

ITALIAN REPUBLIC
IN THE NAME OF THE ITALIAN PEOPLE THE SUPREME COURT OF
CASSATION UNITED CIVIL SECTIONS

Ric. 2017 n°20387 sez SU - ud. 03.11.2020

Judgement of 03.11.2020 Supreme Court of Cassation of Italy

1. - the night between 2 and 3 February 2006, the tragic shipwreck of the ferry Al Salam Boccaccio 98 occurred in the Red Sea, while sailing from the port of Dhiba (Saudi Arabia) to Safaga (Egypt).

The shipwreck caused 1097 deaths.

The vessel was flagged out to Panama and registered to Pacific Sunlight Marine Inc., registered in Panama but totally with Egyptian capital.

Pacific Sunlight had bought her from Tirrenia s.p.a. in April 1999.

2. - the present applicants, in their own right or as heirs of certain victims of the shipwreck, brought an action for damages before the Court of Genoa against RINA - Registro italiano navale s.p.a. (*hinc* only RINA), a company with its registered office in Genoa responsible for ship classification and a recognised safety certification body on behalf of the State of Panama. (*hinc* solo RINA), a company established in Genoa in charge of ship classification and a recognised safety certification body on behalf (from 1999 onwards) of the State of Panama.

According to the plaintiffs, the defendant company had failed to carry out adequate checks to verify the safe navigation conditions of the vessel, which, moreover, was poorly designed and equipped, had undergone structural modifications in the early 1990s and had become outdated.

3. - the defendant, as a preliminary matter and in addition to any other defence, objected to the lack of jurisdiction of the Italian court, since the Panamanian court had jurisdiction. According to the Genoese company, the Republic of Panama had delegated to it the exercise of state functions, with the consequent application of the international custom of immunity of States to the delegated company.

4. - the court, with judgement no. 2097 of 2012, declared the immunity from Italian jurisdiction for the activities carried out, directly or indirectly, by RINA SpA. as Recognized *Organization* (RO according to the IMO Code) of Panama after the ship assumed the Panamanian flag; while it rejected the objection of immunity with regard to the activities indirectly attributed to RINA SpA as carried out by RINA Ente before the ship assumed the flag, remitting the case to the court, with a separate order, for preliminary investigation.

In its subsequent judgement no. 132 of 2014, the court settled the case on the last question, i.e. whether RINA SpA should be liable in any way for the activities carried out on the ship by its parent company RINA Ente before it assumed the Panamanian

flag, during the period in which the certification tasks were performed by the parent company; and this in view of the fact that RINA Ente had transferred the relevant branch of business to RINA SpA by deed of 29 July 1999.

In this regard, it rejected the claims and also rejected the request for authorisation to call RINA Ente to account.

5. - the plaintiffs appealed against both judgments on the basis of seven grounds, the first four relating to the preliminary assertion of jurisdictional immunity and the other three to the alleged continuity between RINA Ente and RINA SpA.

Specifically, the appellants claimed (i) that there had been an implicit acceptance of Italian jurisdiction by RINA s.p.a., (i) that there had been an implicit acceptance of Italian jurisdiction by RINA s.p.a., since it had acted before the Italian Courts in matters connected with the present dispute; (ii) that there had been a waiver of the possibility of availing itself of immunity from Italian jurisdiction, in view of the arbitration clause contained in the Rules for the classification of ships; (iii) that in any case the privilege of jurisdictional immunity could not be recognised in any way, on the basis of the principles of public international law, constitutional law and private international law; (iv) that it had not been proved that RINA s.p.a. had always acted as RO and that it had always acted in the capacity of a shipowner; (v) that there had been no evidence that RINA s.p.a. had been able to rely on the Italian jurisdiction of the Italian Courts in relation to the matter of the classification of ships. (iv) that it had not been proved that RINA s.p.a. had always acted as RO of the State of Panama, nor had it been proved that there had been an official investiture of RINA s.p.a. by the State itself, the assessment of the private nature of the relationship with the shipowning company having been omitted; (v) that the complete continuity between RINA Ente and RINA s.p.a. had to be affirmed (vi) that the limitation of RINA s.p.a.'s liability for the activities carried out by RINA Ente prior to the assumption of the Panamanian flag was erroneous; (vii) that the refusal to authorise RINA Ente to take part in the proceedings on the erroneous assumption that the request was out of time was unlawful.

6. - Rina s.p.a. also appealed in particular, by cross-appeal, it criticised the second judgment in so far as it did not declare that it lacked locus standi in relation to RINA Ente's activities prior to its incorporation.

