Developments

Book Review: Chris Thomale's *Leistung als Freiheit: Erfüllungsautonomie im Bereicherungsrecht*

By Phillip Hellwege[*]

A. Introduction

Chris Thomale's *Leistung als Freiheit*[1] is the printed version of his Berlin doctoral thesis of 2011 (Freie Universität) which was supervised by Martin Schwab. The title of the book will most probably be meaningless or even be misleading to non-German readers: *Leistung als Freiheit* translates to "Performance as Freedom." The subtitle will not be of any help to non-German readers, either: *Erfüllungsautonomie im Bereicherungsrecht* means "Autonomy of Performance in the Law of Unjustified Enrichment." The subtitle points to the area of law to which the book is devoted—the law of unjustified enrichment—and within the law of unjustified enrichment, to those cases which are commonly—and not only in German law—labeled as enrichment by performance or enrichment by deliberate conferral. In German law, and also in other civil law systems, the different *condictiones* are joined together under this label.

Thomale seeks to explore the nature of the performance. He looks upon it as a juridical act, and this qualification explains the title of the book—according to German law, the juridical act is the legal instrument with which anyone can exercise his private autonomy, or in the words of Dieter Medicus, "Das Mittel der Privatautonomie ist das Rechtsgeschäft" ("The means of private autonomy is the juridical act").[2] The nature of the performance is highly controversial in German law, and at the same time it is a key concept to understanding the law of unjustified enrichment. Furthermore, the notion of performance is not restricted to the law of unjustified enrichment, but it is also a legal concept used in the general part of the German law of obligations—a debtor fulfills his obligation by performance and thereby brings the obligation to an end, or as section 362(1) BGB puts it, "an obligation is extinguished if the performance owed is rendered to the obligee."[3] Again, the nature of

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[1] CHRIS THOMALE, LEISTUNG ALS FREIHEIT: ERFÜLLUNGSAUTONOMIE IM BEREICHERUNGSRECHT [PERFORMANCE AS FREEDOM: AUTONOMY OF PERFORMANCE IN THE LAW OF UNJUSTIFIED ENRICHMENT] Mohr Siebeck (Studien zum Privatrecht, vol. 23), 2012, ISBN: 978-3-16-151667-2, 467 pp., € 109, hardcover [hereinafter THOMALE].

[2] DIETER MEDICUS, ALLGEMEINER TEIL DES BGB [GENERAL PART OF THE BGB] para. 175 (10th ed. 2010).

[3] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL.] as amended, § 362, para. 1, *translated at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (last visisited 8 September 2013).

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the performance in section 362(1) BGB is highly controversial in German law. Thomale argues in favor of a unified concept of performance, which is the same in the law of unjustified enrichment and in sections 362 ff. BGB. Because Thomale is of the opinion that the performance is a juridical act, his book finally discusses the so-called *Rechtsgeschäftslehre*, the general theory of juridical acts of the general part of the BGB.

As a consequence, Thomale's book is a dogmatic work in the traditional German sense.

That Thomale's book is a dogmatic work in the traditional German sense becomes clear from the introduction to the book in which Thomale summarizes the main arguments and gives an overview of the structure of his thesis.[4] He argues that the German law of unjustified enrichment as it presents itself in legal writing and in case law is lacking a clear and coherent systematization. This is a finding that will most probably puzzle non-German readers as English-speaking literature often presents the German law of unjustified enrichment as being principled and at the same time as having considered every detail. Thomale rightly points out, though, that every detail of the German law of unjustified enrichment is highly controversial and that many questions are very complex such as, for example, the case of third-party enrichment claims. Thomale explains that these controversies and this complexity arise because the fundamental principles of the German law of unjustified enrichment do not become apparent in the drafting materials of the BGB. Thomale argues that, as a result, the legal literature and the case law—based upon the unclear drafting materials—have, themselves, created a law of unjustified enrichment which is not coherent and which is not reflected in the text of the BGB.

