Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Should Be Scrapped

Richard A. Epstein

FREEDOM OF CONTRACT, TRANSACTION COSTS, AND THE CESL Any system of contract law must deal with two broad classes of transactions: those that take place within a single jurisdiction, and those which involve cross-border transactions between two (or more) parties in different jurisdictions who are normally subject to different law. The question in this paper is whether cross-border transactions requires the articulation of special contract rules, like those in the Common European Sales Law proposal of the European Commission (CESL).[1] This overall assessment recognizes that all systems of contract law combine two types of provisions. The first are intended to facilitate voluntary transactions. The second are intended to set out certain mandatory terms. Once in place, these mandatory terms let the parties decide whether or not to enter into a particular transaction in services or goods. But once they choose the transaction type, they are into forced discreet channels, such that their transaction necessarily contains both a tying and a tied good: they must tie their transaction to the government's mandatory terms to stay.

Like other general codes, the CESL speaks with two voices on this issue. First, under the CESL "in business-to-business transactions, traders enjoy full freedom of contract and are encouraged to draw inspiration from the Common European Sales Law in the drafting of their contractual terms."[2] Thus far, so good. Unfortunately, the CESL then switches gears by supporting two types of coercive interventions. The first set —for reasons that will become clear— involves SME's or

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1 *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11th,2011) [hereinafter CESL Proposal].

2 *Id.* at 18.

small or medium business entities,[3] which the CESL thinks suffer in their relations with larger firms. The second, and more robust, involves consumer transactions, where the principle of freedom of contract takes an oft-reiterated backseat to the requirement that no transaction be allowed that operates "to the detriment of consumers,"[4] which turns out to be whenever these terms are invoked.

As a general matter, we should all be suspicious of these state imposed tie-in arrangements, whereby two parties must agree to one set of state-imposed terms in order to adopt a contract that otherwise reflects their own wishes. The risk here is that the gains from the voluntary portion of the deal will be eroded by the implicit losses that both parties sustain when the state engrafts its own requirement to their agreement. To see why, note that the key challenge in any voluntary transaction is set out by one deceptively simple equation that derives squarely from the Coasean (or transaction cost economics) tradition. The parties themselves have a set of business objectives which should produce joint gain so long as each party receives in the transaction something that it values more than the thing that it surrenders, which, as rational agents, they will do. These advantages are not explained by any general contract theory, for they derive from the needs and desires of the parties to the particular transaction. But whatever the doubts about the scope of this principle, it surely covers all transactions in the CESL, no matter how defined.

Notwithstanding these putative gains, all voluntary transactions must negotiate a set of business obstacles, both in finding the right trading partners, and setting the right contractual terms to increase the odds of mutual gains. The basic point can be made just by looking at a two party case as it relates to transaction gain, G, and transaction costs, T. If $G = G_b + G_s$, and $T = T_b + T_s$,the task in all these cases is to make sure that $G > T$, for otherwise the transaction implodes. Note that it is possible for $G > T$ even if G_b (or G_s) $< T_b$ (or T_s) for any given party. What is

3 *Id.* at 26. The definition covers firms under 250 employees with turnover of under 50 million EUR, or balance sheets assets of under 43 million EUR. These definitions can cause coverages problems of their own for firms close to the line whose staff and sales fluctuate with economic times.

4 For discussion, see Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of the European Sales Law*, in this issue.

required in that situation is for the party with the lion's share of the gain pick up (by modification in the contract price) some of the transaction costs borne in the first instance by its opposite number, so that each party generates gain, at which point the two together are able to go ahead with these transactions.[5] Stated otherwise, the deal will only go through if for any person T_x is always less than G_x from, which it always follows that $G > T$ for all people. Put otherwise, if the distributional constraint is satisfied, the aggregate constraint is necessarily satisfied as well. In addition, if the aggregate constraint is satisfied and initially the distributional constraint is not, a side payment between buyer and seller can solve the problem, unless the cost of making that side payment exceeds the gains that would otherwise be obtainable.

The full range of mandatory devices under the CESL can be understood in one of two ways. By the first, they reduce transaction costs by allowing for certain measures of standardization, combating in the process other forms of market failure perhaps based on such usual suspects as the inequality of bargaining power or the asymmetry of information—two common justifications on which the draft CESL is strangely silent in its quest for greater consumer protection. The CESL uses a number of strategies to implement this program, for both SME and consumer transactions.

