‘Choice is good.’ Really?

John Cartwright

The Green Paper points towards option 4, the Optional Instrument, as the instrument of European contract law. But it is a deceptively reassuring option: the emphasis on choice is misguided. Choice is not necessarily good. If it allows parties to avoid rules or principles of national law which have been developed for good reasons within the national legal system, it can undermine the national policies. And ‘choice’ is not necessarily free choice. The appropriate place for the discussion of consumer protection is in relation to the Consumer Rights Directive. ‘Choice’ is not always present in relation to business contracts, either. The only context in which the emphasis on ‘choice’ makes sense is where there is a negotiation between two equal business parties. The desirability of an Optional Instrument hinges on that case. But this still raises questions about whether a business party would rationally choose the Optional Instrument over its own or the other party’s law, given questions of legal certainty which will arise (at least in the early years), and given the substantive rules of the final text of the Instrument.

This paper focuses on Option 4 presented in the Green Paper from the Commission: that a Regulation setting up an optional instrument of European Contract Law would be the best instrument to respond to the problems, identified by the Green Paper, of diverging contract laws which constitute a barrier to completion of the internal market.

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1 COM(2010) 348, 1.7.2010 (the ‘Green Paper’).
In considering the merits of the Optional Instrument within the context of the Green Paper, the Commission’s own justifications for intervention must always be borne in mind.²

‘The internal market is built on a multitude of contracts governed by different national contract laws. Yet, 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. Divergences in contract law rules may require businesses to adapt their contractual terms. Furthermore, national laws are rarely available in other European languages, which imply that market actors need to take advice from a lawyer who knows the laws of the legal system that they are proposing to choose.

Partly for these reasons, consumers and businesses, in particular small and medium enterprises (SMEs) having limited resources, may be reluctant to engage in cross-border transactions. This reluctance would in turn hinder cross-border competition to the detriment of societal welfare. Consumers and businesses from small Member States might be particularly disadvantaged. ... An instrument of European Contract Law, if sufficiently user-friendly and legally certain, could also serve as a model, in particular to international organisations which have taken the Union as a model for regional integration. ...

An instrument of European Contract law should respond to the problems of diverging contract laws identified above, without introducing additional burdens or complications for consumers or businesses. In addition it should ensure a high level of consumer protection. In the area it covers, the instrument should be comprehensive and self-standing, in the sense that references to national laws and instruments should be as much as possible reduced.’

I The direction of travel

It appears from the way in which the arguments are presented in the Green Paper that the Optional Instrument is firmly in sight as the instrument likely to be preferred, on the balance of advantages and disadvantages. The presentation of Options 1 to 3 is accompanied by rather dismissive counter-arguments.³ Publication of the results of the Expert Group (Option 1) ‘could not address the internal market barriers’ and so falls at the first hurdle of the justification given by the Green Paper for intervention.

² Green Paper, pp 2, 4, 7. This paper seeks only to address the case for an Optional Instrument as made within the framework set by the Green Paper itself, and not to examine other questions such as the economic case for intervention in this area or the legal basis for an Instrument.

The ‘toolbox’ (Option 2), which was spoken of by the Commission, Council and Parliament as recently as 2007 and 2008 as the possible or even likely purpose of the Common Frame of Reference, fares no better: it ‘would not provide immediate, tangible internal market benefits since it would not remove divergences in law’. A Commission Recommendation on European Contract Law (Option 3) would have no binding effect on the Member States and ‘bears the risk of an incoherent and incomplete approach between the Member States’.

If Options 1 to 3 are ineffectual within the framework of the aims set by the Green Paper, Options 5 to 7 are the strong solutions which are still not ideal or may even be politically or legally doubtful. A Directive on European Contract Law (Option 5) ‘would not necessarily lead to uniform implementation and interpretation of the rules’; a Regulation establishing a European Contract Law (Option 6) ‘could raise sensitive issues of subsidiarity and proportionality’ and a Regulation establishing a European Civil Code (Option 7) may not be justified on grounds of subsidiarity.

