Hard Cases

State Immunity and European Civil Procedural Law – Remarks on the Judgment of the CJEU of 7 May 2020, C-641/18, LG v Rina SpA and Ente Registro Italiano Navale

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Abstract

In European procedural law, the existence of jurisdiction implies that a case must be heard by a court, which may be in collision with the obligation to decline jurisdiction when the defendant relies on state immunity. In its recent judgment of 7 May 2020, C-641/18, the Court of Justice of the European Union ruled on the relationship between state immunity and the exercise of jurisdiction resulting from the Brussels I Regulation. The ruling is noteworthy for a number of reasons. Its significance for the development of international law in the sphere of state immunity has already been noted in the literature. This paper analyses the consequences of the judgment for European civil procedural law by way of addressing two specific issues. The first one is a question about the relationship between state immunity and the concept of 'civil and commercial matters' which sets out the scope of the Brussels I Regulation. The second one is a question about the influence of state immunity on the exercise of jurisdiction granted by the Brussels I Regulation. Answering these questions will make it possible to determine the relationship between state immunity and the European civil procedural law.

I. Introduction

In its judgement of 7 May 2020, C-641/18 (*Rina*),[1] the Court of Justice of the European Union (CJEU) answered a question on the relationship between state immunity and the exercise of jurisdiction resulting from Brussels I Regulation.[2] The *Rina* case is thus an interesting example of the interaction between international law and European civil procedural law. The impact of this judgement on the ongoing international discussion on the scope of state immunity has already been addressed in literature.[3] Consequently, this article

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[1] Case C-641/18 *LG* v *Rina SpA and Ente Registro Italiano Navale*, Judgment of 7 May 2020, available at www.eur-lex.europa.eu.

[2] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

[3] A. Spagnolo, 'A European Way to Approach (and Limit) the Law on State Immunity? The Court of Justice in the RINA Case' 5 *European Papers – A Journal on Law and Integration*, 645

focuses on the significance of the judgement for European civil procedural law. Following an outline of the facts and the fundamental grounds of the ruling, this article will address what *Rina* means for the functioning of state immunity in European civil proceedings. This analysis of the CJEU judgement will seek answers to two specific questions. The first question concerns the relationship between state immunity and the concept of 'civil and commercial matters' which sets out the material scope of the Brussels I Regulation. The second question concerns the influence of state immunity on the exercise of jurisdiction granted by the Brussels I Regulation. The resulting answers will help to clarify the relationship between state immunity and European civil procedural law.

II. Facts of the Case and Ruling

1. Factual Background

The issues resolved by the ruling which is the focus of this paper emerged from an action brought by relatives of the victims and survivors of the sinking of the Al Salam Boccaccio '98 vessel before the Tribunale di Genova against *Rina SpA* and *Ente Registro Italiano Navale* (Rina Group companies) with their seats in Genoa. The claimants, who sought compensation, argued that liability for the sinking of MS Al Salam Boccaccio'98 could be attributed to the Rina companies, which completed the certification and classification of the vessel in question as delegates of the Republic of Panama for the purposes of obtaining the Panamanian flag for that vessel. The defendants pleaded immunity from jurisdiction, citing the principle of state immunity. The defendants argued that the vessel certification and classification completed by delegation of the Republic of Panama, as a manifestation of the sovereign powers of the delegating state, was covered by state immunity.

Throughout the course of this action both parties raised a number of arguments for and against its admissibility. The defendants invoked Art 94 of the UN Convention on the Law of the Sea,[4] which stipulates:

> Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

This is additionally supplemented by the International Convention for the Safety of Life at Sea,[5] which obliges states to carry out inspections of ships flying their flags, and at the same time authorises them to entrust inspections and surveys to organisations recognised by them. Therefore, the vessel classification

(2020).

[4] United Nations Convention of 10 December 1982 on the Law of the Sea (UNCLOS).

[5] The International Convention for the Safety of Life at Sea (SOLAS) concluded in London on 1 November 1974, Chapter I, Regulation 6.

and certification was carried out by the defendants in the exercise of obligations arising under international law. In this regard, the defendants acted on behalf of the Republic of Panama as a recognised organisation, although, at the same time, the classification and certification activities were carried out against payment and under a contract concluded with the shipowner. However, in respect of the operations carried out by Rina companies, the claimants submitted that state immunity does not cover technical activities, which are not connected to the sovereign powers of a state and, in consequence, are not acts undertaken in the exercise of public powers.

In light of these conflicting views, the Tribunale di Genova decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling on the interpretation of Art 1(1) and Art 2(1) of the Brussels I Regulation in light of Art 47 of the Charter of Fundamental Rights (CFR)[6] and Art 6(1) of the European Convention on Human Rights (ECHR). The court sought to establish if an action for compensation brought against a private law entity which carries out classification and certification activities on behalf of a third state falls into the scope of the concept of 'civil and commercial matters' and, consequently, into the material scope of application of Brussels I Regulation.

