Some private international law issues of court-approved collective settlements

Koji Takahashi (Doshisha University)

Professor Inchausti notes that the Directive leaves the issues of private international law to the existing EU instruments, while observing that those issues are not adequately resolved by them. In this comment, I would like to underscore some of such inadequacies, focusing on settlement agreements. For collective actions typically end in a settlement, usually with the approval of a court.

A settlement agreement is a contract. The formation of a settlement agreement as a contract is subject to the governing law of the agreement. Thus, where the parties' consent is vitiated by mistake or undue influence, that legal system will determine whether the settlement is invalid. The contractual effects of a settlement agreement are also determined by the governing law of the agreement. Accordingly, a settlement agreement is binding on third parties to the extent the exceptions to the principle of privity of contract are accepted.

Where a settlement agreement is approved by a court, its procedural effects are determined by the *lex fori* (law of the forum). The procedural effects may be more extensive than the contractual effects. Thus, a court-approved settlement agreement may have res judicata effect and may be binding on a wider range of interested persons than those who are bound by it under contractual principles.

The procedural effects which a judicial settlement has under the law of the State of origin is, however, not recognised in other States. Thus, the Brussels Ia Regulation and the Hague Judgments Convention and the Hague Choice of Court Convention provide for cross-border *enforcement* of judicial settlements (Article 59 of the Regulation, Article 11 of the Judgments Convention and Article 12 of the Choice of Court Convention) but none of them provide for cross-border *recognition*. It is true that the silence of these instruments on recognition does not preclude the recognition of contractual effects. A judicial settlement may be adduced as evidence like any other contract and invoked as a contractual defence to a contradicting claim. The procedural effects of a judicial settlement may not, however, be invoked as a defence to a contradicting claim in another State.

In the case of an ordinary settlement, it will usually be sufficient if the agreement is binding on the immediate parties and their successors in accordance with contractual principles. In the case of a collective settlement, however, the contractual effects would not be sufficiently extensive. The latter is submitted to a court for approval with the specific aim of making the agreement binding on potential claimants. Only the procedural rules of the *lex fori* may grant preclusive effects covering all such persons.

Suppose that a collective settlement agreement is concluded under which the party alleged to be responsible agrees to pay a sum of money to a defined group of potential claimants and the settlement is submitted to the court of one State and approved. Suppose further that one of the potential claimants in the defined group nevertheless brings a new action in another State seeking payment on the same cause of action. The omission of reference to 'recognition' in the Brussels Ia Regulation and the Hague Conventions means that the allegedly responsible party cannot rely on these instruments to invoke the settlement in defence of the action.

The omission of 'recognition' in the current text could not be rectified by interpretation. Given the particular importance of recognition for collective settlements, some legislative action may be called for. By either amending the existing text or creating

a new instrument, the legislators may provide for the cross-border recognition of judicial settlements, although in the course of drafting, they will face some difficult issues such as how the indirect jurisdiction of the court approving settlements should be reviewed.