Jurisdiction in Actions for Damages Against Private-law Companies Acting on Behalf of and upon Delegation from a Third State

Judgment of the Court (First Chamber) of 7 May 2020, C-641/18, LG and Others v Rina SpA and Ente Registro Italiano Navale[1]

Article 1 (1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for damages, brought against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third State, falls within the concept of 'civil and commercial matters', within the meaning of that provision, and, therefore, within the scope of that regulation, provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law, which it is for the referring court to determine. The principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law.

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Commentary

Introduction

This paper deals with determining jurisdiction in actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of

[1] ECLI:EU:C:2020:349.

and upon delegation from a third state. The inspiration to take up this topic was the judgment of the Court of Justice in the case C-641/18 LG v Rina SpA, the conclusion of which is merited and deserves approval. In the judgment under analysis, the Court of Justice has interpreted Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[2] The judgment was issued after consulting the Advocate General.[3] The need to seek the opinion of the Advocate General demonstrates the importance of the issue under consideration. The Court of Justice confirmed previous case law on activities related to the exercise of public powers and on the exclusion of such activities from the scope of application of the regulation.[4] Simultaneously, it should be emphasized that in the present case, the novelty lies in the fact that a private-law entity carried out activities in the field of ship classification and certification on behalf of and under the authority of a third state. Therefore, the subjective point of reference differentiates the case under consideration from cases settled previously by the Court of Justice. The purpose of the analysis is to determine whether an action for damages brought against private-law bodies in respect of classification and certification activities carried out by those bodies as delegates of a third state, on behalf of that state and in its interests, falls within the concept of "civil and commercial matters" within the meaning of Article 1(1) of Regulation No 44/2001 or not. For this reason, the activities of ship classification and certification corporations as *acta iure imperii* or *acta iure gestionis* deserves analysis. The tort liability of private-law societies engaged in the classification and certification of ships can be treated as an element of the enforcement of maritime law.

In contrast, the issue of the immunity of states from jurisdiction as a customary principle of international law will be raised only marginally, as it is not decisive for the problem at issue, even if it has caused the referring court to entertain doubts about the scope of Regulation No 44/2001.

It is worth mentioning that the ruling is also valid with regard to Article 1(1) of 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,[5] which replaced above-mentioned Regulation No 44/2001. For clarification, Regulation No. 1215/2012 is a recast version of Regulation No. 44/2001, and the scope of application of the new regulation has not changed in relation to the scope of application of the previous regulation. However, contrary to Article 1(1) of Regulation No 44/2001, which does not list the activities performed *iure imperii*, the second sentence of Article 1(1) of Regulation No 1215/2012 expressly states that it does not apply, *inter alia*, to "the liability of the State for acts and

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[2] OJ L 12, 16.1.2001, pp. 1–23.

[3] Opinion of Advocate General Szpunar delivered on 14 January 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18, ECLI:EU:C:2020:3.

[4] On that case-law see: A. Stadler, *EuGVVO nF Art. 1* [in:] H.-J. Musielak, W. Voigt, *Zivilprozessordnung (ZPO)*, 17. Auflage, München 2020, para 2.

[5] OJ L 351, 20.12.2012, pp. 1–32.

omissions in the exercise of State authority (*acta iure imperii*)." This supplementation included the existing jurisprudence of the Court of Justice for the sake of clarity; therefore the provisions of Article 1(1) of both regulations may be regarded as equivalent.[6] For this reason, the comments contained in this publication apply equally to both the above-mentioned regulations.

1. The facts of the case, preliminary questions and the judgment

The case under analysis was based on the following facts. A ferry sailing under the flag of the Republic of Panama (Al Salam Boccaccio '98) sank on the Red Sea in 2006 and caused the loss of more than a thousand lives. Relatives of the victims, along with survivors of the sinking of the ship (the applicants), brought an action before the Tribunale di Genova (District Court, Genoa, Italy) against the companies Rina SpA and Ente Registro Italiano Navale (the defendants), because these companies were domiciled in Italy (the forum state). The applicants argued that the defendants' certification and classification activities, the decisions they took and the instructions they gave, were to blame for the ship's lack of stability and its lack of safety at sea, which were the causes of its sinking. Therefore, the applicants claimed compensation for the pecuniary and non-pecuniary loss sustained as a result of the ship's sinking. On the one hand, the defendants contested the applicants' claims and pleaded the immunity of states from jurisdiction. They stated that they were being sued in respect of activities which they carried out as delegates of a foreign sovereign state (the Republic of Panama). On the other hand, the applicants argued that Italian courts have jurisdiction pursuant to Article 2(1) of Regulation No 44/2001.[7]

