MEANAGREENMAURA

JURISDICTIONAL IMMUNITY & THE BRUSSELS I REGULATION

Advocate General gives opinion on Case C-641/18 regarding the sinking of Al Salam Boccaccio 98

LG and Others

v

RINA S.p.A. and ENTE REGISTRO ITALIANO NAVALE

On the 3rd of February 2006, the passenger ferry Al Salam Boccaccio 98 sunk in the Red Sea, with more than 1000 people losing their lives. The survivors of the sinking and the relatives of the victims applied to the District Court of Genoa, Italy, asking for compensation for material and non-material loss, from Rina SpA and Ente Registro Italiano Navale. Their claim is based on the argument that the defendants' certification and classification activities in regards to the Panamanian-flagged Al Salam Boccaccio 98, led to the ship's lack of stability and of safety at sea, and ultimately to the sinking.

The defendants, on the other hand, pled immunity from jurisdiction on the basis that they carried out said activities as delegates of, on behalf of, and in the interests of a foreign sovereign state, Panama, and that they constitue a manifestation of the sovereign power of the foreign state.

Faced with the opposing arguments, the District Court of Genoa referred the matter to the Court of Justice of the EU for a preliminary ruling in respect of the plea of immunity from jurisdiction and the applicability of Regulation No 44/2001 (Brussels I).

QUESTION REFERRED TO THE CJEU

"Should Articles 1(1) and 2(1) of Regulation (EC) No 44/2001 of 22 December 2000 be interpreted — particularly in the light of Article 47 of the Charter of Fundamental Rights of the European Union, Article 6(1) of the European Convention on Human Rights and recital 16 of Directive 2009/15/EC — as preventing a court of a Member State from waiving its jurisdiction by granting jurisdictional immunity to private entities and legal persons carrying out classification and/or certification activities, established in that Member State, in respect of the performance of those classification and/or certification activities on behalf of a non-EU State, in a dispute concerning compensation for death and personal injury caused by the sinking of a passenger ferry and liability for negligent conduct?"

Advocate General (AG) Szpunar delivered his opinion on the 14th of January 2020, starting with the matter of admissibility of the questions referred for a preliminary ruling.

Admissibility

The defendants argued that the national court alone had jurisdiction to give a ruling on the issues at stake, and that it would only be able to make a request for a preliminary ruling if it had dismissed the plea of immunity from jurisdiction. The AG, however, found the questions to be admissible, since the CJEU was asked, inter alia, to interpret the Brussels I Regulation so as to give guidance to the national court on how to assess the facts of the case in the main proceedings. Disagreeing with the arguments of the defendants, the AG considered the question of whether classification and certification activities fall within the meaning of article 1(1) of the Regulation, to be far from obvious and in fact, in need of clarification by the CJEU.

Having established the admissibility of the questions referred to the Court, the AG proceeded to examine the relationship between the principle of jurisdictional immunity and the scope ratione materiae of the Regulation.

The effect of jurisdictional immunity on the scope of Brussels I

In the absence of codification at international level, immunity from jurisdiction is mostly governed by customary international law. It is based on the principle par in parem non habet imperium, meaning that an equal has no authority over an equal. The principle of jurisdictional immunity is therefore a procedural bar, preventing the court of one State from giving judgment on the liability of another State.

In the case ***Mahamdia*** (C-154/11), the Court of Justice recognised the doctrine of relative immunity, based on the distinction between acts performed jure gestionis (private or commercial acts of state) and jure imperii (governmental or public acts of state). This means that immunity from jurisdiction is not absolute, and it could be excluded if the proceedings relate to acts performed jure gestionis. Therefore, the claim for immunity from jurisdiction is not based on the fact that the claimant is a state, but rather on the nature of the activities carried out, i.e. whether they fall within the exercise of public powers.

Notwithstanding the aforementioned, it is unnecessary to consider the principle of customary international law about jurisdictional immunity when questioning the scope of Brussels I Regulation. In so far as the regulation is concerned, the distinction between "civil or commercial matters" and those that are not, must be drawn by reference to independent criteria of EU law found in the Court`s case law.

Consequently, the interpretation of the provisions of Brussels I in light of customary international law, cannot be taken to exclude from its scope, disputes in which one of the parties might rely on jurisdictional immunity. As such, the AG continued his analysis by exploring the concept of "civil and commercial matters", to determine whether the classification and certification activities fall within the scope of the Regulation.

