ITALIAN REPUBLIC

IN THE NAME OF THE ITALIAN PEOPLE

THE SUPREME COURT OF CASSATION

JOINT CIVIL CHAMBERS

Composed of the following justices:

(omission)

Delivers the following

JUDGMENT (No 28180-20)

1. In the night between the 2nd and the 3rd of February 2006, the Al Salam Boccaccio 98 ferry tragically sank in the Red Sea while sailing from the port of Dhiba (Saudi Arabia) to Safaga (Egypt).

The sinking caused 1097 deaths.

The vessel sailed under the flag of Panama and its registered owner was Pacific Sunlight Marine Inc., a company registered in Panama, but entirely with Egyptian capital.

Pacific Sunlight had bought her from Tirrenia SpA in April 1999.

2 - The present petitioners for cassation, acting in their own right or as heirs of some of the victims of the sinking, had brought an action for damages before the *Tribunale di Genova* [Court of Genoa] against RINA - Registro italiano navale SpA (''RINA''), a company with registered office in Genoa, responsible for the classification of ships and (since 1999) an accredited body for safety certification on behalf of the State of Panama.

The plaintiffs claimed before the court that the defendant company had failed to carry out adequate checks to verify the safe navigation conditions of the vessel, which, in addition to being poorly designed and equipped, had undergone structural modifications back in the early 1990s and had therefore become outdated.

3- The defendant company, as a preliminary matter – which included any other defence – claimed that the Italian court seised lacked jurisdiction, since the competent court was the Panamanian court. It argued that, given that the Republic of Panama had delegated to it the exercise of State functions, the international custom of the immunity of States also applied to it as delegate.

4- The Court of Genoa, with judgment No 2097 of 2012, declared the immunity from Italian jurisdiction with regard to the activities carried out, directly or indirectly, by RINA SpA. in its capacity as Recognized Organization (RO under the IMO Code) of Panama after the ship was registered under the Panamanian flag; whereas it rejected the objection of immunity with regard to the activities attributed indirectly to RINA SpA given that they had been carried out by RINA Ente before the ship was registered under the Panamanian flag,

and, with a separate decision, entered the case again on the court's docket for taking the relevant evidence.

By its subsequent judgment No 132 of 2014, the Court of Genoa settled the case on the above issue of whether RINA SpA should be deemed in any way liable for the activities carried out on the ship by its parent company RINA Ente before the ship was registered under the Panamanian flag, that is to say during the period in which the certification tasks were carried out 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 dated 29 July 1999.

In this regard, the Court rejected the claims and also rejected the request for permission to summon RINA Ente.

5 - The plaintiffs appealed against both judgments on seven grounds: the first four concerned the preliminary assertion of immunity from jurisdiction and the other three the asserted continuity between RINA Ente and RINA SpA.

Specifically, the appellants claimed that: (i) there had been an implicit acceptance of Italian jurisdiction by RINA SpA, since the latter had seised Italian courts for matters connected with the present case; (ii) there had been a waiver of the right to rely on immunity from Italian jurisdiction, in the face of the arbitration clause contained in the rules for the classification of ships; (iii) in any case, the privilege of immunity from jurisdiction could in no way be accepted, on the basis of the principles of public international law, constitutional law and private international law; (iv) it had not been proved that RINA SpA had always acted as RO of the State of Panama, nor had it been proved that there had been an official investiture of RINA SpA by the State of Panama given that, on the other hand, the assessment of the private nature of the relationship with the ship-owner company had been omitted; (v) it was necessary to establish the complete continuity between RINA Ente and RINA SpA - also for damages purposes - in relation to facts that were not protected by immunity since they related to activities carried out by RINA Ente as RO and as Italian classification company, and to the transfer of obligations consequent to the transfer of the company; (vi) the limitation of RINA SpA's liability for the activities carried out by RINA Ente prior to its assumption of the Panamanian flag was erroneous; (vii) the refusal to authorise RINA Ente to take part in the proceedings was unlawful, since it was based on the wrong assumption that the relevant request had been made out of time.

