

Centre for Business Law and Practice
School of Law
University of Leeds

ANNUAL REPORT
2010 – 2011

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1. ABOUT THE CENTRE FOR BUSINESS LAW AND PRACTICE, THE UNIVERSITY AND THE CITY OF LEEDS

1.1 THE CENTRE

The Centre for Business Law and Practice is located in the School of Law at the University of Leeds (which is part of the Faculty of Social Sciences, Education and Law). The School of Law is situated next to the Business School, in the brand new purpose built Liberty building, which is equipped with two Postgraduate Common Rooms-one for taught postgraduate students and one for research degree students, a Moot Court Room, and modern well equipped seminar rooms.

The aim of the Centre is to promote the study of all areas of Business Law and Practice, understood as the legal rules which regulate any form of business activity. It seeks to promote all forms of research, including doctrinal, theoretical (including socio-legal) and empirical research and to develop contacts with other parts of the academic world, as well as the worlds of business and legal practice in order to enhance mutual understanding and awareness. The results of its work are disseminated as widely as possible by publishing monographs, articles, reports and pamphlets as well as by holding seminars and conferences with both in-house and outside speakers.

Staff members have acted as consultants to law firms, accounting bodies and international bodies such as the International Monetary Fund. Research has been undertaken in many areas of business law including banking and financial services, business confidentiality, corporate (general core company law as well as corporate governance and corporate finance), credit and security, contract, consumer, employment, financial institutions, foreign investment, insolvency, intellectual property, international trade, the regulation of corporate lawyers, and corporate and economic crime (including money laundering and the financing of terrorism).

One of the primary functions of the Centre is to oversee the research undertaken at postgraduate level and to manage postgraduate taught several International Business Law programmes.

The number of postgraduate students recruited, for both doctoral research and taught Masters programmes, indicates the popularity and strength of the Centre's programmes and is testimony to the standing of the Centre's staff.

1.2 TAUGHT POSTGRADUATE PROGRAMMES

These include:

LLM International Banking and Finance Law
LLM International Business Law
LLM International Corporate Law
LLM European and International Business Law
LLM International Insolvency Law
LLM International Trade Law

All postgraduate programmes are available on a full-time and part-time basis.

Postgraduate Diplomas are also available. These do not require the completion of a dissertation.

In all the programmes, the modules are taught by seminars, and there are two 11 week semesters in each academic year. Assessments are by written work.

We have a large postgraduate student cohort with a high proportion coming from outside the United Kingdom. One of the strengths of our programmes is that students come to study at Leeds from a wide range of countries and bring a broad range of experience and diverse perspectives.

The LL.M. programmes involve the completion of taught modules totalling 120 credits that are taken in Semesters 1 and 2. Some modules are compulsory (this varies between programmes) and the others are optional modules chosen from a long list of available subjects. The final stage of the programme is a dissertation (worth 60 credits) being completed in the Summer, following Semester 2. The programme consists of 180 credits in total.

The compulsory modules consist of modules which are believed to form a critical base for the study of business law, nationally and internationally. Students have a broad choice when it comes to the optional modules, and this reflects the breadth of expertise in the Centre.

The dissertation, constituting 60 credits, is compulsory and forms a major part of the programmes, and reflects one of the aims of the programme, namely to foster research capabilities. The dissertation requirement permits students to engage in some detailed research of a particular issue that warrants investigation. Research for, and the writing of, the dissertation is undertaken in conjunction with a supervisor, who is a member of the law staff. The members of the law staff have a wide range of research interests and are able to supervise a broad spectrum of topics in different areas of the law.

The overall objective of this programme is to provide students with a firm grounding in many of the basic principles and rules regulating business activity in the UK Europe and around the world. The programme also aims to enable students to develop the following: analytical legal skills, ability to work independently, writing skills, and ability to undertake research.

1.3 UNDERGRADUATE TEACHING

While the Centre does not directly run any undergraduate programmes, it makes a very important contribution to teaching of the Bachelor of Laws (LLB) degree, in particular. The Centre has developed modules that are taught to both law and non-law undergraduates. These modules have been very popular with students, and have attracted good enrolments. The modules that are taught in the Bachelor of Laws programme (although students from other programmes with the necessary prerequisites can enrol for them) are Commercial Law, Company Law, Banking and Financial Services Law, Intellectual Property Law, Corporate Finance and Insolvency. Members of the Centre also either act as leaders, or contribute to the teaching, of the following modules: Law of Contract, International Law, Equity and Trusts, and Constitutional Law, Medical Law. Offerings to non-law students include Introduction to Company Law and Introduction to Obligations.

1.4 RESEARCH POSTGRADUATES

The Centre for Business Law and Practice has a diverse range of students enrolled for research degrees in a number of areas, including corporate law, banking and finance, insolvency and international trade law. Each postgraduate student receives high quality supervision from two academics who are trained and experienced supervisors as well as being experts in the particular field of research. In addition students are provided with formal research methods training.

The Centre for Business Law and Practice welcomes applications from students wishing to pursue research into any aspect of business and commercial law. The Centre has particular expertise in the following areas: contract law; corporate law – especially corporate governance, the role and duties of company directors, corporate insolvency law, corporate rescue, corporate finance; all aspects of insolvency law; insider dealing; banking and financial services law; economic crime including anti money-laundering and terrorist financing; Islamic banking law; credit; law relating to security; intellectual property; international economic law; consumer law including consumer credit; the role and duties of corporate lawyers and environmental law.

All relevant proposals within the broad remit of business law will be considered and even if the proposed research topic is not listed above it may be worth contacting the Director to discuss whether research supervision would be available.

The degree schemes on offer by research and thesis only are as follows:

- Master of Laws (LL.M) – one year full-time or two years part-time
- Master of Philosophy (M.Phil) – two years full-time or four years part-time
- Doctor of Philosophy (Ph.D) – three years full-time or five years part-time
- Integrated Ph.D – four years full-time (not available part-time). This new degree combines taught classes and the traditional research thesis, with an exit award of LL.M Legal Research the students complete the first two years.

The entrance requirements for all schemes are that applicants must normally possess an upper second class honours degree or equivalent. Applicants with professional qualifications or substantial professional experience are also encouraged to apply. In addition, MPhil and Ph.D applicants are usually required to hold a Masters level qualification.

Informal enquiries from applicants are welcome. Please contact Karin Houkes, Postgraduate Admissions Tutor, lawpgadm@leeds.ac.uk or Tel: 0113 3435009.

1.5 THE UNIVERSITY

The University of Leeds is among the United Kingdom's top universities, located close to the centre of one of the most progressive, cosmopolitan and student-friendly cities in the United Kingdom. One of the largest single site universities, Leeds is a hugely popular choice for students. With over 30,000 students living in the city, it regularly tops the national polls as a favourite destination for students.

Established in 1904, the University is a member of the Russell Group, which was formed by nineteen of the country's most prestigious universities. With a world class reputation for quality in research and teaching, a degree from the University of Leeds, both undergraduate and postgraduate, is highly regarded by employers and universities worldwide.

The University has over many years invested heavily in its infrastructure to provide students with first-class learning, development, support and leisure facilities, including modern well-equipped lecture theatres and seminar rooms, an internationally acclaimed University library, an enterprising careers service, a wide range of sporting amenities and one of the biggest and most active Students' Unions in the country.

The University is one of the main centres for postgraduate teaching in the country, with around 5,000 postgraduate students drawn from all over the UK and another 100 countries world-wide. The new Law School Building (opening January 2011) is a state of the art building situated next to the University of Leeds Business School has dedicated postgraduate facilities and, as a University of Leeds postgraduate research student, you will have access to the full range of university services including our major academic research library and excellent computing facilities.

1.6 THE CITY OF LEEDS

Only a short walk from the bustling shops, boutiques, art galleries, cinemas, bars, restaurants and cafes of the city centre, the University campus is a vibrant place in which to live and study. Leeds is one of the fastest growing cities in the United Kingdom. As a law, finance, business and media centre, the city offers great employment potential. This is complemented by an exciting mix of culture, commerce and style, making Leeds the primary social hub of the North of England. Rich in history with a growing economy and cosmopolitan atmosphere, Leeds remains an affordable student-friendly city and the centre of a region of great cultural diversity. It is very well connected transport wise to the rest of the UK being 2 ½ hours from London (train) and around an hour from Manchester.

Leeds is a '24 hour city' that is famous for the diversity and popularity of its nightlife. The city prides itself on the vitality of its 'independent' bar scene, whilst its nightclubs offer a sophisticated and relaxed clubbing experience with a wide range of music and ambiances to suit all tastes. It is home to a wide variety of theatre, music, film and music venues including the legendary University Refectory. The annual Leeds Film Festival is also one of the leading cinema events in the country.

2. INTRODUCTION

This report covers the activities of the Centre for Business Law and Practice (“the Centre”) during the period from 1st October 2010 to 30th September 2011. Yet again this has been a very productive year for the Centre in terms of activity of staff, research, research outcomes and growth of its postgraduate student community. Dr Sarah Brown has provided support through-out the year to the Centre’s activities in her role as deputy Director of the Centre.

This year we were delighted to welcome a new member of the Centre, Professor David Campbell, Professor of International Business Law, whose research interests are in remedies for non-performance of contractual obligations and in regulatory theory, and particularly in the development of a 'non-Chicagoan' law and economics of these subjects.

We are also delighted to welcome Mr Jason Harris as a visiting Fellow from UTS, Australia who will be giving one of our research seminars this year.

The Centre continues to expand the scope of its activities, and this has been very much in evidence during the past year. In particular the Centre has continued to develop its research profile particularly in those areas where it already has considerable expertise:

- Corporate law - with special emphasis on corporate governance, corporate finance and corporate insolvency law.
- International financial law – banking and financial services and anti-money laundering.
- Credit and security law
- Contract law
- Consumer law.
- The regulation of corporate lawyers and law firms

The Centre enjoys links with the Leeds University Business School and has teaching and research links with the School of Economic Law, Vrije Universiteit of Brussels (VUB). This year saw the introduction of a formal collaboration with the latter, as a result of which students from VUB will be coming to study at Leeds for the award of LLM in International Comparative and Financial Law, delivered by VUB and the Centre.

Full details of the Centre’s activities can be found at www.law.leeds.ac.uk/leedslaw

Joan Loughrey
Director of the Centre for Business Law and Practice

CONFERENCE ACTIVITIES

Research Student Conference, May 2010

This year we hosted our annual PhD conference on 19th September 2011 in the Law School. Thanks go to Mrs Judith Dahlgreen, Marjan Parkinson, one of our research students, and Dr Michael Galanis, for organising this. It was well attended by students and staff with papers grouped into common areas of interest such as corporate law, financial law and international arbitration. The presentations were around 20 minutes in length and were followed by questioning and an exchange of views. The students valued the opportunity to present and defend an academic paper in an informal setting and welcomed the chance to strengthen the academic community with staff and fellow students.

North East Regional Obligations Group

Centre members Sarah Brown and David Pearce organised and hosted the fourth meeting of the North East Regional Obligations Group (NEROG) on 7th July in the Liberty Building. The Group meets once a year to discuss and disseminate current research, and draws members from universities across the North East of England. The key-note speaker was Professor Alastair Mullis, Head of the School of Law, UEA and general editor of *Carter-Ruck on Libel and Privacy*. In his paper (*'Defamation Reform - Wasting an historic opportunity'*) Professor Mullis was forthright in his criticism of parts of the draft Bill and persuasive in putting forward his own proposals for reform. The subsequent discussion was enlivened by the participation of one of the editors of *Gatley on Libel and Slander*.

In the afternoon excellent 'work in progress' papers were delivered by Dr Paul Wragg, from the School of Law, on privacy law (*'Super-idiosyncrasy: the understated public interest issue in the privacy controversy'*) and by Dr Severine Saintier, University of Sheffield, on agency (*'Self-employed agents: the importance of conceptualising the remedial scheme under Directive 86/653.'*)

Centre staff currently NEROG members: David Campbell, Roger Halson, Sarah Brown, David Pearce, Paul Wragg. Other School of Law staff members involved were Cesar-Joel Ramirez-Montes and Neil Stanley.

