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ANOTHER CIVILIAN VIEW OF UNJUST ENRICHMENT'S STRUCTURAL DEBATE

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ABSTRACT. *This article seeks to illustrate the kinds of difficulties that may follow from renouncing a unified approach to restitutionary claims for unjust enrichment. To do so, it draws on the experience of the French legal system, where the notion of unjustified enrichment describes a maxim inspiring various doctrines which have evolved in relative isolation from each other. Relying on this experience, the article argues that the objections recently raised by Nils Jansen against the German law of unjustified enrichment should not lead English lawyers to downplay the value of a unified approach to the subject.*

KEYWORDS: *unjust enrichment, restitution, quasi-contracts, civil law.*

I. INTRODUCTION

The German law of unjustified enrichment has long been a point of reference for comparative lawyers. Its conventional approach to the subject – which is sometimes simply described as the modern civilian approach[1] – has been praised as containing the most sophisticated solutions to the issues raised by obligations outside contracts and wrongs,[2] and even as providing a universal map for the comparative analysis of enrichment problems.[3] It is no coincidence that German scholarship has been instrumental in the development of the law in many jurisdictions within and outside the civilian tradition.[4]

This prominence of the German approach probably explains the impact attained by Professor Nils Jansen's bold call that the approach should be

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[1] R. Zimmermann, "Unjustified Enrichment: The Modern Civilian Approach" (1995) 15 O.J.L.S. 403.

[2] J. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston 1951), 91–92; B. Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law" (1961) 36 Tul.L.Rev. 605, 610; J. Du Plessis, "Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions" (2005) 122 S.A.L.J. 142, 155.

[3] E. Descheemaeker, "The French Law of Unjustified Enrichment" (2017) 25 R.L.R. 77, 96.

[4] D. Visser, "Unjustified Enrichment in Comparative Perspective" in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), 962–63.

abandoned. In a recent paper, he relies on a perceived tendency of German courts and commentators to explain restitutionary claims in others parts of the law to argue that a unifying concept of unjustified enrichment would be too abstract to provide solutions that are both sufficiently responsive to different settings and specific enough to be helpful in deciding individual claims. This would be the case, for example, of the restitutionary claims involving undue transfers between more than two parties, or those available after the unwinding of failed contracts, all of which seem to have been recently explained by German lawyers as remedies in contract law.[5]

Jansen's arguments have received particular attention in the common law world. They are sometimes presented as supporting a reinvigorated criticism against the unified approach to unjust enrichment claims adopted by English courts.[6] For example, Professor Robert Stevens has recently invited common lawyers to take comparative law seriously and pay closer attention to Jansen's case against the German unified approach.[7] This seems sound advice indeed. If it is true that despite centuries of development this predominant civilian model of unjustified enrichment has ultimately proven to be unhelpful, it may be sensible to spare English law from going down a similarly unrewarding road. Jansen's arguments may confirm that the unjust enrichment generalisation adds unnecessary complexity to a part of the law which is better expounded in distinct units.[8]

Considerably less attention has been given to the fact that the fragmentary model that Jansen presents as an alternative to the German unified approach is also known in other civilian legal systems. In fact, many civilian jurisdictions have followed the example of the French legal system, where the notion of unjustified enrichment is not taken as describing a unified area of the law, but rather a vague maxim of justice inspiring restitutionary claims governed by rules which have evolved in relative isolation. Importantly, this fragmentary approach has not resulted in easier solutions to the restitutionary problems dealt with in Germany through a unified framework. At least in France, the application of isolated rules governing different restitutionary claims has seemed to involve difficulties just as serious as those described by Jansen.

Focusing on the French experience, this article will argue that the concerns raised by Jansen should not lead us to downplay the value of a unified approach to some of the obligations originating outside contracts and wrongs. To do so, the article will proceed in three substantive parts. Section II will describe the French approach to some of the restitutionary claims grouped together in German law under a unified unjustified

[5] N. Jansen, "Farewell to Unjustified Enrichment?" (2016) 20 Edin.L.R. 123.
[6] A. Burrows, "In Defence of Unjust Enrichment" (2019) 78(3) C.L.J. 521, 522.
[7] R. Stevens, "The Unjust Enrichment Disaster" (2018) 134 L.Q.R. 574, 601.
[8] S. Hedley, "'Farewell to Unjustified Enrichment?' A Common Law Response" (2016) 20 Edin.L.R. 326.

enrichment scheme. Section III will show that the French model does not necessarily offer an easier solution to the problems presented by Jansen as failures of the German unified approach. Against this comparative background, Section IV will suggest that the objections raised by Jansen are inconclusive and should not be accepted as sufficient to justify a rejection of any unified approach to the subject.

II. An Alternative Civilian Approach

Jansen's criticism of the German unified approach to unjustified enrichment rests on three related propositions. First, the different legal conceptions inspiring the unified theory of unjustified enrichment – the Roman *condictiones* and the natural law doctrine of restitution – would be the basis of fundamentally different claims. Second, the situations analysed in German law as cases of "enrichment by transfer" would be better explained as giving rise to remedies governed by different parts of the law of obligations. Third, the notion of unjustified enrichment may offer a general explanation for some claims, but it would be too abstract to provide the unifying theme of an integrated field of the law. While these propositions may appear as controversial to some German lawyers, they seem well entrenched in French law, where important distinctions are drawn between the restitutionary claims available in situations which lie at the core of the German law of unjustified enrichment.

A. Roman Condictiones and the Doctrine of Restitution

If we believe Jansen, the modern civilian approach to unjustified enrichment was built upon two distinct intellectual foundations. One was the Roman *condictiones* or actions allowing the claimant to recover money or things in a variety of circumstances where the defendant was bound to return what he or she had received, particularly in cases of undue or failing transfers. The other was the natural law doctrine of restitution, which imposed a duty on the defendant to return any enrichment obtained by the infringement of a claimant's right, particularly a property right.[9]

French authors of the *ancien droit* were not particularly prolific on the topic of unjustified enrichment. Yet there seems to be little doubt that they were exposed to similar ideas.[10] This influence is apparent, for example, in the link traditionally recognised by French lawyers between some of the actions inspired in the Roman *condictiones* and an equitable duty sometimes imposed to the defendant to return any enrichment

[9] Jansen, "Farewell", 125–30.

