

Uniform Sales Law and Private International Law (summary)

Tetsuo MORISHITA

Professor, Sophia University Law School

The European Commission proposed the Regulation on a Common European Sales Law (CESL) in 2011, but CESL was withdrawn in 2015. By examining the experience of the European Union, I discussed the effectiveness and limitation of an optional uniform sales law and the rules of conflict of law on contracts as legal frameworks to facilitate cross-border sales transactions. In Europe, there have been various challenges to uniform sales laws, such as the Principles of European Contract Law and Draft Common Frame of Reference.

The Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Business (Green Paper) in 2010 analyzed the pros and cons of seven options to uniform Sales laws: 1) publication of the result of the Expert Group, 2) an official toolbox for the legislators, 3) commission recommendation on European Contract Law, 4) regulation setting up on optional instruments of European Contract Law, 5) directive on European Contract Law, 6) regulation establishing a European Contract Law and 7) regulation establishing a European Civil Law. CESL adopts this fourth option.

CESL was a uniform sales law which would be applied only when parties agree to “opt-in.” CESL would be applied by 2 steps of choices by parties: The 1st choice is to choose the country whose laws would be the laws governing the contract and the 2nd choice is to choose CESL as the law to be applied to the contract among national laws of that country. The 2nd choice is not a choice of a governing law in the sense of the private international law. CESL could be used for cross-border sales contracts or contracts for the supply of digital content in B2C or B2B (at least one party must be SME).

CESL contained mandatory rules on consumer protections. The Commission explained that Article 6(2) of the Rome Regulation would have no practical importance concerning CESL, because “the provisions of the Common European Sales Law of the country’s law chosen would be identical with the provisions of the Common European Sales Law of the consumer’s country.” However, such explanation by the Commission was criticized as “wrong” because the law that would be applied in the absence of a choice under Article 6(1) of Rome I Regulation would not be CESL but the local contract law of the consumer’s

country.

CESL set different opt-in rules for B2B and B2C. In B2B, implied choice and partial uses were allowed. On the other hand, in B2C, a choice is valid only if a consumer consents to the application of CESL by an explicit statement, and partial choices are not allowed. In addition, consumers should be provided a Standard Information Notice by traders before making their choice. Regarding the effectiveness of the Standard Information Notice, a survey showed that consumers typically spend only 6-7 seconds to read the notice, and there was a criticism that such a notice would not be an effective way to protect consumers.

A uniform opt-in law may fit the legislation purpose, that is, providing an additional option to parties without replacing existing laws. However, a uniform opt-in law has only a limited harmonization effect and may increase complexity. Also, structuring an opt-in mechanism is a difficult issue, as the rules on opt-in in CESL showed.

The EU Commission has stressed that differences between contract laws in member states are serious obstacles to cross-border transactions by consumers and SMEs. However, recent surveys show that not many traders consider that differences between contract laws have a large impact on cross-border transactions. The Commission said CESL would reduce transaction costs for traders. However, some commentators argued that CESL would increase the costs because traders would have to study new laws and amend their forms. The Commission also argued that CESL would provide high levels of consumer protection. However, some consumer groups opposed CESL because they considered that CESL might lower the level of consumer protection.

A new uniform law might increase the fragmentation of laws and the complexity of application of laws. For example, CESL would have added new issues to be solved: the relationship between CESL and CISG.

The current rules of private international law on contracts are not very complicated. Parties may choose a governing law and they may freely decide the content of their contracts by their agreement. It is true that conflict of law rules for consumer contracts is a bit complicated from the viewpoint of traders. However, consumers may rely on protections which are provided by mandatory laws of their habitual residence, and such current rules may be considered very clear from the viewpoint of consumers. Considering various difficulties in opt-in uniform contract laws, it seems to be a better choice to maintain the current private international law framework.