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Weighting Competing Considerations: Civil and Common Law Approaches to the Problem of Establishing the Link between the Parties in Unjust Enrichment Claims

Sopesando consideraciones en conflicto: derecho civil y *common law* frente al problema del vínculo entre las partes en acciones de enriquecimiento injustificado

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Abstract: This article seeks to demonstrate that the French approach to the general action in unjust enrichment may help English law in addressing the challenges posed by indirect enrichment cases. To do so, this study first refers to the issue of establishing a link between the parties under English law, and then it compares how German and French legal systems approach to this problem. It is proposed that French case law, which recognizes the general action in cases of unjust enrichment, offers a set of considerations that could guide the resolution of indirect enrichment cases without relying on abstract, ones-size-fits-all concepts.

Keywords: Comparative law, unjust enrichment, restitution, indirect enrichment, *actio de in rem verso*

Resumen: Este trabajo pretende demostrar que la aproximación francesa a la acción general de enriquecimiento injustificado puede contribuir con la solución de los problemas evidenciados por el derecho inglés en casos de enriquecimiento indirecto. Con este objetivo, el trabajo introduce el problema del vínculo entre las partes en el derecho inglés y contrasta las aproximaciones del derecho alemán y francés como potenciales modelos para su análisis comparado. El artículo sugiere que aquellos casos en los que la acción general de enriquecimiento injustificado ha sido reconocida en derecho francés son particularmente útiles para poner de manifiesto un conjunto de consideraciones con base en las cuales es posible decidir casos de enriquecimiento indirecto sin descansar en requisitos abstractos de aplicación universal.

Palabras clave: Derecho comparado, enriquecimiento injustificado, acciones restitutorias, enriquecimiento indirecto, acción *de in rem verso*

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I. INTRODUCTION

Unjust enrichment law is one of the most dynamic areas of private law within common law systems, particularly, in the English law (Virgo, 2015, p. 61). It is not an overstatement to say that no other field within UK private law has received as much scholarly attention over the past four decades (Burrows, 2020, p. 294). The recent surge of interest—prompted by problems that traditionally received little attention in this legal tradition—, has resulted in a radical renewal of concepts in the way English legal scholarship and case law rationalize the rules and principles governing obligations that arise outside of any contracts or wrongdoings (Smith, 2016, pp. 27-29). This renewal is, without any doubts, one of the most visible trends in contemporary English law.

One of the main questions addressed by both legal doctrine and case law in this area refers to the nature of the relationship that the claimant and the defendant shall have for a claim for a restitution claim to be admissible. Though the significance of establishing that the defendant was enriched at the claimant's expense is widely acknowledge, for years the task of clearly defining the content of this concept has been largely overlooked. Instead, attention has focused on other issues, such as defining the features of the enrichment offense or identifying different factors that make it unjust and that shall deem sufficient to support a claim for restitution (Birks, 2005, p. 86; Mitchell *et al.*, 2016, §§ 6-02). As a result, English law lacks a well-defined position on whether a restitution claim can be brought for enrichment obtained through intermediaries, cases that, within the common law tradition fall under the category of indirect enrichment[1]. This vagueness seems to be the cause of some of the most serious criticism recently raised against the possibility of understanding unjust enrichment law as a coherent branch of the English law of obligations (Stevens, 2018, p. 574; Smith, 2019, p. 87).

1 Though the indirect enrichment concept may be used to describe a series of dissimilar restitution hypothesis, English law uses this label to refer to a group of situations that share common problems and thus it makes sense to study them as a category. In this regard, see Dannemann (2013).

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WEIGHTING COMPETING CONSIDERATIONS: CIVIL AND COMMON LAW APPROACHES TO THE PROBLEM OF ESTABLISHING THE LINK BETWEEN THE PARTIES IN UNJUST ENRICHMENT CLAIMS

SOPESANDO CONSIDERACIONES EN CONFLICTO: DERECHO CIVIL Y *COMMON LAW* FRENTE AL PROBLEMA DEL VÍNCULO ENTRE LAS PARTES EN ACCIONES DE ENRIQUECIMIENTO INJUSTIFICADOS

As it occurs with other aspects of this field under English law, the issue of establishing a link between the parties in unjust enrichment claims has proven to be an especially fertile ground for examining the influence of the civil law tradition into the *common law* (Visser, 2019, p. 962). In addition to report the consequences of the lack of clear responses to this issue, recent English legal literature has emphasized the significance of exploring potential solutions through a comparative law perspective (Burrows, 2017, p. 167; Watterson, 2020, p. 271). However, as with other elements of the broader debate on unjust enrichment as a source of obligations, the French approach to the link between the parties has remained largely absent from the debate among different jurisdictions. (Descheemaeker, 2017, p. 77). This is particularly surprising, considering the significant influence of the French approach on numerous legal systems around the world, including the vast majority of Latin American jurisdictions (Schrage & Nicholas, 1995, p. 21).

