

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2013

Precontractual Disclosure Duties under the Common European Sales Law

Douglas G. Baird

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Douglas G. Baird, "Precontractual Disclosure Duties under the Common European Sales Law," 50 Common Market Law Review 297 (2013).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

PRECONTRACTUAL DISCLOSURE DUTIES UNDER THE COMMON EUROPEAN SALES LAW

DOUGLAS G. BAIRD*

1. Introduction

When two merchants meet and begin to bargain, they are better off if there is a sensible set of ground rules both understand. The rules ensure that the parties know exactly what they are getting out of the deal and what they are obliged to do. Difficulty can arise, however, in attempting to agree upon the background rules, especially when the area customs of each of the merchants differ. Indeed, the complications that accompany the setting up of ground rules is often enough to cause parties to abandon the bargain completely. It was because of this fact, and because of the differing rules between Member States, that the European Commission saw fit to propose a *Common European Sales Law*, with a goal of creating uniformity in the background rules of contract law.¹ The Commission's hope was that this uniformity and elimination of transaction costs would "improve the conditions for the establishment and the functioning of the internal market."²

Setting down sensible background rules is no easy task. Even rules that seem entirely sensible prove problematic on close examination. One of the new background rules in the CESL provides an illustration. Article 23 requires sellers to make plain the basic attributes of what they are selling.³ The seller of goods has a duty to disclose "any information concerning the main characteristics of the goods . . . which [she] has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party." Whether any particular information needs to be disclosed turns on all the circumstances and these include such things as the special expertise of the seller, the cost to the seller of acquiring the information, the nature of the information, its importance to the buyer, and good commercial practice.

On the face of it, such a rule seems sound. A seller typically knows the characteristics of the goods she is selling, this information is useful to the

* Harry A. Bigelow Distinguished Service Professor, University of Chicago Law School.

1. See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law ("Proposal"), COM(2011)635 final, p. 2.

2. Art. 1(1) CESL.

3. For an analysis of this rule, see De Boeck, "B2B information duties in the feasibility study: Analysis of Article 23", 6 *European Review of Private Law* (ERPL) (2011), 787–797.

buyer, and the seller can convey it at little cost. Most sellers would make such disclosures. Indeed, reluctance to convey such basic information seems suspect. With a disclosure rule in place, the buyer will know the main characteristics of what she is buying without having to play a game of twenty questions. This kind of disclosure rule increases transparency, decreases the risk of advantage-taking, and makes parties more disposed to trade with one another. And Article 23 is written in such a way that the duty exists only when the disclosure is mutually beneficial. When the seller does not have the information or the buyer does not need it or common intuitions about fairness do not compel it, there is no disclosure duty.

This disclosure rule, especially in the way that it works in conjunction with the merchant's duty to abide by norms of good faith and fair dealing, is entirely in the mainstream of the American commercial law tradition. The *Uniform Commercial Code* was a remarkably successful effort to unify the commercial law of fifty different jurisdictions. Its animating principle is that one can look to the practices of merchants committed to principles of fair dealing in the trade to establish the set of background rules that bind all merchants.⁴ Article 23 works in the same way. The objective of the European Commission in formulating the CESL was not necessarily to create a system of revolutionary new laws, but to create uniformity among Member States in order to remove transaction costs of cross-border trading.⁵ The disclosure obligations of Article 23 are coextensive with the kinds of disclosures made by merchants who conform to widely held norms. It is not unreasonable to expect those who want to be a part of a commercial community to behave in this fashion.

Or so runs an argument in favour of Article 23. It is, however, still prudent to give it a hard look. Article 23's disclosure obligation is new. Every legal rule brings new costs. No rule can be applied perfectly. All lawyers recognize that every legal rule imposes costs on innocent parties. Require a party to do *x*, and in some cases even a party who in fact does *x* (and who might have done *x* even in the absence of a legal rule) will be found liable for failing to do *x* some percentage of the time. One must weigh the benefits of any rule, including even an ostensibly sensible disclosure rule, against the costs that the come with it.

In the context of Article 23, the benefits of the rule may be smaller than they appear. Again, it is not the value of the disclosure itself, but rather the value that comes from *requiring* disclosure. Much disclosure takes place in all events. The benefits come only from the marginal disclosures the rule brings

4. See Danzig, "A comment on the jurisprudence of the Uniform Commercial Code", 27 *Stanford Law Review* (1975), 621–635, 624.

