Journal of Korean Law | Vol. 16, 349-369, June 2017

A Fresh Start for Restitution in Three-Party Situations

*Marietta Auer**

With its ruling from June 6, 2015, the 11th Senate of the German Federal High Court of Justice (Bundesgerichtshof, BGH) has overturned its principles on restitution of unjust enrichment in the cases of revoked payment orders in the payment services law. The significant departure from previous case law opens the door for a general revision and redesign of the law of restitution in three-party situations. The article treats the instruction model(Anweisungmodell), particularly concerning BGHZ 205, 377 which has undertaken a significant change of direction of the previous precedents in case of revoked payment order in payment services law. This article, I believe, would affect the related juristic discussion a lot not only in Germany but also here in Korea regarding the unjust enrichment by the instruction.

Manuscript received: Feb. 21, 2017; review completed: May 11, 2017; accepted: May 19, 2017.

It is a familiar story: For decades, rarely has a piece on the doctrinal evergreen of restitution of unjust enrichment in three- or multiple-party situations appeared without pointing right away at the "lack of systematic coherence,"[1)]

* The author is professor of Private Law and Philosophy of Law at the Justus-Liebig-University Giessen. This article was supported by the Research Grant for Foreign Professors through Seoul National University (SNU) School of Law in 2016. The author thanks Professor Bong-Kyung Choi for his kind support.

1) Chris Thomale, Leistung als Freiheit 1 (2012) („fehlende systematische Kohärenz"). Thomale's work exemplifies that, regardless of all doctrinal work of the last decades, there still is room for monographs on the foundations of the law of restitution. The same is true for Alexander Schall, Leistungskondiktion und „sonstige Kondiktion" auf der Grundlage des einheitlichen gesetzlichen Kondiktionsprinzips (2003); Dennis Solomon, Der Bereicherungsausgleich in Anweisungsfällen (2004); Jan-Dirk Winkelhaus, Der Bereicherungsausgleich bei fehlerhafter Überweisung nach Umsetzung des neuen Zahlungsdiensterechts (2012).

the "state of orderlessness"[2] or the "immense complexity"[3] of the subject matter, that – as *H.H. Jakobs* poignantly put it in 1992 – "overtaxes even professors specialized in the law of restitution"[4]. Has all the academic work of the last decades left us with nothing but a "highly intelligent doctrinal pyre"[5]? Has the recent incremental shift of the German Federal High Court of Justice (*Bundesgerichtshof*, BGH, hereinafter: the Court) from a doctrine based on performance and fairness towards a value-based solution along the lines of the instruction model (*Anweisungsmodell*), as favored by academics, failed to bring clarity?[6] The Court had almost appeared to finally yield legal certainty in line with academic literature: The same 11th Senate that now has rejected the doctrine of instruction for revocation of payment orders[7] had recently started omitting the notorious clause that, regarding restitution in three-party situations, "any schematic solution is out of question and primarily the particularities of the individual case ought to be considered."[8] Is all that old news now? And, if not, are there deeper reasons to fundamentally revise the current solution guided by the

2) Horst Heinrich Jakobs, *Die Rückkehr der Praxis zur Regelanwendung und der Beruf der Theorie im Recht der Leistungskondiktion,* NJW, 2524 (1992) („Zustand der Regellosigkeit"); opposing reply from H.C. Claus-Wilhelm Canaris, NJW, 3143 ff (1992).

3) Alexander Schall, JZ 753 -760 (2013) („unermessliche Komplexität").

4) Horst Heinrich Jakobs, NJW, 2524 (1992) („selbst Professoren mit einer Spezialisierung im Kondiktionsrecht (sind) überfordert.") Lorenz does not find that very amusing in Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (revised edition 2007), § 812 Rn.36. This does not change the accuracy of the statement, though.

5) Uwe Wesel, NJW 2594 (1994) („hochintelligenten Scheiterhaufen der Dogmatik").

6) On this observation *Lorenz*, in Staudinger, BGB, 2007, § 812 Rn. 5, 36; similar Jansen, JZ 2015, 952 (955).

7) BGH, decision from June 16, 2015 – XI ZR 243/13, BGHZ 205, 377 = NJW, 3093 (2015) with case note from Kiehnle , JZ, 950 (2015), with case note Jansen, WM, 1631 (2015); *see* also Foerster, BKR, 471 ff. (2015); Hadding, WuB, 1631 (2015); Kropf, WM, 67 (2016) ff.; Omlor, EWiR, 595 f. (2015); Schnauder, JZ, 603 ff. (2016); Schröter, GWR, 386 (2015); Winkelhaus, jurisPR-BKR, 8 (2016), *supra* note 1; Reuter/Martinek, Ungerechtfertigte Bereicherung, vol. 2, 2nd ed. (2016), § 2 IV 1 a, pp. 82 f.; Grigoleit/Auer, Schuldrecht III, 2nd ed., Rn. 462 ff., pp. 161 f. (2016); concisely also Jansen, AcP 216, 112 (154 f.), (2016).

8) Phrase of the Court ("jede schematische Lösung verbietet (sich) und in erster Linie (sind) die Besonderheiten des einzelnen Falles zu beachten"), used in this wording or similarly since BGHZ 61, 289-292, but increasingly omitted in decisions since 2001; cf. especially BGHZ 147, 145; on that decision Lorenz, in Staudinger, BGB (2007), § 812 Rn. 5; Jansen, JZ, 952 -955 (Fn. 22) (2015) with further references.

instruction model? This essay argues that that is the case. Even though not convincing on its grounds, the new ruling of the Court very much persuades in its fundamental thrust and offers the opportunity for a fresh start in the law of restitution in three-party situations.

