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### The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition

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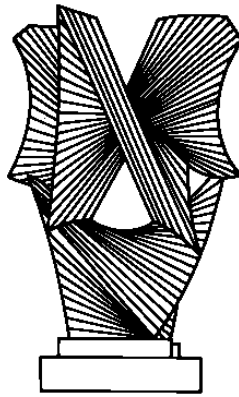
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## The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition

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# The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition

Eric A. Posner<sup>1</sup>

May 1, 2012

**Abstract.** The Common European Sales Law is designed as an optional instrument that European parties engaged in cross-border transactions could choose for their transactions in preference to national law. The goal is to increase cross-border transactions and perhaps to enhance European identity. But the CESL is unlikely to achieve these goals. It raises transaction costs while producing few if any benefits; it is unlikely to spur beneficial jurisdictional competition; its consumer protection provisions will make it unattractive for businesses; and its impact on European identity is likely to be small.

## Introduction

European integration was foremost concerned with reducing trade barriers between member states, but in the last several decades efforts have also been made to create a common legal system. It turns out that reducing trade barriers by itself does not always change people's behavior. When people enter transactions, they prefer to deal with people or entities within the borders of their country, and so will go across borders only when price or quality differences are sufficiently high. Although it is not clear that there is anything wrong with this, European officials concluded that cross-border transactions were hindered by the conflict of laws. A German might refrain from buying from a Swede because the two parties do not know much about the foreign legal system, and dread becoming embroiled in a legal dispute in a foreign system. The parties can choose which legal system will apply, but they cannot avoid using a legal system that is foreign to one of them. In economic terms, the uncertainty about the law that will apply to the dispute raises the cost of transacting.

One possible solution is to create a single common legal system. The EU took some strides in this direction by issuing directives requiring harmonization of some features of contact law, particularly those governing long-distance transactions like time-shares.<sup>2</sup> But these efforts did not go far. There was no political will for a single European contract law.

The alternative approach, which was taken, is more modest: the EU is to promulgate a contract law that parties will be able to opt into for cross-border transactions. The proposed Common European Sales Law (CESL) is envisioned as an "instrument" that parties can use or ignore as they choose when they enter into cross-border transactions.<sup>3</sup> The idea is that parties that fear being obligated under a foreign law they do not understand can choose instead to be bound by the CESL, requiring them to learn only one "foreign" law (the CESL) rather than 26, if they

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<sup>1</sup> University of Chicago Law School. Thanks to Omri Ben-Shahar and participants at a conference on the CESL at the University of Chicago for comments, and to Ellie Norton for research assistance.

<sup>2</sup> See *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM(2001) 398 final.

<sup>3</sup> See *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM(2011) 635 final at 5.

wish to engage in cross-border transactions throughout the EU.<sup>4</sup> This should reduce uncertainty and hence transaction costs.

I make the following points. First, contrary to the general view, the introduction of an optional instrument should increase rather than reduce transaction costs. Second, although such an instrument can nonetheless produce benefits (what I call the reduction of “uniformity costs”), it is unlikely that these benefits exceed the transaction-cost harms. Third, I examine the potential dynamic effect of CESL for jurisdiction competition, and conclude that any benefits are likely to be slight at best. Fourth, I examine an argument that the CESL might be desirable as a means for helping to establish a common European identity, and reject it.

## I. The CESL

The CESL was proposed by the European Commission in 2011, after years of discussion about the possibility and desirability of harmonizing the bodies of contract law of the various EU member states.<sup>5</sup> Earlier efforts had resulted in the harmonization of the law governing certain narrow types of transactions, and a draft European contract law had been proposed by a number of academics and other commentators.<sup>6</sup> But it has become clear that there is no political will for a uniform European contract law, whatever its merits may be, and the CESL has emerged as a compromise between the status quo of jurisdictional variation and the unattainable ideal of a uniform European law.

The basic purpose of the CESL—to encourage cross-border transactions—is abundantly clear from the EC’s explanatory memorandum:

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 expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.<sup>7</sup>

More specifically:

Additional transaction costs compared to domestic trade usually occur for traders in cross-border situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law

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<sup>4</sup> Id at 4.

<sup>5</sup> See id at 4–5.