5. See Proposal, p. 2.

about. And we need to understand the costs that such a requirement imposes on everyone. We cannot assess the virtues of a rule without also knowing how easy it will be to comply with it. And disclosure of the attributes of a product is not as easy as revealing the combination to a safe. There is no ready benchmark by which to tell that the disclosure is sufficient.

One cannot understand what work a rule is doing without seeing how it works with the others around it. In the first part of this paper, I examine how Article 23 works within the framework of commercial law generally and the *Common European Sales Law* and commercial law more generally. In many other contexts, we are reluctant to impose disclosure duties because they distort the parties' incentives to gather information in the first place. The second part of the paper looks at what effects, if any, disclosing the main characteristics of a product has on the seller's behaviour. It is also commonly asserted that disclosure duties are, by their nature, inherently hard to implement. Requiring a party to disclose a particular piece of information in a fashion that ensures that it is understood (and does not make communication of other information harder) has proved difficult in many environments. The third part of the paper asks if Article 23's disclosure requirements present such difficulties.

2. The background

We should note at the outset that the domain over which Article 23 is likely to change behaviour is a narrow one. Sellers have strong incentives to describe the main characteristics of their products. Buyers want such information before deciding to buy, and a seller who refuses to provide it to a buyer will lose out to sellers who do. We should also expect disclosure even when the market is not competitive. Buyers are suspicious of any seller who is unduly coy about what she is selling. This uncertainty makes them more reluctant to buy or pay as much, even from a monopolist. Buyers who do not know what they are buying do not value goods as much as those that do. Even the monopolist who fails to disclose will sell for a lower price and gain nothing in return. It is not a question of imputing noble motives to anyone. Sellers who keep their buyers in the dark leave money on the table. We should not expect it to happen very often.

Most sellers adhere to norms of fair dealing in the trade, but the easiest way to understand how something like a disclosure requirement works is to impute bad motives to the seller. How exactly does a disclosure requirement constrain a seller who wants to take advantage of her buyers? Assume that some buyers do not know enough to ask the right questions or to discount for what they do

not know. How can a seller bent upon mischief profit by remaining silent? We cannot answer this question without first examining what opportunities for mischief other legal rules leave open.

The disclosure requirement may do remarkably little work even in a legal regime that does almost nothing for unsuspecting buyers. Consider the gap a disclosure requirement might fill in a regime of *caveat emptor*. Legal regimes that embraced *caveat emptor* have been outliers; we are speaking of only a few jurisdictions and then mostly in the nineteenth century, and in these, the application of *caveat emptor* was limited to middlemen and to a narrow range of transactions.⁶ Here, the buyer tended to possess as much expertise as the seller, the defects were visible, and the buyer was as well positioned to discover the defect as the seller. But even *caveat emptor* offers little comfort to those engaged in naked advantage-taking. The typical beneficiary was the innocent seller who believed (wrongly as it turned out) that the wood she sold was valuable braziletto wood rather than inferior peachum.⁷ It emphatically did not protect a seller who lied and said that the wood was braziletto when she knew the facts to be otherwise. I cannot say that my goods are of a particular grade when I know them to be of a lesser grade.

There is room to argue over what counts as a misrepresentation. In some environments, a seller can say that he promised his dying mother that he would not sell a jewel for less than \$20,000. To take a penny less would dishonour him and his mother's memory. He nevertheless accepts a counteroffer for \$17,500. It turns out that his mother, far from being dead, is in robust health and has never heard of the jewel. Nevertheless, if the conversation took place in a bazaar and was with another merchant there, it is quite possible that the merchant did not lie. A statement is only a lie if the other merchant believed him, and he did not. On the other hand, sometimes the prohibition against lying is triggered even when I say nothing. I may make a misrepresentation when I remain silent because new information has come to light that makes a previous representation that I made misleading unless it is corrected. Nevertheless, the basic requirement that the seller tell the truth limits a huge amount of mischief.

As long as the seller describes the goods in any fashion, either in the contract or in any negotiations leading up to it, the buyer can be confident that the seller believes what she is saying to be true. Disclaimers and fine print are ineffective when it comes to protecting the buyer from outright falsehoods and gross misbehaviour. If a seller sells me something she calls braziletto, I can be

6. Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (Chicago, 1988), pp. 269–298.

