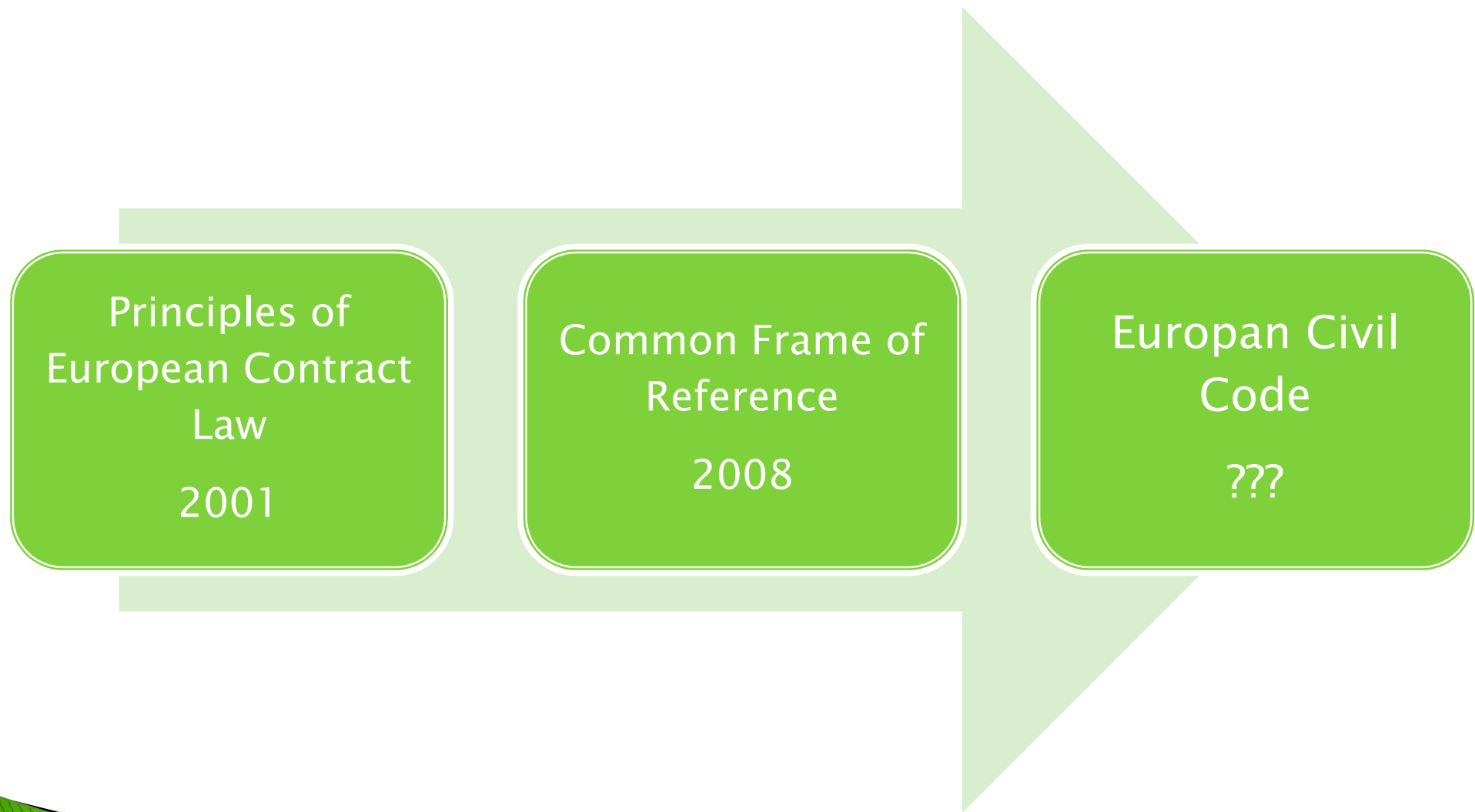


The Principle of Unjust Enrichment.
Roman Law Tradition and Modern Debate
about the European Private Law.