2. Grounds for the Judgment

Having found the request for a preliminary ruling admissible, the CJEU began by distinguishing between the question of whether the matter falls into the scope of Brussels I Regulation, and the issue of whether, due to the jurisdiction immunity possibly enjoyed by the defendants, the jurisdiction resulting from Art 2(1) of the Brussels I Regulation may be exercised.

As regards the first question, the CJEU referred to its case-law and indicated that in order to determine whether a given matter is a civil and commercial matter, it is necessary to identify the legal relationship between the parties to the dispute, the basis of the action, and the rules governing the bringing of the action.[7] Within this context, the Court pointed out that matters in which one of the parties exercises public power (*acta iure imperii*) are excluded from the scope of 'civil and commercial matters' in the Brussels I Regulation.[8] Although in the case at hand vessel classification and certification were carried out upon delegation, on behalf of and in the interest of the Republic of Panama, and their purpose was to ensure the safety of ship passengers, these circumstances did not mean that the defendants enjoyed powers falling outside the scope of the ordinary legal rules applicable to

[6] Charter of the Fundamental Rights of the European Union [2012] *OJ C326/ 391.*

[7] Case C-302/13 *flyLAL-Lithuanian Airlines AS* v *Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, Judgment of 23 October 2014, paras 24, 25 and the case-law cited; available at www.eur-lex.europa.eu.

[8] n 2 above, paras 33-34.

relationships between private individuals, and only in the case that such powers were indeed possessed might it be possible to claim that they exercised public powers.[9] The Court attributed importance to the evaluation of competences of recognised organisations, such as the defendants, in carrying out vessel classification and certification.

Within the context of classification and certification, the CJEU noted that the activities of the Rina companies consist of checking the condition of the ship as per the relevant provisions of the law, which may result in the withdrawal of the certificate in cases in which the ship does not comply with those requirements. The ineligibility of a ship sail following the withdrawal of a certificate is the result of a sanction imposed by the law, and not of the decision-making power of those recognised organisations, whose is limited to verification activities and is technical in nature.[10] This position has been already expressed in an earlier ruling on the exercise by the Rina companies of public powers within the meaning of Art 51 of the Treaty on the Functioning of the European Union (TFEU). At the time, the CJEU found that recognised organisations are commercial undertakings performing their activities under competitive conditions of and do not have any power to make decisions connected with the exercise of public powers.[11] Nothing in the circumstances of the case at hand justified a departure from this conclusion within the interpretation of Art 1(1) of the Brussels I Regulation.

Ultimately, subject to the determination of certain matters by the referring court, the CJEU found that Art 1(1) of the Brussels I Regulation

> 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.[12]

In light of the distinction made by the CJEU, at the stage of evaluating the scope of Brussels I Regulation, there is no need for an examination as to whether or not the party has immunity from jurisdiction. The case is qualified from the perspective of the 'civil and commercial matters' concept, which is subject to independent interpretation. Only in the event of finding that provisions of European civil law procedure apply to this dispute does it become necessary to examine the plea of immunity from jurisdiction. Having found that the dispute

[9] ibid paras 39-42.

[10] ibid para 47.

[11] Case C-593/13 *Presidenza del Consiglio dei Ministri and Others* v *Rina Services SpA and Others*, Judgment of 16 June 2015, para 16-21, available at www.eur-lex.europa.eu.

[12] n 2 above, para 60.

falls within the scope of the Brussels I Regulation, the Court then moved on to an examination of whether the defendant Rina companies, as private law entities, could invoke state immunity in regard to the vessel classification and certification. This issue, although addressed with caution in the judgment, has been broadly discussed in the opinion of the Advocate General, to which the grounds for the CJEU judgment refer approvingly.[13]

The point of departure for the deliberations was the concept of relative state immunity, which is based upon the distinction, pursuant to the international law provisions concerning state immunity, between *acta iure imperii* and *acta iure gestionis*. Within this context, the CJEU found, in accordance with the opinion of the Advocate General, that the principle of state immunity is governed by customary international law.[14] This justified the establishment by the CJEU of whether or not there exists a rule of international customary law which admits the invocation of immunity from jurisdiction by recognised organisations carrying out classification and certification.

The existence of a rule of customary international law is only possible where a given practice actually exists and is accepted as a law (*opinio iuris*). Findings in this respect are to be found primarily in the opinion of the Advocate General,[15] based on which the CJEU held that immunity from jurisdiction of private law entities is not universally recognised in relation to vessel classification and certification.[16] This interpretation was also reinforced by the interpretation of recital 16 of Directive 2009/15,[17] the wording of which indicates that recognised organisations, such as the defendants, do not enjoy immunity from jurisdiction, which only states may invoke. In the Court's view, this recital confirms the intention of the EU legislator to give a limited scope to its interpretation of the customary international law principle of immunity from jurisdiction with regard to the classification and certification of ships. This set of circumstances had led the Court to conclude that

> the principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law.[18]

[13] ibid para 57.