This paper proposes that the French approach to establishing the link between the parties in unjust enrichment claims may be insightful for English law. Unlike German law, which is the main reference in comparative analyses on this matter, French law recognizes a judicial remedy mainly applied in cases of indirect enrichment. This claim, known as the *actio de in rem verso* or general action for unjustified enrichment (*enrichissement injustifié*), requires only that the defendant has been enriched at the expenses of another in order to establish the link between the parties. This requirement is typically met by proving a causal connection between a reduction in the claimant's assets and a corresponding gain in the defendant's assets. However, contrary to concerns raised by those who are against introducing a similar standard into English law, the cases in which the *actio de in rem verso* claim is applied in French law are surprisingly exceptional. This is due to significant limitations that enable courts to resolve indirect enrichment cases analyzing a series of considerations of a different significance depending on different contexts, and not only focusing on an abstract requirement that is applied uniformly across all cases.

But, before beginning the analysis, three clarifications on the scope and purpose of this study are necessary. First, this paper refers to a branch of the law of obligations that, in spite of its limited development in our legal tradition, aims to address a field as wide as that of contract or tort law. Since this paper is not conceived as an introduction, it necessarily assumes the reader is already familiar with the categories and conceptual tools used by legal scholars to structure and give meaning to the broad field of unjustified enrichment.

Second, the purpose of this work is very specific. It argues that English law would benefit from a deeper analysis of the French approach to

defining of the link between the parties in indirect enrichment cases. Though other approaches are mentioned herein, they are included solely to highlight the lack of a conclusive solution in English law, as well as to underscore the advantages of more closely considering the French approach. This study is not intended as a comparative analysis of different approaches to indirect enrichment and, thus, it deliberately disregards perspectives from other legal systems—such as the German or Spanish systems—which could otherwise be relevant to assess the approach adopted by Latin American jurisdictions on this issue.

Finally, this paper does not aim to offer a solution to the issue of establishing the link between the parties in indirect enrichment under English law. This problem remains one of the most debated in contemporary English scholarship concerning unjustified enrichment; thus, it couldn't be resolved by this study. Rather, its purpose is showing how the experience of civil law systems, such as the French one, could be useful to move forward toward solutions that are not currently being considered by scholars of the English common law system.

Having established these limitations, this study has the following structure: the second section introduces the issue of the link between the parties under English law of restitution for unjust enrichment, explaining the main difficulties identified by recent legal doctrine and case law. The third section, compares the German and French approaches to establishing the link between the parties in unjustified enrichment claims, emphasizing the mechanisms adopted under French law to control the scope of the *in rem verso* claim. The third section suggests that a deeper study of the French perspective may serve solving the discussion on this issue under the English law. The fifth section offers some conclusions.

II. THE LINK BETWEEN THE PARTIES IN THE ENGLISH LAW OF RESTITUTION FOR UNJUST ENRICHEMENT

II.1. A gain for the defendant and a loss for the claimant

Contemporary English law considers unjust enrichment as a source of rights and obligations, alongside contracts and wrongful acts (*Lipkin Gorman v. Karpnale*, 1991). The rights arising from unjust enrichment are usually called restitution rights, since their counterpart consist of duties to return a benefit or gain, which is usually a sum of money representing the value obtained from the claimant (Burrows, 2011, pp. 14-15). Though recognizing these restitution rights is nothing new in the English legal system, their integration into a coherent structure of private law is largely credited to Peter Birks (1989), who in the last decades of the former century proposed a framework based on a series

of general questions to analyze unjust enrichment claims: has the defendant been enriched? If so, would it be possible to support that such enrichment was obtained by the defendant "at the expense" of the claimant? If so, is there any factor allowing to conclude that such enrichment is unjust and, thus, condemned by the legal system? If so, is there any reason why the defendant should nonetheless be allowed to retain the enrichment? (p. 7).

According to Birks (2005), the situations in which unjust enrichment serves as a ground for restitution can generally be understood as cases in which—for different reasons—there has been a transfer of value from the claimant's assets to those of the defendant. In such cases, the link between the parties involves an increase in the defendant's assets and a decrease in the claimant's assets (pp. 74-75). Thus, Birks identified two main problems that may arise when attempting to establish this link.

The first issue is identifying the relevant parties in cases of *interceptive subtraction*. In these cases, the transfer of value underlying the claim is produced when the defendant has received a benefit that the claimant would have obtained—had the defendant not intervened. The main example can be found in an older line of English case law, where courts recognized a restitution claim against a person who—without authorization—performed the claimant's work and received the payment that the claimant would otherwise have received (Birks, 1989, pp. 133-134).

The second issue refers to the need to distinguish between restitution for unjust enrichment and restitution for wrongs. The former arises when the defendant is enriched due to a transfer of value from the claimant, as it usually occurs when the claimant mistakenly pays a non-existent debt to the defendant. The latter applies when the defendant is enriched as a result of a wrongful act committed against the claimant—for example, when the defendant has received a payment in exchange for harming the claimant (Birks, 1989, pp. 23-24).

Beyond these specific concerns, Birks (2002) concluded that the central factor in identifying the link between the parties requesting restitution in unjust enrichment claims is the existence of a value transfer between claimant and defendant (p. 496). Most of the times, this transfer occurs directly between the parties. However, it may be the case that it is produced through a third party acting as an intermediary. An example is where the claimant pays to a third party who is a creditor of the defendant, thereby cancelling a previous obligation owed by the defendant to that creditor. In such exceptional cases, English law should be open to recognizing a claim for indirect enrichment, provided that no overriding legal principles or considerations are violated, such as the need to uphold the allocation of risks assumed by the parties

of a contract, or the significance of protecting the system of credit priority in cases of the defendant's insolvency (2002, p. 518; 2005, p. 90).

