ISSN 1975-7980

Korea University Law Review

VOL.13 SPRING 2013

VOLUME 13 SPRING 2013

Korea University Law Review

Published on March 31, 2013

KOREA UNIVERSITY LAW REVIEW

The *Korea University Law Review* is an academic legal journal in English that is produced by the Legal Research Institute of Korea University. The principal mission of the Law Review is to contribute to legal scholarship by introducing the basis of Korean law to foreigners and by addressing important legal issues concerning the relationship between Korean legal systems and other legal systems, and to foster intellectual discourse at Korea University Law School.

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REPORTS ON KOREAN LAW

ARTICLES

EUROPEAN TRENDS IN THE LAW ON UNJUSTIFIED ENRICHMENT - FROM THE GERMAN PERSPECTIVE

Detlev W. Belling[*]

ABSTRACT

The striving for enrichment lies in the nature of human beings. It is legitimate to enrich oneself if an enrichment does not get out of control and violate the legal order. If the enrichment is unjustified, a statutory compensation code will apply. There is disagreement in Europe about the best way to reverse unjustified enrichments.

The origins of unjustified enrichment law lie in Roman law: the Pandects contain in two places the statement by the Roman jurist Pomponius that according to the laws of nature, no one may enrich himself to the detriment of another.

At the beginning of the nineteenth century, Carl Friedrich von Savigny established a dogma of *condictiones* that was based on a unified definition of unjustified enrichment. In his view, the common feature, and at the same time the underlying principle of all *condictiones*, could be found in shifts in wealth without a legal basis.

The German Civil Code contains a general provision: "A person who obtains something as a result of the performance of another person or otherwise at his expense without legal basis for doing so is under a duty to make restitution to him." Immediately following this provision, individual cases are regulated in sections 812 (1) sentence 2 to 817 BGB, specifying particular forms which a lack of legal basis can take and describing their specific manifestations.

Once the German Civil Code entered into force on 1 January 1900, in accordance with the conceptions of the legislators, it was agreed that the codification in section 812 (1) sentence 1 BGB contained a general unified rule governing unjustified enrichment. It was assumed that its alternatively formulated definition of unjustified enrichment "as a result of the performance of another person or otherwise" merely described the two conceivable enrichment procedures that would lead to a shift in wealth. Since the 1930's, the voices critical of the legislative concept of unjustified enrichment law has grown in number. Their basic thesis is that a unified principle of reversal under unjustified enrichment law cannot be derived from the legislative concept underlying sections 812 et seq. BGB. A distinction was made between enrichment based on performance and enrichment by other means, which were essentially of a completely different character.

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The first independent group of *condictiones* was based on a specific use of the term "performance" *(Leistung)* under unjustified enrichment law. The term "performance" represents the "conscious and goal-oriented increase of the assets of another". The *condictiones* "by other means" are to be attributed to the second category. Thus, even things that did not enter into the assets of another due to the intention of the performer, but which the other person obtained at the expense of another due to his action or other circumstances – such as deprivation, use, consumption, processing, and disposition – would also be actionable. First and foremost among the non-performance *condictiones*, which are not defined separately in the law, is the *condictio* of interference with another's rights, which has as its subject matter the encroachment on an asset which is allocated to the enrichment-creditor by the legal system and thus is protected by law. The legal consequence of such encroachment is the restitution of the benefit the enrichment-debtor obtained through the interference.

The focal point of the question of whether one will be allowed to retain assets or must return them is the legal basis for the enrichment, the *causa*, which determines whether the enrichment is justified. If a shift in wealth falls under the category of performance *condictiones*, it has no legal basis if it did not lead to the fulfilment of an obligation of the disadvantaged person. If the shift in wealth consisted of a removal, use, consumption, processing or disposition – at the expense of another – it has no legal basis if the enrichment-debtor has interfered with a legal position allocated to the owner, or the holder of another absolutely protected right, without being legally entitled to the benefit derived therefrom.

The *Principles of European Law (PEL)* on unjustified enrichment law build on the concept of a unified basic rule. The authors of the PEL saw no compelling reason to distinguish between performance and interference *condictiones*. The basic rule contains four prerequisites and reads as follows: "*A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment."*

In the basic rule – Art. 2:101 paragraph (1) – an enrichment is generally presumed to be unjustified. Paragraph (1) (a) and (b) then sets out circumstances that justify an enrichment. An enrichment is justified pursuant to subparagraph (a) if the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law. Pursuant to paragraph (1) (b), an enrichment is also justified if the disadvantaged person consented freely and without error to the disadvantage.

Keywords: Unjustified Enrichment, Principles of European Law, Draft Common Frame of Reference, German Law, European Reform Efforts.

1. Date of Receipt	2. Date of Review	3. Date of Approval
October 8, 2012	December 31, 2012	January 18, 2013

I. Introduction

The striving for enrichment lies in the nature of human beings. It is an element of private autonomy and the "nuclear fuel" that powers the American-oriented economic system. But greed has been frowned upon since ancient times. *Avaritia* is seen by the Catholic Church as one of the Deadly Sins. The Gospel of Luke states: *[B]eware of covetousness: for a man's life consisteth not in the abundance of the things which he possesseth."* In fact the Epistle to the Ephesians goes so far as to say: *"For this ye know, that no covetous man . . . hath any inheritance in the kingdom of Christ and of God."*

It is legitimate to enrich oneself if an enrichment does not get out of control and violate the legal order. The legal order protects not only private autonomy, but also the rights, objects of legal protection, and interests of others at whose expense the enrichment occurs. If the enrichment is unjustified in that sense, a statutory compensation code will apply, which is linked primarily to wrongful possession. The law on unjustified enrichment serves to reverse shifts of wealth that are not in accordance with the laws governing the movement and allocation of goods,[1] thus filling in "gaps in the legal protection".[2] Of decisive importance is the question of what criteria are used to establish the legitimacy of possession.

