

Change of Position – A Comparative View

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The defence of change of position against a claim for restitution in unjust enrichment, for example, an action for money had and received, is recognised in both common law and civil law jurisdictions. The presentation will contrast the solutions to be found in common law systems, especially Australia, New Zealand, and the United Kingdom, with their counterparts in civil law systems, especially Switzerland and Germany. In addition, an outlook on a European Civil Code, as comprised in a draft of the Working Team on Extra-Contractual Obligations of the Study Group on a European Civil Code will be given. The presentation will give a short introduction into the law of restitution and the defence of change of position. The focus will then be laid on the disqualification of bad faith defendants from the defence. Under a comparative analysis two points need to be addressed. First, the relevant standards of knowledge that constitute bad faith will be discussed. In this respect, it will be argued that the legal systems converge towards a solution that a defendant who ought to have known about his or her restitutionary obligation is barred from relying on change of position. Secondly, the question arises whether knowledge alone is decisive or, whether the relative fault of the parties can be taken into account. With respect to the second point the famous New Zealand case of *National Bank of New Zealand v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA) will be discussed. Both points of discussion are of fundamental practical importance to the business transactions of banks.