I. The instruction situation as a (problematic) model

Why do we need to take a fresh look here? At first sight, despite numerous disputes on details, all solutions largely correspond as to their outcome, so the scope of possible doctrinal revision seems to be limited from the outset. In impaired three-party situations, restitution is based on the instruction model. In the instruction situation (*Anweisungslage*), the debtor, who owes performance to his creditor (underlying debt relationship, *Valutaverhältnis*), instructs a third party, who herself owes the debtor performance (cover relationship, *Deckungsverhältnis*), to directly transfer the benefit to the creditor (transfer relationship, *Zuwendungsverhältnis*). Therefore, by means of the instruction, the debtor/instructor links two relationships: i.e. the cover relationship between the debtor/instructor and the instructee/third party with the underlying debt relationship between the debtor/instructor and the recipient/creditor. As a consequence, both relationships can be simultaneously performed by a single transfer of benefit between the instructee and the recipient.[9] In such three-party instruction situations, restitution of unjust enrichment is generally carried out "around the corner" ("*übers Eck*") under the German Law if the instruction is valid, i.e. between the parties of the respective impaired legal relationship.[10] Except for the case when the recipient receives a benefit free

9) Larenz/Canaris, Schuldrecht II/2, 13th ed. (1994), § 62 I 2 e, p. 39; *See* Grigoleit/Auer, *supra* note 7, Rn. 431, p. 148; for a more detailed description, *see* also Solomon, *supra* note 1, 5 ff., 84 ff.

10) Settled case law; for example BGHZ 205, 377-382, (Rn. 17); BGHZ 176, 234 (236 f., Rn. 9); from academic literature Schwab, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, 6th ed. (2013), § 812 Rn. 60 ff.; *See* Reuter/Martinek, *supra* note 7 § 2 II 1, pp. 48 f.; Lorenz, in Staudinger, BGB (2007), § 812 Rn. 49 f.; *See* Larenz/Canaris, *supra* note 9, § 70 II 1, 2, 5, IV 1, 5, pp. 201 ff., 210, 224 f., 235; *See* Grigoleit/Auer *supra* note 7 Rn. 434, p. 149; *See* Thomale, *supra* note 1, 292 ff.; *See* Solomon, *supra* note 1, 16 f.

of charge according to BGB § 822 (section 822 of the German Civil Code, *Bürgerliches Gesetzbuch*), there is no direct restitution between the instructee and the recipient unless the instruction is defective itself. If that is the case, it is necessary to further distinguish the following: Only some particularly serious defects, such as the complete lack or forgery of the instruction, the action of an unauthorized agent or of an incompetent instructor always lead to direct restitution irrespective of whether the recipient was in good faith or not.[11] However, for other defects, such as the revocation of an initially valid instruction, this rule of direct restitution is disputed. The predominant view is that for, such defects of validity of an originally attributable instruction, there should be a counter-exception: Restitution should run "around the corner" and exclude direct restitution between the instructee and the recipient at least in the cases where the recipient had been in good faith regarding the validity of the instruction, i.e. if she did not know about the defect (according to case law) or did not have to know about it (according to academia).[12]

And now there comes the clarity. Even if one leaves aside, for the time being, doctrinal doubts, the solutions of the predominant view peter out in a grey zone of application doubts where the seemingly clear line between an instruction that is defective, but attributable to the instructor, on the one hand, and a completely non-caused and therefore non-attributable instruction, on the other hand, turns out to be illusory. Applying the principles of causation and reliance (*Veranlasser- und Rechtsscheinprinzip*) to a mistaken overpayment by the instructee under a valid instruction amounts to a *petitio principia,* since it is hardly possible to distinguish between the instruction itself and the overpayment without assuming from

11) This is also the new line of case law since BGHZ 147, 145, that has dropped the previous distinction between good and bad faith, confirmed by BGHZ 205, 377 (383, Rn. 18); from academic literature *see* e.g. Schwab, in MüKoBGB, 6th ed. 2013, § 812 Rn. 80 ff.; *See* Reuter/Martinek, *supra* note 7, § 2 III 4, pp. 63 ff.; Lorenz, in Staudinger, BGB, 2007, § 812 Rn. 51; *See* Larenz/Canaris, *supra* note 9, § 70 II 3, IV 2, 5, pp. 206 ff., 225 ff., 235 f.; *See* Grigoleit/Auer, *supra* note 7, Rn. 437, pp. 150 f.; *See* Thomale, *supra* note 1, 305 ff.; *See* Solomon, *supra* note 1, 17 f.

12) E.g. BGHZ 61, 289 (293 f.); BGHZ 87, 246 (249 f.); BGHZ 89, 376 (380 ff.); on the criteria for good faith by analogy to BGB §§ 170 et seq. Wilhelm, AcP 175 (1975), 304, (338 ff., 347 f.); thereinafter especially Canaris, WM, 354 -356, (1980); id., JZ 1984, 627 ff.; *id*., JZ 1987, 201 f.; *See* Larenz/Canaris, *supra* note 9, § 70 IV 3 b, pp. 231 f.

the outset that the instruction is attributable, but not the overpayment[13]. In fact, given that in both cases, there is a primary, attributable act of causation by the instructor, there is no principled difference between a mistaken overpayment and a mistaken disregard of a valid revocation by the instructee.[14] Hence, there is no coincidence that, in its recent ruling, the Court treats both cases the same and considers them both cumulatively applicable without any further distinction, which would hardly be possible anyway.[15]

Even putting aside these doubtful distinctions, another doubt regarding facts arises: What are the requirements for good faith of a recipient? From a viewpoint of systematic coherence, it appears to be tempting to refer not to positive knowledge, but rather to negligent ignorance on the part of the recipient by analogy to BGB §§ 170 et seq., 173.[16] Yet, the obstacles to proof of evidence, which are already considerable when having to prove knowledge on the part of the recipient, become entirely insurmountable when it comes to whether or not the recipient was allowed to rely on the transfer being an authorized performance of the instructor or whether she could have realized its defectiveness on account of questionable circumstances or obvious inquiries.[17] Drawing a doctrinal line on such an unclear, hypothetical basis is not only prone to arbitrary manipulation, but will necessarily slide into a blanket clause of uncontrollable case law.[18] Therefore, in theory, it might appear to be reasonable to grant the recipient

13) In this vein already v. Caemmerer, JZ, 385-387 (1962); likewise Schwab, in MüKoBGB, 6th ed. (2013), § 812 Rn. 90; *See* Larenz/Canaris, *supra* note 9, § 70 IV 2, pp. 225 f.; Canaris, JZ, 201 (202 f.), (1987); differently, however, BGHZ 176, 234 (241 ff., Rn. 22 ff.), where direct restitution is denied in the case of overpayment and a bona fide payee; this case is hence ultimately treated the same as a revoked instruction. On the merits, this in line with the view taken in this article; the outcome will have to be corrected after BGHZ 205, 377, though.