The Tribunale di Genova (District Court, Genoa, Italy) decided to stay the proceedings and to refer the following question to the Court:

"Are Articles 1(1) and 2(1) of Regulation [No 44/2001] to be interpreted – including in the light of Article 47 of the [Charter], Article 6(1) [of the] ECHR and recital 16 of Directive [2009/15] – as preventing a court of a Member State, in an action in tort, delict or quasi-delict in which compensation is sought for death and personal injury caused by the sinking of a passenger ferry, from holding that it has no jurisdiction and from recognising the jurisdictional immunity of private entities and legal persons established in that Member State which carry out classification and/or certification activities in so far as they carry out those activities on behalf of a non-EU State?"[8]

The Court ruled that: "Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments

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[6] Compare the Opinion of Advocate General in case C-641/18, para 56.

[7] Judgment of the Court of Justice of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18, paragraphs 14–20; Opinion of Advocate General in case C-641/18, paragraphs 13–18.

[8] Judgment of the Court of Justice of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18, para 20.

in civil and commercial matters must be interpreted as meaning that an action for damages, brought against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third State, falls within the concept of 'civil and commercial matters', within the meaning of that provision, and, therefore, within the scope of that regulation, provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law, which it is for the referring court to determine. The principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law."[9]

2. Assessment of the Court of Justice's ruling

The judgment discussed here opens the way to actions against private legal persons carrying out activities in the field of classification and certification of ships on behalf and under the authority of a third country, within the scope of Regulation No 44/2001, provided that such activity is not carried out under the prerogatives of the state authority and, therefore, has the nature of *acta iure gestionis*. In principle, the position of the Court of Justice deserves approval. One of the arguments against classification societies' liability to third parties is that this would change a well-balanced system of liability in shipping that has evolved from practice, by allowing claimants to side-step the limitation of liability available to ship owners, through direct, and unlimited, claims in tort against classification societies.[10] This argument does not deserve approval, and in this context the judgment under analysis serves to increase the effectiveness of the system of liability of classification societies. Moreover, the judgement under discussion shows that a balance between EU private international law and public international law has to be struck on a case-by-case basis.[11]

On the one hand, a body that has carried out acts that are covered by the concept of "civil and commercial matters" in so far as its contractual partner is concerned should not be able to escape the jurisdiction of the civil courts in actions for damages brought by third parties in connection with those same acts. On the other hand, the Court has not ruled on whether this kind of acts make part of the acts carried out *iure gestionis* and has left that question to the assessment of the national court. It is worth mentioning that the Advocate General recognized such activity as performed *iure*

[9] Operative part of the judgment of the Court of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18.

[10] P. Bäckdén, *Will Himalaya Bring Class Down from Mount Olympus? – Impact of the Rotterdam Rules*, "Journal of Maritime Law & Commerce" 2011, Vol. 42, No. 1, p. 115 *et seq.*

[11] K. Pacuła, *Relationship between public international law and Brussels Convention and Brussels I/Ibis Regulation: Scope of application and international jurisdiction in ECJ case law*, "Zeitschrift für Europäisches Privatrecht (ZEuP)" 2023, p. 435 *et seq.*

gestionis,[12] but the Court did not share the Advocate General's position on this point, although it was convincing and well-established. The Advocate General concluded that Article 1(1) of Regulation No 44/2001 was to be interpreted as meaning that an action for damages brought against private-law bodies in respect of classification and certification activities carried out by those bodies as delegates of a third state, on behalf of that state and in its interests, *a priori*, falls within the concept of "civil and commercial matters" within the meaning of that provision.[13] Finally, the Court of Justice ruled that such an action for damages fell within the concept of "civil and commercial matters," provided that that classification and certification activity was not exercised under public powers, within the meaning of EU law; it was for the referring national court to determine this issue.[14]

