

Farewell to unjustified enrichment?

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A. INTRODUCTION

In a recent article, Professor du Plessis suggested that South African enrichment lawyers might draw more appropriate stimulation from civilian learning than from the intense debates

in the Common Law world.¹ This inclination towards the civilian law of unjustified enrichment also seems to be particularly well-established in Scotland, where authors such as Niall Whitty or Robin Evans-Jones quite openly acknowledge their debt to civilian theory.² One reason for taking this perspective of looking beyond the Common Law is the civilian origins of both the South African and Scottish laws of obligations. The purpose of this paper is, hence, to make accessible to an English-speaking audience the historical background and present state of unjustified enrichment theory in the German-speaking civilian legal systems, i.e. in Austria, Germany, and Switzerland.³ I do not think, of course, that other civilian or mixed systems should necessarily follow the example of German doctrine. My point is, more modestly, that something might be learned from the experiences in legal systems in which the institution of unjustified enrichment has a comparatively long and lively tradition, but nevertheless continues to be a fast-developing part of the law.

B. HISTORICAL FOUNDATIONS OF UNJUSTIFIED ENRICHMENT

A major challenge for legal theory in general, and unjustified enrichment theory in particular, is the delineation and definition of doctrinal categories. There is a tension between the elegance of abstraction and the practical value of functional and contextual responsiveness. Abstract concepts help to relate otherwise independent institutions and rules to each other and thus may shed new light on the law. Having such categories in a legal system may help lead to fundamentally new insights and understanding. A category applying in fundamentally different contexts such as torts, property law, and contracts, needs however to be kept responsive to the different functions and contexts of those many fields of the law.⁴ It may turn

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¹ J du Plessis, “Labels and Meaning” (2014) 18 EdinLR 416 at 417 f, 426 ff, 432 f.

² N Whitty, “Rationality, nationality and the taxonomy of unjustified enrichment”, in D Johnston and R Zimmermann (eds), *Unjustified Enrichment. Key Issues in Comparative Perspective* (2002) 658 at 679 f, 686 f, 693–713; R Evans-Jones, *Unjustified Enrichment*, vol I (*Enrichment by Deliberate Conferral: Condictio*) (2003) paras [1.67]–[1.87] and *passim*; vol II (*Enrichment Acquired in any Other Manner*) (2013) paras [2.34]–[2.43].

³ Unless indicated otherwise, the term “civilian tradition” will refer only to the discussions in those three legal systems.

⁴ Cf Evans-Jones II (n 2) para [2.35], referring to du Plessis’ discussion of problems resulting from the introduction of new rules into a mixed legal system: J du Plessis, “The Promises and Pitfalls of Mixed Legal Systems” (1998) 9 Stellenbosch LR 338 at 344 f.

out that the concept assumes different meanings in different contexts, and such ambiguities in meaning may eventually result in a general category breaking apart. The history of the civilian law of unjustified enrichment provides an example of such a development.

It is well known, even in the English-speaking world, that the doctrinal and normative structure of the civilian law of unjustified enrichment underwent fundamental and parallel changes during the course of the twentieth century.⁵ During the last few decades, however, it has increasingly become apparent that what was once the “modern civilian approach” to this field of the law⁶ ultimately leads to its dissolution. The reason is the fundamental functional and doctrinal differences between different claims collected under the heading of unjustified enrichment: large parts of the law of unjustified enrichment are no longer treated as freestanding non-contractual obligations, but rather as remedies in contract law. It thus seems to be time to say farewell to the idea of a unified law of unjustified enrichment.

Despite its residually Roman terminology (*condictiones*; *Kondiktionen*), the civilian law of unjustified enrichment can barely be understood as a Roman institution. Indeed, Roman lawyers did not know of “unjustified enrichment” as a separate legal category. The modern rules and their conceptual substance result from nineteenth century Pandectist theory. However, the codification of this theory in the general clauses of § 812 (1) German BGB (1900) and Article 62 Swiss OR (1883) turned out to be premature, as the discussions surrounding this theory had not yet come to a conclusive end. During the twentieth century, it was felt that the rules laid down in those general clauses did not work properly. A famous expert opinion written for the German legislature in 1981 thus began with a long list of “inconsistencies in the (then) current law (*Ungereimtheiten der gesetzlichen Regelung*)”;⁷ today, few German jurists would deny that this was a fair evaluation. Those inconsistencies result ultimately from the fact that the Pandectists had interwoven into their theory of unjustified enrichment two fundamentally different legal conceptions that do not fit well with

⁵ Cf R Zimmermann and J du Plessis, “Basic features of the German law of unjustified enrichment” (1994) 2 RLR 14; but see G Dannemann, *The German Law of Unjustified Enrichment and Restitution* (2009) at 4, 167, and *passim*. Dannemann neglects or criticises as wrong important developments that occurred during the last fifty years.

⁶ R Zimmermann, “Unjustified Enrichment: The Modern Civilian Approach” (1995) 15 OJLS 403.

⁷ D König, “Ungerechtfertigte Bereicherung”, in Bundesminister der Justiz (ed), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol II (1981) 1515 at 1520.

one another. The modern civilian law of unjustified enrichment thus grows from two intellectually separate roots.⁸

(a) The Roman *condictiones*

Only one of those two elements is rooted in the Roman *condictiones*: it is the idea that the debtor has to return what he received without sufficient legal basis (*causa*; *Rechtsgrund*). Yet those restitutionary *condictiones* were never regarded as enrichment claims in the modern sense of the word until the very end of the eighteenth century:⁹ they were not understood as being based upon an unjustified enrichment, neither were they limited to the actual enrichment on the debtor's side.¹⁰ The Roman jurists focussed instead on the original transfer. They gave a restitutionary *condictio* to the claimant in cases where they felt the defendant should be obliged to return what he had received from the former. Originally, however, the Roman *condictio* had not even been a restitutionary remedy. Rather, it was established as an action to enforce promises for stipulations for a certain amount or certain things (*stipulationes certi*).¹¹ Of course, such an action had to be strict, in that the defendant could not claim that he did not have the thing he had stipulated for; there was never a defence on the basis that the defendant was no longer enriched.¹² Modern jurists might therefore wonder how this action could eventually have become the basis of the modern law of unjustified enrichment.

The decisive factor making this development possible was probably the action's formula. This formula was abstract, in that it did not mention a specific cause of action. The *condictio* could thus be used in contexts quite different from those for which it had been designed originally, such as cases where the claimant sued to recover an informal loan

⁸ Similarly, J Esser, *Schuldrecht Allgemeiner und Besonderer Teil*, 2nd edn (1960) at 776 (§ 189). The remark is not found in later editions of his book.

⁹ A von Tuhr, "Zur Lehre von der ungerechtfertigten Bereicherung" in *Festschrift Ernst Immanuel Bekker* (1907) 291 at 297, 303; B Kupisch, *Ungerechtfertigte Bereicherung: geschichtliche Entwicklungen* (1987) at 1–27; N Jansen, "Die Korrektur grundloser Vermögensverschiebungen als Restitution?" (2003) 120 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (rom)* 106 at 110–123; S Lohsse, *Aequitas Martiniana*, Habilitation Bonn, (2013) §§ 4–6, especially § 6 I.

¹⁰ See, for this concept of an enrichment claim, Zimmermann (n 6) at 403 f.

¹¹ M Kaser and K Hackl, *Römisches Zivilprozessrecht*, 2nd edn (1996) at 111–113; D Liebs, "The History of the Roman *condictio* up to Justinian", in N MacCormick and P Birks (eds), *The Legal Mind, Essays for Tony Honoré* (1986) 163 at 164 ff; further references in Jansen, (n 9) at 110 ff.

¹² Paulus, D 12.1.2; Pomponius, D 12.6.7; for detail, see R Zimmermann, *The Law of Obligations* (1990) at 897 f.

(*mutuum*) or things which had been stolen (*condictio furtiva*).¹³ Nevertheless, in view of its strict nature, the action's scope of application remained limited. Besides its application in the field of contractual claims and theft, the most important were instances of undue or failed transfers (*condictio indebiti*, *condictio ob rem*, etc).¹⁴ The Roman jurists never acknowledged a *condictio* genuinely based on an infringement upon another person's rights;¹⁵ only during the twentieth century did this claim find its place in the civilian law of unjustified enrichment.¹⁶ Indeed, such a claim would have looked quite strange within the intellectual structure of Roman law. Roman jurists did not conceive of rights as reasons for legal remedies,¹⁷ and the strict consequences of the *condictio* are quite inappropriate in typical cases of innocent infringements upon other persons' property. For the same reason, Roman jurists did not grant a *condictio* for claims for expenditure made; where they found it appropriate to allow the creditor to recover expenses made, they instead based it on the *negotiorum gestio*.¹⁸

What then, it might be asked, did Roman and *ius commune* jurists mean when they described the *condictiones* as an expression of a natural law principle against unjust enrichment? Obviously they had ideas in mind which significantly differed from modern conceptions of liability for unjustified enrichment. Their concept of unjustified enrichment referred to cases of undue or failing transfers. In the context of the *condictio*, they never thought about the abstract idea of siphoning off an unjustified enrichment.¹⁹ The unjustified enrichment as such was not seen as a causative event triggering a *condictio*. Indeed, civilian authorities explained the *condictiones* on the basis of concepts such as real contracts, fictional

¹³ Liebs (n 11) at 166; for such cases, see also Lohsse (n 9) § 6 II. This was particularly important in cases where the penal *actio furti* did not apply: Gai Inst 4.112 (= J Inst 4.12.1).

¹⁴ For the historical development, see Liebs (n 11) at 167.

¹⁵ Jansen (n 9) at 126 ff. Some scholars have tried to prove the existence of such a claim in Roman law; cf B Huwiler, "Zur Anspruchsgrundlage der Obligation aus ungerechtfertigter Bereicherung im Schweizerischen Obligationenrecht", in N P Vogt (ed), *Liber Amicorum Schulin* (2002) 41 at 48 f. However, the fragments used to support such a theory (especially D 12.6.29) do not concern an infringement upon another person's property right, but rather invalid transfers.

¹⁶ Zimmermann, "Unjustified Enrichment" (n 6) at 417.