<sup>6</sup> See, for example, COM(2001) 398 final (cited in note 2); *A More Coherent European Contract Law—An Action Plan*, COM(2003) 68 final; *Green Paper from the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses*, COM(2010) 348 final; Norbert Reich, *Harmonisation of European Contract Law: With Special Emphasis on Consumer Law*, 1 *China-EU L J* 55 (2011); R. Schulze and Jules Stuyck, eds, *Towards a European Contract Law* (Sellier 2011); Jurgen Basedow et al, *Policy Options for Progress Towards a European Contract Law* (Max Planck Private Law Research Paper No 11/2, July 2011), online at [http://ec.europa.eu/justice/news/consulting\\_public/0052/contributions/247\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0052/contributions/247_en.pdf) (visited Apr 4, 2012).

<sup>7</sup> COM(2011) 635 final at 2 (cited in note 3).

in business-to-business transactions and adapting contracts to the requirements of the consumer's law in business-to-consumer transactions.<sup>8</sup>

Thus, "The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers."<sup>9</sup>

At the same time, the drafters argue that the CESL will advance consumer protection:

This proposal is consistent with the objective of attaining a high level of consumer protection as it contains mandatory rules of consumer protection from which the parties cannot derogate to the detriment of the consumer. Furthermore, the level of protection of these mandatory provisions is equal or higher than the current *acquis*.<sup>10</sup>

The drafters treat consumer protection as distinct from the goal of encouraging cross-border transactions, but perhaps they believe that consumers will more likely buy from foreign sellers in the EU if they can expect a high degree of protection.

The CESL has two major structural features that I will focus on. First, it applies only to cross-border transactions.<sup>11</sup> Second, it is optional: parties can choose the CESL but they remain free to choose the national law of a member state<sup>12</sup>—in the case of business-to-business transactions they have almost complete freedom to choose the law of any member state, while in business-to-consumer transactions their choices are confined to states that have contacts with the parties or the transaction.<sup>13</sup>

## II. Analysis

### A. The Static Benefits and Costs of Uniformity

Consider a hypothetical legal system with two states, France and Germany. Parties engage in cross-border transactions. Under what I will call a system of jurisdictional competition, the parties may choose French law or German law to govern their contracts.<sup>14</sup> Thus, every time parties negotiate contracts, one issue will be whether to use French or German law. What would be the benefits and costs if France and Germany decided to create a uniform law? The benefit of uniformity is the reduction of transaction costs: the parties need no longer learn two bodies of law and negotiate over which will apply to their transaction. The cost of uniformity is loss of variation where the people in the different jurisdictions have different preferences over optimal contract law. Suppose for example that for contract K1 between parties X and Y, German law is optimal; and for contract K2 between parties W and Z, French law is

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<sup>8</sup> Id.

<sup>9</sup> Id at 4.

<sup>10</sup> Id at 6–7.

<sup>11</sup> COM(2011) 635 final at 8.

<sup>12</sup> Id.

<sup>13</sup> Giesela Rühl, *Consumer Protection in Choice of Law*, 44 Cornell Intl L J 569 (2011).

<sup>14</sup> Under EU law, the parties can choose the law of any member state, even of a member state with which the transaction has no contact. See Commission Regulation 593/2008, art 3, 2008 OJ (L 177) 6, 10.

optimal. In the aggregate, the four parties do best if both German and French law are available, and would be made worse off (ignoring transaction costs) if German and French law were replaced by a uniform European law. Thus, the choice between a uniform (mandatory) European law and multiple jurisdictions governed by a choice-of-law regime depends on a tradeoff between transaction costs and what I will call uniformity costs.<sup>15</sup>

In the literature, the variation represented by the CESL—an optional instrument—is treated as halfway between uniform law and jurisdictional competition, so the assumption is that CESL imposes an intermediate level of transaction costs and an intermediate level of uniformity costs.<sup>16</sup> But this is wrong. Continuing with our France/Germany example, under the CESL parties face three choices of law (French, German, and CESL) rather than two choices of law. Transaction costs increase because (1) parties must inform themselves of three bodies of law rather than two; and (2) parties must negotiate over which of three rather than two bodies of law will apply to their contract.

The benefit created by the CESL is that, while transaction costs increase, uniformity costs decline. Whereas before the parties could choose only between German and French law, now they can choose between German law, French law, and the CESL. It is theoretically possible that, for some parties, the CESL is superior to German and French law. Those parties benefit from the availability of the CESL while other parties, which prefer German or French law, are not harmed (putting aside transaction costs). For this reason, the CESL offers lower uniformity costs than even jurisdictional competition does. Table 1 illustrates the analysis.