We are left, then, with Option 4: the Optional Instrument, which is presented in a little more detail than the others, and in language which better addresses the arguments which seem to beset the other Options: it ‘could bring about important internal market benefits without necessitating further in-roads into national law’; it is in line with subsidiarity and would offer ‘a proportionate solution to internal market barriers stemming from diverging contract laws’. Apart from the argument, in the final paragraph of the discussion on this Option, that an Optional Instrument ‘might be criticised for complicating the legal environment’, the presentation of Option 4 seems

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4 Commission: Second Progress Report on The Common Frame of Reference, COM(2007) 447 final, 25.7.2007 (‘According to its original conception the CFR is intended to be a ‘toolbox’…’); European Parliament: resolution of 12 December 2007, P6_TA(2007)0615 (‘whereas the Common Frame of Reference (CFR), which the Commission intends to be a ‘toolbox’ or handbook for the EU legislator, to be used when revising existing and preparing new legislation in the area of contract law, is not intended at present to have any binding legal effect and thus remains in the nature of soft law’); Council: statement on 18 April 2008 endorsing Draft report of the Committee on Civil Law Matters to the Council on the setting up of a Common Frame of Reference for European Contract Law, 11 April 2008, 8286/08 (‘Purpose of the Common Frame of Reference: a tool for better lawmaking targeted at Community lawmakers’). Cf, however, Parliament resolution, 3 September 2008, P6_TA(2008)0397 (The European Parliament … 11. Points out that, when taking a decision about the content of the CFR, the Commission should bear in mind that the CFR could go well beyond a mere legislative tool and could result in an optional instrument’).


to point towards the answer posed by the consultation launched by the Green Paper. And we know that the Expert Group is already re-working the Draft Common Frame of Reference (DCFR)\(^7\) on the basis that it is to turn into the text of a possible Optional Instrument.\(^8\) Add to this the fact that the very notion of an instrument being ‘optional’—giving choice to the parties to enable them to decide whether to use the new model of a European contract law, a positive and useful instrument (unlike Options 1 to 3) but one which they are free to adopt or not (unlike Options 5 to 7)—sounds reassuring. Choice is good, isn’t it?

II Some key elements of the proposal for an Optional Instrument

Certain key elements of the proposal for an Optional Instrument should be discussed. Some of these (indeed, the choice of Options within the Green Paper more generally) cannot be fully separated from the view taken about the scope of operation of the chosen instrument (paragraph 4.2 of the Green Paper) and the material scope of the instrument (paragraph 4.3).

1 The Optional Instrument would be ‘a comprehensive and, as much as possible, self-standing set of contract law rules’

On this issue, the viability of the Optional Instrument cannot be separated from the question of the material scope of the Instrument.\(^9\) The interfaces within each legal system between its rules of contract law and its rules of tort, property and restitution follow a range of different models, and each has settled on sets of inter-related and balanced rules which (we may assume) are designed to achieve a particular end. For

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\(^8\) The mandate of the Expert Group has hardened in this direction: compare the Synthesis of the First Meeting of the Expert Group, 21 May 2010 (‘Although all options for the way forward are open, the European Parliament tends to favour an optional instrument in this area’) with the Synthesis of the Fourth Meeting, 1-2 September 2010 (‘The Chair reaffirmed the mandate of the group to work exclusively on the assumption of an optional instrument, while emphasising that no political decision concerning the options of the Green Paper, including as to whether to propose such an instrument has been taken’). Cf, however, the original terms of reference of the Expert Group: Commission Decision 2010/233/EU, 26.4.2010, esp recital (5). It may be that, strictly, the Expert Group is being asked only to produce a draft which can be used as an Optional Instrument if the political decision is taken in that direction. But the very clear impression is given that the Optional Instrument is now being preferred.