7. These are the facts of *Seixas v. Woods*, 2 Caines Rep. 202 (N.Y. 1804), the canonical *caveat emptor* case in American law.

confident that she at least believes it to be *braziletto*. If she tells me that the battery on the laptop has a six-hour life, she at least cannot believe it has only a four-hour life.

Of course, much advantage-taking is more subtle than deliberate misbehaviour. Moreover, it is easier to show that something is not true than it is to show that the seller did not know it was not true. For this reason, most commercial law regimes go considerably further than *caveat emptor*. Article 100 of the CESL requires a seller's goods to pass without objection in the trade.⁸ There is nothing particularly revolutionary in this rule. The *lex mercatoria* required merchants to warrant that the goods they made pass without objection in the trade under the contract description. This rule has been in place since at least the fourteenth century and has been a consistent feature of the law since then.⁹ *Caveat emptor*, even where it applied, left this rule in place for the vast majority of sellers. It did not relieve manufacturers from standing behind the goods they made.

In terms of ensuring that distant buyers are protected from advantage-taking by their sellers, the implied warranty and the obligation to tell the truth do much of the heavy lifting. When I sell you widgets, I am promising you that my widgets pass without objection in the trade as widgets. There is no need for a disclosure rule to prevent me from selling you substandard goods. You do not need to know the major characteristics of the goods to ensure that I am not taking gross advantage of you.

The Common European Sales Law also imposes an implied warranty of fitness for any purpose made known to the seller at the time of the conclusion of the contract.¹⁰ This rule gives the buyer no guarantee against surprises, but it limits the amount of advantage taking that can take place. As long as I warrant that my goods are suitable for the purposes you have made known to me, I am not in a position to sell you goods when I know that they will not work for you.

The interaction between voluntary disclosure and implied warranties further constrains the potential for advantage-taking. Any description that I make about what I am selling becomes a part of the bargain.¹¹ When I run an ad and announce that my products have particular characteristics, I am

8. See Art. 100 (b) CESL (requiring that the goods or digital content “be fit for the purposes for which goods or digital content of the same description would ordinarily be used”).

9. See generally Trakman, “The evolution of the law merchant: Our commercial heritage, part I: Ancient and medieval law merchant”, 12 *Journal of Maritime Law and Commerce* (1980), 1–24.

10. See Art. 100 (a) CESL.

11. See Art. 69 CESL (“Where the trader makes a statement before the contract is concluded . . . about the characteristics of what is to be supplied under the contract, the statement is incorporated as a term of the contract.”); Art. 100 CESL (“The

promising that my goods in fact possess those characteristics. In a regime in which descriptions become part of the basis of the bargain, my description of the goods also serves as a warranty. I sell a laptop computer. If I say nothing about the battery life, then buyers only receive a warranty that the computer has a battery that passes without objection in the trade. If I describe the battery life, then this description becomes a promise to which I am bound and my buyer will be able to hold me accountable if the battery life turns out to be different.

Furthermore, the failure to disclose information about the goods in question may already violate prohibitions of unfair competition provided by many European Union Member States. The Unfair Commercial Practices Directive prohibits both misleading actions and omissions to do with “the main characteristics of the product.”¹² It seems likely that this prohibition and its corresponding penalties will take care of many of the issues the CESL’s disclosure rule is attempting to address.

Under the Common European Sales Law and under most commercial law regimes, the background rules are such that the buyer has already implicitly asked “Do the goods you are selling me pass without objection in the trade and are they suitable for my purposes,” and the seller has told her that they do. To identify the work that the disclosure rule is doing, it is necessary to ask what room is left for mischief even if no further questions are asked. What room is there for me to take advantage of you when I am already obliged to sell you goods that pass without objection in the trade and are suitable for your purposes?

Even if we posit that a seller with impure motives has secrets, it is not obvious that the secrets the buyer cares about concern the characteristics of the goods being sold. There is no general duty to disclose information, but US common law jurisdictions in recent years have required disclosure when one party to the transaction knows that disclosure “would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.”¹³ To the extent that we can extrapolate much from the cases that are litigated under this rule, the evidence suggests that the sort of secrets that lead to advantage taking tend not to be about attributes of the product, but rather about the surrounding circumstances.

goods . . . must . . . possess the qualities and performance capabilities indicated in any precontractual statement which forms part of the contract terms by virtue of Article 69.”)