PUBLIC SEMINAR PROGRAMME

The Centre continued its evening seminar series, inviting internationally acclaimed speakers to speak on business related topics. The talks are designed to appeal to the legal profession, business professionals (including bankers and directors), academics and students. The seminars attract large audiences and they enrich our research culture and the learning experience of our own postgraduate and undergraduate students and have been organised by Dr Sarah Brown, Deputy Director of the Centre.

The academic year 2010-2011 was a busy one, covering a wide range of topics from academic, global and practical perspectives.

- In November Mr Tim Prudhoe, partner at Kobre & Kim LLP came to speak on the approach of various jurisdictions to chasing assets and piercing the corporate and trust veil.
- Professor Andy Campbell, Centre member, spoke about Bank failure and the adequacy of the UK legal framework.
- In March 2011, Mr Nick Dahlgreen, Group Treasurer of IPF plc, provided a guide to funding structures of the plc and the use of debt capital markets.

Law reform was also on the agenda:

- In February 2011, Professor David Burdette gave a general overview and discussion of UK insolvency law with particular reference to its importance and influence on law reform in the former British Colonies,.
- Professor Eilis Ferran from the University of Cambridge provided some insights into the financial crisis and its influence on the EU's response to law reform.
- March 2011 saw a continuation of this theme within the UK, with Professor Eva Lomnicka, Kings College London, discussing the forthcoming suggested reforms to the UK Financial Services regulatory structure.

The seminar series continues to provide informative and interesting presentations to a wide ranging audience and thanks is extended to all our speakers for their time in sharing their expertise and thoughts with us.

3. GENERAL CENTRE ACTIVITY AND NEWS

There have been some notable achievements by members of the Centre in the past year, and not always reflected in a published piece, that are worthy of mention. What follows is a selection of some of the activities of the Centre and its members and it is not intended to be exhaustive.

Andrew Campbell spent some time in the United Arab Emirates in May 2011. The main purpose of the visit was to undertake research into the establishment and operations of the Dubai International Financial Centre and, in particular, the common law Courts which have been established to deal with commercial disputes in the DIFC. This project will continue into 2011/2012. While in Dubai he also visited the Dubai Police Academy where he had the opportunity of meeting former Ph.D. students. He also visited the Law School at Ajman University of Science and Technology in the Emirate of Ajman.

Michael Cardwell was on research leave in semester one during which time he was a Visiting Scholar at the University of Illinois, conducting research into the regulation of biofuels (October 2010).

Roger Halson provided a formal submission to the European Commission in response to Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses on 31st Jan 2011. All submissions will be published by the Commission.

Andrew Keay continued as a member of the Peer Review College of the Arts and Humanities Research Council. His work was cited in *Kazar, in the matter of Frontier Architects Pty Limited (in liq)* [2010] FCA 1381 at [17] (Australian Federal Court); *Dwyer and Davies v Chicago Boot Co Pty Ltd* [2011] SASC 27 at [14] (Supreme Court of South Australia) and *Jacobsen Venue Management Pty Ltd v Jacobsen & Anor* [2011] FMCA 484 at [39] (Federal Magistrates Court of Australia).

During this past year **Gerard McCormack has been** on a period of research leave funded by Leverhulme as part of their Research Fellowship scheme, working on a project related to “Secured Credit and the Harmonisation of Law”.

The research addressed international harmonisation and modernisation efforts in secured credit law and the role of globalisation and international finance capital in shaping such efforts. This area is highly important and contentious in that a harmonised and modernised secured credit law is seen to increase the availability and lower the cost of credit, thereby contributing to international development. The research asked whether the most comprehensive international standard – the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions (2008) – was suitable for adoption at the national level.

The research reached a number of conclusions including the following –

- (1) US law shaped the content of the Guide to such an extent that it is not really suitable for direct and immediate translation into the laws of other countries. But predicting the likely effect of the UNCITRAL Secured Transactions Guide on international harmonisation efforts is a necessarily forwarding looking and tentative process. Moreover, there are no objective measures for “influence”. Influence is generally indirect; it can be long-term in nature and a number of different influences or factors may combine together to produce the same result.
 - (2) The Guide is more prescriptive and “American” in tone than other comparable instruments such as the European Bank for Reconstruction and Development Model Law on Secured Transactions.
 - (3) The US by virtue of its economic power and the associated prestige of its legal and economic models heavily influences the work of international bodies such as UNCITRAL.
 - (4) US centred groups such as the Commercial Finance Association played an influential role in the formulation and drafting of the Guide.
 - (5) The perceived influence of pressure groups has engendered controversy about UNCITRAL working methods.
 - (6) Legal change including the enactment of “modern” secured credit law is often directed from outside as a result of IMF or World Bank “conditionality”.
 - (7) But legal change seems to operate most effectively when it responds to indigenous needs and builds on domestic legal norms.
- (1) strength and weaknesses

The research combined the benefits of rigorous traditional doctrinal analysis with some of the insights gained from the economic analysis of law. It also leveraged the work of legal sociologists on how legal change operates most effectively in different contexts and settings and on how influential pressure groups may “capture” norm setting institutions. The research was located firmly in the context of global financial pressures and the changing institutional environment.

In terms of weaknesses some of the research conclusions were necessarily tentative and are liable to subjective interpretation. No significant obstacles were encountered during the research and the University of Leeds, was fully supportive throughout.

Surya Subedi was appointed a member of a high-level Human Rights Advisory Group of the UK Government chaired by the Secretary of State for the Foreign & Commonwealth Office. He was also appointed a Global Faculty Member, Centre for Energy, Petroleum, and Mineral Law and Policy, University of Dundee, Scotland.

Furthermore he was elected to the Institut de Droit International at its Rhodes session in 2011 and was elected Vice-President, Asian Society of International Law, Singapore (elected in 2011).

4. PUBLICATIONS

(a) Books

Williams, P.R. and **Cardwell, M.N.**, *Scammell and Densham's Law of Agricultural Holdings: Ninth Edition – Supplement* (LexisNexis, London, 2011), 372pp.

Halson DR: Contributor to Jowitts Dictionary of English Law ISBN 9781847036261 3000pp approx

Halson DR: *The Law of Contract* (4th ed) 2010 Common Law Library Series ISBN 9781405751087 (co-author)

Keay A: *The Corporate Objective*, Cheltenham, Edward Elgar, 2011 (346pp)

Loughrey J: *Corporate Lawyers and Corporate Governance* (Cambridge, 2011) (310pp)

McCormack G: *Secured Credit And The Harmonisation Of Law: The UNCITRAL Experience* (2011) 224 pp ISBN 978 1 84980 397 7

(b) Chapters in Books and Other Contributions to Books

Campbell A, chapter in *Cross-Border Bank Insolvency* which was published by Oxford University Press (with Rosa Lastra).

Campbell A, 'Northern Rock, the Financial Crisis and the Special Resolution Regime' in *Financial Regulation Crisis: The Role of Law and the Failure of Northern Rock* (Joanna Gray and Orkun Akseli, eds)

McCormack G, 'Centre of Main Interests in the European Insolvency Regulation and the Cross-Border Insolvency Law' in 2011 Gore-Browne Special release 73-82

McCormack G, 'Pressured by the paradigm: the Law Commission and company security interests' in J De Lacy ed. *The Reform of UK Personal Property Security Law* (London, Routledge-Cavendish, 2010) at pp. 83-116.

Subedi S: 'WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International Law', in Duncan French, Matthew Saul and Nigel D. White (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing, Oxford, 2010), pp.173-190.

Subedi S: 'Reassessing and Redefining the Principle of Economic Sovereignty of States', in Duncan French (ed.), *Global Justice and Sustainable Development* (Koninklijke Brill NV, The Netherlands, 2010), pp.403-410.

Subedi S: 'Post-conflict Constitutional Settlement in Nepal and the Role of the United Nations', in Morly Frishman and Sam Muller (ed.), *The Dynamics of Constitutionalism in the Age of Globalisation* (Hague Academic Press, The Hague, the Netherlands, 2010), pp.71-87.

Subedi S: 'The Challenges to the National Security of Nepal and the Role of International Law Foreign Policy', in Rajan Bhattarai and Geja S. Wagle (eds.), *Emerging Security Challenges of Nepal* (Nepal Institute for Policy Studies, Kathmandu, Nepal, 2010), pp.65-110.

Wragg P, 'Advertising, Free Speech and the Consumer' in Kenny & Devenney, eds., *European Consumer Protection: Theory & Practice in Europe* (Cambridge University Press, 2011) (forthcoming)

(c) Journal Articles

Brown S: 'Using the Law as a Usury Law: Definitions of Usury and Recent Developments in the Regulation of Unfair charges in Consumer Credit Contracts' [2011] *JBL* 1, 91-118

Campbell A: 'Dealing with Financially Distressed Investment Banks: the New 'Rescue' Proposals' in *Butterworths Journal of International Banking and Financial Law* (2011) Vol. 26.1 p 34 (with Paula Moffat)

Campbell A.: 'United Kingdom Depositor Protection in the Aftermath of the Banking Crisis' in *Journal of International Banking Law and Regulation* (2010) Vol. 25, 10 p 486 (with Paula Moffat)

Campbell D: 'Dicey in the Age of Globalisation (Review of D Nicol, *The Constitutional Protection of Capitalism*)' (2011) 17 *European Public Law* 571-98

Campbell D: 'The Province of Jurisprudence Demolished (Review of AC Hutchinson, *The Province of Jurisprudence Democratised*)' (2011) 20 *Social and Legal Studies* 253-62

Campbell D: 'After Cancun: The Impossibility of Carbon Trading' (2010) 29 *University of Queensland Law Journal* 163-90 (with M Klaes and C Bignell)

Campbell D. 'The End of Posnerian Law and Economics (Review of RA Posner, *A Failure of Capitalism*)' (2010) 73 *Modern Law Review* 302-27

Campbell D: 'Gathering the Water: Abuse of Rights after the Recognition of Government Failure' (2010) 7 *The Journal Jurisprudence* 413-59

Campbell D: 'Marxism, the Market, and Corporate Responsibility: A Comment on Paddy Ireland' (2010) 31 *Adelaide Law Review* 1-11

- Cardwell M:** “Public participation in the regulation of genetically modified organisms: a matter of substance or form?”, (2010) 12 *Environmental Law Review* 12-25
- Cardwell M:** (with Hunt, J.), “Public rights of way and level playing fields”, (2010) 12 *Environmental Law Review* 291-300
- Cardwell M:** “Rural development in the United Kingdom: continuity and change”, [2010] *International Journal of Land Law and Agricultural Science* (4) 1-12
- Cardwell M :** (with Bodiguel, L)., “Les juridictions pénales Britanniques et Françaises face aux anti-OGM: au-delà des différences, un communauté d’esprit”, (2011) *Revue Juridique de l’Environnement* 267-279
- Galanis M:** "Vicious spirals in corporate governance: mandatory rules for systemic (Re)balancing" (2011) 31(2) *OJLS* 327-363
- Halson DR:** ‘Common Lawyer’s Perspective on Contract Codes’ (2011) *Jersey and Guernsey Law Review* 150-172
- Keay A:** “Moving Towards to Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More : Much Ado About Little?” (2011) 22 *European Business Law Review* 1-49.
- Keay A:** “Good Faith and Directors’ Duty to Promote the Success of their Company” (2011) 32 *The Company Lawyer* 138-143 (double columns).
- Keay A:** “The Prescribed Part : Sharing Around the Company’s Funds” (2011) 24 (6) *Insolvency Intelligence* 81-85 (double columns).
- Keay A:** “The Office-Holder’s Delivery Up Power and the Recovery of Debts” [2011] 4 *Corporate Rescue and Insolvency* 3-6 (double columns).
- McCormack G,** “American Private Law Writ Large?: The UNCITRAL Secured Transactions Guide” (2011) 60 *International and Comparative Law Quarterly* 597-625
- McCormack G,** “UNCITRAL, Security Rights and the globalisation of the US Article 9” *Northern Ireland Legal Quarterly* (forthcoming)
- McCormack G,** “Time to Revise the Insolvency Regulation” (2011) 2 *International Insolvency Law Review* 121 -130
- Wragg P,** 'Fickle Justice: Judicial Idiosyncrasy in UK Privacy Cases' (2011) 10(2) *Connecticut Public Interest Law Journal* 139-153
- Wragg P,** 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry' (2010) 2(2) *Journal of Media Law* 295-320
- Subedi S:** ‘Problems and Prospects for the Commission on the Limits of the Continental Shelf in Dealing with Submissions by Coastal States in Relation to the

Ocean Territory Beyond 200 Nautical Miles’, 26 *The International Journal of Marine and Coastal Law* (Martinus Nijhoff Publishers, The Hague, 2011), pp.413–431.