II.2. Two opposing positions

Birks' ideas had a strong influence in the position adopted by common law systems (Edelman & Bant, 2016, p. 89). Nevertheless, an influencing sector of the legal doctrine has criticized the tendency to accept restitution claims in cases of indirect enrichment, arguing that it represents an unbounded expansion of its scope of application. If the only requirement for establishing a link between the parties were the existence of a benefit for the defendant and a corresponding loss for the claimant, a claim for unjust enrichment could theoretically arise from the most far-fetched scenarios. Consider, for instance, a situation where an apartment owner who benefits from lower heating costs, because his neighbor pays to heat his own apartment. To exclude this type of cases, a group of legal scholars has proposed adopting a strict rule: only an individual who has directly conferred a benefit on the defendant may bring a restitution claim for unjust enrichment against him (Burrows, 2011, p. 70; Virgo, 2015, p. 105).

While this rule has the advantage of limiting the unjustified expansion of the unjust enrichment claims, it comes at a cost. A strict rule excluding restitution for indirect enrichment may unfairly harm the claimant in those cases where the third party who directly receives the benefit becomes insolvent, disappears or is otherwise unreachable (Watterson, 2011, p. 437). Furthermore, this strict rule fails to accurately reflect the stand of English courts, which in several cases have upheld restitution claims for unjust enrichment despite there was not a direct transfer between the claimant and the defendant. This typically occurs in cases involving payments through representatives or to representatives, or where the claimant pays the debt of a third party. The strongest indication of this is that even those advocating for such a strict rule acknowledge there is a long list of exceptions that shall be recognized (Burrows, 2012, pp. 49-52).

To avoid these inconveniences, another sector of English scholarship has proposed adopting a more flexible standard, one that focuses on the causal link between a reduction in the claimant's assets and a corresponding increase in the defendant's assets. While other requirements must still be met for an unjust enrichment claim to be upheld, under this flexible approach the link between the parties would be established wherever there is evidence that the defendant's enrichment wouldn't have been obtained but for the claimant's loss (Mitchell, 2008, pp. 142-144; Watterson, 2011, p. 448). For example, if X mistakenly transfers money

to Y, who experiencing a surge of generosity decides to transfer the same sum to Z as a gift, X could file an unjust enrichment claim against Z, provided that he/she is capable to prove that such benefit would not have occurred without X's mistaken transfer to Y. A similar view has been adopted by English case law to uphold restitution claims in cases of indirect enrichment (*Relfo v. Varsani*, 2014; *Menelaou v. Bank of Cyprus*, 2015).

Unfortunately, over the past decade, this flexible standard has proven insufficient to establish reasonable limits to the scope of application of restitution claims for unjust enrichment. A notable example is found in a case where the claimant sought restitution—based on unjust enrichment—for legal costs incurred in a prior judicial procedure against a third party (not the defendant). The decision in the earlier case concluded that the third party was a debtor of the defendant, and not of the party who originally filed the lawsuit. The claimant then filed the unjust enrichment claim, arguing that without the judicial costs paid in the procedure with the third party, the defendant would not have been able to use that decision to collect the money for the corresponding credit, or—at least—not without incurring in significant litigation costs.

Based on a causal link between the costs incurred by the claimant and the benefit obtained by the defendant, the court concluded that the defendant's enrichment could in principle be deemed as obtained at the claimant's expense (*TFL v. Lloyds*, 2013). However, though this analysis is consisting with the flexible standard adopted in other decisions, the result has been widely criticized for being inconsistent with other ruling in which English courts held that restitution is not available for incidental enrichments resulting from actions taken by a claimant in their own interest (Wilmot-Smith, 2015, p. 534; Watts, 2016, p. 324). In line with these critics, recent case law has declined to treat a mere causal connection as sufficient to establish the link required for an unjust enrichment claim (*Prudential v. HMRC*, 2018).

II.3. The need to identify more precise criteria

The tension between the two approaches explained above, was recently addressed by the Supreme Court of the United Kingdom in what remains, to date, the most detailed judicial analysis on the issue of establishing the link between the parties in unjust enrichment claims under English law (*Investment Trust Companies v. HMRC*, 2017). In this case, the claimant had paid for years the value-added tax (VAT) on services provided by financial service companies. These companies, in turn, remitted the tax to the responsible authority responsible (the HMRC). Eventually the claimant discovered that the services in question were exempted from the VAT and—as a consequence—such taxes had been mistakenly

paid. Based on this mistake, the claimant filed a restitution claim for unjust enrichment—not against the financial service companies, who directly received the payments, but against HMRC, who was the ultimate recipient and beneficiary of the undue payments.

