Salamanka, 1553) lib. 4, q. 6, a. 5; Ludovicus de Molina, De iustitia et iure tractatus (Venice 1614) disps. 315, 724; Leonard Lessius, De iustitia et iure, ceterisque virtutibus cardinals libri quatuor (Paris 1628) lib. 2, cap. 12, dubs. 16, 18; §cap. 20, dubs. 10–11.
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).
164 The term ‘early Natural law movement’ indicates to the epoch between 17th -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 bell 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. Hence, ‘negotiorum gestio’, like the other quasi-contracts, was taken to be a ‘presumed contract’, implied by law. 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’.

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. 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. 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. 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.

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


167 Johann Gottlieb Heineccius, Arnoldi Vinnii J.C, In quatuor libros Institutionum imperialium commentarius academicus, & forensic 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).

on the contrary, it was the lack of consent and a corresponding agreement which differentiated *negotiorum gestio* from all the other contracts; 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’ who disassociated 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, 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 19th 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’, 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.

174 D. 44.7.5.pr.
175 Such as Savigny, Windscheid and Puchta of the Historical School.
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’. 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’.

### 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. 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. 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.

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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 *gestão de negócios* 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 eins 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’. 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’. 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.

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, which is a deviation from the general rule of liability as set in article 276. 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. 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.

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. 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/) 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) (13th 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.\textsuperscript{191}

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.\textsuperscript{192} 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.\textsuperscript{193}

One of the prerequisites of negotiorum gestio in Roman law was ‘the gestor’s intention to be reimbursed’\textsuperscript{194} which we also see as a requirement for negotiorum gestio in modern German law.\textsuperscript{195} The BGB expects that the act must not be out of a ‘pure spirit of liberality’,\textsuperscript{196} there needs to be an intention to demand reimbursement from the principal.\textsuperscript{197} 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)\textsuperscript{198} just like a mandatory can.\textsuperscript{199} On the other hand, the BGB is silent on the issue of renumeration 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,\textsuperscript{200} only to be reverted to being a gratuitous contract in the final draft of BGB, as it used to be in Roman law.\textsuperscript{201} Negotiorum gestio,

\textsuperscript{191} BGB art 679; compare with D. 3.5.33; D. 3.5.34.1.
\textsuperscript{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”.
\textsuperscript{194} See I C (4).
\textsuperscript{195} Also see Greek Civil Code art 738.
\textsuperscript{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.
\textsuperscript{197} BGB art 685.
\textsuperscript{199} BGB art 683.
\textsuperscript{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.
\textsuperscript{201} BGB art 670.
owing to the analogy with mandatum also became gratuitous as a result of an editorial oversight.\(^\text{202}\) 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.\(^\text{203}\) In determining the amount for which the principal will be liable, the customary rate applicable to the business in question is taken as basis.\(^\text{204}\)

As for the claims for outlays, the gestor can demand from the principal both his necessary and beneficiary outlays,\(^\text{205}\) 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.\(^\text{206}\) 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’,\(^\text{207}\) 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.\(^\text{208}\) The BGB also allows the gestor to claim the ‘statutory interest’ on his outlays.\(^\text{209}\)

\(^{202}\) 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 (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.”


\(^{208}\) 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. The principal is deemed to be benefitting from the intervention provided that the profits accumulated from the business exceeds the expenses and losses incurred.

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. Also, the managed business shall belong to someone else other than the gestor, 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. 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, while the gestor might be held liable against the principal provided that he knew he was not entitled to manage the business. In such a case of ‘non-genuine’ intervention (unechte Geschäftsführung ohne Auftrag) -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. 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’, while, on the other hand, he may only claim the outlays

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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.


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. The ‘disgorgement of profits’ includes all the gains by the intervenor as a result of his infringement.

Thus, by virtue of art 687/2, the German Law on ‘negotiorum gestio’ seems to acknowledge a dichotomy: 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. In order for the intervener to get satisfied under German law, the intervener 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. 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. However, it is also argued that, on account of BGB art. 684, 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-. Compare with D. 3. 5. 5. 5.