Frankly, there is disagreement in Europe about the best way to reverse unjustified enrichments. Not every European country even has any rules on unjustified enrichment at all. And even where statutory regulations do exist, they differ from each other so greatly that – unlike the other areas of European civil law – one cannot speak of a common core of unjust enrichment law that is inherent in every European legal system.[3]

Efforts are being made in the EU – at the initiation of the European Parliament – to create a unified European codification of civil law. One consequence of the common internal market of the EU is that contractual relationships are increasingly being formed between citizens and companies domiciled in different Member States, and this has led to a need for unification. To achieve this aim, a Commission on European Contract Law

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[1] MICHAEL MARTINEK, *Das Recht der ungerechtfertigten Bereicherung und der Geschäftsführung ohne Auftrag*, *in* JULIUS VON STAUDINGER, ECKPFEILER DES ZIVILRECHTS, 970 (ch. S. margin note 4) (2012) (Ger.); 5 MANFRED LIEB, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, 1247, 1248 (§ 812 margin note 1) (4th ed. 2004) (Ger.).

[2] DETLEF KÖNIG, *Ungerechtfertigte Bereicherung*, *in* GUTACHTEN UND VORSCHLÄGE ZUR ÜBERARBEITUNG DES SCHULDRECHTS 1515, 1519 (1981) (Ger.).

[3] CHRISTIAN VON BAR & STEPHEN SWANN, PRINCIPLES OF EUROPEAN LAW, UNJUSTIFIED ENRICHMENT (PEL UNJ.ENR.) 93 (B.8) (2010).

(Lando Commission), that was not officially mandated, prepared a draft treatise on European contract law on an academic comparative law basis, which was not passed by the legislature (Principles of European Contract Law - PECL). The Study Group on a European Civil Code thereupon drafted the Principles of European Law (PEL), which take up the PECL, making some adjustments and supplementing it with additional principles, inter alia on individual contractual relationships and various other relationships under the law of obligations, including unjustified enrichment. In cooperation with other European research groups and institutions, a Draft Common Frame of Reference (DCFR) was eventually drawn up, the final version of which appeared on October 20, 2009. The PEL are integrated into the DCFR, which will serve as a model for the creation of a possible "politically legitimised" Common Frame of Reference on the EU level. However, as an academic work on comparative law, it also serves as a source of inspiration for reform efforts in the individual EU states.[4] It remains to be seen whether the DCFR will actually pave the way to a unified European law of obligations but, notwithstanding the criticism it is facing in the area of unjustified enrichment law, its efforts to bring about a harmonisation are in any case definitely to be welcomed.

The *PEL* on unjustified enrichment law build upon a single basic rule that does not differentiate between performance and interference with the rights of another. Whether the *PEL* represent a successful contribution to a unification of unjustified enrichment law is a question I would like to take up from the perspective of German unjustified enrichment law.

II. The Sources of German Unjustified Enrichment Law

A. The Origins of Unjustified Enrichment Law[5]

1. Roman Law

Only those who know their history can understand the present and master the future. The origins of unjustified enrichment law lie in Roman law.

The *condictio* developed as a form of action in *legis actio* procedures.[6] It initially

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[4] VON BAR & SWANN, *supra* note 3, at vii

[5] A good historical overview of the development of unjustified enrichment law up to the present day can be found in KUPISCH, UNGERECHTFERTIGTE BEREICHERUNG: GESCHICHTLICHE ENTWICKLUNGEN (1987) (Ger.).

[6] The Law of the Twelve Tables, ca. 450 BC, did not yet contain the term "condictio" even if cases of the later classic Roman law were covered in a fragmentary manner. For example, TABLE VI, Law 8 reads as follows: "No material forming part of either a building or a vineyard shall be removed therefrom. Anyone who, without the knowledge or consent of the owner, attaches a beam or anything else to his house or vineyard, shall be condemned to pay double its value".

covered claims arising from verbal contracts *(stipulatio),* actions due to theft *(condictio ex causa furtiva)*[7] and loan agreements *(mutuum).*[8] Certain cases of unjustified enrichment were placed on the same level as a loan agreement and therefore fell under the "*condictio"* form of action.[9] With the passage of time, various individual instances of *condictio* based on performance *(Leistungskondiktionen)* were added, including the *condictio indebiti,* the *condictio ob turpem vel iniustam causam* and the *condictio causa data causa non secuta.*[10] Apart from the *condictio ex causa furtiva,* on the other hand, there is scarcely a historical basis for a *condictio* based on interference with another's rights *(Eingriffskondiktion)* in Roman law.[11]

Even if Cicero had already considered it aberrant to make a profit at the expense of others,[12] a catch-all category of performance *condictiones* – i.e. *condictio sine causa* – only developed under the Eastern Roman Emperor Justinian. The Pandects[13] of the *Corpus Iuris Civilis,* which he issued, contain in two places the statement by the Roman jurist Pomponius that according to the laws of nature, no one may enrich himself to the detriment of another.[14] For a long time, this thesis was seen as the substantiation for the general *condictio sine causa*, which is also based on equity aspects.[15]

2. Hugo Grotius

In medieval canon law, the Eighth Commandment – "Thou shalt not steal" – was interpreted broadly to mean that one may not keep that to which others are entitled.[16] The Dutch jurist Hugo de Groot, also known as Hugo Grotius, was among the first to derive enrichment conceptions from moral theology.[17] He developed an unjustified enrichment claim with a very broad scope of application. Such a claim exists where "a

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[7] For more, *see* JAN DIRK HARKE, BESONDERES SCHULDRECHT n.479 (2011) (Ger).

[8] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 836 (1996) (ch.26, I.2).

[9] *Id.*; *see also* 5 VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 512 (1847) (Ger.), who pointed out this connection as late as in the 19th century.

[10] MARTINEK, *supra* note 1, at 972 (ch. S. margin note 9); FRANK SCHÄFER, DAS BEREICHERUNGSRECHT IN EUROPA 90 (2001) (Reference to its sources in Corpus Juris Civilis) (Ger.).

[11] MARTINEK „*supra* note 1, at 974 (ch. S. margin note 11).