14) On the impossibility of a clear distinction, *see* also Wilhelm, AcP 175 (1975), 304 (348 f.); Jansen, JZ, 952 -953, 955 (2015).

15) BGHZ 205, 377 (384, Rn. 19); *see* for a more critical view Kiehnle, NJW, 3095 (2015).

16) For references, *see supra* note 12.

17) Concisely denying a duty to inquire Larenz/Canaris (*Supra* note 9) § 70 IV 2 b, p. 231; *see* also for a not exhaustive comment on the burden of proof Canaris, JZ, 627 (628 f.) (1984). More generally on the problem of proof of evidence Schwab, in MüKoBGB, 6th ed. (2013), § 812 Rn. 120 f.: Partly, it is even controversial what has to be set forth to begin with.

18) *See* for a criticism of how to actually handle random case law already Wilhelm, JZ 1994, 585 ff.; similarly also Schall, JZ, 753 -760 (2013); Schnauder, JZ, 603 (605 f.) (2016).

the "abstract" protection not to be subject to direct restitution by the instructee when the recipient was in good faith and the instruction attributable to the instructor. Still, this protection will quite likely remain merely theoretical, as it cannot be realized in practice. Where even professors fail at drawing a clear line as to the relevant criteria of good faith of the recipient, an average attorney of the instructee cannot be expected to waive the direct claim against the recipient, accompanied by a third party notice against the instructor, in order to resolve the *abstract* issue of who is the right defendant – an issue that requires assessment of the *concrete* bona fide circumstances that can hardly ever be determined with legal certainty prior to legal proceedings. This is what happened in the case that was now decided by the German High Court.[19)]

II. BGHZ 205, 377: Departure from previous case law on revoked payment orders

To be clear: We have not yet touched on the doctrinal doubts directed at the predominant solution for restitution in three-party situations according to the instruction model. These doubts concern the issues of how to interpret the concept of performance (*Leistung*) and where to situate the performance relationships (*Leistungsverhältnisse*) between the involved parties – issues that have not been satisfactorily resolved yet.[20)] However, the 11th Senate does not touch upon these questions in its recent decision, but generally confirms the settled principles of restitution along the lines of the instruction model. Particularly, this means that the cover relationship between the instructor and the instructee and the underlying debt relationship between the instructor and the recipient are both conceived as performance relationships. Hence, restitution of the respectively transferred benefits can generally be claimed only "around the corner" by means of restitution claims on the account of "performance without legal ground"

19) In the underlying case, the payment service user, whose payment order had been executed despite valid cancelation, had joined the bank's direct claim against the payee as intervenor; cf. BGHZ 205, 377 (377, Rn. 1).

20) On these issues *see* hereinafter IV.

(*Leistungskondiktion*). An exception only applies if the instruction is lacking. In the latter case, direct restitution between the instructee and the recipient is possible by means of restitution based on "other modes of enrichment" ("*in sonstiger Weise*", cf. BGB § 812 para 1), i.e. on the grounds of a non-performance restitution claim (*Nichtleistungskondiktion*).[21] This up-front confirmation of settled principles does not come as a surprise, though, given that the decision already offers enough revolutionary content through quashing the above-mentioned rule of restitution "around the corner" for revoked instructions in payment services law.

According to the Court and contrary to the current practice of applying the principles of reliance to revoked payment orders, the instructed bank from now on cannot make a restitution claim against the supposedly instructing payer, even if that payer did not cause the unauthorized payment and if the payee is in good faith.[22] Said differently, the payee is no longer shielded from a direct restitution claim of the instructed bank even if his good faith merits protection. Rather, in all cases of unauthorized payment, restitution now is carried out exclusively between the bank and the payee by way of a direct claim as non-performance restitution. Therefore, revoking the authorization is tantamount to its initial non-existence; the distinction between initially non-existent and later revoked instructions is abandoned for the law of payment services. The Court substantiates its ruling by referring to BGB §§ 675j, 675u that have come into force with the revision of payment services law in 2009. According to the Court, these provisions yield the value judgment that, at least within their scope of application, it is irrelevant as to whether the payee's good faith merits protection. Rather, from now on, only the validity of the payment order as judged by principles of valid authorization matters.[23] The Court thereby endorses a view that has been progressing in case law and literature after the revision of the payment services law. This progressing view considers the revision of BGB §§ 675c et seq. to be a fundamental amendment with respect to the protection of interests that underlie

21) BGHZ 205, 377 (382 f., Rn. 17 f.).

22) BGHZ 205, 377 (385 ff., Rn. 22 ff.).

23) BGHZ 205, 377 (385 f., Rn. 23 f.).

electronic payment.[24)]

In this vein, since 2009, some voices in the academic literature have argued even beyond the Court that the purpose of the revision was to strengthen the supposed payer's legal position by completely shielding her from restitution in the cases of unauthorized payment, regardless of the payee's situation.[25)] Similarly to the recent Court decision, this viewpoint is crucially based on BGB § 675u. BGB § 675u excludes the payment service provider from claiming reimbursement of expenses against the seemingly instructing payer and grants instead the latter an action to immediately get reimbursement for the amount of the mistaken payment. In the light of the fully harmonizing effect of the EU directive on payment services as implemented through BGB § 675u,[26)] the academic literature came to read into that rule a general value judgment—namely, that if the payment is not authorized, not only the explicitly mentioned reimbursement claims, but rather all claims of the bank against its customer, including any claims of restitution, should be excluded.[27)] The customer's reimbursement claim against the bank pursuant to BGB § 675u sentence 2 would be to no avail if the bank were able to offset it with a claim against its customer on account

---

24) BGHZ 205, 377 (385, Rn. 22); previously already *LG Hannover*, ZIP, 1406 (1407 f.), (2011); *LG Berlin*, WM, 376 (377), (2015); *AG Schorndorf*, WM, 1239 (1240), (2015); from academic literature *see* e.g. Winkelhaus, *supra* note 1, 129 ff., 222 ff. and *passim*; *id*., BKR, 441 (443 ff.), (2010); *Bartels,* WM, 1828 (1832 f.), (2010); *Belling/Belling,* JZ 708 (710 f.), (2010); *Linardatos*, WuB, 246 ff, (2015); *id*., BKR, 395 f.,(2013); *Madaus,* EWiR, 589 (590), (2011); Casper, in MüKoBGB, 6th ed., § 675u Rn. 22, (2012); opposing view prior to the recent decision of the BGH e.g. *AG Hamburg-Harburg*, WM, 352 (353), (2014); *Fornasier,* AcP 212, 410 (433 ff.), (2012); *Grundmann,* WM, 1109 (1117), (2009); *Rademacher,* NJW, 2169 (2171 f.), (2011); *See* Thomale, *supra* note 1, 320 ff.; *Schwab*, in MüKoBGB, 6th ed., § 812 Rn. 123b, (2013); Omlor, in Staudinger, BGB, § 675z Rn. 6., (2012).