\(^9\) Green Paper, para 4.3.
example, a system which has a narrower scope for the operation of the law of tort may have a more expansive law of contract, or vice versa: the boundaries of the one may have shifted over time and become fixed as a result of the development of boundaries in the other. Put simply: even if the paradigm case of the bilateral onerous agreement (such as sale) can easily be recognised as a contract in all legal systems, the boundaries of the types of transaction that constitute a contract may differ. And, perhaps more significantly, the effects of a contract (even of the paradigm contract of sale) may differ.

A good example is the question of the proprietary effects of a contract for the sale or other transfer of property in goods, which in the common law becomes a key issue where the contract is void for mistake with the consequence that property did not pass under the contract and so could not pass to a third party, even a purchaser in good faith. There may, of course, be good reasons for preferring the answer given to this case in other legal systems where a third-party purchaser is protected independently of the validity of the contract as between the original parties. But for reasons of principle the House of Lords has maintained the position of English law in relation to mistakes of identity rendering a contract void. It should be noted that such questions do not typically arise as between the parties to the contract, but are a good illustration of the fact that the rules of contract become part of the broader picture of private law rights, since in English law the claim that is brought by the original owner against the present possessor of the property is a claim in tort; but the core question raised in the tort action is generally: who owns the property, or has the immediate right to

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10 Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 AC 919 at [84]-[86] (Lord Millett, dissenting from the majority decision and preferring the approach of German law, and noting that the insistence on the strict nemo dat rule in English law ‘would make the contemplated harmonisation of the general principles of European contract law very difficult to achieve’). See also Lord Nicholls, also dissenting, at [35], preferring the innocent third party purchaser as a matter of policy.

11 Ibid, Lords Hobhouse, Phillips and Walker, reaffirming the traditional approach to mistakes as to identity, and the interpretation of written contracts as regards the identity of the parties to the contract. For the strongest statement, see Lord Hobhouse at [55]: ‘what matters is the principles of law. They are clear and sound and need no revision. To cast doubt upon them can only be a disservice to English law. Similarly, to attempt to use this appeal to advocate, on the basis of continental legal systems which are open to cogent criticism, the abandonment of the soundly based nemo dat quod non habet rule (statutorily adopted) would be not only improper but even more damaging.’

12 Typically, the tort of conversion which protects the person in actual possession or with the immediate right to possession of corporeal personal property against dealings with the property inconsistent with the claimant’s rights: M. A. Jones, A. M. Dudgale (eds), Clerk & Lindsell on Torts (London: Sweet & Maxwell, 20th edn, 2010), ch 17. English law has no rei vindicatio in relation to personal property.
possession of it? The answer hinges on the validity of the initial contract: if it was void, there was no title to transfer to the third party; if it was voidable, there was a voidable title to transfer which became indefeasible on the transfer to a third-party purchaser in good faith.

Another area which presents a difficulty, viewed in particular from the perspective of the common law, is the existence of precontractual duties, if they should be included in the Optional Instrument. In legal systems which recognise general duties of good faith (or some similar general normative standard) during the negotiations for a contract, the entry into the negotiations is sometimes already seen as the creation of a relationship which is governed by the law; and the protection given by the law to the relationship between the parties can grow as a result of such factors as the length of the negotiations, and the knowledge by one party of the expenses being incurred by the other party. The approach of the common law to precontractual negotiations is fundamentally different: the party to negotiations is generally free from liability, except where he has entered into contractual duties relating to the negotiations (eg a lock-out agreement or the grant of an option to contract) or has made a fraudulent or negligent misrepresentation which is sufficient to give rise to liability in tort. This represents a different approach to the question of who should bear the risk of the failure of negotiations, and is a conscious policy decision. It would perhaps be odd for a civil law jurisdiction not to include the rules governing the negotiations in its revised law of contract. But if the Optional Instrument were to include them, it would present not only a real practical difficulty in deciding whether the rules of the Optional Instrument were to apply where there is not yet a contract which chooses it.