[12] David Ibbetson, *Unjust Enrichment in English Law*, *in* UNJUST ENRICHMENT AND THE LAW OF CONTRACT 33, 41 (2001) (citing De Officilis, III.22: "natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus.").

[13] Also called Digest.

[14] D.50.17.206: "Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem".; D.12.6.14: "Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem." *available at* http://web.upmf-grenoble.fr/Haiti/Cours/Ak/.

[15] MARTINEK, *supra* note 10; *see also* ERNST RABEL, GRUNDZÜGE DES RÖMISCHEN PRIVATRECHTS § 76, at 119 (1955) (Ger.).

[16] E. J. H. SCHRAGE, *Unjust Enrichment: A Historical and Comparative Overview*, *in* UNJUST ENRICHMENT AND THE LAW OF CONTRACT 1, 3 (2001).

[17] Daniel P. Visser, *Das Recht der ungerechtfertigten Bereicherung*, *in* DAS RÖMISCH-HOLLÄNDISCHE RECHT: FORTSCHRITTE DES ZIVILRECHTS IM 17. UND 18. JAHRHUNDERT 371 (1992) (Ger.).

person gains an advantage *sine causa* from the assets of another or (in the future) could gain an advantage".[18] Several legal scholars already considered this to be a unified claim based on unjustified enrichment that went above and beyond the various individual instances of *condictio* developed by the Romans.[19] The first origins of the non-performance *condictio* and the dogma of shifts in wealth can be found in Hugo Grotius.[20]

3. Carl Friedrich von Savigny

At the beginning of the nineteenth century, Carl Friedrich von Savigny established a dogma of *condictiones* that was based on a unified definition of unjustified enrichment. His goal was to overcome the division into individual categories of legal *condictio* cases that originated in the Pandects.[21] He assumed that the individual *condictiones* were tacitly based on a common principle.[22] Finally, he believed that it should also be possible to base a *condictio* on *"the passing of an asset from my possession to the ownership of another without my intention, whether such other person was enriched through his own action or through coincidental circumstances"*.[23] In von Savigny's view, the common feature, and at the same time the underlying principle of all of the *condictiones* discussed above, could be found in shifts in wealth without a legal basis.[24]

The doctrines of von Savigny formed the basis of the first draft of the German Civil Code *(Bürgerliches Gesetzbuch – BGB)*[25] and – as the *PEL* show – are still in effect today.

B. The Status of German Unjustified Enrichment Law

1. The Conception of the Historical Lawmakers

In the course of the deliberations on the first draft of the German Civil Code, the legislative commission defined four cases of performance *condictiones* that were to be regulated separately. These were then to be followed by a "catch-all" provision containing a general unjustified enrichment norm for those cases in which an enrichment has occurred without the "legally valid" intention of the disadvantaged party.[26] The

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[18] *Id.* at 372. (citing HUGO DE GROOT, INLEYDINGE TOT DE HOLLANTSCHE RECHTSGELEERTHEIT (BK.III, XXX) (1631)(Ger.)).
[19] *Id.*; *see also* ZIMMERMANN, *supra* note 8, at 885 (ch.26, IV.4).
[20] SCHÄFER, *supra* note 10, at 94.
[21] MARTINEK, *supra* note 1, at 973 (ch. S. margin note 10).
[22] 5 VON SAVIGNY, *supra* note 9, at 507, 511.
[23] 5 VON SAVIGNY, *supra* note 9, at 523.
[24] 5 VON SAVIGNY, *supra* note 9, at 525.
[25] MARTINEK, *supra* note 1, at 973, 974 (ch. S. margin notes 10, 12).
[26] §§ 737 to 747 of the government's draft BGB (BGB-E) initially regulated the condictio indebiti (§ 737 BGB-E), the condictio ob rem (§ 742 BGB-E), the condictio ob causam finitam (§ 745 BGB-E), the condictio ob turpem vel iniustam causam (§ 747 BGB-E), the respective grounds for exclusion, as well as the content and scope of the enrichment. Other condictiones sine causa, primarily

legislature deliberately left open the question of when a lack of legal basis was to be assumed. What was decisive was not the circumstances that led to the enriching shifts in wealth, but rather the nature of the legal basis (*causa*) "justifying" them.[27] For performance *condictiones*, the lack of legal basis was supposed to derive from an unsuccessful legal transaction involving a shift in wealth. In the case of the other actions, the lack of legal basis was seen to lie in the fact that the disadvantaged party did not intend such a shift in wealth, regardless of whether it occurred due to an encroachment, the use of assets of the party suffering the loss, statutory order, or any other way. In a second bill, the legislature then decided in favour of the statutory formulation in section 812 (1) sentence 1 BGB which is applicable to this day. With this formulation, rather than listing individual claims for action, performance *condictiones* and non-performance *condictiones* are codified in a general clause.[28] Since then, section 812 (1) sentence 1 BGB has read as follows:

"A person who obtains something as a result of the performance of another person or otherwise at his expense without legal basis for doing so is under a duty to make restitution to him."

Immediately following this general provision, individual cases are regulated in sections 812 (1) sentence 2 to 817 BGB, specifying particular forms which a lack of legal basis can take and describing their specific manifestations; however, these regulations are subordinate to the basic rule.[29]

By regulating the German unjustified enrichment law in such detail, in comparison

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condictiones based on non-performance – although not yet characterised as such – fell under § 748 BGB-E as a kind of catch-all clause. The lawmakers understood the condictio sine causa to comprise unjustified enrichments due to shifts of wealth that led to a material gain for the enriched person without this having been the intention of the deprived person. This included shifts of wealth which according to the present-day terminology would be allocated to *condictiones* for interference with another's rights or improvement of another's assets. On the other hand, this also included changes in the property situation that came about due to statutory orders and were supposed to be corrected through a statutory compensation for the enrichment that was explicit or to be determined by way of construction. *See* 2 BENNO MUGDAN, DIE GESAMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH, 475 et seq. (1899) (Ger.); 2 ALEXANDER ACHILLES et al., PROTOKOLLE DER KOMMISSION FÜR DIE ZWEITE LESUNG DES ENTWURFS DES BÜRGERLICHEN GESETZBUCHS, 684 (1898) (Ger.).