There are many arguments in favour of considering the activities of certification societies as *acta iure gestionis* and therefore as falling within the scope of application of Regulation No 44/2001 as a "civil and commercial matter." Firstly, it should be noted that the state can carry out its tasks by acting not only in the sphere of *imperium*, but also in the sphere of *dominium*. This rule also applies to the certification at stake which is connected with the performance of obligations of states arising from international conventions on maritime safety and the prevention of marine pollution, such as United Nations Convention on the Law of the Sea (UNCLOS)[15] and the International Convention for the Safety of Life at Sea (SOLAS).[16] The fact that a private-law body carries out acts in the performance of a state's international obligations in the area of maritime safety and the prevention of marine pollution has no bearing on whether or not those acts are performed in the exercise of public powers. The competences of a given classification and certification body may result from delegating relevant competences based on an appropriate public law act within the framework of the applicable legislation. However, it is also possible to entrust such activities to external entities of a private-law nature on the basis of civil law contracts as it is obvious that the state may be a party to civil law contracts, or more broadly speaking, the subject of civil law relations in general. Whatever the source of the classification and certification bodies' competences, and whoever the individuals for whose protection these activities are performed, it is the use of public authority prerogatives in taking these measures that is decisive for the application of Regulation No 44/2001. As a rule, the recourse to public powers in the performance of any activities excludes the application of

[12] Compare the Opinion of the Advocate General in case C-641/18, paragraphs 98, 127.

[13] The Opinion of the Advocate General in case C-641/18, paragraphs 1, 155.

[14] The operative part of the judgment of the Court of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale. Case C-641/18.

[15] Adopted in Montego Bay on 10 December 1982. United Nations Treaty Series, Vol. 1833, 1834 and 1835, p. 3. It was approved on behalf of the European Community by Council Decision of 23 March 1998 No 98/392/EC concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179, 23.6.1998, pp. 1–2.

[16] Adopted in London on 1 November 1974. United Nations, Treaty Series, Vol. 1184,1–18961, pp. 278–453. All the Member States are contracting parties to SOLAS Convention.

Regulation No 44/2001. For example, the concept of "civil and commercial matters" excludes actions brought by the agent responsible for administration of public waterways against a person having liability in law in order to recover the costs incurred in the removal of wreckage carried out by or in the course of an investigation by the administrating agent in the exercise of its public authority.[17] However, this is not the case of classification and certification societies, which is the one at issue here.

In principle, a classification society acting on behalf of a flag state is bound by two contracts. The first one, with the flag state itself, is an agreement on the delegation of power. The second contract, with the shipowner, is an agreement on the performance of the obligatory statutory surveys (a statutory survey contract).[18] Generally, this dual role of classification societies can undermine the deterrent effect of tort law.[19] However, it should be noted that even if the activities of certification and classification could be separated, the case discussed here does not solely concern liability for classification activities or certification activities. It should also be emphasized that the problem at stake concerns a third-party claim for damages, and not liability for classification activities as in the "Prestige" case.[20]

As is apparent from the facts presented here, the classification and certification bodies, acting on the basis of an agreement concluded with the Republic of Panama in 1999, carried out, as delegates of that state and on its behalf, and allegedly also in its interests, the classification and certification operations relating to ships flying its flag. In this respect, the mutual rights and obligations of the parties are, therefore, based on a contractual relationship, and not on a unilateral act of public law. Moreover, this agreement is not of a different nature than a classic civil law agreement. Simultaneously, it is significant that the contract was concluded with private-law bodies, specifically companies based in Italy, where Panama's public authority does not apply. In such circumstances, the only instrument effectively imposing certification obligations on foreign law entities operating abroad may be a civil law contract. It is also worth noting that nowadays classification societies provide consultancy services in respect of various aspects of multi-million-dollar shipping operations, in addition to their usual services.[21] This means that their services are of an increasingly broader nature tending to *acta iure gestionis*.

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17 Judgment of the Court of 16 December 1980, Netherlands State v Reinhold Rüffer, Case 814/79, ECLI:EU:C:1980:291.

18 J. De Bruyne, *Liability of Classification Societies: Developments in Case Law and Legislation* [in:] *New Challenges in Maritime Law: De Lege Lata et de Lege Ferenda*, ed. M. Musi, Bologna 2015, p. 5.

19 J. De Bruyne, *Tort Law and the Regulation of Classification Societies: Between Public and Private Roles in the Maritime Industry*, "European Review of Private Law" 2019, Vol. 27, Issue 2, p. 429.

20 The judgment of 19 March 2014 of the *Tribunal de Bordeaux* (District Court, Bordeaux, France) in the Prestige case. It was set aside, in so far as the court held that the defendants enjoyed immunity from jurisdiction, by the *Cour d'appel de Bordeaux* (Court of Appeal, Bordeaux, France) in Judgment No 14/02185 of 6 March 2017.

21 T.A. Karaman, *Comparative Study on the Liability of Classification Societies to Third Party Purchasers with Reference to Turkish, Swiss, German and US Law*, "Journal of Maritime Law & Commerce" 2011, Vol. 42, No. 1, p. 126.