This case illustrates the critical importance of establishing the link between the parties in unjust enrichment claims. If we assume that such link can only be establish under a strict rule that rejects cases of indirect enrichment, the claim would be rejected, as HMRC's enrichment resulted from payments made to it by the financial service companies, not directly by the claimant. Thus, the outcome of a substantial restitution claim turned entirely on how the court understood the link between the parties.

The Supreme Court acknowledge that there had been an increase in the defendant's assets and a corresponding reduction in the claimant's asset. However, it concluded that this was insufficient to establish the required link between claimant and defendant for an unjust enrichment claim to be upheld. To reach this conclusion, the Court described a series of scenarios in which previous judicial decisions had upheld the existence of such a link underscoring the reasons that justified considering these cases as a transfer of value between the claimant and the defendant. Under the Court's perspective, these reasons led to conclude that, though there was enough evidence of a value transfer from the claimant to the financial service companies, followed by a subsequent transfer from those companies to HMRC, the mere chain of transfers was not enough to prove a direct transfer between the claimant and HMRC.

In contrast with former judicial attempts to clarify the nature of the link between the parties required by English law, the Supreme Court in this case did not rely only on abstract criteria, but it rather focused on specific scenarios and the reasons why in restitution was granted in those particular circumstances. However, as clarified in the decision, the list of identified scenarios is not exhaustive, and it needs further development. Due to the indifference showed -until recently- by English literature and case law in relation to establishing the link between the parties, some scholars have proposed to analyze the experience of civil law jurisdictions, searching for criteria that could help expanding or complementing this list (Burrows, 2017, p. 170). Despite this approach, as explained in the section below, existing differences between the diverse legal systems of this tradition show that this task is far more complex than it was initially thought.

III. DIFFERENT APPROACHES TO ESTABLISHING THE LINK BETWEEN THE PARTIES IN THE CIVIL LAW TRADITION

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III.1. The "immediacy" and "performance" concepts in German law

The German legal system is often regarded as the one offering the most sophisticated solutions to problems arising from non-contractual obligations and wrongful acts (Dawson, 1951, pp. 91-92; Nicholas, 1961, p. 610). It is not surprising that comparative analyses of the rules and principles that govern these issues in English law frequently take German law as their main reference (Häcker, 2020, p. 291). Nevertheless, establishing the link between the parties in unjust enrichment claims have brought serious complications. The rules adopted by German scholarship to identify the link between the parties in cases that involve more than two sets of assets have been described as a "mined field" (Meier, 1999, p. 567) or a "inaccessible jungle of disputes and uncertainty" (Zimmermann & Du Plessis, 1994, p. 31). To understand such difficulties, it is worth briefly analyzing the evolution of more general concepts.

In the years that followed the entry into force of the German Civil Code (BGB, in German), the provisions governing unjust enrichment were interpreted as recognizing a general claim that always required proof of enrichment "at the expense of another" (auf dessen Kosten). While this expression may have originally been intended to indicate that unjust enrichment did not require the direct reception by the defendant of a sum or good that had belonged to the claimant, legal doctrine in general assumed that the link between claimant and defendant should be defined in terms of "immediacy" (Unmittelbarkeit) or absence of intermediaries (Meier, 2019, pp. 455-456). This understanding of the link ruled out claims brought to court in cases where—for instance—the claimant had paid a sum of money to a third party under an invalid contract, and the third party either transferred the funds to the defendant or used them to build a house in land owned by defendant (Dawson, 1969, pp. 792-793).

However, in more complex scenarios, the concept of immediacy often proved insufficient to precisely identify the link between the parties supporting valid enrichment claims. For example, in the cases where the claimant mistakenly paid another's person debt, immediacy could be used both to describe the link between the claimant and the creditor who received a benefit since the credit was paid, and that between the claimant and the debtor whose debt was cancelled. In this and other similar cases, the idea of a direct transfer served equally to describe several potential defendants in an unjustified enrichment case (Zimmermann & Du Plessis, 1994, p. 31-32).

These difficulties eventually led to abandoning the immediacy requirement, and adopting the separation theory, which currently guides the decision of cases involving more than two parties (Dawson, 1969, pp. 795-796). According to this theory, unjust enrichment cases may be classified considering if the benefit obtained by the defendant is a consequence of a performance (*Leistung*) by the claimant, as typically occurs with mistaken payments. In these cases, the link between the parties is automatically established, once we determine who performs the purposeful transfer and to whom it is directed (p. 798). Considering this distinction, the greatest problem addressed by German law when defining the link between the parties refer to the so-called "triangular relationships", where the claimant performs a transfer to the defendant through a third party, or those in which the performance will consists precisely on the claimant transferring a benefit to a third person, rather than to the defendant (Basozabal, 2018, p. 34).

Except in those cases where a performance or purposeful transfer is conducted between the parties, the relevant question becomes identifying the person whose rights were infringed by the defendant's enrichment. For instance, in the cases of unjust enrichment by infringement or through interference (*Eingriffskondiktion*), where the defendant benefits from using, consuming or selling another person's property. In such claims, the claimant must be the person whose property rights were infringed, regardless of whether the defendant received the property from him/her or from a third party. Something similar happens in the case of enrichment through improvements or expenses incurred by the claimant (for instance, paying another person's debt or enhancing somebody else's property), where the defendant typically has obtained a benefit without a direct deal between the parties (for instance, the defendant becomes richer because the claimant pays a debt the defendant had with a third party, or because the claimant decides to repair a fence that is in the defendant's property). In these cases, however, the issue under analysis in this study does not play a very significant role, since it is clear that the German law allows for restitution in unjust enrichment claims even when the parties have not participated in a direct transfer of assets (Meier, 2019, p. 460)[2].