[27] JOACHIM WOLF, DER STAND DER BEREICHERUNGSLEHRE UND IHRE NEUBEGRÜNDUNG 4 (1980) (Ger.).

[28] The formulation initially proposed in the first draft with regard to the *condictio* in any other way "from the asets [of another]" was rejected. Instead, they chose the formation "at his expense," which was considered to be more broadly conceived and more suitable for the offence and also covered those cases in which the object of the enrichment affects the enriched person's property holding without already having (completely) passed into his ownership, for example when an item belonging to another is held in custody or is in the possession of a thief. *See* ACHILLES et al., *supra* note 26, at 684 et seq. (Ger.).

[29] The emphasis on the individual offences does not follow a unified conception and is presumably only to be explained by the various historical influences and the compromises and coincidences involved in the discussions of the second commission. *See* ULRICH LOEWENHEIM, BEREICHERUNGSRECHT 7 (3d ed. 2007).

to other legal systems, the legislature was taking into account the peculiarity inherent in German civil law of differentiating between a claim to the transfer of an asset and the transfer of the asset itself. Unlike in other legal systems such as Hungarian law, the German unjustified enrichment law does not assume merely a subsidiary position in the reversing of shifts in wealth; it is applicable even if other regulations govern the reversal of shifts in wealth as well. Conversely, claims based on other parts of the law are not precluded.

2. Construction of the Wording of the Statute

Once the German Civil Code *(Bürgerliches Gesetzbuch)* became effective on January 1, 1900, in accordance with the conceptions of the legislators, it was agreed that the codification in section 812 (1) sentence 1 BGB contained a general unified rule governing unjustified enrichment. It was assumed that its alternatively formulated definition of unjustified enrichment "as a result of the performance of another person or otherwise" merely described the two conceivable enrichment procedures that would lead to a shift in wealth. No legal categorisation of the *condictiones*, whose features differ in some respects, was made.[30] Rather, it was of equal importance for all unjustified enrichment claims that a direct shift in wealth have occurred between the person who suffers a loss in wealth (creditor of the obligation to reverse the enrichment) and the person who experienced an increase in wealth (debtor of the obligation to reverse the enrichment). Linked to this is the question of the legal basis for the acquirer's being permitted to retain the benefit.[31] Consequently, according to a historical understanding, a claim for the reversal of an enrichment arose if a direct shift in wealth occurred without legal basis between the disadvantaged person and the enriched person. At the same time, the direct shifts in wealth were linked to the feature "at his expense".[32] Of great importance for the practice of law was the directness of the shifts in wealth, with the help of which, particularly in multi-party relationships, the parties to the claim for restitution were to be identified. There was largely agreement on the assumption that an increase in the wealth of the enriched person should be due to the loss of wealth of the disadvantaged party.[33] However, the feature of "directness" was difficult to grasp in multi-party cases in which the enrichment was obtained not via a chain of successive

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[30] JÜRGEN KAMIONKA, *Der Leistungsbegriff in Bereicherungsrecht*, 1992 JURISTISCHE SCHULUNG [JuS] 845 (Ger.).

[31] WOLF, *supra* note 27, at 6; KAMIONKA, *supra* note 30; WILHELM STOLTE, *Der Leistungsbegriff – ein Gespenst des Bereicherungsrechts?*, 1990 JURISTENZEITUNG [JZ] 220 (Ger.).

[32] MARTINEK, *supra* note 1, at 975 (ch. S. margin note 14); ERNST NEBENZAHL, DAS ERFORDERNIS DER UNMITTELBAREN VERMÖGENSVERSCHIEBUNG IN DER LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG 28 (1930) (Ger.); II/2 GOTTLIEB PLANCK, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, 1624 (§ 812 I.2.c.) (4th ed. 1928); LUDWIG ENNECCERUS & HEINRICH LEHMANN, RECHT DER SCHULDVERHÄLTNISSE, § 222-III (1958) (Ger.); consistent case law of the Supreme Court of the German Reich (Reichsgericht), *See, e.g.*, *RGZ 73,* 173, 177 (Ger.).

[33] PLANCK, *supra* note 32; II/2 HEINRICH DERNBURG, DAS BÜRGERLICHE RECHT 603 (1906) (Ger.).

transfers of an asset from the first to the second and finally to a third party, but through an abbreviated performance from the first directly to the third party, for example in non-cash payment transactions such as bank transfers.[34]

3. The Development of the "Theory of Separation of Claims" (*Trennungslehre*)

Since the 1930's, the voices critical of the legislative concept of unjustified enrichment law has grown in number.[35] Their basic thesis is that a unified principle of reversal under unjustified enrichment law cannot be derived from the legislative concept underlying sections 812 et seq. BGB. Consequently, the reversal of unjustified shifts in wealth could not be expressed in a general norm. Rather, it was deemed necessary to distinguish between various individual types of *condictiones* that served either the unwinding of failed or terminated contractual relationships within the framework of the movement of goods on the one hand or the protection of property and other rights under the rules governing the allocation of assets on the other.[36] Here, a distinction was made between enrichment based on performance and enrichment by other means, which were essentially of a completely different character.[37] Each of these types of *condictio* was to be linked to its own prerequisites. The categorisation into *condictiones* based on performance and those not based on performance – both of which were then divided into other *condictiones* – found more and more support and was ultimately also followed by case law and a large part of the legal commentaries.[38]

(a) Performance Condictiones

The first independent group of *condictiones* was based on a specific use of the term "performance" *(Leistung)* under unjustified enrichment law. The term "performance" in section 812 (1) sentence 1 alt. 1 BGB represents the "conscious and goal-oriented

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[34] DETLEF KÖNIG & ERNST VON CAEMMERER, UNGERECHTFERTIGTE BEREICHERUNG 186 (1985) (Ger.).