12. See Art. 6 (1) (b) and Art. 7 (4) (a) of Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices, O.J. 2005, L 149/22.

13. See *Restatement (Second) of Contracts* §161(b).

The owner of a building brings in a second contractor to repair the mistakes of a previous one and fails to disclose a number of defects that are not readily observable that will make the job much more costly than it first appears.¹⁴ I approach you to buy tobacco. I know that the War of 1812 is over and that the price of tobacco will rise and do not disclose this information to you.¹⁵ I have a storeroom by the ocean that I have converted to an amusement centre containing a number of different concessions with pinball machines and other devices that might or might not be legal. I sell my amusement centre to you knowing that the police plan to raid the establishment and close many parts of it down.¹⁶ I own a rubbish collection business and sell it to you knowing that there is a strong possibility that the city will let a contract for the rubbish collection and render the business superfluous.¹⁷

US Courts have reached different decisions in these cases, but for our purposes what is noteworthy is that none of the information that is being kept secret goes to the attributes of the goods. One of the parties is getting a bad bargain not because the goods themselves are bad or anything other than what they appear to be, but rather because the opportunity the contract makes possible is not as rosy as it seems. Sellers may have secrets about their goods, but in a world in which the goods must pass without objection in the trade and be suitable for the purposes for which the buyer intends them, those inclined to sharp practice are not likely to make much money by remaining silent about product attributes, at least not in comparison to other information that they possess.

The gap that Article 23's disclosure rule fills may be small, but this is not to say that it does not exist at all. To give one example, buyers may be left in the dark about a critical attribute of the goods when the sellers in a particular industry are jointly better off if a characteristic of their product remains a secret. None of them may have an incentive to disclose the information, even though buyers as a group would be better off if they did. Consider the following hypothetical. A new machine has come to market. Precisely because it uses cutting-edge technology, it can be kept running only ninety-five percent of the time. The rest of the time it is down for maintenance. The seller provides the maintenance, and the downtime is a necessary consequence of the new technology. Every buyer needs to trade off the advantages of the new technology against the greater difficulties of using it. The information is relevant for the buyer because if she possessed this information she might not

14. *Los Angeles Unified School Dist. v. Great American Ins. Co.*, 49 Cal.4th 739, 234 P.3d 490 (Cal. 2010).

15. *Laidlaw v. Organ*, 15 U.S. 178 (1817).

16. *Dyke v. Zaiser*, 80 Cal.App.2d 639, 182 P.2d 344 (Cal. App. 1947).

17. *Jappe v. Mandt*, 130 Cal. App.2d 426, 278 P.2d 940 (Cal. App. 1955).

invest in the new machine at all. She might continue to use her existing processes until the technology improved.

A disclosure duty may have traction in this case. The seller's silence about a characteristic of the machine is relevant to the buyer's decision to purchase. The machine is imperfect in the sense that it does not work 100 percent of the time, but it is not defective. Someone who sells such a machine has broken no implied warranty. The machines are as good as anyone else's and as reliable as it can be given the state of the technology. Notwithstanding the downtime, they pass without objection in the trade.

If the buyer asks about downtime, the seller is obliged to reveal it. But it may be that only sophisticated buyers ask. The imposition of this duty seems to level the playing field. And it is information that the forces of competition would not otherwise bring forward. Other manufacturers will not reveal it, as their machines suffer from the same problem.

Other products possess attributes about which some buyers may be ignorant and that the sellers have no interest in volunteering. I sell you ground beef or some other processed meat to which I have added lean finely textured beef ("LFTB"). The forces of competition may not be sufficient for it to be brought to your attention. Other sellers may also use LFTB and share my reticence. Those that do not use it may prefer to extol the virtues of their own goods rather than disparaging those of others. You would not have bought ground beef from me had you known that I have used this filler, but you did not and you did not know to ask.

The tougher the background rules are that govern the sale of goods and the more broadly one conceives the implied warranty of merchantability, the less need there is for disclosure. Some jurisdictions, such as Great Britain, prohibit the use of LFTB altogether. The more a jurisdiction regulates what can be sold, the less there will be that can take buyers by surprise. In an environment in which the bar for goods to pass without objection is low, the disclosure requirement has a larger role to play. The two legal rules are perhaps best seen as substitutes rather than as complements. In any event, a disclosure rule provides some benefits. Against whatever benefits do exist, however, one has to discover whether there are costs. One such cost is the possibility that the disclosure requirement will force the seller to reveal information that is sensibly kept secret.