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 intervener; 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 Wöflschläger (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.”.
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;\textsuperscript{228} 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,\textsuperscript{229} that incorporates the question of the lack of capacity on the part of the voluntary agent,\textsuperscript{230} which is yet another indication to the fact that it is the indeed the German law where the legal framework of ‘\textit{negotiorum gestio}’ is constructed in the strongest sense.\textsuperscript{231} The extensive admission of\textit{ negotiorum gestio} by the German law is evident from both its scope of application and the frequency of its employment by the courts.\textsuperscript{232} The BGB contains references to\textit{ negotiorum gestio} as part of issues of property law,\textsuperscript{233} lease\textsuperscript{234} and inheritance law.\textsuperscript{235} And, notwithstanding that some issues which used to fall under the category of ‘\textit{negotiorum gestio}’ is now addressed with novel, specialized remedies,\textsuperscript{236} new types of cases continue to be absorbed into the institution of ‘\textit{negotiorum gestio}’ such as the case of the self-sacrifice of a motorcyclist for evading a crash with a pedestrian (or a cyclist).\textsuperscript{237}

2. French Law and the French Civil Code (\textit{Code Civil})

The \textit{Code Civil} (Napoleonic Code), which was drafted nearly a century before BGB,\textsuperscript{238} had regulated \textit{negotiorum gestio} (\textit{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

\textsuperscript{228} BGHZ 47, 370, 374; BGH NJW-RR 1989, 970; Bergmann, § 683 (31).
\textsuperscript{229} See Swiss Code of Obligations (\textit{Obligationenrecht/OR}) art. 421, Turkish Code of Obligations (\textit{Türk Borçlar Kanunu/ TBK}) art 528. The other codes are the Greek Civil Code (\textit{see} art 735), which was largely influenced by the German Civil Code, and the Italian Civil Code (\textit{see} art 2029).
\textsuperscript{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.”
\textsuperscript{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).
\textsuperscript{232} Bar, Benevolent Intervention (n 6) 73.
\textsuperscript{233} BGB 994/2.
\textsuperscript{234} See \textit{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 \textit{see} art. 581/2; for usufructuary lease \textit{see} BGB art 581/1.
\textsuperscript{235} See BGB 1959/1, 1978/1-3.
\textsuperscript{236} \textit{Fe} the issue of the right of recourse of a person who had paid someone else’s debt is resolved today via a \textit{cessiones legis} (assignment by operation of law) and similar devices instead of \textit{negotiorum gestio}, \textit{see} Zimmerman, \textit{Law of Obligations} (n 4) 447.
\textsuperscript{237} Christian Von Bar, \textit{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 \textit{see} BGHZ 38, 270 et seq; for the criticisms \textit{see} Wollschläger (n 133) 305 et seq; Zimmerman ibid (n 4) 444; also \textit{see} Rainer Frank, ‘Die Selbstaufoerung des Kraftfahrers im Straßenverkehr’ (1982) 37/21 Juristenzeitung 737-744.
\textsuperscript{238} In 1804. For a general information regarding the \textit{Code Civil} (Napoleonic Code) \textit{see}, The Code Napoleon, The (1855) 3 (11) American Law Register 641-650.
extensive amendment via Ordinance nº 2016-131 dated 10 February 2016 whilst the norms on negotiorum gestio, now regulated within the sections of article 1301, virtually remained unchanged.\textsuperscript{239} Furthermore, the use of the term “quasi-contract”, which was the subject of recurring criticisms from the French jurisprudence,\textsuperscript{240} 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.\textsuperscript{241} 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.\textsuperscript{242} 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-;\textsuperscript{243} and the intervenor can be held liable under the provisions of the law of delicts or unjustified enrichment, provided that relevant conditions are met.\textsuperscript{244} 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’.\textsuperscript{245}

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.\textsuperscript{246} Additionally, the gestor’s acts must both comply with the principal’s objective interest and his subjective wishes.\textsuperscript{247} 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


\textsuperscript{240} See fe Gabriel Baudry-Lacantinerie, Louis Barde, Traité théorique et pratique de droit civil: des Obligations III (2\textsuperscript{nd} 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.