[10] E. Schrage and B. Nicholas, "Unjust Enrichment and the Law of Restitution: A Comparison" in E. Schrage (ed.), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin 1995), 21–22.

obtained at the expense of the claimant. An interesting example is provided by the *condictio indebiti*, the Roman action for claiming a performance rendered with the objective of fulfilling an obligation which did not in fact exist. This action has long been explained in French law as effecting an obligation similar to that of repaying a loan, or *mutuum*. A proper *mutuum*, however, only involved assets which could be weighted or counted. Money was the prime example. In cases where the claimant's performance did not involve such an asset, the influential writings of Cujas concluded that the *condictio indebiti* could not be assimilated to a *mutuum*, and should adopt instead the form of an equitable action, a *condictio ex bono et aequo*, recognised to reverse the defendant's enrichment.[11]

Unlike their German counterparts, French authors never integrated these ideas into a general unjustified enrichment theory. This is often explained in two developments. The first was the elevation by Domat of the notion of "legal basis" or *cause* as a requirement of every contract in French law. In his important works, Domat seems to have made the validity of every contract depend on the existence of a sufficient *cause*, the absence of which would render the contract void and trigger the restitution of all benefits received under it. According to a generally accepted opinion, by doing so he effectively superseded most of the Roman *condictiones* dealing with failed transfers, and rendered the development of a unified theory of unjustified enrichment a considerably less pressing issue.[12] The second development was the casuistic approach taken by Pothier while discussing obligations originating outside contracts and delicts. The fact that this author focused mainly on the Roman actions of *negotiorum gestio* and *condictio indebiti* has been blamed for the lack of recognition by the French Civil Code of 1804 of unjustified enrichment as a general source of obligations.[13]

Neither of these developments was expressly acknowledged by the drafters of the French Civil Code a reason for rejecting a unified notion of unjustified enrichment. The fact remains, however, that the French Code did not include a general clause on unjustified enrichment, nor any explicit reference to the common foundation of claims which earlier French authors sometimes related to this idea.[14] Apart from recognising the quasi-contracts of *negotiorum gestio* and *condictio indebiti*, and a number of other scattered

[11] J.M. Augustin, "Introduction Historique à l'Enrichissement sans Cause en Droit Français" in V. Mannino and C. Ophèle (eds.), *L'Enrichissement sans Cause – La Classification des Sources des Obligations* (Paris 2007), 33.

[12] F. Goré, *L'Enrichissement aux Dépens d'Autrui* (Paris 1949), 23–24; C. Filios, *L'Enrichissement sans Cause en Droit Privé Français: Analyse Interne et Vues Comparatives* (Brussels 1999), 42–43; N. Davrados, "Demystifying Enrichment without Cause" (2018) 78 La.L.Rev. 1123, 1234.

[13] P. Roubier, "La Position Française en Matière d'Enrichissement sans Cause" in *L'Enrichissement sans Cause – La Représentation dans les Actes Juridiques: Travaux de l'Association Henri Capitant*, vol. IV: *Journées Néerlandaises* (Paris 1949), 42; Dawson, *Unjust Enrichment*, 95–96; J.M. Augustin, "Les Classifications des Sources des Obligations de Domat au Code Civil" in Mannino and Ophèle, *L'Enrichissement sans Cause*, 126–27.

[14] Schrage and Nicholas, "Unjust Enrichment", 22.

provisions governing loosely related problems – like improvements on another's land and payments made to persons lacking capacity – the French Code of 1804 provided no support for accepting broader ideas on enrichment liability. In fact, the approach adopted by such provisions is sometimes described in other civilian jurisdictions as epitomising a more traditional alternative to the integrated unjustified enrichment theory underpinning the German unified approach.[15] The Roman *condictiones* and the doctrine of restitution may have played a role in the development of some of the restitutionary claims provided by the French Code of 1804. But they did not crystallise in a general theory providing the basis for a systematically independent area of modern French law.

B. Different Sets of Rules for Different Claims

The label "enrichment by transfer" identifies an important subset of the restitutionary claims which German law brings together under its unified approach to unjustified enrichment.[16] These situations include cases of benefits conferred in pursuance of failed contracts and benefits resulting from the discharge of non-existent obligations, which sometimes can take place in settings involving more than two parties. In French law, the restitutionary claims recognised in these situations have been customarily explained through doctrines belonging to different parts of the law of obligations. Three of them seem particularly relevant from a comparative perspective.

The first is the theory of nullity of contracts, or *nullité*. One of the distinctive features of the French approach to restitutionary claims is the difference recognised by French lawyers between the rules dealing with benefits conferred in performance of non-existent obligations generally, and the rules dealing specifically with benefits conferred in pursuance of contracts that are avoided.[17] In the case of avoided contracts, particular importance is attached to the fact that the legal ground initially explaining the provision of a benefit to the defendant was an agreement between the claimant and the defendant. This fact would justify the application of different rules governing limitation periods, the subsistence of contractual securities, and some restrictions to the measure of recovery based on the legal capacity of the parties to the contract.[18] While the claim available in this kind of situation is referred to as "restitution", the rules governing this legal response are generally seen as part of the law of contracts.[19]

[15] R. Feenstra, "Grotius: Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law" in Schrage, *Unjust Enrichment*, 236.
[16] Jansen, "Farewell", 136.
[17] Zimmermann, "Unjustified Enrichment", 409.
[18] A. Sériaux, *Manuel de Droit des Obligations*, 3rd ed. (Paris 2018), 213.
[19] French authors often emphasise that the historical origin of the theory of nullity should be traced not to the Roman *condictiones*, but to the doctrine of *restitutio in integrum.* See e.g. Goré, *L'Enrichissement aux Dépens*, 24.

French law deals with other benefits conferred by transfer through the rules of undue payment, or *paiement de l'indu.* Following the model of the Roman *condictio indebiti*, French law explains the duty to return a benefit conferred in performance of an obligation which did not in fact exist as arising from a distinct quasi-contract.[20] The rationale behind this quasi-contract is found in the lack of legal ground for the retention of a benefit which cannot be justified as the payment of an existing debt. In light of this feature, it is difficult to deny that a very similar logic underlies the recognition of the restitutionary claims arising from the quasi-contract of undue payment, and the restitutionary claims afforded by the theory of nullity described above.[21] Despite the similarities, however, French courts have explicitly concluded that the availability of a restitutionary claim in each of these situations should be the subject of different sets of rules.[22]

Beyond situations falling within the scope of the theory of nullity of contracts and the quasi-contract of undue payment, French law recognises restitutionary claims on the basis of a general action in unjustified enrichment, or *enrichissement injustifié*, which is also known as the action *de in rem verso*. Unlike the claims based on the two previous doctrines, this general action was not originally included in the French Civil Code of 1804, but was developed later by courts and commentators. After the recent Reform to the French Civil Code of 2016, the new Articles 1303 to 1303-4 recognise this action in situations where the law affords no other way of recovering benefits received by the defendant without legal ground.[23] To a significant extent, these provisions seem to expand the same principle of liability underlying the narrower action of undue payment, in particular to cover situations involving more than two parties.[24] However, each of these doctrines is subject to a distinct set of rules, which French lawyers refuse to subsume into a single regime.[25]

C. A General Maxim

This assortment of rules has not prevented French lawyers from acknowledging a common – diffuse – foundation underpinning restitutionary

[20] Descheemaeker, "The French Law", 80–81.

