The ECJ on the notions of “damage” and “indirect consequences of the tort or delict” for the purposes of the Rome II Regulation

In *Florin Lazar*, a judgment rendered on 10 December 2015 (C-350/14), the ECJ clarified the interpretation of Article 4(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).

Pursuant to this provision, the law applicable to a non-contractual obligation arising out of a tort is “the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur”.

The case concerned a traffic accident occurred in Italy, which resulted in the death of a woman. Some close relatives of the victim, not directly involved in the crash, had brought proceedings in Italy seeking reparation of pecuniary and non-pecuniary losses personally suffered by them as a consequence of the death of the woman, ie the moral suffering for the loss of a loved person and the loss of a source of maintenance. Among the claimants, all of them of Romanian nationality, some were habitually resident in Italy, others in Romania.

In these circumstances, the issue arose of whether, in order to determine the applicable law under the Rome II Regulation, one should look at the damage claimed by the relatives in their own right (possibly to be localised in Romania) or only at the damage suffered by the woman as the immediate victim of the accident. Put otherwise, whether the prejudice for which the claimants were seeking reparation could be characterised as a “direct damage” within the meaning of Article 4(1), or rather as an “indirect consequence” of the event, with no bearing on the identification of the applicable law.

In its judgment, the Court held that the damage related to the death of a person

in an accident which took place in the Member State of the court seised and sustained by the close relatives of that person who reside in another Member State must be classified as "indirect consequences" of that accident, within the meaning of Article 4(1).

To reach this conclusion, the ECJ began by observing that, according to Article 2 of the Rome II Regulation, "damage shall cover any consequence arising out of tort/delict". The Court added that, as stated in Recital 16, the uniform conflict-of-laws provisions laid down in the Regulation purport to "enhance the foreseeability of court decisions" and to "ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage", and that "a connection with the country where the *direct* damage occurred … strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage".

The Court also noted that Recital 17 of the Regulation makes clear that "in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively".

It follows that, where it is possible to identify the occurrence of direct damage, the place where the *direct* damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of the tort. In the case of a road traffic accident, the damage is constituted by the injuries suffered by the direct victim, while the damage sustained by the close relatives of the latter must be regarded as indirect consequences of the accident.

In the Court's view, this interpretation is confirmed by Article 15(f) of the Regulation which confers on the applicable law the task of determining which are the persons entitled to claim damages, including, as the case may be, the close relatives of the victim.

Having regard to the *travaux préparatoires* of the Regulation, the ECJ asserted that the law specified by the provisions of the Regulation also determines the persons entitled to compensation for damage they have sustained personally. That concept covers, in particular, whether a person other than the direct victim may obtain compensation "by ricochet", following damage sustained by the victim. That damage may be psychological, for example, the suffering

caused by the death of a close relative, or financial, sustained for example by the children or spouse of a deceased person.

This reading, the Court added, contributes to the objective set out in Recital 16 to ensure the foreseeability of the applicable law, while avoiding the risk that the tort or delict is broken up in to several elements, each subject to a different law according to the places where the persons other than the direct victim have sustained a damage.

Commission presents new proposals for fully harmonised directives on e-commerce

As already announced in its Digital Single Market Strategy adopted on 6 May 2015, the Commission has, on 9 December 2015, finally presented a legislative initiative on harmonised rules for the supply of digital content and online sales of goods. The Commission explains: "This initiative is composed of (i) a proposal on certain aspects concerning contracts for the supply of digital content (COM(2015)634 final), and (ii) a proposal on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015)635 final). These two proposals draw on the experience acquired during the negotiations for a Regulation on a Common European Sales Law. In particular, they no longer follow the approach of an optional regime and a comprehensive set of rules. Instead, the proposals contain a targeted and focused set of fully harmonised rules" (COM(2015)634, p. 1). From the perspective of legal policy, this change of approach can only be applauded (see already in this sense *von Hein*, Festschrift Martiny [2014], p. 365, 389: "Die beste Lösung dürfte aber eine effektive Harmonisierung des europäischen Verbraucherrechts auf einem verbindlichen Niveau darstellen, das optionale Sonderregelungen für den internationalen Handel überflüssig machen würde.") According to the Commission, "[t]he proposals also build on a number of amendments adopted by the European

Parliament in first reading concerning the proposal for a Regulation on the Common European Sales Law, in particular the restriction of the scope to online and other distance sales of goods and the extension of the scope to certain digital content which is provided against another counter-performance than money" (COM(2015)634, p. 1).

On the relationship between the new directive on certain aspects concerning contracts for the online and other distance sales of goods and the existing Brussels I*bis* and Rome I Regulations, the Commission elaborates (COM(2015)635, p. 4):

"The proposal is compatible with the existing EU rules on applicable law and jurisdiction in the Digital Single Market. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), which provide rules to determine the competent jurisdiction and applicable law, apply also in the digital environment. These instruments have been adopted quite recently and the implications of the internet were considered closely in the legislative process. Some rules take specific account of internet transactions, in particular those on consumer contracts. These rules aim at protecting consumers inter alia in the Digital Single Market by giving them the benefit of the non-derogable rules of the Member State in which they are habitually resident. Since the current proposal on the online and other distance sales of goods aims at harmonising the key mandatory provisions for the consumer protection, traders will no longer face such wide disparities across the 28 different legal regimes. Together with the proposed new contract rules for online and other distance sales of goods as set out in this proposal, the existing rules on private international law establish a clear legal framework for buying and selling in a European digital market, which takes into account both consumers' and businesses' interests. Therefore, this legislative proposal does not require any changes to the current framework of EU private international law, including to Regulation (EC) No 593/2008 (Rome I)."

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.