The main advantage of the separation theory is that it renders unnecessary to ask about the immediacy of the value transfer between claimant and defendant. Aiming at using this advantage, a similar solution has been recently proposed to address the same problem within the common law context. For instance, Andrew Burrows (2017)—now, lord Burrows of the UK Supreme Court—has suggested classifying

2 The contemporary position of German law is reflected in a Draft law prepared by Detlef König in 1981 An analysis of this draft and its merits can be found in Basozabal (2018, p. 21-36).

unjust enrichment claims into two great categories: those in which the enrichment is "conferred" by the claimant, and those in which the defendant "subtracts" it from the claimant (p. 171). Among other advantages, this distinction helps excluding claims in cases where the claimant had no intention of conferring a benefit to the defendant, or in those where no claimant's rights were infringed by the defendant when obtaining the benefit under dispute. In line with recent English case law, establishing a link between the defendant's enrichment and the claimant's loss is not sufficient to uphold a restitution claim (Burrows, 2017, p. 172; Watterson, 2020, pp. 271-275).

Unfortunately, this solution is not without complications. In a recent study, Nils (2016) suggested that the concept of performance (*Lesitung*) adopted in German law does not always produces predictable outcomes in triangular relationships, which are common in practice (p. 123). In particular, Jansen (2016) refers to the well-known example where X, a bank customer, pays by check to Y (his/her creditor), then issuing a stop-payment order to Z (the bank). If there was a reason to question the legal basis that support Y or X right to receive the corresponding payment, in principle X might file a claim for unjust enrichment against Y, and Z might seek restitution under a similar claim X.

However, it is hard to defend this analysis when Z pays Y in spite of X's stop-payment order. In this case there would be no performance from X to Y, because with the stop-payment order X explicitly withdrew the intention to pay. Moreover, there would be no performance from Z to X, since Z—by disregarding the stop-payment order-would have acted outside contractual obligations. The only possible claim would be one filed by Z against Y, the only two parties of a potential performance. Notwithstanding the above, and this is Jansen's main argument, it is generally acknowledged that such a claim must find a limit in the need to protect Y, who can only be held liable if it is possible to prove that he/she was aware of the stop-payment order and, consequently, received the payment in bad faith. According to Jansen (2016) the complexity and complications in this analysis prove that the response to the question of the link between the parties does not depend solely on identifying who made the transfer (performance) to whom, but also on other considerations that have nothing to do with the transfer of value between the parties (pp. 139-140).

Undoubtedly, these complications do not mean that the German experience is irrelevant for assessing English law solutions. On the contrary, German law has served as the main reference in comparative analyses of English laws on these matters. Furthermore, it will probably continue to do so, considering its important development as compared to other legal systems of the civil tradition. Nevertheless, the

abovementioned complications do suggest that the German approach is not the "only one" that should be considered for assessing how to define the link between the parties in unjust enrichment claims under common law3. As explained below, French law offers an alternative perspective, one not frequently included in comparative analyses of this subject.

III.2. *Actio de in rem verso* in French law

While the German approach to unjust enrichment is usually described as the most sophisticated, the French approach has—undeniably—been equally -if not more- influential (Schrage & Nicholas, 1995, p. 21). The model adopted by the French Civil Code of 1804, along with the ideas and concepts shaping its approach to the right to restitution for unjust enrichment claims, has been adopted by a significant number of legal systems worldwide, including several European countries, Quebec province, the state of Lousiana, and the large majority of Latin American countries (Dawson, 1951, p. 107). Though this approach shares certain characteristics with the German model, especially when compared with common law legal systems, there are key differences between the German and the French approaches. These distinctions are particularly evident in how the French legal system defines the link between claimant and defendant in actio de in rem verso, or general unjust enrichment claim[4].

Similarly to the German approach, many of the concepts that inspired the French judicial remedies for unjust enrichment trace their roots to the Roman *condictiones* (Zimmermann, 1995, p. 409). Unlike the BGB, however, the French Civil Code of 1804 did not incorporate these ideas into a general unjust enrichment claim (Filios, 1999, p. 47). The main remedy originally established with a similar purpose was a version of the Roman *condictio indebiti*, recognized by French law to address the quasi-contract of undue payment (*paiement de l'indu*) (Schrage & Nicholas, 1995, p. 22; Dickson, 1995, p. 112; Zimmermann, 1996, p. 838).

Roman law imposed at least two significant limitations on the *condictio indebiti* claim: it didn't apply to undue payments made in the form of services, and it only allowed restitution of benefits directly conferred by the claimant to the defendant; *i.e.*, in those cases that could be described

3 As explained by Visser (2002), there is no doubt that the solutions provided by German law in this area have been—and continue to be—so refined that no other legal system has come even close. The disappointment, however, lies in the fact that—despite so many efforts—these solutions still fail to provide exhaustive answers, and their complexity makes it unlikely that any other legal system will attempt to replicate them (pp. 527-528). Free translation from the Spanish version.