Subedi S: ‘Protecting Human Rights through the Mechanism of UN Special Rapporteurs’, 33 *Human Rights Quarterly* (The John Hopkins University Press, U.S.A.), 2011, pp. 201-228.

Subedi S: ‘The UN Human Rights Mandate in Cambodia: The Challenges of a Country in Transition and the Experience of the UN Special Rapporteur for the Country’, 15 (2) *The International Journal of Human Rights* (Taylor & Francis, London), 2011, pp.247-261.

Subedi S: ‘Introduction: The Role of the Special Rapporteurs of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms’, (with Steven Wheatley et al.) 15 (2) *The International Journal of Human Rights* (Taylor & Francis, London), 2011, pp.155-161.

Subedi S: ‘Erosion of State Sovereignty under the Law of Foreign Investment: The Challenge of Balancing Investment Protection with the Sovereignty of Investment Receiving States’, 6 (1-4) *AALCO Quarterly Bulletin* (2010) (The Secretariat, Asian-African Legal Consultative Organisation, New Delhi), pp.19-26.

d) Reports

Subedi S: ‘The situation of human rights in Cambodia’, Third Report (it was focussed on Parliament) to the UN Human Rights Council in September 2011 (U.N. Doc. A/HRC/18/46) as the UN Special Rapporteur for Human Rights in Cambodia.

Subedi S: ‘The situation of human rights in Cambodia’, Second Report (it was focussed on the judiciary) to the UN Human Rights Council in September 2010 (U.N. Doc. A/HRC/15/46) as the UN Special Rapporteur for Human Rights in Cambodia.

5. CONFERENCE PRESENTATIONS AND PUBLIC LECTURES

Brown S: I "Expensive credit: specific cases, specific controls" 'Personal Loans in crisis' From challenges to solutions' Colloquium organised by the L'Observatoire du credit et de l'endettement, Brussels, 3rd December 2010.

Campbell A: Invited paper at the IADI’s Annual Conference in Tokyo in October 2010 entitled ‘Deposit Insurance in the UK – The Weaknesses Exposed’

Campbell A: Invited paper to IADI’s first Research Conference at the Bank for International Settlements in Basel, Switzerland in June 2011.

Campbell A: Invited paper 'Demutualisation and Risk: What Happened to the Demutualised Building Societies?' at ‘Tipping Points’ multi-disciplinary conference, in relation to the ongoing financial crisis, Durham University, July 2011. There was a particular Northeast England flavour to the conference as the financial crisis in the

UK arrived with the run on Northern Rock which is based in nearby Newcastle Upon Tyne.

Campbell A: Invited paper, entitled ‘Dealing with Bank Failure – Is the UK’s New Legal framework Adequate?’ staff seminar at the School of Law at De Montford University in March 2011 .

Campbell D: ‘Current Issues in Commercial Contracts: Transatlantic Perspectives,’ School of Law, University of Sheffield, September 2011 and Annual Conference of the Society of Legal Scholars, Cambridge, September 2011

Cardwell M: ‘European Union agricultural policy and practice: the new issue of climate change’, American Agricultural Law Association, Agricultural Law Symposium, Omaha, Nebraska, USA, October 2010

Cardwell M: ‘Rural development in the United Kingdom: continuity and change’, Fourth International Forum on Agricultural Law, Tarragona, November 2010

Cardwell M: (with Bodiguel. L.), ‘Genetically modified organisms: protest and the law’, Sustainable Rural Development Conference, University of Aberdeen, September 2011

Cardwell M: National Rapporteur (with Petetin, L.): Commission III: ‘The development of agricultural law in the EU, Member States and WTO’, XXVith European Agricultural Law Congress, Bucharest, Romania, September 2011

Galanis M: ‘EMU and its impact on Corporate Governance’ Invited paper, Law & finance workshop, University of Oxford, 24 May 2011

Galanis M: "Vicious spirals in corporate governance: mandatory rules for systemic (Re)balancing?" 3th biennial conference of European consortium of political research's standing group on "regulatory governance", June 17-19 2010, University College Dublin

Halson DR: ‘Contract Law of the Channel Islands at the Crossroads’ on 15th October 2010 delivered paper critically examining attempts at contract codification in common law jurisdictions.

Halson DR: ‘1st African Conference on International Commercial Law’ 13th-14th January, 2011 Douala, Cameroon combined with research visit.

Halson DR: ‘The Optional Contract Law Instrument – What to expect’ 7th February 2011 British Institute of International and Comparative Law delivered paper ‘Broader Reflections on a European Contract Law ‘Foolish Consistency or a Noble Quest? Cautionary Lessons from History and Economics’

Halson DR: ‘7th International Association of Law Schools Annual Conference 13th-15th April 2011 Buenos Aries, Argentina delivered short paper on establishing a free legal advice clinic in a law school.

Halson DR: ‘Current Issues in Commercial Contracts: Transatlantic Perspectives School of Law Univ of Sheffield Working Paper with Prof David Campbell on ‘Specific Performance Clauses in Contract’ delivered by at conference by David Campbell.

Keay A : “The Global Financial Crisis : Risk, Shareholder Pressure and Short-Termism in Financial Institutions. Does Enlightened Shareholder Value Offer a Panacea? An invited paper presented at the University of Durham on 14 July 2011 at the Conference organised by the Institute of Hazard, Risk and Resilience and titled, “Tipping points and crises in market economies : the contemporary and historical relationships between law, business and banking” held on 13-14 July 2011.

Keay A: “The Interpretation and Application of the Duty to Promote the Success of the Company : Purposes, Problems and Prognoses” presented at the Midland Chancery and Commercial Bar Association at St Philips Chambers, Birmingham on 20 October 2010

McCormack G, ‘Football creditors’ September 2010, Istanbul: a revised and shortened version of this paper is forthcoming in the practitioner oriented journal *Insolvency Intelligence*.

Subedi S: Chaired a panel on ‘Financial Architecture and Development’, at the Third Biennial Conference of the Asian Society of International Law on ‘Asia and International Law: A New Era’ held at China Foreign Affairs Univeristy, Beijing, China, on 28 August 2011.

Subedi S: ‘From the Human Rights Commission to the Human Rights Council: An Analysis of the Role of the UN Special Procedures’, presented at a conference on “Irrelevant, Advisors or Decision-Makers? The Role of ‘Experts’ in International Decision Making”, Erasmus School of Law, Erasmus University, Rotterdam, 24 June 2011.

Subedi S: ‘The UN Human Rights Mandate in Cambodia’, presented at a conference on Human Rights Education in Cambodia at Pannasastra University, Phnom Penh, Cambodia, on 23 February 2011.

Subedi S: ‘Problems and Prospects for the Commission on the Limits of the Continental Shelf in Dealing with Claims by Coastal States for Ocean Territory Beyond 200 Nautical Miles’, presented at an international conference on “Sharing and Distributing Ocean Resources” organised by the SLOC Study Group-Korea and the Yonsei University, Seoul, Korea, on 19 November 2010.

Subedi S: Chaired a seminar on “The First Verdict of the ECCC (the Khmer Rouge Tribunal) – the Duch Case” organised by the British Institute of International and Comparative Law, London, on 30 September 2010.

Subedi S: ‘The Human Rights Situation in Cambodia’, a statement delivered to the plenary session of the UN Human Rights Council in Geneva on 28 September 2010.

Subedi S: Chaired a session at a conference on “Directors Duties and Shareholder Litigation in the Wake of the Financial Crisis” organised by the Centre for Business Law and Practice, University of Leeds on 20 September 2010.

Subedi S: ‘The Impact of International Legal Standards on International Commercial Arbitration’, presented at the 74th Biennial Conference of the International Law Association (ILA) held in The Hague, the Netherlands, on 16 August 2010.

Subedi S: ‘The experience of the UN Special Rapporteur in a country in transition: A case study of Cambodia’, presented at an international research workshop on the Role of Special Rapporteurs of the Human Rights Council in the Development and Promotion of International Human Rights Norms at the University of Leeds on 25 June 2010.

Subedi S: ‘What role does international law and protection of the rule of law play in promoting stability and development?’ presented at a workshop organised by the Cambridge International Development Studies Programme at the Faculty of Law, University of Cambridge on 1st of May 2010.

Subedi S: ‘What Should be the Future Form of Governance in the New Republican Constitution of Nepal: Parliamentary or Presidential?’, presented at an International Conference on Dynamics of Constitution Making in Post-Conflict Scenario organised by the Nepal Constitution Foundation in Kathmandu, Nepal, 16 January 2010.

Wragg P ‘Contemporary Figures: Privacy Invasion and Global Tabloid Markets’, Roundtable event, Law and Society Association Annual Meeting, San Francisco, California, USA, June 2011.

Wragg P, ‘Unfair Commercial Practices: Rights, Remedies and Law Commission Reform’, 3rd session, Leicester-Durham Duo-Colloquium, Leicester, December 2010.

6. EDITORIAL WORK

Members of the Centre are actively involved as members of editorial boards and editorial activity includes:

Keay A: Commonwealth Editor for *Gore-Browne on Companies* and a member of the editorial board.

Keay A: Member of the Editorial Board for the *Insolvency Law Journal*

Keay A: Member of the Editorial Board for *International Insolvency Review*.

Keay A: Member of the Advisory Board for *Insolvency Intelligence*

Keay A: Member of the Advisory Board for the *QUT Law and Justice Journal*.

Subedi S was appointed Founder Editor, Asian Journal of International Law (Cambridge University Press) from 2010.

8. WORKING PAPERS

THE TRANSACTION COST ARGUMENT FOR THE EUROPEAN CONTRACT CODE: SOME OBSERVATIONS ON THE COMMISSION'S GREEN PAPER

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Introduction

In furtherance of the Europe 2020 strategy,ⁱ the European Commission is currently seeking to encourage ‘economic recovery’ by tackling perceived ‘bottlenecks’ in the internal market.ⁱⁱ Work towards a European law of contract is seen as key to this project and has been proceeding for over a decade. Following its 2001 Communicationⁱⁱⁱ and the 2003 Action Plan^{iv} that led to the Draft Common Frame of Reference (DCFR),^v the Commission’s recent Green Paper on a *European Contract Law* sets out the range of policy options the Commission now believes are open for implementation of the CFR.^{vi} This paper examines the treatment of these options and criticises the key economic argument said to support the codification project: the argument that the costs that attend cross-border transactions will be minimised and so productive trade maximised if a unified European law of contract is enacted.

The Green Paper identifies the problem it is claimed that the CFR will solve in this way: ‘[d]ivergences between national contract laws’ constitute ‘barriers’ to ‘the smooth functioning of the internal market’,^{vii} and so ‘[a]n instrument of European Contract Law should respond to the problems of diverging contract laws’^{viii} in order ‘to ease cross-border transactions’ so that ‘citizens [may] take full advantage of the internal market’.^{ix} These barriers are caused because ‘differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market’.^x It is now being asserted that these transaction costs are retarding economic recovery in Europe and that an ‘instrument of European contract Law could help the EU to meet its economic goals and recover from the economic crisis.’^{xi} This bold claim is supported by Project Europe 2030, a report to the European Council by a group focusing upon recovery from the current economic crisis.^{xii}

This transaction cost argument for codification of European contract law is purportedly an economic one based on improving market efficiency.^{xiii} In essence, the CFR will reduce the transaction costs of the internal market. But the concept of the transaction cost is gravely misused here in just the ways that the most important contributor to the formulation of the concept, Ronald Coase, has repeatedly counselled against. Indeed, this particular transaction cost argument is so weak that it

amounts to no more than a sort of tautology. It can be thought to work only if one has a prior political commitment to the codification of the contract laws of the EU members. Without such a prior commitment, the argument has no weight at all.