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

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

\textsuperscript{243} See Code Civil art 1301/3. Cf BGB 684.

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

\textsuperscript{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.

\textsuperscript{246} Jacques Flour, Jean-Luc Aubert, Eric Savaux Droit civil; les obligations; le fait juridique (10\textsuperscript{th} edn, Dalloz 2003) n. 12-13.

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for any harm which he has suffered as a consequence of the management of the principal’s business.\textsuperscript{248}

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,\textsuperscript{249} the French Code explicitly lays down the gestor’s duty to continue his management of another’s affairs until the principal\textsuperscript{250} is able to take care of his affairs himself.\textsuperscript{251} 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 entains the risk of a serious personal loss.\textsuperscript{252}

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.\textsuperscript{253} 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.\textsuperscript{254}

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.\textsuperscript{255} And although the gestor’s demands for renumeration does not constitute an essential element of his entitlement, his loss of time might be treated as recoverable expenses.\textsuperscript{256}

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

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

\begin{itemize}
  \item \textsuperscript{248} Code Civil art 1301/2.
  \item \textsuperscript{249} For the view that rejects of such a duty in German law, see Benjamin Schmidt, \textit{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.
  \item \textsuperscript{250} or in the case of his death, his heir; compare with D. 3.5.3.7.
  \item \textsuperscript{251} Code Civil art 1301/1.
  \item \textsuperscript{252} Marcel Planiol, Georges Ripert, \textit{Traité pratique de droit civil français} Vol 7 (2\textsuperscript{nd} edn, Durand 1954) no. 730.
  \item \textsuperscript{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).
  \item \textsuperscript{254} Code Civil art 1374/2; also see fe Civ. 16.11.1955 J.C.P. (Juris-classeur periodique) 1956.II.9087.
  \item \textsuperscript{255} Tandoğan, \textit{Vekaletsiz İş Görme} (n 2) 15.
  \item \textsuperscript{256} F.H. Lawson, A.E. Anton, L. Neville Brown, \textit{Amos & Walton’s Introduction to French Law} (3\textsuperscript{rd} edn, Clarendon 1967) 194.
\end{itemize}
the same period as the Napoleonic Code. As mentioned above, the ABGB, being a product of the age of enlightenment, was deeply influenced by natural law ideas. 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. Provisions on negotiorum gestio are placed in the second Part (“Of the law of patrimony”), Second Division (“Of the personal patrimonial rights”) and the 22nd 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’ and matters of lease.

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. 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’. 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.

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. The elements of ‘necessity’ and ‘utility’ is determined from the principal’s perspective, whereas the gestor’s concurrent self-interest is generally not a bar to indemnification unless he has acted solely in his own interest. 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.

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, JBI 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 JBI 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.269

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 1881’270 and the current ‘in force’ version of 1912.271 The Swiss Code of Obligations (Obligationenrecht: OR) is the 5th 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 419-424.272 The rights and obligations of the gestor is regulated between articles 419-422, while the position of the principal is addressed between articles 422-424.273

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.274 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 (2nd edn, Elgar 2012) 852-859; M. Walter Young, ‘Eugene Huber ve İsviçre Medeni Kanununun Ruhu’, 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 ((Schulthess 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 recepted -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,275 there are indeed ‘two Federal Court decisions’276 where the gestor’s awareness of his ‘lack of authority’ is deemed to be a prerequisite for the rise of a ‘negotiorum gestio’.277

Under Swiss law, as in Roman law, the gestor is under an omnis culpa liability which may decrease or increase subject to circumstances.278 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.279

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 423.280 The gestor’s claim under an action of ‘genuine negotiorum gestio’ is dependent on his acting in the principal’s interest.281 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 & Lichtenhain 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 the gestor may act in order to avert imminent damage to the principal then his liability is to be judged more leniently. Whereas the Swiss academia seems to be unanimously critical of such a qualification, there are indeed ‘two Federal Court decisions’ where the gestor’s awareness of his ‘lack of authority’ is deemed to be a prerequisite for the rise of a negotiorum gestio.