7. - the Court of Appeal of Genoa, with a judgement filed on 26-4-2017, rejected the main appeal and deemed the cross-appeal to be absorbed, confirming the ruling on immunity and sentencing the main appellants to pay the costs of the proceedings.

For the part that interests him most, he considered that the privilege of immunity should be extended to RINA SpA, as RO, because it was delegated 'state functions'.

This was based on indications from various sources, among which the court of appeal mentioned in particular:

(i) domestic legislation (the Navigation Code) and international legislation, and in particular the SOLAS and UNCLOS Conventions, ratified by both Italy and Panama, according to which the coastal State has the power-duty to control its own vessels

and the responsibility for the safety of people and the protection of the sea - a responsibility that can be extended to the certification activity and therefore intact (in its hands) even in the event of delegation of functions to ROs;

(i) the domestic case law - and specifically (a) the judgment of the Regional Administrative Court of Liguria no. 1569 of 2007, which became final in a case to which at least one of the present appellants had been a party, stating that the classification and certification activity of RINA S.p.A. should be considered as a manifestation of the public authority and capacity of the foreign State administration; (b) the judgment of the Council of State no. 3352 of 2005, which would have made it possible to deny the value of the thesis of the foreign State administration. (b) judgment no. 3352 of the Consiglio di Stato (Council of State) of 2005, which would have made it possible to deny the validity of the argument of the appellants based on the distinction between acts carried out *iure imperii* and acts carried out *iure gestionis*;

(iii) foreign case law - notably (aa) the judgment of the Paris Court of Appeal of 30 March 2010, which excluded immunity for the disaster caused by the oil tanker Erika off the coast of Brittany on the grounds that the classification society (in that case Bureau Veritas) had waived it, thus confirming the general principle that private companies carrying out RO activities enjoy immunity "because they are engaged in a public function"; (bb) the fundamental judgment of the International Court of Justice (ICJ) of 3 February 2012 on the dispute between Germany and Italy concerning the possibility of exercising civil jurisdiction for the massacres committed during the Second World War on the national territory - which judgment affirmed the principle that even where the violation affects fundamental goods (such as human life), this does not mean that there is a waiver of the immunity of States, since this can only be linked to acts constituting real crimes against humanity and war crimes.

The Court of Appeal further excluded that RINA SpA's activity could be included among those of a "merely technical nature", considering that it was "the purpose of the assessment" (aimed at guaranteeing the safety of the ship in accordance with conventional standards) and "the resulting effect" that made the activity "of public importance". And in this respect it denied specific relevance even to the distinction between classification and certification activities, since the relevant conditions "are part of a set of rules that condition state certification", so that the class certificate had to be said to participate, like state certification, "of the same nature as an act of public importance".

With this in mind, it considered that the main appellants' request for a reference for a preliminary ruling under Article 267 of the EU Treaty was unfounded.

Lastly, the same court rejected, because they were not supported by Articles 2558 and 2560 of the Civil Code, nor by Article 1292 of the Civil Code, the objections relating to the indirect compensation liability of RINA SpA for the activities attributed to RINA Ente prior to the disaster.

8. - the original named plaintiffs have appealed against this judgment on six grounds.

The defendant replied with a counter-appeal and put forward two grounds for a conditional cross-appeal, reiterating, moreover, the objections set out in the grounds of cross-appeal that were considered to be absorbed.

9. - the case was assigned to the Joint Sections at the request of the main applicants, pursuant to Article 376(2) of the Code of Civil Procedure, in view of the importance of the underlying issue the parties have filed briefs.

By interlocutory order No 19582 of 2019, the Court ordered that the case be referred to a new case-file pending the decision of the Court of Justice of the EU on the reference for a preliminary ruling made by the Tribunale di Genova in a separate dispute, pending there on the initiative of the families of other victims of the same shipwreck, concerning identical hypotheses of civil liability of RINA SpA.

The ruling of the Court of Justice was made on 7-5-2020.

Reasons for the decision

I. - the main applicants complain in order:

(i) infringement and misapplication of Article 112 of the Code of Civil Procedure, of Law No 619/1977 (ratifying the Convention between Italy and Egypt), of Articles 7 and 11 of Law No 218/1995 and of Articles 10, 2, 3, 24, 32 and 111 of the Italian Constitution, given the failure to declare that the privilege had lapsed due to waiver or tacit acceptance of Italian jurisdiction;

(ii) infringement or misapplication of Article 1 of Regulation (EC) No 44/2001 (known as (Brussels I) in relation to the refusal to make a reference to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty;