¹⁷ There were some arguments that may be understood to be pointing in the direction of such a conception of rights, however (see e.g. D. 12.1.32; 12.6.55).

¹⁸ There was no independent claim to recover expenses incurred by the possessor of another's property. The possessor could only hold back the property and would lose his right when he returned the thing: J Inst 2.1.30 and 33; Julian, D 12.6.33.

¹⁹ Lohsse (n 9) § 6.

contracts, quasi-contracts, or quasi-delicts.²⁰ Those concepts were intellectually quite different from, and unrelated to, the idea of unjustified enrichment.

(b) The doctrine of restitution

The second element of the civilian concept of unjustified enrichment is the idea of a duty to return all enrichment received out of another person's property. This idea stems from the theological doctrine of *restitutio*, and thus from the theological tradition of natural law. According to Catholic theology, a *restitutio* was a necessary requirement for the sacrament of penitence. No sin could be forgiven, so it had been taught since Augustine, unless the sinner returned what he had taken from another person. During the fifteenth and sixteenth centuries, this theological doctrine of *restitutio* was turned into a natural law theory of corrective justice. Its purpose was primarily to explain moral duties of compensation for loss suffered by another person.

According to the sixteenth century doctrine of *restitutio*, all such duties rested on the creditor's property right (*dominium*).²¹ They could arise, of course, where the goods had been credited to the debtor, where the debtor had taken them, or where he was responsible for damage done to them – this was the *restitutio ratione acceptionis*. Yet such duties did not necessarily presuppose a contractual obligation or fault on the debtor's side. The debtor was likewise under a duty of restitution if he had some good that belonged to the creditor, or if he had received some benefit out of the creditor's *dominium* – this was the *restitutio ratione rei*.²² If the debtor could not return the creditor's property *in specie*, so the natural lawyers

²⁰ J Voet, *Commentarius ad Pandectas* (1829 edn; transl by P Gane, *Commentary on the Pandects*, 2nd edn, 1989): *condictio ob rem* and *condictio indebiti* as quasi-contracts (lib XII, tit IV, § 1 and XII, VI, § 1); *condictio furtiva* as delictual claim (XIII, I, § 2). For detail, see Zimmermann, *Obligations* (n 12) at 857–873; D Visser, “Das Recht der ungerechtfertigten Bereicherung”, in R Feenstra and R Zimmermann (eds), *Das römisch-holländische Recht* (1992) 369 at 383–415; B Kupisch, “Ungerechtfertigte Bereicherung. Usus modernus pandectarum in Deutschland unter Berücksichtigung des preußischen Allgemeinen Landrechts (ALR) und des österreichischen Allgemeinen bürgerlichen Gesetzbuchs (ABGB)”, in E Schrage (ed), *Unjust Enrichment*, 2nd edn (1999) 237 at 240–248.

²¹ F de Vitoria, *Commentaria in secundam secundae* (*Commentarios a la Secunda secundae de Santo Tomás*, ed by B de Heredia 1932–1952) qu LXII, art I, n 6: “*omnis restitutio fundatur in dominio*” (all claims for restitution rest upon *dominium*); D de Soto, *De iustitia et iure* (1556, repr 1968) lib IV, *prooemium*.

²² For more detail, see N Jansen, *Theologie, Philosophie und Jurisprudenz in der spätscholastischen Lehre von der Restitution* (2013) at 24–142.

argued, he should at least be liable for any resulting enrichment,²³ in particular for expenses saved.²⁴ Thus, the claim to make restitution was understood to continue the violated right;²⁵ it was an *obligatio ex dominio*, or, as modern German enrichment lawyers have it, a *Rechtsfortwirkungsanspruch*.²⁶ As such, it was limited by the creditor's loss on the one hand and by the debtor's actual enrichment on the other.

Time and again thereafter, civilian jurists tried to integrate the Roman *condictiones* and this natural law idea into a general clause on unjustified enrichment, viz. into an intellectually coherent part of the law.²⁷ Those theories were not without some basis in the sources. Already Justinian's *Corpus iuris* seemed to present the *condictiones* as an expression of the general principle against unjustified enrichment.²⁸ Conversely the theologians had from early on included in their doctrine of *restitutio* contractual claims to pay back a loan and cases of acquisitions *contra bonos mores*.²⁹ Furthermore, the Roman jurists had applied their *condictio* not only to cases of undue or failing transfers, but also to the delictual *condictio furtiva*. None the less, all of those attempts to integrate the *condictiones* and the theory of *restitutio* had failed. The most famous example is probably the theory of Hugo Grotius. Relying on the natural law heritage, Grotius had formulated a general clause on unjustified enrichment arising from property (*obligatio quae ex dominio oritur*),³⁰ and then went on to

²³ Vitoria (n 21) LXII, VI, n 2, arguing that liability was based on the thing *virtualiter* remaining with the debtor. Similarly L Molina, *De iustitia et iure* (1659) tract II, disp 720, n 1. See further Jansen, *Theologie* (n 22) at 70 ff.

²⁴ Cajetan, *Secunda Secundae Summae Theologiae S. Thomae Aquinatis Cum Commentariis ... D.D. Thomae de Vio, Caietani* (1588) ad qu LXII, art VI.

²⁵ See, for this metaphor, most recently J Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" (<http://ssrn.com/abstract=1538342>, accessed 10 August 2015) at 40, 45, 54; E Weinrib, *Corrective Justice* (2012) at 84, 87, 92 f, 341; A Steel, "Private Law and Justice" (2013) 33 OJLS 607 at 622 f.

²⁶ W Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung* (1934) at 27, 47, 49; W Wilburg, "Zusammenspiel der Kräfte im Aufbau des Schuldrechts" (1963) 163 *Archiv für die civilistische Praxis* ("AcP") 346 at 348; K Larenz and C-W Canaris, *Lehrbuch des Schuldrechts*, vol II/2, 13th edn (1994) at 170; H Koziol, *Grundfragen des Schadensersatzrechts* (2010) paras [2/34] f.

²⁷ D König, *Ungerechtfertigte Bereicherung. Tatbestände und Ordnungsprobleme in rechtsvergleichender Sicht* (1985) at 18; similarly R Zimmermann, "Europa und das römische Recht" (2002) 202 *AcP* 243 at 292 f.

²⁸ *Pomponius*, D 12.6.14. Note, however, that the argument was, in its original context, not meant to explain the *condictio*, but rather to exclude it.

²⁹ For references, see Jansen, *Theologie* (n 22) at 53 ff.

³⁰ H Grotius, *De iure belli ac pacis libri tres* (1758) lib II, cap III, §§ 2–12; H Grotius, *Inleiding tot de Hollandsche Rechtsgeleertheyd* (transl by Lee, 1926) boeck III, deel XXX.

describe the Roman *condictiones* as special instances of this general clause.³¹ This explanation, however, unavoidably resulted in severe tensions and inconsistencies. One of those problems concerned the extent of enrichment liability. According to the doctrine of *restitutio*, liability was limited to value surviving, but this was obviously contrary to the Roman sources, and clearly not what Grotius intended with his theory.³²

An even more fundamental problem was that an *obligatio ex dominio* is difficult to explain in a case where the owner has voluntarily transferred a property right to another person and thus lost all claims arising from that right. Grotius did not, therefore, include the *condictio ob rem* in his theory of *restitutio*.³³ In those cases, the creditor of the *condictio* had performed *ob rem*: he had given something in contemplation of an agreement which he knew was not enforceable in law. Of course, he had done so in the expectation that the other party would honour the agreement, and the *condictio* was granted where this expectation was frustrated. It seemed clear, though, that he had acted voluntarily and that property had therefore passed to the other party. It was already understood in Grotius' time, however, that this analysis also applied in the case of other transfer-based *condictiones*. Those *condictiones*, too, seemed to be designed to unwind voluntary, and thus effective, transfers. Later natural lawyers therefore fell back on the *ius commune* categories³⁴ of tacit contracts (Pufendorf)³⁵ and quasi-contracts (Christian Wolff)³⁶ to explain those *condictiones*. In accordance with

³¹ Grotius, *Inleiding* (n 30) III, XXX, nn 4–17; Grotius, *De iure belli* (n 30) II, I, 2, n 1.

³² In accordance with Roman law, Grotius discussed a limitation of liability only where minors were concerned; Grotius, *Inleiding* (n 30) III, XXX, nn 3, 11. Under the *condictio indebiti*, in contrast, the debtor should clearly give back what s/he had received (*loc cit*, n 7).

³³ Grotius, *Inleiding* (n 30) III, XXXI, nn 9–11. Cf also the irritating discussion in *De iure belli ac pacis* (n 30). In the chapter on the causes of obligations, Grotius qualified the Roman *condictiones* alternatively as *obligationes ex dominio*, or quasi-contracts, or as quasi-delicts (II, I, 2, n 1). And in the chapter on unjustified enrichment (II, X) he did not mention the *condictiones* at all; thus, he did not explain in which category or categories the different *condictiones* belonged.

³⁴ A Vinnius, *In quatuor libros institutionum imperialium commentarius*, 3rd edn (1659) lib III, tit XXVIII, § 6, n 4; J G Heineccius, *Anfangsgründe des bürgerlichen Rechts nach der Ordnung der Institutionen* (1786) §§ 966, 987 ff (“Scheinkontrakt”); Voet (n 20) XII, IV, § 1, and XII, VI, § 1.

³⁵ S Pufendorf, *De iure naturae et gentium libri octo* (cum integris commentariis Io Nic Hertii atque Io Barbeyraci, 1759) V, VII, § 4; further *loc cit*, IV, IX, § 4 with nn 5 f. Only indirectly (*aliquo modo*), according to Pufendorf, could the Roman transfer-based *condictiones* be based on the idea of *restitutio*: *loc cit*, IV, XIII, § 5.

³⁶ C Wolff, *Ius naturae methodo scientifica pertractatum, pars V* (1745) §§ 570 ff, 600 ff, 618 ff; C Wolff, *Grundsätze des Natur- und Völkerrechts* (1754) §§ 693–695.

prevailing *ius commune* doctrine,³⁷ they assumed that ownership also passed under an erroneous transfer without legal basis.³⁸ It would, hence, have been illogical to describe the transfer-based *condictiones* as *obligationes ex dominio*.