[35] *See* ERICH JUNG, DIE BEREICHERUNGSANSPRÜCHE UND DER MANGEL DES "RECHTLICHEN GRUNDES" 26 (1902) (Ger.); WALTER WILBURG, DIE LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG NACH ÖSTERREICHISCHEM UND DEUTSCHEM RECHT (1934) (Ger.). Building upon Wilburg's assessment: ERNST VON CAEMMERER, *Bereicherung und unerlaubte Handlung*, *in* FESTSCHRIFT FÜR RABEL (BD.1) 333 (1954) (Ger.); HARM PETER WESTERMANN, DIE CAUSA IM FRANZÖSISCHEN UND DEUTSCHEN ZIVILRECHT (1967); JAN WILHELM, RECHTSVERLETZUNG UND VERMÖGENSENTSCHEIDUNG ALS GRUNDLAGEN UND GRENZEN DES ANSPRUCHS AUS UNGERECHTFERTIGTER BEREICHERUNG (1973) (Ger.).

[36] *See* WILBURG, *supra* note 35, at 27; VON CAEMMERER, *supra* note 35, at 342, 353; Erich Jung also already draws a distinction between condictiones based on performance and otherwise, but still without the dogmatic stridency of the scholars following him. *See* JUNG, *supra* note 35, at 26. *See also* HANS-WILHELM KÖTTER, *Zur Rechtsnatur der Leistungskondiktion*, 153 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 193 (1954) (Ger.).

[37] WILBURG, *supra* note 35, at 49, 133.

[38] *Cf.* BGHZ 40, 272; 56, 239; 58, 184; most recently 167, 118; 185, 341 (Ger.). For legal commentaries, *see* DIETER MEDICUS & JENS PETERSEN, BÜRGERLICHES RECHT n.665 (23rd ed. 2011) (Ger.); SASCHA BECK, DIE ZUORDNUNGSBESTIMMUNG IM RAHMEN DER LEISTUNG 347 (2008) (Ger.); HANS JOSEF WIELING, BEREICHERUNGSRECHT 4 (4th ed. 2007) (Ger.).

increase of the assets of another".[39] This goal pursued by the performer is supposed to consist of the fulfilment of a contractual or legal obligation or the bringing about of a certain behaviour on the part of the recipient.[40] A good example would be the transfer of assets to fulfil an act of sale. Despite its largely unanimous acceptance, the term "performance" has remained controversial with regard to its content. Particularly in cases where multiple parties were involved, a juristic terminology has been developed which only very few scholars completely master. In fact, there is talk of an "almost impenetrable dogmatic thicket,"[41] while many others see a "spectre" haunting civil law.[42]

(b) Non-performance Condictiones

Non-performance *condictiones,* are attributed to the second category under the theory of separation of claims. They are regulated as an independent category in section 812 (1) sentence 1 alt. 2 BGB. Thus, even things that did not enter into the assets of another due to the intention of the performer, but which the other person obtained at the expense of another due to his action or other circumstances – such as deprivation, use, consumption, processing, and disposition – would also be actionable.[43] First and foremost among the non-performance *condictiones*, which are not defined separately in the law,[44] is the *condictio* of interference with another's rights, which has as its subject matter the encroachment on an asset which is allocated to the enrichment-creditor by the

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[39] KÖTTER, *supra* note 36; *see also* consolidated case law since BGHZ 40, 272; 56, 239; 58, 184 (Ger.). The term "performance," above all the intended purpose, is not without controversy among the proponents of the theory of separation of claims. The views fluctuate between a subjectively one-sided act on the part of the "performer," which merely requires the existence of an attributable natural will, and the nature of the intended purpose as a legal transaction (as presumably ASTRID STADLER, *in* OTHMAR JAUERNIG, BÜRGERLICHES GESETZBUCH, 1104, 1105 (§ 812 margin note 6) (13th ed. 2009) (Ger.), in any event in the cases in which the intended purpose is at the same time supposed to be a redemption clause within the meaning of § 366 BGB), all the way to a contractual agreement between the performer and the recipient (as in Horst Ehmann, *Über den Begriff des rechtlichen Grundes im Sinne des § 812 BGB*, 1969 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 398) (Ger.).

[40] Who wants any comprehensible grounds to be sufficient to comprise a causa. *See* WOLF, *supra* note 27, at 29. *See also* VON CAEMMERER, *supra* note 35, at 371. Westermann differentiates between causae based on an agreement of the parties, or lacking of such an agreement, on the typical meaning of disposition of property, and statutory causae, which stand in their respective connection to the disposition of property as an overall transaction. *See* WESTERMANN, *supra* note 35, at 78.

[41] MANFRED LIEB, *Das Bereicherungsrecht de lege ferenda*, 1982 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2034 (Ger.). For König, the complexity of the German unjustified enrichment law is often the subject of complaints by the author(s) in their introductions to commentaries and textbooks. *See*, KÖNIG & VON CAEMMERER, *supra* note 34, at 14.

[42] MANFRED HARDER, *Das Ende des bereicherungsrechtlichen Leistungsbegriffs*; 1979 JURISTISCHE SCHULUNG [JuS] 76 (Ger.). Extensively on the term "performance" *see* Kötter, *supra* note 36; *see also* Ulrich Bälz, *Leistung – Rückgriff – Durchgriff*, *in* FESTSCHRIFT FÜR JOACHIM GERNHUBER ZUM 70. GEBURTSTAG 3 (1993) (Ger.); *contra* Werner Flume, *Der Bereicherungsausgleich im Mehrpersonenverhältnis*, 199 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 1, 9 (1999) (Ger.).

[43] WILBURG, *supra* note 35, at 15.