25) In this vein especially *Casper*, in MüKoBGB, 6th ed., § 675u Rn. 22, 24, (2012); with the same outcome Grigoleit/Auer in *supra* note 7, Rn. 464, p. 162; a different view Jansen, JZ 952 (954), (2015).

26) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, OJ L 319/1, implemented by law from 29 July 2009, BGBl. (Federal Law Gazette) I, 2355, come into force on 31 October 2009. The importance of interpreting national law in accordance with directives is stressed by *Winkelhaus* (*supra* note 1) 157 ff.; Linardatos, WuB, 246 ff., (2015); *id*., BKR, 395 (396), (2013); Casper, in MüKoBGB, 6th ed., § 675u Rn. 22., (2012). The BGH has apparently left this argument aside in order to avoid a submission to the ECJ; cf. BGHZ 205, 377 (385, Rn. 22). This is correct in its outcome; cf. hereinafter at note 36.

27) E.g. Winkelhaus (*supra* note 1) 129 ff., 222 ff.; *Belling/Belling,* JZ, 708 (710 f.), (2010).

of restitution of performance or by way of recourse (*Leistungskondiktion oder Rückgriffskondiktion*) or on account of a right of retention.[28] On this basis, BGB § 675u sentence 1 has partly been interpreted to exclude any restitution claim between the bank and the customer from the outset.[29] In that view, the traditional way of recovering defective but attributable payments "around the corner" is rendered void in all constellations of lacking authorization.

This line of argument – as will be detailed later on – is certainly open to criticism in many ways, if not simply wrong. And yet, the High Court of Justice is ultimately on the safe side insofar as its change in case law can also draw on the considerable doctrinal criticism that had previously been raised in the academic literature against the application of the principles of causation and reliance on revoked payment orders – a critique that has preceded even the amendment of the payment services law.[30] The impossibility to draw a clear line between the cases of initially non-existent and later revoked payment orders put the case for direct restitution already under former law, especially as the payee finds herself in the exact same situation in both cases and as the payer has no reason to doubt the bank's compliance with an order of revocation more than with any other case of instruction.[31] Finally, it is crucial that, at least with single payment orders in modern electronic payment transactions, there is no operative fact that could give rise to liability under reliance rules in favor of the bona fide payee by analogy to BGB §§ 170 et seq.[32] The mere account statement,

---

28) Belling/Belling, JZ, 708 (711), (2010).

29) *See* Winkelhaus, *supra* note 1, 130, 222; *Belling/Belling,* JZ, 708 (710), (2010); Madaus, EWiR, 589 (590), (2011).; *Casper*, in MüKoBGB, 6th ed., § 675u Rn. 24., (2012). The 11th Senate has rightly not endorsed this view; cf. hereinafter at note 35.

30) BGHZ 205, 377 (385, Rn. 22); critisicm had already been voiced e.g. by Flume, AcP 199, 1 (6 f.), (1999); Müller, WM, 1293 (1300 ff.), (2010); Lieb, in FS 50 Jahre BGH, vol. 1, 547 (552 f.), (2000); Langenbucher, in FS Heldrich, 285 (293), (2005); *See* Solomon, *supra* note 1, 76 ff.; *Lorenz*, in Staudinger, BGB, § 812 Rn. 51, (2007); cf. also Jansen, JZ, 952 (955), (2015); *See* Winkelhaus, *supra* note 1, 206 ff.; with further references respectively.

31) It would be particularly unrealistic to oblige the payer in this case to separately notify the payee; in this vein rightly Solomon (*supra* note 1) 78 against Larenz/Canaris (*supra* note 9) § 70 IV 3 a, S. 231.

32) *See* especially Lieb, in FS 50 Jahre BGH, vol. 1, 547 (552 f.), (2000); Wilhelm, AcP 175, 304 (349), (1975); Jansen, JZ, 952 (955 f.), (2015).

which the payee receives from its bank and which is the only record documenting the payment of the debtor/payer, does not suffice for that purpose. The account statement only asserts that the instructed bank was seemingly authorized to communicate as a messenger a supposed declaration of will by the debtor to pay off his debt to the payee (*Tilgungsbestimmung*). Such a mere transmission of a declaration without authorization (*Botenerklärung ohne Botenmacht*) that at most entails claims for reliance damages pursuant to BGB §§ 120, 122, 179 et seq., does not constitute an operative fact that could estop the supposed payer pursuant to BGB §§ 170 et seq.[33)]

III. The literature's criticism and the general questionability of restitution "around the corner"

In view of the above, it becomes clear that the Court – at least in its outcome – has hit the right spot with its recent decision by simply reversing the established relationship between the rule of restitution "around the corner" and the exception of direct restitution for unauthorized payment orders. Now, the bank always has a direct claim of restitution against the payee. And yet, there is something unsatisfactory and preliminary about this outcome that is clearly reflected in the reactions of the academic literature published to date.

Apart from some few favorable statements, criticism prevails, sparked off mainly by the Court's reasoning in overturning settled principles of restitution on the basis of the supposedly mandatory regulations in BGB §§ 675j, 675u.[34)] Indeed, it is more convincing to assume that the recent amendment of payment services law did not intend, nor necessarily implied a revision of the traditional principles on restitution of unjust enrichment.[35)] Not only judging by the legislative materials, but also taking

33) In detail Wilhelm, AcP 175, 304 (349 f.), (1975); Jansen, JZ, 952 (955 f.), (2015).