Thomale wants to achieve a coherent law of unjustified enrichment that is firmly rooted in the text of the BGB. Central to his process of rethinking the German law of unjustified enrichment is the notion of performance. Thomale argues that performance has the same meaning in the law of unjustified enrichment and in sections 362 ff. BGB. It is a juridical act with which the debtor links his act of performance to a specific obligation. As a result, the general theory of juridical acts, the so-called *Rechtsgeschäftslehre*—which is to be found in the General Part of the BGB—does apply. Thomale wants to work out the consequences of these findings for the law of unjustified enrichment; he wants to prove that every performance is done *causa solvendi*. Thus, there is no need to distinguish between the *condictio indebiti*, the *condictio causa data causa non secuta*, and the *condictio ob turpem vel iniustam causam*. All of them can be merged into a general claim in unjustified enrichment by performance. Thomale finally wants to show how his general claim in unjustified enrichment by performance applies to third-party enrichment situations.

This introduction raises questions. Thomale is right that the law of unjustified enrichment is full of controversies, but he is probably too harsh in his verdict that nobody has as yet

[4] *See* THOMALE, *supra* note 1, at 1–3.

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built a coherent system of the law of unjustified enrichment. Instead, it seems that there are too many opposing coherent systems. Thomale is right that the law of unjustified enrichment is very complex, but, up to this point, I had the impression that both—the controversies and the complexity—are instead caused by the fact that the law of unjustified enrichment has to solve very complex and very diverse cases. Is Thomale, thus, able to solve the controversies and the complexity? Or will he just add yet another controversial theory?

There is one aspect of the introduction which raises suspicions: Thomale wants to develop a coherent law of unjustified enrichment which is firmly rooted in the text of the BGB, as he starts off with the observation that the theories which have hitherto been developed by the legal literature and the case law are not reflected in the text of the BGB. Yet, if Thomale argues that there is no need to distinguish between the different *condictiones*, and that there is only one general claim in unjustified enrichment by performance he, *prima facie*, does not take the text of the BGB seriously, because the BGB does distinguish between the different *condictiones*. The reader is eager to see how Thomale will resolve this contradiction.

B. Performance in Sections 362 ff. BGB

In his first[5] and second[6] chapters, Thomale analyzes the details of the performance in sections 362 ff. BGB.

Section 362(1) BGB reads: "An obligation is extinguished if the performance owed is rendered to the obligee."[7] Section 362(1) BGB seems to be straightforward—the obligation extinguishes if the debtor renders the owed performance. Yet, there is a controversy with regards to the notion of the performance. Three theories on this subject have been developed, and they disagree as to the question whether performance is an objective concept or whether it requires an additional subjective element. The so-called *Theorie der realen Leistungserbringung* takes a purely objective approach. The debtor has to render the performance. Nothing more is required. If the performance and the obligation correspond, the latter extinguishes. According to the so-called *Vertragstheorie*, it is not sufficient that the debtor has objectively rendered his performance. The debtor and the obligee have to agree that the performance is to have the effect of section 362(1) BGB. This agreement is a contract. It is important not to confuse this contract with other contracts. It is not the original contract—that which obliges the debtor to perform, for

[5] *See* THOMALE, *supra* note 1, at 5–58.

[6] *Id*. at 59–162.

[7] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL.] as amended, § 362, para. 1, *translated at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (last visited 8 September 2013).

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example, a sales contract. It is not a contract that might be necessary in order to bring about what is owed. According to section 433(1) BGB a sales contract, for example, obliges the seller to transfer the property rights to the sold object. According to section 929(1) BGB, the transfer of ownership is affected by agreement and delivery, and this agreement is a contract. The only contract content required by the *Vertragstheorie* in order for the legal consequences of section 362(1) BGB to occur is that the performance shall extinguish a specific obligation. Finally, the *Theorie der finalen Leistungserbringung* does not require an agreement, but a unilateral statement of intent—a so-called *Tilgungsbestimmung*—which identifies the obligation that is to extinguish. Within the *Theorie der finalen Leistungserbringung*, there is a further controversy. Some say that the *Tilgungsbestimmung* is a juridical act. Others argue that it is merely a *rechtsgeschäftsähnliche Handlung*—an act akin to a juridical act to which the rules on juridical acts do not apply directly, but apply only if they are appropriate and with appropriate adaptations.