[44] After all, the historical lawmakers has already conceived of section 812 (1) BGB (the former section 748 (1) BGB-E) as a catch-all norm, *cf.* MARTINEK & LIEB, *supra* note 1.

legal system and thus is protected by law. The legal consequence of such encroachment is the restitution of the benefit obtained through the interference.[45] In most cases, encroachments are made upon the ownership position of the person from whose assets the enriched person has obtained his benefit. However, protection against interference with another's rights under unjustified enrichment law is also enjoyed by other rights that are recognised and protected by the legal system, such as copyrights, receivables, legitimate possession and general personality rights. Accordingly, the status quo of the legal order is restored with the help of the *condictio* of interference with another's rights, because the person whose legal position has been interfered with is entitled by law to the use of a thing or other benefit.[46] Thus, the *condictio* of shifts in wealth "otherwise" serves the protection of personal assets.[47] The offsetting of a shift in wealth under German law is affected exclusively through the element of the legal rule governing the *condictio* of interference with another's rights.

Other legally and empirically important groups of non-performance *condictiones* involve cases of recourse due to payment on the debt of another (section 267 BGB) or the assertion of claims due to joint liability for debts and other cases of sacrifices of one's own assets for the improvement of another's asset, as a result of which the owner of that asset saves on costs.[48]

(c) The Doctrine of Subsidiarity

The relationship of a performance *condictio* and a non-performance *condictio* to

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[45] Although the interference with another's rights condictio is similar to tort claims, unlike them it pursues a different purpose. While tort claims in German Law compensate by way of restitution in kind what the damaged party has lost, the condictio draws from what the enriched person (still) has too much of. Thus, the content and scope of a damages claim goes further than a condictio claim, since the compensation for the damage can be greater than the debtor is in a position to pay from his assets. Consequently, a damages claim is linked to more stringent prerequisites, primarily with regard to protected legal interests, unlawfulness and the fault of the damaging party. If the interferer has acted culpably, he will be liable for damages pursuant to section 823 (1) BGB, if he acted with intent, he will additionally have to surrender the amount demanded on due to acting as an agent without authority pursuant to section 687 (2) BGB.

[46] It is occasionally argued that the unjustified enrichment must have been obtained unlawfully, *see* FRITZ SCHULZ, *System der Rechte auf den Eingriffserwerb*, 105 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 1 (1909) (Ger.); ENNECCERUS & LEHMANN, *supra* note 32, § 222. However, this assessment has a problem in covering cases in which assets of others are not burdened, but one's own assets have been reduced due to an error and this led to the enrichment of another. Moreover, unjustified enrichment law is not concerned with the act of acquisition itself which, if illegal, would trigger a condictio claim, but rather with the grounds (causa) for retaining the increase in assets.

[47] HELLWIG, *Erweiterung des Eigentumsschutzes durch persönliche Ansprüche*, 68 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 217 (1885) (Ger.); WILBURG, *supra* note 35, at 27; VON CAEMMERER, *supra* note 35, at 353.

[48] "Verwendungskondiktion" (condictio based on the improvement of another's assets); VON CAEMMERER, *supra* note 35, at 366. Of course this conclusion was not without controversy, but other norms also provide for claims for compensation for improvements of another's assets, e.g. §§ 994 et seq. BGB. Additionally, a problem is presented if the enriched person is opposed to the enrichment, so-called "undesired enrichment" (aufgedrängte Bereicherung); *See also* RGZ 158, 394 (Ger.).

each other does not pose a problem in a two-person relationship. If the assets of another are increased due to a performance, an enrichment in any other manner cannot exist. On the other hand, where three or more persons are, problems arrive in the reversal of unjustified enrichments since performance and non-performance relationships could exist side by side. If, for example, an item is acquired by two persons successively, no performance relationship exists between the seller and the final buyer. Performance relationships exist only between the seller and the intermediary buyer, as well as between the intermediary buyer and the final buyer. Here, the doctrine of subsidiarity would apply, according to which the reversal should be carried out primarily in the respective performance relationship. Its application to the case at hand would mean that in the event of the invalidity of both the purchase agreements and the agreement containing the transfer of the asset itself from the seller to the intermediary buyer, the seller would not be able to take action against the final buyer by way of the non-performance *condictio*. Instead, he would have to act against the intermediary buyer, who for his part would be able to take action against the final buyer.

Proceeding from Canaris, the priority of performance *condictiones* over non-performance *condictiones* rests on the following three valuation criteria: firstly, each party to an invalid contract or juridical act should retain its defences against the other party; secondly and conversely, each party should be protected against defences that the other party to its contract derives from its legal relationship to a third party; and thirdly, each party should only bear the risk of insolvency which it itself has chosen to bear as a party to the contract.[49] These criteria are suitable for bringing about equitable results and should also be taken into account in future regulations, however they may be structured.

4. The Relevance of the Legal Basis in Light of the Unification Model and the Separation of Claims Model

The focal point of the question of whether one will be allowed to retain assets or must return them is the legal basis for the enrichment, the *causa*, which determines whether the enrichment is justified.

Very early on, the recognition carried the day that the question of the justification of a shift in wealth is actually a question about the uppermost goals of the legal system. This question incorporates the material principle of justice, for example with regard to shifts in wealth, which the law does permit on more weighty grounds, such as protection

[49] Fundamentally, CLAUS-WILHELM CANARIS, *Der Bereicherungsausgleich im Dreipersonenverhältnis*, *in* FESTSCHRIFT LARENZ 799 (1973) [hereinafter CANARIS, *Der Bereicherungsausgleich im Dreipersonenverhältnis*] (Ger.); CLAUS-WILHELM CANARIS, *Der Bereicherungsausgleich im bargeldlosen Zahlungsverkehr*, 1980 WERTPAPIER-MITTEILUNGEN 354 [hereinafter CANARIS, *Der Bereicherungsausgleich im bargeldlosen Zahlungsverkehr*] (Ger.).

of transactions and protection of legitimate expectations.[50]