The initial question that covers both types of transactions is whether these restrictions provide benefits sufficient to offset their admitted costs, for if $B_x > T_x$ then the gains from trade still exceed the transaction costs in question. It is at this point that the idea of heterogeneity enters into the analysis, by asking whether this constraint can be satisfied on a person-by-person basis. The CESL and its report all use "consumer" and "SME" in the singular which creates the unfortunate impression

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[5] Just this happens in all two-sided markets, on which see, Richard A. Epstein, *Dunwody Distinguished Lecture in Law, The Constitutional Paradox of the Durbin Amendment: How Monopolies are Offered Constitutional Protection Denied to Competitive Firms*, 63 U. FLA. L. REV. 1307, at 1324 (2011). The classic article on the subject is William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541, 541–43 (1983).

that there is no variation within each of these two classes that could matter for the overall analysis. All consumers are said to have similar deficits and all SME similar difficulties. In virtually any and all market settings the implicit assumption of a zero variance necessarily leads the overall analysis astray. Thus in seeking to explain the variation of roles of persons within firms or markets, it is critical to note that on all key matters of taste and competence, individuals differ from one another in systematic ways. That level of variation in the business context has a positive consequence because it creates additional dimensions over which there can be gains from trade.[6] People who like art can go into art; those who like numbers can go into finance; people who like risk can become managers or holders of equity, while people who don't become employees or bondholders. Yet when potential regulation is on the table, the exact opposite consequence holds. The more heterogeneous the class, the more difficult it is to determine the impact of regulation, first in the individual case and then in the aggregate. That high level of variance makes it virtually certain that regulation that is intended to protect the needy and unsophisticated will necessarily increase the transactional burdens of other merchants and consumers who do quite well on their own. The relationship between B_x and T_x will differ strongly across persons, for even if it $B > T$ for some persons, $T > B$ for others.

The aggregation is not possible to state with precision, especially in the abstract, but there are two reasons to think that it will in most cases turn sharply negative. The first is that the rules themselves are not costless to promulgate or enforce on the public side, or to comply with on the private side. Thus if one assumes that the $B = T$ as an initial focal point for the aggregate, the whole system immediately turns negative given that administrative, compliance and error costs are necessarily positive even in the most ideal situation, and substantially so in the common cases where the regulation is badly designed, subject to ambiguity, or modified by political interest groups. The slippage between what was enacted at the

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[6] For discussion, Richard A. Epstein, *Inside the Coasean Firm: Why Variations in Competence and Taste Matters* (forthcoming)

legislative level and what is enforced on the ground is large, and it typically moves only in one direction. The only bureaucrats who can be entrusted with the interpretation and enforcement of the laws are those who supported its adoption. Once freed from their opponents at design level, in implementation, they push further in one direction only.

Second, the dynamic effects of these interventionist forms of regulation are always negative. To simplify the analysis without loss of generality, assume that the less-sophisticated half of the consumers or SMEs stand to benefit from the regulation and the more-sophisticated half of consumers or SMEs are hurt by them, in equal degrees. Over time, the harm to the more-sophisticated group will reduce its level of growth relative to the less-sophisticated group, as the even-handed application of uniform rules operates as an implicit cross-subsidy of weak consumers or SMEs by their stronger counterparts. In addition, firms in the stronger group will tend to become less careful in their own practices, because they know that they can now take advantage of a set of protections that never should have been adopted in the first place.

The removal of the protective devices has, moreover, exactly the opposite effect. The weak consumers or SMEs now know that they will operate at a systematic disadvantage to their stronger counterparts, unless they improve their performance. In this context, these consumers use firm branding as a low cost way to assess quality. To be sure, this passive, if low cost, strategy may not allow these weak players to match the performance of the stronger group with multiple sources of information. In an unregulated market, moreover, nothing precludes weaker consumers from taking advice from strong ones, or otherwise acquiring the education or experience needed to improve their own performance. The dynamic effects therefore strongly favor holding back on these various forms of protection.

In making this statement, it is not my intention to reject the use of any and all remedies for fraud, either before or after the fact. Rather it is to argue that these antifraud protections are better applied if one or two conditions are satisfied. First, that there has been a standard set of transactions in which fraud has been practiced, so that damages for past actions and injunctions of future ones are both needed.