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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 held 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;

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 İçfabadı Birletmiştir Kararları) E. 1958/15, K. 1958/7, T. 4.6.1958: “Borçlar Kamununun vekaleti olmadan başka bir hesabına tasarrufa iş yapan istahhi hesabına iş yaptığın bilmeli ve bu sifatla hareket etmelidir…” (…In the ‘management of another’s aff’ 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.


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’;\(^{282}\) 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.\(^{283}\) The ratification by the principal turns the negotiorum gestio into mandate and accordingly, the provisions of mandate apply retrospectively.\(^{284}\)

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.\(^{285}\) 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.\(^{286}\) 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.\(^{287}\)

### 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’\(^{288}\) is mostly based on Roman law by virtue of the reception of Swiss Civil law during the early, formative years of the Republic.\(^{289}\) 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

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\(^{282}\) Rudolph (n 280) Art 419 (6).

\(^{283}\) Suter (n 192) 39-40; Hagenbühli (n 274) 65-67; Lischer (n 192) 54; also see Hermann Becker (ed), Kommentar zum schweizerischen Zivilgesetzbuch, Band VI Obligationenrecht Abteilung: Die einzelnen Vertragsverhältnisse Art. 184-551 (Stampfli 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; Nipperney (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).


\(^{287}\) 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 (7th 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 Öğuz, ‘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 Örücü, ‘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 nevileri),\footnote{For the criticisms of ‘negotiorum gestio’ not being a part of the ‘First division of ‘General principles’ see Eren (n 280) 844; H. Kübra Ercoskun Şenol, ‘Gerçek Olmayan Vekâleti 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.} within the 14th Title, -following the 13th title of ‘agency’- under the heading of ‘Vekaleti olmadan başka kişi 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.\footnote{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.} 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;\footnote{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).} as part of the Second Division, now termed as ‘Special Types of Obligatory Relations’ (Özel Borç İlişkileri), within the 10th Title, -following the 9th title of ‘agency relations’- under the heading of “Vekaleti İş Görme (managing a business without mandate)”, now between the articles of 526-531.\footnote{The original Turkish term for ‘Negotiorum Gestio’ as ‘vekaleti olmadan başkasının işini görme’ 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.} 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.\footnote{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).}

**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.\footnote{Cf OR art 432/1; BGB art 687/2. On an account of the terminology of negotiorum gestio in Turkish-Swiss law see Arkan Akbıyık (n 280) 15-21; Tandoğan, Vekaletsiz İş görme (n 2) 21-24.} Accordingly, there can be mentioned two main types of ‘negotiorum gestio’ under Turkish law: as genuine and non-genuine.\footnote{Eren (n 280) 829, 834, 842-843; Rona Serozan, Abdülkadir Arpacı, Borçlar Hukuku Özel Bölüm (Filiz 1992) 488; Çevdet Yavuz, Faruk Acar, Burak Özen, Türk Borçlar Hukuku: Özel Hükümler (10th edn, Beta 2012) 639; Ece Baş Süzel, Gerçek Olmayan Vekaletsiz İş Görme ve Menfaat Devi Yaptırımı (On İki Levha 2015) 15-16; also see Mustafa Alper Güümüş, Borçlar Hukuku Özel Hükümler II (3rd edn, Vedita, 2014) 225-228.} 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
to be either as ‘good-faithed’ or as ‘bad-faithed’ depending on the existence of *animus negotia aliensi gerendi* on the intervenor part.\(^{297}\) 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 aliensi gerendi*, under Swiss-Turkish law. Lastly, while the ‘genuine’ negotiorum gestio includes all lawful acts, juristic or not,\(^ {298}\) the ‘non-genuine’ negotiorum gestio, on the other hand, is acknowledged to be akin to a ‘tortious act’.\(^ {299}\)