The Waste of Haste If one assumes a fully harmonised contract law which, in effect, makes the EU a completely unified single contract jurisdiction, then the transaction costs of cross-border exchange which arise when '[t]he internal market is built on a multitude of contracts governed by different national contract laws'^{xiv} *must* be eliminated by codification, and the benefits of internal trade maximised so far as the elimination of these costs can do this. When the Green Paper generally speaks of providing 'a common European Contract Law which could be applied and interpreted uniformly in all the Member States',^{xv} it has this optimal solution in mind, and this sort of thinking has been implicit in all talk – going back to at least the Tampere European Council's commitment to a 'genuine European Area of Justice'^{xvi} and now part of the Europe 2020 economic strategy^{xvii} - of the 'completion or perfection of the Internal Market' as 'one of the central themes' of the contract law initiative.^{xviii}

But, of course, this optimal solution is not remotely a possibility. We do not mean by saying this to refer to the limits to the EU's competence to pursue harmonisation of national contract laws.^{xix} This pursuit so clearly raises questions of subsidiarity and proportionality^{xx} that it is, to say the least, surprising that the Green Paper does not engage in any sustained way with the problems its proposals raise in EU law. The failure to do this might, of course, result in challenges to any instrument enacted, via motions for preliminary rulings in the Court of Justice of the European Union (CJEU) or by 'ultra vires' challenges in national courts with constitutional jurisdiction.^{xxi} The downplaying of perhaps the two core formal principles of EU jurisprudence that is implicit in the extraordinarily ambitious project of codifying all the Member States' national laws of contract is so serious as to call into question the actual strength of the EU's stated basic commitment to diversity.^{xxii}

Though the essentially 'surreptitious' character of the codification process is the subject of this paper,^{xxiii} we also do not intend to dwell on the detail of the political technique used to extend the necessary competence, especially the creative 'soft law' interpretation of what is possible within the current framework, in order to turn what its drafters initially insisted was an academic DCFR into the political reality of a CFR.^{xxiv} We merely note that understanding this detail is really the key to understanding the actual history and prospects of the contract law initiative.^{xxv} However, some things might be said specifically of the manifestly gathering pace of the codification process after the Green Paper was issued, and its inevitably adverse effect upon the quality of the evidence mustered in support of the proposals under consideration.

At the close of the 7 month formal consultation on the Green Paper, 320 responses had been received. German nationals and organisations made over 90 submissions, more than twice as many as that of the next national cohort, the UK. In April 2011, two months after the end of the consultation, the European Parliament's Legal Affairs Committee supported a pan-European contract law instrument to encourage cross-border trade.^{xxvi} *Concurrently* with the Green paper consultation, a Group of Experts established by the Commission was tasked with producing a feasibility study on the contract law initiative. This was delivered on 3 May 2011 and feedback was invited to be made within the following two months. This unfeasibly short,^{xxvii} and for the northern hemisphere also unseasonal, period for comment, combined with the evident preference for concurrent, rather than consecutive, procedures, conveys the impression of hurried travel towards a known destination. Both business and professional bodies responding to the Green Paper emphasised the difficulty in contributing to a debate when short timescales are imposed and parallel processes are in action. Typical comments from UK respondents were that a 'sounding board' is not effective 'if you can only comment on the content without having an overview of the total picture'^{xxviii} and that the time frames for action were '... being needlessly, and damagingly truncated.'^{xxix}

Further reflection upon the context of these deliberations confirms the impression that those deliberations are driving towards a pre-determined goal. In the Stockholm Programme for 2010-14 announced in December 2009, the European Council reaffirmed that the CFR would be of a non-binding nature which would merely furnish a 'set of fundamental principles, definitions and model rules to be used by the lawmakers at Union level to ensure greater coherence and quality in the lawmaking process'.^{xxx} In effect, this is option 2 set out in the Green Paper, where it is described as an 'An Official 'toolbox' for the legislator'. Yet the Expert Group was apparently tasked with producing something different: 'a potential European contract law instrument', a 'self-standing and comprehensive text covering most aspects of a contractual relationship'.^{xxxi} Legal practitioners in the UK have a greater engagement with cross-border trade than any of their continental counterparts,^{xxxii} and surely weight should be given to the fact that their representative bodies submitted cogent evidence that the process of consultation followed was 'fundamentally flawed',^{xxxiii} being characterised by 'a lack of practitioner input (both in general and from common law jurisdictions)'.^{xxxiv}

The Transaction Cost Argument

When we say that the optimal solution to the transaction cost problem is not possible we mean that, for so long as the EU is not itself an actually unified jurisdiction, it is theoretically impossible that there can be a fully harmonised law, whether of contract or of anything else. We do not believe ourselves to be doing anything original,^{xxxv} or indeed to be doing more than pointing out the unarguable, when we say that residual

national divergences in the implementation, interpretation and application of even a purported completely uniform law must remain,^{xxxvi} and even were the DCFR substantively perfect (which surely it goes without saying it is not),^{xxxvii} it must inevitably fragment and unravel to great extent as it is made into law and then applied. In essence, to the extent it is carried out, purportedly uniform implementation must implant a hybrid of transnational and national law within the national jurisdictions which will greatly unsettle the national law.^{xxxviii}

It is conceptually misleading to believe that codification will incur ‘set-up costs’ that will settle down.^{xxxix} There will, of course, be such costs,^{xl} though those proposing harmonisation sometimes neglect to account for them, and in certain contexts they may settle down after sufficient time has elapsed to allow a reasonably consistent jurisprudence to emerge from the litigation and appeal of disputes. But the crucial point is that, in the context of the persistent national differences within the EU, any settling down will always be marginal. It is only because the contract law initiative typically has focused on an implausibly formal conception of the law, saying very little about both the ineradicable national linguistic and cultural influences on the constitution of substantive law and about the extremely difficult procedural issues that certainly will arise, that the goal of uniformity can possibly be maintained.

The Green Paper points to the US Uniform Commercial Code as an example of productive unification,^{xli} but surely this is a most inappropriate and misleading example. Let us put it aside that the process which has led to the DCFR can hardly be compared to the largely transparent and very time-consuming process of drafting and redrafting the UCC, which rests on a foundation of appropriate private institutions which must work by securing consent;^{xlii} and that even the UCC process has run into the gravest difficulties over the proposed redrafting of Article 2.^{xliii} It is more relevant to us that, not only are the US deliberations over unification models of openness by comparison to what is going in the EU, but that, notwithstanding this, approximately half of the Commissioners on Uniform State Laws’ proposals have not been adopted by any US state, and many of those proposals that are regarded as most successful have been adopted by less than half of the states.^{xliv} Most importantly, the Green Paper’s admiring reference to the achievement of the UCC does not address the fact that the UCC works because represents a systematised common law regime. One is, as so often, left in doubt whether the Commission intends to mislead or is simply ignorant when one realises that the US state with a civilian tradition, Louisiana, has never adopted the article of by far the greatest relevance to the DCFR, Article 2 on sales! The Green Paper refers to this situation by saying that the UCC ‘has been adopted by all but one of the 50 states’.^{xlv}

It is a valid criticism of the CFR that it is arguably redundant for businesses engaged in cross-border commerce as, not only is there the usual choice of law options open to those businesses, but they may also, of course, use the CISG or the UNIDROIT principles.^{xlvi} When considering whether to implement the CFR as another ‘optional instrument’,^{xlvii} the Green Paper, in addition to unfavourably

comparing choice of law rules to a fully harmonised system,^{xlviii} says that the use of ‘optional regimes’^{xlix} may be criticised because it means that ‘businesses do not have the option of a common European Contract Law’ which could be applied and interpreted uniformly in all the Member States’.¹ The carries the ridiculous implication, which nevertheless is central to the Green Paper, that under full harmonisation, uniformity of legislation and ultimate adjudication of disputes by the CJEU ‘could replace the diversity of national laws with a uniform European set of rules [which] would remove legal fragmentation in the field of contract law and lead to ... uniform application and interpretation’.^{li}

One might have thought that, rather than maintain that codification can produce this theoretically optimal but practically absurd solution,^{lii} those contributing to the contract law initiative, other than outright politicians, would prefer to talk in much more measured ways of, in essence, degrees of convergence based on an instrument which currently displays undeniable flaws,^{liii} and of ‘the harmonisation of the general contract law within the European Union’ as ‘a longer-term objective’.^{liv} But if codification cannot possibly realise the theoretically optimal elimination of national differences, what economic advantage can it realise? The principal point we wish to make here is that no sensible answer to this has emerged or can emerge from the contract law initiative because the concept of the optimal solution actually does play an essential and indispensable part in the transaction cost argument on which the initiative rests, and without that concept, the economic case for a European code simply falls.

The Evidence for the Transaction Cost Argument

The costs central to the transaction cost argument have been described at various lengths in various contributions to the contract law initiative, but the brief statements about them in the Green Paper capture the essential idea:^{lv}

[d]ivergences in contract law rules may require businesses to adapt their contractual terms ... national laws are rarely available in other European languages, which imply [sic] that market actors need to take advice from a lawyer who knows the laws of the legal system that they are proposing to choose ... Businesses wishing to engage in ... cross-border trade may face high legal costs when their contracts are subject to foreign ... law. In extreme cases, some businesses may even refuse to sell across borders and thus potential consumers of that company may be locked in their national markets and be deprived of the enhanced choice and lower prices offered by the internal market.^{lvi}

It is our view that, though the transaction cost argument claims to be supported by empirical data, this vital claim is the least well investigated and substantiated part of the argument for a European code. Despite the efforts of the Commission, utilising

its great resources, to marshal this evidence, commentators who have directly addressed the problem of the corrigibility of the empirical evidence for the transaction cost argument have usually concluded that it is ‘slender’ and ‘would clearly not withstand scrutiny’.^{lvii} As if to demonstrate this inadequacy, the evidence the Green Paper itself seeks to put forward^{lviii} - some of the opinions invited in the consultation which followed the 2001 Communication,^{lix} two Eurobarometer surveys,^{lx} the Clifford Chance survey,^{lxi} and an observation derived from sectoral Commission work on e-commerce^{lxii} - is opaque,^{lxiii} partial, lacks methodological rigour, and, even if accepted, is overall highly equivocal. All variants of the transaction cost argument are subject to the same basic criticism: that transaction costs are not proven but asserted, and further that they are asserted to justify a conclusion preferred for other, implicit reasons.

