Third-party liability of classification and certification societies in the context of conflict of laws and public international law – a comment on the CJEU's recent 'Rina judgement'

Written by Yannick Morath

Yannick Morath, doctoral candidate at the University of Freiburg, has kindly provided us with his thoughts on the CJEU's judgement in the case of LG and Others v Rina SpA, Ente Registro Italiano Navale (C-641/18 – ECLI:EU:C:2020:349)

(See also the earlier post by Matthias Weller concerning the CJEU's judgement).

1. **Introduction**

Private-law classification and certification societies play a vital role in modern economies. Especially in the maritime sector, external auditors issue certificates dealing with public tasks such as the seaworthiness and safety of vessels. Not only their contractual partners but also third parties rely on the accuracy of such certificates. Due to cross-border mobility of certificates and certified items, issues of Private International Law have to be taken into account when dealing with a certifiers' liability.

When not applying the appropriate level of care, classification and certification agencies can – according to the CJEU – be sued in the courts of the Member State where the agency is seated. By finding this ruling, the CJEU had to deal with two interesting questions: Firstly, it had to establish whether an action for damages, brought against private certifiers falls within the concept of 'civil and commercial matters', and therefore, within the scope of the Regulation 44/2001 (Brussels I). Secondly, the CJEU had to examine the legitimacy of the certifier's plea based on

the principle of customary international law concerning immunity from state jurisdiction.

2. Facts of the 'Rina-case'

In 2006, the *Al Salam Boccaccio '98*, a ship sailing under the flag of the Republic of Panama, sunk in the Red Sea, tragically causing the loss of more than 1,000 lives. Relatives of the victims and survivors have brought an action under Italian law before the Tribunale di Genova (District Court, Genoa, Italy) against two private law corporations (the Rina companies), that are seated in Genoa and were responsible for the classification and certification of the ship.

The applicants argue that the defendants' operations, carried out under a contract concluded with the Republic of Panama, are to blame for the ship's lack of stability and its lack of safety at sea, which are the causes of its sinking. Therefore, they claim compensation from the Rina companies for the losses they suffered.

The Rina companies counter that the referring court lacks jurisdiction, relying on the international-law principle of immunity from jurisdiction of foreign States. They state that they are being sued in respect of activities, which they carried out as delegates of the Republic of Panama. The activities in question were a manifestation of the sovereign power of a foreign State and the defendants carried them out on behalf of and in the interests of that State.

The applicants, however, argue in favour of the case's civil law nature, within the meaning of Article 1 (1) of Regulation 44/2001. As the Rina companies are seated in Genoa, the Italian courts should have jurisdiction under Article 2 (1) of that regulation. They submit that the plea of immunity from jurisdiction does not cover activities that are governed by non-discretionary technical rules, which are, in any event, unrelated to the political decisions and prerogatives of a State.

The Tribunale di Genova decided to stay the proceedings and consult the CJEU for further clarification under Article 267 TFEU.

3. Background: The dual role of classification and certification societies

When dealing with the classification and certification of ships it is important to be aware of the dual role private-law societies play in this area. Traditionally they

are hired by a shipowner to attest that a ship is built in accordance with the standards of a specific ship class. Those 'class rules' are developed by the classification societies themselves. The maritime industry depends on these services, as the classification of a ship is necessary to evaluate its insurability and marketability. Therefore, these voluntary classifications are mainly prompted by private interest. This is referred to as the 'private function' of classification.

On the other hand, the same societies fulfil a 'public function' as well. Under international maritime law, states have a duty to take appropriate measures for ships flying under their flag to ensure safety at sea (Article 94 (3) of the United Nations Convention of the Law of the Sea). For this purpose ships have to be surveyed by a qualified personnel to make sure it meets all relevant safety and environmental standards. Flag states can perform these tasks themselves; however, most of them delegate executive powers to classification societies. Pursuant to Article 3 (2) of Directive 2009/15 this is also possible under EU law. When executing these powers classification agencies are subject to two contracts: The first one is the agreement on the delegation of powers with the flag state, the second contract is the actual certification agreement with the owner of the ship that is about to be surveyed. Whereas shipowners are free to choose one of the recognized classification societies, the certification itself is compulsory.

It must be noted that the classification according to class rules (private function) is a prerequisite for the statutory inspection and certification (public function). In the case at hand, the Rina companies were responsible for both aspects. They classified the ship in accordance with their class rules and then issued the statutory certificate on behalf of and upon delegation from the Republic of Panama. This public law background caused the need for clarification by the CJEU.

4. The CJEU on the interpretation of 'civil and commercial matters'

Under Article 1(1) of Regulation 44/2001, the scope of that regulation is limited to 'civil and commercial matters'. It does not extend, in particular, to revenue, customs or administrative matters. In order to ascertain whether Italian courts have jurisdiction pursuant to Article 2 (1) of that regulation it is necessary to interpret the concept of 'civil and commercial matters'. This concept is subject to an autonomous European interpretation. By determining whether a matter falls within the scope of the Regulation, the nature of the legal relationships between

the parties to the dispute is crucial. It must be noted that the mere fact that one of the parties might be a public authority does not exclude the case from the scope of the Regulation. It is, however, essential whether the party exercises public powers (*acta iure imperii*). These powers are 'falling outside the scope of the ordinary legal rules applicable to relationships between private individuals' (para. 34).