6- Also Rina SpA appealed against the judgment. In particular, by means of a cross-appeal, it attacked the second judgment in so far as it did not declare that RINA Ente lacked *locus standi* as defendant in relation to its activities prior to its incorporation.

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

As regards what is now of interest, the Court of Appeal deemed that the privilege of immunity should be extended to RINA SpA, as RO, because it had been delegated 'State functions'.

This was based on various sources, among which the court highlighted the following:

(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 is intact (in respect of it) even in case of delegation of functions to the ROs;

(ii) Italian case-law - and specifically (a) the judgment of the Regional Administrative Court [TAR] of Liguria No 1569 of 2007 - which has become final - concerning a case in which at least one of the present petitioners had been a party, and which stated that the classification and certification activity of RINA SpA should be considered as a manifestation of the power and capacity under public law of the foreign State administration; (b) the *Consiglio di Stato* [Council of State] judgment No 3352 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 Italian territory; indeed, that judgment affirmed the principle that even where a violation affects fundamental goods (such as human life), this does not mean that there is a waiver of the immunity of States, since a waiver can only be linked to acts constituting actual crimes against humanity and war crimes.

Moreover, the Court of Appeal excluded that the activity of RINA SpA could be included among those of a "merely technical nature", being of the opinion 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 also to the distinction between classification and certification activities, since the relevant conditions "are part of a set of rules that condition State certifications", so that the class certificate had to be said to be- as much as a State certification - "of the same nature as an act of public importance".

With this approach, the Court of Appeal concluded that the request of the original appellants for a reference for a preliminary ruling under Article 267 of the EU Treaty was unfounded.

Lastly, the Court of Appeal rejected the claims relating to the indirect damages liability of RINA SpA for the activities attributed to RINA Ente prior to the disaster, since they were not supported by Articles 2558 and 2560 of the Civil Code, nor by Article 1292 of the Civil Code.

8. The original plaintiffs - specified here in the caption – submitted a petition for cassation of that judgment on six grounds.

The respondent replied with a cross-petition for cassation submitting two grounds and also reiterating the pleas in the grounds of the cross-appeal, that were considered to be absorbed.

9. The case was assigned to the Joint Civil Chambers of this Supreme Court of Cassation at the request of the original petitioners, pursuant to Article 376(2) of the Code of Civil Procedure, in view of the importance of the underlying issue.

The parties filed written pleadings.

By interim decision No 19582 of 2019, this Court ordered that the case be stayed pending the decision of the Court of Justice of the EU on the reference for a preliminary ruling made by the *Tribunale di Genova* [Court of Genoa] in a separate case pending before it, brought by the families of other victims of the sinking, and which raised identical claims concerning RINA SpA's civil liability.

The judgment of the Court of Justice was delivered on 7 May 2020.

Reasons for the decision

I. – The original petitioners submit the following grounds, in the following 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 been lost due to waiver of it 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 TFEU;

(iii) infringement or misapplication of several provisions of the Italian Constitution (Articles 2, 3, 10, 23, 29 and 30 of the Constitution), also in the light of Article 6 of the ECHR, and Articles 2697 of the Civil Code and Articles 115 and 116 of the Code of Civil Procedure, in relation to the conclusion that there is an international custom entailing immunity from legal proceedings for the activities of classification or certification companies acting 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, since the factual conditions for immunity were deemed to exist even in the absence of clear evidence of the commencement of that privilege;

(v) infringement or misapplication of Articles 2560 and 2558 of the Civil Code, and failure to examine decisive elements 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 company; the existence of a contract between RINA Ente (as an "Italian

class" and an Italian RO) and the ship-owner 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 plaintiffs were ordered to pay the costs of the proceedings and that those costs were excessive.

The petitioners for cassation also request a preliminary ruling by the Court of Justice of the European Union 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 Charter of Fundamental Rights of the European Union and Article 6 of the ECHR, and recital (16) of Directive 2009/15/EC, as including within the scope of the Regulation the action for damages brought by the persons damaged by the sinking of a ship and seeking a declaration of civil liability of a private company for acts and omissions in all its activities of a technical nature relating to the ship's design, its classification and, as a Recognised Organisation, the issue of technical certificates (only in the latter case on behalf of a non-EU foreign State).