The rise of fraud-rings to obtain benefits from no-fault insurance, workers compensation or health care fraud is often a major problem that involves just these issues.[7] In dealing with these cases, the best protection often involves cutting out certain entitlements that breed the fraud, rather than using higher standards of proof for policing applications. Long (i.e. 14 day) return periods for consumers under the CESL[8] could easily result in the return of goods that the consumer wanted for a single occasion or which were damaged by improper use.

Second, the anti-fraud regulations must be narrowly tailored to the fraud risk which allows their reliable use at low cost. The best illustration of such a practice may involve the use of the Annual Percentage Rate (or even the expanded Schumer Box)[9] in consumer lending transactions. Use a few key measures and avoid information overload or mistakes in communication. The CESL, however, has no such modest ant-fraud ambition. Instead it rests on the asserted but undefended notions of harmonization across the EU with highly intrusive consumer protection regulation.

II. Over the Top on Harmonization The CESL's turn toward excessive regulation lies its oft-iterated claim that harmonization is the summum bonum of regulation when dealing with cross-border transactions. But the Brussels Commissioners do not explain why or how this one single strategy works better than a decentralized approach that consciously puts multiple Member States in direct competition with each other. In support of its major intervention, the CESL is content to assert: "The existing harmonization of consumer law at Union level has led to a certain approximation in some areas but the differences between Member

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7 *See*, *e.g.*, Gary Schwartz,, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 Md. L. Rev. 983 (1993) (detailing fraud mechanisms in California for so called mental-mental cases in California). A mental-mental case is one where an external stimulus triggered a psychological reaction, without physical invasion or physical injury.

8 CESL Proposal, *supra* note 1 at 114. The provision does not make it clear whether the 14 day period applies to goods that are delivered immediately, although it seems likely that this is the case.

9 The Schumer box is named after then-Congressman Charles Schumer who proposed it as a device to list all the key terms in covered credit transactions. For a general description, see credit.com at http://www.credit.com/products/credit_cards/schumer-box.jsp .

States' laws remain substantial."[10] Elsewhere, the same theme is repeated: "the Common European Sales Law would contain fully harmonised consumer protection rules providing for a high standard of protection throughout the whole of the European Union."[11] Or this, "The minimum harmonisation approach meant that Member States had the possibility to maintain or introduce stricter mandatory requirements than those provided for in the acquis."[12] And in a somewhat different key: "It should also include fully harmonised provisions to protect consumers."[13] Using only these threadbare justifications, the CESL's new provisions, as detailed by Bar-Gill and Ben-Shahar, are truly breathtaking in their scope. They deal with mandated provisions, mandated disclosures, mandated rules for entering and exiting contracts, and sticky pro-consumer default terms.[14]

The omitted structural issues need closer exploration behind the blanket assertions of the superiority of harmonization. CESL's initial premise starts off with a neutral stance that, for cross-border transactions, a harmonised set of rules provides all the parties with the benefit of uniformity, which presumably means that member states could not adjust the standards either upwards or downwards. The third of these quotes appears to take a different view, by treating the harmonised position as a *minimum*, which can be raised by that member state which has jurisdiction over a particular consumer, which once again subjects the seller to the multiplicity of laws that harmonization is supposed to avoid.

At the outset, it is best to ignore the ability of individual member states to raise the ante, thereby assuming that the single EU standard takes precedence over local rules. That system does not yield uniformity for any firm doing business in both its own member state market and the EU market, for those two rules could

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10 CESL Proposal, *supra* note 1 at 2.

11 *Id.* at 4.

12 *Id.* at 5.

13 *Id*. at 16.

14 Bar-Gill & Ben-Shahar, *supra* note 4, at 2-3.

easily differ from each other in important ways. That dual standard would create at least two bad consequences. First, it would force the firm to market goods on two different standards at higher costs. Second, it would make it more difficult to supply one of the key protections extended by firms in voluntary markets to consumers with limited knowledge only, namely a pledge of equal treatment to all of its customers regardless of location.