It is true that the institution of ‘non-genuine negotiorum gestio’ shares many similarities with ‘tort’ and ‘unjustified enrichment’,\(^ {300}\) and in certain cases of ‘non-genuine negotiorum gestio’, compensation based on claims of unjust enrichment or tort might also be available.\(^ {301}\) 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.\(^ {302}\) 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.\(^ {303}\)

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.\(^ {304}\) ‘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 gestor as good faithed vs bad faithed as ‘irrelevant’ see; Hüseyin Avni Göktürk, *Borçlar Hukuku İkinci Kısım: Akin Muhafizler Envelerim* (Güney 1951) 526; Necip Bilge, *Borçlar Hukuku Özel Borç Müıüsseleleri* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 1971) 330-331; Theo Guhl, Anton K. Schmoyer, Alfred Koller, Jean N. Druy, *Das Schweizerische Obligationenrecht - mit Einschluss des Handels und Wertpapierrechts* (9th edn, Schulthess 2000) § 49 N. 46; Serif Helvacı, Gülşah Sanem Aydın, ‘Kişilik Hakki İhlalinden Doğan Vekâletisiz İşgörmede Kusurun Bir Şarti OlaRak Aranıp Aranmayacağı Sorunu’ (2017) 23 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 265, 284-285.

\(^{298}\) See (n 280) 829.


\(^{300}\) 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.


\(^{304}\) 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.305

Furthermore, the claim for ‘disgorgement of profits’ (kazanç devri),306 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.307

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.308 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’.309 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.310

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 İş Görme (n 2) 71; Eraslan Özkaya, Vekalet Sözleşmesi ve Köprüye Kullanımları, (3rd 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 Aydin’a Armağan, 793, 801-802; Yavuz, Acar, Özen (296) 641; Baş Süzel (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.311 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 Geschäftsleitung 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’312 and has been done in good-faith.313 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.314 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’.315 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.316

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 Hükmümler I (17th edn, Vedat 2019) N. 766; Schmid (n 192) N. 406 et seq; Staudinger/Bergmann (n 223) §§ 677 N. 217.
315 Oser, Schönenberger (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 Geschäftsleitung ohne Auftrag’ (1952)
The tendency to give external effects to the internal relation within *negotiorum gestio* is mostly a product of German scholarship. 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.

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). 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.

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*’. 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 faithed’ 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 faithed, non-genuine *negotiorum gestio*’ while the rest are obvious cases of ‘bad faithed, non-genuine *negotiorum gestio*’. However, unlike the BGB, where the good-faithed interventions are explicitly excepted from

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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.


320 Gümiş (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.

the effects of ‘negotiorum gestio’, 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’, the majority view holds ‘gestor’s bad faith’ to be a necessary condition for the principal’s claim of ‘disgorgement of profits’. 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’.

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 Gasbı’ (Geschäftsanmaßung) but ‘İşe Karışma’ (Geschäftseinmischung/interference in someone else’s business).

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 BGB 687/1.

324 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 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.

326 See BGB 687/1.
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’.327

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.328 It is also asserted that, in line with the Swiss academia, the TBK art 530 (and the OR art 440) constitutes ‘a legal basis’ (*Recshtsgrundverweisung/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 *Reschtfolgenverweisung*) in its complementary application.329

