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Case C-641/18

Request for a preliminary ruling

Date lodged:

12 October 2018

Referring court:

Tribunale di Genova (District Court, Genoa, Italy)

Date of the decision to refer:

28 September 2018

Applicants:

LG and Others

Defendants:

Rina S.p.A.

Ente Registro Italiano Navale

RG No 9852/2013

THE TRIBUNALE DI GENOVA (DISTRICT COURT, GENOA)

[…]

in the civil proceedings brought by

LG and Others […], with an address for service in Genoa, […]

Applicants

v

RINA S.p.A. and ENTE REGISTRO ITALIANO NAVALE, […] with an address for service in Genoa, […]

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Defendants

[Or.2]

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1. MAIN PROCEEDINGS

1.1. Succinct presentation of the proceedings

By means of the document instituting the proceedings […], the applicants — relatives of the victims and survivors of the sinking of the Al Salam Boccaccio '98 ferry in the Red Sea on 2 and 3 February 2006, in which more than 1 000 people lost their lives — filed a lawsuit against the defendants seeking a judgment on their collective and/or joint and several civil liability for all pecuniary and non-pecuniary losses suffered as a result of the disaster in *jure proprio* or *jure successionis* and, as a result, the award of compensation in respect of those losses. The applicants submit that the defendants acted negligently when carrying out their classification and certification activities and when adopting decisions and guidelines, thereby rendering the vessel unstable and unsafe and causing it to sink.

The defendants entered an appearance […], challenging the applicants' claims on various grounds, including in particular — with regard to the present proceedings — the defendants' immunity from Italian jurisdiction. Briefly, that plea is based on the fact that RINA S.p.A. and RINA ENTE were summonsed in relation to activities carried out as delegates of a foreign sovereign State, the Republic of Panama. Those activities were an expression of the sovereign prerogatives of that delegating foreign State, in whose name and in whose interest the defendants acted.

On that issue — the only one relevant to the present request for a preliminary ruling — the applicants reply that, since both defendants are domiciled in Italy (and specifically in Genoa) and given the 'civil' nature of the dispute, the Italian courts and the Tribunale (District Court) seised have jurisdiction under Article 2(1) of Regulation (EC) No 44/2001 (Brussels I). In particular, according to the applicants:

- under Article 1(1) of the Brussels I Regulation, that regulation does not apply where the dispute concerns '*revenue, customs or administrative matters*';

[Or.3]

- nevertheless, in those limited cases — and as regards administrative matters in particular —, the plea of jurisdictional immunity entered by the two RINA defendants is invalid, since the concept of acts *jure imperii* must be confined to acts carried out by States and public authorities in the political

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exercise of State sovereignty, whereas planning, classification and certification activities governed by non-discretionary technical rules which are unrelated to the political choices and prerogatives of a sovereign State do not fall within its scope;

- this also applies, with regard to EU legislation, 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 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)*'.

1.2. Succinct presentation of the facts

[…] **[Or.4]** […] [Procedural matters of internal relevance only]

2. NATIONAL LAW

2.1. Provisions of national law relied on

First paragraph of Article 10 of the Italian Constitution

International law and legal status of foreigners

'*The Italian legal system conforms to the generally recognised rules of international law.*'

First paragraph of Article 24 of the Italian Constitution

Protection of subjective rights and legitimate interests

'*All persons are entitled to take judicial action to protect their individual rights and legitimate interests.*'

2.2. Relevant national case-law

Corte Costituzionale (Constitutional Court, Italy), judgment No 238 of 22 October 2014 (Maxim)

'*According to the Constitution, it must be established whether the international rule on the immunity of States, as interpreted in international law, may be enshrined in Italian law, in so far as it is not contrary to fundamental principles and inviolable rights; indeed, in the latter case this would disable the automatic adaptation mechanism laid down in the first paragraph of Article 10 of the Constitution, with the inevitable consequence that the international rule, in so far as it conflicts with those principles and rights, cannot be enshrined in law and*

