Fulli-Lemaire on the private international law aspects of the PIP breast implants scandal

In a recent article, Samuel Fulli-Lemaire, a Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg and a PhD candidate in Private International Family Law at the Paris II – Panthéon-Assas University, examined the private international law aspects of the PIP breast implants scandal.

The article, in French, appeared under the title *Affaire PIP: quelques réflexions sur les aspects de droit international privé* in the first issue for 2015 of the *Revue internationale de droit économique*, together with other papers concerning the PIP case.

Here's an abstract of the article, provided by the author.

It is now common knowledge that the PIP company, domiciled in France, fraudulently mixed industrial-grade and medical-grade silicone gels to make its breast implants. The victims, women who have received the defective implants and have subsequently developed medical conditions, or who wish to have the implants removed or replaced as a precaution, can claim damages from a variety of actors. Because the victims, the clinics where the operations were performed, and the companies that were part of the supply chain, as well as their insurers, are domiciled in states spread all over the world, this case raises innumerable private international law issues.

This paper focuses on some of these issues, specifically those related to the tort actions which the victims can bring against the manufacturer, its executives, its insurer, and the notified body, which is the entity that was tasked with ensuring that PIP complied with its obligations under the European Union legal framework for medical products. In each case, both international jurisdiction and applicable law will be addressed.

To that end, some technical questions have to be answered first, for instance determining the place where the damage is sustained following the insertion of a

potentially defective implant, or to what extent criminal courts can be expected to apply private international rules.

But on a more fundamental level, the PIP case highlights some of the shortcomings of the product liability regime in the single market. To take just one striking example, a French judge ruling on a claim against the manufacturer would apply the rules of the 1973 Hague Convention on the law applicable to products liability, while a German judge would apply the specific provision for product liability of the Rome II Regulation, a discrepancy which might ultimately result in the two claims being subject to different laws. Even though this particular field of the law has been harmonized by the 1985 Product Liability Directive, significant differences remain between the legislations of Member States, and these could have a decisive influence on the outcome of the cases.

This is just one factor that parties should take into account when deciding before which court to start proceedings, and it is likely that the significant forum shopping opportunities afforded to the victims by the Brussels I Regulation will be put to good use by the best-informed among them.

This state of affairs might legitimately be regarded as a lesser evil, since what is ultimately at stake is the compensation of victims of actual or possible bodily harm brought about by the fraudulent behaviour of a manufacturer. But the unequal treatment of victims, particularly depending on their domicile, cannot be regarded as satisfactory, any more than the considerable risk that contradictory or incoherent decisions will be rendered by the courts of different Member States, as some lower courts in Germany and France have already done.

The development of class actions, as introduced recently in French law, albeit in a very limited way, could help suppress or mitigate these difficulties, but accommodating these mechanisms within the framework of European private international law will create additional challenges.