(iii) infringement or misapplication of several provisions of the Constitution (Articles 2, 3, 10, 23, 29 and 30 of the Constitution), including in the light of Article 6 of the ECHR, and Articles 2697 of the Civil Code and 115 and 116 of the Code of Civil Procedure, in relation to the finding that there is an international custom entailing immunity from legal proceedings for the activities of classification or certification societies under a state delegation scheme;

(iv) infringement or misapplication of Article 112 of the Code of Civil Procedure, Article 10 of the Constitution, Article 2697 of the Civil Code and Article 96 of the Code of Civil Procedure, in view of the fact that the factual conditions for immunity were deemed to exist even in the absence of certain evidence of the commencement of the privilege;

(v) infringement or misapplication of Articles 2560 and 2558 of the Civil Code, and failure to examine decisive facts concerning: the fact that the administration of RINA SpA can be referred to RINA Ente; the abuse of rights embodied in the deed of transfer of the business unit; the existence of a contract between RINA Ente (as an "Italian class" and an Italian RO) and the shipowner Pacific Sunlight Marine Inc. which was transferred to RINA SpA;

(vi) infringement or misapplication of Articles 91 and 92 of the Code of Civil Procedure and Article 6 of the ECHR in relation to the fact that the applicants were ordered to pay the costs of the proceedings and were overpaid.

They also request a preliminary reference to the Court of Justice of the European Union for a preliminary ruling on the question whether, in relation to Regulation No 44/2001, Article 1 (which distinguishes civil matters from administrative matters) and Article 2(1) (which lays down the general rule of the defendant's domicile as the forum of jurisdiction) are to be interpreted, in the light, *inter alia*, of Article 47 of the FEU Charter and Article 6 of the ECHR, and recital (16) in the preamble to Directive 2009/15/EC, as including within the scope of the regulation the provisions of Article 1(1) (which distinguishes civil matters and 2(1) (which establishes the general rule of the defendant's domicile as the forum of jurisdiction).

6 ECHR and recital 16 in the preamble to Directive 2009/15/EC, to be interpreted as including within the scope of the regulation compensation proceedings brought by persons who have suffered damage as a result of the sinking of a ship and claiming civil liability on the part of a private company for acts and omissions in all activities of a technical nature relating to the design of the ship, its classification and, in its capacity as a recognised organisation, the issue of technical certificates (only in the latter case on behalf of a non-EU State from administrative matters) Article in the alternative, the applicants ask the Court to raise a question of constitutional legitimacy concerning the interpretation (of customary international law) which recognises the jurisdictional immunity of States to classification or certification societies or bodies established in Italy and sued in Italy for the activities they carry out, all of a technical nature, relating to the design of the ship, its classification and, as a recognised organisation, the issue of technical certificates, in relation to Articles 10(1), 2, 3, 29, 30, 32, 24 and 111 of the Constitution in the light of Article 6(1) ECHR, 2, 3, 29, 30, 32, 24 and 111 of the Constitution in the light of Article 6(1) ECHR.

In the further alternative, they claim that the Italian courts have jurisdiction at least with regard to the claims for damages against RINA SpA in respect of the activities connected with the ship (including design) for which they are jointly and severally liable, with the exception of the certification activities (RO).

II. - two grounds of conditional cross-appeal, RINA complains in turn: (i) in relation to Articles 115, 183 and 345 of the Code of Civil Procedure, that the documentary evidence consisting of the certification by the Panama Maritime Authority relating to its status as RO and to the continuation of the assignment received from the Panamanian authority was held to be incorrectly late;

(i) in relation to Articles 329 and 342 of the Code of Civil Procedure, the incorrectness of the denial that the judgment at first instance had become partially *res judicata* (on the ground of failure to appeal) in relation to the reconstruction of the contractual relations between Tirrenia and RINA Ente, between RINA Ente and Pacific Sunlight and between Pacific Sunlight and RINA SpA

III. - regards the main action, the Court of First Instance observes first of all that the fact that the Court of Justice has already ruled on the matter removes the function of the reference for a preliminary ruling.

The reference was made to another court, so that since the relevant decision of the Court of Justice has been handed down on the same question, the question now turns to the relevance of that decision to the specific subject-matter of the case.

IV. - the first plea in law of the main action is unfounded apart from the unusually long exposition, the appellants criticise the judgment for failing to recognise in the conduct of RINA SpA (which had not pleaded privilege in cases connected with the case in question and which, above all, had made a counterclaim under Article 96 of the Code of Civil Procedure in the same case) a tacit waiver of immunity.