34) For a critical view *see* Jansen, JZ, 952 ff., (2015); Kiehnle, NJW, 3095 f., (2015); Omlor, EWiR, 595 f., (2015); Schnauder, JZ, 603 ff., (2016); *See* Reuter/Martinek, *supra* note 7, § 2 IV 1 a, pp. 82 f.; Hadding, WuB, 1631, (2015).

35) This view had been taken already before the ruling of the BGH by Fornasier, AcP 212,

into account the underlying directive on payment services, the legislative intent is explicitly restricted to "contractual obligations and responsibilities between the payment service user and his payment service provider"[36]. Therefore, it is quite compelling that the amendment of BGB §§ 675j, 675u was only supposed to verbalize what has always been an established part of agency law (cf. BGB §§ 665, 666, 667, 670, 675c para 1) and, therefore, was supposed to be compatible with restitution "around the corner" and protection of the bona fide payee vis-à-vis the payer.[37] However, it is remarkable that, at least since the ruling of the Court, the return to restitution "around the corner" for revoked payment orders has only seldom been unequivocally advocated. The criticism is directed not so much at the outcome of direct restitution against the payee, but rather at the Court's lacking willingness to coherently integrate this outcome into the traditional principles on restitution in three-party situations according to the instruction model.[38]

In fact, this lack of willingness is so obvious in the light of the Court's reference to BGB §§ 675j, 675u that it seems likely that the Court's decision might provoke a general revision of the traditional principles on restitution in three-party situations. Looked at more closely, it is indeed impossible to reconcile the ruling with the traditional system of restitution without fundamentally questioning its underlying principles. After all, the pivot of the instruction model is to give priority to restitution "around the corner", i.e. restitution involving the instructor and excluding direct recovery. There is an almost unanimous consensus regarding the merits of this model from a viewpoint of equitable reconciliation of interests. It should suffice here to

410 (433 ff.), (2012); Grundmann, WM, 1109 (1117), (2009); Rademacher, NJW, 2169 ff., (2011); Schwab, in MüKoBGB, 6th ed., § 812 Rn. 123b, (2013); now also those mentioned in note 34.

36) Directive 2007/64/EC, OJ L 319/1, recital 47; cf. also BT-Drucks. (Bundestag publication) 16/11643, p. 113 on the draft version of § 675u BGB, that states that the provision already reflects the existing legal situation in Germany; on this issue, *see* e.g. Fornasier, AcP 212, 410 (433 ff.), (2012).

37) In particular, the authorization pursuant to BGB 675j merely authorizes to debit the payer's account (Casper, in MüKoBGB, 6th ed. § 675f Rn. 42, § 675j Rn. 9, (2012); Winkelhaus (*supra* note 1) 40) and hence, contrary to the BGH's interpretation, does not absolutely exclude attribution in the underlying debt relationship; *see* also Hadding, WuB, 1631, (2015); Omlor, EWiR, 595 (596), (2015); Reuter/Martinek (*supra* note 7) § 2 IV 1 a, pp. 82 f.

38) *See* especially Jansen, JZ, 955 f., (2015)

shortly mention the generally recognized significance of a just distribution of litigation, defense, and insolvency risks[39] that seem to dictate restitution between the parties of the defective relationship and to only exceptionally allow a direct restitution claim, when the defects of the instruction cannot be cured under principles of reliance. Yet this very certainty is called into question by the recent decision, because it now apparently does not seem to be appropriate to refer the bank to the payer for restitution, even in the case of an attributable instruction and a bona fide payee.[40]

Indeed, the very constellation of a revoked payment order with an existing claim in the underlying debt relationship illustrates that excluding direct restitution does not distribute litigation and defense risks more equitably than allowing it. On the one hand, given what was said above about unfeasible distinctions between types of cases, the bank will mostly end up making a direct claim against the payee anyway,[41] where the academic question will be decided just who the correct defendant is. On the other hand, the questionable abstract protection of the bona fide payee via restitution "around the corner" comes at the cost of a considerable, not justifiable gap in the protection of the supposed payer. The latter's reimbursement claim on account of BGB § 675u sentence 2 would always be offset by a right of retention on the basis of restitution of performance or by way of recourse (*Leistungskondiktion oder Rückgriffskondiktion*). Therefore, the payer would himself be subjected to a simultaneous, double risk of litigation vis-à-vis both the bank *and* the payee – without having caused the bank's mistake![42] The first litigation risk is vis-à-vis the bank since the payer cannot tell at first whether the payee was in bad faith and hence has to directly restore the unjustified advantage to the bank, with the consequence that the bank's restitution claim against the payer would be void for lack of enrichment on the part of the payer. The second litigation risk is vis-à-vis the payee since the payer would still have to perform under the underlying debt relationship, where he could raise against the payee

39) For a seminal account of this significance, *see* Canaris, in 1. FS Larenz, 799 ff. (1973).

40) Different view in Jansen, JZ, 952 (956), (2015).

41) *See supra* note 19; on the de facto priority of a direct claim *see* also Thomale (*supra* note 1) 329.

42) Flume, AcP 199, 1 (7), (1999) correctly points out the bank's responsibility.

the defenses that probably led to the revocation in the first place. If, however, restitution is ultimately carried out "around the corner," the supposed payer is not only forced to accept performance and loss of defenses in the debt relationship vis-à-vis the payee. He is also forced to introduce those defenses into his litigation with the bank, since he can only avert their final loss by holding them against the restitution claim of the bank by analogy to BGB §§ 404 et seq. This is a clear violation of the dogma to confine litigation and defense risks to the respective underlying legal relationships.[43)]

Just by way of comparison: If there is a direct restitution between the bank and the payee from the outset, the revoking customer is not affected by the restitution, but can always and with legal certainty make a claim against the bank to have the mistaken booking cancelled pursuant to BGB § 675u sentence 2. The remainder of the case can usually be disposed of in *one* single litigation between the bank and the payee, where the latter is not in a less favorable position than with restitution "around the corner": If there is a valid claim in the underlying debt relationship and performance has been rendered, e.g. by virtue of a declaration to pay off that debt (*Tilgungsbestimmung*), the payee can invoke loss of his claim against the instructor as loss of enrichment on the basis of BGB § 818 para 3, i.e. as "specific" protection of good faith. This defense, sensible from a viewpoint of efficiency in adjudication, is tantamount to the classic defense of *suum recepit* or *good consideration* or *discharge for value* that had already been recognized in Roman Law and is valid until today under Common Law. [44)]