Table 1: Comparison of Regimes

	<b>Uniform European Law</b>	<b>Choice of Member State Law</b>	<b>Optional Instrument</b>
<b>Transaction Costs</b>	Low	Moderate	High
<b>Uniformity Costs</b>	High	Moderate	Low

Given this simple analysis, will the CESL be used by parties (or, what is the same thing, will it increase efficiency and cross-border transacting)? There are several reasons for skepticism.<sup>17</sup>

<sup>15</sup> As has been frequently observed; see, for example, Fernando Gomez and Juan Jose Ganuza, *How to Build European Private Law: An Economic Analysis of the Lawmaking and Harmonization Dimensions in European Private Law* (forthcoming, European Journal of Law & Economics), online at <http://www.springerlink.com/content/5304617436009622/> (visited Apr 4, 2012).

<sup>16</sup> See especially the EC Proposal itself, which lists transaction cost reduction as one of the justifications for the CESL. COM(2011) 635 final at 2–3, 8–10 (cited in note 3). See also Gomez and Ganuza, *How to Build* at \*10, which does not in my view accurately depict the relative merits of the optional instrument in an otherwise thorough and persuasive treatment of different harmonization regimes in the context of European efforts to harmonize contract law.

<sup>17</sup> For some related reasons regarding the economic motives of firms, see Gary Low, *Will Firms Consider a European Optional Instrument in Contract Law?* (forthcoming, European Journal of Law & Economics), online at <http://www.springerlink.com/content/4183211716710j20/> (visited Apr 4, 2012).

First, the increase in transaction costs may well be significant. Consider again the French-German transaction. Before the introduction of the CESL, suppose the parties choose German law. The CESL is introduced. One might argue that the CESL could not increase transaction costs because, if the parties choose to, they can simply ignore the CESL and continue to use German law. However, this argument is wrong. Each party will take into account the possibility that the CESL is superior to German law either in efficiency or distributional terms. From an efficiency standpoint, both parties stand to gain if CESL is more efficient than German law. They will need to make an initial investment to determine whether CESL is more efficient for their particular transaction. Moreover, each party will want to know whether CESL has different distributive effects from those of German law. If one party learns that the other party benefits from CESL, then it will either resist application of the CESL or demand a side payment.

How could this point have been overlooked by the literature? One possibility is that commentators imagine that all businesses in all 27 EU member states that engage in cross-border transactions will opt for the CESL because a single law is better than dealing with 27 different laws. A German firm might sell products to buyers in all of the other 26 countries. Learning 26 different laws is a formidable task; learning just the CESL will be much cheaper. The problem with this reasoning is that any given transaction might be more valuable under a national law than under the CESL. To capture these potential gains, the German company must learn all the laws of the other 26 countries (or, more realistically, consult local lawyers). There is no getting around the point that transaction costs increase rather than decline when the common law is offered as an option rather than as a (mandatory) replacement of the various national laws.

Second, the benefit of the CESL—the reduction in uniformity costs—is likely to be slight. There are two reasons for this. First, as I discuss in Part B, the application of the CESL to specific fact-situations will be shrouded in uncertainty until a jurisprudence has built up, and this can take years. Thus, the nature of the legal variation offered by the CESL will be largely unknown to parties, making the CESL less attractive than familiar legal systems. Second, the CESL as drafted does not differ that much from existing legal systems. Contract, unlike tort law, is largely facilitative rather than regulative. The contract law of all western countries is quite similar because the overall purpose of contract law is not to prevent parties from acting in the ways that they want to, but to enable them to act in the ways that they want to.<sup>18</sup> Many contract rules are default rules; the parties can contract around them. Thus, if given a choice between German law and French law, the parties can choose the better law and then contract around whatever provisions of that law that they do not like. In such circumstances, it is hard to believe that a new option—the CESL—will give the parties an option that is more than trivially better than their existing legal choices, while they will nonetheless sustain the costs of an uncertain instrument in the short to medium term.<sup>19</sup>

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<sup>18</sup> See Ewan McKendrick, *Harmonization of European Contract Law: The State We Are In*, in Stefan Vogenauer and Stephen Weatherill, eds, *The Harmonisation of European Contract Law* 5, 21–24 (Hart 2006) (describing the view of many English lawyers who oppose European harmonization of contract law).

