COURT OF JUSTICE
OF THE EUROPEAN UNION

ANNUAL REPORT 2020

JUDICIAL ACTIVITY

COURT OF JUSTICE
OF THE EUROPEAN UNION

Annual Report 2020
Judicial Activity

Synopsis of the judicial activity of the Court of Justice and the General Court of the European Union

Luxembourg, 2021

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IX. Judicial cooperation in civil matters

1. Regulations No 44/2001 and No 1215/2012 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

In the judgment in ***Rina*** (C-641/18, EU:C:2020:349), delivered on 7 May 2020, the Court held, first, 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 Article 1(1) of Regulation No 44/2001 [153] ('the Brussels I Regulation') 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. Secondly, the Court held that 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.

In 2006, the vessel *Al Salam Boccaccio'98*, sailing under the flag of the Republic of Panama, sank in the Red Sea with the loss of over 1 000 lives. Relatives of the victims and survivors of the sinking brought an action before the Tribunale di Genova (District Court, Genoa, Italy) against Rina SpA and Ente Registro Italiano Navale ('the Rina companies'), that is to say, against the companies which carried out the classification and certification of the ship which sank and which have their seat in Genoa. The applicants claimed compensation for the pecuniary and non-pecuniary losses stemming from the Rina companies' civil liability, arguing that the classification and certification operations were the cause of the sinking. The Rina companies contended that the court seised lacked jurisdiction, relying on the principle of immunity from jurisdiction, since the classification and certification operations which they conducted were carried out upon delegation from the Republic of Panama and, therefore, were a manifestation of the sovereign powers of the delegating State. The court seised, raising the question of the jurisdiction of the Italian courts, referred a question for a preliminary ruling to the Court of Justice.

In the first place, the Court considered the interpretation of the concept of 'civil and commercial matters' within the meaning of Article 1(1) of the Brussels I Regulation, in the light of the ship classification and certification activities carried out by the Rina companies upon delegation from and on behalf of the Republic of Panama, in order to ascertain whether the Italian courts had jurisdiction under Article 2(1) of that regulation. [154] The Court, first, recalled that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels I Regulation where the legal proceedings relate to acts performed without exercising public powers (*iure gestionis*), the position is otherwise where the public authority is acting in the exercise of its public powers (*iure imperii*). In that regard, the Court found that it is irrelevant that certain activities were carried out upon delegation from a State: the mere fact that certain

153| Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1). That provision states, inter alia, that that regulation is to apply in civil and commercial matters.

154| Under that provision, persons domiciled in a Member State are, whatever their nationality, as a rule to be sued in the courts of that Member State.

powers are delegated by an act of a public authority does not imply that those powers are exercised *iure imperii*. The same is true of the fact that the operations at issue were carried out on behalf of and in the interest of the Republic of Panama, since the fact of acting on behalf of the State does not always imply the exercise of public powers. Furthermore, the fact that certain activities have a public purpose does not, in itself, constitute sufficient evidence to classify them as being carried out *iure imperii*. The Court emphasised therefore that, in order to determine whether the operations at issue in the main proceedings were carried out in the exercise of public powers, the relevant criterion was the recourse to powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals.

In that regard, the Court found that the classification and certification operations carried out by the Rina companies consisted solely in establishing whether the vessel examined met the requirements laid down by the applicable legislative provisions and, if so, in issuing the corresponding certificates. The interpretation and choice of the applicable technical requirements were for their part reserved to the authorities of the Republic of Panama. Admittedly, checks of the ship by a classification and certification society may, where appropriate, result in the certificate being withdrawn on the ground that the ship does not comply with those requirements. However, such a withdrawal does not stem from the decision-making power of those companies, which operate within a pre-defined regulatory framework. If, following the withdrawal of a certificate, a ship is no longer able to sail, that is because of the sanction which is imposed by law. Consequently, the Court concluded that, subject to the checks to be carried out by the referring court, the classification and certification operations carried out by the Rina companies could not be regarded as being carried out in the exercise of public powers within the meaning of EU law.

In the second place, the Court examined the possible effect, for the purposes of the applicability of the Brussels I Regulation, of the plea based on the principle of customary international law concerning immunity from jurisdiction. The Court noted that it had already ruled that, in the present state of international law, the immunity of States from jurisdiction 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. The immunity from jurisdiction of bodies governed by private law, such as the Rina companies, is not generally recognised as regards classification and certification operations for ships, where they have not been carried out *iure imperii* within the meaning of international law. Consequently, the Court concluded that that principle does not preclude the application of the Brussels I Regulation in a dispute such as that at issue in the main proceedings, where the court seised finds that the classification and certification organisations at issue have not had recourse to public powers, within the meaning of international law.

By its judgment in ***Wikingerhof*** (C-59/19, EU:C:2020:950), of 24 November 2020, the Court, sitting as the Grand Chamber, ruled on a case in which the operator of a hotel in Germany had concluded, in 2009, a contract with Booking.com BV, a company governed by Netherlands law which has its seat in the Netherlands and operates an accommodation booking platform. That contract was a standard form contract provided by Booking.com, which stated, inter alia, the following: 'The hotel declares that it has received a copy of Version 0208 of the General Terms and Conditions … of Booking.com. These are available online at Booking.com … The hotel confirms that it has read and understood the terms and conditions and agrees to them. The terms and conditions form an integral part of this contract …'. Subsequently, and on several occasions, Booking.com amended its general terms and conditions, accessible on that company's Extranet.

Wikingerhof objected in writing to the inclusion in the contract at issue of a new version of the general terms and conditions that Booking.com had brought to the attention of its contracting partners on 25 June 2015. It claimed that it had had no choice but to conclude that contract and to suffer the effect of subsequent amendments to Booking.com's general terms and conditions by reason of the latter's strong position on the market for intermediary services and accommodation reservation portals, even though certain practices of Booking.com were unfair and therefore contrary to competition law.

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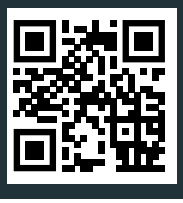

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