

§ 6 The distinction between obligation transaction and disposition transaction

I. An essential but almost unique feature of German private law

- a core structural element, crucial for the understanding of German private law, but rejected in its rigidity (i.e. including both principles), in almost all other countries
 - exceptions: Estonia, Greece

II. The deconstruction of the business transaction into two (or more) distinct legal transactions: the *principle of separation* [Trennungsprinzip]

- uniform business transactions are legally splitted into several legal actions:
 - one obligation transaction that only creates the obligations of the parties [Verpflichtungsgeschäft]
 - one or several disposition transactions that actually perform these obligations [Verfügungsgeschäfte]
- example: the purchase of a book is legally splitted into
 - the purchase agreement (that creates the obligations to deliver the book and procure ownership of it to the buyer resp. to pay the purchase price to the seller and accept delivery of the book, sect. 433 BGB)
 - the transfer of the ownership of the book (cf. sect. 929 BGB)
 - the transfer of the ownership of the paid money (cf. sect. 929 BGB)
- obligation transactions create *rights in personam*, disposition transactions *rights in rem*
- so, unlike in other countries, when you buy something, the purchase agreement as such does not yet make you its owner!

III. The independence of the disposition transaction from the obligation transaction: the *principle of abstraction* [Abstraktionsprinzip]

- the *validity and legal effect of the disposition transaction does not depend on that of the obligation transaction*
- so if the seller has made you the owner of the sold thing, you will remain the owner, even if the purchase agreement turns out to be invalid or is avoided

IV. Consequences of the separation and abstraction of obligation and disposition transaction

1) Important role of unjustified enrichment law (sect. 812 et seq. BGB)

- if the obligation transaction turns out to be invalid, the disposition transaction performing the obligation remains valid, but the disposing party may *claim restitution* (e.g. retransfer of ownership) for enrichment without legal ground (sect. 812(1) BGB)
- however, there are restrictions; in particular no claim for restitution if recipient is no longer enriched (sect. 818(3) BGB)
 - e.g. if he has spent the transferred money for holidays...

2) New owner of a thing may transfer it to third person

- in case of an invalid obligation transaction, the new owner of thing can transfer in his turn the acquired ownership to a third party, and the original owner will not get it back

3) Purchase agreement does not guarantee acquisition

- the purchase agreement may not allow it, but the seller still *can* effectively sell and transfer the sold thing to a third party

4) Tendency to interpret uniform processes in such a way that they include both, the obligation and disposition transaction

- especially in daily life business transactions
- no risk of irregularities as under IV.2/3, since the obligation is immediately performed...
- low risk of problematic outcomes, since deficiencies in the declarations of intent may relate to both transactions
- written or notarized contracts (e.g. on purchase of land) usually include a clause already performing the disposition transaction