Notwithstanding the foregoing, the mere fact that certain powers are conferred, or even delegated, by an act of public authority does not imply that those powers are exercised *iure imperii*.[22] Furthermore, the mere fact of acting on behalf of a state does not mean that the acts in question are performed in the exercise of public powers, in the above-mentioned sense.[23] Similarly, "acting in an interest comparable to the general or public interest" does not mean "acting in the exercise of public powers."[24] Otherwise, it could be considered that any activity carried out by or on behalf of a state may be identified as a government objective, which would, in turn, mean that entire categories of purely civil cases could be excluded from the scope of Regulation No 44/2001.[25] Likewise, the fact that a private-law body carries out, as delegate of a state, on behalf of that state and in its interests, acts in the performance of the state's international obligations in the area of maritime safety and the prevention of marine pollution does not mean that such measures are taken in as part of the exercise of public powers.[26] Thus, the mere fact that the classification and certification activities were performed on the account of and in the interest of the authorizing state is also not, in itself, decisive for considering that those activities were performed in the exercise of public authority.[27]

In this context, the provisions of the agreement concluded with the Republic of Panama in 1999 also require analysis. As the Advocate General points out,[28] it is apparent from the 1999 agreement that the interpretation of the applicable legal instruments, the determining of equivalences, and the approval of requirements other than those laid down in the applicable instruments are prerogatives of the Panamanian Government. On the one hand, the 1999 agreement provides that exemptions from the requirements laid down in the applicable instruments are also prerogatives of that government and require its approval before a certificate can be granted. Simultaneously, there is nothing to suggest that the delegating state did not retain its exclusive competence as far as that activity is concerned. On the other hand, activities such as those carried out by classification and certification bodies, the purpose of which is to establish the conformity of ships with the relevant requirements laid down in the applicable legal instruments and to issue the corresponding technical certificates, seem to be activities of a purely technical nature. As the Advocate

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22 Compare the Opinion of the Advocate General in case C-641/18, para 68; Contrary: K. Schmalenbach, *A Tale of Autonomy and Self-Containment* [in:] *The European Union and Customary International Law*, eds. F. Lusa Bordin, A.Th. Müller, F. Pascual-Vives, Cambridge 2022, p. 110.

23 Compare the Opinion of the Advocate General in case C-641/18, para 80 and the case law cited there.

24 Compare the Opinion of the Advocate General in case C-641/18, para 79 and the case law cited there.

25 Compare the Opinion of the Advocate General in case C-641/18, para 77.

26 Compare the Opinion of the Advocate General in case C-641/18, para 84.

27 Compare the Opinion of the Advocate General in case C-641/18, paragraphs 71, 83. For comparison: J. De Bruyne, *Liability of Classification Societies*…, pp. 231–232.

28 Compare Opinion of Advocate General in case C-641/18, para 94.

General underlines in this context,[29] the revocation of a certificate due to a ship's lack of conformity with those requirements does not result from the exercise of the decision-making powers of organisations such as the classification and certification bodies, whose role is limited to carrying out checks in accordance with a pre-defined regulatory framework, in particular with previously established legal regulations. If, following the revocation of a certificate, a ship is no longer capable of sailing, that is because of a sanction which is imposed by law.

In addition, the relationship between the companies in question and the shipowner is crucial. It is important that the circumstances characterizing the relationship between the public authority granting the authorization and the authorized entity have no effect on the characterisation of the legal relationship between this authorized entity and parties that benefit from its services.[30] The facts show that the defendant companies provided their services for consideration, pursuant to a private-law agreement concluded directly with the owner of the vessel Al Salam Boccaccio '98. As the Advocate General rightly points out, the provisions of this agreement were formulated on the basis of the principle of freedom of contract. Firstly, the parties to that agreement were at liberty to determine the price for those services. Secondly, the defendants could have inserted into the agreement terms to limit their liability. Finally, all the details of that agreement were not decided upon unilaterally, but in the exercise of freedom of contract. It is most important to note that freedom of contract includes the freedom to choose with whom to do business. Actually, facts prove that the shipowner chose the defendants from a number of organisations carrying out classification and certification operations for the flag state.[31] Consequently, the position of the defendants *vis-à-vis* the shipowner was framed within the agreement made with the shipowner's voluntary consent, under which the shipowner agreed to submit to inspections and surveys, and to bear the costs thereof. For that reason, even if the defendants were able to exercise their powers, they would have done so on the basis of the shipowner's voluntary consent to carry out inspections and surveys, and to bear the related costs.[32]