In the alternative, the petitioners ask this Court of Cassation to challenge the constitutionality of the interpretation (of customary international law) granting the immunity from jurisdiction of States to classification or certification societies or bodies established in Italy and sued in Italy for their activities - all of a technical nature - concerning the design of a 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 Italian Constitution in the light of Article 6(1) ECHR.

In the further alternative, they ask this Court to conclude that the Italian courts have jurisdiction at least with regard to the actions for damages against RINA SpA concerning the activities related to the ship (including its design), even as joint and several liability, with the exception of the certification activities (RO).

II. – In the two grounds of its conditional cross-petition, 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 incorrectly held to have been submitted out of time;

(i) in relation to Articles 329 and 342 of the Code of Civil Procedure, the incorrectness of the denial that the first instance judgment had become partially res judicata (due to non-appeal) with respect to the reconstruction of the contractual relationhip between Tirrenia and RINA Ente, between RINA Ente and Pacific Sunlight and between Pacific Sunlight and RINA SpA.

III. As regards the original petition for cassation, these Joint Chambers observe first of all that the fact that the Court of Justice has already ruled on the matter eliminates the purpose of a reference for a preliminary ruling.

In fact, a reference was made by another court so, given that the Court of Justice has handed down its judgment on the same question, all the issues now concern the relevance of that decision with respect to the specific subject-matter of this case.

IV. The first ground of the original petition for cassation is unfounded.

Apart from the unusually long presentation of the case, the petitioners attack the judgment for having failed to recognise a tacit waiver of immunity in the conduct of RINA SpA (which had not pleaded that privilege in other cases connected with the one in question and which, above all, had made a counterclaim under Article 96 of the Code of Civil Procedure in that same case).

The criticism is based overall on the defence made in the judicial proceedings in France which culminated in the well-known judgment of the Paris Court of Appeal of 30 March 2010 (Erika case), and in this respect the contested judgment held that immunity relates exclusively to the situation in which the person claiming the privilege suffers the action, and not also the situation of the plaintiff.

In this regard, it referred to the principle affirmed by these Joint Civil Chambers in a partially different case, concerning members of the Court of Justice of the EC (Joint Chambers judgment No 11150-97) when it 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 aimed at protecting its beneficiaries from the interference that could be exercised by the courts of Member States, and therefore concerns (as regards criminal courts and also civil, administrative and tax courts) exclusively the position of the accused and the defendant/respondent, i.e. "the party against which the action is brought"; so that when the person enjoying immunity is acting as a plaintiff, they may in no case rely on that immunity claiming it in order to oppose possible counterclaims.

Therefore, although it must be confirmed that immunity is relevant only in the context of proceedings brought against the person claiming that privilege, so that a waiver can never be inferred from the conduct of the same person in proceedings other than the relevant one, it must be observed that another argument (in a decisive sense) precludes - *in iure* - the view held by the petitioners.

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

In international law, the true sense of this immunity is the following: it is intended to avoid any circumvention of the prohibition to sue a State before a foreign court by suing its delegate.

The basis of the argument made it necessary to identify the State of Panama as the beneficiary of the privilege, since RINA SpA, according to the assertion, would enjoy only derived immunity.

Indeed, derived immunity is the heart of the problem, and will be addressed in relation to the third ground of the petition for cassation.

As far as a 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 be by this Court of Cassation examining the compliance with the law.

This elides the basis of the grounds from every point of view, although it is also necessary to confirm - in the present proceedings - the conclusion of the Genoa Court of Appeal as to the irrelevance in itself of the submission of counterclaims by RINA SpA. The examination of the defendants' defence, the main features of which are restated in the cross-petition here, confirms that those claims were merely subordinate, in the event that the preliminary objection was not upheld.

V. On the other hand, the third ground of the original petition is well founded, in the sense that it follows, and this leads to the judgment being quashed and all other issues being absorbed.

VI. The entire reasoning of the Court of Appeal summarised above, is based on the assumption that RINA SpA, although being 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 legal concept that those who represent the State on the basis of an organic relationship can invoke.