4 The French approach is also significantly different to the that of the Spanish contemporary scholarship, which through codified provisions—similar to those of the French Civil Code of 1804—has evolved toward an understanding of the unjust enrichment claim that has been strongly influenced by the German law. It is also different to that reflected in EU private law instruments, such as the Draft Common Frame of Reference, which Book VII includes elements of the German approach and the common law. For a critical analysis, see Basozabal (2018).

as direct enrichment in contemporary English law (Whitty, 2002, p. 682). The same restrictions were inherited by the quasi-contract of undue payment introduced in the French Civil Code of 1804, which excluded the restitution of the services and payments received by the defendant from a third party (Dawson, 1951, p. 98). Over time, French case law adapted other remedies explicitly recognized in the Code, particularly the irregular management of another's affairs (*gestión d'affaires anormal*), to address cases of indirect enrichment where denying restitution to the claimant appeared inequitable (Gutteridge & David, 1935, pp. 207-208; Nicholas, 1962, pp. 618-621). However, because this strategy was artificially conceived, the French Court of Cassation soon focused its attention on an older remedy not explicitly recognized in the French Civil Code: the *actio de in rem verso* (Zweigert & Kötz, 1998, p. 545).

This claim was in no case invented by the French courts (Honoré, 1960, pp. 237-243), but the Court of Cassation effectively expanded its scope in an unprecedented way. In the famous case *Boudier v. Patureau-Mirand* (1892), the Court established a single requirement for a claimant seeking restitution for a benefit indirectly conferred to the defendant: the claimant must allege and present evidence supporting that the defendant obtained an advantage, as a result of the claimant's actions or sacrifices. Under such a broad definition, any benefit that could in any way be connected to a reduction in the claimant's assets might support a restitution claim, regardless of how vague is the connection between the defendant's gain and the claimant's corresponding loss. For this reason, the Court's approach was criticized and, ultimately, rejected by both French and foreign scholars and case law (Flour *et al*., 2011, pp. 41-42; Dawson, 1951, p. 100).

The BGB drafters were among the main critics of this remedy, and thus they firmly opposed to recognize in German law a remedy as wide as the French *actio de in rem verso*. In their opinion allowing claims against indirect beneficiaries of transactions between the claimant and third parties would lead to an unacceptable expansion of unjust enrichment claims (Zimmermann & Du Plessis, 1994, p. 18). The immediacy concept, initially adopted by German scholarship to describe the link between the parties in these claims, was probably a direct response to the reasoning established by the French Court of Cassation in cases such as *Boudier* (1892; Zweigert & Kötz, 1998, pp. 542-543). This skepticism also gained traction within French doctrine and caselaw, which promptly argued that—without meaningful qualifications—this thesis was inacceptable (Bénabent, 2018, p. 377). However, instead of focusing on abstract notions, such as the immediacy concept in German law, French law adopted a very different approach to limit the scope of the *in rem verso* claim.

III.3. The limits of the *actio de in rem verso*

Unlike German law, French law has no inconvenient to accept a general unjust enrichment claim against a person who receives a benefit not from the claimant, but from a third party (Terré *et al.*, 2018, p. 1366). For instance, in cases where a brother and sister live together, and the sister incurs a debt to buy goods for their shared household, French case law has concluded that the creditor may file an *in rem verso* claim against the brother, even though he is only an indirect beneficiary of the debt assumed by his sister. Likewise, in a case where a contractor provides repair services to a property, and the company that hired him becomes insolvent before paying for the work, the contractor may file a *in rem verso* claim against the property owners, despite the fact that such works were conducted based on a contract signed with a third party (Romani, 2018, § 105).

This characteristic of the *in rem verso* remedy is often described by comparative law scholars as an eccentricity of French law (Gallo, 1992, pp. 455-456; Dickson, 1995, p. 114; Zweigert & Kötz, 1998, pp. 542-543), but comparative studies often overlook that this flexible approach does not necessarily translate into an expansive scope of application of the *in rem verso* claim. On the contrary, following the significant limitations imposed by scholarship and case law after the decision of the Court of Cassation in the *Boudier* case (1892), the hypotheses in which *in rem verso* claims are applied under French law are surprisingly exceptional (Malaurie *et al.*, 2018, pp. 614-615). As a result, despite the absence of a formal restriction on the definition of the link between the parties that will give place to a restitution under a *in rem verso* claim, this remedy has not experienced the uncontrolled expansion feared by its critics.

Above all, we need to consider that the *in rem verso* claim is inadmissible if the defendant's enrichment arises from the fulfillment of contractual obligations or from other legally valid acts, a requirement traditionally known in France as the absence of legitimate cause (Chénedé, 2016, p. 230; Descheemaeker, 2017, p. 90)[5]. For instance, case law has held that an *in rem verso* claim must be rejected, if the defendant benefits from improvements made to a property, he/she rented to a third party, provided that the rental agreement establishes that such improvements are assigned for the benefit of the property owner. Though this could be a case of indirect enrichment at the claimant's expense, such enrichment is justified by (has a legitimate cause) the rental agreement entered into with the third party, and therefore does not give rise to restitution through a *in rem verso claim* (Romani, 2018, § 137).