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

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 Süzel (n 296) 271.
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 Süzel (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 4th 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 Karşilaştırmalı Olarak FSEK Kapsamında Gerçek Olmayan Vekâletsiz İş Görme’ (*2020* 6 Ticaret ve Fikri Mülkiyet Hukuku Dergisi154 - 171.
331 Cf TBK art 396/3, 446; also see Arkan Akbıyık (n 280) 93-94; Baş Süzel (n 296) 326-341.
332 See Arkan Akbıyık (n 280) 86-93; Baş Süzel (n 296) 312-326; Cf Turkish Commercial Code (*Türk Ticaret Kanunu/TTK*) art 56/1.
333 Arkan Akbıyık (n 280) 81-84; Baş Süzel (n 296) 341-345; also see TMK art 995: “İyiniyetli olmayan zilyet, geri vermekle yükündü olduğu şeyi haksız alımış olması yüzünden hak sahibine verdiği zararlar ve elde ettiği veya elde etmeyi ihmal eyleldiği ürünler karşılığında tazminat ödenmek 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 Süzel (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’.\(^{336}\) 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*.\(^ {337}\) 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.\(^ {338}\)

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.\(^ {339}\) Furthermore, managing a business shall involve positive acts, negative acts do not constitute the act of ‘managing a business’ in terms of *negotiorum gestio*.\(^ {340}\) 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*’.\(^ {341}\) The *gestor* does not need to manage the business in person and may choose to use an assistant or vicarious.\(^ {342}\)

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337 Kaya (n 280) 379.


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.  

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, 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. The gestor shall also be under no legal duty to intervene.

There is indeed a technical difference between ‘lacking a valid mandate’ and ‘having no authority to represent’ (yetkisiz temsil). First of all, the gestor of negotiorum gestio is an -indirect- ‘agent’ by law (ex lege). 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.

343 Gümüş (n 296) 228; Staudinger/Bergmann (n 223) § 677 N. 39, 177; Hofstetter (n 192) 237; Oser, Schönberger, (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 olmadı hâlde temsilci olarak bir hukuki işlem yaparsa, bu işlem ancak onadığı takdirde temsil olunan bağlar.” (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 Hakukunda 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. 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. 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. 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. 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,
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 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.354

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 intervenor, then the principal shall claim for ‘loss of profits’ instead of ‘disgorgement of profits’.355

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 tasarrufun kanuni şartlarıarasındaki, iş görenin başkasının işini gördüğü iradesiyle hareket etmiş olması durumunda hakiki vekaletsiz tasarrufta 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, Gökyayla (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.356

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’.357

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.358 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.359 The gestor is under a ‘duty of care’ -similar to the ‘duty of care’ foreseen in the law of ‘agency’,360 which also includes the duties of ‘loyalty’ and ‘confidentiality’.361 In the case of the gestor intervening as a requirement of his profession or in exchange of a renumeration then the standard of care will elevate accordingly.362 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.363

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.364

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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 Akbıyık (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. 1650; Tandoğan, Vekaletsiz İş Görme (n 2) 192.

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) 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.\textsuperscript{365}

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,\textsuperscript{366} 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),\textsuperscript{367} meaning that he will be liable of ‘ordinary negligence’ (culpa levis) together with ‘gross negligence’ (culpa lata), fraud and intent (dolus).\textsuperscript{368} 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.\textsuperscript{369} 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’.\textsuperscript{370}

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 fortii) 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.\textsuperscript{371}

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

\textsuperscript{365} Schmid (n 192) N. 441; Suter (n 192) 35-36.

\textsuperscript{366} See III B (1).

\textsuperscript{367} See TBK art 527/1: “Vekâletsiz işgören, her türlü ihmalinden sorumludur.” (The gestor is liable of any negligence).

\textsuperscript{368} Cf D. 3.5.10; also see fe the rationale of TBK art 115.

\textsuperscript{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.

\textsuperscript{370} Tandoğan, \textit{Vekaletsiz İş Göreme} (n 2) 214-215; Schmid (n 192) N. 470; Staudinger/Bergmann (n 223) §680 N. 9; Suter, (n 192) 52; Manfred Wandt, \textit{Gesetzliche Schuldverhältnisse: Deliktsrecht, Schadensrecht, Bereicherungsrecht} (9th edn, F. Vahlen 2019) §5 N. 68.