C. THE INVENTION OF THE LAW OF UNJUSTIFIED ENRICHMENT

Nevertheless, the idea of a general clause on unjustified enrichment remained alive, and it was often related to the Roman *condictiones*.³⁹ Some authors even suggested limiting liability under the *condictiones* to the value surviving.⁴⁰ It was not until Savigny, however, that such a general clause was finally acknowledged. Savigny had explained all *condictiones* as being based on an “unjustified enrichment coming from the creditor’s property”;⁴¹ with this formulation, he defined the point of departure for the nineteenth century developments.⁴² His argument, however, was much more subtle. The *condictio*, said Savigny, replaced the owner’s *rei vindicatio* against the possessor.⁴³ It applied where the creditor, despite disposing of his or her property right, deserved to be protected like an owner. The reasons for such protection were, according to the sources, the fact that he had credited money to the debtor, or that he had erred when performing.⁴⁴ Quite clearly, Savigny did not describe the *condictiones* as

³⁷ Zimmermann, *Obligations* (n 12) at 867. While it was true that the passing of ownership required a legal *causa* (*titulus*), nevertheless the erroneous assumption of such *titulus* (*causa putativa* or *erronea*) was regarded as sufficient.

³⁸ Pufendorf, *De iure naturae* (n 35) V, VII, § 4; Wolff, *Ius naturae* (n 36) § 580; particularly clearly Wolff, *Grundsätze* (n 36) § 693.

³⁹ Cf W A Lauterbach, *Collegii Theoretico-Practici* (1725) lib XII, tit VII, § 5, on whom see Zimmermann, *Obligations* (n 12) at 872; similarly Voet (n 20) XII, VII, 1 and 2, on whom see C F Glück, *Ausführliche Erläuterung der Pandecten nach Hellfeld*, vol 13.1 (1811) at 185 f.

⁴⁰ Lauterbach (n 39) XII, VI, 29. As far as the sources were concerned, this argument was obviously wrong; see, for detail, Zimmermann, *Obligations* (n 12) at 899; Glück, *Erläuterung* (n 39) at 71 f, 75, 152, 155 ff, 165 ff and *passim*.

⁴¹ F C von Savigny, *System des heutigen römischen Rechts*, vol V (1841) at 526: “grundlose Bereicherung des Andern aus unserm Vermögen”.

⁴² See C F Mühlenbruch, *Lehrbuch des Pandecten-Rechts, Theil II*, 4th edn (1844) § 378, fn *; G F Puchta, *Lehrbuch der Pandekten*, 9th edn (1863) § 307; K L Arndts von Arneseberg, *Lehrbuch der Pandekten*, 5th edn (1865) § 340; C F F Sintenis, *Das practische gemeine Civilrecht*, vol II (1847) § 109; B Windscheid, *Lehrbuch des Pandektenrechts*, 7th edn (1891) vol II, § 421; H Dernburg, *Pandekten*, vol II, 6th edn (1900) § 138.

⁴³ von Savigny, *System V* (n 41) at 109 ff, 515, 518.

⁴⁴ von Savigny, *System V* (n 41) at 108 ff, 513 ff, 521 ff; see also von Savigny, *System des heutigen römischen Rechts*, vol III (1840) at 114 f, 359 ff.

restitutionary claims arising from property.⁴⁵ They did *not* arise from property. Nevertheless, they were an equivalent to the *rei vindicatio*.⁴⁶ Savigny did not, however, explain this point in more detail; later, those elements of his argument fell into oblivion.⁴⁷ Subsequently, Pandectists assumed that all *condictiones* were based on the fact that some benefit had been shifted from one person's property to another.⁴⁸ They presented the Roman *condictiones* as restitutionary claims based on an infringement upon another person's property⁴⁹ and completed this formula with the idea of a limitation of liability to value surviving.⁵⁰

This new shifting-of-property formula created no problems as long as it was understood not as an applicable rule, but rather as an abstract principle systematically explaining the *condictiones*.⁵¹ Judges and lawyers continued to rely on the specific Roman *condictiones* rather than on the concept of unjustified enrichment.⁵² The same approach also prevailed when the transfer-based *condictiones* were intellectually integrated and doctrinal writers began to classify 'voluntary' and 'involuntary' enrichments.⁵³ Again, it was a matter of course that different rules applied for different enrichment claims.⁵⁴ It was not until the

⁴⁵ Though see J Wilhelm, *Rechtsverletzung und Vermögensentscheidung als Grundlagen und Grenzen des Anspruchs aus ungerechtfertigter Bereicherung* (1973) at 21 ff, 27 ff; F Schäfer, *Das Bereicherungsrecht in Europa* (2001) at 410.

⁴⁶ In more detail, see Jansen (n 9) at 152 ff.

⁴⁷ Cf the references in n 42; the argument that the protection was based on the creditor's reliance was explicitly rejected by Windscheid II (n 42) § 426, fn 14.

⁴⁸ See the references in n 42.

⁴⁹ Cf n 43; Sintenis (n 42) § 109, fn 1; Arndts (n 42) § 340, presenting the *condictio* as an alternative to the *rei vindicatio*. Further A Erxleben, *Die Conditiones sine causa I. Die Condictio indebiti* (1850) at 29–31, 37 f, 89 f, 183; H Witte, *Die Bereicherungsklagen des gemeinen Rechts* (1859) at 53 ff, 289 ff; Windscheid II (n 42) §§ 421, no 1, 423, no 1.

⁵⁰ For the *condictio indebiti*, see Puchta (n 42) § 309; Arndts (n 42) § 341. The same arguments were made with regard to the *condictio causa data non secuta*, see Puchta (n 42) § 308; Arndts (n 42) § 342. More generally, see Sintenis (n 42) § 109 (pp 531–534); Windscheid II (n 42) § 421. The traditional view was defended by Mühlenbruch (n 42) § 379; Erxleben I (n 49) at 182–190, 194–198, 201–203; Witte (n 49) at 139–159.

⁵¹ B Windscheid, "Zwei Fragen aus der Lehre von der Verpflichtung wegen ungerechtfertigter Bereicherung", in B Windscheid, *Gesammelte Reden und Abhandlungen* (1904) 301 at 326.

⁵² See, e.g., Puchta (n 42) §§ 308–312; Arndts (n 42) §§ 341–345; similarly Dernburg II (n 42) §§ 139–143. This approach prevailed also in the nineteenth century codifications; see Arts 902–940 of the draft for a Bavarian Civil Code; §§ 1519–1550 Civil Code of Saxony; Arts 976–1006 Dresdener Entwurf.

⁵³ Windscheid II (n 42) § 422 (and the subsequent §§); Windscheid, "Bereicherung" (n 51) at 326. Similarly, the later "Motive" to the German Civil Code: B Mugdan (ed), *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol II (1899) at 464 ff, 475 f; Witte (n 49); L Jacobi, "Der Rechtsbegriff der Bereicherung mit dem Schaden eines Anderen" (1861) 4 Jherings Jahrbücher ("JhJb") 159.

⁵⁴ Cf, as an example, Windscheid, "Bereicherung" (n 51) at 333–336.

German and Swiss civil-law codifications that this legal principle was reformulated in the form of unified general clauses.

It is important to realise that enrichments resulting from infringements upon other persons' rights still did not figure in these debates.⁵⁵ Very few treatises at all mentioned those cases that are today regarded as typical instances of this group of enrichment claims.⁵⁶ One reason was that it remained unclear whether, in such a case, a *condictio* or another action applied.⁵⁷ In the Roman sources, those cases had been discussed on the basis of a *rei vindicatio*, or in the context of the *negotiorum gestio* or some other specific action. And the modern paradigm case of enrichment by infringement, namely the claim for the money received for passing ownership to a *bona fide* purchaser, was difficult to discuss on the basis of the Roman sources, as Roman law did not acknowledge such an acquisition of property in good faith. Most of what is today basic knowledge with regard to this rule was highly uncertain or disputed at the end of the nineteenth century.⁵⁸ Similarly, infringements upon immaterial property rights, another major example of the modern concept of enrichment by infringement, were never seriously considered to fall under the shifting-of-property formula.⁵⁹

⁵⁵ Jurists did discuss the *condictio furtiva*, of course: von Savigny, *System V* (n 41) at 556–561; Puchta (n 42) § 311; Arndts (n 42) § 344, but this *condictio* was regarded as exceptional in many respects: Windscheid II (n 42) § 425.

⁵⁶ Sintenis (n 42) § 109 (pp 536–538); Arndts (n 42) § 341, n 2 (p 541). More detailed Windscheid II (n 42) § 422; see also vol I, § 187, at the end.

⁵⁷ Cf C F Koch, *Lehrbuch des preußischen gemeinen Privatrechts*, 3rd edn (1858) § 642: *actio in factum* based on enrichment. On Koch's exposition of the subject, see also Jacobi (n 53) at 164–176.

⁵⁸ Dernburg, *Pandekten*, vol I/2, 6th edn (1900) § 225, n 27; Windscheid II (n 42) § 422, n 4; Windscheid, "Bereicherung" (n 51) at 302, 333. Many authors argued that the former owner could only claim the difference between the money received and the actual value of the thing. The modern rule in § 816 (1) BGB can be traced back directly to arguments made by Windscheid and by the OAG (*Oberappellationsgericht*: higher court of appeal) Lübeck; yet, this theory was famously attacked by R von Jhering, "Ist der ehemalige gutgläubige Besitzer einer fremden Sache verpflichtet, nach deren Untergang dem Eigenthümer derselben den gelösten Kaufpreis herauszugeben?" (1878) 16 JhJb 230, *passim*, esp 235 ff; at the end of the century, most authors followed Jhering's view rather than Windscheid's arguments.

⁵⁹ Where a patent right had been violated, courts based a claim on the *negotiorum gestio*: ROHGE (*Entscheidungen des Reichsoberhandelsgerichts*: decisions of the supreme commercial court) 22, 338, 340 f (1877), but nevertheless described it as a claim for damages: RGZ (*Entscheidungen des Reichsgerichts*: decisions of the supreme court) 35, 63, 72 ff (1895 – Ariston). Early nineteenth century natural lawyers had made similar arguments in the context of illegitimate reprinting of books; see Jansen, in *Historisch-kritischer Kommentar zum BGB* ("HKK"), vol II (2007), vol III (2013), §§ 249–253, 255, paras [116] ff and § 687 Abs 2, paras [4] f.