The criticism is based overall on the defence in the proceedings before the French court which culminated in the well-known judgment of 30 March 2010 of the Paris Court of Appeal (Erika case), and in this respect the contested judgment noted that immunity relates exclusively to the situation in which the person claiming the benefit suffers the action, and not also that of the person assuming the position of plaintiff.

In this regard, he referred to the principle affirmed by these Joint Sections in a partially different case concerning members of the Court of Justice of the EC (Cass. Sez. U no. 11150-97). 11150-97), when it was said that immunity from the jurisdiction of member states, by virtue of its characteristics and the public purposes for which it is intended and, among these, in particular, because it is aimed at guaranteeing the freedom of exercise of the functions of the body to which it relates, is intended to protect the addressees from the interference that could be exercised by the jurisdictions of member states, and therefore concerns (as regards both criminal and civil, administrative and tax jurisdiction) exclusively the position of the accused and defendant, i.e. "those who are subject to the jurisdictional action"; so that when the person enjoying immunity is acting as a plaintiff, he may in no case rely on that immunity by waiving it in order to oppose possible claims counterclaims. however, although it must be confirmed that immunity is relevant only in the context of the proceedings brought by the person claiming privilege, so that a waiver can never be inferred from the conduct of the same person in proceedings other than that one, it must be observed that another argument (*in a decisive sense*) precludes - *in iure* - the contention of the appellants.

From a legal point of view, the meaning of the exception raised by RINA s.p.a. is based on the concept of derived immunity (defined by it - and by the Court of Appeal - as functional), practically constituting a specification of that of the delegating State (Panama).

In international law, the ultimate meaning of this immunity is that it is intended a from action before a foreign court. to prohibition on delegated bringing prevent State an person circumventing the against the basis of the argument was that it was necessary to identify the State of Panama as the beneficiary of the privilege, since RINA S.p.A., according to the postulation, would enjoy only derived immunity.

This of derived immunity is the heart of the problem, and will be addressed in relation to the third ground of appeal.

As far as waiver is concerned, it is sufficient to note that only the actual holder of direct immunity can, according to the rules of international law, legitimately waive it; and therefore the conduct adopted by RINA SpA could not in any case have been considered effective for that purpose, nor could it have been in this court of law.

This eliminates the basis of the censure from every point of view, although the Genoa court's assessment as to the irrelevance in itself of the submission of counterclaims by RINA SpA in the present proceedings must also be confirmed. Examination of the statement of appearance, the salient features of which are reproduced in the counter-appeal, confirms that these were merely subordinate claims, in the event that the preliminary objection was not upheld.

V. - the other hand, the third ground of the main appeal is well founded, in the sense that it follows, and this leads to the judgment being set aside and all the issues being absorbed.

VI. - the entire reasoning of the trial court, which is summarised in the foregoing, is based on the assumption that RINA SpA, although a subject of private law, must, as a recognised organisation (RO) of Panama, enjoy functional immunity, as an extension of State immunity.

Functional immunity is the institution from which those who represent the State on the basis of an organic relationship can properly benefit.

According to the territorial court, RINA S.p.A. is to be considered as such because it is the certification body for shipping designated for this purpose by the State of Panama.

The conclusion, which confirms the finding of the court at first instance, was based on the consideration that 'only the function performed must be taken into account', since the interpreter must 'assess whether that function is in fact a State function, performed by the delegate in place of the State, and for which, therefore, immunity may apply' (p. 48 of the grounds).

The statement is legally incorrect error lies at the level of the recognition of the legal situation, since immunity, a cardinal institution of international law to which the judgment refers, albeit in the so- called derivative form affecting the RINA company, is in no way an absolute consequence of the function performed, as if every time the function exercised is (*broadly speaking*) State, it (immunity) must necessarily be asserted.

VII. - the centre of extensive doctrinal reconstructions, the principle of customary international law on the jurisdictional immunity of States (*par in parem non habet imperium*) is not absolute.

Even in international practice, its application is limited to acts carried out by States *iure imperii*, according to the restricted meaning of this term (see already CJEC 19-7-2012, case C-154/11, *Mahamdia*), which refers to acts of government.

The Court of Appeal denied this (several times implicitly and then also explicitly, on page 59 of the grounds), relying instead on a broad (and distorted) notion of the concept.

It did so on the basis of case-law statements (such as those taken from the cited decisions of the administrative judge) that were generic, non-binding and in any event irrelevant, since they were limited to cases of a completely different nature.

On the other hand, the restriction of state immunity to acts *iure imperii* according to the specific meaning mentioned above, which alludes to acts in which the sovereign prerogative expressed by political power is expressed, is necessary for several concentric reasons.