<sup>19</sup> That said, it must be acknowledged that the majority of European businesses surveyed expressed a preference for a uniform European contract law, including an optional instrument. See Stefan Vogenauer and Stephen Weatherill, *The European Community's Competence to Pursue the Harmonization of Contract Law—An Empirical Contribution to the Debate*, in Vogenauer and Weatherill, eds, *Harmonisation* 105, 105 (cited in note 18).

There is, however, a sense in which contract law is regulative rather than facilitative. The rules that regulate the creation of contracts (rather than enforcement of their terms) are regulative in the sense that they prevent parties from accomplishing their aims if they do not satisfy various formalities. In the United States, for example, it is easier to form a contract under the U.C.C. than under the common law because the U.C.C. does not require a perfect match between the terms proposed by the offeror and the terms accepted by the offeree.<sup>20</sup>

From the standpoint of regulative rules, it is unclear how CESL can help parties who might otherwise be defrauded or otherwise taken advantage of. The problem is that if, say, a seller seeks to defraud a buyer, then the seller will choose whichever body of law is least likely to give the buyer an effective remedy if the buyer should discover the fraud. If the CESL has stronger protections for buyers, then sellers will simply not use it, and thus its introduction could not have a beneficial (or any) effect, in this respect.

One might argue that if the benefit of the optional instrument is small, then the additional transaction costs must be low as well. Parties do not need to incur significant transaction costs learning about a law that likely resembles existing national legal systems. However, because of the uncertainty introduced by the CESL, transaction costs will likely be large. Parties will need to invest significant resources predicting how the CESL will be applied to their transactions.

Third, the consumer protection provisions of the CESL are likely to make it quite unattractive for businesses. The consumer protection provisions are extensive and are probably more extreme than the rules of many if not most of the EU member states.<sup>21</sup> As a general matter, sellers will opt out of jurisdictions with strong consumer protection laws (including the CESL) because they can offer in a contract whatever consumer protections they believe will appeal to their customers, such as a warranty, while avoiding those that will not, which reduces costs and prices and hence increases sales. Thus, the strong emphasis on consumer protection in the CESL is at war with the main goal of encouraging cross-border transactions.

On the other side, one might argue that the CESL will serve a branding function like Underwriter's Laboratories or Good Housekeeping. Imagine that European consumers do not trust the law of foreign member states because they cannot understand it and fear that it is excessively favorable to sellers in those states. They might think, for example, that the foreign law makes it easy for sellers to violate warranties without paying the consequences, or that foreign courts will be unsympathetic to their claims. Thus, consumers will be reluctant to enter cross-border transactions with foreign sellers unless the contract is governed by either their own domestic law or the CESL, because at least the CESL is "European" rather than foreign. In response, sellers will offer CESL in their contracts.

There are several problems with this argument. Note initially that customers may have to deal with foreign courts irrespective of the choice of law. There is no European trial court. In

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<sup>20</sup> CESL Art 38 follows this route as well. See COM(2011) 635 final at 49 (cited in note 3).

<sup>21</sup> See Oren Bar-Gill and Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of the Common European Sales Law* \*\*4–6 (forthcoming, Conference on European Contract Law: A Law-and-Economics Perspective, Apr 27, 2012), online at [www.law.uchicago.edu/files/files/OBS-OBG%20paper.pdf](http://www.law.uchicago.edu/files/files/OBS-OBG%20paper.pdf) (visited Apr 4, 2012),



addition, and of greater importance, the argument depends on the heroic assumption that European customers will know something about European law, and distinguish contracts governed by European law and contracts governed by foreign law. Everything we know about consumer ignorance, and consumers' inability and unwillingness to read and understand contracts, suggests that this assumption is false.<sup>22</sup> If it is false, then availability of the CESL option will not increase the number of cross-border transactions between consumers and foreign sellers and sellers will not use the CESL in consumer transactions.

In sum, making the CESL available as an option increases transaction costs, and probably does not provide sellers and buyers any real benefits. It is theoretically possible that the CESL is superior to the relevant national laws, but its facilitative rules are probably not much different from those of the national laws, and could not have much effect even if they were different; and its regulative rules will be evaded by the sellers who might be constrained by them. Moreover, the emphasis on consumer protection will make the CESL unattractive to businesses.