It is exceedingly unsatisfactory that the single statistic the Green Paper itself cites in support of the transaction cost argument is that ‘for 61% of cross-border e-commerce offers, consumers were not able to place an order mainly because businesses refused to serve the consumer’s country’, surely with the implication in this context that this is related to divergences between national laws. However, the research from which this statistic is derived provides no information about the relevance of such divergences and, indeed, gives other reasons for this situation.^{lxiv}

In a Eurobarometer poll that asked EU citizens who hypothetically had purchased goods abroad what principles they would prefer a dispute to be settled under, 57% expressed a preference for harmonised EU law.^{lxv} But, on the other hand, none of the 181 responses to the 2001 Communication, including associations representing small and medium enterprises,^{lxvi} expressed dissatisfaction with a sectoral approach to specific problems of cross-border trade or thought it should be abandoned in favour of a general harmonisation approach.^{lxvii} Further, the Green Paper suggests, without reference to supporting evidence, that ‘consumers and businesses from small Member States might be particularly disadvantaged’.^{lxviii} Eurobarometer evidence would in fact seem to contradict, rather than support, this view. A 2008 survey found that cross-border trade exceeded domestic transactions only in the small states of Luxembourg, Malta and Cyprus, and further that Luxembourg, Denmark and Malta recorded the highest figures for cross-border distance purchases at, respectively, 45%, 25% and 25%.^{lxix}

As we have mentioned, the Green Paper also refers to a survey conducted in 2005 by Clifford Chance, the City of London law firm, in which 66% of the 175 businesses in 8 EU countries which responded were of the view that there are obstacles to cross-border trade in the EU. However, there was a huge divergence between nationals as to whether the EU had reduced such obstacles in the past. In Hungary 88%, but in the UK only 34%, of those interviewed thought it had. There was a strong consensus of over 80% that an EU contract law might help for the future, but only if that law is optional. The Green Paper’s brief reference to the results of the Clifford Chance survey does not reveal the larger picture. Interviewees were invited

to rate a number of factors, including variations between legal systems, which might impede cross-border trade. Tax was in fact the highest rated factor according to the survey, but, of course, this would not be affected at all by the options considered in the Green Paper. Indeed, the marginal value of addressing a single impediment to trade when others, such as differential tax regimes, language barriers and cultural differences are endemic and enduring,^{lxx} is entirely questionable.

Two other surveys have revealed further complexities. In 2010, the Law Society of England and Wales interviewed senior personnel from 602 law firms.^{lxxi} This survey confirmed the result of the earlier Cap Gemini survey commissioned by the Lord Chancellor's Department,^{lxxii} which had emphasised the primary importance of legal certainty to contracting parties.^{lxxiii} Though, of course, codification claims perhaps is fundamental background justification from the 'certainly' to be obtained through civilian jurisprudence, it is clear that the very notion of certainty is itself uncertain, for it is important to note that it is the Anglo-American common law, and standard terms based on it, that are the law of choice in international trade, and the principal reason given for this by its users is its certainty! In the Clifford Chance survey, 83% of respondents said that it was important to be able to choose the governing law and English law was recorded as the most frequently utilised system at 26%. This was confirmed by a survey conducted by the Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal Studies which found that almost 60% of respondents said that English law was the most utilised regime in cross-border contracting.^{lxxiv} A further recent survey by Queen Mary College, University of London examined the applicable systems of law where the dispute was to be settled by arbitration. English law was the most popular at 40%, followed by New York law (17%), Swiss law (8%) and French law (6%).^{lxxv} The preference for common law jurisdiction is said to be a result of its practical nature, market orientation and superior problem-solving ability, and this has led a legal sociologist to speculate whether continental legal education is not destined to produce global losers because its graduates lack higher level skills in problem solving.^{lxxvi}

This preference for the common law impacts directly upon the argument that codification will assist economic recovery in Europe. The provision of legal advice on English law by legal firms based in the UK is big business. In 2000, 4 out of the 12 largest law firms in the world were based in London.^{lxxvii} In 2007, the fee income of the 100 largest law firms was almost £15billion, with over 50% of that being earned by London based international firms. This is clearly a valuable contribution to the European economy which would be threatened if there was a substantive change in the law applicable to cross-border trade.

It is instructive at this point to consider the latest 'Doing Business' survey by the World Bank.^{lxxviii} This survey ranks countries by reference to the ease of doing business in them which is determined by metrics affecting 9 areas in the life cycle of a business: starting a business, dealing with construction permits, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing

contracts and closing a business. A notable feature here is that the top five aggregate ranking positions are taken by common law based systems: Singapore, Hong Kong, New Zealand, the UK and the United States. The next five positions are taken by Nordic (Denmark and Norway), common law (Australia and Ireland) and one mixed, ie common and civil law, system (Canada). The major civil law systems do not score highly in these tables: Germany ranks 22nd, after Estonia and Thailand, and France 26th, after Lithuania and Latvia. The clear preference for common law based systems would seem to be at odds with assertions that trade would be facilitated by the greater use of a contract code that would reflect more civil law than common law principles and where the very idea of a code is most readily associated with civilian legal regimes. The Doing Business survey does contain some counter evidence to mitigate a little the picture so far conveyed of the civilian legal systems. When the ease of enforcing contracts is isolated as a single metric, the major civilian jurisdictions of France and Germany fare better (7th and 6th respectively), though the metric of the ease of trading across borders is less flattering (26th and 14th respectively).

Though it is indeed our provisional belief, we are not arguing that the common law generally provides a superior framework for the law of contract than the civilian systems, including the essentially German position articulated in the CFR.^{lxxxix} Any such argument raises fundamental issues about, *inter alia*, the relationship between legal institutions and economic performance that cannot be sensibly discussed here.^{lxxx} We are arguing that the evidence marshalled by the contract law initiative for the transaction cost argument is completely ambivalent and can be regarded as supporting that argument only as a result of a most strained interpretation. All this reflects the fact that, prior to the contract law initiative, there was no significant market or political demand for codification even from those engaged in cross-border commerce, and the evidence of such a demand put forward in the Green Paper is that the evidence that there is such a demand is essentially, as it were, self-referential. All such evidence is the result of solicitations of opinions about hypothetical situations made under the contract law initiative itself, or of other, related efforts by the Commission or sometimes other EU bodies since the 2001 Communication.

The Evidence that is Ignored

The way responses to the consultation under the 2001 Communication have been interpreted is very telling.^{lxxxi} As we have mentioned, the 2003 Action Plan concluded that that none of the responses expressed dissatisfaction with a sectoral approach. This is how this was dealt with by the Commission in its 2004 Communication on the *acquis*:

The Action Plan concluded, *inter alia*, that at this stage there were no indications that the sectoral approach followed thus far leads to problems or that it should be abandoned. It was nevertheless considered appropriate to examine whether non-sector-specific-measures such as an optional

instrument may be required to solve problems in the area of European contract law. The Commission intends to continue this process in parallel with the work on developing the CFR and taking into account the comments received so far from stakeholders about their preferences for the parameters of any such instrument, if the need for it were to arise.^{lxxxii}

The consequence of proceeding down the line ‘nevertheless considered appropriate’, for reasons which are not set out but about which it is possible to speculate, is that the revealed preferences of the citizens of the EU who are supposed to benefit from general harmonisation are ignored, despite all the rhetoric about consultation.^{lxxxiii} The first of the four policy options set out in the 2001 Communication was to take ‘no EC action’,^{lxxxiv} and therefore ‘[t]o leave the solution of any identified problems to the market’.^{lxxxv} Of those who participated in the consultation under the Communication, ‘[o]nly a small minority’ favoured this option,^{lxxxvi} upon which almost no weight has been placed during the course of the contract law initiative. Significantly, this option just dropped out of the Action Plan^{lxxxvii} and is long forgotten in the Green Paper. But surely the significance of the response to this option is being misunderstood. The small minority of those that contributed to the consultation was preponderantly academics committed to harmonisation^{lxxxviii} who, as so often in transnational law, are confusing their ‘own best intentions with society’s best interests’.^{lxxxix} To take this to be a small minority of the citizens of the EU who are to benefit from codification, as the initiative has done, is ridiculous.

The main result of the contract law initiative’s concentration on responses to questions about hypothetical states of affairs which its own efforts have produced is that the main source of evidence about the actual views of the citizens who supposedly are to benefit from codification is almost entirely disregarded. This is the evidence of preferences revealed by the choices made on the existing market. Of course, these choices are constrained by transaction costs. But to acknowledge this does not give one scope simply to ignore those choices, though this is what the initiative, committing gross errors of policy formulation, has done.

It is wrong to believe, as the initiative evidently believes, that the unsurprising, indeed inevitable, fact that the existing market is affected by transaction costs means that the market has ‘failed’ and that the preferences revealed on that market should therefore be ignored. If this was so, then all preferences revealed on all markets should be ignored, because all markets fail in this way. The concept of market failure as it is normally understood is far too wide and extends a general power to identify any market, not as inevitably imperfect, but as having failed, so as to justify intervention. The very looseness of the identification of market failure extends a discretion to focus on a reason for failure for reasons which cannot be traced to the analysis of the market and typically remain implicit. The transaction cost argument for codification is a clear example of the common mistake of selectively identifying a particular cost, in this case divergence, in order to argue for its removal, ignoring the

evidence of the existing market that, in overall context, and in consciousness of resource implications, choosing not to sustain the cost of codification may be entirely rational. To make one's economic choices locally or, when engaging in cross-border commerce, which was not entirely unknown within the EU prior to the initiative, to deal with its problems by means other than pursuit of codification, are the 'options' chosen by the citizens who are supposed to benefit from the code, and in this case these choices are the best evidence of the 'real' preferences of those citizens.

The 'barriers' to the operation of the internal market other than legal divergence, including fundamental ones such as language and culture, the preference to inspect goods and the cost of travelling to do so; transport costs, confidence in relationships with local suppliers especially in the event of necessity of a remedy, etc, can and do make preferences to obtain goods principally locally entirely rational in the case of the great majority of exchanges, and this would mean that, in respect of these exchanges, the pursuit of codification is a pointless expense. The adoption of lower cost methods of dealing with the legal issues of cross-border trade as these arise by those who do wish to engage in such trade, though these methods, such as obtaining advice over conflicts of law, are always depicted in the contract law initiative as costs to be eliminated,^{xc} also would appear to be generally entirely rational. They avoid the perceived greater expense of pursuing codification by those engaging in such trade.^{xcⁱ}

How can it be that the, at best, slender evidence of a need for codification produced under the contract law initiative may be thought to carry greater weight than the existing market evidence that the alternatives are superior? The whole idea of public intervention is based on the belief that market evidence of this sort does not reflect a Pareto optimal situation and so a welfare improvement may be possible, and indeed this is always the case because of the existence of transaction costs. But, whilst we can conceive of cautious cases for sectoral intervention being made,^{xcⁱⁱ} and whilst certain parts of EU consumer law (but, tellingly, not all) are good evidence that such intervention can produce a superior level of welfare, the claim that intervention at the astoundingly ambitious level of generally harmonising the laws of contract of the EU Member States has simply not been made out.

Just because a transaction cost exists does not mean that steps should be taken to eliminate it. Those steps should be taken only when there is a net welfare improvement to be obtained from the elimination. A step taken towards a goal, such as a 'level playing field' for competition, will not be a welfare improvement if that step involves costs greater than its benefits.^{xcⁱⁱⁱ} What market choices typically bring home to those making them is that such choices reflect costs as well as benefits. This may well not happen when a political case for an intervention, which naturally focuses on benefits, is made. The contract law initiative has typically not asked questions about the cost of codification as a solution to the problems of cross-border commerce but has presented it entirely as a matter of the benefits of an optimal solution to the problems of divergence.^{xc^{iv}} It is important to see how the concept of

the optimal, uniform solution does its work. If one is asked whether one would prefer to maintain the undeniable current transaction costs of divergence or to have a fully harmonised system which eliminates those costs, then, of course, it would be perverse not to say that one prefers the fully harmonised system.^{xcv} The choice is between the empirical world with its defects and the theoretically optimal unified solution. But, as this optimal solution cannot be achieved, the evidence cited in the Green Paper, putting aside its shortcomings in its own terms, is irrelevant. It is evidence about a choice that is not available. The actual choice available is between the divergent systems and a code which itself will be in many ways defective by contrast to the optimal solution. It therefore simply is not the case that ‘the implementation of a European Code leads, inevitably, to a reduction in transaction costs’.^{xcvi} If this implementation produced the optimal solution of an actually uniform European law of contract, this argument would apply, but the actual choice will be between alternatives both of which have costs.