The practical relevance of the controversy is minor. With all three theories, one is able to achieve similar practical results to a given legal problem. Yet, they arrive at this result with a different reasoning. The controversy is about which reasoning is in line with the BGB and which is not. To give an example: A renders performance to B, who is a minor. The legal representatives of B have not agreed to B receiving the performance. Does this performance nevertheless extinguish A's obligation? The answer is in the negative. The *Vertragstheorie* argues that B, as a minor, cannot enter into the required contract. Because the extinction of his claim against A is a legal detriment to B, his legal representatives have to consent under section 107 BGB. The *Theorie der finalen Leistungserbringung* holds that the *Tilgungsbestimmung* will only become effective once it is received by the legal representatives, or once they had consented: section 131(2) BGB. Even though the *Theorie der realen Leistungserbringung* only requires that the debtor renders his performance objectively with the consequence that neither section 107 BGB nor section 131 BGB are applicable, the obligation will extinguish under section 362(1) BGB only if he has rendered his performance to the correct person. Generally speaking, the performance must be rendered to the obligee. Nonetheless, there are cases in which the obligee does not have the capacity to receive the performance himself—in which case, he misses the so-called *Empfangszuständigkeit*. An example of one of these cases is when the obligee is a minor.

The *Theorie der realen Leistungserbringung* is predominant, but the *Theorie der finalen Leistungsbewirkung* is gaining more and more support in literature. In his first chapter, Thomale convincingly argues in favor of this *Theorie der finalen Leistungsbewirkung*. In addition, Thomale holds that the *Tilgungsbestimmung* is a juridical act and not merely a *rechtsgeschäftsähnliche Handlung*. Thomale reviews the different rules on juridical acts and comes to the conclusion that all are applicable to the *Tilungsbestimmung*. The principle of normative interpretation under sections 133, 157 BGB applies. The *Tilgungsbestimmung* will only become effective when it is received by the obligee under

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section 130 BGB. It is voidable, for example, for mistake under section 119 BGB. And the rules on the capacity of minors are applicable.

My one problem with this first chapter is that it is very condensed. Thomale discusses issues which could have filled a full monograph in a little over 50 pages. Consequentially, I was not convinced by every argument that Thomale puts forward. Consider the question of the voidability of the *Tilgungsbestimmung*. Thomale argues that the *Tilgungsbestimmung* is a juridical act and, thus, is voidable for mistake. If the debtor performs in the mistaken belief that the obligation was enforceable, he may rescind his *Tilgungsbestimmung*. As a result, the debtor has, according to Thomale, the right to claim back the performance. Yet, as the creditor avoided the *Tilgungsbestimmung* the conferral does not count as a performance any longer, and, as a consequence, the creditor does not have a claim in unjustified enrichment by performance under section 812(1)(1)(1) BGB against the obligee; he, instead, has a claim based on section 812(1)(1)(2) BGB for an unjustified enrichment by non-performance. As a consequence, the bars to restitution under section 214(2) BGB and section 813(1)(2) BGB do not apply, as they are only applicable to claims in unjustified enrichment by performance. Section 214 BGB, for example, states: "(1) After limitation occurs, the obligor is entitled to refuse performance. (2) *Performance* rendered in satisfaction of a claim that is now statute-barred may not be claimed back even if performance was rendered without knowledge of the limitation."[8] I do not see how it can be brought in line with the rationale of both section 214(2) BGB and of section 813(1)(2) BGB to argue that the debtor can reclaim his performance once he has avoided the performance for mistake. And Thomale does not give any policy-based reasons for allowing restitution in such a situation. He should have given himself the room to discuss these problems more extensively.

