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0521844231 - Mistake, Fraud and Duties to Inform in European Contract Law
Edited by Ruth Sefton-Green
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Mistake, Fraud and Duties to Inform in European Contract Law

This examination of twelve case studies about mistake, fraud and duties to inform reveals significant differences about how contract law works in thirteen European legal systems and, despite the fact that the solutions proposed are often similar, what divergent values underlie the legal rules of these jurisdictions. Whereas some jurisdictions recognise increasing duties to inform in numerous contracts so that the destiny of mistake and fraud (classical defects of consent) may appear to be uncertain, other jurisdictions continue to refuse such duties as a general rule, or fail to recognise the need to protect one of the parties where there is an imbalance in bargaining power or information. Avoiding preconceptions as to where and why these differences exist, this book first examines the historical origins and development of defects of consent, then considers the issues from a comparative and critical standpoint.

RUTH SEFTON-GREEN is a lecturer in law at University of Paris 1 (Panthéon-Sorbonne). She has received a Master's degree from the University of Oxford, and was awarded her PhD in Law from the University of Paris 1 (Panthéon-Sorbonne).

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The Common Core of European Private Law

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For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of Europe Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger. This is its fifth completed book.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

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General editors' preface

This is the fifth book in the series *The Common Core of European Private Law*. The *Common Core of European Private Law* Project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger. The methodology used in the Trento project is novel. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the *Common Core Project* is a precious asset of knowledge and legitimization for any such normative enterprise.

We must thank the editors and contributors to these first published results. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly. No scholarly project can survive without committed sponsors. The Dipartimento di Scienze Giuridiche of the University of Trento, its past and present directors and its excellent staff must be thanked. The European Commission has partially sponsored some of our past general meetings, having included them in their High

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xii GENERAL EDITORS' PREFACE

Level Conferences Program. The Italian Ministry of Scientific Research is now also funding the project, having recognized it as a 'research of national interest'. The Istituto Subalpino per l'Analisi e l'Insegnamento del Diritto delle Attività Transnazionali, the University of Torino, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law have all contributed to the funding of this project. Last but not least, we must thank all those involved in our ongoing Trento projects in contract law, property, tort and other areas whose results will be the subject of future published volumes. Our home page on the internet is at <http://www.jus.unitn.it/dsg/common-core>. There you can follow our progress in mapping the common core of European private law.

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Preface

This project was conceived in Paris at a meeting with Jacques Ghestin, Horatia Muir Watt and myself at the request of Mauro Bussani. The original cases were formulated by Horatia Muir Watt, Stéphane Reifegerste and me in June 1996. Our questionnaire became the subject of a brainstorming session in Trento in July with all the members of the contract group present which was most useful. I subsequently became editor of the project.

I am indebted to Jacques Ghestin for formulating the theme of the project and to Horatia Muir Watt for her initial contribution and constant encouragement. I would like to record my thanks to Stéphane Reifegerste for his active participation in the early stages of the project and particularly the group work he carried out with the students of the DEA de droit anglais et nord-américain des affaires at the University Paris I (Panthéon-Sorbonne) in the years 1997–98. I am also grateful to Muriel Fabre-Magnan for her friendly counsel and consistent support.

Above all, I would like to record my warmest thanks to the national reporters of this project with whom I would like to think we have formed a team. I would like to make special mention of the friendships and discussions which have ensued by e-mail and in our annual meetings in Trento and notably the intellectual and moral support I received from John Cartwright and Martijn Hesselink. I am immensely grateful to John Cartwright for contributing a paper on ‘The rise and fall of mistake in the English law of contract’ and also to Martin Schermaier for his contribution on ‘Mistake, misrepresentation and precontractual duties to inform: the civil law tradition’. The team was greatly helped by our round-table discussions held at the UMR de droit comparé of the University Paris I in May 1999. I am very grateful to the director of the UMR (then Mireille Delmas-Marty) and her co-directors (Hélène Ruiz-Fabri and

Horatia Muir Watt) for having made this meeting possible. The meeting was extremely valuable for all who attended. Several people helped with the organisation of our two-day meeting: my thanks once again to Sophie Guy for her administrative assistance and Martine Kloepper and Maxime Dequesne for their material and intellectual support and hard work.

Last, but certainly not least, I would like to thank the general editors of the Common Core of European Private Law Project, Ugo Mattei and Mauro Bussani, for their hospitality and support. They are of course the original inspiration for this particular project in the widest sense. My participation in the Common Core Project has enriched my understanding and teaching of comparative law and its methodology and encouraged these to evolve continually. For this I owe them an incommensurable debt for it is in action that our understanding grows.

The reports were all originally written in the period 1998–2002, but where possible reporters have updated their reports to reflect the law as at March 2004.

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March 2004

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Mistake, misrepresentation and precontractual duties to inform:
the civil law tradition by *Martin Josef Schermaier*, University of
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General introduction, comparative observations and comparative
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