[14] Case C-641/18 *LG* v *Rina SpA and Ente Registro Italiano Navale*, Opinion of Advocate General Szpunar of 14 January 2020, paras 37-39, available at www.eur-lex.europa.eu.

[15] ibid paras 108-128.

[16] n 2 above, para 57.

[17] Directive of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations [2009] OJ L131/47.

[18] n 2 above, para 60.

III. Consequences for European Civil Procedural Law

1. General Remarks

The scope of application of European civil procedural law regulations within the context of interpretation of the 'civil and commercial matters' concept is a recurring issue in the Court's rulings. While the problem with qualifying a matter as 'civil and commercial' usually occurs in cases in which one of the parties to proceedings is a state or a state authority, situations in which the CJEU must assess the influence of immunity from jurisdiction on this qualification are rare.

When ruling in the *Lechouritou* case,[19] which was considered in light of the Brussels Convention, the CJEU found that an action brought by a natural person for compensation in respect of loss or damage against a foreign state as bearing civil liability for acts and omissions of its armed forces does not fall within the scope of 'civil and commercial matters', because acts perpetrated by armed forces, even when illegal, are acts carried out in the exercise of public powers. An exclusion of *acta iure imperii*, earlier present in other European civil procedural law, was added to the effective Brussels I-bis Regulation as a result of this ruling.[20] In the later *Mahamdia*[21] case, the CJEU held that immunity from jurisdiction of a state does not preclude the application of Brussels I in a case in which an employee demands compensation from a foreign state and questions termination of the employment contract when his duties did not form part of the exercise of public powers. In both cases, the consequences of invoking state immunity were assessed from the perspective of the scope of its application and exclusion from it of matters in which one of the parties exercised public powers.

In contrast, the interpretation made in *Rina* extends beyond the understanding of the concept of 'civil and commercial matters'. The Court focused on the controversial issue of the position of state immunity within the regime of Brussels I Regulation. With the exception of recital 14 of Regulation no 2201/2003,[22] immunity from jurisdiction is neither regulated nor cited in the provisions of European civil procedural law. Thus, the establishment of the relationship between immunity and jurisdiction is left primarily to case-law and legal scholars. Any subsequent CJEU judgment would be of great importance for the ongoing discussion in this regard, but the considerations presented in *Rina* make this judgment crucial for shaping the approach of the European civil

[19] Case C-292/05 *Eirini Lechouritou and Others* v *Dimosio tis Omospondiakis Dimokratias tis Germanias*, Judgment of 15 February 2007, available at www.eur-lex.europa.eu.

[20] B. Hess, 'The Application of the Brussels Ibis Regulation in the EU Member States', in G. Van Calster and J. Falconis eds, *European Private International Law at 50. Celebrating and Contemplating the 1968 Brussels Convention and Its Successors* (Cambridge: Intersentia, 2018), 35.

[21] Case C-154/11 *Ahmed Mahamdia* v *People's Democratic Republic of Algeria*, Judgment of 19 July 2012, available at www.eur-lex.europa.eu.

[22] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L338/1.

procedural law to state immunity.

2. Civil and Commercial Matters

Before moving on to discussing the issues that make *Rina* of key significance for the placement of state immunity within European civil procedural law, I would first like to address the part of the judgment in which the CJEU only applied an existing concept, in order to provide a background against which to assess the ruling on qualifying the dispute as a 'civil and commercial matter' within the meaning of Art 1(1) of the Brussels I Regulation.

The Court's settled case-law provides that this concept is subject to independent interpretation, which means that it should be understood without references to *lex fori* or *lex causae*.[23] In practice, qualification of a given dispute as a civil and commercial matter is not always unambiguous, to which the wealth of case-law concerning this concept offers abundant testimony.[24] Of significance to its understanding is also the exclusion of tax, customs and administrative matters from civil and commercial matters; cases concerning state liability for acts and omissions committed in the exercise of public powers (*acta iure imperii*) are also excluded. The CJEU confirmed the existence of the latter exclusion in light of both the Brussels I Regulation and of the earlier Brussels Convention.[25] It has been expressed in the currently effective Art 1(1) of the Brussels I-bis Regulation.

The understanding of the *acta iure imperii* exclusion gives rise to doubts, especially in borderline cases. This is well illustrated by *Rüffer*,[26] which hinged on the qualification of a claim in connection with the costs of removing a shipwreck that had sunk on an international waterway. The obligation to remove the wreck arose out of an international agreement in which Germany conferred upon the Netherlands the exercise of river police functions. In the Court's view, the Netherlands entered this dispute in connection with the exercise of public authority, as the costs of removal of the wreck had been incurred in the performance of obligations under international law. Based on the foregoing, the Court held that the case did not fall into the scope of civil and commercial matters, even though its subject was the payment of a given amount of money, and the claim had been examined by a court. Of deciding significance was the fact that the claim had arisen out of the exercise of a public power.

[23] Case C-29/76 *LTU Lufttransportunternehmen GmbH & Co. KG* v *Eurocontrol*, Judgment of 14 October 1976, available at www.eur-lex.europa.eu.