The contract law initiative has failed to produce any sustained evidence about the preferences of the citizens who are supposed to benefit from codification in respect of the actually relevant choice between defective and costly codification and the existing market.^{xcvii} Though this failure no doubt follows from the basic misunderstanding of the nature of the choice actually available, it nevertheless is providential, for such evidence is not obtainable.^{xcviii} The choice between a costless, optimal solution and the existing market is easy in itself and easy to formulate for the purposes of consultation. The choice between an intendedly general, uniform and costless but inevitably partial, uneven, complicated and costly ‘solution’ and the existing market is hard. The least one can say is that any attempt to assess whether any claimed savings in transaction costs will be greater than the inevitable increases caused by codification would have to be immensely more sophisticated than the transaction cost argument for codification that has been articulated so far. But, in our opinion, reflection on the extent and complexity of the issues which would be encountered by private contracting parties throughout the EU caused by adoption of a single code leads one to conclude that these are simply too complicated to be at all plausibly modelled from the centralised perspective of an intervening public authority. Once one acknowledges what is involved in it, assessment of the welfare outcomes of codification of all the national contract laws of the EU is simply too great an informational and computational challenge for any intervening public authority which seeks to legitimately implement a rational policy.

The inevitable lack of relevant evidence about the demand for codification cannot be remedied by reference to the very substantial literature discussing various doctrinal alternatives produced by the consultation of experts committed to some form of harmonisation, though this is, of course, what typically has been done in the course of producing the *Principles of European Contract Law* and the DCFR. These experts are not really the citizens who are to benefit from harmonisation, though they will indeed be the ones who principally do obtain ‘a significant non-financial utility, such

as that derived from increased prestige^{xcix} from it. When such experts claim to point to ‘practical problems’ of divergence that require full harmonisation, they are laying claim to a knowledge of the general empirical operation of contract law that is not available for any national legal system in the world,^c and to make it for all of the EU is, *a fortiori*, quite without foundation.

The Teleology of the Green Paper

What the welfare effects of the contract law initiative will be will, of course, depend on the precise form of its results. The Green Paper sets out the current range of possibilities in a way which is highly revealing. The view of the CFR as a ‘toolbox’ without necessary legal effects from which private parties can select as they wish is the, as it were, minimal result.^{ci} As it seems to contemplate leaving adoption of the code entirely optional, the toolbox view can be defended as imposing the least cost on private parties were it adopted.^{cii} The principal question about it would be whether the construction of the toolbox was a wise use of public funds, a question that is not asked in the general atmosphere of congratulation about the academic merits of the CFR, but this a question not relevant to our concerns here.

However, having served its purpose as the thin end of the wedge, we do not, despite persistent authoritative opinion to the contrary, think the toolbox is now anything other than a distraction. Not only has it been very effectively demonstrated that the CFR has been (rightly, indeed inevitably in our view) drafted in a way that powerfully works against cherry picking from it,^{ciii} and not only would widespread use of the toolbox by European and national legislators and other governmental bodies committed to harmonisation, centrally including the Commission itself, undermine the idea of its remaining optional for private parties,^{civ} but the entire direction of the codification argument now made quite explicit in The Green Paper has been towards much more maximal implementation. The Green Paper criticises all variants of the toolbox idea because ‘it would not provide immediate, tangible internal market benefits since it will not remove divergences in law [and] could not ensure a convergent application and interpretation of European Union contract law by the courts’.^{cv}

Though, as this is written, the idea of an optional instrument implemented by Regulation seems to be receiving the most powerful political backing,^{cvi} the Green Paper applies essentially the same criticism it made of the toolbox to all other variants of implementation, ordered according to the EU legislative mechanisms necessary to give effect to their increasing degrees of harmonisation, which fall short of a mandatory uniform code. Even a Directive on European Contract Law which ‘could harmonise national contract law on the basis of minimum common standards’ ‘would not necessarily lead to uniform implementation and interpretation of the rules [and]

might not be able to deliver the necessary legal certainty and businesses would thus continue to incur compliance costs'.^{cvii}

Nothing, it seems, will do, save a Regulation establishing a European Contract Law (and, one step further, a European Civil Code covering other types of obligations),^{cviii} which could include mandatory rules as deemed necessary and so 'could replace the diversity of national laws with a uniform set of rules'.^{cix} The undeniable teleological logic of the Green Paper inexorably follows from the postulation of the optimal solution to the transaction cost problem, for everything that falls short of this is, by definition, inadequate, and can be criticised as such. That the optimal solution is, as we have already argued, absurd becomes irrelevant in a way which should be understood.

When addressing the scope of the implementation of the CFR, it becomes clear to what extent the Green Paper is prepared to press the transaction cost argument. Whilst an 'instrument covering cross-border contracts only' would be 'capable of resolving the problems of conflict of laws [and] could make an important contribution to the smooth functioning of the internal market', the existence of 'two sets of terms – one for cross-border and one for domestic contracts' obviously is not the optimal solution, and the Green Paper now argues that 'an instrument covering both cross-border and domestic contracts could represent a further incentive for businesses to expand across borders, as they would be able to use one single set of terms and one single economic policy'.^{cx} In a sense, the transaction cost argument has become incidental. The whole problem of cross-border commerce was merely the starting point for a project aimed at producing a purportedly uniform EU law of contract.

One is grateful for this clarity of statement of intention in an area of policy formulation that has been and continues to be dogged by a lack of clarity which has sometimes amounted to obfuscation and dissimulation, for it allows us to assess the mischief that will eventually be caused by the contract law initiative as it approximates to its goal.^{cxii} The code will create within national jurisdictions the transaction costs of legal complexity that it is meant to eliminate between those jurisdictions. Even in so far as the code will allow parties to opt out of its provisions, it will generate the costs of understanding when ouster is necessary and of the means of accomplishing it, but in so far as the code is mandatory, its costs will increase. At an impressionistic level, we cannot but conceive that these costs will be immense.

The Implicit Foundation of the Transaction Cost Argument

The transaction cost argument for codification commits the errors identified by Ronald Coase as characteristic of the typical economic case for public intervention.^{cxii} In that argument, it is pointed out that the existing market is deficient because of the existence of transaction costs, in this case the transaction costs imposed on the internal market by divergences between national contract laws. This argument is

indisputably true. But for it to carry, as it has unproblematically carried for the contract law initiative, the implication that the existence of these transaction costs is enough to justify public intervention, is, we are afraid, a major mistake in policy formulation. Intervention is warranted only if the result of the intervention is a superior level of welfare than that produced by the existing market. In the transaction cost argument for codification, the conclusion is reached that intervention is warranted, but only because it is thought that the intervention will produce (at no specified cost) a theoretically optimal uniform law which eliminates the relevant transaction costs. And, of course, replacing the defective real world of transaction costs with a utopia in which they do not exist does produce, at least in the minds of those who believe this stuff, a major welfare improvement.

Maintaining this absurd position, the contract law initiative has done little or nothing to estimate the level of welfare which will be produced by the real world pursuit of unification, which will require a contrast between the transaction costs of the existing market and the transaction costs of the imperfectly unified market which is bound to be the actual result of that pursuit. We are of the opinion that the relevant evidence about the results of attempts to create a general European contract law is far too difficult to be obtainable by a public body operating from the perspective of centralised intervention. The overwhelming evidence produced by choices on the existing market has been that codification is unwanted by those it is supposed to benefit, and in this case this is the best available evidence.

Though the Green Paper restates the purportedly economic case for codification, the crucial feature of that case is that it is not fundamentally economic at all. It is a sort of tautology. If one has a prior commitment to the political aspiration of the EU, then even full harmonisation can seem plausible and arguments such as the transaction cost argument can then be marshalled for it.^{cxiii} Though, on any reasonable assumptions about the facts of national diversity, the idea that there can be a fully harmonised contract law is absurd, that idea may nevertheless be posited as a goal. The purportedly rational economic argument about transaction costs may then be made, but it is a façade for a far more visceral prior commitment to EU unification.

If one has this prior commitment to harmonisation, one has the attitude that can make harmonisation seem to approximate to the optimal solution. Without this prior commitment, the economic case for harmonisation is exposed as worthless and falls, and the emerging irony of the CFR can be seen. On any but the most minimalist of views of the way the CFR will be used, views which in our opinion are now irrelevant, the CFR must exacerbate within national boundaries the very transaction costs of legal complexity which harmonisation supposed is to eliminate.

Collins and Citizenship

By demonstrating the worthlessness of the purportedly economic case for codification, we have attempted to expose the prior political assumptions that are essential to that case but which normally remain implicit. However, it might be valuable to conclude this attempt by making reference to an explicit statement of this part of the case. Professor Collins' argument for the European Code^{cxiv} registers many of the criticisms of the transaction cost argument (with which he is, in any case, out of sympathy as he is really interested, not in an economic case as such, but in fairness under the European social model) which we have sought to make, though in our opinion he very much underestimates the impact of those criticisms. However this is, Professor Collins therefore does not rest his argument for codification on the transaction cost argument or on an economic case at all. Having registered the weakness of that argument, he goes on to make an outright political argument for codification of the civil law as part of, in essence, building a European identity. Explicitly maintaining the political commitment we have argued others hold implicitly, Professor Collins does not need the transaction cost argument:

The need for a European Civil Code derives from the need to facilitate the construction of a European civil society, in which national boundaries appear less significant as social and economic ties cross these artificial borders in increasingly dense networks ... the case for developing common principles of private law in Europe need not be tied to the question of whether or not these uniform rules are needed to reduce barriers to cross-border trade. Instead, it becomes possible to imagine how common principles of private law might contribute more broadly to the aims of the European Union to secure peace, prosperity and respect for human rights.^{cxv}

Professor Collins' explicitness is part of his highly commendable, long-standing commitment to ensuring that codification is achieved by legitimate, not surreptitious, means.^{cxvi} We do not find his vanguard political project attractive, but we applaud the honesty of his expression of it. However, we cannot but believe that he is being somewhat naïve here. Why are others promoting the code who share his commitment to a European identity insistent on the transaction cost argument despite its feebleness? We feel it churlish not to join in the common pastime of putting our words into the mouths of the citizens of the EU who the contract law initiative believes will benefit from codification and so let us ask what those citizens would say if they were asked to disrupt or abandon their national contract laws at likely very great cost in order to forge a European identity? We believe, and we believe those committed to the contract law initiative believe, that an overwhelming majority would say no thanks, and whilst we believe they would be wise to do so, we can see that this failure to accommodate their private interests (and their commitment to national diversity and their suspicion of a major intervention of this nature) to the great project of overcoming the 'artificial borders' of the nation states may be felt disappointing by those who rise to this aspiration. The function of the transaction cost argument is to

deal with the inconvenient preferences held by those who are supposedly to benefit from codification by getting the ball rolling with a purportedly economic argument that nullifies those preferences. And just as the transaction cost argument needs a prior commitment to harmonisation to seem plausible, commitment to the forging of a European identity needs the transaction cost argument to turn that commitment from the political aspiration of a vanguard to something that appears in the economic interests of the common citizens of the EU. Surreptitiousness is not an unfortunate characteristic of the contract law initiative. It is its necessary form.

It is, we repeat, commendable of Professor Collins to argue against a ‘technocratic approach’ which he feels seeks to establish the code by illegitimate means. But he does not see that this approach is essential to the codification project, nor that the problem with it is not that it is economic, but that its economics are nonsense, for sensible economics, based on the best evidence of real preferences, very strongly counsel against codification. Professor Collins is to be strongly distinguished from those pursuing full harmonisation by surreptitious means. But whilst they have their fantasy of an actually uniform law as an optimal solution to the transaction cost problem, Professor Collins has his own fantasy of a European contract law initiative which is open in its overriding political commitment to the generation of a European identity when the initiative cannot possibly take this form.

Conclusion

Perhaps the message of this examination of the purported economic argument for a European Contract Code is that, to those involved in the contract law initiative, there is simply no need really to prove the claimed economic advantages of the code because the necessity and mandate for that code are inevitable corollaries of membership of the EU and its concomitant commitment to the single market. Let us conclude by making our own position clear. We have sought to focus on theoretical issues of policy formation and to put to one side the underlying issue of how legitimate a policy-making process one can in general sensibly expect the EU institutions, particularly the Commission, to follow, though the generation and selective invocation of congenial evidence in support of a predetermined agenda is entirely consistent with common Commission practice. That the EU can promote so obviously remarkably ambitious a project as codifying the contract laws of all the Member States itself raises a serious question about the wisdom of extent of the EU’s effective competence in our minds. That it can do so in so ill-argued a fashion, generating an inevitably highly costly policy, is so worrying as further call the legitimacy of so defective a set of institutions into question.