In the second chapter, Thomale discusses at great length the fundamental problem of when we can hold anybody to an act or statement that indicates intent. There are cases in which somebody does not want to carry out a juridical act, but in which somebody else believed and was allowed to believe that the first person wanted to carry out such act. The problem is discussed at great length in the German literature. It touches upon a number of important issues, such as, for example, the contrast between the subjective and the objective theory in contract law. Thomale carefully summarizes the discussions and the different viewpoints and develops his own opinion. It remains a general discussion of a general problem, though, and Thomale does not link it directly with his specific subject matter. Nevertheless, he returns to his findings of his second chapter later in the book—they are central to the fifth chapter.

[8] *Id*. § 214.

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C. Comparing the Concepts of Performance in Sections 362 ff. BGB and in Sections 812 ff. BGB

In his third chapter, Thomale wants to prove that the concepts of performance in sections 362 ff. BGB and in sections 812 ff. BGB are identical.[9]

First, Thomale tries to prove that every performance according to sections 362 ff. BGB implies a performance in the meaning of section 812(1)(1)(1) BGB. Section 812(1)(1) BGB states, "A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him."[10] Performance is defined as any willful increase of the assets of another for a purpose. In short sketches Thomale argues that the elements "willful," "increase of assets," and "of another" are superfluous in this definition. What Thomale is left with is that a performance is an act done for a purpose. Understood in such a broad way, every performance in the meaning of sections 362 ff. BGB will also be a performance in the meaning of section 812(1)(1)(1) BGB.

Next, Thomale wishes to show that every performance in the meaning of sections 812 ff. BGB implies a performance in the meaning of sections 362 ff. BGB. This is the case if sections 812 ff. BGB accepts performances *solvendi causa* only. However, there is the *condictio causa data causa non secuta* or *condictio ob rem* of section 812(1)(2)(2) BGB: "This duty also exists. . . if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur."[11] And with this *condictio* it has never been disputed that the "result intended to be achieved" which "does not occur" is not the discharge of an obligation. The prime examples of section 812(1)(2)(2) BGB are to be found outside the law of contract. For example, a person is home caring for another person in the shared understanding that the first person will become the heir of the second person. Ultimately, though, he or she was not made the heir. The first person has a claim in unjustified enrichment under section 812(1)(2)(2) BGB for the value of the homecare services against the estate. Thomale first argues that all cases covered by section 812(1)(2)(2) BGB can be solved differently—the homecare case for example by application of the doctrine of frustration which, in German law, does not result in a claim in unjustified enrichment but in a claim under section 346(1) BGB. Next, Thomale points to inherent problems with the *condictio causa data causa non secuta* of section 812(1)(2)(2) BGB. Thomale also discusses a number of other purposes of performance that appear in

[9] *See* THOMALE, *supra* note 1, at 163–213.

[10] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL.] as amended, § 812, para. 1, sentence 1, *translated at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (last visited 8 September 2013).

[11] *Id.* § 812, para. 1, sentence 2.

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the case law and in legal writing, such as performances *acquirendi causa* or *donandi causa*. Thomale is of the opinion that it is possible to construct a performance *solvendi causa* in all of these cases.

At the end of the chapter, Thomale reaches the conclusion that the notions of performance in sections 362 ff. BGB and in sections 812 ff. BGB are identical. To do so, Thomale had to reconstruct the law of unjustified enrichment. He does not argue that any cases should be solved differently. He simply argues that the legal reasoning to achieve these identical results should be different. The changes Thomale proposes are not small. Indeed, they are far reaching. And, with them, Thomale is able to build a coherent system.

Nevertheless, I am critical of whether Thomale shows the way forward for the future development of German law; a comparative lawyer will observe again and again that one is able to solve similar cases by applying different legal tools and nevertheless achieve similar results. Thus, it does not come as a surprise to a comparative lawyer that Thomale is able to reinterpret German law to a wide extent and that he still ends up with a coherent system. Most German lawyers will agree with Thomale's critical assessment of the present understanding of the BGB—the *condictio causa data causa non secuta* of section 812(1)(2)(2) BGB and its relationship to the doctrine of frustration is, indeed, highly problematic.