5 This requirement is in article 1303-1 of the French Civil Code, which provides: "L'enrichissement est injustifié lorsqu'il ne procède ni de l'accomplissement d'une obligation par l'appauvri ni de son intention libérale".

Furthermore, it is worth noting that the *in rem verso* claim is subsidiary to other legal remedies available to the claimant to protect his/her interests[6]. This subsidiary nature has been the subject of considerable debate in the French legal system (Descheemaeker, 2017, pp. 91-93) and in other jurisdictions influenced thereby (Smith, 2002, pp. 596-609). Nevertheless, in the specific context of the *in rem verso* remedy for indirect enrichment claims, it seems to be agreed that the subsidiarity requirement restricts the use of this remedy unless it is proved that the third party through whom the benefit was conferred is insolvent (Remy, 2013, p. 45; Chénedé, 2016, p. 232). Thus, even when no contract or valid legal act justifies the defendant's enrichment, the claimant must first seek restitution from the third party who directly received the benefit, unless insolvency can be proven.

Finally, French law recognizes at least two defenses that the defendant may invoke against an *in rem verso* claim in indirect enrichment cases[7]. First, this remedy is not available when the defendant's enrichment is the consequence of a claimant's action carried out in their own interest or for their own benefit[8]. For instance, a property owner who installs an electrical system for their own use, cannot subsequently claim restitution from a neighbor who incidentally benefits by connecting to the same network (Romani, 2018, § 159). Second, French law establishes a general restriction on the amount recoverable through an *in rem verso* claim[9]. Such restriction provides that—even if all other requirements are met—the defendant is only liable for the lesser of the gain received or the loss suffered by the claimant (Terré *et al.*, 2018, p. 1377). Since the value of the defendant's gain is assessed at the time the claim is brought to court, in practice the defendant may avoid liability by proving that they lost the benefit before the decision is made (Descheemaeker, 2017, pp. 94-95 y 102-103).

Because of all these limitations, the *in rem verso* claim has been used—to date—within very narrow margins. This result has been possible, even though—unlike the German law approach—French scholarship and case law have not offered a precise definition of the link between the parties in unjust enrichment cases (Descheemaeker, 2017, p. 89). This approach

6 This requirement is in article 1303-3 of the French Civil Code, which provides: "L'appauvri n'a pas d'action sur ce fondement lorsqu'une autre action lui est ouverte ou se heurte à un obstacle de droit, tel que la prescription".

7 Though these rules are not classified as "defenses" by the French law, this label facilitates a comparative analysis, particularly in relation to common law systems. In this regard, see Descheemaeker (2017, p. 87).

8 This requirement is in article 1303-2, paragraph 1, of the French Civil Code, which provides: "Il n'y a pas lieu à indemnisation si l'appauvrissement procède d'un acte accompli par l'appauvri en vue d'un profit personnel".

9 This requirement is in article 1303-4 of the French Civil Code, which provides: "L'appauvrissement constaté au jour de la dépense, et l'enrichissement tel qu'il subsiste au jour de la demande, sont évalués au jour du jugement. En cas de mauvaise foi de l'enrichi, l'indemnité due est égale à la plus forte de ces deux valeurs".

has recently been introduced through an amendment to the French Civil Code, which in article 1303 simply provides that an unjust enrichment claim may be filed against a person who obtains a gain "from another person's loss" (*au détriment d'autrui*)[10]. While other legal systems have been reluctant to grant restitution in indirect enrichment cases, the French approach appears as an anomaly that deserves further attention. As explained below, such anomaly may offer valuable insights into how common law jurisdictions could address the persistent difficulties in defining the link between the parties in unjust enrichment claims.

IV. ADVANTAGES OF THE FRENCH APPROACH

The section above explained that it is possible to distinguish at least two approaches in the civil law tradition that could be useful to assess the issues of establishing the link between the parties in unjust enrichment claims within common law systems. The first is the German approach, which has pretended having clearly identified a universal rule applicable to all potentially relevant enrichment cases. In the most common cases, this rule relies on the concept of performance (*Lesitung*), which in theory always allows identifying the parties of an unjust enrichment transaction which value transfer is intended to be reversed through restitution. The second, is the French approach, which does not offer a comprehensive theory of the link between claimant and defendant and has no problem to admit restitution in cases of indirect enrichment. Nevertheless, this approach establishes a series of restrictions that prevent this remedy from expanding beyond reasonable limits.