14 Walford v Miles [1992] 2 AC 128, 138 (Lord Ackner: ‘Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms’).

15 Cf, in Germany, the introduction of precontractual liability in the revision of the BGB in the 2001 reform: BGB §311(2); and, in France, the proposals to introduce precontractual liability in recent reform projects, such as the Avant-projet de réforme du droit des obligations et du droit de la prescription (the ‘Avant-projet Catala’) (Paris: La documentation Française, 2006), art 1104, translated by J. Cartwright and S. Whittaker in J. Cartwright, S. Vogenauer and S. Whittaker (eds), Reforming the French Law of Obligations (Oxford: Hart Publishing, 2009), 633; see also the proposals in F. Terré (ed), Pour une réforme du droit des contrats (Paris: Dalloz, 2009), 14 (art 24) and 132-9.
(or is some other mechanism to be found for the parties to ‘opt in’ during the negotiations?)

but it would represent a fundamental shift in the responsibilities normally expected of parties negotiating under English law.

These examples highlight a general question which naturally arises in relation to any Optional Instrument of European contract law: the scope of the Instrument, and therefore the nature of the interface with national systems. Matters outside those covered by the Optional Instrument will be governed, as between the parties to a contract concluded under the terms of the Instrument, by whatever national law is dictated by the normal operation of the choice of law rules in private international law. Some matters of dispute between the parties may therefore be covered by the Instrument; others by national law. And there can be a clash of policies, or at least significant (and sometimes even subtle) complications, at the interface between the two sets of rules. It is critical to be clear about the scope of the Optional Instrument as well as to identify possible problems of the interface with national laws.

2 The Optional Instrument would provide parties ‘with an option between two regimes of domestic contract law’

Accepting a model of contract under an Optional Instrument which has a different scope of what constitutes a contract, or where the contract has a different effect from that which would be recognised under the domestic legal system, may result in significantly different outcomes from those which would obtain under the domestic law. This is also a key factor to bear in mind in relation to the scope of application of the instrument, and in particular if the Optional Instrument is to be applicable in

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16 This is not the place to discuss this in detail, but it should be noted that the Syntheses of the Meetings of the Expert Group show that the Group is working on this issue: see, eg, Third Meeting, 22-23 July 2010, para 3 (pre-contractual information duties to be placed before negotiations and formation); Fourth Meeting, 1-2 September 2010, section V (general information duty to be retained for B2B contracts), Fifth Meeting, 30 September-1 October 2010, section I (range of options how to deal with Rome II Regulation for choice of law relating to pre-contractual duties).

17 Including, in the case of consumers, mandatory consumer protection provisions of their own habitual residence, under Article 6 of the Rome I Regulation, even if those mandatory provisions are excluded in relation to the Optional Instrument itself: below, section II.4.

18 For a study group which is working on the interface between the (D)CFR and English and German law, see The Common Frame of Reference for European Contract Law – and its Interaction with English and German Law, http://cfr.iuscomp.org.
domestic contracts as well as in cross-border contracts.\textsuperscript{19} It is one thing for a general, international model of law to be devised to assist parties in cross-border transactions: the sacrifice of some rules and principles of one’s own legal system may be necessary in relation to international dealings under private international law. But to introduce into purely domestic transactions a different, second model of contract which will inevitably have a different scope and effect from the domestic model, is difficult to justify.

The Green Paper suggests that\textsuperscript{20}

‘in business-to-business contracts where the principle of freedom of contract is paramount, it may be unreasonable to deny the parties the possibility of choosing the European instrument in purely domestic transactions. 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.’

Again here we find language which suggests that choice is good, and that choice means a free choice. But the ‘choice’ is hardly a real choice in many business-to-business contracts, any more than in business-to-consumer contracts where one party in effect can dictate the core terms of the contract. The Green Paper itself recognises\textsuperscript{21} that ‘large companies with strong bargaining power can ensure that their contracts are subject to a particular national law’. So a large company with strong bargaining power could equally well ensure that it has the benefits, or avoids the disbenefits, of the Optional Instrument (depending on its own assessment of the relative merits of the Instrument as against domestic law).