According to the Court of Appeal, RINA SpA is to be considered as such, because it is the certification body for naval ships designated for this purpose by the State of Panama.

The Court of Appeal's conclusion, confirming the finding of the first instance court, was based on the consideration that 'only the function performed must be taken into account', since the interpreter of the law 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' (see p. 48 of the grounds of the judgment).

This statement is legally incorrect.

The error lies in the assessment of the legal category, since immunity - a cardinal concept of international law to which the judgment refers, albeit in the so-called derivative form that would apply to the RINA company - is in no way an absolute consequence of the function performed, as if every time the function exercised is (broadly speaking) a State function, it (immunity) must necessarily ensue.

VII. At the heart of extensive doctrinal reconstructions, the principle of customary international law on the immunity from jurisdiction of States (*par in parem non habet imperium*) is not absolute.

Even in international practice, its application is limited only to acts carried out by States *iure imperii*, according to the restricted meaning of this term (see cj 19-72012, case C-154/11, *Mahamdia*), and which refers to the acts of the government.

The Court of Appeal denied this (many times implicitly and then also explicitly on page 59 of the grounds of its judgment), 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 court) that were generic, non-binding and in any event irrelevant, given that they were limited to cases of a completely different nature.

On the other hand, many concentric reasons impose to restrict state immunity only to acts *iure imperii* according to the specific meaning mentioned above, which alludes to acts expressing the sovereign prerogative manifested by political power.

VIII. First of all, the indication of what is relevant for identifying the features of such an activity, in the face of the shipwreck at issue, must be deduced from the recent ruling of 7 May 2020 of the Court of Justice (Case C- 641/18).

The true weight of this decision must be given due consideration, because the defendants' defence attempt to diminish its significance is pointless.

In its 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 concept of "civil and commercial matters" for the purposes of the application of EU Regulation No 44 of 2001 (on which, in general, see the aforementioned CJEU judgment of 19 July 2012, *Mahamdia*).

In that regard, the Court of Justice considered essential to ascertain whether the activity carried out fell within the exercise of public powers under European Union law. "*Article 1(1) of Regulation No 44/2001 must be interpreted as meaning 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 that provision, 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, which it is for the referring court to determine. 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.*"

This last sentence ("*where that court finds that such corporations have not had recourse to public powers within the meaning of international law*") is the logical corollary of a principle already clearly established by the Court of Justice regarding the boundaries of civil and commercial matters.

The Court of Justice has in fact clarified that only relations with public authorities "*acting in the exercise of public powers*" (see C. J. judgment of 28 April 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 CJEU judgment of 23 October 2014, in Case C-302/13, and CJEU judgment of 6 February 2019, in Case C-537/17).

In the case of mediated activities (in return for remuneration) by private-law companies, such relations must anyway correspond to those in which the companies act exercising decision-making powers that in turn belong to the field of sovereign prerogatives, which are widely discretionary powers and, as such, are independent of the legal framework intended to govern their characteristics and the manner in which they are carried out.

IX. The fact that this is the specific meaning of the above statement is confirmed by the Court of Justice's simultaneous reference to similar case-law on that concept, as well as by the consistency of the evolution of EU law on the issue of jurisdiction.

Similar precedents apply to the activities of private-law bodies responsible for checking and certifying that undertakings carrying out public works meet the conditions laid down by law. Indeed, these precedents (e.g. CJEU judgment of 12 December 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 scope "*of the decision-making independence inherent in the exercise of public powers*", given that such check, carried out under direct State supervision, "*is regulated entirely by national legislation*."

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 eventually 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 revenue, 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 court [of appeal].

The conclusion is that the assertion of immunity from jurisdiction 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 generically State-related activities (i.e. ordinarily under the responsibility of the State although carried out, by designation, by private companies). The concept 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 do not fall within that specific notion.

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

It is indeed necessary to do so also in consideration of 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 even more neatly the exegesis activity as being the only sustainable determination.

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

The Court of Justice referred to its earlier judgment of 25 May 2016 in Case C559/14 and emphasised that the 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 of Fundamental Rights of the European Union: 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 of access to 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 immunity from jurisdiction beyond the limit of a restrictive interpretation as highly problematic.