## B. Dynamic Benefits and Costs of Uniformity: Jurisdictional Competition and Drift

One of the advantages of non-uniformity is said to be jurisdictional competition, which is a “dynamic” benefit in the sense that it produces gains over time. In the France/Germany example, it is possible that France and Germany would compete to produce the best contract law. The theory may be that France and Germany seek to maximize the number of transactions involving their own citizens or firms. If German law is the best law, then (in a more complicated but realistic setup) French firms would rather transact with German firms than with Dutch firms, unless parties entering French-Dutch transactions can opt into German law (which would involve additional complexities).<sup>23</sup> However, it is far from clear that countries have these types of incentives, especially because the law in practice is often in the hands of the courts, which will be less democratically responsive than legislatures. And history suggests that even legislatures react sluggishly at best to proposals to reform and improve contract law.

If jurisdictional competition is a real phenomenon, then non-uniform law is superior to uniform law. Or to put this point precisely: people do better if they can choose to make their contract subject to the law of any one of a number of jurisdictions than if they must use the law of only one jurisdiction. This assumes that the parties enter contracts freely and with full information, an assumption that I will make for now. Thus, on this basis, it is better that French and German cross-border transactors can choose between French and German law than if they were required to use one (say) European law.

How does the CESL system fit in? The CESL is another source of law that could, in theory, compete with the various national laws. If currently France and Germany compete to supply the law for French-German transactions, then the addition of the CESL would mean that each country would compete with each other and the EC, the sponsor of the CESL. The additional competitor might be thought to strengthen incentives to provide optimal contract law.

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<sup>22</sup> See Simon Whittaker, *The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties* \*42 (Oxford Legal Studies Research Paper No 10/2012, Mar, 2012); on consumer ignorance generally, see Omri Ben-Shahar, *The Myth of Opportunity to Read in Contract Law*, 5 Eur Rev Cont L 1 (2009).

<sup>23</sup> They typically can, albeit subject to certain limits. See Rühl, 44 Cornell Intl L J at 589–90 (cited in note 13).

There are several problems with this argument. First, as noted above, it is not clear that French and German legal institutions actually have the proper incentives to supply optimal law. It is possible that legislatures might compete to improve the contract law in the hope of attracting business to constituents. If German law is improved, then the Dutch may prefer to transact with Germans and with the French (assuming that the Dutch and the French cannot opt into German law). But it is also possible that the gains in this area are too marginal to motivate legislatures. Given the similarity of contract law across jurisdictions (which as noted is largely facilitative everywhere), and the very limited extent to which contract law has changed over the years, one suspects that the gains are in fact small.

In addition, it is not entirely clear what the incentives of the EU lawgivers are. The producers of the CESL must be prepared to improve the CESL if French and German law overtakes it. But European lawmaking institutions move with extreme slowness because it is necessary to obtain consensus or supermajority support among the member states (which may not want to face competition from the institutions they are supposed to support). Thus, even if the CESL is better than the national laws today, one would expect national laws to improve tomorrow, resulting in desuetude for the CESL. On this view, the CESL may have positive welfare effects, but it will not itself become a symbol of European unity—an issue to which I will return in Part III.

Second, jurisdictional competition can lead to races to the bottom as well as to the top. Here, consider the consumer protection law. To the extent that consumer protection law is desirable but that businesses do not like it, businesses will pressure countries to weaken consumer protections. The addition of the CESL creates a new opportunity for businesses to exert such influence. Even though the current CESL contains strong consumer protections, once the precedent is established that European institutions can enact a CESL, businesses will have stronger incentives to lobby for amendments that strip away consumer protections, and even create new consumer protection ceilings that undermine consumer protection legislation in the member states. Indeed, one selling point for the CESL is that it offers a safe harbor to businesses otherwise confronted with 27 different consumer protection statutes. As a general matter, it is hard to predict how a system of competition between EU institutions and national institutions will operate.<sup>24</sup>

Third, the institutional structure of the legal system may encourage “drift” that will undermine the advantages of a common (even if optional) law. Cross-border disputes will continue to be adjudicated by national courts, albeit under the very broad supervision of the European Court of Justice.<sup>25</sup> It is in the nature of things that different court systems will interpret the same text differently. This phenomenon is familiar in the United States, where different state courts interpret the U.C.C. differently, leading to entrenched conflicts about the meaning of various provisions.<sup>26</sup> Inevitably, over time the national courts of different member states will put

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<sup>24</sup> For additional discussion of political economy concerns for contractual harmonization in Europe, see Erin O’Hara O’Connor, *The Limits of Contract Law Harmonization* (forthcoming, *European Journal of Law & Economics*), online at <http://www.springerlink.com/content/1358826650357510/> (visited Apr 5, 2012).