Even if those differences are ignored, the EU never explains its preference for transaction harmonization. A complete analysis of the problem cannot assume that any uniform government outcome always migrates to the superior rule. It is equally possible that the preferred proposal will be infected by some intellectual error or political bias, including those attributable to the relentless statism of the European Commission that has its own bureaucratic ambitions. The harmonization strategy puts all the regulatory eggs in a single basket, instead of creating a portfolio of diversified government strategies which compete for the allegiance of contracting parties.

The advantages of competition are borne out by a quick look at the American federalist system, which has long protected individual exit rights as a means to insulate liberty of the subject from the dangers of state monopoly. Thus the Supreme Court is fond of making pronouncements of this sort: "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[15] The logic behind the exit rights position is that people who do not like the local laws in one jurisdiction can flee to a second whose rules are more to their liking. That response helps constrain state and local power of taxation and regulation, allowing parties to look for communities with the right combination of taxes and public services.[16] There are reasons why dictators make exit rights their first targets: think only of East Germany before the fall of the wall.

This standard model of exit rights, however, does not supply a perfect remedy because parties have to relocate physically in order to live under their

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15 *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

16 Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. (1956).

preferred political or economic order. The exit right thus always requires people to leave behind their site-specific capital, which may include land (that they sell at a discount) and all sorts of personal and business contacts (that they cannot sell at all). This exit remedy is both easy to enforce and incomplete.[17] The easy escape from self-help leaves to people the losses of site-specific assets. The commercial parallel is between the right to reject goods, which is cheap to exercise but offers only incomplete protection, and the expectation measure of damages for lost profits for nonconforming goods, which offers better protection but is expensive to exercise.

In dealing with SME and consumer contracts, however, it is possible to have the best of both worlds: competition between Member States *without* giving up site-specific assets. A better approach allows any Member State to set up its preferred contractual regime for both SMEs and consumers, and let the parties by agreement choose whichever they regime they want, simply by checking a box. It is possible that sellers and buyers will converge on a solution that does recognize some mandatory terms, such as warranty of merchantable quality, enforceable by state fines that consumers could prefer to their own private rights of action. Using this competitive mechanism between Member States does not require any *a priori* judgments about the trade-offs between the costs and benefits of government programs. The parties are free to accept whatever terms they chose, even those supplied by some other Member State.

The CESL is hostile to any inter-jurisdictional competition over contract terms. Toward that end, it wrongly insists that the principle of subsidiarity requires a uniform EU to facilitate cross-border trade.[18] Yet why assume a single supplier of contract law, which necessarily slights the above competitive mechanism? In these cases, why assume that only the CESL can get the right mix, especially when its own list of terms is far more regulatory than those of any of its Member States? This

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[17] For discussion, see Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROB. 147 (Winter, 1992).

[18] CESL Proposal, *supra* note 1 at 21.

brand of harmonization sends the implicit message that more regulation is better, without offering any empirical check on that sweeping proposition.

The claims that subsidiarity requires centralization is even more bizarre in trader-to-trader transactions that are included in a regime of freedom of contract. More specifically, the CESL is correct to note that the proposal is able "to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules."[19] But it is a complete nonsequitur to argue that *only* the EU is in a position to make available these terms, when all the Member States can do so. Indeed, whenever there are no mandatory terms, every trade association in the EU should be free to roll out its own terms for use. Why even worry about states at all?

III. Jurisdictional Issues: Forum Selection, Choice of Law, and Mandatory Terms The various jurisdictional issues raised by the CESL need some further examination, both with respect to the rule that all consumers contracts are tied to the habitual residence of the consumer, and then with respect to the special treatment for SMEs.

It is instructive to contrast the approach of CESL to forum selection and choice of law issues with the treatment of those issues in the United States. By way of background, the American case law has witnessed a long-standing tension between state jurisdiction based on the control over *territory*, which is done by public fiat, and state control by *consent*, including that consent that is often under a general standard form contract that governs the relationship. The territorial account of jurisdiction works well in disputes over the ownership of land, but in consensual transactions, it hardly makes sense to say that if, as in the key case of *Pennoyer v. Neff*,[20] two Oregon citizens enter into a service contract in Oregon, for performance in Oregon, it cannot be enforced in Oregon after the defendant relocates to California. The correct analysis approaches such transaction from the ex ante perspective to ask which jurisdiction or jurisdictions the parties would have accepted if asked to decide that question before suit. In *Pennoyer*, Oregon would

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19 *Id.*

20 95 U.S. 714 (1878).

surely top that list as the preferred forum, such that the reduction of enforcement costs would in turn increase the potential gains from the transaction. Conversely, California would be on that list, but only at the option of the *plaintiff*. *Ex ante,* neither side would agree to a provision that allows his unilateral decision to relocate and impose the cost of a distant jurisdiction on his trading partner.