Therefore, the relationship between the defendants and the shipowner has a private-law character and not public-law one. It is clear that the issuing of a certificate as well as the refusal to issue a certificate by the defendant companies is not an administrative decision which could potentially make it subject to a legal remedy raised within an administrative procedure before a court. It should be highlighted that the intention of the EU legislator was to adopt a broad understanding of the concept of "civil and commercial matters" contained in Article 1(1) of Regulation No 44/2001 and, consequently, a broad scope of application of that regulation.[33] This means that,

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29 Compare Opinion of Advocate General in case C-641/18, para 95.

30 Compare the Opinion of the Advocate General in case C-641/18, para 69.

31 Compare the Opinion of the Advocate General in case C-641/18, para 92.

32 Compare the Opinion of the Advocate General in case C-641/18, para 93.

33 Judgment of the Court of 28 February 2019, BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v Gradbeništvo Korana d.o.o., Case C-579/17, ECLI:EU:C:2019:162, para 47 and case law cited there.

in principle, actions for damages fall within the scope of the "civil and commercial matters" within the meaning of Regulation No 44/2001. However, the nature of the given action may not be such as to exclude the action for damages in question from the notion of a "civil and commercial matter,"[34] in this case, to belong to *acta iure imperii*. It should be noted that the mere fact that public funds might be used to compensate for the damage caused as a result of actions undertaken by a person acting on behalf of the state does not mean that disputes arising from those activities are automatically excluded from the substantive scope of Regulation No 44/2001.[35] Likewise, possible state liability for damage caused as a result of actions undertaken on behalf of the state does not exclude *per se* disputes arising from these actions from the scope of application of that regulation.[36] From this perspective, third party compensation claims against entities such as the defendants are of a private-law, not a public-law nature. Consequently, the resulting relationship is also of a private-law nature. An act carried out without recourse to public powers does not change in nature depending upon the person that has suffered harm as a result of that act. Indeed, bodies such as the defendants do not take a sovereign position towards the injured third parties, and their action also in this context does not constitute an exercise of the prerogatives of the state. Anyhow, a body that has carried out acts that are covered by the concept of "civil and commercial matters" in so far as its contractual partner is concerned should not be able to escape the jurisdiction of the civil courts in actions for damages brought by third parties in connection with those same acts.[37]

Besides, the case law of the Court of Justice on the freedom of establishment and the freedom to provide services also supports the nature of the *iure gestionis* of classification and certification activities such as those carried out by the defendant companies. In particular, in case C-593/13 Rina Services *et al.*, the Court of Justice stated that the certification activities performed by companies acting as institutions responsible for certification are not covered by the exemption referred to in Article 51 of the Treaty on the Functioning of the European Union,[38] due to the fact that these companies are for-profit undertakings operating under competitive conditions and do not have any decision-making powers relating to the exercise of public powers.[39] Directive 2009/15/EC[40] also allows for the recognition that classification and certification activities carried out by private-law entities should be considered as

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[34] Compare the Opinion of the Advocate General in case C-641/18, para 54.

[35] Compare the Opinion of the Advocate General in case C-641/18, para 82.

[36] Compare the Opinion of the Advocate General in case C-641/18, para 82.

[37] Compare the Opinion of the Advocate General in case C-641/18, para 70.

[38] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

[39] Judgment of the Court (Grand Chamber) of 16 June 2015, Presidenza del Consiglio dei Ministri and Others v Rina Services SpA and Others, Case C-593/13, para 20.

[40] Consolidated text: Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (Recast), ELI: http://data.europa.eu/eli/dir/2009/15/2019-07-26 [accessed: 2024.01.04].

activities carried out without exercising the prerogatives of a public authority.[41] This is confirmed by recital 16 of that directive, which is the expression of the position taken by the European Union on the recognition of classification and certification activities carried out by a private-law body as activities not arising from the exercise of public power.[42]