U.S. Federal Judicial Center Publication on “Discovery in International Civil Litigation”

The Federal Judicial Center (FJC) has just published the most recent item in their series on international litigation. The text, entitled “Discovery in International Civil Litigation: A Guide for Judges,” was written by Timothy Harkness, Rahim Moloo, Patrick Oh and Charline Yim. The guide joins a variety of other titles, including those on mutual legal assistance treaties (T. Markus Funk), the Foreign Sovereign Immunities Act (David Stewart), international commercial arbitration (S.I. Strong), recognition and enforcement of foreign judgments (Ron Brand), and international extradition (Ronald Hedges).

The new text can be downloaded from the FJC website here. The other texts are also available for download at fjc.gov. If you would like a free copy of the new discovery guide or any of the judicial guides on international law, just contact the FJC.

Conference From common rules to best practices in European Civil Procedure

As was announced earlier on this blog, on 25 and 26 February 2016 a conference will be held at Erasmus University Rotterdam (Netherlands) on the theme **From common rules to best practices in European Civil Procedure**, jointly organized by Erasmus School of Law and the Max Planck Institute in Luxembourg.

The conference brings together distinguished academics, practitioners,

legislators, and policy makers, discussing in panels the need for common rules to facilitate judicial cooperation and mutual trust, procedural innovation and e-justice in the EU, alternative dispute resolution, and best practices on the operationalization of judicial cooperation.

The program and more information is available here and you are cordially invited to register.

The Council of the EU to adopt a political agreement on the regulations on matrimonial property regimes and the property consequences of registered partnerships

The Council of the European Union is expected to adopt at its next meeting on Justice and Home Affairs, scheduled to take place on 3 and 4 December 2015, a political agreement on the compromise text of the future regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (see here, however, for a corrigendum), and the compromise text of the future regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

The initiative comes one year after the Council had observed that “some member states needed more time to complete their internal reflection process” on the two Commission proposals of 2011 and decided to “re-examine this matter as soon as

possible, and by no later than the end of 2015”.

Peter Hay: Selected Essays on Comparative Law and Conflict of Laws

Although it is hard to believe given his prolific writing and his remarkable fitness, American-German conflicts giant Professor Dr. Dr. h.c. mult. *Peter Hay* has actually celebrated his eightieth birthday on 17 September this year in Berlin. On this occasion, he has been honoured by a publication of *Selected Essays on Comparative Law and Conflict of Laws*, edited by *Hans-Eric Rasmussen-Bonne* and *Manana Khachidze*. For further information, click here. This volume is a collection of articles, case notes and book reviews authored by Professor *Hay*, both in English and in German. The contributions cover the whole range of his academic interests, mainly private international law, comparative law and international civil procedure. Taken together, they provide a fascinating view of the development of private international law and comparative law in recent decades, from the U.S. conflicts revolution in the 1960’s to the Europeanization of conflict of laws since the Treaty of Amsterdam. This book is a testimony to a truly impressive lifetime achievement, and it is to be hoped that many more contributions will be added in the future. *Ad multos annos!*

Notice from Member States – Update of Information on the Brussels I Recast

First update of the information referring to Article 76 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to be found here (OJ C 390/10, 24.11.2015).

International Seminar on Private International Law, Madrid 2016. Call for Papers

The 10th edition of the International Seminar on Private International Law, organized by Prof. Fernández Rozas and Prof. de Miguel Asensio will be held next 14 and 15 April 2016, at the Faculty of Law of the Universidad Complutense of Madrid .

At the sitting of Thursday 14 special attention will be paid to the recent reforms of Spanish private international law; the latest developments towards codification of private international law in Latin America will also be addressed . The following sessions, on Friday, will focus on the development of private international law in Europe and within international commercial arbitration.

As in previous editions the main lectures of the seminar will be in charge of well-known scholars, including Jürgen Basedow (Max Planck Institute Hamburg), Roberto Baratta (University of Macerata), Bertrand Ancel (Paris II), Christian Heinze (University of Hannover) and Sebastien Mancieaux (University of Dijon). Nonetheless, the seminar is open to all scholars, either Spanish or foreigners,

willing to participate with brief presentations. In this regard proposals including both the title and a brief summary are to be sent no later than December 15 to Prof. Angel Espiniella Menéndez (espiniell@gmail.com). The final written version of the presentations, not exceeding 25 pages, is to be submitted before April 1, 2016. Subject to prior peer-review they will be published in the *Anuario Español de Derecho Internacional Privado,* vol. XVI.

The registration deadline to attend the seminar, as well as the programme and further information will be announced in due time.

The recast EU Regulation on insolvency proceedings: an invitation to join the on-line debate at the Italian Society of International Law

SIDIBlog – the blog of the *Italian Society of International Law and European Union Law* – has issued a call for contributions to an on-line debate on EU Regulation No 848/2015 on insolvency proceedings (recast).

> [From the blog] – *The EU Regulation No 848/2015 of the European Parliament and of the Council of 20 May 2015 brings about the revision of the EC Regulation No 1346/2000 in matters of insolvency proceedings: while not departing from the structure of the pre-existing Regulation, the new instrument aims at improving the application of uniform rules under several aspects. With the following post of Professor Stefania Bariatti, and other ones that will be published in the coming weeks, the SIDIBlog intends to start a debate on the novelties contained in the new Insolvency Regulation, trusting*

to host further contributions of Italian and foreign scholars and practitioners, willing to discuss the issues raised by the new instrument. Prospective contributors can submit their posts at sidiblog2013@gmail.com.

Contributions may be submitted in English, French, Spanish or Italian. The papers received will appear in the next issue of the on-line journal *Quaderni di SIDIBlog*.