\textsuperscript{371} TBK art 527/2.
be resorted to in the absence of a special regulation. 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.

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. 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.

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. The ‘receivable’ expenses shall both be necessary and appropriate to see the business done and must be proportionate to the interests of the principal.

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.
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.\(^3^8^1\) The ‘damages’ may comprise both tangible and intangible losses.\(^3^8^2\) 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.\(^3^8^3\) As for the *gestor’s* claim for renumeration, the majority view maintains that renumeration may be demanded provided that the work done by the *gestor* is the type of regular work undertaken as a matter of profession.\(^3^8^4\) However, this shall also not mean that demands for renumeration is restricted only for professionals.\(^3^8^5\)

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.\(^3^8^6\) 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.\(^3^8^7\) 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.\(^3^8^8\) 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’.\(^3^8^9\)

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

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\(^{381}\) 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: “….. Söçleşme veya teamül varsa vərsa vekil, ücrete hak kazanır.” (Remuneration is payable where agreed or customary.); also see Haluk Tandoğan, ‘Vekaletsiz İşgörenin Ücret Talebi’ (1955) 12 AÜFD 384-391; Hofstetter (n 192) 206; Pierre H. Engel, *Contracts 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 renumeration 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* renumeration, it also provides a blanket refusal to demands of renumeration 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 hak kimlerine göre ayırp 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, Schönberger (n 281) Art. 422 N. 9; Schmid, (n 192) N. 500; Hagenbichl, (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.


\(^{389}\) Turgut Öz, *Öğreti ve Uygulamada Sebepsiz Zenginleşme* (Kazancı, 1990) 165-166; Tandoğan, *Vekaletsiz İş Görme* (n 2) 288-289. Schmid (n 192) N.501; Aebü (n 280) 93.
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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.\textsuperscript{390} The gestor may continue to retain such goods until his demands for compensation of damages and/or reimbursement of expenses are satisfied.\textsuperscript{391}

\section*{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.\textsuperscript{392} 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,\textsuperscript{393} which is the general prescriptive period for claims.\textsuperscript{394} However it is also argued that for ‘certain claims’\textsuperscript{395} deriving from negotiorum gestio, the 5-years long prescriptive period laid down in the art. 147 of the TBK is to be applied.\textsuperscript{396}

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.\textsuperscript{397} In the case of the principal’s approval, the provisions governing agency become applicable retrospectively (ex tunc).\textsuperscript{398}

In the 808 numbered ‘abolished’ Code of Obligations, the term used instead of ‘approval/approbation’ (uygun bulma)\textsuperscript{399} was ‘ratification’ (icazet), which became a

\textsuperscript{390} Tandoğan, Vekaletlisiz İş Görme (n 2) 292 et seq; Schmid (n 192) N.551; Özkaya (n 309) 1096 - 1097.
\textsuperscript{391} Tandoğan, Vekaletlisiz İş Görme (n 2) 292-293; Özdemir Vekaletlisiz İş Görme (n 23)127-128; also see Suter (n 192) 111-112.
\textsuperscript{392} Such as the ‘Draft Common Frame of References (DCFR)’ or the ‘Draft Swiss Code of Obligations (2020)’.
\textsuperscript{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, Huguenin, Jenny (n 280) Art. 419, N. 22, Art. 422, N. 9.
\textsuperscript{394} TBK art 146: “Kanunda aksine bir hüküm bulunmadıkça, her alacak on yıllık zamanında tabidir.” (All claims are subject to a ten years prescriptive period unless otherwise provided by law).
\textsuperscript{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’.
\textsuperscript{396} Yavuz, Acar, Özen (n 296) 645; Tandoğan, Özel Borç İlişkileri (n 299) 484; cf TBK art 147/5.
\textsuperscript{397} TBK art 531: “İşsahibi yapılan iş uygun alınması, vekâlet hükümleri uygulanır.” (Where the managed business is ‘subsequently approved’ by the principal, the provisions governing agency become applicable).
\textsuperscript{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, Vekaletlisiz İş Görme (n 2) 254-255; Bilge (n 297) 332.
\textsuperscript{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 (Adâlet 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’. 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’; thus, what the principal exercises for accepting the gestor’s business, is his ‘right to approve’, not the ‘right to ratify’.