Here it was doubted whether the debtor's enrichment came from the creditor's right;⁶⁰ similar doubts were raised in the context of physical property.⁶¹ Paradoxically, it was not until the end of the nineteenth century that Savigny's formula was understood to embrace infringements upon another person's property rights, too, i.e. those cases for which the natural law concept of *restitutio* had originally been formulated.⁶² Only during the twentieth century did infringements upon property rights again become a basic element of the civilian law of unjustified enrichment.

No further analysis of the rather complex drafting processes of the German⁶³ and Swiss⁶⁴ Civil Codes is necessary in order to understand that the modern unitary claims of unjustified enrichment can hardly be praised as the results of Roman ingenuity and centuries of steady doctrinal progress.⁶⁵ At the end of the nineteenth century, legislatures had to formulate their rules on the basis of doctrines which had barely been tested in legal practice, and which were therefore not yet fully understood.⁶⁶ The most important doctrines were

⁶⁰ See ROHGE 22, 338, 340 (profits not gained from the property of the right-holder); contrariwise later RGZ 35, 63, 70, 74 (1895 – Ariston): appropriation of the fruits of intellectual property (“Früchte des geistigen Eigentumes”; gain made “out of” the creditor's intellectual property); RGZ 43, 56, 60 f (1898).

⁶¹ “Protokolle der 1. Kommission”, in H H Jakobs and W Schubert (eds), *Die Beratung des Bürgerlichen Gesetzbuchs in systematischer Zusammenstellung der unveröffentlichten Quellen. Recht der Schuldverhältnisse*, vol III (1983) 861; “Motive” (n 53) at 476 f.

⁶² Particularly clearly Jacobi (n 53) at 189 f, 232–255. See also Witte (n 49) at v, viii, 289 ff, 314 ff; Windscheid, “Bereicherung” (n 51) at 302–333.

⁶³ See König, *Bereicherung* (n 27) at 54 ff, 157 ff; B Kupisch, “Leistungsbereicherung ‘auf Kosten’ des Bereicherungsgläubigers?”, in *Festschrift Andreas Heldrich* (2005) 275; Schäfer, in *HKK III* (n 59) §§ 812–822, paras [39]–[46], [85] f; S Heine, *Condictio sine datione* (2006) at 156–196.

⁶⁴ Huwiler (n 15) at 61 ff.

⁶⁵ Zimmermann, *Obligations* (n 12) at 887 f.

⁶⁶ Similarly König, *Bereicherung* (n 27) at 16; König, “Schuldrechtsreformgutachten” (n 7) at 1520.

Savigny's shifting-of-property formula,⁶⁷ the innovative doctrine of failure of purpose,⁶⁸ and the assumption that the creditor could only recover value surviving.⁶⁹

These three elements, however, not only helped to integrate the different *condictiones* and other enrichment claims into a unitary claim of unjustified enrichment, they fundamentally altered the nature of the Roman *condictio*. This action now became an independent claim which was based on the creditor's property and limited to value surviving. Moreover, the *condictio indebiti* was now used to unwind contracts, although it had never been designed for this purpose.⁷⁰ Without much reflection, it had replaced former contract law remedies such as the *restitutio in integrum*,⁷¹ and thus also the principle *restitutio est reciproca*.⁷² Only during the twentieth century did civilian jurists understand that neither the *condictio*'s requirement of an error (Art 63 OR; § 814 BGB),⁷³ nor the intellectual isolation of the mutual claims, were appropriate in this context.⁷⁴

Another problem was that it was still not settled whether the shifting-of-property formula applied to cases where the debtor had disposed of the creditor's property – this explains the unnecessary provision of § 816 BGB.⁷⁵ Moreover, the draftsmen for the codifications had discussed infringements upon physical property only in passing.⁷⁶ In accordance with the

⁶⁷ See the debates in Jakobs and Schubert III (n 61) at 833 f; “Motive” (n 53) at 463. For a more detailed analysis, see Kupisch, “Leistungsbereicherung” (n 63) at 276 ff.

⁶⁸ Erxleben I (n 49) at 25–151, esp 25 ff, 89 ff; A Erxleben, *Die Conditiones sine causa II. Die Condictio causa data non secuta* (1853) esp 47 f, 53 f, 82–139; Witte (n 49) at 41 ff, 53 ff, 64 f. Similar, though less precise in its formulation was Windscheid's *Voraussetzungslehre*: Windscheid I (n 42) §§ 97 f, vol II, § 423, no 3, §§ 426 f. For the codification process, see Jakobs and Schubert III (n 61) at 834 ff; “Motive” (n 53) at 464 f, 470 f. For the OR, see Huwiler (n 15) at 65.

⁶⁹ See § 739 of the first draft of the code; this assumption was never doubted: Jakobs and Schubert III (n 61) at 838; “Motive” (n 53) at 467 f, 472 f, 477. The same is true for Art 64 OR.

⁷⁰ Although the *condictio indebiti* had occasionally been applied in the context of void contracts (Glück, *Erläuterung* 13.1 [n 39] at 88, 124, 126; L J F Höpfner, *Theoretisch-practischer Commentar über die Heineccischen Institutionen*, 4th edn [1793] § 1006), such cases remained exceptional.

⁷¹ Often the *actio empti* also applied; see Höpfner (n 70) §§ 1003, 1005–1009; A F J Thibaut, *System des Pandekten-Rechts*, 4th edn (1814) vol I, §§ 199, 206.

⁷² Höpfner (n 70) § 1004. Many authors argued that this principle applied independently of the action chosen by the claimant: *loc cit*, § 1008.

⁷³ König, *Bereicherung* (n 27) at 81 ff, 119 ff, 151.

⁷⁴ König, *Bereicherung* (n 27) at 85–152.

⁷⁵ See Jakobs and Schubert III (n 61) at 861 f; “Motive” (n 53) at 476 f.

⁷⁶ See the discussion on §§ 27 f of F P von Kübel's first draft: Jakobs and Schubert III (n 61) at 826 ff.

nineteenth century codifications,⁷⁷ those claims had first been placed in property law.⁷⁸ And finally, the problems of undue or failed transfers in three-party situations, which were to become the central battlefield of later doctrinal debates, were never discussed systematically before the end of the century.⁷⁹ Yet in the nineteenth century, the policies and rules applying in such situations differed quite significantly from modern law.⁸⁰ Thus, it was widely accepted that the *actio de in rem verso* applied in cases of undisclosed agency and allowed the agent's contractual partner to proceed directly against the undisclosed principal if the agent became insolvent.⁸¹ The modern policies applying in this field of the law⁸² could not be formulated before this direct claim had been abolished in rather controversial debates.

D. TRANSFORMING THE LAW OF UNJUSTIFIED ENRICHMENT

(a) Doctrinal developments

Today, the nineteenth century foundations of unjustified enrichment lie in ruins.⁸³ The unitary claim for unjustified enrichment has been split up into different claims of rather divergent legal natures; those claims are not necessarily limited to value surviving; and the shifting-of-property formula no longer plays any significant role. It does not apply to enrichments by

⁷⁷ See §§ 271, 276, 283, 305 I 9 ALR (Prussian *Allgemeines Landrecht* of 1794); Art 103, 109, 113 s 2 of the draft of a Bavarian Civil Code (1861); §§ 246, 251 f Saxon Civil Code (1863/1865). In Art 1005 f Dresdener Entwurf, however, those claims had been placed in the law of unjustified enrichment.

⁷⁸ For detail, see Jakobs and Schubert III (n 61) at 859 ff, 871.

⁷⁹ See Windscheid, "Die indirekte Vermögensleistung" (1892), in Windscheid, *Reden und Abhandlungen* (n 51) 410; O H Wendt, *Das allgemeine Anweisungsrecht* (1895) at 21–35 and esp 55–70; RG, *Seufferts Archiv* 44, 416, 418 f, no 257 (1889).

⁸⁰ If A had performed in favour of B, and B in favour of C, and if both transfers lacked a good legal basis, most writers allowed for a direct claim by A against C: Witte (n 49) at 78 f; Windscheid, "Vermögensleistung" (n 79) at 417 f; Wendt (n 79) at 65 f.

⁸¹ § 262 I 13 ALR (1794): general *actio de in rem verso*; § 791 Saxon Civil Code (1863/1865) and Art 767 Dresdener Entwurf (1866): direct claim in case of indirect representation.

Furthermore, the Austrian ABGB had provided in its §§ 1041 f for a general *actio de in rem verso*; see F von Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch* (1811 and later) § 1041, Comments 1 ff. Today, however, those provisions have been fundamentally re-interpreted: they are regarded as the legal basis for claims for enrichment in another way (i.e. not resulting from a transfer); see H Koziol and R Welser, *Grundriß des bürgerlichen Rechts*, vol II, 12th edn (2001) at 258 ff.

⁸² König, *Bereicherung* (n 27) at 179–236; Larenz and Canaris (n 26) at 246–251 (§ 70 VI).

⁸³ Similarly, D Reuter and M Martinek, *Ungerechtfertigte Bereicherung* (1983) at 39 f.

transfer,⁸⁴ and whether it applies to other *condictiones* is disputed, though immaterial. Here the formula has been replaced with the idea that the creditor can only claim benefits that are “assigned” to him.⁸⁵ In fact, today there is a huge gap between the wording of the codes’ general clauses on unjustified enrichment and the law as it is actually applied. It is not surprising that doctrinal progress was only made where jurists began to develop arguments independently of the conceptual substance of the provisions on unjustified enrichment. Four points deserve particular attention:

(1) The once unitary general clause on unjustified enrichment⁸⁶ has been split into independent claims (Wilburg/von Caemmerer typology).⁸⁷ The most important of those are claims for enrichment by transfer, for enrichment by infringement upon another person’s rights,⁸⁸ for enrichment by expenditure made on another’s property, and for enrichment by payment of another’s debt.⁸⁹ In every category, the requirement “without legal basis” is constructed differently, and the enrichment is determined on the basis of different measures.