[24] For an overview of the CJEU's case-law on the concept of "civil and commercial matter" see eg M. Illmer, in A. Dickinson and E. Lein eds, *The Brussels I Regulation Recast* (Oxford: Oxford University Press, 2015), 60-61; P. Rogerson, in U. Magnus and P. Mankowski eds, *Brussels I bis Regulation. Commentary* (Köln: Verlag Dr. Otto Schmidt KG, 2016), 63-70.

[25] B. Hess, 'The Application' n 21 above, 35.

[26] Case C-814/79 *Netherlands State* v *Reinhold Rüffer*, Judgment of 16 December 1980, available at www.eur-lex.europa.eu.

In this context, *Pula Parking*[27] provides an insight. The facts of this case speak for a practice of using the Brussels regime for the assertion of claims against private persons by public authorities.[28] The case concerned an enforcement proceeding brought by a publicly-owned company in Pula (Croatia), against a German resident, for the recovery of an unpaid 'parking debt'. The administration of public parking and the collection of parking fees had been delegated to the company by that public authority.[29] In *Pula Parking*, the Court observed that the conferral or delegation of powers by public authority does not imply that those powers are exercised *iure imperii*.[30] Key to this concept is the nature of the acts and how the powers were exercised.[31] In this regard, the Court held that the 'parking debt' was a 'consideration for a service provided' by the company, and that the relationship between the parties was contractual.[32] Based on this, the case fell into the scope of civil and commercial matters. In consistency with the case law of the CJEU,[33] *Pula Parking* may be viewed as an example of a rather broad interpretation of the scope of application of Brussels I-bis regulation.[34]

In light of this, doubts may arise as to the qualification adopted in *Rina*, as the defendants carried out acts in order for a third state to fulfil its obligations of international character, as was the case in *Rüffer*. The difference, as the Advocate General observed, lies in the exercise of public powers. While in *Rüffer*, the public authority that brought the action exercised the functions of river police and acted *iure imperii* with regard to the vessels, it was held in *Rina* that recognised organisations, such as the *Rina* companies, had no decision-making powers. The weight of the *Rina* case, then, rests not so much on the interpretation of the concept of 'civil and commercial matters' and of the delineation of the boundaries of the *acta iure imperii* exclusion, but rather on qualifying vessel classification and certification as the exercise of public powers.

This issue was previously examined by CJEU within the interpretation of Art 51 of TFEU,[35] which employs the concept of the 'exercise of official authority'. In *Rina Services,* it was held that as regards certification activities, the defendant companies perform their activities under competitive conditions and do not

[27] Case C-551/15 *Pula Parking d.o.o.* v *Sven Klaus Tederahn*, Judgment of 9 March 2017, available at www.eur-lex.europa.eu.

[28] Case C-172/91 *Volker Sonntag* v *Hans Waidmann*, Judgment of 21 April 1993; Case C-266/01 *Préservatrice foncière TIARD SA* v *Staat der Nederlanden*, Judgment of 15 May 2003; Case C-433/01 *Freistaat Bayern v Jan Blijdenstein*, Judgment of 15 January 2004; available at www.eur-lex.europa.eu.

[29] n 28 above, para 29.

[30] ibid para 35; see also Advocate General Szpunar at 79.

[31] P. Rogerson, in U. Magnus and P. Mankowski eds, *Brussels I Regulation. 2nd Revised Edition* (Münich: Sellier European Law Publishers, 2012), 55.

[32] n 28 above paras 35, 39.

[33] H. Roth, 'Vollstreckungsbefehle kroatischer Notare und der Begriff „Gericht" in der EuGVVO und der EuTVTO' *Praxis des Internationalen Privat- und Verfahrensrechts*, 41, 42 (2018).

[34] B. Hess, *The Application* n 21 above, 36.

[35] Treaty on the Functioning of the European Union [2012] OJ C326/47.

have any power to make decisions connected with the exercise of public powers.[36] Regardless of the qualification in the perspective of Art 1(1) of the Brussels I Regulation, ensuring the coherence of the system was an argument made in favour of sustaining this view in *Rina*.

Within the discussed scope, the *Rina* case does not contribute a great deal to the interpretation of the concept of 'civil and commercial matters'. In this part, it boils down to the application of existing concepts to unusual factual circumstances. The judgment, however, remains compatible with the interpretation of the *acta iure imperii* exclusion in the CJEU case-law.

3. Immunity from Jurisdiction and the Concept of 'Civil and Commercial Matters'

In the European procedural law, the existence of jurisdiction implies that a case must be heard by a court.[37] A member state's obligation to grant legal protection may be waived, but only in cases explicitly provided for in individual EU regulations.[38] At the same time, state immunity precludes a ruling on the merits of the case in an action brought to a foreign court, owing to observance of international law obligations. This may lead to a conflict between the obligation to exercise jurisdiction, resulting from the provisions of European civil procedural law, and the obligation to decline jurisdiction when the defendant enjoys immunity, as resulting from international law.