The ‘right to approve’ is a ‘right effective in changing legal relations’ (Gestaltungsrecht - yenilik doğuran hak), 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.

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. 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. 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.

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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 Hakuka: 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 Gestaltungsmacht/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’.\(^{407}\) 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.\(^{408}\)

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.\(^{409}\) 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.\(^{410}\) 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.\(^{411}\) 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.\(^{412}\) If there is no enrichment on the principal’s part, then the gestor cannot demand reimbursement from the principal for the expenses incurred.\(^{413}\) With an 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,\(^{414}\) owing to its general consideration as an ‘unlawful intervention’.\(^{415}\) 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),\textsuperscript{416} 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.\textsuperscript{417} 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.\textsuperscript{418}

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.\textsuperscript{419} 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;\textsuperscript{420} 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.\textsuperscript{421}

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.\textsuperscript{422} The argument here lies in the fact that

\textsuperscript{416} See TBK art 529/1.
\textsuperscript{417} See TBK art 530.
\textsuperscript{418} Eren (n 280) 850.
\textsuperscript{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 faithed gestor and the 10 years period anticipated for the altruistic/good faithed gestor as ‘unjust and unfair’ see Gauitschi (n 373) Art. 423, N. 8d; Honsell, Schweizerisches Obligationenrecht (n 281) 335 et seq. In that regard it is argued that both the bad faithed/selfish gestor and the good faithed/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.
\textsuperscript{420} see TBK art 72/2: “Ancak, tazminat ceza kanunların daha uzun bir zamanı olmasına rağmen eyleme gerekli bir fiilden doğmuşsa, bu zamanı 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)
\textsuperscript{421} Eren (n 280) 850.
\textsuperscript{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.\textsuperscript{423} It does not matter whether the \textit{gestor} is acting with good faith or not.\textsuperscript{424} However, certain decisions from the Turkish Court of Cassation indicate that the principal might indeed subsequently approve the managed business of the \textit{gestor};\textsuperscript{425} although in the case of the bad faithed \textit{gestor} managing the business \textit{sine animus negotia aliena gerendi}, it is also argued that there exists no ‘business’ for the principal to approve.\textsuperscript{426}

**Conclusion**

“\textit{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 \textit{negotiorum gestio} as a valid source of obligation.\textsuperscript{427}

Starting from pre-classical law, the institution of \textit{negotiorum gestio} covered a wide range of cases due to the activity of the \textit{praetor} in general and the \textit{ex bona fide} wording within its \textit{formula} in specific. Accordingly, the legal boundaries of \textit{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 \textit{negotiorum gestio} was too obvious for the jurists to ignore. It is rather indicatory 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 ‘\textit{negotiorum gestio}’, leaving the problems and contradictions of classical law unresolved.\textsuperscript{428}

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

\textsuperscript{423} At most, the principal might opt to waive the rights and claims he holds against the \textit{gestor}.

\textsuperscript{424} Eren (n 280) 850; Arkân Akbıyık (n 280) 52.

\textsuperscript{425} For relevant Turkish Court of Cassation decisions, see decisions of 15th Civil Chamber of Court of Cassation (\textit{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 (\textit{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.

\textsuperscript{426} Huguenin (n 274) N. 897; Lischer (n 192) 110 et seq.

\textsuperscript{427} On this disinterest see Schölzel, \textit{Principles of Roman Law} (n 21) 40 et seq.

\textsuperscript{428} Özdemir \textit{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”.\(^{429}\) 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’.\(^{430}\) 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 limp.\(^{431}\)

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 gestorium 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*, *amacitia* 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.\(^ {432}\)

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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.”
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