VIII. - First of all, the indication of what is relevant to identify the features of such an activity, in the face of the shipwreck at issue, must be deduced from the recent ruling of the Court of Justice (Case C- 641/18).

The actual scope of this decision must be given due consideration, as the defendant's attempt to diminish its significance is futile.

In this judgment, the Court of Justice explained the current interferences between the activities of classifying and certifying ships on behalf of and by delegation of a sovereign State and the notion of "civil and commercial matters" for the purposes of the application of EU Regulation No. 44 of 2001 (on which, in general terms, see the aforementioned CJ 19-7-2012, *Mahamdia*).

In that regard, it considered it essential to ascertain whether the activity carried out fell within the exercise of the prerogatives of public authority under European Union law. Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that an action for damages brought against a legal person governed by private law which carries on the activity of classifying and certifying ships on behalf of and under delegation from a third State falls within the concept of 'civil and commercial matters' within the meaning of that provision and, consequently, within the scope of application of that regulation, if that activity is not carried on by virtue of the exercise of official authority within the meaning of European Union law, which is a matter for the referring court to determine. The principle of customary international law on immunity from legal proceedings does not preclude the national court before which an action is brought from exercising the jurisdiction provided for by that regulation in a dispute concerning such an action where that court finds that those bodies have not exercised the prerogatives of public authorities under international law.

This last sentence ("*if that court finds that those bodies have not availed themselves of the prerogatives of public authority under international law*") is the logical corollary of a principle already established by the Court of Justice itself regarding the boundaries of civil and commercial matters.

It has in fact been clarified that only relations with public authorities "*acting in the exercise of public powers*" (see C. Justicia, 28.4.2009, in Case C-420/07), and which are therefore not subject to the application of private and commercial law, remain outside the scope of civil and commercial matters - which are notoriously autonomous and very broad in scope (see C. Justicia, 23.10.2014, in Case C-302/13, and C. Justicia, 6.2.2019, in Case C-537/17).

In the case of activities mediated (in return for remuneration) by private-law companies, such relationships must in any event be identified as those in which the companies act by exercising decision-making powers belonging in turn to the group of sovereign prerogatives, powers that are broadly discretionary and, as such, independent of the regulatory framework intended to govern their characteristics and the manner in which they are carried out.

IX. - at this is the specific meaning of the above statement is confirmed by the Court of Justice's simultaneous reference to similar precedents on the concept, as well as by the consistency to be found in the development of EU law on the subject of jurisdiction.

Similar precedents apply to the activities of private-law bodies responsible for verifying and certifying that undertakings carrying out public works meet the conditions laid down by law. Indeed, these precedents (e.g. CJEC, 12-12-2013, Case C-327/12), cited in the judgment by analogy, exclude the possibility that the activities in question, precisely because they involve mere verification and subsequent certification, can be considered as falling within *the "decision-making autonomy inherent in the exercise of the prerogatives of public authorities"*, given that such verification, carried out under direct State supervision, *"is defined in all its aspects by the national regulatory framework"*.

In turn, the development of European Union law reinforces the specificity of the concept itself, and it seems of no minor importance that the boundary of immunity, as regards acts exercised in the context of a sovereign power, has finally been codified in the new text of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the so-called New Brussels I Regulation).

The reference is to Article 1, which excludes from the scope of the Regulation fiscal, customs and administrative matters and the liability of the State *"for acts and omissions in the exercise of State authority (acta iure imperii)"*.

X. - the essential convergence of the principles referred to therefore leads to a completely different conclusion from that postulated by the Ligurian court.

The conclusion is that the assertion of jurisdictional immunity depends indeed on the substance of the activity underlying the dispute, regardless of the public nature of the subject involved in the litigation, but cannot be recognised in the presence of mere activities of a generically state-related order (*i.e.* ordinarily under the responsibility of the State although carried out, by designation, by private companies). The notion of immunity is relevant only when the dispute concerns *'acts of sovereignty performed iure imperii'*, so that, simultaneously and conversely, any assertion of immunity must

be excluded whenever the claim relates to acts (or the consequences of acts) that are not covered by that specific notion.

XI. - should now be added that the same conclusion must be drawn by the national court beyond the authority of the source.

It is indeed necessary to consider the competing profiles of the necessary compatibility with the interpretation presupposed by the ECHR and domestic constitutional law.

From this point of view, the convergence of values ends up conditioning the governance of exegesis even more sharply, as the only sustainable determination.

This resolutely leads to the rejection of the idea - still feared by the defence of the appellant but absolutely unfounded because undermined by the same erroneous conceptual premise - that the Court of Appeal correctly carried out, even in double conformity, the relevant assessment in this matter, in the face of statements of the Court of Justice to be relegated to the margins of *obiter dictum*.