Wojciech Dajczak
Uniwersytet im. Adama Mickiewicza w Poznaniu

Civilian Tradition and Modern Debate about the Principles of Private Law



Roman law – the part of ancient history and an element of european legal experience



- ▶ *In quoque, qui non debitum accepit ab eo qui per errorem solvit, re obligatur: nam proinde ei condici potest si PARET EUM DARE OPORTERE, ac si mutuum accepisset.*
- ▶ *He also who received something that was not due from a person who paid him through mistake, is liable under a real obligation, a personal action can be brought against him under the formule „ If it appears that he was required to give”.*

Ancient history

Principles of law

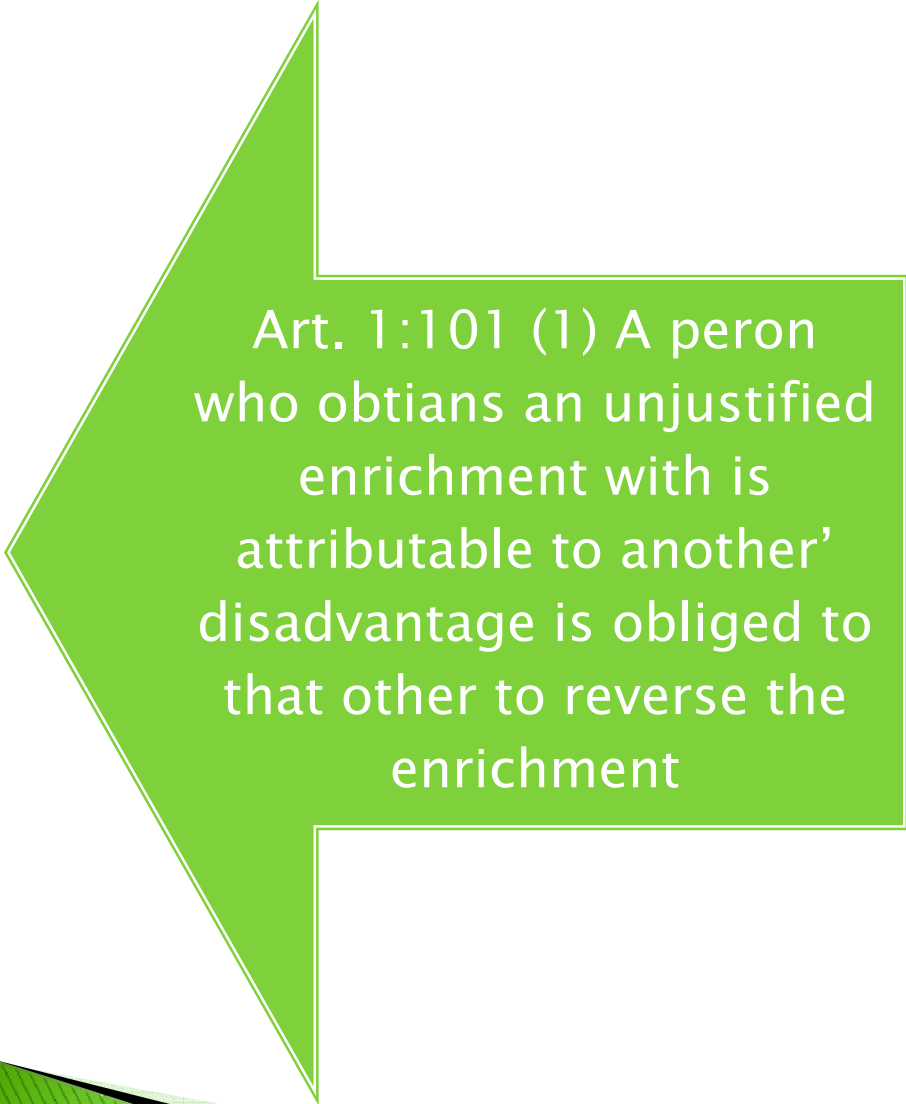
Civilian Tradition and Modern Debate about the Principles on Private Law

European
Private Law
CFR


National systems of civil law

Ius commune – Roman Law in the
Europe since 11th till to the end of
19th century

Unjustified enrichment in the CFR project – comparative and historic perspective



Art. 1:101 (1) A person who obtains an unjustified enrichment with is attributable to another' disadvantage is obliged to that other to reverse the enrichment



The general formulation distinguishes the CFR project from the national regulations

Unjustified enrichment in the CFR project – comparative and historic perspective

Art. 1:101 (1) A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment.

Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiolem, Pomponius (D. 12,4,6)

Unjustified enrichment in the CFR project – comparative and historic perspective

Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiolem, Pomponius (D. 12,6,14)

Odpovídá přirozené spravedlnosti, že nikdo se nesmi obohacovat na údruhého, Pomponius (D. 12,6,14)

Unjustified enrichment in the CFR project – comparative and historic perspective

- Model of general clause
- German Civil Code (BGB)

- Model of general acknowledgement of unjustified enrichment as a source of obligation through a creative judicial interpretation
- French Law

- The principle of unjust enrichment serves only to single out an independent part of law of obligation
- English common law

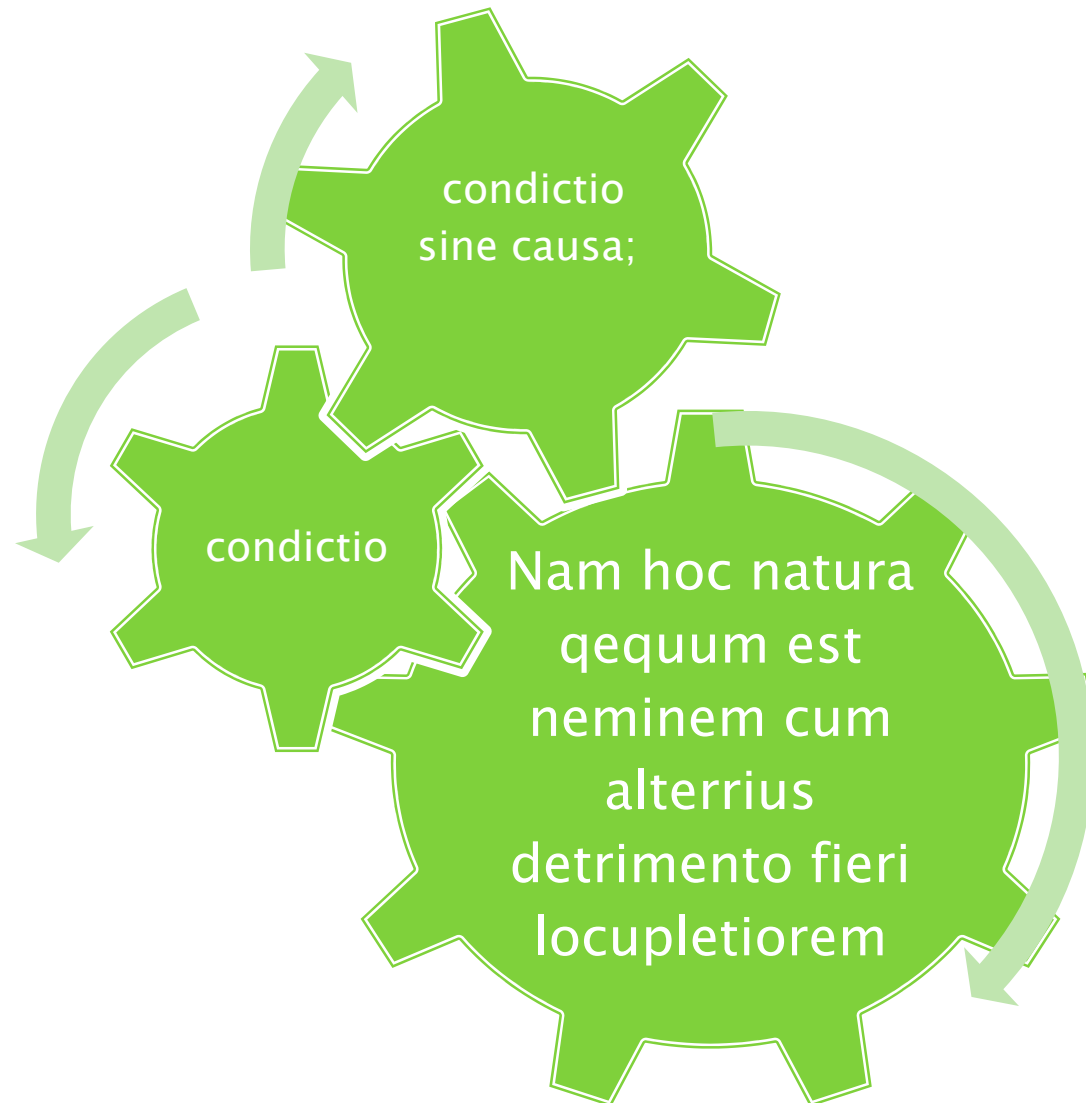
The normative nature of principle of unjustified enrichment in ancient Roman law