[21] J. Carbonnier, Droit Civil, Volume II (Paris 2004). This conclusion is not unanimously endorsed. See P. Malaurie, L. Aynès and P. Stoffel-Munck, *Droit des Obligations*, 10th ed. (Paris 2018), 607–08; Sériaux, *Obligations*, 214.

[22] See e.g. Civ. 1re, 24 sept. 2002, D. 2003. 369, note J.L. Aubert.

[23] An English version of the new provisions by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker is included as an appendix in J. Cartwright and S. Whittaker (eds.), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Oxford 2017), 410.

[24] I. Defrenois-Souleau, "La Répétition de l'Indu Objectif" (1989) 88 R.T.D.Civ. 243. See also B. Starck, H. Roland and L. Boyer, *Droit Civil: Les Obligations. 2. Contrat*, 6th ed. (Paris 1998), at [2126].

[25] Some of the reasons justifying these singularities are spelt out in P. Rémy, "Des Autres Sources d'Obligations" in F. Terré (ed.), *Pour une Réforme du Régime Général des Obligations* (Paris 2013), 36–37.

claims.[26] This common foundation was noted during the debate preceding the recent Reform to the French Civil Code, and it was relied upon by some commentators to justify the introduction of limited modifications to the rules governing these different claims.

For example, the new Articles 1352 to 1352-9 of the French Civil Code subject the restitutionary claims based on the theory of nullity and those based on the quasi-contract of undue payment to a new unified set of rules governing the measure of the claimant's recovery. Underlying this innovation seems to be the shared restitutionary objective pursued by both doctrines. As noted above, these are usually described as restoring a benefit retained by the defendant without a valid legal ground.[27] Likewise, the new Article 1302-1 of the French Civil Code effectively removes the requirement of an error on the part of the claimant in most common situations giving rise to an action in undue payment, thus bridging one of the most noticeable differences between this action and the action *de in rem verso*. This modification could be understood as confirming that the action in undue payment, just like the action *de in rem verso*, reflects the law's concern for preventing the defendant's enrichment, and not for reversing every consequence of the claimant's mistake.[28]

Importantly, however, the French adoption of these limited modifications does not mean that a unified and systematically independent area of the law can be identified with unjustified enrichment. The rules governing these and other restitutionary claims are still presented as belonging to different pockets of the law of obligations, and the idea of unjustified enrichment is predominantly considered as a maxim of justice existing at a very high level of generality. Compared to the unified approach described by Jansen as the one adopted by German law, the complex web of doctrines and rules which in French law may relate to this broad maxim seems indeed fragmentary.[29]

[26] See e.g. Malaurie et al., *Droit des Obligations*, 613–14; F. Terré, P. Simler, Y. Lequette and F. Chénedé, *Droit Civil: Les Obligations*, 12th ed. (Paris 2018), 1111–14; A. Bénabent, *Droit des Obligations*, 17th ed. (Paris 2018), 375–77.

[27] Interestingly, these provisions do not apply to the measure of recovery in a general unjustified enrichment claim. O. Deshayes, T. Genicon and Y.M. Laithier, *Réforme du Droit des Contrats, du Régime Général et de la Preuve des Obligations: Commentaire Article par Article*, 2nd ed. (Paris 2018), 919; G. Chantepie and M. Latina, *La Réforme du Droit des Obligations: Commentaire Théorique et Pratique dans l'Ordre du Code Civil*, 2nd ed. (Paris 2018), 944–45.

[28] Under the new provisions, the claimant does not need to show an error where there is no debt justifying the payment (*indu objectif*), nor where despite existing a debt, the claimant pays the wrong person (*indu subjectif actif*). The only cases where an error must be demonstrated is those where the claimant pays a person who, despite not being his or her creditor, was owed the debt by another person (*indu subjectif pasif*). For commentary, see Terré et al., *Droit Civil*, at [1292].

[29] For accounts describing the French model as "fragmentary", see Filios, *L'Enrichissement sans Cause*, 47; Du Plessis, "Towards a Rational Structure", 155.

III. The Challenges of Fragmentation

On the basis of the three propositions explained above, Jansen argues that a unified approach to unjustified enrichment like in Germany produces conceptual difficulties which eventually lead to its dissolution. To substantiate this claim, he points to specific problems faced by German lawyers while applying unjustified enrichment rules in different situations. That no unified approach is required to deal with the restitutionary claims arising in these situations is confirmed by the fact that French lawyers have traditionally analysed them quite separately from general theories of enrichment liability. But this is not the only insight revealed by a comparison of the German and French models. The French experience also shows that renouncing a unified approach may result in difficulties as serious as those troubling German lawyers. This section explores them in three different contexts: restitutionary claims in third-party situations, restitutionary claims following the unwinding of failed contracts, and restitutionary claims arising from quasi-contracts.

A. Third-party Situations

German courts and commentators have struggled to fit unjustified enrichment rules into some third-party situations. A particularly controversial example is provided by the case where X gives Y a cheque which is countermanded but is nonetheless paid by bank Z. The conventional treatment of this kind of case in German law, which is an extension of the principles behind restitution of enrichment by transfer in two-party settings, focuses on the performances discharging the underlying debt relationship between the parties: X would normally give the cheque to discharge an obligation towards Y, and Z would normally pay out on the cheque to discharge an obligation towards X. If X's obligation does not exist, X may recover from Y. If Z's obligation does not exist, Z may recover from X. If none of these obligations exist, X should recover from Y and Z should recover from X, except if the cheque is paid without a valid order from X, where Z may recover directly from Y. If, however, a valid order once existed but was later countermanded, additional considerations need to be introduced to protect Y's good faith reliance on the validity of payment.[30] According to Jansen, this overly complex and ultimate unpredictable set

[30] Where there is no valid payment order, Z's transfer to Y cannot be properly construed as a performance from X to Y. Until recently, it was widely accepted that if Y receives the payment without knowing of X's countermand, the restitutionary claim should be brought by X, because Y should not be made responsible for a misunderstanding taking place between X and Z. It should be noted, however, that in 2015 the German Federal Court departed from this position and concluded that a bank paying without a valid mandate should always be afforded a direct claim against the recipient, even if the latter was not aware of a countermand. On the difficulties posed by this kind of situations, sometimes referred to as "order situations", see S. Meier, "Mistaken Payments in Three-party Situations: A German View of English Law" (1999) 58 C.L.J. 567.