The solutions proposed by Thomale, however, are not without problems. First, he wants to develop a coherent systematization of the law of unjustified enrichment, which is, secondly, he claims, firmly rooted in the text of the BGB. I do not believe, though, that Thomale keeps his second promise. To give just two examples: If Thomale has to argue that the *condictio causa data causa non secuta* of section 812(1)(2)(2) BGB does not exist and that one should simply ignore section 812(1)(2)(2) BGB, then he cannot assert that his systematization is firmly rooted in the text of the BGB. Furthermore, Thomale wants to see that the concept of performance is identical in sections 362 ff. BGB and in sections 812 ff. BGB. That is why he has to argue that the *condictio causa data causa non secuta* does not exist. Yet, it would have been sufficient for his further study to show that every performance according to sections 362 ff. BGB implies a performance in the meaning of section 812(1)(1)(1) BGB. It was not necessary to take the further step and prove that every performance in the meaning of sections 812 ff. BGB implies a performance in the meaning of sections 362 ff. BGB. It appears that Thomale took this second step because he wants to simplify the law of unjustified enrichment. Yes, by abolishing the *condictio causa data causa non secuta* he is able to simplify the law of unjustified enrichment to a great extent. In doing so, though, he will just reallocate the problems to other areas of law.

The second example relates to what is called a *Handschenkung*. In German law, a donation is a contract. However, with an instantaneous donation that is not preceded by a promise to donate—the prime examples are birthday and Christmas presents—it seems to be artificial to construct an obligation to donate. One could, of course, say that in handing

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over the present the donor is making an implied offer to enter into a contract of donation. One could say that, by taking the present, the donee makes an implied acceptance to enter into the contract of donation. Thus, a contract of donation is formed which obliges the donor to make his donation. This contract is void for lack of form. Nonetheless, as the donor has fulfilled his obligation, the invalidity is resolved under section 518(2) BGB. Such an analysis of a simple donation is overly complex and the predominant view follows a different analysis of a simple *Handschenkung*. According to section 518 BGB, the formal requirement only applies if the donor makes a promise to donate and thereby creates an obligation to give. With a simple *Handschenkung*, though, there is no obligatory element. Thus, the contract of the parties is reduced to the content that the donee is allowed to keep the present. The contract of donation in case of a simple *Handschenkung* does not create an obligation on the side of the donor, but constitutes the legal cause that allows the donee to keep the present. Thomale wants to follow the artificial analysis of the *Handschenkung*. And, indeed, if Thomale wants to argue that every performance is done *solvendi causa* he has to construe obligatory contracts where prima facie there are none. This is problematic in itself. Thomale hints, though, that even with the predominant analysis of the *Handschenkung*, the donor acts *solvendi causa* and that one renders a performance in the meaning of section 362(1) BGB because it is, according to Thomale, possible to make a performance in the meaning of section 362(1) BGB if one achieves nothing else than that the performances creates a legal cause to keep what has been given.[12] Such an understanding is hardly in line with the wording of section 362(1) BGB: "An obligation is extinguished if the performance owed is rendered to the obligee."[13] In case of a *Handschenkung*, the performance is not owed. And there is no obligation that can extinguish. One cannot say that Thomale's analysis of the *Handschenkung* is firmly rooted in the text of the BGB if he argues that section 362(1) BGB does not call for an interpretation in the "natural sense."[14]

D. Claims in Unjustified Enrichment by Performance

After having argued that the notions of performance in sections 362 ff. BGB and sections 812 ff. BGB are identical, and after having argued that sections 812 ff. BGB only recognize performances *solvendi causa*, Thomale gives, in his fourth chapter, an account of his understanding of claims in unjustified enrichment by performance.[15]

[12] *See* THOMALE, *supra* note 1, at 203–04.

[13] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL.] as amended, § 362, para. 1, *translated at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (last visited 8 September 2013).

[14] *See* THOMALE, *supra* note 1, at 204.

[15] *See* THOMALE, *supra* note 1, at 215–62.