Well, the viewpoint of internal constitutional law is convergent in the sense that the need for a restrictive interpretation, to which to anchor the recognition of immunity from jurisdiction for the *acta iure imperii*, is the only one compatible with the counter-limits offered by the Italian constitutional system, based on the necessary balancing with the fundamental human right of access to a court. 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 of Fundamental Rights alone, in the context of the effective judicial protection provided by Article 47 (see CJEU judgment of 6 November 2012, case C199/11).

The right of access to a court is in fact intrinsic to the right to a fair trial enshrined in Article 6 of the ECHR, within the limits marked by a case-law aimed at highlighting 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 ECtHR judgment of 14 January 2014, Jones v. United Kingdom; ECtHR judgment of 21 November 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 Italian 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 aiming at achieving a balance that stands the remark of non-compliance with the Italian Constitution of 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 (see Constitutional Court judgment No 238 of 2014): namely, that the immunity of a foreign State from the jurisdiction of the Italian courts "*protects the function, not also conducts that do not relate to the typical exercise of government powers*", and requires (moreover) to find a link in support of the legitimate exercise of such power, in order not to make disproportionate the sacrifice of the competing right of access to a court.

XII. In view of this, these Joint Civil Chambers cannot fail to note that the essential aspects of the problem, which intercept constitutionally relevant rights, were not taken into any account by the Court of Appeal of Genoa. That 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 of the law were responsible for assessing aseptically if (and only if) "this function is actually a State function, carried out by the delegate in place of the State".

As we have seen, this statement is in itself, due to its vagueness, wrong, since the judgment implied that it was necessary to establish whether RINA had acted exercising, within its 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 also necessary to consider the repeated balancing link, which stood out (and still stands out) as the cardinal point of a very different conclusion given that, in an institutional context marked by the centrality of human rights, it was precisely the concurrent right of access to a court (to be ensured in the name of an effective protection also according to Article 24 of the Constitution) that should have been inferred as being unjustifiably hindered by a generalised statement of the kind made.

Moreover, 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 did) the exercise of the action for damages only before the Panamanian authorities, and only as a consequence of the (unexplained) rules of that State; with the inevitable corollary of accepting that the exercise of that action (before the Panamanian authority) could eventually be paralyzed by a defense mirroring exactly the one at issue here. A circular defence (indeed), 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 that potentially eliminates any functional possibility of ascertaining the substance of the case, in clear contrast to the ultimate aim of any trial.

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

So the thesis supporting it must ultimately be firmly rejected.

XIII. - The criterion of judgment based on the exercise of public powers inherent in a sphere *of iure imperii* activities (in the strict sense of the term), by means of the exercise of prerogatives reserved to sovereign authority, must be based on the finding that, in

general, classification and certification activities do not entail a decision-making power independent of the regulatory framework of eminently international origin, predefined to guarantee safety conditions at sea.

To this end, another consideration is necessary.

The Court of Appeal of Genoa showed that it considered irrelevant the distinction between these activities (classification and certification), since it affirmed - on page 68 of the grounds of its judgment - 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 too is erroneous, and it is so in 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 ship-owner, attesting 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). Therefore, obtaining the classification certificate becomes a condition for the regulatory certification, which takes place after the ship-owner has chosen the flag State.

In turn, the certification activity consists in the issue 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 Convention (Rule 3-1 of part A-1, Chapter II-1, and Rule 6 of Chapter I).

In turn, the flag State cannot avoid complying 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 December 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 concerning the ships flying its flag (see Article 94 of that Convention).

However, it is the prerogative of the flag State to interpret the requirements for complying with these measures, whereas this is not possible for (classification and) certification companies.

It is undisputed that the State of Panama entrusted RINA SpA only 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 judgment, no power to interpret those requirements was conferred on the company.

This means that the judgment we are now examining 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 (and this fact is acknowledged even by the Court of Appeal); therefore, the assessment, while giving to the issue of the safety certificate the connotation of an act of public relevance, it did not add anything (nor does it take anything away) from the fact that after all it was a technical activity regulated by pre-established rules and normative standards.