of rules and exceptions is considerably simplified when the position of the parties is directly analysed in light of what he refers to as general contract law arguments, like the importance of respecting Y's good faith receipt, and the convenience of enforcing X's responsibility for statements made in contractual relationships.[31]

French law has long recognised this kind of argument while dealing with restitutionary claims in similar three-party situations. A clear example can be found in the doctrine of apparent agency, or *mandat apparent*. Article 1154 of the French Civil Code provides that, as a general rule, the principal will only be liable for acts executed by an agent within the scope of the conferred powers. Where Z purports to pay Y acting on behalf of X but beyond these powers, French law will generally assume that no effective transfer has taken place between Z and Y, and thus that a claim to recover what Y received may be available.[32] But if Y can show that he or she had a legitimate reason to believe that Z was acting within the powers conferred by X, the transfer will be deemed as effective and no claim will lie against Y. Echoing Jansen's reasoning, French courts have often explained this solution as a way of respecting Y's good faith[33] and enforcing X's responsibility for statements.[34]

Unfortunately, this kind of argument seems to have been insufficient to provide adequate solutions in many other third-party restitution scenarios. A conspicuous example is the *Boudier* case, where the claimant sold fertiliser to a tenant farmer. After applying the fertiliser to the land but before paying its price, the tenant farmer became insolvent and was forced to return the fertilised land to the defendant landlord, who as a result received a benefit directly from the tenant farmer but at the expense of the claimant.[35] In the decades following the enactment of the Code, French lawyers tried to reconcile claims for benefits received in similar three-party situations with the rules provided for the quasi-contract of *negotiorum gestio*, or *gestion d'affaires*, an institution closely related to the contract of agency.[36] Eventually, however, they were forced to accept that these rules did not reflect adequately the genuine basis of the claimant's right, which did not rely on a real or fictional agreement between any of the parties, but exclusively on the equitable maxim forbidding the defendant's unjustified enrichment. This conclusion paved the way for the judicial recognition of the action *de in rem verso*.[37]

[31] Jansen, "Farewell", 140.
[32] P. Puig, *Contrats Spéciaux*, 7th ed. (Paris 2017), 730–31; H. Kenfack and S. Ringler, *Droit des Contrats Spéciaux* (Paris 2017), 231.
[33] See Cass. 3 civ., 15 déc. 2004, GDP 2005, IV, 2732, note J.J. Barbièri.
[34] See Cass. Ass. Plén., 13 déc. 1962, GDP 1963, I, 283, D. 63. 277, note J. Calais-Auloy; G. Cornu, "Mandat" (1963) R.T.D.Civ. 572.
[35] Req. 15 juin 1892, GAJC, t. 2, 12 éd., no 239; DP 1892. 1. 596; s. 1893. 1. 281, note J.E. Labbé.
[36] Filios, *L'Enrichissement sans Cause*, 81. On the link between *mandat* and *gestion d'affaires* in French law, see Rémy, "Des Autres Sources d'Obligations", 33.

The recognition of this action took place in a context where there was no general theory explaining the scope and limits of unjustified enrichment claims in less complicated two-party situations. The fragmentary approach of French law to these situations meant that the rules governing other well-known restitutionary claims – and particularly undue payment – had not been generalised into considerations applicable to situations not expressly covered by the Code. So instead of carefully extending the conceptual implications of established rules to decide third-party restitution situations like the one presented in *Boudier*, French courts created an original action subject to extremely loose requirements. The Cour de cassation famously noted that this action derives

> from the principle of equity which forbids enrichment at the expense of another, and since it has been regulated by no provision of the enacted law, its exercise is subject to no precise rules; it is sufficient that the plaintiff alleges and undertake to prove that as a result of some sacrifice or act on his part he has procured an advantage to the defendant.[38]

That this action was unreasonably broad was soon noted by French authors, who in the following years devised a number of important restrictions. But the somehow inorganic way in which these restrictions were developed resulted in a body of rules riddled with problems. The so-called rule of subsidiarity provides a clear illustration. The traditional view is that one of the main mechanisms keeping the action *de in rem verso* within reasonable boundaries is the requirement that no other action should be open to the claimant to obtain what belongs or is owed to him or her, and particularly actions arising from undue payment and *negotiorum gestio*. To date, there is significant uncertainty about the kind of cases where this rule is applicable. But in the few cases where the rule unquestionably applies, it allows recovery in circumstances under which most legal systems, and certainly the German, no recovery would be available. Thus where Y receives a benefit as a consequence of the performance of a contract between Z and X, it seems that the requirement of subsidiarity would be satisfied if, unable to recover from X due to its insolvency, Z brings a claim directly against Y. Unsurprisingly, this rule has been criticised for undermining the contractual allocation of risks as between X and Z.[39]

It may be true that the solutions adopted by German law in third-party restitution situations can be excessively complicated. But the simple

[37] J. Flour, J.L. Aubert and E. Savaux, *Les Obligations*, vol. II: *Le Fait Juridique*, 14th ed. (Paris 2011), 41.

[38] The translation is from Nicholas, "Unjustified Enrichment", 622. Roman law recognised an *actio de in rem verso*, but this action was not intended to be applied as a general remedy against unjustified enrichment. R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford 1996), 878–79.

[39] Descheemaeker, "The French Law", 93. Similar difficulties affect many other of the rules governing critical aspects of the *actio de in rem verso*, including the test to define the required link between claimant and defendant and the effect of the claimant's fault in the measure of recovery.

renunciation of any unjustified enrichment analysis and hoping that contractual arguments will do all the work does not seem a promising alternative. Reinterpreting the principles underlying claims like the action in undue payment in light of these arguments would further obscure the rules applicable in three-party situations which, as those dealt with by French law through the action *de in rem verso*, cannot be accommodated within a contractual logic. Banished from their place along with other better-known instances of restitutionary liability, these situations are likely to be abandoned to judicial discretion or unarticulated notions like the French subsidiarity. This, of course, was no mystery to the drafters of the German Civil Code, whose decision to remove the action *de in rem verso* from German law formed part of a deliberate effort to provide a principled solution to the enrichment issues arising in third-party restitution situations.[40]

B. Failed Contracts

German law has traditionally drawn a sharp line between cases of restitution after the termination of contracts and cases of restitution after the avoidance of them. In the first group of cases, we are concerned with the unravelling of a contract on the ground of its non-performance; in the second, with the annulment of a contract as a consequence of defects of consent or the lack of another requirement for its validity. In both groups of cases, unwinding the failed contract generally requires the parties to return the benefits received under it. In each of these groups, however, restitution is governed in German law by different rules belonging to different parts of the law. The rules for restitution after termination are considered to belong to the law of contracts; the rules for restitution after avoidance, to the law of unjustified enrichment.[41]

According to Jansen, the law of unjustified enrichment has proved inadequate to accommodate considerations of critical importance in cases of restitution after avoidance. Two main reasons are provided. First, unwinding a contract through the recognition of independent unjustified enrichment claims shifts the analysis away from the main challenge in this context, which is to undo reciprocal performances that are mutually connected. Second, the abstract logic of unjustified enrichment claims would be blind to policies and considerations like the protection of minors which are particularly relevant while assessing the consequences of avoidance. These inconveniences would have led the German legislature and the

[40] E. von Caemmerer, "Problèmes Fondamentaux de l'Enrichissement sans Cause" (1966) 18 R.I.D.C. 573, 588; R. Zimmermann and J. du Plessis, "Basic Features of the German Law of Unjustified Enrichment" (1994) 2 R.L.R. 14, 18; Meier, "Mistaken Payments", 598.