The Court of Justice referred to its earlier judgment of 25 May 2016 in Case C-559/14 and emphasised that rules which are the expression of customary international law are, as such, binding on the institutions of the Union and form part of its legal order. On the other hand, it recalled that any national court implementing EU law must comply with the requirements arising from Article 47 of the Charter: it must therefore ensure that the upholding of the plea of judicial immunity is not such as to deprive the persons concerned of their right to bring proceedings before a court, in the context (precisely) of the effective judicial protection guaranteed by Article 47.

In this respect, albeit briefly, the Court of Justice has shown that it regards an extension of jurisdictional immunity beyond the limit of restrictive interpretation as highly problematic.

Well, the viewpoint of the internal constitutional law is convergent, in the sense that the need for a restrictive interpretation, to which to anchor the recognition of jurisdictional immunity for the *acta iure imperii*, is the only one compatible with the counterbalances offered by the Italian constitutional system, based on the necessary balancing with the fundamental human right of access to a judge. This right - it should be recalled - is widely recognised at a general and international level, and does not constitute a prerogative of the EU Charter alone, in the context of the effective judicial protection provided by Article 47 (see CJEC 6-11-2012, case C-199/11).

The right of access to the courts is in fact intrinsic to the right to a fair trial enshrined in Article 6 of the ECHR, within the perimeter marked by case-law which shows that the recognition of immunity - where it is not demarcated by function, and therefore not calibrated on the pursuit of a legitimate aim of safeguarding relations between States through respect for the principle of sovereignty (see Edu Court 14-1-2014, Jones v. United Kingdom, Edu Court 21-11-2001, Al-Adsani v. United Kingdom) - may result in an unjustified compression of that right.

In sequence, the conclusion must be related to the conforming principle deriving from Article 111 of the Constitution, in conjunction with Articles 3 and 24 of the Constitution, since this is also the interpretation offered by the Constitutional Court.

Indeed, it is precisely in the objective of balancing that the statement that what would otherwise result from the International Court of Justice's judgment of 3 February 2012 in the well-known case of Germany v. Italy is contrary to the principles of the Italian constitutional order was placed underlined (see Constitutional Court no. 238 of 2014). Italy (see C. Cost. n. 238 of 2014): namely, that the immunity of a foreign State from the jurisdiction of the Italian court "*protects the function, not also conduct that does not relate to the typical exercise of the power of government*", and requires (moreover) the finding of a link of non extraneousness to the legitimate exercise of such power, in order not to make disproportionate the sacrifice of the competing right of access to a judge.

XII. - view of this, the united sections cannot fail to note that the essential aspects of the problem, which intercept constitutionally relevant rights, were not taken into account by the Court of Appeal of Genoa. This court based its decision on the unfounded assumption that, for the purposes of immunity, "only the function carried out" should be taken into account, as if the interpreter were responsible for assessing aseptically whether (and only if) "this function is actually a state function, carried out by the delegate in place of the State". This statement is in itself, in its vagueness, wrong, as we have seen, since the judgment implied that it had to be established whether RINA had acted by exercising, at the end of the conventional relationship with the State of Panama, the public power strictly inherent in the scope of *iure imperii* activities.

In any case, it could not have been predicated, since it was necessary to consider the repeated balancing link, which stood out (and still stands out) as the cardinal point of a very different conclusion since, in an institutional context marked by the centrality of human rights, the very right of access to jurisdiction (to be ensured in the name of effective protection also according to Article 24 of the Constitution) should have been inferred as unjustifiably hindered by a generalised statement of the kind made.

This should have been understood bearing in mind the circumstance that the extensive exegesis, finally preferred, would have ended up legitimizing (as in fact it legitimated) the exercise of the action for damages only before the Panamanian authorities, and only as a consequence of the (inexplicable) rules of that State; with the inevitable corollary of accepting that the very exercise of that action (before the Panamanian authority) could eventually be paralyzed by a defense exactly mirroring the one at issue here. A circular defence (of course), since it was based on the assumption that the action of the victims of the event had to be brought against the delegated company before the courts of its seat, for acts (of classification and certification) which were not relevant for the purposes of immunity because they did not imply the exercise of sovereign powers; but nevertheless an effective defence and potentially cutting off any avenue for ascertaining the merits, in clear contrast to the ultimate aim of any trial.

The unsustainability of this development should have been immediately apparent, if only in terms of fundamental rights and the related constitutional balances.

So that the thesis supporting it must ultimately be decisively rejected.