The advantage of having ‘one single set of terms’, which would encourage businesses to engage in cross-border trade, must also be viewed cautiously. At a minimum, it means that business will have two sets of terms: one under their national law, the other under the Instrument. It is not realistic to think that all contracts, including all domestic contracts, will be entered into under the (single) terms of the Optional Instrument. The advantage is in having just two sets of terms, rather than one’s own

\textsuperscript{19} Green paper, para 4.2.2.
\textsuperscript{20} Green Paper, p 12.
\textsuperscript{21} Green Paper, p 7.
as well as terms under multiple different laws in dealing with parties in multiple overseas jurisdictions. Whether that is an attraction to the expansion of trade depends on whether it is rational to choose the particular terms contained in the final Optional Instrument.  

Moreover, where there is a difference between the rules of the Optional Instrument and the relevant domestic law, this may reflect a conscious difference of policy, and therefore the policy underlying the domestic law could be undermined by the ‘choice’ of the Optional Instrument. There are two separate points here. First, one might take the view that in the case of a genuine, free choice, the parties should be allowed to decide which policy to prefer: but even this raises a question about whether the parties should be free to reject the policy underlying the domestic law. Secondly, however, to base the preference of the policy of the Optional Instrument over the domestic policy on the parties’ choice opens the door to the stronger party imposing on the weaker party a departure from the domestic policy. But should there then be some mechanism for the courts to control such inequality of bargaining power? In English law, at least, this would require the introduction of a new and broader power for the courts to intervene in business-to-business contracts; and in any legal system there are at least theoretical difficulties, given that (under the model set out in the Green Paper) the Optional Instrument would have become a parallel set of rules within the domestic legal order. On what basis is it an unacceptable ‘choice’ for a party to make?

3 The Optional Instrument must be ‘sufficiently clear to the average user and provide legal certainty’

We are now coming to the crux of the problem. Who will be the ‘average user’ of the Optional Instrument? The Green Paper argues that the Instrument must be clear and certain to the ‘average user’, as ‘preconditions for building the confidence of the contracting parties in the instrument so that it would be chosen as the legal basis of

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22 Below, section III.
23 See also below, section II.4.
the contract in the first place”; and in particular consumers must be reassured that their rights will not be compromised.\textsuperscript{24}

The model presented here is therefore of a clear, accessible set of contract rules which the consumer, amongst others, will choose. Indeed, the Green Paper speaks expressly\textsuperscript{25} about the need for ‘clear information to allow consumers to understand their rights and thereby make an informed decision as to whether they want to conclude a contract on this alternative basis’. Really? The use of the language of ‘choice’ in consumer contracts is counter-intuitive. The consumer may be a party to a contract which is concluded on the basis of the Optional Instrument, but will the consumer really be ‘choosing’ it? The Green Paper does not make it clear, but unless the business is to be required by the Regulation introducing the Optional Instrument to offer a choice between the Optional Instrument and the otherwise-applicable national law (that is, between the ‘blue button’,\textsuperscript{26} and the ‘national law button’), in reality the consumer’s choice is only of a contract rather than no contract. That is, the advantage to cross-border trade is that a business in Country X may be willing to enter into a contract with a consumer in Country Y only because it can do so on the Optional Instrument terms, avoiding completely the risks of the contract law of Country Y.\textsuperscript{27} But what of the position of the consumer? If the choice between the two systems (the two ‘buttons’) were offered, how would the consumer choose? And, if it is just a take-it-or-leave-it blue button, how is the consumer in Country Y to know what he is giving up by choosing this contract with the supplier in Country X, rather than looking for another contract with a local supplier?