[41] R. Zimmermann, "Restitutio in Integrum" (2005) 10 Unif.L.Rev. 719, 721; S. Meier, "Unwinding Failed Contracts: New European Developments" (2017) 21 Edin.L.R. 1, 11.

majority of commentators to look for solutions outside the law of unjustified enrichment, and particularly among the contractual principles governing restitution after termination.[42]

Unlike the German Civil Code, the original version of the French Civil Code did not include a set of rules dealing specifically with the restitution of benefits conferred in performance of failed contracts. French courts and commentators developed the applicable rules by working out the implications of the principles underpinning the theory of nullity of contracts referred to above. This theory required the rejection of all the consequences following from a non-effective contract, or as French authors would have it, its "retroactive disappearance".[43] As termination for breach was presented in the Code as a kind of sanction depriving a validly constituted contract of its normal effects (*condition résolutoire*), it was eventually accepted that the principle of retroactive disappearance should govern the destiny of benefits conferred in this context as well.[44]

As far as avoided contracts were concerned, the retroactive disappearance principle seemed to be appropriate. If the contract was invalid because of a defect existing since its formation, it was reasonable to conclude that, in general, the law had to restore the parties to the same position they occupied before the contract was concluded.[45] Importantly, the acceptance of this principle did not prevent the recognition of exceptions where policy considerations like those invoked by Jansen required so. Thus, unlike their German counterparts, French lawyers did not find many difficulties in tempering the effects of retroactivity where reciprocal restitution between the parties was impossible, or where one of the parties to the avoided contract was a minor. The latter situation is specifically addressed by Article 1352-4 of the French Civil Code, which provides that a minor's liability to make restitution after the avoidance of a contract is limited to money or property received and turned into his or her profit.[46]

French lawyers soon realised, however, that extending the rationale of retroactive disappearance to restitution following initially valid but terminated contracts produced significant inconveniences. In contrast to what happened in the context of initially defective contracts, forcing the parties to reverse their respective performances in cases where a valid contract was mutually performed over an extended period before being terminated was seldom considered an adequate solution. But once retroactivity was accepted as the default response to non-effective transactions, it was difficult to distinguish between those contractual performances which

[42] Jansen, "Farewell", 142.
[43] Terré et al., *Droit Civil*, at [576]–[578].
[44] See e.g. Civ. 3e, 29 janv. 2003, JCP 2003, II, 10116, note Y.M. Serinet; J. Mestre and B. Fages, "Effets de la Résolution" (2003) R.T.D.Civ. 501.
[45] Bénabent, *Droit des Obligations*, at [230]; Malaurie et al., *Droit des Obligations*, at [723].
[46] Terré et al., *Droit Civil*, 652, 1890–91.

should be restored and those which should not.[47] Before the Reform, the conventional position was that restitution should not be available in contracts where performance was continuous or in instalments (*contrats à exécution successive*). Today, Article 1229 al. 3 of the French Civil Code limits the availability of restitution to those cases where performance resulted in a "final utility" to the parties (*utilité finale*), as opposed to cases where performance was intended to be continuous (*utilité continue*), as would normally happen in contracts of employment or leases.[48]

Such distinctions have long troubled French commentators, and the equivocal way they are presented by the Reform show that they are still not conclusively settled. But they do not seem particularly problematic to Jansen, who seems to believe that civilian systems would be better off by subjecting the cases of restitution after termination and avoidance to the same set of contractual principles. This is not a new idea, nor one which had brought about acceptable solutions in the past. In fact, German lawyers tried for decades to bring the unjustified enrichment rules governing the unwinding of avoided contracts in line with the contractual rules applicable to restitution after termination, only to find out that these contractual rules were unsatisfactory and to replace them completely when the German law of obligations was reformed in 2001. Instead of superseding unjustified enrichment rules, the modifications introduced aimed at coordinating the contractual rules appropriate in the context of restitution after termination, with the unjustified enrichment rules appropriate in the context of restitution after avoidance.[49] This seems to be also the current trend across other civilian systems, where recent developments regarding restitution after failed contracts are better described not as a steady replacement of unjustified enrichment rules by contract rules, but as a process of synchronisation of both sets of rules into a special regime.[50]

Since the Reform, a similar thrust can be identified behind the rules on *restitutions* adopted by French Civil Code in the new Articles 1352 to 1352-9. To a significant extent, these rules can be read as a consequence of French lawyers' increasing realisation that a single principle of retroactive disappearance is not always appropriate to explain restitution.[51] But the path leading to this conclusion has not been free of important challenges. If German lawyers had a head start on the current civilian trend towards synchronisation, this seems to have been precisely because their received distinction between the contractual rules of restitution after termination and enrichment-based rules of restitution after avoidance saved them

[47] T. Genicon, *La Résolution du Contrat pour Inexécution* (Paris 2007), at [814].
[48] Terré et al., *Droit Civil*, 123–25, 883–85. See further S. Rowan, "Termination for Contractual Non-performance" in Cartwright and Whittaker, *The Code Napoléon Rewritten*, 325.
[49] Meier, "Unwinding Failed Contracts", 12.
[50] Zimmermann, "Restitutio in Integrum", 727–28.
[51] Terré et al., *Droit Civil*, at [1811].

the trouble which French lawyers went through to recognise the different rationales underpinning restitutionary liability in these different contexts.

C. Quasi-contracts

Unlike German law, French law still classifies a significant part of the obligations arising outside contracts and wrongs under the category of quasi-contracts.[52] It has been noted many times that this category misleadingly suggests that it would bring together claims similar to those originating in contracts, a conclusion which is false, dangerous and ultimately useless.[53] Although these objections have never been convincingly rebutted,[54] from time to time French courts and commentators press the idea of quasi-contracts into service to justify diverse claims not fitting the other sources of obligations.