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thus cannot apply. The fundamental principles of constitutional law include the right to bring proceedings before and be defended in a court of law (the right to a court) recognised by Article 24 **[Or.5]** *of the Constitution, primarily to protect the fundamental rights of the individual. Article 24 of the Constitution is closely linked to Article 2 thereof, which, of all the fundamental constitutional principles, is the substantive provision that safeguards the inviolability of the fundamental rights of the individual, including […] dignity. Article 24 also safeguards human dignity, protecting the right of the individual to go to court in order to enforce his inviolable rights. In relations with foreign States, the fundamental right to judicial protection may be limited, provided that there is a public interest recognisable as potentially overriding the principle enshrined in Article 24 of the Constitution. However, the customary international rule on the immunity from jurisdiction of foreign States, in so far as it excludes the jurisdiction of the courts in cases of compensation for damage suffered by the victims of crimes against humanity and serious violations of fundamental human rights, requires the right to judicial protection of those victims' rights to be entirely sacrificed, in the absence of an identifiable overriding public interest. The immunity of a foreign State from the jurisdiction of the Italian courts recognised under Articles 2 and 24 of the Constitution, while making primarily logical rather than legal sense, justifying the sacrifice of the principle of judicial protection of inviolable rights, must be related — in substance and not only in form — to the sovereign function of the foreign State concerned and the traditional exercise of its governmental power. Crimes against humanity, such as deportation, forced labour and massacres, cannot justify entirely sacrificing the protection of the inviolable rights of the victims of those crimes. In an institutional context where human rights are paramount, emphasised by constitutional law being open to external sources, the fact that a review by the courts is precluded for the protection of the fundamental rights of the victims of the crimes in question renders the sacrifice of two supreme principles enshrined in the Constitution completely disproportionate to the aim of preserving State sovereignty, when that sovereignty is expressed through actions that are clearly criminal and unrelated to the legitimate exercise of governmental power.*

Moreover, the right to a court enshrined in the Constitution requires effective protection of the rights of individuals: the very absence of the possibility of effective protection of fundamental rights before a court reveals the conflict between the international rule, as defined by the International Court of Justice, and Articles 2 and 24 of the Constitution. That conflict renders inoperative **[Or.6]** *the reference in the first paragraph of Article 10 of the Constitution with respect only to the extension of the immunity of States from the civil jurisdiction of other States to actions for damages caused by acts deemed* jure imperii *in violation of international law and the fundamental rights of the individual. Therefore, in so far as it conflicts with these fundamental principles, that international rule is not enshrined in Italian law and has no effect.*'

Corte di Cassazione (Court of Cassation, Italy) in Joint Session, judgment No 15812 of 29 July 2016 (Maxim)

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‘*The immunity from civil jurisdiction of foreign States for acts* jure imperii *constitutes a prerogative (and not a right) recognised by customary international rules whose operativeness is precluded in Italian law, following judgment No 238/2014 of the Constitutional Court, for* delicta imperii *— that is, for those crimes committed in violation of international* jus cogens *rules, since they are contrary to universal values that transcend the interests of individual States.*’

Corte d’Appello di Genova (Court of Appeal, Genoa), judgment No 534 of 26 April 2017 […]

‘*… the appellants cited recital 16 of Directive 2009/15/EC, which 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.”*

Quite rightly, the lower court noted that recitals are not a preceptive part of directives, but merely make a recommendation to the Member States. In the present case, Italy did not follow those recommendations when transposing the Directive into national law by means of Legislative Decree No 104/2011, deciding not to waive immunity, at least not for recognised organisations.

…

[Or.7]

Rather, it is the amount of effort and the lengthy elaboration process described by the appellants, who have produced the different versions of what has ultimately become recital 16, that persuade us that the benefit exists in favour of recognised organisations. If not, there would be no justification for the wish for it to be excluded at EU level, which is essential, moreover, to the Union’s very objectives.’

3. EUROPEAN UNION LAW

Regulation (EC) No 44/2001

Article 1(1)

‘*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.*’

Article 2(1)

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'*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*'

Charter of Fundamental Rights of the European Union

Article 47

Right to an effective remedy and to a fair trial

'*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*'

European Convention on Human Rights

[Or.8]

Article 6(1)

Right to a fair trial

'*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*'

Directive 2009/15/EC

Recital 16

'*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.*'

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Directive 2014/111/EU (subsequent both to the events of the case and the date on which the proceedings were brought)

Recital 17

'*First, paragraph 16.1 of part 2 of the III Code provides for a minimum list of resources and processes which flag States have to establish, including the provision of administrative instructions pertaining inter alia to ship class certificates required by the flag State to demonstrate compliance with structural, mechanical, electrical, and/or other requirements of an international convention* **[Or.9]** *to which the flag State is a party or compliance with a requirement of the flag State's national regulation. As detailed in recital (21) below however, Union law draws a distinction between statutory certificates and class certificates. The latter are documents of a private nature and are neither acts of a flag State nor issued on any flag State's behalf. This provision of the III Code in fact refers to SOLAS Chapter II-1, Part A-1, Regulation 3-1, which provides that ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognized by the Administration in accordance with the provisions of regulation XI-1/1.1. The SOLAS convention clearly identifies the ship or its legal representation vis-à-vis the flag State as the object of this requirement. Furthermore, when acting in its capacity as class society, a recognised organisation issues ship class certificates in accordance with its own rules, procedures, conditions and private contractual arrangements, to which the flag State is not a party. Therefore, this provision of the III Code contradicts the delineation of class and statutory activities as set out in the existing EU legislation.*'