In all of this, as presented by the Green Paper, we are back to the reassuring argument that ‘choice is good’. However, what protects the consumer’s position in entering into a contract based on the Instrument is the level of (mandatory) consumer protection afforded by the Instrument. The Green Paper acknowledges this by stating expressly

\textsuperscript{24} Green Paper, p 9.
\textsuperscript{25} Green Paper, p 10.
\textsuperscript{27} Avoiding also its mandatory consumer protection rules, since Art 6 of the Rome I Regulation will not apply: below section II.4.
that ‘the optional instrument would need to offer a manifestly high level of consumer protection’. But if each legal system has an acceptable level of (mandatory) consumer protection built into its domestic law, that should be sufficient on this point for the consumer. That is, an argument in favour of an Optional Instrument based on the protection of the consumer, and the provision of choice for the consumer, is misplaced. Consumer protection needs to be effected in domestic legal systems as much as in the Optional Instrument—and that is the role of the proposed Directive on consumer rights. If agreement on that Directive can be reached, it must be on the basis of the appropriate agreed scope and degree of consumer protection; and it is difficult to see how one can justify a different scope and degree of consumer protection under a ‘new’ European law of contract to be effected through the Optional Instrument. Otherwise, how can a consumer possibly be in a position to take an informed decision on whether to contract under the Optional Instrument rather than any other law (whether his own law or the law of another Member State)? Adding in a new law of contract with different protections increases the confusion.

4 The Optional Instrument ‘would have to affect the application of the mandatory provisions’ of the domestic law, ‘including those on consumer protection’

Here the Green Paper includes an argument that does appear to open up the very confusion just mentioned. The system of contract law introduced by the Optional Instrument must be wholly independent of national laws. It must offer its own ‘manifestly high level of consumer protection’. But it will, in effect, operate as a complete harmonisation where the parties adopt the Optional Instrument: it will prevail over whatever rules of contract law would have applied had the parties contracted under a national legal system, even if the national law had its own stronger consumer protection provisions. In order to satisfy the requirement that the Optional

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29 The Green Paper itself recognises the difficulty of finding agreement on the appropriate scope and degree of consumer contract protection through the proposed Consumer Rights Directive: p 5.
30 To this extent, the Green Paper seems to assume that there will be no harmonisation of national laws on the basis of the Consumer Rights Directive—otherwise there would be no place for any argument based on any difference between the consumer protections offered by the Optional Instrument and those offered by national laws. But if no agreement on the appropriate mandatory protections for consumers can be reached within the negotiations for the Consumer Rights Directive, it is
Instrument insert a ‘self-standing set of contract law rules’ into all the national laws, rules of the national law(s) of the parties must be irrelevant. That is fine, one might say, because the parties will have chosen the alternative rules, and therefore the consumer will have chosen to adopt (if such should be the case) the lower level of consumer protection than the national law. And, of course, choice is good. But will the consumer (or, indeed, the non-consumer) have a clear picture of the significance of what he is giving up by ‘choosing’ the optional instrument? There can hardly be a pre-contractual information duty on the business to ensure that the consumer knows the scope of what is being given up: that defeats the whole market-oriented advantage set out in the Green Paper in allowing the business to offer the Optional Instrument without having to concern itself about the consumer’s local law. The normal position under Article 6 of the Rome I Regulation is that the consumer who agrees to enter into a contract under another law which provides a lower level of consumer protection cannot be deprived of the benefit of mandatory protective provisions of the law of his habitual residence. The Green Paper draws attention to the benefits of this provision, whilst then apparently going on to depart from it when discussing how the Optional Instrument would work.

The fact that the rules of the Optional Instrument would take effect even over mandatory provisions of national law is seen by the Commission as a bonus: it ‘would constitute the added value compared with the existing optional regimes, such as the Vienna Convention’. This must give each Member State pause for thought about whether it is prepared to allow a new contract law regime to override those rules (including, but not limited to, consumer protections) which it has deliberately chosen to make mandatory, and which it has been free (and continues to be free) within EU law to make mandatory, as a matter of national law.

unsatisfactory to seek to achieve a harmonised consumer protection regime using the Optional Instrument.