The legal instrument which served in ancient Roman law to liquidate cases of unjustified enrichment was *condictio*

How were the factors of *condictio* in the case of unjust enrichment (*causa condictiois*)

The roman principle of unjustified enrichment belonged to a legal philosophy – a reflection on direct causes of law.

The normative nature of principle of unjustified enrichment in ancient Roman law



The normative nature of principle of unjustified enrichment in ancient Roman law

- ▶ The meaning of the discussed rule came down to the fact that it could be perceived as a clue resulting from the observation of experience and from a notion of the nature of law, which inspired one to seek accurate premises of granting *condictio*.

Judicature defines premises of liability for unjustified enrichment which are unknown to the code – the example of France

Art. 1376 cc. Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû s'oblige à le restituer à celui de qui il l'a indûment reçu.

Boudier case from the year 1892

Action de in rem verso

Judicature defines premises of liability for unjustified enrichment which are unknown to the code – the example of France

Enrichment at the expense of another

Lack of legal ground (sans cause legitime)

Defendant hasn't claim from contract or delict

General clause of restitution of unjustified enrichment on the example of BGB

§ 812 BGB Wer durch Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet.

BGHZ 36, 232 (235): The claims arising from unjustified enrichment belong to equity law and are subject to the rule of good faith....”

General clause of restitution of unjustified enrichment on the example of BGB

- ▶ Interpretation of the German Supreme Court is a continuation of an attitude expressed in particular in Pomponius's dictum – *nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiozem.*
- ▶ This is an attitude of openness to liquidation of previously unidentified cases of unjustified enrichment.

English debate on the factors of an obligation for unjustified enrichment

- ▶ Moses v. Macferlan [1760]
- ▶ ... obligation to reverse unjustified enrichment resulted from *aequo et bono*.
- ▶ In English law there was no dogmatic concept of unjustified enrichment as a source of obligation.

English debate on the factors of an obligation for unjustified enrichment

1966: *law of restitution – independent area of obligations independent with regard to torts and contracts*