4. SUCCINCT PRESENTATION OF THE GROUNDS FOR THE REFERENCE FOR A PRELIMINARY RULING

The question that has given rise to the present reference for a preliminary ruling pertains to the jurisdiction of the Italian courts in the present case, given that the defendants are established in Italy, but acted as the delegates of a non-EU foreign State (Panama) and therefore — as argued by the defendants — in *jure imperii*.

It is therefore a case of establishing whether Articles 1(1) and 2(1) of Regulation (EC) No 44/2001 should be interpreted in such a way that the activities in question, carried out by the defendants on behalf of a non-EU State, may be regarded as 'administrative matters'. This would determine whether or not the State in whose territory the defendants are domiciled (Italy) has jurisdiction.

The uncertainty of the referring court as to the correct interpretation of those provisions stems from the fact that:

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- on the one hand, the case-law cited above — and that of the International Court of Justice by means of its judgment of 3 February 2012 in the *Ferrini* case — seems to exclude jurisdiction;

- on the other hand, the principles enshrined in the sources cited by the applicants would seem to give precedence to the right to judicial protection in the State in which the proceedings are brought;

- the Court of Justice of the European Union does not appear to have set any precedent in the matter.

5. ESSENTIAL ARGUMENTS OF THE PARTIES TO THE MAIN PROCEEDINGS

The parties' positions on the subject of the present reference for a preliminary ruling have already been substantially and succinctly set out above.

6. POINT OF VIEW OF THE REFERRING COURT

The Tribunale di Genova (District Court, Genoa), in the person of this judge, has already ruled on a similar question raised in another case very similar to the present one, by means of judgment No 2097 of 8 March to 1 June 2012. That judgment, at least in part, upheld the plea of immunity from the jurisdiction of the Italian courts entered by the defendant.

Specifically, pages 31 et seq. of that judgment read as follows:

'***5. Recital 16 of Directive 2009/15/EC***

The applicant refers to French doctrine which, in criticising the ruling of the [Cour d'appel de Paris (Court of Appeal, Paris)] regarding its reasoning on "jurisdictional immunity" ("Le raisonnement paraît fragile"), also found that reasoning to be contrary to recital 16 of 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)".

[Or.11]

[…] [reproduction of recital 16, cited above]

However, as RINA effectively replies on this point, the Italian State did not translate the recommendations of recital 16 into a provision of Italian law. Legislative Decree No 104/2011, which transposes the Directive and lays down the rules governing the relationship between the State and recognised organisations, is silent on the subject. Furthermore, a recital is not part of the regulatory content of a directive. Recital 16 of the Directive in question cannot

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therefore be considered a suitable basis for derogating from the application of the principle of immunity applicable by reference to Article 10 of the Constitution.

In addition, RINA acted in this case as the delegate of a non-EU State, in accordance with the SOLAS convention.

Lastly, the existence of recital 16 seems rather to show that EU law also intrinsically recognises the principle of international law on State immunity. At the same time, it is irrelevant whether, de jure condendo*, this will be waived for recognised organisations, which act on the authority of the States themselves. Therefore — apart from the decisive fact that the "recitals" have not been inserted in the Italian law that transposed the Directive — the argument can also be interpreted in the sense that, although it is to be hoped that the current trend will be corrected, recognised organisations are currently still granted immunity.'*

The reasoning set out in that judgment appears to be confirmed in the light of the abovementioned judgment No 238 of the Constitutional Court of 22 October 2014 and judgment No 15812 of the Court of Cassation in Joint Session of 29 July 2016. Indeed, they appear to limit the inoperativeness of the principle of 'restricted immunity':

- to acts of a foreign State consisting of war crimes and crimes against humanity which violate inviolable human rights, and

[Or.12]

- to those cases in which the application of the principle of restricted immunity would preclude — unlike in the present case (where Panama undoubtedly has jurisdiction) — the possibility of bringing an action before any judicial authority (as is also apparent from the abovementioned judgment of the International Court of Justice of 3 February 2012, paragraph 104).

7. REFERRAL OF THE QUESTION TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING

On those grounds, the Tribunale di Genova (District Court, Genoa), having regard to Article 267 TFEU, refers the following question to the Court of Justice of the European Union for a preliminary ruling:

> **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**

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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?

Genoa, 28 September 2018

[…]

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