43) On non-performance restitution based on recourse to an unjust enrichment (*Rückgriffskondiktion*) against the instructor and the analogous applicability of BGB §§ 404 et seq. in the case of an instruction that can be attributed by estoppel, *see* Reuter/Martinek (*supra* note 7) § 2 IV 1 a, p. 81; *See* Larenz/Canaris, *supra* note 9, § 70 IV 3 f, pp. 232 f. If the instruction is valid, however, restitution of performance (*Leistungskondiktion*) will be carried out between the instructor and the instructee. However, this differentiation of the predominant view is not convincing, since the defective instruction does not change the purpose of the transfer. For the analogous problem with direct restitution, *see* hereinafter at note 72.

44) For an instructive account on this, *see* Schall, JZ, 753 (757 f.), (2013) as well as *id.*, Restitution Law Review , 110 ff., (2004); *See* Solomon, *supra* note 1, 143 ff.; with further references and a detailed discussion of the English landmark case *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] Q.B. 677.

Only when this defense holds, the bank can make a claim of restitution against the payer, who only then is discharged from his obligation in the underlying debt relationship. There should be no doubt as to which of the two solutions can claim the "charm"[45] of simplicity, legal clarity and efficiency in adjudication.

These considerations illustrate that it is a *petitio principii* to deny the bank a direct claim against the payee on the grounds that the payee is worthier of protection than the seeming payer from a viewpoint of equitable risk distribution between the parties. In fact, the evoked principle of equitable distribution of litigation risks is an empty phrase.[46] Why should the payee necessarily have to be shielded from proceedings with a person she does not have a contract with if she ultimately is not allowed to keep the received benefit anyway? Why should not the payee generally be expected to be ready to restore a benefit, and, moreover, obviously to the same person whom she received the benefit from in the first place? On the basis of these and similar questions,[47] it becomes clear that questioning the dogma of restitution „around the corner" puts all other constructive dogmas of traditional restitution in three-party situations to the test as well. These dogmas include the construction of performance relationships along the underlying contractual relationships, the normative attribution of a transfer as a performance outside of the transfer relationship, as well as the famous doctrine of subsidiarity of non-performance restitution vis-à-vis performance restitution. It is mainly this doctrine that constructively establishes the priority of restitution within the performance relationships and the subordination of direct restitution.[48]

---

45) Concisely Winkelhaus, *supra* note 1, 130; concurring Schnauder, JZ, 603 (606), (2016).

46) Especially the reference to insolvency risks – that will not be discussed further here – is misleading, because these risks are not assumed by entering a contract; cf. Schwab, in MüKoBGB, 6th ed. § 812 Rn. 55, (2013); *See* Thomale, *supra* note 1, 276 ff.; Wilhelm, AcP 175, 304 (318 f.), (1975). For a detailed criticism of the self-referenciality of risk attribution, *see* also Schall, JZ, 753 (757), (2013); Seinecke, in *Rückert/Seinecke*, Methodik des Zivilrechts – von Savigny bis Teubner, 2nd ed. Rn. 1071 ff., pp. 382 ff., (2012); *See* Thomale, *supra* note 1, 278 ff., especially 280 ff.

47) Further questions regarding the example of BGHZ 113, 62 can be found at Seinecke, *supra* note 46, Rn. 1075, p. 383 note 215.

48) For a criticism of this subsidiarity in more recent literature, *see* Schall *supra* note 1, at 92 ff; Thomale *supra* note 1, at 258 ff.

The crucial point is: All these considerations are completely independent from BGB § 675u. However, now that they become so vividly evident for payment services law in the Court's reading of BGB § 675u, it seems hardly possible to ignore them in other three-party situations once one acknowledges the Court's line of argument on the fairness of direct restitution in the case of revoked payment orders.[49] Against this background, the alarmed reactions of some writers, speaking of a "vast doctrinal damage" [50] or erosion of the doctrine of attribution "in its very foundations"[51], become comprehensible. *Schnauder* gets to the heart of this matter by conjecturing that the 11th Senate apparently "seized the first chance that came along to get rid of its reliance-based case law, that – one seems to read between the lines – had not be deemed worthy to uphold any more."[52] Indeed: It is difficult not to draw this conclusion from the new decision of the High Court in the long term.[53]

IV. A fresh start for restitution in three-party situations

The recent decision provides reason to put to the test the entire regime of restitution in three-party situations – a regime that has hit a dead end of doctrinal constructions that do not further but rather veil and suppress the adequacy of the underlying restitution mechanisms. The starting point of such a new conception is a return to the general provisions on restitution and performance (*Erfüllung*) in the German law of obligations. In the case of

49) Diese Konsequenz sieht trotz Kritik auch Kiehnle, NJW, 3095 (3096) (2015).

50) Omlor, EWiR, 595 (596) (2015). („dogmatischen Flurschaden").

51) Jansen, JZ, 952 (956) (2015). („in ihren Grundfesten").

52) Schnauder, JZ, 603 (606) (2016). („die erstbeste Chance ergriffen und zum Anlass genommen, sich seiner – wie man zwischen den Zeilen zu lesen meint – nicht verteidigungswürdigen Veranlassungsrechtsprechung mit einem Schlag zu entledigen").