Thus far, the existing case-law of the Court has not provided clear answers as to how such a conflict can be solved. In *Lechouritou*, the Court found that

> a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State[39]

is not a civil matter. By holding that acts perpetrated by armed forces are a manifestation of state sovereignty, the Court found that that the case did not fall into the scope of the Brussels Convention, which concerns civil matters. In this way, the conflict between immunity from jurisdiction and the exercise of jurisdiction was avoided by finding that the case was excluded from the scope of the Brussels Convention.

[36] n 12, paras 16-21.

[37] A. Layton, H. Mercer, *European Civil Practice* (London: Thomson/Sweet & Maxwell, 2nd ed, 2004), I, 373.

[38] CJEU ruled that that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction on grounds of *forum non conveniens* doctrine, see Case C-281/02 *Andrew Owusu* v *N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, Judgment of 1 March 2005, available at www.eur-lex.europa.eu.

[39] Case C-292/05 *Eirini Lechouritou and Others* v *Dimosio tis Omospondiakis Dimokratias tis Germanias*, Judgment of 15 February 2007, available at www.eur-lex.europa.eu.

The ruling in *Lechouritou* was not tantamount to acknowledging that state immunity affects the qualification of the case, leading *ipso iure* to its exclusion from the scope of the Brussels Convention. However, in a theoretical approach, this is one of the possible solutions of the conflict at hand. It has been noted both in the case-law of member states[40] and in the literature,[41] that, in general, the reliance by a defendant on immunity from jurisdiction affects the qualification of the case as civil and commercial, to the effect that it is excluded from the scope of a given regulation. An alternative opinion has also emerged, according to which immunity from jurisdiction affects the exercise of jurisdiction resulting from the provisions of a given regulation, but not the scope of the regulation. The difference between these two approaches boils down to how justify the conclusion that the provisions of European civil procedural law, while granting national jurisdiction to the courts of the Member States, do not preclude the option of declining the examination of the case on merit on the grounds of immunity from jurisdiction.[42]

The later *Mahamdia* case, in which it was concluded that state immunity is not excluded in disputes concerning acts carried out *iure gestionis*,[43] did resolve doubts. As the Advocate General observed, in *Mahamdia* it was only ruled that

> once it has been established that immunity from jurisdiction does not preclude the application of that regulation, the latter must, *a fortiori*, apply in the dispute.

Leaving aside evaluations of this judgement, it must be noted that the observation made by the Advocate General indicated that the CJEU was not bound in *Rina* by its earlier ruling as to the influence of state immunity on the scope of Brussels I Regulation. This was of great significance, given that the Advocate General proposed a clear break with the position connecting state immunity with the scope of application. The opinion of the Advocate General emphasized that legislators may adopt rules governing jurisdiction with regard to disputes in which one of the parties relies on immunity from jurisdiction, and that international law only requires that jurisdiction should not be exercised towards such a party against its will.[44] If the European civil procedural law adheres to this position, it is not necessary to define the scope specifically taking into account the issue of state immunity.

The concept presented by the Advocate General was acknowledged in the

[40] *Grovit* v *De Nederlandsche Bank NV and Others* [2005] EWHC 2944 (QB), [2006] 1 WLR 3323.

[41] P. Rogerson, in U. Magnus and P. Mankowski eds, *Brussels I Regulation. Commentary* (Köln: Sellier, 2007), 51.

[42] P. Grzegorczyk, *Immunitet państwa w postępowaniu cywilnym* (Warszawa: Wolters Kluwer, 2010), 598.

[43] n 22 above, para 55.

[44] n 15 above, paras 41.

distinction between two issues made in *Rina*. The first issue was the interpretation of the concept of 'civil and commercial matters' within the context of vessel classification and certification in order to establish whether the dispute falls into the scope of the Brussels I Regulation. The second issue was an evaluation of the influence of immunity from jurisdiction on the exercise of jurisdiction conferred by this regulation. Therefore, already at the onset of its considerations, the CJEU rejected the position that the concept of 'civil and commercial matters' coincides with the negative scope of immunity from jurisdiction. In this respect, *Rina* presents a new approach to the relationship between state immunity and jurisdiction in European civil procedural law.

In light of *Rina*, the facts that lend state immunity to a party are examined during the determination of whether or not the dispute is a 'civil and commercial' matters, and may lead to the conclusion that the case does not fall within the scope of Brussels I Regulation. In such event, the case will be excluded from the application of the regulation due to the *acta iure imperii* exception. This, however, does not result from state immunity, but rather from a qualification made within the framework of European civil procedural law for the purpose of deciding whether the matter falls within the application scope of a given regulation.