As already mentioned, the question of immunity of states from jurisdiction does not have an important impact on the determination of the scope of Regulation No 44/2001 in the case discussed here. Generally, immunity from jurisdiction prevents the courts of one state from giving judgment on the liability of another and it is based on the principle of international law *par in parem non habet imperium*, which means that an equal has no authority over an equal.[43] As a rule, the immunity of states from jurisdiction is recognised where the dispute concerns sovereign acts performed *iure imperii*, and, by contrast, is not recognised where the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers.[44] It should be noted that this does not mean that immunity from jurisdiction is completely irrelevant to the legal problem in question, because immunity from civil action would severely inhibit the preventive role of liability in damages.[45] Simultaneously, it should be emphasized that state immunity is not absolute, but is generally recognized only where the legal dispute concerns legal acts performed *iure imperii*, which is not so in the Rina case.[46] The analysis of this case led to the finding that a private-law entity performing classification and certification activities does not act as public authority and it can neither be considered a state nor an entity performing activities *iure imperii*. It is therefore not necessary, in the context of the considerations relating to the substantive scope of Regulation No 44/2001, to rely on the principle of customary international law relating to the immunity from jurisdiction of states. As the Advocate General rightly points out, the EU legislator did not use the institution of immunity from jurisdiction to define the scope of legal regulations in the field of judicial cooperation

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41 See B. Rensch, L.-S. Wollschläger, *Verfahrensrecht. Gerichtliche Zuständigkeit für Schadensersatzklagen im Zusammenhang mit dem Untergang der Fähre Al Salam Boccaccio '98*, "EuZW" 2020, p. 903.

42 Compare the Opinion of the Advocate General in case C-641/18, para 127. On the liability regime of the Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, OJ L 319, 12.12.1994, pp. 20–27, see J.L. Pulido Begines, *The EU Law on Classification Societies: Scope and Liability Issues*, "Journal of Maritime Law & Commerce" 2005, Vol. 36, No. 4, p. 517 *et seq.*

43 Compare the Opinion of the Advocate General in case C-641/18, para 34. On the immunity of a state from jurisdiction in the USA see: W.S. Dodge, *Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of US Foreign Relation Law*, "Chinese Journal of International Law" 2020, Vol. 19, No. 1, pp. 101–135.

44 Judgment of the Court (Grand Chamber), 19 July 2012, Ahmed Mahamdia v People's Democratic Republic of Algeria, Case C-154/11, paragraphs 54 and 55, ECLI:EU:C:2012:491; Judgment of the Court of Justice of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale, Case C-641/18, paragraphs 55–58, ECLI:EU:C:2020:349.

45 J.L. Pulido Begines, *The EU Law…*, p. 539.

46 A.R. Markus, I. Ruprecht, *Rechtsprechung zum Lugano-Übereinkommen (2020)*, "Swiss Review of International and European Law" 2021, Vol. 31, No. 2, pp. 318–320.

in civil matters having cross-border implications, and in particular to define the substantive scope of the application of Regulation No 44/2001.[47] Nevertheless, the inclusion of *acta iure gestionis* performed by states into the scope of application of the said regulation is consistent with the theory of the relative or limited immunity of states, which nowadays seems to dominate under public international law.[48]

In contrast, in Canadian maritime law, the responsibility for the seaworthiness of a vessel lies primarily with its owner. The role played in this respect by a classification society is subsidiary. A classification society acts in the interests of navigation as such and not for private interests engaged in maritime commerce. Acknowledging a liability to third parties would result in its adopting a defensive attitude. It would ultimately be the shipowners who would have to assume, by means of clauses inserted in the contracts binding them to the classification societies, the consequences of the latter's negligence. American law is not more favourable to third parties.[49] On the one hand, these legal systems seem inconsistent with the economic reality in which certification societies operate nowadays. On the other, such legal systems deprive third parties of their right of access to the courts, which is one of the elements of the right to effective judicial protection.

It is worth noting that the Rina case is very often misunderstood and thus misjudged by representatives of legal doctrine. For instance, the thesis according to which the Court of Justice in the Rina case ruled on the relationship between state immunity and the exercise of jurisdiction resulting from the Brussels I Regulation, or even the relationship between state immunity and European civil procedure law, is not confirmed by the judgment under analysis and is therefore untrue.[50] Advocate General Szpunar, in his opinion in the Rina case, clarified that it was unnecessary to refer to the principle of customary international law concerning state immunity from jurisdiction when considering the *ratione materiae* scope of Regulation No 44/2001.[51] Furthermore, the claim that the Court of Justice tends to narrow the scope of state immunity is

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47 Compare the Opinion of the Advocate General in case C-641/18, paragraphs 34–48.

48 B. von Hoffmann, K. Thorn, *Internationales Privatrecht*, München 2007, p. 69.

49 A. Braën, *La Responsabilité de La Société de Classification En Droit Maritime Canadien*, "McGill Law Journal" 2007, Vol. 52, No. 3, p. 506.