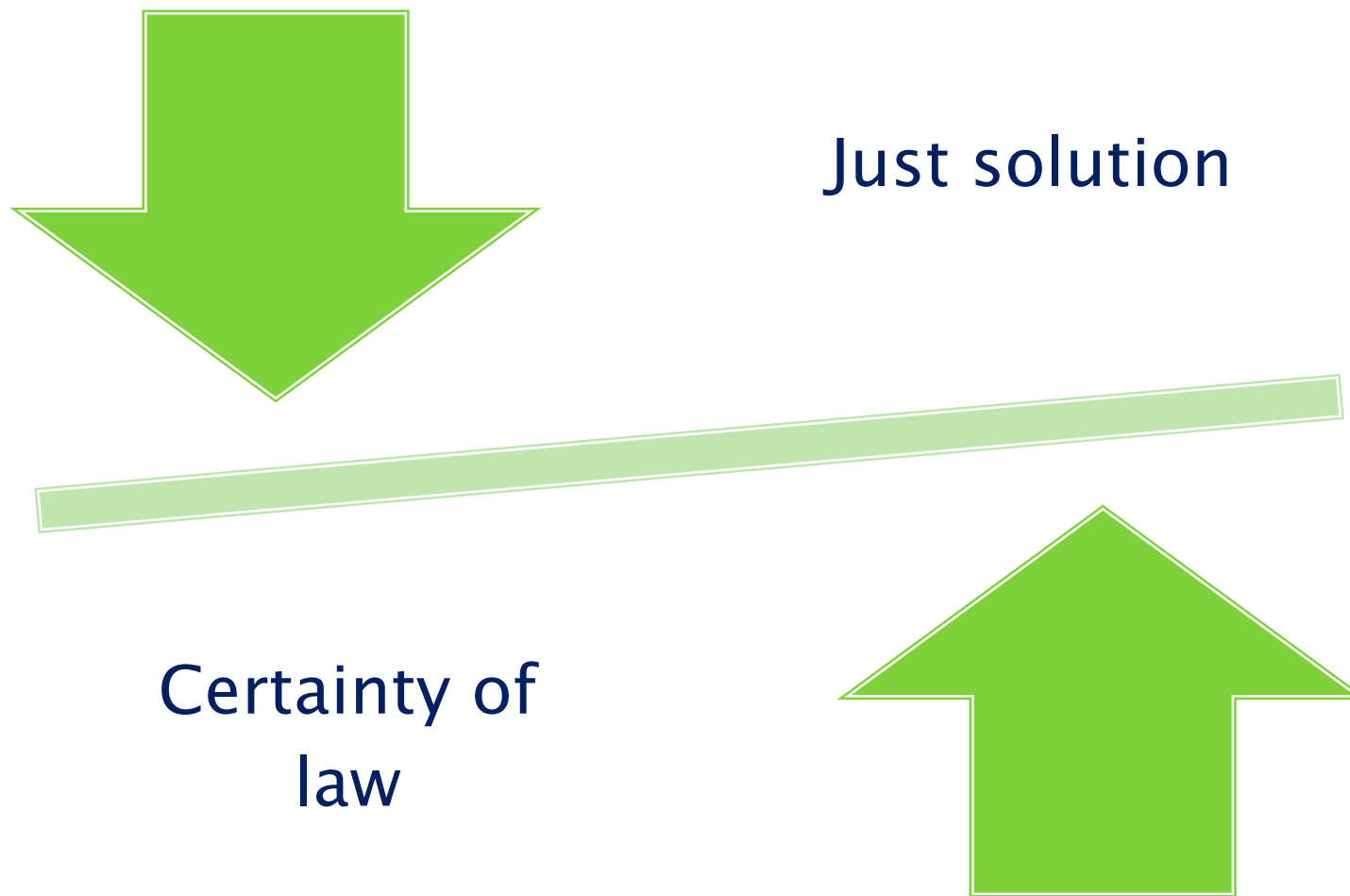
1991: The House of Lords recognized the unjust enrichment principle

2004: „no basis” theory by Peter Birks

English debate on the factors of an obligation for unjustified enrichment

- ▶ „no basis” theory
- ▶ The English law should uniformly adopt lack of bases to retain enrichment known from the Roman law tradition
- ▶ The development of English common law over last 20 years is a clear step in the direction pointed out by Pomponius’s words.

The rule of restitution of unjustified enrichment from the perspective of a comparative and historical discussion



The rule of restitution of unjustified enrichment from the perspective of a comparative and historical discussion

Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiores (Papinianus)

The claim of restitution of unjustified enrichment is based on natural equity

(Bouder case)

FRANCE

Claims arising from unjustified enrichment belong to equity law..."

GERMANY

The principle of restitution of unjust enrichment has been recognized in English common law

ENGLAND

Unjustified enrichment in the CFR and tradition of roman law

Art. 1:101 (1) CFR: A person who obtains an unjustified enrichment which is attributable to another' disadvantage is obliged to that other to reverse the enrichment.

The law experience inspire to retain a certain openness to the equitable decisions of courts within the scope of the identification and liquidation of cases of unjust enrichment.

The referring to Roman sources in the modern debate shows more clerarly that realism in law requires totake into consideration the values which were primal in relation to it.