Over time *Pennoyer's* misguided territorial fixation unraveled,[21] in favor of an approach that looked to the "minimum contacts" that the parties to the transaction had at the time of its occurrence, at which point *Pennoyer* is overruled in all but name.[22] The minimum contact rule shifts the focus back from the time of the dispute to the time of the transaction. In so doing it edges closer to the correct approach which leaves it to the parties to select their own forum by agreement. On that view, if the parties are silent, the judicial exercise becomes one of setting the implied terms by a default provision. The key point here is that these defaults can always be displaced by *explicit* contract terms, which should govern unless some public policy objection intervenes. Indeed, these contracts are likely to emerge when the costs of uncertainty are too high. That is most likely with repetitive transactions that involve multiple jurisdictions, where any minimum contact test may not yield clear results.

It is not surprising therefore that the single most instructive decision in the United States, *Carnival Cruise Lines v. Shute*.[23] *Carnival Cruise* upheld a forum-selection clause that required its passengers, the Shutes, to litigate their personal injury claims against Carnival Cruise only in the state of Florida. The Court held that this clause bound the Shutes, residents of Washington state, with respect to injuries that took place while on board the ship in international waters. The logic of the

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21 For my account, see Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. Chi. Legal Forum 1.

22 See International Shoe v. Washington, 325 U.S. 310 (1945), which adopted this scheme to allow the state of Washington to sue International Shoe in state court for sales taxes owed on sales within the state. Note that the case would have been entirely different if the state of New Jersey had come to Washington state to collect its own sales taxes. In standard American language, the case stands for "specific jurisdiction" with respect to a particular provision.

23 499 U.S. 585 (1991).

decision makes it clear that the Supreme Court would have also upheld any choice of law provision requiring these disputes had to be litigated under Florida law, given that no territorial law clearly governs disputes that arise in international waters.

Clauses of this sort are in obvious tension with the consumer–first mentality of the CESL, which ties jurisdiction in consumer transactions to the consumer's habitual residence.[24] But why find some public policy objection to these terms? Consumer protection is not an end itself, but a means to maximize the net value out of these transactions. Although the CESL does not recognize the point, the selection of the correct forum and the substantive law depend not just on the one transaction but on the full portfolio of transactions that face the firm. *Carnival Cruise* shows the importance of taking this broader perspective. The passengers on any given cruise come from all over, and the place of injury could be in any one of a number of domestic or foreign territories, or, as in *Carnival* itself, on the high seas. To allow the consumer to force, as of right, jurisdiction in his or her own state creates awkward situations in which the cruise line can be forced to litigate tort disputes in multiple jurisdictions (including those in foreign countries) whenever many passengers are injured in a given accident. Picking the home state reduces those costs ex post for all parties and thus increases the value of the contract ex ante, because it is known at least that one side has easy access to the relevant court; it also allows for easier consolidation of multiple claims. *Carnival Cruise* did not involve choice of law clauses, which raise similar considerations: just whose law should apply on the high seas, and why should the choice of law be tied to the location of the ship at the time of the accident?

The public policy objections to this contractual solution are several. The first has to do with the risk of insufficient disclosure. That issue was not addressed in *Carnival Cruise*, where the clause was included in the ticket. But as with most disclosure issues, the provision is not likely to change in substance even with

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[24] *See* CESL Proposal, *supra* note 1 at 15: "whenever a trader directs its activities to consumers in another Member State the consumer protection provisions of the Member State of the consumer's habitual residence that provide a higher level of protection and cannot be derogated from by agreement by virtue of that law will apply, even where another applicable law has been chosen by the parties."