Following the Advocate General's opinion and the CJEU's judgement in *Pula Parking* (C-551/15 – ECLI:EU:C:2017:193), the Court notes that 'it is irrelevant that certain activities were carried out upon delegation from a State' (para. 39). The fact that the operations were carried out on behalf of and in the interest of the Republic of Panama and that they fulfil a public purpose, do not, in themselves, 'constitute sufficient evidence to classify them as being carried out *iure imperii*' (para. 41.).

In fact it must be taken into account that 'the classification and certification operations were carried out for remuneration under a commercial contract governed by private law concluded directly with the shipowner of the *Al Salam Boccaccio '98*' (para. 45). Moreover, it is the responsibility of the flag state to interpret and choose the applicable technical requirements for the certification necessary to fly their flag.

The CJEU continues to examine the agency's decision-making power. If the agency decides to withdraw a certificate, the respective ship is no longer able to sail. It argues, however, that this effect does not originate from the decision of the agency but rather from the sanction which is imposed by law (para. 47). The role of the certifier simply 'consists in conducting checks of the ship in accordance with the requirements laid down by the applicable legislative provisions.' As it is for the States to fix those provisions, it is ultimately their power to decide on a ship's permission to sail.

Whereas the general remarks on the interpretation of 'civil and commercial matters' are convincing and based on settled case law, the findings about the 'decision making power' of recognised organisations give rise to further questions. If a ship does not comply with the relevant requirements, the statutory certificate must not be issued and the shipowner is not allowed to sail under the flag of the respective state. Even though this legal consequence is finally imposed by law, it is the certifier's application of that law that leads to this effect.

Whenever a certification agency refuses to issue a certificate, the ship is initially not able to sail. The CJEU's technical perspective in paragraph 47 does not sufficiently appreciate the factual decision making of the certifier. The judgement does unfortunately not explicitly address the issue of legal discretion and its consequences on the concept of 'civil and commercial matters'.

However, there are other grounds to qualify the case a 'civil matter'. As the CJEU pointed out as well, it follows from Regulation 6 (c) and (d) of Chapter I of the International Convention for the Safety of Life at Sea, that the final responsibility is allocated to the flag state (para. 48). Therefore, the state is subject to far-reaching supervisory duties. Even though this is not expressively regulated by international or EU law, it appears like the flag state can at any time overrule an agency's decision to issue or withdraw the certificate. This would result in a limitation to the finality of the agency's powers and prepare the ground for a civil law qualification. Some further remarks by the CJEU about this aspect would have been interesting.

5. The CJEU on state immunity from jurisdiction

Doubts regarding the jurisdiction of the Italian courts arose from the Rina companies' plea based on the principle of customary international law concerning immunity from jurisdiction. Pursuant to the principle *par in parem non habet imperium*, a State cannot be subjected to the jurisdiction of another State. 'However, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii.* By contrast, it may be excluded if the legal proceedings relate to acts which do not fall within the exercise of public powers' (para. 56).

The CJEU held that this principle does not preclude the application of the Regulation in this case, although it is the referring court that has to examine whether the Rina companies had recourse to public powers within in the meaning of international law. It must be noted that a rule of customary international law will only exist where a given practice actually exists that is supported by a firm legal view (*opinio iuris*). Following the Advocate General, the CJEU finds that the case-law cited by the defendants 'does not support the unequivocal conclusion that a body carrying out classification and certification operations may rely on immunity from jurisdiction in circumstances such as those of the present case` (c.f. para. 109 of his opinion).

In regard of state immunity, the CJEU changes its perspective on the case. Whereas the interpretation of 'civil and commercial matters' was driven by EU law, the doctrine of state immunity requires a different methodological approach, as it originates from international law. Nevertheless, the CJEU's overall convincing remarks are in line with its earlier findings, setting a high bar for statutory certification societies to plead for state immunity.

6. Final remarks

The CJEU established legal security for the victims of maritime disasters such as the sinking of the *Al Salam Boccaccio '98*. The judgement indirectly clarified the applicability of the Brussels I Regulation in cases where maritime certifiers operate only in their private function. When statutory certifications are a civil matter, this must *a fortiori* be the case for voluntary classifications. Having consistent results when establishing jurisdiction in such cases, also meets with the principle of foreseeability. The remarks on the applicability of the Brussels I regulation are also of significant relevance when dealing with the Brussels Ibis and the Rome I and II Regulations, as all of them apply the concept of 'civil and commercial matters'.

Moreover, the judgement underlines the responsibility of private-law certifiers and recognises their vital role as regulators that operate in the public interest. Even though the CJEU' findings on the interpretation of 'civil matters' are consistent with its earlier developed broad understanding of the concept, further clarification regarding privatised decision making powers would have been desirable.