3. Product characteristics and trade secrets

Most critiques of mandatory disclosure begin with the observation that disclosure obligations can distort the incentives of the seller to produce

information in the first place.¹⁸ It might seem that information about the major characteristics of a product one is selling is not likely to produce such problems. Indeed, much information about a product that I sell is of use only to someone who actually buys the product and tries to use it. To start my machine, two buttons need to be pressed in sequence, first the blue button and then the green one. I have no reason to withhold such information. It is of no use to anyone except a buyer of the machine, and the buyer has no particular need for it before she buys the machine and no value to her unless she buys it.

Nevertheless, there remains information about a product that a seller will be reluctant to disclose, and this information is especially likely to exist when the contract is between two merchants. Product characteristics may themselves be proprietary information. A seller of chemical supplies might test many different suppliers before finding one that meets the purity standards that its buyers demand. The seller then repackages these chemicals. The buyers are paying the seller a premium because of the effort the seller has expended in finding potential sources of supply and testing them. The seller loses the ability to recover this investment if she is forced to disclose the source of her chemicals when she sells them.

Information about one's sources is a standard example of what trade secret law vigorously protects.¹⁹ If we force a seller who is adept at finding great product sources to reveal them, we take away from her the incentive to find them in the first instance. Similarly, we do not require merchants who bargain with each other to reveal their reservation price. Mutually beneficial trade may itself depend on each party not being completely sure about what the other knows. Indeed, in the limit, when each party knows exactly what the other does, trade is impossible.²⁰

It would not seem that a sensible interpretation of the CESL would require such disclosures. Product sources may not count as "characteristics" of the product. Moreover, disclosing them is not consistent with "good commercial practice," but it should be pointed out that three of the benchmarks for assessing whether information about a product should be disclosed – the expertise of the seller, the importance of the information to the buyer, and the ability of the buyer to acquire it by other means – weigh in favour of disclosure, rather than against it.

More important is the question whether a court is well equipped to identify information that sellers should be able to keep close to their chest. Consider

18. See Kronman, "Mistake, disclosure, information and the law of contracts", 7 *Journal of Legal Studies* (1978), 1–34.

19. See, e.g., *Sigma Chemical Co. v. Harris*, 605 F. Supp. 1253 (E.D. Mo. 1985).

20. See Milgrom and Stokey, "Information, trade, and common knowledge", 26 *Journal of Economic Theory* (1982), 17–27.

for example, the question whether Apple should be required to disclose information about when a new product is going to be released. It is costless for it to reveal the information, and buyers cannot discover it from other sources. It is not hard to argue that a relevant characteristic of a product is whether it is about to become out-of-date or that its price is about to fall dramatically. But is requiring disclosure under such circumstances a good thing? Requiring such disclosure will, among other things, affect a manufacturer's incentives to introduce new products in ways that are complicated and not obvious.

In industries in which products are rapidly evolving, sellers may include features in their products that they do not want to reveal when they first sell them. I sell you a machine to which a new component can be added when I finish designing it. I do not want to announce my plans to introduce this component (and thereby reveal my plans to my competitors) until I have the component in hand. One of a machine's characteristics is that it is built to accommodate an additional component, and one can make an argument in favour of such disclosure. Some buyers will buy another, perhaps more expensive machine from me or someone else if they do not know about my plans for the product I am selling them.

My own economic incentives will keep me from engaging in too much of this. It is, after all, in my own interest to reveal to you all the things my product does and might do. (Your ability to add the component will make you more inclined to buy my machine in the first place. Hence, I have an incentive to disclose it to you.) But we do in fact see sellers offering products with characteristics they do not disclose under circumstance in which, if we do not completely understand what is going on, advantage-taking does not seem to be at work. The most obvious example is again from Apple. Apple does not disclose the basic attributes (such as even the type of chip it is using) for the iPad. And an iPhone or an iPad will sometimes include undisclosed hardware that the current generation of software does not exploit.

One can argue that disclosure requirements do not tread on this territory and that a sensible interpretation of Article 23 will read "main characteristics" narrowly. But the more narrowly these are read, the less they will matter. In asking whether concerns about proprietary information present a cost that needs to be taken into account, two concerns seems most telling. First, one needs to have some sense of how much proprietary information is embedded in "information concerning the main characteristics of the goods." Second, one needs to possess some intuition about a court's ability to identify such information. Courts that are unable to do this risk either imposing a large cost on sellers by requiring inappropriate disclosure or eviscerating the rule by preventing disclosure even when it is useful.