(2) The recovery of unjustified enrichments in three-party situations is governed by specific rules and principles that do not derive from, and are unrelated to, the provisions on unjustified enrichment.⁹⁰

⁸⁴ Esser, *Schuldrecht* (n 8) at 776 (§ 189); Larenz and Canaris (n 26) at 131 f, 135 f (§ 67 II).

⁸⁵ Larenz and Canaris (n 26) at 135 (§ 67 II.2.b).

⁸⁶ For Switzerland, Huwiler (n 15) at 60 ff; for Germany, Kupisch, “Leistungsbereicherung” (n 63) at 276 ff; further references in n 67.

⁸⁷ W Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung* (1934) at 5 ff, 7 ff, 27 ff; E von Caemmerer, “Bereicherung und unerlaubte Handlung”, in *Festschrift Ernst Rabel*, vol I (1954) 333 at 334 ff; those contributions are authoritative in all three civilian systems. Particularly clear later, Esser, *Schuldrecht* (n 8) at 776 (§ 189); König, *Bereicherung* (n 27) *passim*; Larenz and Canaris (n 26) at 129 ff (§ 67 I.2); C Thomale, *Leistung als Freiheit* (2012) at 238–262; C Wendehorst, in H G Bamberger and H Roth, *Kommentar zum Bürgerlichen Gesetzbuch*, 3rd edn (2012) § 812, paras [18]–[31]; M Schwab, in *Münchener Kommentar*, 6th edn (2012–2015) § 812, paras [41] ff, [235] ff, [296] ff, [317] ff. For Austria, Koziol and Welser (n 81) at 256 ff; for Switzerland, BGE (Entscheidungen des Bundesgerichts: decisions of the supreme court) 123 III, 101, 107 (1997). In Switzerland, the question is still debated, however; cf H Schulin, in *Baseler Kommentar zum Obligationenrecht*, 5th edn (2011) Art 62, paras [10] f, [19] ff.

⁸⁸ In Austria, *Verwendungsanspruch* based on § 1041 ABGB: Koziol and Welser (n 81) at 258 ff.

⁸⁹ Details are controversial so far as enrichment by expenditure made on another’s property and by payment of another’s debt are concerned; see e.g. Reuter and Martinek (n 83) at 56–62.

⁹⁰ E von Caemmerer, “Bereicherungsansprüche und Drittbeziehungen” (1962) *Juristenzeitung* 385; C-W Canaris, “Der Bereicherungsausgleich im Dreipersonenverhältnis”, in *Festschrift Karl Larenz* (1st) (1973) 799; König, *Bereicherung* (n 27) at 179–236; Larenz and Canaris

(3) Loss of enrichment is no defence against a claim for enrichment by infringement upon another person's property, as far as the price paid for the benefit is concerned. Here, the enrichment claim is seen as an alternative to, or rather a continuation of, the *rei vindicatio*.⁹¹

(4) Specific principles guide the restitution in cases of failed contracts; those principles fundamentally diverge from the rules and principles of enrichment liability as laid down in the codifications (§ 818 (3) BGB; Art 64 OR). Normally restitution is reciprocal; hence, the mutual claims are not limited to value surviving.⁹²

Today, all four of those propositions are trite legal knowledge. They are also acknowledged in Austria, despite fundamental differences between the Austrian ABGB on the one hand, and the German BGB and Swiss OR on the other.⁹³ However, in view of the codifications' wording of the provisions on unjustified enrichment, it was quite a long and indeed rocky road to get there.

(b) The Wilburg/von Caemmerer typology

The Wilburg/von Caemmerer typology remained seriously disputed until the 1980s, and it is remarkable how much intellectual effort is expended even today in both Switzerland⁹⁴ and Germany⁹⁵ to revitalise the ideas originally underlying the codes: namely, the concept of a

(n 26) at 197–253 (§ 70); S Lorenz, “Bereicherungsrechtliche Drittbeziehungen”, 2 parts (2003) *Juristische Schulung* 729 and 839; Koziol and Welser (n 81) at 269 ff.

⁹¹ BGHZ 55, 176, 179 f (1971); Larenz and Canaris (n 26) at 302 f (§ 73 I.5.a); Koziol and Welser (n 81) at 268.

⁹² See in particular A Bolze, “Der Anspruch auf Rückgabe aus einem nichtigen Geschäft” (1890) 76 *AcP* 233 at 239 ff (on the *ius commune*), 252 ff (on the first draft of the Civil Code); A Bolze, “Zum Anspruch auf Rückgabe aus einem nichtigen Geschäft” (1894) 82 *AcP* 1 at 6 ff (on the 2nd draft of the codification); RGZ 54, 137, 140 ff (1903). See also the thorough analysis of case-law by König, *Bereicherung* (n 27) at 81–154; Larenz and Canaris (n 26) at 321–338 (§ 73 III); Schwab in *Münchener Kommentar* (n 87) § 818, paras [209]–[275].

⁹³ Koziol and Welser (n 81) at 256–281. Thus the old *actio de in rem verso* (§§ 1041 f ABGB) has been abolished, as those provisions became the legal basis for claims for unjustified enrichment by infringement upon another person's property right: above n 81.

⁹⁴ L R Kaufmann-Bütschli, *Grundlagenstudien zur ungerechtfertigten Bereicherung in ihrer Ausgestaltung durch das schweizerische Recht* (1983) at 188 ff and *passim*; Huwiler (n 15) at 64 ff, 75 ff.

⁹⁵ C Kellmann, *Grundsätze der Gewinnhaftung* (1969) esp 69 ff; Wilhelm (n 45) at 173 ff, 191 ff and *passim*; B Kupisch, “Einheitliche Voraussetzungen des Bereicherungsanspruchs – ein Mißgriff des Gesetzgebers?”, in *Festschrift Ulrich von Lübtow* (1980) 501; B Kupisch, *Gesetzespositivismus im Bereicherungsrecht* (1978) at 21 f, 62 f and *passim*. More recently,

unitary claim of unjustified enrichment and the shifting-of-property formula. Indeed, the separation of different claims for unjustified enrichment amounted to a fundamental break with the codifications' legislative programme.⁹⁶ Meanwhile, however, even the German Parliament has acknowledged, in the context of conflicts of law legislation, the fundamental differences between different enrichment claims.⁹⁷

(c) Three-party situations

Three-party situations are regarded as a 'minefield' in the law of unjustified enrichment,⁹⁸ yet they are also the touchstone for every theory in this field. A typical case is where B orders A, a sub-contractor of B, to render services to B's creditor, C. Where A, in accordance with the order, passes some benefit to C, A means to fulfil an obligation towards B, and B likewise intends to perform upon an obligation towards C. Problems arise, hence, where either the obligation between A and B or between B and C is invalid, or where both are. In such a case, it is today generally agreed that B should normally only have a claim against C, and A only against B. This rule against leapfrogging follows from the privity of contract, and in particular from the fact that A had no business with C. Thus, A had neither information about C's solvency nor a reason to be concerned about it; conversely, C should be protected where he might have defences arising from the contract with B.

Now, in view of the shifting-of-property formula and the wording of § 812 BGB,⁹⁹ courts and writers first tried to decide such three-party situations on the basis of the

A Schall, *Leistungskondiktion und „Sonstige Kondiktion“ auf der Grundlage des einheitlichen gesetzlichen Kondiktionsprinzips* (2002); CH Jahn *Der Bereicherungsausgleich im Mehrpersonenverhältnis dargestellt anhand der Rückabwicklung von Werk- und Dienstleistungen* (2014) at 33 f, 67 f, 116-178 and *passim*; Schäfer, in *HKK III* (n 59) §§ 812–822, paras [51]–[55].

⁹⁶ References at n 86. The argument sometimes heard (cf Dannemann [n 5] at 22) that the dichotomy has a footing in the wording of § 812 (1) BGB assigns to this provision a meaning which the draftsmen never had in mind.

⁹⁷ See Art 38 Einführungsgesetz zum Bürgerlichen Gesetzbuch (1999); the norm provides for different rules for the different types of enrichment claims. For an analysis, see Thomale (n 87) at 250–254.

⁹⁸ S Meier, "Mistaken payments in three-party situations: A German view of English law" (1999) 58 Cambridge LJ 567.

⁹⁹ § 812 (1) BGB: "A person who obtains something as a result of the performance of another person or otherwise at the person's expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur."

requirement “at the expense of” (*auf Kosten*);¹⁰⁰ thus they asked whether property had passed from the creditor to the debtor.¹⁰¹ Soon, however, it became obvious that this approach led to wrong results, e.g. in cases of indirect representation,¹⁰² as it would confront the debtor with the undisclosed principal as an unwanted creditor. Clearly this could no longer be right after the *actio de in rem verso* had been abolished. Another approach was to focus on the concept of unjustified enrichment. Under the *ius commune*, it had been argued that A could proceed against C as long as C had no valid claim against B. The reason was that C seemed not to be enriched if – though only if – he had simply got what was due to him.¹⁰³ However, this argument allowed A to proceed against C where both underlying obligations were void.¹⁰⁴ Scholars and courts realised that such a claim would also be contrary to the privity interests of the parties. Obviously one had to look for alternative solutions.

For many decades, scholars and courts therefore focussed on the concept of “transfer”, or rather “performance (*Leistung*)”, in § 812 BGB.¹⁰⁵ This meant saying farewell to the shifting-of-property formula, but could still be regarded as an argument based on § 812 BGB. Yet this approach no longer led to predictable results, in particular in cases where it was doubtful whether the third person (A) had acted on the basis of a valid order. A telling example is where B countermands a cheque which he had given to C.¹⁰⁶ If the bank, A, nevertheless pays on this cheque, it should probably not be able to sue C if C has accepted the payment in good faith. The countermandate is an issue that only concerns the relationship between the bank and its client. C should therefore be entitled to rely on receiving the money as a payment from B, as B had signed the cheque that made C believe he was receiving a payment from B. It follows that the result must be different if B informs C about the

¹⁰⁰ André, in G Planck (ed), *Bürgerliches Gesetzbuch nebst Einführungsgesetz*, vol I, 1st and 2nd edns (1897) intro to § 812, comment III at the end, § 812, comment 1.b); RG (1905) *Juristische Wochenschrift* 80, no 19 (1904); RG (1908) *Juristische Wochenschrift* 432, no 6 (1908).