Perhaps the final word should go to the House of Lords’ European Union Committee which noted that:

There is still little hard evidence on the fundamental question whether and how far differences in substantive law are a source of extensive problems which require addressing at the European level or whether and how far a common framework of contract law in the EU would bring net benefits, which would justify the expenditure of time, effort and money in developing it and the transactional costs for users of adaption to a new product... But even in relation to the suggestion that an optional instrument might be prepared, there appears to be no real idea whether and how far this would be welcomed, worthwhile and feasible.^{cxvii}

My Lords, we concur.

Notes

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- ⁱ COM(2010)2020 final, p 21,3.3.2010
- ⁱⁱ ‘Contract Law: Commission Considers Way Forward’, Press Release 31 January 2011 MEMO/11/55.
- ⁱⁱⁱ Communication from the Commission, *European Contract Law* COM(2001) 398, 11.7.2001.
- ^{iv} Communication of the Commission, *A More Coherent European Contract Law: An Action Plan* COM(2003) 68, 12.2.2003.
- ^v C von Bar and E Clive, eds, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, Oxford, Oxford University Press, 2010.
- ^{vi} Green Paper from the Commission, *Policy Options for Progress Towards a European Contract Law for Consumers and Businesses* COM(2010) 348, 1.7.2010.
- ^{vii} *ibid*, para 3.
- ^{viii} *ibid*, para 4.
- ^{ix} *ibid*, para 1.
- ^x *ibid*.
- ^{xi} n vii above, para 1.
- ^{xii} ‘Project Europe 2030: Challenges and Opportunities; Report to the European Council by the Reflection Group on the Future of the EU 2030’, 41.
- ^{xiii} B Kurger, ‘The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe’, in T Wilhelmsson et al, eds, *Private Law and the Many Cultures of Europe*, The Hague, Kluwer Law International, 2007, 177, 187.
- ^{xiv} n vii above, para 1.
- ^{xv} *ibid*, para 3.2.
- ^{xvi} Tampere Presidency Conclusions, 15-16 October 1999, para 28.
- ^{xvii} http://ec.europa.eu/europe2020/tools/improving/index_en.htm
- ^{xviii} D Wallis MEP, ‘European Contract Law – The Way Forward: Political Context, Parliament’s Preoccupations and Processes’ (2006) 7 *ERA Forum* 8.
- ^{xix} JW Rutgers, ‘The Rule of Reason and Private Law, or the Limits to Harmonisation’, in A Schrauwen, ed, *The Rule of Reason*, Groningen, Europa Law Publishing, 2005, ???.
- ^{xx} n vii, para 4.1 (options 6 and 7).
- ^{xxi} MW Hesselink ‘An Optional Instrument on EU Contract Law: Could it Increase Legal Certainty and Foster Cross-border trade?’ Centre for the Study of European Contract Law, University of Amsterdam Working Paper Series No 2010/06 (2010), para 3.3.

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- ^{xxii} These issues are thought to be of no weight by Professor Lando: O Lando, ‘Can Europe Build Unity of Civil Law whilst Respecting Diversity?’ (2006) *Europa e diritto privato* 1.
- ^{xxiii} KP Berger, ‘The Principles of European Contract Law and the Concept of the “Creeping Codification” of Law’ (2001) 9 *European Review of Private Law* 21.
- ^{xxiv} C von Bar et al, eds, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (Outline Edition)*, Muncich, Sellier, 2009, 7.
- ^{xxv} M Kenny, ‘The 2004 Communication on European Contract Law: Those Magnificent Men in Their Unifying Machines’ (2007) 30 *European Law Review* 724.
- ^{xxvi} Diane Wallis, rapporteur, report adopted 12 April 2011 (INI/2011/2013)
- ^{xxvii} The Commission would appear to have unrealistic expectation here. The 7 month consultation on the Green Paper was described as ‘...longer than usual to ensure as wide as possible participation in the policy discussion’ Press release 31st January 2011 MEMO/11/55.
- ^{xxviii} EuroCommerce ‘Response to the European Commission consultation on a Green Paper on policy Options for Progress towards a European Contract Law for Consumers and Businesses’ p1. See further ‘COMBAR Response to EU Green Paper on policy Options for Progress towards a European Contract Law for Consumers and Businesses’ section V and ???.
- ^{xxix} Bar Council of England and Wales ‘Response to the European Commission Consultation on Contract Law’ para 10.
- ^{xxx} ???.
- ^{xxxi} ‘A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback’ 3rd May 2011 ec.europa/justice/contract/files/feasibility-study_en.pdf
- ^{xxxii} See infra ???.
- ^{xxxiii} Bar Council of England and Wales ‘Response to the European Commission Consultation Contract Law’, para 91.
- ^{xxxiv} Law Society, ‘Response to Commission Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses’ para 9.
- ^{xxxv} P Legrand ‘European Legal Systems are Not Converging’ (1996) 45 *International and Comparative Law Quarterly* 52; P Legrand ‘Against a European Civil Code’ (1997) 60 *Modern Law Review* 44 and P Legrand, ‘Codification and the Politics of Exclusion: A Challenge for Comparativists’ (???) 31 *UC Davis Law Review* 799..
- ^{xxxvi} We are ignoring the problems of uniformity of law within a single jurisdiction: J Smits, ‘A Principled Approach to European Contract Law?’ (2000) 7 *Maastricht Journal of European and Comparative Law* 221.
- ^{xxxvii} We entirely agree with the point that has repeatedly been made (eg G Wagner, ‘The Economics of Harmonisation: The Case of Contract Law’ (2002) 39 *Common Market Law Review* 995, 999-1013) that it is wrong to regard legal diversity only negatively because such diversity creates *prima facie* valuable regulatory competition which a uniform law extinguishes, and we would add that putting all the EU’s 27

contract eggs in one basket in this way might enormously increase the risk of harm and cost caused by a single ill-judged law. We are putting these points to one side in order to conduct our argument on the basis of accepting the transaction cost argument in principle.

^{xxxviii} J Basedow, ‘Codification of Private Law in the European Union: The Making of a Hybrid’ (2001) 9 *European Review of Private Law* 35.

^{xxxix} CF Hesselink ‘An optional instrument on EU contract law could it increase legal certainty and foster cross-border trade?’ Centre for the Study of European Contract Law University of Amsterdam Working Paper Series No 2010/06, 2.3: ‘the costs of introducing an optional instrument are likely to be modest’. No evidence is offered to support this assertion. It might be that Hesselink is proceeding on the basis of an overly narrow definition of set up costs.

^{xl} This experience of the Netherlands, which enacted a new civil code in 1992, is instructive in this respect: ???.

^{xli} n iv above, 8.

^{xlii} W Twining, *Karl Llewellyn and the Realist Movement*, London, Weidenfeld and Nicolson, 1985, ch 11. The Green Paper describes the National Conference of the Commissioners on Uniform State Laws and the American Law Institute as ‘quasi-public bodies’.

^{xliii} RE Speidel, ‘Revising UCC Article 2: A View from the Trenches’ (2001) 52 *Hastings Law Journal* 607.

^{xliv} ???.

^{xlv} Louisiana has adopted most of the code other than Article 2.

^{xlvi} S Vogenauer, ‘Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competititon, or Overkill of Soft Law?’ (2010) 6 *European Review of Contract Law* 143.

^{xlvii} n vii above, para 4.1. (options 3b and 4). The Green Paper believes that, if the optional instrument is implemented by a Regulation rather than a Recommendation by the Commission, it could deal with the divergence of mandatory rules of eg consumer law in a superior way to the purely voluntary CISG or UNIDROIT. It is a microcosm of our argument here that, although the contract law initiative has long been aware that the fate of opt-in instruments has typically been that they are ignored (eg that there is not a known single instance in English law of a party opting in to the ULIS rules despite legislative encouragement to do so under the Uniform Law of Sales Act 1967, s 1(3): n **Error! Bookmark not defined.** above, para 4.3.3), the response to this has typically been, not to take this as evidence that another optional instrument is not needed but that any such instrument brought in should be optional only in a (highly) qualified sense.

^{xlviii} *ibid*, para 4.1 (option 4).

^{xlix} *ibid*.

^l *ibid*, para 3.2.

^{li} *ibid*, para 4.1 (option 6).

^{lii} Or that a coherent ‘multi-level’ (or whatever synonym is used) system of contract law may be established: *pace* S Grundmann, ‘The Optional European Code on the Basis of the *Acquis Communautaire*: Starting Point and Trends’ (2004) 10 *European Law Journal* 698, 708-10.

^{liii} Professor Whittaker’s report commissioned by the Ministry of Justice is something of an object lesson in speaking to its audience in a nuanced way which, by virtue of this, secures agreement with the strong harmonisation which nevertheless is maintained from that audience: S Whittaker, *The ‘Draft Common Frame of Reference’: An Assessment*, 2008: <http://www.justice.gov.uk/publications/eu-contract-law-common-frame-reference.htm>

^{liv} O Lando and H Beale, eds, *Principles of European Contract Law*, The Hague, Kluwer Law International, 2000, xxiv. It is obvious that there is some considerable divergence between the editors of these *Principles*. Professor Beale would seem to rather repent of this statement of the *Principles*’ purpose and continues to endorse only the most minimal idea of a European code (see text accompanying n cii below) in a way we think simply fails to reflect the teleology of the contract law initiative. Professor Lando has, in contrast, always had a firm, vanguard commitment to that teleology: O Lando, ‘Can Europe Build Unity of Civil Law While Respecting Diversity’ (2006) *Europa e diritto privato* 1, 8.

^{lv} n vii above, paras 1, 3.1.

^{lvi} Similar assertions are made in the Opinion of the European Economic and social Committee on the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses COM (2010) 348 final at 4.2.

^{lvii} C Twigg-Flesner, *The Europeanisation of Contract Law*, London, Routledge-Cavedish, 2008, 31. See generally J Smits, ed, *The Need for a European Contract Law: Empirical and Legal Perspectives*, Groningen, Europa Law Publishing, 2005, especially the final chapter and summary by the editor.

^{lviii} n vii above, paras 3, 3.1.

^{lix} The views of these contributors, elevated to the status of ‘stakeholders’ whether they wanted a stake or not, are available at http://ec.europa.eu/consumers/rights/stakeholders_en.htm and digested in an Annex to the 2003 *Action Plan*: n **Error! Bookmark not defined.** above.

^{lx} DG SANCO, Special EUROBAROMETER 298 (2008) (in the Green Paper this is given as Special EUROBAROMETER 292 (2008)) and DG SANCO, Flash EUROBAROMETER 278 (2009).

^{lxi} S Vogenauer and S Weatherill, eds, *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Oxford, Hart, 2006, ???.

^{lxii} Communication from the Commission, *Cross-Border Business to Consumer e-Commerce in the EU* COM(2009) 557, 22.10.2009, para 13. The research was commissioned from the YouGov polling organisation by DG SANCO: YouGov Psychonomics, *Mystery Shopping Evaluation of Cross-border e-commerce in the EU* (2009) para 5.

^{lxiii} As is the Opinion of the European Economic and social Committee on the Green Paper referred to above where statistical support is not referenced, eg see para 4.1 and 4.3.

^{lxiv} Communication from the Commission, n lxii above, para 13.

^{lxv} 54% in the UK. Interestingly the UK recorded the highest percentage 23% who expressed a preference for the national law of their contractual partner.

^{lxvi} Despite this, as it is hard to argue with a straight face that the EU consumers, other than an elite, are much interested in solving the legal problems of cross-border trade, or that large companies cannot sort out their solutions, and that public assistance of either this elite of consumers or this elite of businesses with their legal expenses is defensible, small and medium sized enterprises features prominently in the transaction cost argument. Numerous subsequent consultations of small and medium business organisations by EU bodies have produced results more satisfactory results for the contract law initiative: eg *SME Panel Survey on the Impacts of a European Contract Law*, February 2011

http://ec.europa.eu/justice/policies/consumer/docs/report_sme_panel_survey_feb_2011_en.pdf This reports the results of a consultation conducted in November and December 2010 by the Enterprise Europe Network, a Commission agency which offers support to small and medium sized businesses: http://www.enterprise-europe-network.ec.europa.eu/index_en.htm

^{lxvii} n **Error! Bookmark not defined.** above, para 14.