The key point of departure for a justification of a shift in wealth is the nature of the enriching act itself, which determines whether the legal order will allow the enriched person to keep the benefit or, due to a conflict with the rules on the protection of personal assets, order the surrender of the benefit. Not only, but primarily, the advocates of the doctrine of separation of claims can be credited with the important recognition that there can be an essential difference in possible shifts in wealth and that the legal basis must be based on their particularities[51]: If a shift in wealth falls under the category of performance *condictiones*, it has no legal basis if it did not lead to the fulfilment of an obligation of the disadvantaged person. If the shift in wealth consisted of a removal, use, consumption, processing or disposition – at the expense of another – it has no legal basis if the enrichment-debtor has interfered with the legal position allocated to the owner, or the holder of another absolutely protected right, without being legally entitled to the benefit derived therefrom.[52] The strict division of offences between the types of *condictio* with and without performance leads – necessarily – to a stronger differentiation of the lack of legal basis for the respective type of *condictio*. The justifying grounds cannot be determined without a typology of the unjustified enrichment claims. Consequently, the type of *condictio* and the legal basis are indissolubly bound to each other. The performance *condictiones* involve the unwinding of failed performances or the unwinding of performances once the contract or juridical act has been nullified. As a result, the unlawfulness of the enrichment derives from the lack of a contractual or statutory obligation. Thus, the intended purpose of the performance cannot be achieved for lack of a claim to the performance.[53] In the case of a non-performance *condictio*, primarily statutory provisions or specific legal grounds of

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[50] CARL CROME, 2 SYSTEM DES DEUTSCHEN BÜRGERLICHEN RECHTS 979 (1902) (Ger.).

[51] ENNECCERUS & LEHMANN, *supra* note 32, § 222-b), at 887

[52] On the legal grounds with regard to the individual condictiones, *see* WESTERMANN, *supra* note 35, at 177, 201.

[53] For a fundamental description of the "teleological" or "final definition of performance," *see* KÖTTER, *supra* note 36; VON CAEMMERER, *supra* note 35, at 342; critical on the final definition of performance, *see* HERMANN WEITNAUER, *Ungerechtfertigte Bereicherung*, in *Grundlagen, Tendenzen, Perspektiven, Symposium der Juristischen Fakultät der Universität Heidelberg zum Gedenken an Professor Dr. Iur. Detlef König*, 25 et seq. (1984) (Ger.), on failure to attain objective as a lack of legal basis. Already Wilburg, following the example set by von Savigny, argued that an error on the part of the performer should not be used as a basis, but solely and objectively the existence of a contractual relationship. *See* WILBURG, *supra* note 35, at 11. He also rejected the doctrine of the illegality of enrichment that was criticised by Schulz primarily for the non-performance condictio. *See* WILBURG, *supra* note 35, at 26; SCHULZ, *supra* note 46, at 479; VON CAEMMERER, *supra* note 35, at 352. An overview of the developments of the causa doctrine within the separation of claims model can be found in GUANGYU FU, DAS CAUSAPROBLEM IM DEUTSCHEN BEREICHERUNGSRECHT 140 (2010) (Ger.). For a detailed critique of the term "performance," with numerous references, *see* WOLF, *supra* note 27, at 77. A correction of the antiquated term "performance" is proposed by, inter alia, Alexander Schaller. *See* ALEXANDER SCHALLER, LEISTUNGSKONDIKTION UND "SONSTIGE KONDIKTION" AUF DER GRUNDLAGE DES EINHEITLICHEN GESETZLICHEN KONDIKTIONSPRINZIPS 21 (2003) (Ger.).

justification come into consideration as grounds for the recipient to retain the benefit.[54]

III. Modern European Reform Efforts

A. The Introduction to the Principles of European Law (PEL)

As I mentioned early on, the *Principles of European Law (PEL)* on unjustified enrichment law build on the concept of a unified basic rule. The authors of the PEL sought to keep the text "suitably concise," and they saw no compelling reason to distinguish between performance and non-performance *condictiones*. The basic rule contains four prerequisites and reads as follows: "*A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment."* Paragraph 2 states that this basic rule is only to be read in connection with the following provisions, which define the features of the elements described in the basic rule in more detail. This provision rigorously implements the unification model, which can easily be followed from a German perspective. The PEL continue the doctrine handed down by von Savigny.

B. Lack of Justification for an Enrichment

1. Art. 2:101 paragraph (1)

The second chapter takes up the justification for enrichment in more detail. In the basic rule – Art. 2:101 paragraph (1) – an enrichment is generally presumed to be unjustified. Paragraph (1) (a) and (b) then sets out circumstances that justify an enrichment. An enrichment is unjustified only if none of the preconditions set forth in either subparagraph (a) or subparagraph (b) is met.[55]

(a) Art. 2:101 paragraph (1) (a)

An enrichment is justified pursuant to subparagraph (a) if the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law.

The fact that an attempt is being made to define the legal basis in a positive manner is welcome. From a German point of view, however, one can find fault with the fact that in listing the possible legal bases in subparagraph (a), the rule does not draw a distinction between the manners in which the enriched person obtained the enrichment. The list

[54] See LIEB *supra* note 1 (§ 812 margin note 10 et seq.) (4th ed. 2004)

[55] The equally possible approach which proceeds from the assumption that enrichment is generally justified, was rejected. *See* VON BAR & SWANN, *supra* note 3, at 214 (A.2).

contains legal bases that could justify a performance as well as an interference with the rights of another and appears to make all of the legal bases listed available for both performance and non-performance cases. In German law, on the one hand, the legal basis for performance *condictiones* is based on the performance relationship, i.e. the contractual relationship or the claim for performance deriving from it.[56] In the case of interference *condictiones,* on the other hand, the essential issue is whether the enrichment infringes on the allocation of assets by law.[57] What is decisive is whether the enriched person is allowed to keep what he obtained under the general rules of the allocation of personal assets.[58] Even if the unified model is to be welcomed from the German point of view in that it comes closest to the intentions of the fathers of the BGB,[59] the definition of the *causa* must be differentiated according to how the enrichment was obtained. After all, a performance *condictio* and an interference *condictio* have different protective functions. The former primarily protects private autonomy, while the latter protects the legal interests of the disenriched. Ideally, these different protective functions would be reflected in the dogmatics of the legal basis, but this was not implemented in the *PEL* with the combined regulation of the various legal bases in paragraph (1) (a). Because of this, in practice, it would be entirely possible to justify interferences with another's rights on the basis of existing contractual connections, which would increase the danger of people taking the law into their own hands. For example, the creditor of a purchase agreement[60] could obtain the purchase item by means of trespass, and would not need to return it to the debtor because Art. 2 (1) (a), without making a differentiation, also provides for an existing purchase agreement as a possible legal basis for the enrichment – a possibility that would not be open to the purchaser under German law. This clearly tarnishes the good image of the positive regulation of the legal basis. A major dogmatic advance of German unjustified enrichment law has apparently not registered on the European level. The norm must now once again be construed by way of teleological reduction such that – depending on the mode of enrichment involved – only certain legal bases are suitable to serve as justifications for the enrichment.