A notorious example is provided by a series of decisions by the Cour de cassation recognising a quasi-contractual claim against companies which for publicity purposes made potential clients believe that they had won a lottery. The trick worked as follows. A company sent letters recognising potential clients as the winners of a sum of money, the receipt of which required the clients to provide certain specified information. After proceeding as required, the clients eventually discovered that the letters also said in fine print that the award of the money was conditioned upon the results of an additional lottery. There was little doubt that this practice was reprehensible. But French courts faced significant difficulties in trying to explain the companies' liability on the basis of obligations arising from a contract or a wrong. The Cour de cassation found a handy tool for this purpose in the notion of quasi-contract. This allowed it to conclude that a company announcing a gain to an identified client without making clear that obtaining such gain was a matter of chance incurred in a voluntary, yet non-contractual, obligation to deliver on the gain.[55]

This perceived flexibility of the quasi-contractual category recently confronted the different projects for the Reform of the French Civil Code with a dilemma. On the one hand, the notion appeared regularly in judicial decisions and many authors believed it could be helpfully used for the development of the law. On the other hand, the notion had proved to be as vague and indeterminate as any residual category, and could be used to justify a non-voluntary obligation in almost every possible context.[56] The Reform's

[52] E. Descheemaeker, "Quasi-contrats et Enrichissement Injustifié en Droit Français" (2013) R.T.D.Civ. 1.
[53] H. Vizioz, *La Notion de Quasi-contrat, Étude Historique et Critique* (Bordeaux 1912), 314; F. Zenati-Castaing and T. Revet, *Cours de Droit Civil: Contrats, Théorie Générale – Quasi-contrats*, (Paris 2014), at [225].
[54] But see M. Douchy, *La Notion de Quasi-contrat en Droit Positif Francais* (Paris 1997), offering an influential reinterpretation of the notion of quasi-contracts.
[55] Cass., ch. mixte, 6 sept. 2002, no 98-22.981, Bull. ch. mixte no 4; D. 2002. 2963, note D. Mazeaud.
[56] Terré et al., *Droit Civil*, 1335.

solution to this dilemma was to preserve the category while attempting to narrow down its scope by making its underlying rationale explicit. Thus, the new Article 1300 of the French Civil Code emphasises that quasi-contracts are events giving rise to "a duty in a person who benefits from them without having a right to do so".[57]

This rationale is not a novelty among French lawyers. Since the times of the first commentators of the French Code of 1804, quasi-contractual obligations have been explained as effecting a duty to restore benefits obtained without a legal ground at the expense of a person not intending to confer them.[58] Yet this notion was not generally used to guide the application of the rules governing the disparate quasi-contractual claims recognised by French law. Unlike those arising from contracts or delicts, these claims developed quite independently from any unifying theme.[59] Because of this, quasi-contracts are still widely regarded as a kind of hybrid category where obligations equivalent to those originating in contracts can be attached to non-contractual settings.[60] Unsurprisingly, from time to time quasi-contractual claims are subject to the kind of fictional reasoning which in English law has been condemned as hopeless.[61]

This was exactly what happened after the recognition of the quasi-contractual claims arising in the publicity lottery cases referred to above. No agreement between the parties could be identified in these cases. On the contrary, the fine print included in the misleading letters made it plain that the defendant did not agree to confer a benefit upon the claimant. The Cour de cassation was at pains to conclude that the event giving rise to liability was not an agreement, but the voluntary action which induced the claimant to mistakenly assume the existence of an intention on the part of the defendant to confer a benefit. However, some commentators construed the decisions of the Cour as recognising the source of the defendant's obligation in a "quasi-agreement" between the parties.[62] This kind of analysis reflects the old idea that quasi-contractual obligations would originate in a fictional contract operating between claimant and defendant.[63]

Jansen acknowledges that the unifying notion of unjustified enrichment helped overcome the undesirable categories of quasi and fictional contracts

[57] This solution was proposed in P. Catala, *Avant-projet de Réforme du Droit des Obligations et de la Prescription* (Paris 2005), 75.
[58] C. Toullier, *Droit Civil Français*, vol. XI, 4th ed. (Paris 1824), at [16].
[59] Rémy, "Des Autres Sources d'Obligations", 34.
[60] P. Le Tourneau, "Quasi-contrat" in *Encyclopédie Juridique Dalloz: Répertoire de Droit Civil* (Paris 2018), at [52].
[61] P. Birks, "Definition and Division: A Meditation on Institutes 3.13" in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), 18.
[62] E. Terrier, "La Fiction au Secours des Quasi-contrats ou l'Achèvement d'un Débat Juridique" (2004) 17 Recueil Dalloz 1179.
[63] R. Libchaber, "Le Malheur des Quasi-contrats" (2016), *Droit & Patrimoine*, 73. This kind of reasoning can be also found in J. Honorat, "Rôle Effectif et Rôle Concevable des Quasi-contrats en Droit Actuel" (1969) R.T.D.Civ. 653.

in German law. He implies that now that these categories are banned there would be no need to recognise a systematically independent law of unjustified enrichment.[64] From the perspective of the systematisation achieved by German lawyers, it may indeed be tempting to believe that renouncing the unitary notion of unjustified enrichment will come at no significant cost. But the French experience suggests that without the discipline imposed by a stable conceptual framework, the analysis of obligations outside contracts and wrongs could easily be carried away by the pressing need to accommodate changing realities. The reluctance of French law to overcome the notion of quasi-contract, despite more than a century of ferocious criticism, should remind us that the risk of going back to fictional reasoning can never be completely eradicated.

IV. Inconclusive Objections

The French experience shows that leaving the difficult issues raised by a unified approach to unjustified enrichment to other parts of the law may mean changing one set of problems for another, with the additional inconvenience of opening the door to fictional categories like the French quasi-contracts. To be sure, any legal system may eventually realise there are good reasons for rejecting a unified approach anyway. However, that the notion of unjustified enrichment rests on diverse foundations, or that it works on a high level of generality, do not appear as convincing reasons for taking such a step. In what follows, it will be argued that, despite these circumstances, a unified unjustified enrichment category might play an important role in the exposition and development of the law.

A. Legal Categories as Integration Devices

Integrating different legal conceptions is a process well known to civilian lawyers. In fact, this process is traditionally conceived as necessary for rendering comprehensible the collection of dispersed solutions provided by legal materials.[65] To discharge this task, legal scholarship develops principles intended to explain previous decisions and guide the solution of future cases.[66] These principles, in turn, are organised around legal categories, which allow us to present the solutions adopted by the legislature or the courts in particular situations as part of an intelligible order.[67]

[64] Jansen, "Farewell", 144–45, 147.