32 Green Paper, p 5.

33 Green Paper, p 10.
III The business context

It follows from what has been said above that the discussion in the Green Paper of the consumer protection dimension of the Optional Instrument is misplaced. Consumer protection is of course necessary. But the proper mechanism to effect it is not the Optional Instrument but the Consumer Rights Directive. First decide on the appropriate scope and degree of consumer contract protection. Then ensure that national laws comply with it. And, of course, the Optional Instrument (if that is the chosen instrument for a European Contract Law) must itself also similarly comply with it. But consumer protection is not of itself a justification for the adoption of a Regulation to give effect to the Optional Instrument. Indeed, it is largely a red herring, because if the proper protections for consumer contracts are in place across Member States, the adoption of the Optional Instrument is in that regard unnecessary, or at least neutral, because it adds nothing.

The value of the Optional Instrument should be tested against the case where it would have greatest significance: in business-to-business contracts where the parties meet on equal terms. That is where there is a real ‘choice’. The stakeholders whose voices should count most in this debate are those entering into business-to-business contracts, rather than consumers. Even putting on one side the fact that very many business-to-business contracts are not in themselves based on an equality of bargaining power, and therefore the ‘choice’ of contractual regime in this context is not necessarily the result of a fully autonomous will, we need to ask whether a new European regime of contract law contained in the Optional Instrument would be a rational choice for parties who do have a genuine and equal bargaining position. The answer will be yes if, but only if, the business sees an advantage in contracting under a set of rules which are different from its own national law. This requires the business to assess the risks involved. Set against the advantage of being able to enter into a contract that might not otherwise be available, and bearing in mind the possible impact on the price at which the contract can be negotiated in the light of the various risks, two issues, at least, are likely to be relevant: the (un)certainty of the law contained in the Optional Instrument, or its application; and the risks posed by the substantive rules contained in the Instrument.
1 Legal certainty

One question which will inevitably arise for the party offered the choice of an alternative set of contract law rules is the clarity of the rules, including the certainty of judicial interpretation of them. The need for legal certainty is emphasised in the Green Paper:34

‘an optional instrument could only constitute a sensible solution to the problems stemming from regulatory divergences if it is sufficiently clear to the average user and provides legal certainty’.

It also appears to be assumed that the absence of an instrument to resolve the differences between national contract laws is in itself a source of uncertainty thus providing an argument of principle in favour of the instrument:35

‘differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses’.

However, if contracting on the basis of another legal system’s contract law is a source of uncertainty, and therefore discourages contracting, one may wonder whether there will be much greater encouragement to adopt a new system, on which there will for a considerable period be little authority and therefore on which relatively little definitive advice will be available. This may be resolved in due course, as more evidence becomes available. But commercial parties, who have well-established ways of doing things, may well be reluctant to put themselves forward as (we would say) guinea-pigs for the adoption of new, untried contract terms.36 The English lawyer will remember how the Contracts (Rights of Third Parties) Act 1999, which was designed by the Law Commission to provide a simpler method of creating enforceable third-party rights, was met initially with a widespread reluctance of the commercial

34 Green Paper, p 9. See also at p 4 (‘An instrument of European Contract Law, if sufficiently user-friendly and legally certain, could also serve as a model, in particular to international organisations which have taken the Union as a model for regional integration’).

35 Green Paper, p 2. This may indeed be a reason against taking the risk of entering into a cross-border contract. But there may be very many others of equal or greater weight.