53) A distinction is in order, though: The doctrine of estoppel will continue to be relevant in instruction cases with regard to the instructor's declaration to pay off her debt (*Tilgungsbestimmung*); *see* cf. Reuter/Martinek, *supra* note 7, at 81. Good/bad faith is unsuited, though, as BGHZ 205, 377 should have made obvious, to be the criterion to determine whom the instructee's restitution claim should be directed at. Similarly, Flume, AcP 199, 1 (10) (1999) argues that there can be no bona fide rights protection that could justify which of several parties should be granted a restitution claim against the bona fide party.

third-party involvement, the BGB offers clear rules as to who is the performing party and who is the recipient: If the obligor need not perform in person, then, pursuant to BGB § 267 para 1, a third party may also render performance; pursuant to the clear wording of the provision, performing party is not the obligor, but rather the third party who renders performance to the obligee. Inversely, the same follows from BGB § 362 para 2: If, with the obligee's consent, "performance is rendered to a third party for the purpose of performing the contract", then performance is not rendered between the obligor and the obligee, but between the obligor and the receiving third party.[54)]

Therefore, an unbiased look at the BGB yields an understanding of the concept of performance and of the distribution of the performance relationships between the parties that considerably departs from the prevailing view on restitution in three-party situations. Contrary to restitution "around the corner", the central performance relationship, giving rise to the primary claim of restitution, should hence be situated in the *transfer relationship* between the instructee and the recipient (!).[55)] Moreover, the instructor/debtor is also a performing party vis-à-vis the recipient because the recipient receives the transferred object (*erlangtes Etwas*, cf. BGB § 812 para 1) from the instructor for the purpose of performance in the underlying debt relationship.[56)] However, the instructor does not receive performance by the instructee in the cover relationship for the reason that she never receives the object of performance herself. Rather, by virtue of her instruction, she explicitly consents to performance being rendered to the recipient as third party. Restitution of performance (*Leistungskondiktion*) is therefore possible – depending on the nature and

54) Arguing in this vein already Schall, JZ, 753 (755 ff.) (2013). and *id. supra* note 1 at 21 ff.

55) *See* also Schall, JZ, 753 (755 f.) (2013). and *id. supra* note at 22 ff.; Kupisch, Gesetzespositivismus im Bereicherungsrecht, 19f (1978)., has the same argumentative starting point, but his further conclusion to eventually come back to restitution „around the corner" by analogy to BGB § 812 is to be rejected from the viewpoint outlined in this article. For a methodological criticism, *see* Larenz/Canaris *supra* note 7, at 251.

56) This value judgment is confirmed by BGB § 788, pursuant to which the performance relationships in the case of an accepted order are situated between the drawee and the payee, as well as between the drawer and the payee; cf. Schall, JZ, 753 (756) (2013); *id. supra* note 1 at 22.

extent of the underlying defect – both in the transfer relationship between the instructee and the recipient and in the debt relationship between the instructor and the recipient. The possible conflict of both claims can be resolved according to the rules of joint and several creditors as set forth in BGB § 428.[57] Furthermore, if performance in the debt relationship is valid, the recipient can always avail himself of the defense of loss of enrichment pursuant to BGB § 818 para 3 – *suum recepit* – based on the fact that he lost his own claim against the instructor.[58]

Nevertheless, in the cover relationship between the instructor and the instructee, there is no restitution of performance, but rather non-performance restitution by way of recourse (*Rückgriffskondiktion*). This applies to the cases of defects in the cover relationship, defects affecting both the cover and underlying debt relationships, as well as defects of the instruction that cannot be invoked due to reliance. The restitution claim of the instructee is aimed at recovering what the instructor has obtained as enrichment in lieu of the actual object of performance, e.g. the discharge in the debt relationship or a restitution claim against the recipient.[59] This is not a claim of restitution of performance, because none of the possible objects were rendered by the instructee to the instructor by way of performance of the underlying debt relationship. In the view taken here, the actual object of performance cannot be normatively attributed to the instructor as performance rendered by the instructee in the cover relationship.[60] Assuming that the function of the concept of performance in restitution is to identify both the object of performance and the parties of the restitution claim,[61] it seems fundamentally wrong to separate the performance relationships between parties in three-party situations from

57) Schall, JZ, 753 (757 f.). (2013); *id*. *supra* note 1 at 55, 95 ff.

58) Schall, JZ, 753 (757 f.) (2013); see also Flume, AcP 199, 1 (12) (1999), as well as *supra* note 44 with further references.

59) *See* also Schall, JZ 753 (757 note 28), (2013)

60) This runs counter the predominant view, as e.g. in v. Caemmerer, JZ, 385 (386) (1962); *see* Canaris *supra* note 1. FS Larenz, 799 (813) (1973); Kupisch, JZ, 213 (219) (1997); Schwab, in MüKoBGB, 6th ed. 2013, § 812 Rn. 66, 72 ff.; *see* Reuter/Martinek *supra* note 7 at 43 ff.; Lorenz, in Staudinger, BGB, 2007, § 812 Rn. 55; *see* Laren/Canaris *supra* note 9, at 205 f.; Thomale *supra* note 1, at 290 ff.

61) *See* Schall, *supra* note 1, 15 ff.; Grigoleit/Auer *supra* note 7 at 12.

the actual object of performance by attributing performance on normative grounds.[62] The resulting uncertainty regarding the performance relationships is one of the core reasons for the flawed present state of the doctrine of three-party situations. From the point of view of clarity, practicality and efficiency in adjudication, it would make much more sense to start litigation of restitution where the lost object actually ended up—i.e., obviously, with the recipient.

At first sight, given the resulting asymmetry between cover and debt relationships – No to performance (and restitution of performance) between the instructor and the instructee, but Yes between the instructor and the recipient, this conclusion might seem odd. However, one should always have in mind that the doctrinal urge to see performance in three-party situations where the underlying legal relationships are, i.e. "around the corner", is based on the illusion that restitution in three-party relationships should be modeled on a comprehensive analogy to the case of chain performance.[63] In the cases of chain performances, i.e., several subsequent performance relationships pertaining to the same object, but not linked together by instruction, restitution is naturally conducted only on a two-party basis between the parties involved in a failed performance relationship (restitution of performance); and this obviously cannot change only on the grounds that several two-party relationships are performed in series. The underlying interests change fundamentally, however, when the involved parties themselves cut short the path of performance by means of an instruction and direct performance to a third party recipient. This way of shortcutting the transaction is not, as the chain performance model might suggest, a merely coincidental, "technical" simplification of the transfer without normative relevance[64]. As shown by the rules pertaining to third-party performance in BGB §§ 267 para 2, 362 para 2, 185, it is rather a deliberate risk decision to let the object of performance go into other hands than as provided in the contract. Consequently, when it comes to

62) Similarly Schall, JZ 2013, 753-758 (2013).