XIII. - the criterion of judgement based on the exercise of public power in a sphere of *iure imperii* activity (in the strict sense of the term), by means of the exercise of prerogatives reserved to sovereign authority, must be based on the observation that, in general, classification and certification activities do not entail a decision-making power which goes beyond the regulatory framework, of eminently international origin, predefined to guarantee safety conditions at sea and to this end, another consideration seems necessary.

The Court of Appeal of Genoa showed that it considered the distinction between these activities (classification and certification) to be irrelevant, since it affirmed - at page 68 of the grounds - that the activity of RINA SpA, although carried out within the framework of the regulations and criteria dictated by the SOLAS and UNCLOS Conventions, was to be considered an expression of immunity for the public purpose of assessment.

This statement is also erroneous, and so is the assumption.

It should be recalled that the classification of a ship consists in the issue of a certificate by a company chosen by the shipowner, which certifies that the ship is designed and built in accordance with the class rules established in accordance with the principles laid down by the IMO (International Maritime Organisation). Obtaining the classification certificate then becomes a condition for regulatory certification, which takes place after the shipowner has chosen the flag State.

In turn, the certification activity takes the form of the issuance of the regulatory certificate by the flag State (or, on its behalf, by one of the bodies authorised to carry out appropriate inspections) in accordance with the SOLAS 74 Convention ("International Convention for the Safety of Life at Sea", concluded in London on 1 November 1974).

While it is true that classification and certification activities are often carried out by the same company, as the Court of Appeal pointed out, it is not less true that the two activities are different in terms of their purpose and object, even though they are generally concerned with the safety of ships: the former do not even include a public delegation, and the latter, although carried out by delegation (normally on the basis of a commercial agreement), involve the performance of technical activities, which are precisely regulated by the aforementioned agreement (rule 3-1 of part A-1, chap. II-1, and Rule 6 of Chapter I).

In turn, the flag State cannot escape compliance with its guarantee obligations. It too is bound by the need to adopt the measures necessary to safeguard safety at sea, and among these in particular (see the UNCLOS Convention, "United Nations Convention on the Law of the Sea", concluded in New York on 10-12-1982) the measures relating to the "*construction, equipment and seaworthiness of ships*". Compliance with them is a prerequisite for the effective exercise of its jurisdiction

(and control) over administrative, technical and social matters over ships flying its flag (see Article 94 of that Convention).

However, it is the prerogative of the flag state to interpret the requirements for compliance with these measures, whereas this is not given to (classification and) certification societies.

It is not disputed that the State of Panama only entrusted RINA SpA with the task of carrying out the certification activity necessary to establish the ship's compliance with the requirements. It follows that, in the absence of any other evidence, even on the basis of the findings in the judgement, no power to interpret those requirements was conferred on the company.

This means that the judgment under appeal is wrong even in its assessment of the facts of the case.

The above-mentioned Conventions (and especially the SOLAS 74 Convention) identify the technical criteria and standards to be followed in order to ensure safety at sea (which is acknowledged by the Court of Appeal itself); therefore, the purpose of the assessment, if it gave to the issuance of the safety certificate the connotation of an act

of public relevance, did not add (and did not take away) from the fact that it was still a matter of carrying out a technical activity regulated on the basis of pre-established dictates and normative parameters.

It follows that it is not essential that the certification was carried out by delegation or on behalf of the State, nor that it had a generic public purpose.

All this is obvious, but not relevant.

The decisive element, for the purposes of the recognition of immunity from Italian jurisdiction, was (and is) instead another, namely that the substance of the activity had been commissioned by means of the conferral of powers exceeding the scope of the rules established in the form of regulation.

This is not the case, as this Court can tell from a direct examination of the documents.

In this respect, it must be recalled that whenever questions of jurisdiction are to be resolved (and in any other case where the enquiry is directed to ascertaining whether the court on the merits has committed an *error in procedendo*) judge of procedural fact. In this respect, the court has the power to directly examine the documents in the case (see, among others, Court of Cassation U-Sect. 5640-19, Court of Cassation U-Sect. 20181-19), subject to the need (complied with here) for the appellant to request the power of assessment by submitting the corresponding defect.

The factual situation as presented in the application at the time of its formulation is relevant to the assessment of jurisdiction (arts. 5 and 386 Code of Civil Procedure).

The United Chambers of the Court of Justice are therefore, in this process, the national judicial body empowered to carry out the assessment referred to in the Court of Justice's judgment of 7-5-2020.

Since a question of jurisdiction is being discussed, they are the judge of the fact, so they can and must examine the acts whose assessment affects the determination of jurisdiction, taking into account, however, that the findings must be considered, pursuant to article 386 of the code of civil procedure, as they emerge from the legal request and its possible clarification, the Court of Cassation being concerned with the *causa petendi* and the substantial *petitum* (see Court of Cassation section U no. 156-20).