4. Understanding disclosures

The previous parts of this paper focused upon information that the seller, for good reasons or bad, did not wish to disclose to the buyer. In this part, I focus upon a different problem. Conveying information is inherently difficult. Merely transferring information can be done at almost no cost. But a disclosure obligation does no good unless the buyer for whom it is intended understands the facts she is given. A seller could send an email to prospective buyers attaching a huge text file that revealed all the characteristics of the goods, but it may be next to useless.

Recall Borges's *The Library of Babel*. The story centres on a library with an infinite number of books in an infinite number of identical rooms. The library contains every possible book, but almost all of the books are gibberish. Among these countless volumes are the works of Shakespeare and Cervantes, but without a catalogue, there is no way to find them. All the information one wants is in the library, but there is no way to use it. Disclosure obligations may do little more than create such a library. They are useless unless the seller is obliged to package the information in a way that makes it accessible.²¹

We have witnessed a proliferation of disclosure rules in the United States over the past half-century. These rules, in the main, have been a spectacular, albeit well-intentioned failure.²² Not only have they imposed substantial costs and given rise to misplaced liability, but they have rarely done much good. It turns out to be hard to make particular information salient, without making some other piece of important information less salient. Valuable information rarely has a discrete yes-no, on-off character that can be easily and readily conveyed. This is especially likely with respect to information about goods that already pass without objection in the trade and that are already suitable for whatever purposes the buyer has disclosed to the seller. What the buyer needs to know under such circumstances is not in plain sight.

We want the seller to package the information in such a way that it gives the buyer what she needs. This requires considerable sorting and editing. Doing this is costly. Moreover, disclosing one piece of information and giving it prominence necessarily means giving less prominence to something else or omitting it entirely. In practice, mandating disclosure may create a world in which the legal system rather than the forces of the market are determining what is disclosed. To justify disclosure requirements where it really matters,

21. See Craswell, "Taking information seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere", 92 *Virginia Law Review* (2006), 565–632.

22. See Ben-Shahar and Schneider, "The failure of mandated disclosure", 159 *University of Pennsylvania Law Review* (2011), 647–749.

one needs to show not only that the market is imperfect (which is easy), but also that it is less imperfect than a court (which is hard).

It may be comparatively easy for the seller to convey the information that her buyer wants. But this is not the information that we care about. If the buyer knows the information she needs, she can ask for it. It is only with respect to information for which the buyer does not know how to ask that a rule mandating disclosure matters.

It might seem that merchant buyers, as opposed to consumers, would be well equipped to sort through the information they are given and isolate what is of importance to them. What matters is that they possess the information, not the particular form it takes. But here one must return to the question of the problem that the disclosure obligation is solving. Sophisticated buyers do not need the rule to protect them. They know what information they need. Disclosure mandates are aimed at buyers who are less sophisticated. They do not know exactly what to ask for or what they will find relevant.

Tailoring the disclosure matters, precisely because the buyer being protected does not know what she does not know. To return to the example of lean finely textured beef, it is not obvious that a buyer would understand that the meat product they were buying contained LFTB even if this fact were listed along with any number of other product attributes. For it to register with buyers, it needs to stand out. Buyers would, for example, take note if the seller were required to disclose the existence of LFTB by its other name (“pink slime”). But a seller under a general disclosure mandate cannot easily tell what needs to be said nor how to say it.

Disclosure obligations are especially difficult in the environment in which the CESL is intended to operate. Disclosure is easiest when buyer and seller speak the same language. The word “chicken” means the same thing to both.²³ But the CESL is designed to work across jurisdictions. There is a greater likelihood that they do not share a common understanding of commercial conventions. Unless they share a common understanding of what words mean it is not easy to communicate even when everyone has the best of motives, and this legal rule is premised upon its ability to work effectively when some do not. Beef that includes LFTB still consists of nothing but beef. Some merchants might understand that a label that described the product as “one hundred percent beef” might include LFTB, but others might not. When and under what circumstances is a seller required to explain such things?