36 Cf the limited use made by businesses of the possibility of opting into existing soft law instruments such as the UNIDROIT Principles of International Commercial Contracts: S. Vogenauer, ‘Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?’ ERCL 2010, 143, 176.
community to use it. For example, the construction industry, one of the sectors for whose benefit the Law Commission claimed that it was reforming the law,³⁷ knew how its existing, complex contract forms achieved their objectives, and was not easily persuaded to abandon them in favour of the new, simpler statutory mechanism. For most commercial parties, contracting on their own well-established and well-known national law of contract will be the safest bet. A party will move to adopt another contract law only if there are real commercial advantages in it which outweigh the uncertainties. And it is not obvious where the balance of certainty lies as between the text of an Optional Instrument which is in one’s own language but with relatively little evidence of its likely interpretation, and another national law which may well be in another language and on which one has to take advice from a local lawyer. Moreover, given that contracting on the basis of the Optional Instrument is ‘all or nothing’ – a complete system of contract law – the parties need to understand the whole package of rules contained in the Instrument, as well as the points of interface with the law of the national system that would otherwise apply.

2 The substantive rules contained in the Optional Instrument

More important, though, is the question whether a party will be willing to accept the substantive rules of European contract law contained in the Optional Instrument in place of its own rules (or, indeed, in place of the rules of another national system). To a large extent, this will hinge on the final text of the Instrument, and the differences between it and the national law(s) in question, although we already know from the work of the Expert Group that it is likely to take the form of a revised version of the DCFR. From the perspective of English law, one might expect many commercial parties to take the view that the DCFR goes a step too far.³⁸ This is not the place for a detailed comparison between the common law approach to a contract, and the


approach taken by the DCFR, but some obvious pressure points include the court’s powers to adapt the contract in cases of mistake or unfair exploitation, or in response to changes of circumstances; the duty to negotiate in good faith, and other duties expressly based on a standard of good faith, such as in relation to performance and remedies; duties of disclosure; and the priority of a right to performance and to the remedying of defective performance by a party in breach. It may also present a problem to have a single set of open-textured standards applicable to both consumers and businesses. Even if their application may in practice be more limited in relation to the business-to-business contract, the fact that they are in principle available causes concern for the risk-averse business. However, this is not simply a question of the common lawyers’ reaction to the text of the Optional Instrument, but a question which the lawyer and the businessman in every system need to address: is it necessary to give up the certainty and security of one’s own law of contract? And is it acceptable, on balance, to adopt the contract law set out in the Optional Instrument in order to obtain the contract?—the balance being struck also as against adopting the other party’s national law.

40 DCFR, art II.-7:203.
41 DCFR, art II.-7:207.
42 DCFR, art III.-1:110 (to be retained by the Expert Group: Synthesis of the Sixth Meeting, 28-29 October 2010, p 2).
43 DCFR, art II.-3:301 (discussed by the Expert Group: Synthesis of the Fifth Meeting, 30 September – 1 October 2010, p 2); cf the discussion of the approach of English law to precontractual liability, above, section II.1.
44 Eg DCFR, art III.1.-103. It appears that the Expert Group will propose the inclusion of a general duty of good faith and fair dealing: Synthesis of the Second Meeting, 24 June 2010, pp 3-4; Fifth Meeting, 30 September – 1 October 2010, p 3.
46 DCFR, art III.-3:302.
47 Cf the hostile reaction of the business community to the suggestion of the Law Commission that the same general standards of judicial intervention in relation to unfair contract terms could be extended in English law to businesses and consumers, on the model of the Directive on Unfair Terms in Consumer Contracts, 93/13/EEC (OJ L95, 21.4.93, p 29). The Law Commission’s argument that the same test could be used, although its application would be different in the business-to-business context (Law Commission, Consultation Paper No 166, *Unfair Terms in Contracts* (London: T.S.O., 2002), paras 5.74-5.88) was rejected and in its final recommendations the Law Commission took a more modest approach, proposing that the consumer provisions be extended (with certain modifications) only to small businesses: Law Commission Report No 292, *Unfair Terms in Contracts* (London: T.S.O., 2005), para 2.24.