Scope of Article 1(1) Regulation No 44/2001

"This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters."

The question here is whether the acts carried out by the two Italian bodies were performed jure imperii and are therefore excluded from the scope of article 1, or whether they were instead performed jure gestionis, meaning that they fall within "civil and commercial matters".

While the referring court accepted that the two parties carried out the activities as delegates of and on behalf of the flag state, it was unsure about the characterisation of these activities as either jure imperii or jure gestionis. It is this characterisation that will determine whether the referring court is under an obligation to recognise immunity from jurisdiction in these circumstances and decline to hear the case on this basis.

An examination of the Court´s case law shows that the scope of the Regulation is defined by the nature of the legal relationships between the parties to the dispute. To that end, recital 7 of the Regulation makes it clear that the intention of the EU legislature was to adopt a broad definition of the concept of "civil and commercial matters", in turn making the regulation broad in its scope.

The Court has consistently held that it is the exercise of public powers by one of the parties that excludes a case from the scope of Article 1(1), so far as the powers fall outside the scope of the ordinary legal rules governing relaltionships between private individuals. This means that an activity will fall within the concept of "civil and commercial matters" only if the party performing it is in the same position as a person governed by private law would be in regards to the activity in question.

Considering the case law, the AG proceeded to establish whether the classification and certification activities of the defendants stemmed from the exercise of public powers, within the meaning established by the Court.

Classification and Certification activities of the defendants

The involvement of Rina S.p.A and Ente Registro Italiano Navale in this matter, originated from an agreement with the Republic of Panama concluded in 1999, under which the defendants would carry out certification and classification operations as delegates of the state, on its behalf and in its interests.

In the specific case, the defendants carried out such activities pursuant to a commercial agreement with the owner of Al Salam Boccaccio 98, and against remuneration. The mere fact, however, that the defendants were acting upon delegation from a State, in its interests and on its behalf, does not necessarily imply that the powers were exercised jure imperii so as to fall outside the scope of Article 1(1).

It follows that each case depends on its specific facts, and whether, in light of all considerations, the activities were performed in the exercise of public powers. The case law of the Court was useful again, as the AG examined past decisions and their reasonings. In ***Kuhn*** (C-308/17) for instance, the Court focused on the public interest objective of the activities and on whether the dispute stemmed from a manifestation of public authority. That is not to mean that the objective of an action is in itself sufficient to exclude it from the scope of "civil and commercial matters". This was showcased in ***Pula Parking*** (C-551/15), where it was stated that "acting in an interest comparable to the general or public interest" does not mean "acting in the exercise of public powers" within the meaning given by the Court.

Having established that it is the recourse to public powers that excludes activities from the scope of Brussels I, the AG proceeded to identify the range of powers used by the defendants, in performing the activities in question.

The defendants might have acted as a public authority in the context of their relationship with the shipowner, but this definitely does not mean that they retain that status of public authority in regard to other private individuals, such as the claimants.

As for the contractual relationship between the defendants and the shipowner, it is important to note that the former were chosen from a number of organisations carrying out classification and certification activities on behalf of Panama. Their private-law agreement, the terms of which were decided in the exercise of freedom of contract, did not dispose of the exclusive competence retained by the delegating state in relation to the activities.

In this sense, even in so far as the defendants had corrective powers in case of non-conformity, they would be able to exercise them solely within the terms of the agreement to which the shipowner had previously consented, and the pre-defined regulatory framework provided and controlled by the Republic of Panama. This is supported by the case ***Rina Services and Others*** (C-593/13), where certification bodies were held to be commercial undertakings performing their activities in conditions of competition and without power to make decisions connected with the exercise of public powers.

In light of the above, the AG reached the interim conclusion that the classification and certitifcation activies in question fall within the scope of "commercial and civil matters" as interpreted by the Court. Consequently, Brussels I was found to apply ratione materiae to the dispute, and since the defendants are domiciled in a member state, the Italian Courts derive their jurisdiction from the regulation.

At this point, the AG had to consider whether the defendants can rely on jurisdictional immunity under international law, and if so, whether the referring court can nevertheless hear the case or must instead decline to exercise the jurisdiction it derives from Brussels I.

The plea of jurisdictional immunity

In interpreting the concept of jurisdictional immunity, a lack of uniform treatment is revealed in cases of entities that are legally separate from the State. The obscurity is enhanced by the need to decide whether to use criteria of the law of the forum, or of international law when classifying the activities in question. Whichever the case, even if priority is given to the law of the forum, the resulting classification should be consistent with international law as well.