¹⁰¹ See in particular R von Mayr, *Der Bereicherungsanspruch des deutschen bürgerlichen Rechts* (1903) at 211; further P Oertmann, *Recht der Schuldverhältnisse*, 3rd and 4th edns (1919) intro to § 812, Comment 2.d); Engelmann, in Staudinger, *Kommentar zum BGB*, 7th and 8th edns (1912) intro to § 812, Comment 4, § 812, Comment 1.b) and 2; RGZ 66, 77, 79 ff (1907).

¹⁰² König, *Bereicherung* (n 27) at 186; König, “Schuldrechtsreformgutachten” (n 7) at 1578.

¹⁰³ RG (1903) *Juristische Wochenschrift*, Beilage 3, 24, no 49 (1902); cf above n 80.

¹⁰⁴ See, e.g., P Heck, *Grundriß des Schuldrechts* (1929) at 432 f; further references in König, *Bereicherung* (n 27) at 196 f.

¹⁰⁵ Wilburg (n 87) at 113 f; von Caemmerer, “Bereicherung” (n 87) at 350 ff; id, “Drittbeziehungen” (n 90) at 385–388; Esser, *Schuldrecht* (n 8) at 779–788 (§§ 189 f).

¹⁰⁶ For further detail, see Meier (n 98) at 573 f.

countermandate before money is paid on the cheque, or else if C otherwise knows about the countermandate. In that case, C obviously does not deserve legal protection. However, again different considerations apply if B is a minor. Minors cannot be said to be responsible for statements made in commercial dealing. C will therefore not be protected in relying on B's making a payment, and the bank could sue C directly.

Such decisions and rules are quite easy to explain on the basis of general contract law arguments. The decisive issue is responsibility for statements made in contractual relationships. Such decisions are, however, terribly difficult to justify and explain on the basis of the concept of *Leistung*:¹⁰⁷ it would be very difficult to understand on the basis of conceptual reasons alone why A's payment on B's behalf would be regarded as B's *Leistung* even if B had countermanded the cheque, and it would be even more difficult to see why the payment ceases to be B's *Leistung* (only) if B informs the recipient about the countermandate. Courts therefore regularly qualified their decisions on the grounds that enrichment claims were intrinsically subject to considerations of equity,¹⁰⁸ but this created unsatisfactory uncertainty.

In view of all of those problems, scholars, and more recently also the courts, have begun to analyse those cases expressly from a contract law perspective. They focus directly on who was a party to the failing legal relationship (*Parteirolle im rückabzuwickelnden Schuldverhältnis*)¹⁰⁹ and conceive of the rules as a “completion of *contract law*, based on the policy that claims for payment and claims unwinding a contract can only be made against the contract partner”.¹¹⁰ Decisive aspects include, *inter alia*, the contractual allocations of insolvency risks and of contractual defences.¹¹¹ It is no longer assumed, therefore, that the correct solutions can be found on the basis of the concept of *Leistung* alone. Rather, decisions are based on the rules of performance¹¹² and on the principles concerning responsibility for

¹⁰⁷ Cf, as an example, Dannemann (n 5) at 50–60.

¹⁰⁸ BGHZ 61, 289, 292 (1973); 89, 376, 378 (1984). Since 2001, the XIth senate of the *Bundesgerichtshof* no longer recognises this qualification, see BGHZ 147, 145; 147, 269 (2001); 151, 127, 129 f (2002); 167, 171, 173–175 (2006); 176, 234, 236–243 (2008); BGH, NJW 2012, 3294, 3297 f.

¹⁰⁹ Larenz and Canaris (n 26) at 131 (§ 67 II.1.b).

¹¹⁰ “[E]ine Ergänzung des *Vertragsrechts* unter dem rechtspolitischen Gedanken, dass Vergütungs- und Rückabwicklungsansprüche nur gegen den Vertragspartner gerichtet werden können”: König, *Bereicherung* (n 27) at 179; similarly König, “Schuldrechtsreformgutachten” (n 7) at 1578–1588.

¹¹¹ Larenz and Canaris (n 26) at 247 f (§ 70 VI.1); H-G Koppensteiner and E A Kramer, *Ungerechtfertigte Bereicherung*, 2nd edn (1988) at 13 f, 27–49.

¹¹² Kupisch, *Gesetzespositivismus* (n 95) at 19 ff and *passim*. More recently, see the very

statements,¹¹³ and, furthermore, on more specific rules, e.g. on the transfer of rights.¹¹⁴ As a consequence of this third step of legal development, most controversies in this area of the law could quite easily be settled; only minor aspects are still disputed. Today, this is no longer an “intractable” part of the law;¹¹⁵ it is actually quite easy to digest for students. The Swiss *Bundesgericht* has also recently embraced this perspective.¹¹⁶

(d) Defence of loss of enrichment

When the BGB was enacted, many lawyers believed that § 816 (1) BGB¹¹⁷ allowed the debtor to raise the defence of loss of enrichment with regard to the contract price paid to a third person as well.¹¹⁸ This defence arose as a matter of course where the *condictio indebiti* was used to unwind a contract; it seemed to be implied in the very idea of enrichment liability. A similar argument was made by Fritz Schulz, though with the contrary result. For Schulz, it was evident that the debtor could *not* avail himself of this defence, and hence, Schulz argued, § 816 (1) BGB could obviously not be a claim for unjustified enrichment.¹¹⁹ Today, it is understood that this claim fundamentally differs from other claims in § 812 BGB as it is, functionally, a continuation of the *rei vindicatio*, and the contract price paid in good faith to a third person could never be a defence against this original *vindicatio*.

detailed analysis in Thomale (n 87).

¹¹³ Larenz and Canaris (n 26) at 201 ff (§ 70); S Lorenz, “Drittbeziehungen” II (n 90) at 839–845; see also Koziol and Welser (n 81) at 271; for case-law, see BGHZ 147, 145, 149–151 (2001); 147, 269, 269–274 (2001); 158, 1, 5 f (2004); 167, 171, 173–175, 177 (2006); 176, 234, 236–243 (2008); BGH, NJW 2012, 3294, 3297 f.

¹¹⁴ Koziol and Welser (n 81) at 272 f; Kupisch, *Gesetzespositivismus* (n 95) at 83 f; König, “Schuldrechtsreformgutachten” (n 7) at 1587 f; Larenz and Canaris (n 26) at 237–239 (§ 70 V.1); S Lorenz, “Drittbeziehungen” II (n 90) at 842 f.

¹¹⁵ Comparative literature still draws a different picture.

¹¹⁶ BGE 121 III, 109, 113 ff (1995).

¹¹⁷ § 816 (1) BGB: “If an unauthorised person disposes of an object and the decision is effective against the authorised person, then he is obliged to make restitution to the authorised person of what he gains by the disposal. (...).”

¹¹⁸ A Stieve, *Der Gegenstand des Bereicherungsanspruchs nach dem Bürgerlichen Gesetzbuche* (1899) 89 ff, esp 93–95; R Freund, *Der Eingriff in fremde Rechte als Grund des Bereicherungsanspruchs* (1902) at 57–59; von Mayr (n 101) at 622 f; Engelmann, in Staudinger, *Kommentar* (n 101) § 816, Comment 3. Influential authorities, however, soon began to constrain this defence: B Windscheid and T Kipp, *Lehrbuch des Pandektenrechts*, 8th edn (1900) at 820 (§ 422, addition 2); Oertmann (n 101) § 816, Comment 2; Landois, in Planck, *Kommentar zum BGB*, 4th edn (1928) § 816, Comment IV.

¹¹⁹ F Schulz, “System der Rechte auf den Eingriffserwerb” (1909) 105 AcP 1 at 346 ff.

(e) Unwinding failing contracts

The unwinding of failing contracts by means of the *condictio indebiti* raised problems, because the rules of unjustified enrichment had not been designed for this purpose. The logic of two independent enrichment claims made it possible for one party, A, to claim back a benefit which he had transferred to the other party, B, even if A could not return what he had received from B. To avoid such results, both courts and scholars very specifically constructed the concepts of “enrichment” and “thing obtained” (*Erlangte*):¹²⁰ reciprocal restitution was ensured by arguing that expenses incurred to acquire a benefit reduced the enrichment (*Saldotheorie*). If one party to a void contract was unable to return what he had received under the contract, the other party could hence withhold the benefit received; in such a case, the parties were only liable for the difference between the value of the benefit received and the price paid to the seller.¹²¹ The *Bundesgerichtshof* maintains this approach to the present day.¹²² However, as the *Saldotheorie* was based on conceptual arguments concerning the meaning of “enrichment” and *Erlangte*, it responded neither to the policy considerations on which the connection between the mutual claims is based, nor to the contractual policies actually invalidating the contract.¹²³ Thus, it seemed that the theory was also applicable as far as contracts with minors were concerned,¹²⁴ yet this was obviously contrary to the law’s policy of protecting minors effectively. Influential authors therefore stuck to the isolation of the two *conditiones* which seemed to be implied in their *non*-contractual nature.¹²⁵ To the present day, this part of the law is not really settled.¹²⁶ Again, solutions cannot be found on the basis of the abstract logic of the *condictio indebiti*, which is blind to the relevant policies

¹²⁰ For § 812 BGB, see above n 99.

¹²¹ RGZ 54, 137, 141 (1903); on which W Flume, “Die Saldotheorie und die Rechtsfigur der ungerechtfertigten Bereicherung” (1994) 194 AcP 427; André (n 100) § 812, Comment 1.a); cf also Bolze, “Zum Anspruch” (n 92) at 6 ff.

¹²² Cf, with minor differences in its formulation of this theory, BGHZ 1, 75, 81 (1951); 53, 144, 145 f (1970); 57, 137, 150 (1971); 72, 252, 255 f (1978); 145, 52, 54 f (2000); 147, 152, 157 (2001).