<sup>25</sup> See COM(2011) 635 final at 6,21, 28 (cited in note 3).

<sup>26</sup> Notably for 2-207, which has at least three major interpretations. See Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts* 60 (Foundation 2006). See generally Douglas E. Litowitz, ed, *Perspectives on the U.C.C.* (Carolina Academic 2007).

their own gloss on CESL provisions, perhaps influenced by their different legal traditions or differences in the perceived needs of commercial actors across states. This will create additional confusion, raising transaction costs, as firms will need to consult not only the laws of 27 member states but also potentially as many as 27 interpretations of the CESL. On this view, the problems that motivate the CESL stem from the existence of numerous forums, not numerous laws; and the CESL provides the wrong remedy by offering a uniform law rather than a single forum (which would be politically and practically impossible).

Fourth, there will be high start-up costs associated with the CESL, which may discourage businesses to use it, and thus prevent the CESL from producing benefits in the long run. Any new set of laws will create interpretive difficulties, and it will take some time to work them out. When parties are confronted with the option between choosing a new and untried common law, and the tried-and-true national laws, they will be strongly biased to the latter. The reason is that the national laws are accompanied by an enormous body of jurisprudence that renders their application relatively predictable. Creating the CESL is a bit like creating a new language like Esperanto and inviting everyone to learn it. While it would be beneficial if everyone spoke the same language, the costs of learning the language are high, and the benefits are partly enjoyed by others because of network effects. Accordingly, optional laws, like optional languages, are unlikely to obtain many adherents. This is the experience with the UN Convention on Contracts on Contracts for the International Sales of Goods, another optional law, and one that appears to be used very rarely.<sup>27</sup>

### III. Political Symbolism

The project of European integration has always been a political project, not only an economic project. From the beginning, the idea was that economic integration would weaken nationalist rivalries and hence prevent a recurrence of the European warfare that took place during the first half of the twentieth century. Thus, although earlier I assumed, in common with most authors writing about the CESL, that the goal of CESL is to maximize welfare, that may be an excessively restrictive assumption. Could the CESL be justified on political grounds?

Martijn Hesselink makes just such an argument.<sup>28</sup> Hesselink argues that there is no normative reason to take the narrow economic interests of the member states as the starting point for evaluating the CESL. The tendency to do so reflects nationalism, which for Hesselink is a mostly emotional identification with the nation state where one was born.<sup>29</sup> However, European countries exist in a post-nationalist institutional structure: they have yielded a portion of their sovereignty to European institutions. A small but not trivial minority of Europeans identify with Europe as such, and a much more substantial portion of Europeans identify with both their nation

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<sup>27</sup> See, for example, Lisa Spagnolo, *Through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)* 1 Vidobona J Intl Comm Law & Arb 135, 135–36 (2009) (noting that somewhere between 55–71 percent of lawyers “typically/generally” opt out of the CISG).

<sup>28</sup> See Martijn Hesselink, *The Case for a Common European Sales Law in an Age of Rising Nationalism* (Centre for the Study of European Contract Law Working Paper Series No 2012-01, Feb 2, 2012), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1998174###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998174###) (visited Apr 5, 2012).

<sup>29</sup> Id at \*\*11–12.

state and with Europe.<sup>30</sup> A large minority identify only with their nation state, and there is no reason to give their national identification priority over the attitudes of others.

If the goal were to forge a common European identity, Hesselink argues, then a uniform (mandatory) European contract law would be justified.<sup>31</sup> Such a law would reflect a common European identity and (presumably) further strengthen it. Hesselink acknowledges that there is not a strong enough or sufficiently widespread European identity to support such a project, but argues that the more limited goal of the CESL, which is to make available an *optional* common law, is supported by the current state of European nationalism.<sup>32</sup> A majority of Europeans either wholly or partially identify as Europeans; these people would not object to, and should benefit from, the optional instrument. And because the instrument is optional, the nationalist minority would be free not to use it, and thus do not have legitimate grounds to object to it.