[65] B. Starck, H. Roland and L. Boyer, *Introduction au Droit*, 5th ed. (Paris 2000), 103; J. Ghestin, "Les Données Positives du Droit" (2002) R.T.D.Civ. 11.

[66] C. Jamin and P. Jestaz, *La Doctrine* (Paris 2004), 230; S. Pimont, "A Propos de l'Activité Doctrinal Civiliste" (2006) 4 R.T.D.Civ. 707.

[67] G. Cornu, *Droit Civil: Introduction au Droit*, 13th ed. (Paris 2007), 104. This understanding of the notion of "legal category" is sometimes described as a distinctive feature of legal reasoning in the civilian tradition. See e.g. G. Samuel, *The Law of Obligations* (Cheltenham 2010), 2–3.

Legal categories often integrate solutions previously explained as the consequence of independent ideas. A famous example is provided by the general clause on extra-contractual liability contained in the old Article 1382 and the new Article 1240 of the French Civil Code. As it is well known, this clause sets out the overarching principle underpinning the French law of delict and was one of the few provisions on the basis of which French courts and commentators have developed most of the rules governing claims arising from civil wrongs. The clause's extremely broad terms were deliberately designed to generalise the common features of a number of claims arising from nominative wrongs which Roman law kept clearly separated.[68]

Proceeding in this way is by no means an eccentricity of French law, as shown by the recent evolution of the German rules on liability for the defective performance of contractual obligations. The German Civil Code originally dealt with liability for defective performance through an intricate set of rules which had evolved from ideas originated both in Roman law and the work of the authors of the *ius commune.* Among many other peculiarities, these rules recognised claims applicable to some contracts but not to others, and contemplated separate regimes establishing various forms in which a breach could take place between the parties.[69] Eventually, the solutions provided by these rules were assimilated into a common regime inspired by the unifying theme of avoiding a deviation from the original plan of the agreement between the parties.[70] Just like the French category of extra-contractual liability, the current German category of breach of contract seems to rest on quite diverse foundations.

A similar propensity to integrate ideas from different origins seems to be at the core of the efforts to harmonise European Private Law. This is particularly clear in the case of restitutionary obligations arising outside contracts and wrongs, where specific differences separate the solutions adopted by different European legal systems. Obvious examples are immediately apparent when we consider how these systems conceptualise the reasons for restitution (unjust factors or absence of legal ground), the measure of recovery (enrichment received or enrichment surviving), and the link between the parties to restitutionary claims (requiring or not a correspondence between enrichment and impoverishment).[71] These differences reflect ideas which are not necessarily consistent with one another. But it is difficult to deny that the search for conceptual structures flexible enough

[68] E. Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford 2009), 113, 122–23.
[69] For an overview, see Zimmermann, *The Law of Obligations*, 783.
[70] S. Grundmann and M.S. Schäfer, "The French and the German Reforms of Contract Law" (2017) 13 E. R.C.L. 459.
[71] R. Zimmermann, "Comparative Law and the Europeanization of Private Law" in Reimann and Zimmermann, *The Oxford Handbook of Comparative Law*, 2nd ed., 554.

to bring these ideas together is not only a commendable project, but one which has already brought about important developments in recent decades.[72]

Jansen suggests that the reason why the German approach to unjustified enrichment must inevitably dissolve is that it rests on legal conceptions which had originally been mutually inconsistent.[73] But in doing so the unified approach to unjustified enrichment does not seem to differ greatly from other conventional approaches to many areas of the law, including the French approach to extra-contractual liability, the German approach to liability for breach of contract, and the comparative approach underlying the efforts to harmonise European Private Law.[74] The process of integrating individual solutions into general categories may sometimes lead to difficulties which justify keeping those categories under permanent revision.[75] Nonetheless, the fact that a category is built over ideas which would once have been considered as inconsistent with one another should not be a problem in and of itself.

B. Nuanced Generalisations

Jansen suggests that a unified unjustified enrichment category prevents the law from being responsive to the different functions it should serve in different contexts.[76] On its face, French law may appear to confirm this concern. The vague terms in which the general action in unjustified enrichment was first recognised by French courts led some commentators to note that the entirety of private law could be replaced by a general rule forbidding unjustified enrichment.[77] Recognising a general action of this generality, however, is by no means the only form which a unified category could take.

The proof is provided by Jansen himself, who reminds us that the general principles underpinning the German unjustified enrichment category are currently articulated in groups of cases where claims are subject to specific requirements designed to balance the different interests that are at stake. These cases are divided depending on the way the defendant's enrichment is brought about: transfer, infringement upon another person's property, expenditure made on another's property, and payment of another's debt. This differentiated approach allows the law to be interpreted and applied

[72] Visser, "Unjustified Enrichment", 962.
[73] Jansen, "Farewell", 125.
[74] The modern law of contract provides a further illustration of this point. As noted by Professor MacQueen, "underneath and indeed preceding it lay a law of particular contracts, for each of which the substance of the generalisation was not infrequently inapplicable at least in part". H. MacQueen, "The Sophistication of Unjustified Enrichment: A Response to Nils Jansen" (2016) 20 Edin.L.R. 312, 324.
[75] S. Pimont, "Peut-on Réduire le Droit en Théories Générales?" (2009) 3 R.T.D.Civ. 417.
[76] Jansen, "Farewell", 124, 148.
[77] G. Ripert, *La Règle Morale dans les Obligations Civiles*, 4th ed. (Paris 1949), 246.

in distinct units without assuming that the same abstract and general criteria should govern the recognition of a claim in every possible situation.[78]

It could be argued that such a nuanced approach would effectively amount to splitting up the unjustified enrichment category into totally independent claims.[79] Yet distinguishing types of claims is not the same as accepting fragmentation. The way in which the French model of isolated restitutionary claims has been integrated in recent decades by Spanish lawyers provides a useful illustration. Following the French model, the Spanish Civil Code originally recognised a disparate set of rules dealing with restitution in specific situations.[80] Spanish authors eventually realised that these rules were too narrow to cover all the cases where restitution may be appropriate, so the scattered solutions inherited from French law were increasingly organised in groups of cases inspired in the Germany typology.[81] The resulting groups include rules recognising claims which differ significantly. But approaching these different claims through a unified framework allowed Spanish authors to develop principles that gradually extended beyond the original rules and apply them to situations not previously foreseen by the French Civil Code. These principles have been recognised by the Spanish Tribunal Supremo in discussing claims for the disgorgement of profits arising from an infringement of personality rights, and are also reflected in Article 31.1.6 of the Spanish Law of Unfair Competition (*Ley de Competencia Desleal*), which recognises a claim inspired in the German *Eingriffskondiktion* for the disgorgement of profits.[82] While it may not be immediately apparent, there is a significant difference between the French fragmentary approach and a typological interpretation of the German unified approach to restitutionary claims.[83]

C. Benefits of a Unified Scheme

Jansen argues that the unjustified enrichment generalisation would be so abstract that it could not play any concrete role in the development of the law.[84] Again, comparing the German and French experiences allow us to see that there are at least three important and concrete benefits of adopting this idea as a unifying theme.