regulation that requires it to be printed in conspicuous and/or contrasting type. A second objection is that these clauses could be rigged in favor of the defendant. It is easy to imagine, and even possible to find clauses that meet that description, such as those in the notorious Gateway 2000 contract, whose reference to arbitration before the International Chamber of Commerce did not reveal its steep nonrefundable filing fees, which were typically in excess of the amount in controversy. But the ability to invalidate that clause does not require the wholesale invalidation of any such provisions. On this issue, the U.S. Supreme Court adopted two simple safeguards against this type of advantage taking, which seem to have worked well.[25] By the first, the dominant party has to have some independent and prior connection with the chosen forum. By the second, that party has to choose this forum for all future disputes, not just some. It is easy to think of cases where these constraints on forum selection clauses may be too severe, but for these purposes, the critical point is that virtually every firm can live comfortably within the safe harbor created by these dual limitations. The history after *Carnival Cruise* is not replete with businesses seeking to push the envelope in either forum-selection or choice-of-law provisions, precisely because these well-designed constraints protect customers against roguish surprises without crippling honest cost-minimizing transactions. The solution looks efficient. Why then rule it out of bounds?

The CESL also misfires for thinking that some special treatment (which does not quite rise to the level of protection) is required for SMEs. The gist of its case is contained in these two paragraphs:

> Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or

[25] *See* Brower v. Gateway 2000, Inc, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (arbitration before International Tribunal with high fees undisclosed in basic contract).

> expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.[26]
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> The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.[27]

The cure for these alleged defects is the creation of "a self-standing uniform set of contract law rules" for these SMEs.[28] The entire approach is, however, mystifying. The argument here does not purport to invoke the consumer protection rationales that are so evident throughout this agreement. So why worry which body of contract law is used, especially when the basic principle of freedom of contract appears to apply to SMEs? As noted earlier the key question in all cases is whether the *sum* of the transaction costs for *both* parties exceeds the potential gains from trade. That principle is wholly ignored in the one-sided effort to reduce the costs of the small SME, which will, of course, increase the cost for the larger firms with whom they do business. So long as there is any element of variation across firms, there is no reason to believe that an externally driven shift in legal regimes will improve the overall rate of contracting, or indeed that the overall rate should be increased. As the CESL proposal notes, there are many other regulatory reasons which make it more difficult to do cross border transactions. In addition, the costs of these transactions are likely to be higher even if there are no differences whatsoever in dealing with contract terms, precisely because it is harder for parties

26 CESL Proposal, *supra* note 1 at 2.

27 *Id.* at 3.

28 *Id.* at 4.

to work at a distance to iron out their differences or to make assessments of the credibility of their trading partners. The strong preference for doing business within the Member States may well be attributable to some combination of clashing regulatory regimes on the one hand and well-developed internal markets on the other. Expanding the scope of markets by knocking down trade barriers is always a desirable good, but it is not an objective worthy of state subsidization. The proper response here is the same as it was above. Allow parties to figure out the terms on which they wish to contract in a voluntary market, and then enforce those terms faithfully on all issues of forum selection and choice of law. The CESL speaks about uniformity across transactions as the goal, when the proper function is to reduce the cost of transaction for trading partners who may wish for reasons sufficient for themselves to choose different approaches. Singling out SMEs for special treatment may not do as much mischief as the consumer protection provisions, but it will be unlikely to do any good either.

CONCLUSION One danger of large bureaucracies is that they often seek to drum up work to do. From the perspective of the outsider, that seems to be the case with respect to the European Commission's effort to harmonize the law of sale. The difficulties with its approach are legion.

First, harmonization need not be tied to an effort to raise the level of regulation in all cross-border transactions, whether they involve consumers or SMEs. Harmonization downward must in principle be regarded as at least as desirable as harmonization upward, given that overregulation is a serious risk in both the long and the short term.

Second, coherence in individual transactions does not require comprehensive EU articulation of either mandatory or background norms. For mandatory terms, one possible system is to allow each Member state to articulate the rules that it wishes to impose, so that firms could then pick from that roster the terms that they want, knowing that if these are too one-sided, they will lose customers to rival firms who select packages that are more favorable to customers. For transactions between SMEs and larger firms, there is no need for intervention at

all, as the two parties should, in line with the American practice after *Carnival Cruise*, let whoever wants specify the background terms of their choice.

Third, so long as the European Commission believes that freedom of contract is the preferred solution, it should do what all sound regulators do to achieve that goal: step out of the limelight as quickly as possible.