63) Cf. e.g. Schwab, in MüKoBGB, 6th ed. 2013, § 812 Rn. 52 ff.; *see* Larenz/Canaris *supra* note 9, at 200 f.; *see* Grigoleit/Auer *supra* note 7, at Rn. 419 ff., 430 ff., p. 144 ff.; Kupisch, JZ 1997, 213 (218 f.).

64) This is, however, what Larenz/Canaris *supra* note 9 at 201 argue.

restitution, the instructor also has to expect the risk situation to be different from the contractual and transfer relationships of a supply chain.[65]

This consideration also reveals the deeper reason behind the ongoing dispute over the concept of performance.[66] This dispute pertains to the academic critique of the concept of performance based on the concept of purpose (*Leistungzweck*, *finaler Leistungsbegriff*). Based on this critique, almost all voices in current academic writing try to reconnect the concept of performance in three-party situations to the underlying contractual relationships. This can be done either by directly referring to the underlying contractual relationships,[67] or by indirectly alluding to the declarations of purpose by the parties in performance,[68] or, finally, by doctrinal construction on the basis of risk distribution,[69] thereby referring back to the respective bilateral contractual relationships as well. Yet, all these approaches lead up to the same problem: They miss the crucial point that the distribution of restitution risks has to be modified when a third party gets involved. In this vein, it is generally correct to connect the concept of performance to the law of performance (*Erfüllungsrecht*) and to carry out restitution where performance has been rendered. However, this generally correct consideration fails precisely when performance is rendered by or to a third party. In the latter case, for example, the obligation between the obligee and the obligor is fulfilled pursuant to BGB § 362 para 1, but performance is not rendered to the obligee, but rather to a *third party* pursuant to BGB § 362 para 2.[70] In spite of the general concurrence between performance in restitution and performance of contracts under the German law, it does not follow from the clear wording of the BGB that the two

65) Rightly arguing in this vein Schall, JZ 2013, 753 (757) (2013).

66) Cf. e.g. Lorenz, in Staudinger, BGB, 2007, § 812 Rn. 4 ff. who describes this quite unrewarding merely conceptual as „typical German phenomenon" („typisch deutsches Phänomen"); concisely also Schall, JZ 2013, 753 (754 f.). (2013).

67) Lorenz, in Staudinger, BGB, 2007, § 812 Rn. 37 ff.; Schwab, in MüKoBGB, 6th ed. 2013, § 812 Rn. 60 ff.

68) *See* Reuter/Martinek, *supra* note 7, at 6 ff.; Thomale *supra* note 1 at 163 ff.; Jansen, AcP 216 (2016), 112 (160).

69) *See* Canaris, *supra* note 1. FS Larenz, 799 (857 ff.) (1973); id., WM 1980, at 354 (367 ff.); *See* Larenz/Canaris *supra* note 9 at 248 ff.

70) *See* also Schall, JZ 2013, 753 (758 note 34), (2013) against Thomale *supra* note 1 at 57.

necessarily have to be situated in the same two-party relationship when *more* than two parties are involved. Similarly, it is not compelling to conclude that performance always has to be rendered in the same two-party relationship where the purpose of performance originates.[71)]

Against this background, the actual „charm" of the Court's decision to give a direct claim of restitution for revoked payment orders becomes apparent: Though disguised in a questionable use of concepts, but with an astonishing accuracy as to the outcomes it produces, this new path sketches out a new solution for restitution in three-party situations that not only has the merits of simplicity and legal certainty, but is also favorable with regard to deeper aspects of fairness and systematic coherence. Moreover, the latter aspects can be generalized far beyond payment services law. There is just one aspect where the Court might have decided differently: The claim of direct restitution between the bank and the payee should not have been qualified as non-performance restitution pursuant to BGB § 812 para 1 sentence 1 alternative 2, but as restitution of performance pursuant to BGB § 812 para 1 sentence 1 alternative 1. This is irrespective of the revocation, as the lacking instruction does not change the fact that the intention of the bank had been performance.[72)] Unrelated to this is the final question whether performance could have been attributed in the debt relationship between the instructor and the payee according to principles of reliance. The performance then would have to be taken into account in favor of the payee as defense of *suum recepit* pursuant to BGB § 818 para 3. In the case at hand, however, the Court correctly denied this question.[73)]

---

71) At least on a conceptual basis, there is nothing wrong with rendering the performance from the instructee to the recipient in pursuit of the purpose underlying the cover relationship between the instructee and the instructor.

72) Its failure does not render the bank's performance a non-performance enrichment (*in sonstiger Weise*); cf. also Flume AcP 199, 1 (10). BGHZ 55, 176 (177 f.). („Jungbullenfall") is an example of how this consideration is disregarded with respect to the transfer of ownership to a bona fide third party transferee that fails because of BGB § 935; for criticism, *see* e.g. Laren/Canaris *supra* note 9 at 215 f.

73) BGHZ 205, 377 (385 f., Rn. 24-25.); critically Omlor, EWiR 2015, 595-596 (2015); Kiehnle, NJW 2015, 3095 (2015).

V. Conclusion

A quick look at the BGH's recent case law on restitution in three-party situations suffices to reveal: There is hardly a decision without extensive theoretical discussion of the correct parties of litigation, the right criteria of attribution, bona fides and risk, and the correct object of enrichment. But can it really be the purpose of the German restitution law to produce a new scholarly textbook on third-party restitution with every new case? If not, then we should ask whether the time might be ripe for a fundamental "disarmament"[74] and rethinking of three-party situations in restitution. In particular, courts and scholars should consider dropping the doctrine of restitution "around the corner" modeled on the instruction situation and reversing e rule and exception between restitution "around the corner" and direct restitution. The Court's recent decision on restitution of revoked payment orders opens the door for such a fresh start. It is now the turn for legal academia and adjudication to seize the opportunity and walk through that door with appropriate reasoning.

The article treats the instruction model(Anweisungmodell), particularly concerning BGHZ 205, 377 which has undertaken a significant change of direction of the previous precedents in case of revoked payment order in payment services law. This article, I believe, would affect the related juristic discussion a lot not only in Germany but also here in Korea regarding the unjust enrichment by the instruction.

74) In reference to the poignant title of Schall, JZ 2013, 753 ff. (2013); cf. also Wesel, NJW 1994, 2594-2595 (1994) pleading for a simplification of the law of restitution.

***

***