At the same time, Hesselink argues that the CESL could contribute to the emergence of a European identity by “‘thickening’ the moral dimension of European identity.”<sup>33</sup> He argues that the CESL sends a normative message supporting good faith and fair dealing, freedom of contract, and cooperation, which distinguishes CESL from the supposedly harsher regime in the United States. The rules of the CESL “express the fundamental idea that the Internal Market is not a jungle where might is right.”<sup>34</sup> So while the optional character of the CESL ensures that people retain the choice not to opt into European identity, the availability of the CESL at the same time enables those who seek to strengthen their European identity to do so, and perhaps in this way to strengthen European solidarity in general.<sup>35</sup>

I cannot do justice to this interesting argument in the space that I have been given. But a number of brief comments are in order. First, there are significant questions as to whether “political” goals can supersede economic goals in practice, at least within the context of nation-building. Compare monetary union. A strong argument could be—and was—made that Europeans who are constantly reminded of their national identities by national currencies might find it difficult to forge a collective identity, so that the removal of this barrier would plausibly help advance Europeanization. Thus, the well-founded economic objections to monetary union at the time could be placed aside for the sake of the larger political goal of establishing a collective European identity. If so, however, monetary union provides an important cautionary tale for arguments like Hesselink’s. The economic weaknesses underlying monetary union ultimately contributed to, and worsened, a significant sovereign debt crisis, which has so far put enormous strains on European identity.

The CESL is, of course, much less significant than monetary union. If the CESL turns out to be a failure, then businesses will simply not use it, and European identity will be none the worse. But by the same token it is hard to believe that merely the existence of this law can lead to greater European solidarity (which is the emphasis of Hesselink’s argument), when it will

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<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Hesselink, *The Case for a Common European Sales Law* at \*13.

<sup>33</sup> Id.

<sup>34</sup> Id at \*14.

<sup>35</sup> Id at \*\*14–15.

surely be the case that the vast majority of Europeans will never hear of it. If the law increases cross-border transactions, then this might increase Europeanization, but as we have seen, it is not clear that the law will have that effect.

Second, it is far from clear that a body of contract law can “send a message” in the way that Hesselink thinks it can. Contract law does not differ much from state to state, since it provides the basis of general economic relations in a market system, and all the relevant states have market systems. Yet it is essential for the project of European nationalism to send a message that shows what is distinctive about European identity. Implicitly acknowledging this, Hesselink argues that the CESL sends a message that Europe is a more humane and civilized place than (inevitably) the United States (the rest of the world is not mentioned). But the provisions that he identifies—which emphasize good faith, fair dealing, and freedom of contract—exist in the U.S. contract law systems. CESL’s consumer protection rules are somewhat stronger, but in my view the differences (depending on which U.S. state one uses for comparison) are fairly modest. It is hard to imagine that these distinctions would make much of an impression on the average European.

Third, there is a tension between Hesselink’s claim that the nationalist minority should not object to the CESL because it can opt out, and his claim that the CESL will further European identification by expressing common European values. Furthering European identification is just what the nationalist minority objects to, and if it is reasonable for them to oppose such a goal (which Hesselink acknowledges<sup>36</sup>), then it is reasonable for them to oppose the CESL.

Fourth, we could consider another mechanism that would in theory enable the CESL to enhance European identity. Suppose the CESL increases the number of cross-border transactions, and that depth of European identity is a function of the number of cross-border transactions. But what is the basis for believing that such a mechanism is at work? International trade between the United States and China has increased markedly over the last few decades, but certainly Americans and Chinese do not share an identity. Perhaps they regard each other as somewhat less foreign than before. But Europe already enjoys a high level of regional trade; it seems unlikely, for reasons given earlier, that the CESL could increase that amount of trade by more than a trivial amount; and it is unclear how this additional trade could make Europeans feel more European.

In sum, it seems unlikely that the CESL can contribute to the broader project of European integration. It is unlikely to increase the number of cross-border transactions; and even if it does, it seems unlikely that an increase in cross-border transactions will contribute much to European identity. And a law that expresses European values, but is largely unknown to Europeans, will not likely cause those values to spread; and even if it does, that reason alone would justify, and possibly cause, opposition by those skeptical of further European integration, thus undermining the constructive effects of the CESL for Europeanization.

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<sup>36</sup> Hesselink, *The Case for a Common European Sales Law* at \*17.

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