In practice, the *acta iure imperii* exception excludes most cases in which state immunity must be accounted for from the scope of application of a given regulation.[45] This results from the distinction between *acta iure imperii* and *acta iure gestionis* made in respect of state immunity. The CJEU settled case-law presents the view that state immunity, in the present legal circumstances of international law, is not absolute, and only applies to acts carried out in exercise of public authority. In areas in which a state acts *iure gestionis*, it is subject to being sued. As a result, both for the purposes of determining the scope of state immunity and the scope of application of the provisions of European civil procedural law, a similar criterion is applied to the exercise of public authority. This criterion, however, serves different purposes and refers to other legal orders, so its application may lead to different results.[46] The CJEU stressed this difference for the first time in *Rina*, stating that, with regard to immunity from jurisdiction, it is necessary to examine whether the defendant acts *iure imperii* in the light of the provisions of international law and, with regard to the scope of application, in the light of the independently interpreted concept of 'civil and commercial matters'.

The CJEU judgment correctly defines the relationship between state immunity and the scope of European civil procedural law. The mere possibility of a case falling within the scope of this regulation does not in itself breach the limitations as to the potential outcomes of the case resulting from state

[45] M. Stürner, 'Staatenimmunität und Brüssel I-Verordnung – Die zivilprozessuale Behandlung von Entschädigungsklagen wegen Kriegsverbrechen im Europäischen Justizraum' *IPRax*, 197, 203 (2008).

[46] ibid 203; P. Grzegorczyk, n 43 above, 602.

immunity. In some cases the defendant may enjoy state immunity, but the case will be qualified as 'civil and commercial' within the meaning of European civil procedural law nonetheless. Within this context, some authors have pointed to disputes concerning employment contracts with persons employed in diplomatic posts, which meet the criteria of a civil case and in which, pursuant to Art 11 of the New York Convention, state immunity may be at play, depending on the plea.[47] In such event, the regulation would apply to the subject matter of the dispute, but at the same time the court should refuse to rule on the merits of the case because of the state immunity. Thus, the approach is both theoretically sound and practically applicable.

In conclusion, the resolution of doubts regarding the impact of immunity from jurisdiction on the scope of regulations of the Brussels-Lugano system, provided by the ruling in *Rina*, was a significant step in placing state immunity within the European civil procedure. The position adopted in *Rina* was confirmed by CJEU in its judgment of 3 September 2020 C-186/19 (*SHAPE*),[48] the Court applied the same test to define civil and commercial matters and accepted that the material scope of European civil procedural law is not defined with the concept of immunity from jurisdiction. SHAPE suggests the emergence of a clear trend in the case law.[49]

4. Declining of Jurisdiction by Reason of State Immunity

In *Rina*, the issue of the impact of state immunity on the exercise of jurisdiction conferred by European civil procedural law was merely outlined. The CJEU held that defendants could not invoke state immunity if the national court found that the defendants did not exercise the prerogatives of public authority under international law, as unambiguously evidenced by criteria set out in the grounds. Thus, in the *Rina* case, immunity from jurisdiction did not preclude exercise of jurisdiction. Nevertheless, the CJEU admitted such a possibility in its considerations, with two important remarks.

Firstly, the CJEU adopted the position that the principles that are a manifestation of customary international law form a part of the EU legal order. It reflects not only a general assumption that the EU is bound by general international law, but also a position based on the 'fundamental rules of customary international law' above EU secondary legislation.[50] This confirms

[47] P. Grzegorczyk, n 43 above, 603.

[48] Case C-186/19 *Supreme Site Services GmbH and Others* v *Supreme Headquarters Allied Powers Europe*, Judgment of 3 September 2020, available at www.eur-lex.europa.eu.

[49] See also G. Cuniberti, 'Sovereign Immunities and the Scope of the Brussels Ibis Regulation after Rina and SHAPE', available at https://tinyurl.com/23rfcd93 (last visited 30 June 2021).

[50] Case C-162/96 A. Racke GmbH & Co. v Hauptzollamt Mainz, Judgment of 16 June 1998, paras 45-51, Case C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, Judgment of 21 December 2011, paras 101, 107-110; Case C-266/16 Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and

that it is necessary to decline the exercise of jurisdiction conferred by provisions of European civil procedural law when this obligation results from immunity from jurisdiction granted by international law. Within this context, it seems surprising that the CJEU did not address Art 71 of the Brussels I Regulation, which stipulates that this regulation does not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

It has been noted in the literature that Art 71 of the Brussels I Regulation governs relations between this regulation and, among others, the Basel Convention on state immunity and Vienna conventions on diplomatic and consular immunity.[51] A classification of these treaties as conventions that take precedence over the Regulation is one of the ways in which the position of immunity from jurisdiction within European civil procedural law could be determined.[52] However, it was not possible to apply the Basel Convention to the *Rina* case, as neither Italy nor the Republic of Panama are parties to it.

The source of possible immunity for defendants was to be international custom, which was difficult to fit under Art 71 of the Brussels I Regulation, both in terms of literal and purposive interpretation. As the Advocate General observed, this would lead to a 'freezing' of customary international law in the state it was in when that Brussels I Regulation was adopted. For this reason, the Advocate General proposed that the relationship between immunity from jurisdiction and jurisdiction should be examined in the light of the relationship between EU law and international law.