¹²³ Cf Flume, “Der Wegfall der Bereicherung in der Entwicklung vom römischen zum geltenden Recht”, in *Festschrift Hans Niedermeyer* (1953) 103 at 162 f; Larenz and Canaris (n 26) at 323 f (§ 73 III.2.d); U Bündenbender, “Die Berücksichtigung der Gegenleistung bei der Rückabwicklung gegenseitiger Verträge” (2000) 200 AcP 627 at 666.

¹²⁴ See André (n 100) § 812, comment 1.a); on the development of case-law, see M Diesselhorst, *Die Natur der Sache als außergesetzliche Rechtsquelle verfolgt an der Rechtsprechung zur Saldotheorie* (1968) at 166–192.

¹²⁵ von Tuhr (n 9) at 308 ff; P Oertmann, “Bereicherungsansprüche bei nichtigen Geschäften” (1915) *Deutsche Juristen-Zeitung*, cols 1063–1067.

¹²⁶ For an overview, see Larenz and Canaris (n 26) at 321–337 (§ 73 III).

and considerations,¹²⁷ those being primarily the assumption of the parties that performance and counter-performance are legally connected and the purpose of the contract law provisions nullifying the contract.¹²⁸ It was therefore plausible to look for relevant legal policies in other parts of the law, in particular in the rules on the consequences of revocation of contracts (*Rücktritt*: §§ 346 ff BGB).¹²⁹ Meanwhile, the German legislature also assumes that the same principles guide the unwinding of contracts after revocation and under a claim for unjustified enrichment.¹³⁰ Those principles (laid down in the provisions on revocation) quite significantly depart from those of § 818 (3) BGB. Today, this approach has become the prevailing view among scholars.¹³¹ Again, unjustified enrichment considerations were replaced with contract law policies. The same is true, incidentally, as far as illegal contracts are concerned.¹³²

E. FAREWELL TO THE LAW OF UNJUSTIFIED ENRICHMENT?

Reflecting on these transformations of the law of unjustified enrichment from a wider historical perspective, it becomes apparent that scholars and courts have in fact disentangled –

¹²⁷ This is confirmed by a comparative look at other civilian legal systems, such as Italy or Poland; see P Schlechtriem, *Restitution und Bereicherungsausgleich in Europa*, vol I (2000) at 466–468, 543 f.

¹²⁸ König, *Bereicherung* (n 27) at 80–87 and ff; C-W Canaris, “Die Gegenleistungskondiktion”, in *Festschrift Werner Lorenz* (1st) (1991) 19 at 37–43; F Bockholt, “Die Übertragbarkeit rücktrittsrechtlicher Wertungen auf die bereicherungsrechtliche Rückabwicklung gegenseitiger Verträge” (2006) 206 AcP 769 at 776, 778 ff, 803; D Medicus and J Petersen, *Bürgerliches Recht*, 23rd edn (2011) para [230]. This is also the European point of view: Schlechtriem, *Restitution I* (n 127) at 403–411; C Wendehorst, “Die Leistungskondiktion und ihre Binnenstruktur in rechtsvergleichender Perspektive”, in R Zimmermann (ed), *Grundstrukturen eines europäischen Bereicherungsrechts* (2005) 47 at 79 f, 82–84; R Zimmermann, “Restitutio in Integrum: The Unwinding of Failed Contracts under the Principles of European Contract Law, the UNIDROIT Principles and the Avant-projet d’un Code Européen des Contrats” (2005) Uniform LR/Revue de Droit Uniforme 7195.

¹²⁹ E von Caemmerer, “‘Mortuus Redhibetur’. Bemerkungen zu den Urteilen BGHZ 53, 144 und 57, 137”, in *Festschrift Larenz* (n 90) 621 at 627 ff, 634–638; Koppensteiner and Kramer (n 111) at 180–187; Larenz and Canaris (n 26) at 324 and ff (§ 73 III); Reuter and Martinek (n 83) at 39, 44, 53 f; Büdenbender (n 123) at 630–632, 671–680.

¹³⁰ Entwurf eines Gesetzes zur Modernisierung des Schuldrechts, BT-Drucksache 14/6040 (2001) 194.

¹³¹ Bockholt (n 128) at 769–804; Medicus and Petersen (n 128) paras [228] f, [231]–[235]; Schwab, in *Münchener Kommentar* (n 87) § 818, paras [252]–[265].

¹³² König, “Schuldrechtsreformgutachten” (n 7) at 1526 ff, 1531 ff.

often unconsciously¹³³ – those two originally independent ideas which had unfortunately been interwoven by Savigny and nineteenth century doctrine. One is the idea that a *condictio* lies where a transfer fails to achieve its purpose. This institute has nothing to do with the idea that a person gaining some benefit as a result of an infringement upon another person’s right is liable for restitution to the extent that he is enriched. During the twentieth century, this latter idea has been fully developed in the form of the civilian *Eingriffskondiktion*; nevertheless, it is nothing less than a twentieth century “discovery”.¹³⁴ It has been seen above that the idea of restitution was a basic element of European legal theory from the sixteenth century onwards; only during the nineteenth century was it hidden behind the façade of the *condictio*. Its explanatory force, however, became apparent only when it was fully understood that the foundation of the creditor’s claim is neither the shifting of property from the creditor to the debtor,¹³⁵ nor the unlawfulness of the infringement of the creditor’s right,¹³⁶ but rather, more specifically, the fact that the benefit obtained by the debtor was “assigned” by the law (*zugewiesen*) to the creditor.¹³⁷ Only with this new approach did it become possible to analyse appropriately those cases in which the debtor’s enrichment resulted from an infringement of the creditor’s rights. It is true, of course, that the concept of *Zuweisungsgehalt* (legal positions assigned with a right) will never be a mechanically applicable formula,¹³⁸ yet it helps in asking the right questions;¹³⁹ namely whether the creditor has an exclusive right to dispose of the benefit in question. Thus, it became the intellectual basis for the judicial development of the law.

It is today widely acknowledged that those transformations of the law of unjustified enrichment altogether amount to decisive legal progress. Yet those transformations did not simply change the doctrinal structure of the law of unjustified enrichment, nor did they leave the legal nature of the different claims collected under the nineteenth century umbrella of

¹³³ But see Wilhelm (n 45) at 21.

¹³⁴ Though see Reuter and Martinek (n 83) at 24–30; cf also Larenz and Canaris (n 26) at 130 (§ 67 I.2.b).

¹³⁵ See, for such an approach, RGZ 90, 137, 139 (1917); 121, 258, 263 (1928).

¹³⁶ This was assumed by the so-called *Rechtswidrigkeitstheorie*: F Schulz (n 119) at 431 ff, 443 ff; Kellmann (n 95) at 90–97, 110–116; H H Jakobs, *Eingriffserwerb und Vermögensverschiebung in der Lehre von der ungerechtfertigten Bereicherung* (1964) at 106–110, 113–122; cf also Wilhelm (n 45) at 81 ff, 90–100.

¹³⁷ See in particular von Caemmerer, “Bereicherung” (n 87) at 253–256, building upon Heck (n 104) at 421, and Wilburg (n 87) at 27–46. Further E-J Mestmäcker, “Eingriffserwerb und Rechtsverletzung in der ungerechtfertigten Bereicherung” (1958) *Juristenzeitung* 521 at 523–525; Larenz and Canaris (n 26) at 169–177 (§ 69 I).

¹³⁸ Koppensteiner and Kramer (n 111) at 79.

¹³⁹ T Helms, *Gewinnherausgabe als haftungsrechtliches Problem* (2007) at 62.

unjustified enrichment unchanged either. This is, in particular, true for enrichments by transfers. Claims under this category can no longer be understood as “independent claims in corrective justice”¹⁴⁰ beside obligations arising from contracts and from delicts. Rather, they have become *remedies* in contract law. From the point of view of German private law, their proper systematic place is hence within general contract law. Functionally, those claims pertain to the rules on performance and on the unwinding of contracts.¹⁴¹ “Enrichment” claims resulting from undue or failing transfers are much easier to understand if one does not feel obliged to apply the framework of unjustified enrichment, but rather analyses these cases from a contract law perspective. This is particularly important for three-party situations.

To the present day, Civilian jurists nevertheless proceed doctrinally from the assumption, so deeply enshrined in the codifications’ order,¹⁴² of a systematically independent law of unjustified enrichment.¹⁴³ It is assumed that there is a unified law of unjustified enrichment standing beside contracts and torts. Yet it is difficult to deny that the semantics of arguments taken to provide the solutions to enrichment cases have long made them leave behind this approach. This new contractual semantics is, ultimately, a consequence of splitting up the general and unified enrichment clause into different unjustified enrichment claims. The nineteenth century idea of a unified and independent law of unjustified enrichment is today no more helpful than the idea of a general law of liability for damages or a general law of fault would be. Of course, there may be functions and principles applying to all claims for restitution, but those are so abstract that they are not particularly helpful.¹⁴⁴ Civilian jurists have begun to realise that the different claims that developed under the umbrella of unjustified enrichment belong to different contexts, and that the codifications’ order is no sufficient reason to integrate within a unified institute claims that are of a fundamentally divergent legal nature. This is confirmed by the other groups of unjustified enrichment claims which have not been discussed in this paper, namely those claims that are based on the discharge of another

¹⁴⁰ Though see Wendehorst (n 87) § 812, para [3]; Kupisch, “Einheitliche Voraussetzungen” (n 95) at 503 f.

¹⁴¹ Wendehorst (n 87) § 812, para [5].

¹⁴² Kupisch, “Einheitliche Voraussetzungen” (n 95) at 503 f; Kaufmann-Bütschli (n 94) at 15 f, 38–45.

¹⁴³ Esser, *Schuldrecht* (n 8) at 763 (§ 187 1): “Die §§ 812 ff. enthalten den Versuch, alle Arten ungerechtfertigter Erwerbsakte nach Tatbestand und Rechtsfolgen unter einheitliche Regeln zu bringen”. Cf Dannemann (n 5) *passim*.