50 B. Wołodkiewicz, *State Immunity and European Civil Procedural Law – Remarks on the Judgment of the CJEU of 7 May 2020, C-641/18. LG v Rina SpA and Ente Registro Italiano Navale*, "Italian Law Journal" 2021, Vol. 7, No. 1, pp. 285–302. Similarly: C. Fossati, *Material Scope of Regulation 44/2001 and State Immunity from Jurisdiction: The ECJ Judgement in the Rina Case*, "Cuadernos de Derecho Transnacional" 2021, Vol. 13, No. 1, pp. 856–873; K. Knol Radoja, *Exemption from Jurisdiction in European Civil Procedural Law*, "Pravni Vjesnik (Journal of Law, Social Sciences and Humanities)" 2022, Vol. 38, No. 2, pp. 21–36; A. Spagnolo, *State Immunity, Delegation of Public Powers to Private Actors and Access to Justice: Anything New Under the (European) Sun?*, "The Italian Yearbook of International Law" 2022, Vol. 31, No. 1, pp. 277–296; R. Dragisic, *The Shipwreck in the Red Sea and the Customary International Law Principle regarding Immunity of States from Jurisdiction – A Link with the European Union Law*, "Harmonius: Journal of Legal and Social Studies in South East Europe" 2021, pp. 62–75; A. Oddenino, D. Bonetto, *The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law*, "Global Jurist" 2020, Vol. 20, No. 3, p. 1 *et seq.*

51 Opinion of Advocate General in case C-641/18, para 48.

unfounded in the context of the Rina case,[52] because the Court of Justice did not interpret state immunity as a principle of customary international law, but interpreted secondary EU law for the purposes of a specific case involving the classification and certification of ships on behalf of and upon delegation from a third state. In fact, the essence of the Rina case was to determine whether an action for damages brought against private-law companies dealing with the classification and certification of ships on behalf of and for the benefit of a third country falls within the scope of the concept of "civil and commercial matters" contained in the Brussels I Regulation. This, in turn, depends on whether the activity in question is carried out under a "public authority" within the meaning of EU law, because only then would it be a sovereign activity and not a commercial one.[53] Since it was not the case of the exercise of public authority, there was no need to interpret the principle of state immunity as such.

Conclusions

The Court of Justice's case law concerning the determination of the scope of application of Regulation No 44/2001 is already rich, but the Court of Justice is still facing new challenges in this regard. The judgement discussed here follows the line of this case-law in the area of activities of ship classification and certification societies. In the case presented here, the Court of Justice was asked to express its position on the relationship between a customary principle of international law, which was a plea of immunity from jurisdiction, and an instrument of EU private international law, which was the regulation 44/2001. The way the preliminary question was formulated might suggest that the main problem is connected with the plea of immunity from jurisdiction raised by the defendants. In reality, the main doubts concerned the scope *ratione materiae* of Regulation No 44/2001. That is why the Court of Justice had to characterize classification and certification operations in order to determine whether they justify the obligation to recognise the immunity of states from jurisdiction on which the defendants rely. The Court's case law proves that jurisdiction – and not state immunity – operates as the predominant rule, and state immunity operates as

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52 L. Lonardo, E. Ruiz Cairó, *The European Court of Justice Allows Third Countries to Challenge EU Restrictive Measures: Case C-872/19 P, Venezuela v Council*, "European Constitutional Law Review" 2022, Vol. 18, No. 1, p. 123.

53 Similarly: V. Power, *Ships, sovereign immunity and the subtleties of the Brussels I regulation: Case C-641/18 LG and others v. Rina SpA, Ente Registro Italiano Navale: Ships, sovereign immunity and the subtleties of Brussels I: Rina*, "Maastricht Journal of European and Comparative Law" 2021, Vol. 28, No. 3, pp. 419–429; D. Moravcova, *The Scope of Judicial Cooperation in Civil and Commercial Matters within the EU in the Context of the Exclusion of Administrative Matters and Acta Iure Imperii*, "Institutiones Administrationis – Journal of Administrative Sciences" 2023, Vol. 3, No. 1, p. 122; A.R. Markus, I. Ruprecht, *Rechtsprechung…*, pp. 318–320; M. Pérez, A. Lucas, *Doctrine of the CJEU on the Immunity of Execution of International Organizations and the Field of Application of the Brussels I Bis Regulation*, "Cuadernos de Derecho Transnacional" 2021, Vol. 13, No. 1, pp. 1039–1040.

an exception, which only applies in those cases where there is a functional need for state immunity.[54]