(b) Art. 2:101 paragraph (1) (b)

Pursuant to paragraph (1) (b), an enrichment is also justified if the disadvantaged person consented freely and without error to the disadvantage. This explicit connection

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[56] This is the objective theory; according to the – rather unpersuasive – subjective theory, the purpose pursued with the performance is to be taken as a basis, *cf.* 2 KARL LARENZ & CLAUS-WILHELM CANARIS, LEHRBUCH DES SCHULDRECHTS (PT.2: BESONDERER TEIL) § 67-III (13th ed. 1994) (Ger.).

[57] BGH NJW 1990, 52.

[58] 5 DIETER SCHWAB, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, 1448 (§ 812 margin note 346) (5th ed. 2009) (Ger.).

[59] *Id.*

[60] In any case to the extent specific obligation was agreed upon.

to errors is also to be found in the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB) which, along with the lack of an obligation, requires the existence of an error regarding the existence of such obligation (section 1431 ABGB). English law also differentiates within the framework of the "unjust factors" approach as to whether the enrichment came about by error or by other forms of impaired consent (e.g. duress, undue influence). German law does not provide for such a legal linkage to impaired consent, or only indirectly in that contracts which are based on the impaired consent can be rescinded and then can no longer serve as a legal basis. The actual differences among the various legal systems are based more on the question of which errors the respective legal system deems necessary to take into account.

2. Art. 2:101 paragraph (4)

Pursuant to Art. 2:101 paragraph (4), an enrichment is unjustified if it was conferred for a purpose which is not achieved or with an expectation that is not realised. This provision draws on the *condictio ob rem*, which can be found in Roman and German law, and expands Art. 2:101 paragraph (1). Consequently, even if the enriched person had a legal or contractual claim to the enrichment or the disadvantaged person has consented freely and without error, the enrichment can be unjustified pursuant to paragraph 4.[61]

The incorporation of the *condictio ob rem* was necessary so that cases in which a purpose is not achieved would also be properly covered. Jurists coming from jurisdictions that do not recognise this type of *condictio* may find it difficult to grasp the point of it, at least without the help of commentaries. For example, some scholars attribute cases of erroneous payment on a non-existent debt not only to paragraph (1), but also to paragraph (4).[62]

3. Conclusion

Thus, Art. 2:101 of the PEL on unjustified enrichment law leaves us with a mixed impression. On the one hand, the positive regulation of the legal basis can be considered to be an advance over German law. On the other hand, the failure to take *condictiones* based on performance and interference with another's rights into account when determining the *causa* ignores essential findings of German civil law dogmatics. Moreover, the complicated structure of this provision and the incorporation of many different European legal systems make it all the more difficult to comprehend.

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[61] The purpose pursued by the enrichment must be causal for the performance. *See* VON BAR & SWANN, *supra* note 3, at 244 (E.83).

[62] JAN SMITS & VANESSA MAK, *Unjustified Enrichment*, *in* A FACTUAL ASSESSMENT OF THE DRAFT COMMON FRAME OF REFERENCE 259 (2011).

C. Enrichment, Disadvantage and Attribution

The provisions of the third chapter define the features of enrichment and disadvantage. They set out the two in a mirror image of each other and contain a conclusive list of all of the different kinds of enrichment and disadvantage.[63] These norms are supplemented by Chapter 4, which provides that an unjustified enrichment claim exists only if the enrichment of the respondent can be attributed to the disadvantage of the claimant.[64] While the first provision in this chapter – Art. 4:101 – regulates the connection between enrichment and disadvantage in relatively simple cases, the subsequent provisions concern themselves with the question of attribution in tripartite relationships. In this chapter too, the unification model is rigorously implemented. None of the provisions differentiates between whether the enrichment was obtained by performance or in some other ways. At least for German jurists, who are accustomed to the separation of claims, it is difficult to assess at first glance whether this covers every scenario that could arise. The fact that the attribution provisions are not conclusive, however, should also make it possible for the most part to arrive at a proper solution in those cases which are not covered, by further developing the law, if need be. Ultimately, though, the attribution provisions must be measured against the evaluation criteria set by Canaris.[65] It is easier to meet these criteria if, in the area of attribution, a stringent dogmatic distinction is drawn between performance and non-performance *condictiones* and priority is accorded to the former in general, but not always, depending on the actual situation involved. Nonetheless, the attribution norms provide jurists with much more to work with than section 812 German Civil Code and, at least in this sense, provide a positive contrast to the German provisions.

IV. Afterword

Viewed as a whole, the complete lack of consideration of the teachings deriving from the separation of claims model is a disappointment to the German jurists. Even if the historically developed unification model is not without a certain elegance, the dogmatic advances of the separation of claims model should not be ignored. However, we do not want to give up hope that Europe will still be able to bring about something better – and not only in the area of unjustified enrichment law. Unity must not be allowed to be a step backward.

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[63] VON BAR/SWANN, *supra* note 3, at 343-344 (Comments A. 1).
[64] VON BAR/SWANN, *supra* note 3, at 344 (Comments A. 4).
[65] Fundamentally, CANARIS, *Der Bereicherungsausgleich im Dreipersonenverhältnis*, *supra* note 49; CANARIS, *Der Bereicherungsausgleich im bargeldlosen Zahlungsverkehr*, *supra* note 49.