23. See *Frigalment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

Industry groups can also do work here.²⁴ They can establish conventions for a two-by-four piece of lumber.²⁵ But the disclosure requirement embedded in a commercial law cannot work in this fashion. It is based on a standard, rather than a rule. It obliges the seller to disclose, but, by its nature, it cannot prescribe the form of the disclosure. Its contours are set only when a judge applies it. It is hard for a seller and a buyer to speak a common language when none exists.

When a strong need for a common metric exists, regulation can provide it. Instead of merely requiring car manufacturers to disclose the fuel efficiency of their cars, we require them to express their fuel efficiency in a prescribed way. While we can debate whether the existing measure, which focuses on miles per gallon in the highway and the city, facilitates comparison shopping and enables the buyers to make intelligent decisions, this sort of mandatory disclosure at least has the virtue of being uniform across sellers. Moreover, when regulators design the rules, they can readily pick and choose among what attributes are disclosed. They do not have to fear legal liability if they omit something in the interest of making other information more salient.²⁶

5. Conclusion

None of this is to say that Article 23 is necessarily bad. In the vast majority of cases, it may be relatively toothless. It will induce relatively little additional disclosure, and the case in which it trips up a merchant who engages in an ordinary commercial practice is likely to arise only rarely. Precisely because Article 23 lacks hard contours, it may be hard to bring a case under it and show meaningful damages. Indeed, the effect of the rule may lie not in the value of the new information that is communicated as a result of the rule, but rather the legal consequences that attach to the marginal information that is disclosed.

The disclosure requirement works in conjunction with the rule that requires any description of the goods to serve as a warranty. In the absence of the disclosure rule, a seller can sell a laptop computer and remain silent about the battery. Buyers would be able to complain (and the seller would only be liable) if the battery failed to pass without objection in the trade. But if the battery-life

24. See, e.g., Bernstein, "Private commercial law in the cotton industry: Creating cooperation through rules, norms, and institutions", 99 *Michigan Law Review* (2001), 1724–1790.

25. The dimensions of a two-by-four are 1.5 in. by 3.5 in. These are set by the American Lumber Standard Committee. Its members are appointed by the Secretary of Commerce. See <www.alsc.org/geninfo_history_mod.htm> (last visited 24 Aug. 2012).

26. See "Proposed Label Designs for a Range of Vehicle Technologies", at <www.epa.gov/fueleconomy/label/420f10049.pdf> (last visited 24 Aug. 2012).

of a laptop is a main characteristic of the laptop, then the seller must disclose the battery life and be liable if it proves to be somewhat less.

The effect of the disclosure rule in this environment is to ensure that a product is bundled with a warranty with respect to its main characteristics. Article 23 then serves less as a rule that conveys information than as a mandatory warranty. The rule has traction not so much because the buyer cares about the information that I provide, but rather that, in the course of providing the information, I necessarily give a warranty at the same time. A disclosure rule has this effect regardless of whether the information is useful to the buyer or whether the buyer even notices it.

Requiring goods to be sold with broader warranties is not likely to prove especially costly, given the ability of the seller to qualify and hedge in their descriptions. But it suggests that the drafters might have started in a different place. Instead of linking warranties with disclosures and then mandating disclosures, one might have asked what information buyers were likely to need and how to shape legal rules in a way that best ensured that this information was conveyed. A regime that requires disclosure and makes the seller liable for anything disclosed may leave buyers not only worse off, but also with less information than a regime that did neither. Under a regime like that of the CESL, I may believe that my laptop's battery lasts for six hours, but I may be reluctant to say this, given that I shall be held liable if it turns out not to be true. I may say instead that it has a four-hour life (or at least a four-hour life) or add other qualifications that have the effect of limiting my liability. My buyer might be better served if I were free to say what I really thought.

Ironically, a regime of mandatory disclosure and attached warranties to representations might lead to less information and less useful information than a regime of *caveat emptor*. Buyers might be better off if their seller conveyed whatever information she wanted in whatever form as a result of market pressures rather than face a seller who transmitted information because of legal compulsion.

Upon reaching such a conclusion, it is a commonplace to observe that the trade-off depends upon empirical study. Less often observed, though nevertheless true, is that rarely will the results of any empirical study change anyone's mind. Most policymakers and academics begin their careers with strongly held views about how much the forces of the marketplace constrain the merchants who operate within it. These starting positions tend to shape decisively attitudes towards rules such as Article 23.