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It is in this context that his understanding of the performance as a juridical act becomes important—as a juridical act, the performance is voidable, for example, for mistake. If it is avoided, there is no performance left with the consequence that the *condictio indebiti* of section 812(1)(1)(1) as a claim in unjustified enrichment by performance is not applicable. A claim of unjustified enrichment by non-performance under section 812(1)(1)(2) BGB applies. Consequentially, those bars to restitution that require a performance do not apply. I have already pointed to the fact that Thomale, as a result, believes that a performance rendered under the mistaken belief that it was still enforceable where it, in fact, was not because the limitation period has lapsed is recoverable under section 812(1)(1)(2) BGB after the performance has been avoided for mistake as to the enforceability. This is a case in which Thomale's analysis actually changes the outcome of a case. I have already pointed out above that I do not find this convincing in the light of section 214 BGB and section 813 BGB.

In the fourth chapter, Thomale also turns to the *condictio ob turpem vel iniustam causam* of section 817(1) BGB. Thomale rightly observes that the scope of application of this *condictio* is rather narrow in German law. The predominant view argues that it potentially applies in those cases in which the *condictio causa data causa non secuta* of section 812(1)(2)(2) BGB does not apply because the intended result does occur. As Thomale does not see any room for the *condictio causa data causa non secuta* he argues that there is equally no potential for the *condictio ob turpem vel iniustam causam*. Even if one agrees with Thomale's analysis, there is, again, the problem that one cannot say that Thomale's coherent system of the law of unjustified enrichment is reflected in the text of the BGB—section 817(1) BGB is pushed to the side and ignored.

In the last section of the fourth chapter, Thomale puts the relationship of claims in unjustified enrichment by performance (*Leistungskondiktionen*) and all other claims in unjustified enrichment (*Nichtleistungskondiktionen*) under review.

E. Third-Party Enrichment Claims

The fifth, and longest, chapter is devoted to third-party enrichments claims.[16] After a short account of the different theories developed in the legal literature, Thomale develops a solution to these highly problematic cases. Central to his solution is the concept of performance as juridical act: the claim in unjustified enrichment should follow the performance. Thomale follows the general distinction of these types of cases and discusses them separately. The first is the so-called *Anweisungsfälle*. In these cases, the obligee instructs the debtor to render performance directly to a third party because the obligee himself owes performance to the third party. Today the predominant view holds that enrichment claims have to be raised between the debtor and the obligee on the one hand

[16] *See* THOMALE, *supra* note 1, at 262–413.

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and the obligee and the third party on the other hand if the contracts underlying both performances are invalid. Problems arise in cases in which the instruction is defective. Thomale solves the resulting problems by convincingly drawing on the findings of his second chapter. The second type of cases is more problematic. In the case of a contract in favor of a third party the debtor has two formal obligees: The debtor is obliged to his contracting party to render performance to the third party; at the same time the debtor is obliged to the third party. Prima facie, the one conferral may be interpreted as including three performances: The debtor renders his performance to his contracting party and at the same time to the third party; in addition, the contracting party, through the debtor, renders a performance to the third party. Thomale also argues that in the case of a contract in favor of a third party, there is only one performance: the debtor either renders his performance to his contracting party or to the third party. Thomale draws a subtle difference between *Anspruch* and *Forderung* in order to support this result. In the case of cession, the predominant view holds that the debtor has a claim in unjustified enrichment against the assignor and the assignor has a claim in unjustified enrichment against the assignee. Thomale points to the fact the debtor renders his performance only to the assignee, and that the claim in unjustified enrichment should, thus, be between the two. Thomale discusses further cases, and with each one he comes to the conclusion that the claim in unjustified enrichment should follow the performance.

This fifth chapter is definitely the strongest chapter of the book. The arguments of the preceding chapters were rather conceptual. Thomale argued in favor of a certain understanding of the notion of performance and drew conceptual conclusions from this understanding. In the fifth chapter Thomale also puts a strong emphasis on the policy considerations involved when one has to solve third-party enrichment claims. Because of this, it becomes clear that the notion of performance is actually the correct legal instrument to start of solving these cases as it reflects these policy considerations.

F. Conclusion

That a reviewer is not convinced by every detail of a book has nothing to do with the quality of the book or the quality of the arguments. Indeed, Thomale's book is a very strong and very well thought through contribution to a highly controversial debate. The book will certainly influence the future of the debate.

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