

Commercial Trusts in European Private Law

Edited by

Michele Graziadei, Ugo Mattei

and

Lionel Smith

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Commercial Trusts in European Private Law

This book examines how fifteen legal systems of the European Union regulate relationships of trust, focusing in particular on asset management. Following the Common Core approach, national reporters examine their Member State's trusts laws primarily through the discussion of a series of hypothetical cases on, amongst other topics, the establishment and termination of management relationships, obligations of loyalty and of professionalism, and the choice of law. There is a special focus on commercial applications such as collective investment, collective secured lending, pension funds and securitisation. In addition to a much-needed comparative treatment of the subject, the book discusses the scholarly setting for the issues and gives guidance on the terminology in the evolving European scene.

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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 European 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 sixth book published by Cambridge University Press.

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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To the memory of Professor Peter Birks
in different ways, a mentor to all of us

General editors' preface

This book brings 'The Common Core of European Private Law' over the threshold of a half dozen published results. The 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 nearly 200 scholars involved in the Common Core Project is a precious asset of knowledge and legitimization for any such normative enterprise.

We must thank not only the editors and contributors to these first published results but also all the participants who continue to contribute to The Common Core of European Private Law project. 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 and its

excellent staff must first be thanked. The European Commission has partially sponsored some of our past general meetings, having included them in their High 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 book is the result of a genuinely collective enterprise. As a project, it was conceived at a preliminary meeting of one and a half days in March 1998 at the University of Trento, within a small group made up of two of the editors (Graziadei and Mattei), the chairman of the property group of the Common Core project, Professor Antonio Gambaro, and leading trust scholars Professor John Langbein from Yale, Professor Hein Kötz from Hamburg and Professor Shael Herman from Tulane. At that meeting general issues of applicability of common core methodology to the domain of trust were discussed, and a clear sense emerged that the focus should be on trust law in the commercial setting.

The trust project was officially launched in July of the same year at the general meeting of the Common Core project, in Trento, where a rudimentary first draft questionnaire was discussed in depth under the leadership of Professor Antonio Gambaro, at the property session. At that meeting Lionel Smith (at that time of Oxford University) joined the editorial team and the first participants joined in. In June 1999 all the participants to the project met in Como for a three-day conference sponsored by the University of Insubria. At that meeting draft responses to the new version of the questionnaire were discussed together with Professor John Langbein, who also gave a speech on institutional investors and the law of trusts. Professor Paul Matthews of King's College London participated in our work and addressed the group on the law of trusts in offshore jurisdictions. Professor Jonathan Macey from Cornell intervened on the economic aspects of fiduciary relationships. More work with most of the participants was devoted to the finalisation of the questionnaire at the 1999 meeting in Trento, and in January 2000 the editors met for ten days of joint work on the draft responses at

Oxford University. Feedback and changes in the reports and in the questionnaire happened through the following year and a half, with another joint two days of work in Trento in July 2000. Finalised answers were prepared in the course of the following year, and at the July 2001 meeting the editors met for some more planning and for the final editorial organisation of the volume. The very last meeting with all the participants was organised at Stresa, Italy and sponsored by the Facoltà di giurisprudenza of the Università del Piemonte orientale, whose faculty was meanwhile joined by Professor Graziadei. At that meeting, Professor Donovan Waters, Dr Joshua Getzler of St Hugh's College, Oxford, and Mr Stuart Willey, of the UK Financial Services Authority, participated in the discussion of the country reports and delivered papers on the Hague Convention of 1985 on the law applicable to trusts and on their recognition, on the Trustee Act 2000, and on fiduciary duties in financial services law.

This long and thorough joint effort can be seen as a truly collective authorship of the questionnaire and of the semantics of the answers, and should be reflected in a relatively high level of homogeneity between the national reports. What is most important to point out, however, is that in this process comparison has been carried on as a matter of learning by doing, and a high level of communication between lawyers of so many different traditions has certainly been reached. The very existence of this book shows that when comparative work is done (even in traditionally very tricky areas like property and trust), it looks less problematic than when one limits oneself to discussing how it should be done.

Like everyone else, the editors were shocked and saddened by the news of the death of Professor Peter Birks, as this book was going to press. He was an intellectual leader in the field of comparative private law, as in so many other fields, and he was a great friend and supporter of the Trento enterprise. In different ways, each of the editors is intellectually indebted to Peter Birks, to whose memory this book is dedicated.

The authors jointly wish to thank all the aforementioned participants to the conception of this volume who might or might not appear as authors but who have all helped us tremendously in carrying out our task. Thank you to the brilliant Managing Editor of *The Common Core of European Private Law*, Mrs Carla Boninsegna, for kindness, softness and efficiency. We wish to thank Finola O'Sullivan and Professor David Ibbetson at Cambridge University Press, together with the anonymous

referee of this volume, who have all, in different ways, greatly helped to improve our final artefact. We are grateful to Professor Martijn Hesselink and to Professor Rick Verhagen who joined in our discussions in Trento at an early stage of the project and who kindly corresponded with us. We thank Dr avv. Edoardo Andreaoli for his early contribution to the Italian report. We are also indebted to Professor Silvia Ferreri and to Dr Bianca Gardella Tedeschi for their effective support in the organisation of the Stresa meeting of our group. Finally, we wish to thank Mauro Bussani, General Editor of the Common Core Project, Andrea Pradi, President of the Associazione R. B. Schlesinger per lo Studio del Diritto Europeo, and Luisa Antonioli, Professor of Comparative Law at the University of Trento, for their tremendous organisational efforts during and in between the Trento meetings.

Michele Graziadei gratefully acknowledges the support of Dr Mara Zilio, Daniela Gentili and Nadia Bovone of the Dipartimento di Scienze giuridiche ed economiche dell'Università del Piemonte orientale for their brilliant and enthusiastic administrative support of the research work. He is also indebted to Dr Cesare Tibaldeschi of the same Department for his exceptional contribution to preparation of the electronic copy of the typescript.

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Abbreviations

A.2d	Atlantic Reporter (2d series) (US)
AAMN	Anales de la Academia Matritense del Notariado
ABGB	Allgemeines bürgerliches Gesetzbuch
Abs	Absatz
AC	Appeal Cases
act. juris. [in French report, with D.]	Recueil Dalloz actualités jurisprudentielles
Act. proc. coll.	Actualité des procédures collectives
ADC	Anuario de Derecho Civil
AFM	Autoriteit Financiële Markten
AG	Die Aktiengesellschaft – Zeitschrift für das gesamte Aktienwesen
AJCL	American Journal of Comparative Law
AktG	Aktiengesetz of 6 September 1965, 1965 Bundesgesetzblatt part I, 1089
All ER	All England Reports
ALR	Australian Law Reports
AMF	Autorité des marchés financiers
Annales Droit lux.	Annales du droit luxembourgeois
ANVR	Algemeen Nederlands Verbond van Reisondernemingen
AP [in French report]	Assemblée plénière (de la Cour de cassation)
AP [in German report]	Hueck/Nipperdey/Dietz, <i>Nachschlagewerk des Bundesarbeitsgerichts – Arbeitsrechtliche Praxis</i>
AP [in Greek report]	Greek Supreme Court in Civil and Criminal Matters