First, recognising unjustified enrichment as a unifying theme may help in extending the scope of existing claims to deserving situations that are not

[78] Von Caemmerer, "Problèmes fondamentaux", 591.
[79] Jansen, "Farewell",135.
[80] P. Del Olmo and X. Basozabal, "Unjustified Enrichment in Spanish Law" (2017) 25 R.L.R. 104.
[81] L. Diez-Picazo, "La Doctrina del Enriquecimiento Injustificado" in L. Diez-Picazo and M. De la Cámara, *Dos Estudios sobre el Enriquecimiento sin Causa* (Madrid 1988), 100.
[82] C. Vendrell Cervantes, "La Acción de Enriquecimiento Injustificado por Intromisión en los Derechos al Honor, a la Intimidad y a la Propia Imagen" (2012) LXV Anuario de Derecho Civil 1107.
[83] A similar point is made on the basis of the South African experience in MacQueen, "The Sophistication", 321–22.
[84] Jansen, "Farewell", 144, 147.

previously covered. Until the recent Reform to the French Civil Code, the action in undue payment was only available in cases where the undue performance consisted in a specific thing or a sum of money, a restriction inherited from the Roman *condictio indebiti*.[85] Understanding this action as part of a body of law preventing the defendant's unjustified enrichment led some French lawyers to suggest that there was no reason for excluding recovery in cases involving benefits provided in other ways.[86] Following indications from authors reasoning along these lines, the Reform extended the scope of the claim in undue payment to cover services and the use value of goods, a solution which is reflected in the new Articles 1352-3, 1352-7 and 1352-8 of the French Civil Code.

Conversely, the recognition of unjustified enrichment as a unifying theme may help to restrict the scope of a recognised claim by identifying situations where liability does not follow a single rationale. Again, the French action in undue payment provides a convenient illustration. A feature of this action is that its measure of recovery depends on whether the defendant knew that he or she was receiving an undue benefit, in which case liability is significantly aggravated: not only must the defendant deliver up the transferred asset or its value, but he or she is also liable for any reduction in the value of the asset, for applicable interest and for all the fruits taken.[87] Noting that this difference cannot be explained only in the existence of an obligation to return an unjustified benefit, some commentators have argued that the French action in undue payment would in fact roll-up two claims into one: a claim based on the defendant's unjustified enrichment, and a claim based on the defendant's wrongful receipt of an undue benefit.[88] Certainly, this distinction only makes sense when we accept that the action in undue payment is not just an independent claim inherited from Roman times, but the expression of broader principles inspiring distinct categories of the law. Although the new Articles 1352-1, 1352-2 and 1352-7 of the French Civil Code fail to give explicit recognition to this distinction, it is relatively uncontroversial that an action in undue payment against the knowing recipient of an undue benefit seeks to compensate the harm caused by his or her fault.[89]

Finally, and perhaps more importantly, a unifying theme may stimulate a structured approach to situations which cannot be accommodated within the scope of pre-existing claims. To see why, it is helpful to compare the solutions provided for by German and French law to cases where the defendant obtains a benefit from the infringement of the claimant's rights. While the unjustified enrichment analysis of these cases has caused significant

[85] Zimmermann, *The Law of Obligations*, 854.
[86] Bénabent, *Droit des Obligations*, at [461].
[87] M. Douchy-Oudot, "Répétition de l'Indu" in *Encyclopédie Juridique Dalloz*, at [109].
[88] Carbonnier, *Droit Civil*, at [1229]; Descheemaeker, "Quasi-contrats", 20.
[89] Terré et al., *Droit Civil*, at [181]; Deshayes et al., *Réforme du Droit des Contrats*, 928–30, 933–34.

controversies in German law, Jansen acknowledges that the conceptual tools emerging from these controversies have enabled German lawyers to take a systematic approach to the relevant legal issues by asking the right questions.[90] The situation of French law is radically different. In some cases, courts may order the defendant to pay compensatory damages calculated on the basis of the gains arising from the infringement of the claimant's rights, and in other cases the action *de in rem verso* may be used to recover gains obtained by a defendant as a consequence of knowingly receiving a benefit to which the claimant was entitled. But these scattered solutions only confirm that French law lacks a clear framework to analyse the relevant issues arising in this kind of situations. Compared to German law, French law appears as significantly underdeveloped in this regard.[91]

V. Conclusion

Jansen's call to abandon the leading civilian approach to unjustified enrichment chimes with the strengthened wave of scepticism about the benefits of recognising unjust enrichment as a unified field in English law. The continuing difficulties faced by German lawyers while discussing some relatively common unjustified enrichment problems may seem to confirm that there is something structurally wrong in analysing distinct restitutionary claims through general theories about enrichment liability. When we consider the German experience in the broader civilian context, however, a completely different picture emerges.

The French experience shows that, far from making problems disappear, renouncing any form of a unified approach to enrichment liability may deepen the difficulties raised by the different situations where restitutionary claims are relevant. The lack of such unified approach in France seems to explain at least in part the significant uncertainty surrounding restitution in situations involving more than two parties, failed contracts and the miscellaneous circumstances dealt with by French lawyers through the category of quasi-contracts. Considering this alternative civilian experience is useful for putting Jansen's objections against the German approach into perspective. It may well be true that the civilian category of unjustified enrichment rests on diverse foundations, or that it is too general to be applied directly to decide difficult cases. But this does not mean that a unified approach to enrichment liability cannot play an important part in enhancing our understanding of the law and guiding our attention towards the right questions.

Of course, neither the German nor the French experiences should be taken as a model for deciding the role and limits of the English law of unjust enrichment, or at least not before addressing the particular challenges

[90] Jansen, "Farewell", 143.
[91] Descheemaeker, "Quasi-contrats", 22–23; Descheemaeker, "The French Law", 97–103.

involved in drawing normative conclusions from comparative legal research.[92] But if we are to take comparative law seriously, we should expand the focus of our inquiry beyond German law, which certainly does not provide the only example of a civilian approach to the subject. Chances are that, after a detailed comparison of the German and French approaches, we feel inclined to reaffirm rather than reject the efforts undertaken by common lawyers for explaining different restitutionary claims as forming a unified part of the law.

[92] J. Bell, "Legal Research and the Distinctiveness of Comparative Law" in M. Van Hoecke (ed.), *Methodologies of Legal Research* (Oxford 2011), 175–76.