As aforementioned, immunity from jurisdiction is not absolute, and in turn neither is the conclusion that bodies like the defendants can successfully rely on it. The doctrine of relative immunity will depend on the nature of the activities carried out. The State will not enjoy immunity in cases where the activities do not fall within the exercise of public powers, or where the proceedings are not likely to interfere with the security interests of the State. This was stated in *Mahamdia*, but the principle is also reflected through the provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, which has not yet entered into force. Part III of the Convention outlines proceedings in which State immunity cannot be invoked and in particular, Article 10, which refers to commercial transactions is insightful for current purposes.

"Article 10
Commercial transactions
...
3. *Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:*
(a) suing or being sued; and
(b) acquiring, owning or possessing and disposing of property, including properly which that State has authorized it to operate or manage,
is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected."

Additionally, the referring court had also mentioned Recital 16 of Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, and Recital 21 of Commission Implementing Directive 2014/111, amending the former. Significantly so, Recital 16 of the 2009/15 Directive clearly prevents jurisdictional immunity from being delegated to any organisations or bodies other than the State. It states:

"When a recognised organisation, its inspectors, or its technical staff issue the relevant certificates on behalf of the administration, Member States should consider enabling them, as regards these delegated activities, to be subject to proportionate legal safeguards and judicial protection, including the exercise of appropriate rights of defence, apart from immunity, which is a prerogative that can only be invoked by Member States as an inseparable right of sovereignty and therefore that cannot be delegated."

The defendants raised multiple objections to the reference to Directive 2009/15, arguing namely that the directive as a whole does not apply, that a recital has no prescriptive force, that the directive concerns only member states and that the EU has no jurisdiction to impose its interpretation of customary international law to member states. Nonetheless, recital 16 cannot simply be dismissed, since from the point of view of international law, a recital is capable of contributing to the formation or expression of a rule of customary international law.

None of the propositions considered are decisive in establishing whether the plea of immunity from jurisdiction should be upheld in these circumstances. The problem remains that there are two co-existent obligations creating tension that the CJEU is called to resolve. One is imposed by international law, and it requires a national court to recognise immunity from jurisdiction, whereas EU law requires the same court to exercise the jurisdiction it derives from Brussels I. In light of these obligations, it is necessary to examine the relationship between EU law and international law, which has been expressed to a large extent in Article 3(5) of the TEU:

"In its relations with the wider world, the Union... shall contribute...to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

This proves that the question of primacy of one over the other is not as straightforward. Having these two contradicting obligations imposed on the national court, calls for an analysis of the hierarchy of laws and regulations.

The courts have repeatedly held that international conventions have primacy over secondary legislation, so that the latter must be interpreted in accordance with the former. Following this line of thought, rules of customary international law, like jurisdictional immunity, must also have primacy over secondary legislation such as Brussels I, at least in theory. However, such a rule of customary international law should not be incorporated into the legal order of the EU without prudent consideration.

In order for such a principle imposed by international law, convention, or custom, to form part of the legal order of the EU, that principle must not interfere with the constitutional structure and values on which the EU is founded.

Considering that excluding jurisdictional immunity from the legal order of the EU would constitute a departure from the acquis of the international community, it appears that the principle is to be considered a part of the EU legal order, as long as it doesn't infringe fundamental rights. For this reason, it is necessary to consider whether accepting jurisdictional immunity in the circumstances of this case would breach, in particular, Article 47 of the Charter of Fundamental Rights of the EU or Article 6(1) of the ECHR.

The granting of immunity from suit constitutes a restriction of the right of access to a court, which is inherent both to the right to a fair trial (art.6 ECHR) and to the principle of effective judicial protection (art.47 Charter). However, this restriction would pursue a legitimate objective in this case, namely compliance with international law in order to promote comity and good relations between states. In addition, the restriction would not be disproportionate, especially given that there is undisputed access to Panamanian Courts, which indeniably have jurisdicition to hear the case. That said, the right of access to a court would not preclude the Italian courts from recognising immunity from jurisdiction in the main proceedings.

AG's conclusion

In response to the question posed by the referring court, and in consideration of all the above, Advocate General Szpunar proposed the following answer:

"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 is 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, falls within the concept of 'civil and commercial matters' within the meaning of that provision." ■