¹⁴⁴ Cf Larenz and Canaris (n 26) at 128 (§ 67 I.1): skimming off undeserved benefits. This is not helpful, particularly as many undeserved benefits are not skimmed off. Canaris therefore continues much more specifically: *loc cit*, at 130 (§ 67 I.2.b) – unwinding of failing contracts; protection of fundamental interests.

person's debt (*Rückgriffskondiktion*) and on expenditure made on another person's property (*Verwendungskondiktion*). Historically, those two groups of claims developed in the context of the *negotiorum gestio*.¹⁴⁵ Quite clearly, we are speaking here, again, of independent claims with rather specific requirements that are stated outside of the provisions on unjustified enrichment. Thus, the *Rückgriffskondiktion* is governed predominantly by the rules on the discharge of debts by third parties (§ 267 BGB)¹⁴⁶ and on the retroactive alteration of legal acts: those rules are found in the general part of the law of obligations.¹⁴⁷

F. CONCLUSION

The purpose of this paper has been to show that the unitary unjustified enrichment claims in §§ 812 to 822 BGB and Art 62 to 67 OR were based on nineteenth century doctrinal assumptions which have long since been superseded. Those assumptions do not fit in well with the law of our times.

It seems clear, on the one hand, that the rules on unwinding contracts and on payments made in contemplation of future contracts should be treated in the lectures and treatises on general contract law. For the *condictio ob rem*, this thesis seems to be agreed upon by many scholars,¹⁴⁸ even if it is still not honoured by the authors of contract law textbooks. As far as the unwinding of contracts is concerned, Austria and other civilian legal systems may be taken as examples.¹⁴⁹ From a comparative perspective, the *condictio indebiti* finds its place not within, but rather beside, “unjustified enrichment”.¹⁵⁰ Quite interestingly, the Principles of European Contract Law (PECL) and the UNIDROIT Principles (PICC) also proceed from such an approach. They provide for specific rules on issues such as the unwinding of failing

¹⁴⁵ See Jansen, in *HKK III* (n 59) §§ 677–687 I, paras [3]–[20] and *passim*.

¹⁴⁶ Cf S Meier, “Performance of an Obligation by a Third Party”, in A Burrows, D Johnston, and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013) 618.

¹⁴⁷ E von Caemmerer, “Irrtümliche Zahlung fremder Schulden”, in *Festschrift Hans Dölle*, vol I (1963) 135; Thomale (n 87) at 27–41, 382–389.

¹⁴⁸ von Caemmerer, “Bereicherung” (n 87) at 346–348; Larenz and Canaris (n 26) at 150 f (§ 68 I.3.a); Wendehorst, “Leistungskondiktion” (n 128) at 75.

¹⁴⁹ H Koziol, “Glanz und Elend der deutschen Zivilrechtsdogmatik” (2012) 212 *AcP* 1 at 11 f. Details are disputed, however, in Austria, too.

¹⁵⁰ D Visser, *Unjustified enrichment* (1998) at 975–977, 981–983, referring not only to Dutch and French law, but also to the Common Law.

contracts¹⁵¹ and also on the question of a direct claim in the case of undisclosed agency¹⁵² in the proper contractual context. Yet this approach also holds for other cases of enrichment by transfer,¹⁵³ and in particular for failing transfers.¹⁵⁴ The causative factor explaining these claims is not unjustified enrichment on the debtor's side, but rather the fact that the transfer failed or was made without legal basis.¹⁵⁵ The decisive questions are, therefore, whether a performance was effected, for whom it was effected, and whether the obligation was thereby discharged.¹⁵⁶ Those questions do not find specific answers in the law of unjustified enrichment, but must rather be decided on the basis of the general rules and principles of the law of obligations.¹⁵⁷ Conversely, the requirement of an *error*, which used to be essential for a *condictio indebiti*, has long since lost its independent function.¹⁵⁸

On the other hand, claims based on an infringement upon another person's property right have become, together with the law of delict, a group of genuinely non-contractual obligations. Those claims are based on the infringement of another person's legal right. Here we are indeed confronted with independent claims in corrective justice. They give expression

¹⁵¹ Cf Wendehorst, "Leistungskondiktion" (n 128) at 82–84; Schlechtriem, *Restitution I* (n 127) at 403–411; Jansen, "The Concept of Non-Contractual Obligations" (2010) 1 JETL 16 at 24 f; Zimmermann, "Restitutio" (n 128); P Hellwege, *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem* (2004).

¹⁵² In accordance with a couple of legal systems, Art 3:302 PECL provides here for a direct claim against the undisclosed principal; similarly Art 13 (2) of the Geneva Convention on Agency in the International Sale of Goods (though the convention has not entered into force). Art 2.2.4 PICC, in contrast, much more convincingly bars such a direct claim.

¹⁵³ Cf also Thomale (n 87) who does not, however, make this assumption explicit. For the traditional view, see Wendehorst, "Leistungskondiktion" (n 128) at 96 f, 113, who regards cases of failing transfers as the paradigm of unjustified enrichment claims.

¹⁵⁴ One classical example is transfers made by minors; see *Ulpian*, D 12,6,29; "Motive" (n 53) at 477. There may be others, however, see Thomale (n 87) at 216–222.

¹⁵⁵ See, very clearly, already Kupisch, "Einheitliche Voraussetzungen" (n 95) at 510 f, 527 f. Kupisch therefore argued that the Wilburg/von Caemmerer typology was contrary to the law. See also von Caemmerer, "Bereicherung" (n 87) at 342 f; du Plessis (n 1) at 433.

¹⁵⁶ König, *Bereicherung* (n 27) at 34 f; similarly Thomale (n 87) at 164, 216 f, 222–224 and *passim*. The same arguments are present in recent case-law: BGHZ 186, 269, 280–282 (2010).

¹⁵⁷ See, for the concept of transfer (*Leistung*), von Caemmerer, "Drittbeziehungen" (n 90) at 386; Kupisch, *Gesetzespositivismus* (n 95) at 22; C Grigoleit, "Die Leistungszweckbestimmung zwischen Erfüllung und Bereicherungsausgleich", in *Festschrift Dieter Medicus* (2009) 125 at 141 f; Schwab, *Münchener Kommentar* (n 87) § 812, paras [47] ff; Thomale (n 87) at 163 ff and *passim*.

¹⁵⁸ König, "Schuldrechtsreformgutachten" (n 7) at 1520 f, 1526 f, 1529 f, 1542; Reuter and Martinek (n 83) at 183–185; Zimmermann (n 6) at 410 f; Thomale (n 87) at 191–194. Dutch law, incidentally, totally abolished the requirement: Schlechtriem, *Restitution I* (n 127) at 144 f. South African and Scottish law also seem to re-interpret fundamentally the function of this requirement: J du Plessis, *The South African Law of Unjustified Enrichment* (2012) at 172–174; Evans-Jones I (n 2) paras [2.27] ff, [2.35], [3.01], [3.20]–[3.38].

to the basic rights and interests of citizens. Clearly, it is not always obvious whether the infringed interest deserves legal protection as a right and whether the benefit acquired by the debtor pertains to the creditor. The concept of *Zuweisungsgehalt* structures the necessary argument, but does not by itself provide the answer. Yet it seems clear that these questions must equally be answered with regard to a claim for damages (delict), for an unjustified enrichment, and for a wrongful gain.¹⁵⁹

Is there a doctrinal lesson to be drawn from this historical report? It would be wrong to infer that the Pandectists went “wrong” when establishing the idea of unjustified enrichment as a separate part of the law. Even if the merger of the *condictiones* and the doctrine of *restitutio* seems infelicitous from a modern point of view, it would make no sense to criticise former legal developments; for the legal historian, history is a matter of fact, not of right or wrong. Moreover, the idea of enrichment liability helped civilian jurists to overcome the former categories of quasi- and fictional contracts, and of quasi-delicts; categories of no doctrinal value or explanatory force. Furthermore, the abstractness of the concept of unjustified enrichment forced civilians to re-analyse thoroughly the claims granted under the umbrella of this concept and thus identify their proper foundations. It is a result of this process that the idea of a unified law of enrichment has broken into parts. Like “damage” and “damages”, it is an important concept, but no longer an integrated field of the law in which a set of common principles and rules uniformly applies.

I think that these historical experiences of civil law may also be relevant for the Common lawyer. The Common Law’s history obviously parallels civilian developments in that the Common Law’s concept of unjust enrichment likewise helped to integrate two formerly independent parts of the law, namely (quasi-)contracts and (constructive) trusts;¹⁶⁰ today, the English law of unjust enrichment covers a field that is far larger than the German *Recht der ungerechtfertigten Bereicherung*.¹⁶¹ Of course, the observation that such an integration of

¹⁵⁹ Larenz and Canaris (n 26) at 170–177 (§ 69 I); Zimmermann (n 6) at 418; E Picker, “Negatorische Haftung und Geldabfindung. Ein Beitrag zur Differenzierung der bürgerlich-rechtlichen Haftungssysteme”, in *Festschrift Hermann Lange* (1992) 625 at 683 ff; E Picker, “Deliktsrechtlicher Eigentumsschutz bei Störungen der Sach-Umwelt-Beziehung” (2010) *Juristenzeitung* 541 at 547 f, 551; R Schurer, *Der Schutzbereich der Eingriffskondiktion. Zugleich ein Beitrag zur Struktur von Zivilrechtspositionen* (2000) at 9 and *passim*; R Michaels, in *HKK II* (n 59) intro to § 241, para [74]; H Sprau, in Palandt, *BGB*, 74th edn (2015) § 812, para [40]; similarly Reuter and Martinek (n 83) at 245–281.

¹⁶⁰ See A Kull, “James Barr Ames and the Early Modern History of Unjust Enrichment” (2015) 25 *OJLS* 297.

¹⁶¹ Dannemann (n 5) at 11–20.

different ideas no longer works well in civilian legal systems does not mean that the integration of law and equity in the Common Law context suffers from the same problems. The purpose of this paper is not to support voices criticising the English notion of unjust enrichment.¹⁶² Unifying concepts are helpful where things belong together, and, more importantly, a concept as broad and abstract as “unjustified enrichment” may become helpful in shedding new light on old and well-established claims and thus initiate legal progress. This is so because such a highly abstract concept must be kept responsive to the different functions which the different claims collected under this umbrella are expected to serve in those many contexts of the law where the abstract concept applies.

¹⁶² See in particular S Hedley, “Unjust Enrichment” (1995) 54 Cambridge LJ 578; S Hedley, “Ten questions for ‘unjust enrichment’ theorists” (1997) 3 Web JCLI.