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Mistake over the terms of a contract: A comparative analysis of England, France and Germany

Jonathan Beech

[...] In addition to construing a contract to remedy a mistake as to a term, English courts have also developed the equitable doctrine of rectification where the parties use the wrong words to express their common intention. Megaw J underlined in London Weekend Television v Paris and Griffiths\(^5\) that where two parties expressly agree with one another for the meaning of a particular phrase used in a written contract, but incorrectly document it, the contract can be rectified so the phrase represents the meaning agreed.\(^5\) It should also be noted that for rectification to be applicable it must be a term that is misunderstood and not the background issues that relate to a term; Rose v Pim\(^5\) can highlight this as the court upheld a contract when both parties misunderstood the word ‘feveroles’ to mean ‘horsebean’ when it actually related to a particular type of horsebean.\(^5\) There was no rectification as the mistake was not an erroneous recording of what they intended to contract to, both the parties intended to contract for horsebeans.\(^5\) Hence, this can show an aspect of subjectivity, looking at the parties’ intentions, for addressing mistakes over terms, operating alongside the objective principle in English law.

Within Germany, the doctrine of falsa demonstratio non nocet (“a false description does not vitiate if the thing or person has been sufficiently described”) functions in a similar manner as rectification in English law. For example, in a German case where a buyer and seller both used the word Haakjöringsköd to describe “whalemeat”, when it in fact meant “sharkmeat”, the contract was held to be for whalemeat and the delivery of sharkmeat enabled the buyer to claim damages for non-performance.\(^5\) From both the parties intending to contract for whale meat, the remedy was available to honour what the parties intended and correct a mistakenly used term. Therefore, as with rectification, there is an element of subjective analysis for addressing a misunderstanding over a term in order to uphold what the parties really meant.

Moreover, in the French legal system it is likely a similar result to England and Germany can be achieved where a mistaken term may not reflect an apparent common intention. Article 1156 of the Code civil states “one must in agreements seek what the common intention of the parties was, rather than pay attention to the literal meaning of the terms”,\(^5\) illustrating with a shared misunderstanding over a term there will be a similar approach as to the German doctrine of falsa demonstratio non nocet and rectification in English law; the mistaken term will be read as what should have been written. Article 5: 101 of the PECL can provide further evidence of the different legal systems unity concerning this approach, suggesting that “a contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words”.\(^5\) Thus, even though the objective principle is dominant within English law, and often in Germany, there will still be situations where the subjective intentions of parties will be influential in remediing a misapprehension to a term in a contract across the different European jurisdictions.

Looking at how the DCFR approaches mutual misunderstanding to a term, Article II 8.101 (2) corresponds heavily with falsa demonstratio non nocet; under this section of the DCFR if an offeree, or addressee, of a declaration misapprehends
a term in the same fashion as the offeror, or addressor, the contract will reflect what was intended by both parties.\textsuperscript{60} The article also provides that enforcement should be upheld even if the addressee actually intends to obtain what the addressor objectively declared but knows a mistake occurred over a term but contracts anyway.\textsuperscript{61} With this taken into account, in the “shark meat” case, if the buyer intended to buy shark meat but realised the seller thought they were providing whale meat, there would be a binding contract under the DCFR; this could lead to a buyer in effect “snatching a bargain” if shark meat was more expensive. In England, however, rectification would be available in this described scenario as the Court of Appeal held in \textit{Thomas Bates & Son v Wyndham's (Lingerie)}\textsuperscript{62} that rectification can remedy a mistake when a term does not reflect what one party intended and the other party knows this and does not point it out.\textsuperscript{63} [...]