XIV. - the present case, the subject-matter of the dispute was related to a claim for damages based on technical objections, the claimants having complained of professional inconsistencies, omissions, negligence (and so on) in the inspection activities and the consequent technical assessments carried out by RINA in the context of the activity referred to it as RO.

The essential elements of the case emerge clearly, in this perspective, from the same judgment, in measures of the fact that only the (classification and) certification activity was commissioned to RINA SpA.

The activity was postulated as being carried out on the basis of a relationship of a commercial nature in order to establish whether the vessel Al Salam Boccaccio '98 was eligible for a certificate in accordance with the conventional provisions.

Such an activity, although in the broad sense it is part of a public ascertainment function, cannot in its technical implementation be regarded as the expression of the exercise of sovereign prerogatives of the delegating State.

It follows that the Italian courts have jurisdiction over the claim for damages brought by the plaintiffs against that company.

XV. - st for the sake of completeness, it is worth adding that the fact that such a case is not subject to jurisdictional immunity is now definitively confirmed by Directive 2009/15/EC of 23 April 2009 on common rules for ship inspection and survey organisations.

This Directive - which the Court of Justice itself refers to in support of the legal framework - is also part of the current trend against providing ROs with immunity from prosecution.

Recital 16 (which the present appellants referred to before the Court of Appeal) states that *"when a recognised organisation, its surveyors or technical staff issue statutory certificates on behalf of the administration, Member States should consider allowing them, in respect of such delegated activities, to be subject to appropriate legal safeguards and judicial protection, including the exercise of appropriate rights of defence, except for immunity, a prerogative which may be invoked by Member States alone, as an inseparable right of sovereignty which as such cannot be delegated"*.

The contested judgment misinterpreted the scope of the reference.

In particular, it devalued the reference drawn from the phrase "*except for immunity*", deeming it non-essential, because it does not constitute a preceptive part of the Directive and because it is included in an area in any case limited to the Community area, from which the State of Panama is excluded.

That the State of Panama is outside the Community area is obvious.

However, the concomitant devaluation of the importance of the directive cannot be shared, nor can the allusion to the limited function of the recital.

If the Directive were directly applicable to the concrete case, because, for example, the company had acted within the scope of the Directive as an RO of the EU, all issues would be resolved *in nuce*.

However, although not applicable, the Directive has its importance, since that very recital helps to identify the direction taken by EU law in exact conformity with the limits of the concept of immunity.

In other words, the aforementioned "recital" - in other words - is a sign of validation of the link that, at an exegetical level, must be able to link the institution of immunity to the prerogative invoked by states in the exercise of non-delegable sovereign functions ("*as an inseparable right of sovereignty that as such cannot be delegated*"). And thus it can (and does) serve the reconnaissance of the customary norms that regulate the historical institutions of international law, such as immunity, whose *rationale* is inherent to the concept of state sovereignty.

The case pits the plaintiffs against a private Italian company.

As noted in doctrine, it is not without significance that the 2009 Directive (referred to as "Erica III") was enacted following the "Erica" case, which the court of appeal itself referred to as reflecting the immunity of the certifying company held therein (allegedly by implication) by the judgment of the Paris Court of Appeal of 30-3-2010.

The meaning of the expressions used in the Directive and the *rationale* of the approval procedure lead to the conclusion that there is a path towards completion of European Union law and that there is no customary basis for extending State immunity to companies entrusted with transactions of the kind at issue in this case.

Any reference to the extension of the immunity of States would, moreover, presuppose a customary basis for this purpose, and thus a basis based on a conforming *opinio iuris*.

The Directive, which expresses the positions, and therefore in a broad sense the "opinions", of the sovereign States, departs significantly from this *opinio iuris*.

XVI. - the judgment under appeal is set aside.

The remaining pleas in law of the main action are absorbed and the conditional cross- appeal is also absorbed in relation to its subject-matter.

The case is referred to the Court of Genoa, in a different composition, pursuant to Article 383(3) of the Code of Civil Procedure.

The court shall also decide on the costs of the proceedings.

p.q.m.

The Court upholds the third plea in law in the main action, dismisses the first claim and declares the others to be inadmissible; declares the cross- appeal to be inadmissible; declares that the Italian court has jurisdiction; sets aside the judgment under appeal and refers the case, including the costs of the appeal, to the Tribunale di Genova.

Decided in Rome, in the council chamber of the United Civil Sections, on 3 November 2020.