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 at ascertaining whether the court examining the substance of the case has committed an *error in procedendo*) the Court of Cassation judges the procedure. From this point of view, the Court of Cassation has the power to examine directly the documents in the case (see, among others, Court of Cassation Joint Civil Chambers judgment 5640-19, Court of Cassation Joint Civil Chambers judgment 20181-19), subject to the need (duly complied with here) for the petitioner to request the power of assessment by claiming the relevant defect.

For the purposes of assessing jurisdiction, what is relevant is the factual situation as presented in the claim at the time of its formulation (Articles 5 and 386 Code of Civil Procedure).

Therefore, the Joint Civil Chambers of the Court of Cassation are, in these proceedings, the national judicial body empowered to carry out the assessment referred to in the Court of Justice's judgment of 7 May 2020.

Since a question of jurisdiction is being discussed, the Joint Chambers are the judge of the facts, therefore they can and must examine the acts the assessment of which affects the determination of jurisdiction, and also take into account that the findings must be considered, pursuant to Article 386 of the Code of Civil Procedure, according to how they emerge from the claim to the court and its possible specification in the light of the *causa*

petendi and the substantial *petitum* (see Court of Cassation Joint Civil Chambers judgment No 156- 20).

XIV. In the present case, the subject-matter of the dispute was related to an action for damages based on technical claims, where the plaintiffs had complained about 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 in its function as RO.

The essential elements of the case emerge clearly, in this perspective, from the judgment itself, as proof of the fact that only the (classification and) certification activity had been commissioned to RINA SpA.

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

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

It follows that, as regards the action for damages brought against the above company, the jurisdiction of the Italian courts must apply.

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

Indeed, also this Directive - which the Court of Justice also refers to in support of the legal framework – is part of, and completes, the current trend contrary to providing ROs with immunity from jurisdiction.

Recital 16 of the Directive(which the present petitioners recalled before the Court of Appeal) states that "*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 contested judgment dismissed the importance of that reference.

In particular, it devalued the reference drawn from the phrase "*except for immunity*", deeming it non-essential, because it does not constitute a mandatory part of the Directive and because it is included in a field 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 be 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 solved at the source.

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, also the aforementioned "recital" is a sign of validation of the link that, at an exegetical level, must be able to tie immunity to the prerogative that States can invoke in the exercise of non-delegable sovereign functions ("*as an inseparable right of sovereignty that therefore cannot be delegated*"). And thus it can (and does) serve the purpose of making a survey of the customary rules governing the historical institutions of international law, such as immunity, whose *rationale* is inherent to the concept of state sovereignty.

The case sees the plaintiffs against a private Italian company.

As noted by legal scholars, it is not without significance that the 2009 Directive (referred to as "Erica III") was enacted following the "Erica" case, and that even the Court of Appeal mentioned it referring to the immunity of the certifying company which was held (allegedly by implication) by the judgment of the Paris Court of Appeal of 30 March 2010.

The meaning of the expressions used in the Directive and the rationale of the approval procedure lead to see the course to follow for completing European Union law, and for excluding a customary basis for the extension of State immunity to companies delegated to carry out operations 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, although it expresses the positions - and therefore in a broad sense the "opinions" - of the sovereign States, departs significantly from this *opinio iuris*.

XVI. - The judgment submitted is quashed.

The remaining grounds of the original petition for cassation are absorbed and also absorbed is the conditional cross-petition as regards its subject-matter.

The case is remitted to the *Tribunale di Genova* [Court of Genoa], in a different panel composition, pursuant to Article 383(3) of the Code of Civil Procedure.

That court shall also decide on the costs of the proceedings held before this Court of Cassation.

FOR THESE REASONS

The Court of Cassation upholds the third ground in the original petition for cassation, dismisses the first ground and declares the other grounds absorbed; declares the cross-

petition for cassation absorbed; declares that the Italian courts have jurisdiction over the matter; quashes the judgment submitted and remits the case, including with reference to the costs of the cassation proceedings, to the *Tribunale di Genova* [Court of Genoa].

Decided in Rome by the Joint Civil Chambers in closed sessions, on 3 November 2020.