^{lxviii} n vii above at 1

^{lxix} Special Eurobarometer 298,

^{lxx} See Bar Council of England and Wales ‘Response to the European Commission Consultation on Contract Law’ para 70-75.

^{lxxi} Law Society Report – Firms’ Cross Border Work December 2010.

^{lxxii} Cap Gemini Ernst and Young *Commercial Court Feasibility Study* (2001).

^{lxxiii} The Law Society Survey emphasised the importance of both ‘legal certainty’ and ‘familiarity with the legal system of contracting parties’ whereas the Cap Gemini Report found that enforceability and predictability of decision making was twice as important as familiarity with the applicable legal regime.

^{lxxiv} Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal Studies report ‘Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law’ (2008)..

^{lxxv} Queen Mary College, School of International Arbitration International Arbitration survey: Choices in International Arbitration. This and the Oxford survey above are examined in the Law Society ‘Response to Commission Green Paper on policy options for progress towards a European Contract Law for consumers and businesses’ paras 54-55..

^{lxxvi} Gessner ‘Globalisation and Legal Certainty’ in Gessner and Cem Budak eds, *Emerging Legal Certainty: Empirical Studies on the Globalisation of Law* (1998).

^{lxxvii} Cap Gemini Ernst and Young *Commercial Court Feasibility Study* (2001) at p 14.

^{lxxviii} *Doing Business 2011 Making a difference for entrepreneurs* published by the IFC and World Bank on Nov 4th 2010

^{lxxix} O Lando, 'The Structure and Legal Values of the Common Frame of Reference (CFR)' (2007) 3 *European Review of Contract Law* 240.

^{lxxx} They have been pursued in relationship to the codification project by Professor Legrand: P Legrand, 'Are Civilians Educable?' (1998) 18 *Legal Studies* 216.

^{lxxx} M Kenny, 'Constructing a European Civil Code: *Quis Custodiet Ipsos Custodes*' (2005-6) 12 *Columbia Journal of European Law* 775.

^{lxxxii} Communication from the Commission, *European Contract Law and the Revision of the Acquis: The Way Forward* COM(2004) 651, 11.10.2004, para 2.3.

^{lxxxiii} The Action Plan, n **Error! Bookmark not defined.** above, para 89 tells us that, during the consultation invited by the 2001 Communication, 'there were calls to continue reflections on the opportuneness of non-sector-specific measures in the area of European contract law', but does not tell us by who, though one can guess and find one's guess confirmed by reading the responses..

^{lxxxiv} n **Error! Bookmark not defined.** above, paras 49-51.

^{lxxxv} *ibid*, executive summary.

^{lxxxvi} n **Error! Bookmark not defined.** above, paras 7, 4.1.

^{lxxxvii} 'Editorial Comments: European Contract Law: *Quo Vadis?*' (2005) 42 *Common Market Law Review* 1, 2.

^{lxxxviii} *ibid*, 55..

^{lxxxix} PB Stephan, 'The Futility of Unification and Harmonisation in International Commercial Law' (1998-9) 39 *Virginia Journal of International Law* 743, 796. See also the influence of Bourdieu's sociological theories which emphasise the fact that transnational elite lawyers might champion legal globalisation as a result of conviction or self interest Dezalay and Garth *Dealing in Virtue, International Commercial arbitration and the Construction of a Transnational Legal Order* (1996) at p 343. For a historical survey of legal professional self interest in relation to codification in the US see the magisterial survey by Weiss 'The Enchantment of Codification in the Common Law World' (2000) 25 *Yale Journal of International Law* 435 at 502-9.

^{xc} It is not our intention to go into this matter, for it raises issues of a theoretical profundity which it is not really appropriate to discuss here, but the transaction cost argument for codification exemplifies the tendency to describe facilitative institutions, such as the existing law of conflicts, as costs that makes much transaction cost analysis incoherent: D Campbell, 'On What is Valuable in Law and Economics' (1996) 8 *Otago Law Review* 489, 505-6.

^{xci} Wagner, n xxxvii above, 1013-8.

^{xcii} Though the Green Paper is essentially an argument for a purportedly fully harmonised contract law, it rather inconsistently does hold out the possibility of 'an instrument tailor-made for the online world' (n vii above, para 4.2.2), and this seems to us a suggestion worth considering. The idea of the 'blue button', by which consumers making internet purchases could click on an on-screen EU flag to indicate

their preference for the sale to be subject to European Contract Law (H Schulte-Nolke ‘EC Law on the Formation of Contract: From the Common Frame of Reference to the “Blue Button”’ (2007) 3 *European Review of Contract Law* 332), seems to us to have merit, as does the suggestion that that by this means businesses would effect a saving in transaction costs sufficient to persuade them to accept higher levels of consumer protection: H Beale ‘The Future of the Common Frame of Reference’ (2007) 3 *European Review of Contract Law* 257.

^{xciii} R Van den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be continued’, in S Grundmann and J Stuyck, eds, *An Academic Green Paper on European Contract Law*, The Hague, Kluwer Law International, 2002, 249, 253-5.

^{xciv} M Kenny ‘The 2003 Action Plan on European Contract Law: Is the Commission Running Wild’ (2003) 28 *European Law Review* 538, 545-6.

^{xcv} To these costs could be added the costs of ensuring a consistent and frictionless interface between the instrument codifying the law of contract and the national based areas of contiguous law such as tort, property and restitution law.

^{xcvi} D Kallweit, ‘Towards a European Contract Law: For a Prosperous Future of International Trade’ (2004) 35 *Wellington Law Review* 269, 283. A similar easy reliance upon assertion is perhaps apparent in some of the English language discussions that preceded the Uniform Contract Act in China ‘China’s market economic policy is the driving force behind the drafting of the UCL [Uniform Contract Law]. A contract law that is applicable to all areas will better serve the homogeneous market prescribed by the policy’: Ping Jiang ‘Drafting the Uniform Contract Law in China’ (1996) 10 *Columbia Journal of Asian Law* 245, 246.

^{xcvii} HL EU Committee, 12th Report (2008-9) *European Contract Law: The Draft Common Frame of Reference*, HL Paper 95, paras 40, 83-4.

^{xcviii} This makes the EU Committee’s own insistence, *ibid*, para 85, that an impact assessment should precede ‘any form of mandatory harmonisation’, though commendable in its intent, pointless, or worse, as we have no doubt that, if the political necessity arose, such an assessment could be undertaken. The necessity for such an assessment was pointed out to the Commission at least as early as the response to consultation under its 2001 Communication: n **Error! Bookmark not defined.** above, para 4.4.2. This distance between the evidence base of the Green paper and what Professor Schwartz, one of the contributors to the contract law initiative who has looked the problems of data collection in the face, thinks should be done, is immense: A Schwartz, ‘Design for an Empirical Data Investigation into the Impact of Existing Contract Law Harmonisation under the White Paper of 1985’, in Grundmann and J Stuyck, eds, above n xciii, 59. Though we are anxious not to put words in his mouth, our point that the really relevant date is not obtainable seems to us to be effectively conceded by Professor Schwartz.

^{xcix} AI Ogus, ‘Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law’ (1999) 48 *International and Comparative Law Quarterly* 405, 416.

^c Stewart Macaulay reached the age of 80 in 2011. Perhaps it is as well to seek to learn from the greatest empirical researcher into contracting who has ever lived: S Macaulay. ‘Contracts, New Legal Realism and Improving the Navigation of the Yellow submarine’ (2006) 80 *Tulane Law Review* 1161, 1165: ‘We need an accurate

empirically informed picture of how law is working on the ground if we are to assess whether it actually promotes efficiency. Overlooking the way the law in action may distort the consequences of various rules is bad enough when we are focused on American problems. The distortion is likely much worse when we advocate rules to be applied in international transactions or in nations with very different constellations of legal institutions and cultures’.

^{ci} n vii above, para 4.1 (options 1 and 2).

^{cii} Beale, above n , 268-9.

^{ciii} R Schulze, ‘The Academic Draft of the CFR and the EC Contract Law’, in R Schulze, ed, *Common Frame of Reference and the Existing EC Contract Law*, Munich, Sellier, 2008, 3, 14.

^{civ} This is made quite explicit in para 3 of the recent *Draft Report* of the Legal Affairs Committee which is discussed in n cvi below.

^{cv} n vii above, para 4.1 (option 2b).

^{cvi} On 12 April, the Legal Affairs Committee endorsed a Report, Diana Wallis Rapporteur, which preferred this option: European Parliament Committee on Legal Affairs, *Draft Report on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses 2011/2013(INI)* draft motion para 2. We do not purport to fully understand the EU political process at work here. Ms Wallis’ Report was submitted on 25 January, which was prior to the closing date for submissions to the consultation under the Green Paper. Although the Green Paper is noted in the recitals to the Report, its argument that, because it will add a parallel system’ to national laws, the optional instrument ‘might be criticised for complicating the legal environment’ (n vii above, para 4.1 (option 4)) is not considered in that Report. The Green Paper argues. To the extent that the EU optional instrument will not remain actually option for private parties, this is undoubtedly true, for this optional instrument will not be able to be ignored as others are. Our point is, of course, that to go on, as the Green Paper does, to argue that a uniform code will remove the parallel system is quite wrong.

^{cvii} *ibid*, para 4.1 (option 5).

^{cviii} *ibid*, para 4.1. (option 7).

^{cix} *ibid*, para 4.1 (option 6).

^{cx} n vii above, para 4.2.2.

^{cx} We will ignore the mischief pursuit of increasing harmonisation threatens to consumer law which is giving rise to considerable political difficulty and bedevils The Green Paper’s review of the options. One is speculating, but it does seem to us to be highly likely that the main pressure for whatever call for weak harmonisation there was was, in a sense, generated by the EU because of the amount of inconsistent mandatory consumer law: G Howells, ‘European Consumer Law: The Minimal and Maximal Harmonisation Debate and Pro Independent Consumer Law Competence’, in Grundmann and Stuyck, eds, n xciii above, 73. But, although it gained strength from earlier being in large part a sort of tidying up of the consumer *acquis* which disavowed full harmonisation (n lxxxii above, para 2.3), the contract law initiative was bound eventually to run into the contradiction between full harmonisation and

ineradicable (on plausible political assumptions) divergences in the levels of consumer protection that are possible in different Member states: T Wilhelmsson, 'International *Lex Mercatoria* and Local Consumer Law: An Impossible Combination' (2003) 8 *Uniform Law Review* 141.

^{cxii} The clearest single statement of Coase's views is RH Coase, 'Social Cost and Public Policy', in GA Edwards, ed, *Exploring the Frontiers of Administration*, Toronto, Bureau of Research, Faculty of Administrative Studies, York University, 1970, 33. An attempt to ascertain those views from 'The Problem of Social Cost' must approach this seminal work through Coase's own comments on it in the collection of his essays in which it is reprinted: RH Coase, *The Firm the Market and the Law*, Chicago, University of Chicago Press, 1986, 1-31, 157-86.

^{cxiii} T Wilhelmsson, 'The Design of an Optional (Re)statement of European Contract Law: Real Life Instead of Dead Concepts', in S Grundmann and J Stuyck, eds, *An Academic Green Paper on European Contract Law*, The Hague, Kluwer Law International, 2002, 353.

^{cxiv} H Collins, *The European Civil Code*, Cambridge, Cambridge University Press, 2008.

^{cxv} *ibid*, 7. 89-90.

^{cxvi} eg H Collins, 'Transaction Costs and Subsidiarity in European Contract Law', in Grundmann and Stuyck, eds, n xciii above, 269 and Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653.

^{cxvii} *European Contract Law: the Draft Common Frame of Reference* HL Paper 95, para 83.