In the light of the considerations presented above, the general conclusion is that a private-law entity performing classification and certification activities does not act as a public authority. As a consequence, it is justified to state that actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state are not excluded from the scope of Regulation No 44/2001 and, consequently, from the scope of Regulation No 1215/2012, because these actions fall within the concept of "civil and commercial matters." Such a legal classification of the classification and certification of ships on behalf of and upon delegation from a third state is reasonable and merits approval. What is more, the risk of tort liability can be used as a starting point to increase the accuracy and reliability of class certificates because of its so-called deterrent effect.[55] More broadly, the risk of tort liability of private-law societies engaged in the classification and certification of ships can serve as an element of enforcement of maritime law.

The only thing that could be unsatisfactory in the judgment under analysis is that the Court did not rule definitively on whether this kind of act is part of the acts carried out *iure gestionis*, and it left that question to the assessment of the national court. Simultaneously, the recognition of such activities as performed *iure gestionis* in the wording of the Advocate General's opinion is clear and leaves no doubt. Deferring the question is all the more incomprehensible as it follows from the content of the ruling under discussion that the Court considers such activities as performed *iure gestionis*. The only explanation for the position of the Court of Justice could be an intention to give the judgment a more universal scope so that it can be used in similar cases in the future. Regardless of the intention of the Court in this particular case, the matter of jurisdiction in actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state is already settled.

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[55] J. De Bruyne, *Tort Law…*, p. 429.

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Summary

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Jurisdiction in Actions for Damages Against Private-law Companies Acting on Behalf of and upon Delegation from a Third State

This paper deals with the legal characteristic of the classification and certification of ships in the context of jurisdiction in actions for damages against private-law corporations acting on behalf of and upon delegation from a third state which is generally the ship's flag state. The aim of the analysis was to determine whether the activities of ship classification and certification societies fall within *acta iure imperii* or *acta iure gestionis*. This is a key issue in determining the jurisdiction of courts in case of an action for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state. Analysis showed that a private-law entity performing classification and certification activities does not act as a public authority. Thus, the activities of ship classification and certification corporations fall within *acta iure gestionis*. As a result, actions for damages against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state fall within the concept of "civil and commercial matters" and, consequently, are not excluded from the scope of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and, consequently, of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Keywords: jurisdiction**,** actions for damages, *acta iure imperii*, *acta iure gestionis*, delegation of public powers, ship classification, ship certification, state immunity from jurisdiction.

Streszczenie

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Jurysdykcja w sprawach o odszkodowanie przeciwko spółkom prawa prywatnego działającym w imieniu i na rachunek państwa trzeciego

Niniejsza glosa zawiera charakterystykę prawną czynności klasyfikacji i certyfikacji statków dokonaną na potrzeby ustalenia jurysdykcji w zakresie powództw o odszkodowanie przeciwko spółkom prawa prywatnego działającym w imieniu i na rachunek państwa trzeciego, którym zazwyczaj jest państwo bandery statku. Celem analizy było ustalenie, czy działalność towarzystw klasyfikacyjnych i certyfikujących statki mieści się w zakresie *acta iure imperii* (działania władcze państwa) czy też *acta iure gestionis* (czynności cywilnoprawne). Kwestia ta stała się kluczowa

dla ustalenia właściwości sądów w sprawach o odszkodowanie przeciwko spółkom prawa prywatnego zajmującym się klasyfikacją i certyfikacją statków w imieniu i na rachunek państwa trzeciego. Dogłębna analiza wykazała, że podmiot prawa prywatnego wykonujący działalność klasyfikacyjną i certyfikacyjną nie pełni funkcji władzy publicznej. Tym samym działalność instytucji zajmujących się klasyfikacją i certyfikacją statków ma charakter *acta iure gestionis*, czyli czynności cywilnoprawnych. W rezultacie pozwy o odszkodowanie przeciwko spółkom prawa prywatnego zajmującym się klasyfikacją i certyfikacją statków w imieniu i na rachunek państwa trzeciego wchodzą w zakres pojęcia „spraw cywilnych i handlowych" i tym samym nie są wyłączone z zakresu rozporządzenia 44/2001 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych oraz w konsekwencji z rozporządzenia 1215/2012 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych (przekształcenie).

Słowa kluczowe: jurysdykcja, powództwo o odszkodowanie, *acta iure imperii*, *acta iure gestionis*, delegowanie uprawnień publicznych, klasyfikacja statku, certyfikacja statku, immunitet państwa.