The approval that the Court expressed for the Advocate General's approach is not tantamount to rejection of the assertion of Art 71 of the Brussels I Regulation that the Regulation does not affect any international treaties to which a state is a contracting party, with reference to immunity from jurisdiction. In any case, to attribute this opinion to the CJEU based on *Rina* would be premature. For this reason, this judgment will not resolve the dispute between those who argue that the issue of immunity from jurisdiction remains outside the scope of the Brussels I Regulation altogether,[53] and those who maintain that

Secretary of State for Environment, Food and Rural Affairs, Judgment of 27 February 2018, paras 47, 58 available at www.eur-lex.europa.eu.

[51] See ie B. Hess, 'European civil procedure and public international law', in U. Fastenrath et al eds, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011), 936; J.J. Fawcett et al, *Cheshire, North, Fawcett, Private International Law* (Oxford: Oxford University Press, 2008), 510; P. Mankowski, in U. Magnus and P. Mankowski eds, *Brussels I bis Regulation. Commentary* (Köln: Verlag Dr. Otto Schmidt KG, 2016), 1058.

[52] For an overview of this approach, see S. Rinke, Schadensersatzklagen gegen Staaten wegen schwerer Menschenrechtsverletzungen im Europäischen Zivilprozessrecht. Zugleich ein Beitrag zum Verhältnis der EuGVVO zur Staatenimmunität (Berlin: Berliner Wissenschafts-Verlag, 2016), 182-200.

[53] J. Kropholler, *Europäisches Zivilprozessrecht. Kommentar zu EuGVO, Lugano-Übereinkommen und Europäischem Vollstreckungstitel* (Frankfurt am Main: Verlag Recht und

the issue of the exercise of jurisdiction in the event of plea of immunity from jurisdiction can be resolved under Art 71 of the Brussels I Regulation.[54]

Secondly, the CJEU stated that in the event of the referring court upholding the plea relating to immunity from jurisdiction, it should ensure that a refusal to exercise jurisdiction would not deprive the claimants of access to a court. This is one of the guarantees under Art 47 of the Charter of Fundamental Rights. In this way, by allowing the refusal of jurisdiction for reasons of observance of international law obligations, the Court defined the boundary by noting the necessity of accounting for the upholding of fundamental rights. This issue arose in connection with the court's reference in its request for a preliminary ruling to Art 47 of the CFR and Art 6(1) of the ECHR, which was an expression of a doubt as to whether the possible recognition of immunity does not violate the right to a court. This was broadly addressed by the Advocate General, who stressed that immunity from jurisdiction, which is a manifestation of international law obligations, and which the European Union must observe, may be in conflict with the obligation to observe fundamental rights. It was not examined in *Rina*, where it was found that immunity from jurisdiction does not apply to vessel classification and certification carried out by recognised organisations, so far as these activities are not performed in the exercise of public powers. Nevertheless, the CJEU *obiter dictum* expressed the view that upholding the plea of immunity from jurisdiction, leading to refusal of jurisdiction, must remain in compliance with European fundamental procedural rights.[55]

The standard of European fundamental rights operates within the framework of application of the EU law, which means that it is also in line with the interpretation and application of European civil procedural law.[56] The CJEU case-law includes references to guarantees stipulated under Art 47 of the CFR both within the context of jurisdictional regulations, recognition and enforcement of rulings in relations between Member States, and in the interpretation and application of national civil procedural law, when they supplement the regulations of the EU in the necessary scope.[57] The *Rina* case links this standard to the

Wirtschaft, 9th ed, 2009), 120-121; R. Geimer, in. R. Geimer, R.A. Schütze eds, *Europäisches Zivilverfahrensrecht* (München: C.H. Beck, 3rd ed, 2010), 122; P. Grzegorczyk, n. 43 above, 607-608; B. Wołodkiewicz, *Ustanowienie jurysdykcji krajowej przez wdanie się w spór na podstawie rozporządzenia Bruksela I bis* (Warszawa: Wolters Kluwer, 2020), 38. See also Oberste Gerichtshof (OGH) 14 May 2001, 4 Ob 97/01w, ECLI:AT:OGH0002:2001:RS0115353, with approbation of W. Obwexer, 'Staatenimmunität innerhalb der EU', *ecolex* (2002), 57-59.

[54] See works cited in n 51 above.

[55] n 2 above, para 55.

[56] B. Hess, *Europäisches Zivilprozessrecht* (Heidelberg: C.F. Müller, 2010), 136; K. Weitz, 'Wpływ prawa Unii Europejskiej na krajowe prawo procesowe cywilne' *Kwartalnik Prawa Prywatnego*, 297, 305-207 (2019).

[57] Case C-7/98 *Dieter Krombach* v *André Bamberski*, Judgment of 28 March 2000; Case C-327/10 *Hypoteční banka a.s.* v *Udo Mike Lindner*, Judgment of 17 November 2011; Case C-292/10 *G* v *Cornelius de Visser*, Judgment of 15 March 2012; Case C-112/13 *A* v *B and Others*, Judgment of 11 September 2014, available at www.eur-lex.europa.eu.

application of international law provisions in conjunction with European civil procedural law.