As mentioned before, the natural tendency in common law systems has inclined toward the German approach, which—comparatively speaking—is more sophisticated. However, as suggested by Jansen (2016)—already cited above—, this approach may lead to the adoption of rigid conceptual categories that complicate the resolution of indirect enrichment cases. To achieve less rigid solutions, it is crucial to identify the conflicting considerations which normally should influence the decision of different scenarios (Visser, 2002, pp. 527-528). As referred by the main comparative studies on this issue, one of such considerations should be the allocation of risk established by contractual arrangements entered into by the parties involved, the need to protect benefits conferred under contractual provisions, the protection of the principle of equality among creditors—which should be applied in cases of insolvency of

10 Article 1303 of the French Civil Code provides: "En dehors des cas de gestion d'affaires et de paiement de l'indu, celui qui bénéficie d'un enrichissement injustifié au détriment d'autrui doit, à celui qui s'en trouve appauvri, une indemnité égale à la moindre des deux valeurs de l'enrichissement et de l'appauvrissement". This wording originates from a discusion in which it was suggested that the main purpose of the *in rem verso* claim should be to enable restitution of benefits obtained by the defendant through intermediaries or indirectly. In this regard, see Remy (2013, pp. 37-38 y 43-44).

the intermediary from whom the potential defendant has received the benefit, and the hierarchy of available remedies within the legal system (pp. 530-532).

The French approach offers clear advantages, as it identifies and weights these and other considerations that may be relevant for the resolution of indirect enrichment cases. While in the German separation theory, the "immediacy" is no longer necessary to define the link between the parties, since the BGB's entry into force, German scholarship has been consistent at excluding the possibility to obtain a restitution of benefits conferred through intermediaries (Zimmermann & Du Plessis, 1994, p. 31; Meier, 1999, p. 598). In contrast, the French *in rem verso* claim is mainly applied for indirect enrichment cases, which means that its analysis would necessarily focus more on the specific complexities of such cases.

Moreover, since the French approach lacks a precise definition of the link between the parties as a limit to the scope of application of unjust enrichment claims, it offers a privileged perspective to study the way in which different considerations must be weighted to resolve the diverse cases of enrichment through intermediaries. For example, the cases in which the *in rem verso* claim is not upheld due to lack of legal cause or legal basis reflect the significance of abiding by pre-existing arrangements that establish the terms of transactions between the claimant and a third party or between a third party and the defendant, under applicable laws. Likewise, the claims rejected based on the subsidiarity principle show that courts weighted the available remedies and the order in which they must be pursued. Thus, the possibility to bring to court a claim against a person who receives a benefit from a null contract shall exclude the possibility to file a claim against a third party benefitting from the same contract, not because there is not a sufficient link between the gain and corresponding loss, but because the claimant has an available remedy based on the contract nullity.

Instead of trying to transplant abstract rules of universal application, common law jurisdictions could focus on the different ways to weigh these and other considerations, as well as on the arguments that support such considerations in order to uphold or reject restitution for indirect enrichment claims. This way of addressing the issue of the link between the parties will probably produce outcomes that better align with the reasoning style of common law justice systems. Scottish law experience offers a compelling example of this. Although German law has strongly influenced the Scottish understanding of unjust enrichment, prevailing scholarship in Scotland assesses the link between the parties focusing on different potentially relevant considerations, rejecting rigid

rules of universal application (Whitty, 1994, pp. 207-208; Evans-Jones, 2013, § 1.30).

Furthermore, this approach has an additional advantage as it helps avoiding methodological problems that frequently arise when domestic legal issues are assessed through the lens of foreign legal rules. This approach facilitates a more subtle influence across different legal traditions focusing on engaging with the reasoning developed in other jurisdiction to resolve difficult cases, rather than promoting the direct transplantation of any foreign laws (Smits, 2019, p. 522). As the House of Lords has recognized, this way of making laws is not unknown in the common law tradition:

> Comparative law does not aim at a poll of the solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations. This means that comparative law in this type of cases can—at best—inspire the process of reasoning for or against a particular outcome (*McFarlane v. Tayside Health Board*, 1999).

V. CONCLUSION

It is not news that unjust enrichment law offers a fertile ground for a productive dialogue between the common law and the civil law tradition. The way recent English doctrine has addressed the issue of the link between the parties once again seems to demonstrate that solutions developed in civil law systems can meaningfully influence the evolution of rules and principles within common law. Nevertheless, it is also true that the solutions adopted by the civil law tradition may vary a lot from one jurisdiction to the other. A particularly clear example of the above is the contrasting approaches developed by German and the French law in the context of unjust enrichment.

To date, English legal scholarship has almost exclusively focused on the German approach when analyzing the link between the parties in unjust enrichment claims. This preference is understandable, considering the level of sophistication of the German model in this regard. However, this study proposes that the French law offers a perspective that may also be useful to make progress at addressing the challenges posed by cases of indirect enrichment. The *in rem verso* remedy applies mainly to these cases and is not constrained by abstract requirements that are universally applied, such as the German requirements of "immediacy" or "service/payment". Therefore, it is an especially useful tool to analyze a group of relevant considerations in the multiple scenarios where indirect enrichment may take place.

Naturally, the task of identifying these considerations and decide how they are going to be weighted within common law jurisdictions lies beyond the scope of this study. Nonetheless, the analysis above confirms that this is a task well worth pursuing and one that holds real promise for the further development of unjust enrichment laws. This conclusion should be particularly clear for Latin American comparative scholars, who—due to their familiarity with the principles of French private law—are very well positioned to contribute to this dialogue between common law and civil law systems. From this vantage point they can offer new ways to approach to a problem that, so far, has not found a definitive resolution in either the common law or the civil law traditions.

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