The CJEU has held that the principle of state immunity and the attendant necessity to decline jurisdiction may collide with the right to a fair trial stipulated by Art 47 of the CFR. The point here is not to restrict the boundaries of state immunity by deciding on the admissibility of the invocation of immunity in cases involving serious human right abuses perpetrated by state functionaries in the exercise of public powers, an issue that the CJEU confronted in *Lechouritou*. The position of the CJEU addressed the tendency to view the refusal of jurisdiction due to state immunity as a breach of the right to a fair trial, which is demonstrated in the case-law of some Member States and of the European Court of Human Rights.[58]

This position embodies the view that the granting of immunity to a foreign state, even though a 'legitimate means of complying with international law to promote comity and good relations between states',[59] may nonetheless be found to be a disproportionate restriction of the right of access to a court.[60] Within this approach, access to a court requires that the court exercise its jurisdiction unless international law requires that immunity be granted to the foreign state. The declining of jurisdiction on the basis of state immunity is, therefore, an exceptional circumstance, and so the granting of immunity must take place within the strict limits of the requirements of international law.[61] Against this background, the reference of the CJEU to the premise that a national court applying EU law in the form of Regulation 44/2001 must comply with the requirements of Art 47 of the CFR is an undeniable simplification. This premise can be successfully applied to national procedural law, but with regard to obligations of international law, it must be considered in the context of the European Union's obligation under Art 3(5) TEU to contribute to the strict observance and development of international law. If a conflict between fundamental rights and international obligations in the field of state immunity should arise, its resolution may require an adaptation of the rules relating to the relationship between national law and European law.

In the light of EctHR case law, one of the available solutions is to adopt a requirement that the exercise of state immunity should respect the limits set by international law. In one case between an individual and an international

[58] A Sanger, 'State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights' 65 International and Comparative Law Quarterly, 213 passim (2016).

[59] See, in particular, Eur. Court H.R, *Al-Adsani* v *United Kingdom*, Judgment of 21 November 2001, para 56; *Jones and Others* v *United Kingdom*, Judgment of 14 January 2014, paras 186-189, available at www.hudoc.echr.coe.int.

[60] R. Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?', in A. Van Aaken and Iluia Motoc eds, *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018), 265.

[61] n 59 above, 213, 222-223.

organisation, the ECtHR also considered whether claimants would have access to an alternative court if immunity from jurisdiction was recognised.[62] It seems that in formulating the requirement for the national court to ensure that an alternative forum is available, the CJEU made a reference to this concept as mentioned in the opinion of the Advocate General.[63] In establishing this limit for state immunity, the CJEU has not stipulated the conditions for its application.

It seems appropriate to at least consider whether access to the courts of a third state, which is not a Member State of the European Union, is sufficient. The circumstances of *Rina* indicate that the CJEU takes this possibility into account.[64] However, the question arises as to whether there are conditions that a third state court should meet in order for it to be sensible to require the claimant to use a reasonable alternative forum. In particular, this is relevant to whether a court of a Member State should be satisfied that the alternative forum will ensure the implementation of other standards under Art 47 of the CFR. Additionally, this may concern the reasonable length of proceedings or the independence of the judiciary. Undoubtedly, the ordinary burdens of seeking legal protection abroad should not preclude the requirement to initiate proceedings before the courts of a foreign country. This leads to the conclusion that a court of a Member State should at the same time make sure that referring claimants to an alternative forum will not lead to a denial of justice.[65]

It is difficult to escape the impression that the impact of permitting the examination of compliance of the declining of jurisdiction with Art 47 of the CFR was not thoroughly considered by the CJEU. The *Rina* case merely presents this problem, but stops short of solving it. To a certain extent, the failure of the CJEU to explain how it assessed whether a declining of jurisdiction interferes with the right of access to a court is explained by the fact that immunity from jurisdiction was not an obstacle to the exercise of jurisdiction in *Rina*. In any case, in stating that the court should make sure that upholding the plea of immunity from jurisdiction does not deprive claimants of access to court, the CJEU pointed to another limitation to which immunity from jurisdiction is subject. However, the limits of this exception have been left undefined.

In closing, it remains to be noted that *Rina* does not give space to addressing an issue that is raised in the doctrine of some Member States, namely, the question of the order in which state immunity and jurisdiction immunity is to be examined. Some commentators have expressed the opinion that priority of examination should be given to state immunity, as it precludes any action in the case. From the perspective of European civil procedural law, these questions

[62] Eur. Court H.R *Waite and Kennedy* v *Germany*, Judgment of 18 February 1999, para 68, available at www.hudoc.echr.coe.int.

[63] n 15 above, fn 106.

[64] ibid para 153.

[65] In the literature, this problem is considered in relation to negative conflicts of jurisdiction, among other things, which can be a point of reference for the problem that arises from *Rina*.

must give way to determination of whether the case falls within the scope of the regulation in question at all. A negative answer to this question will mean that the question of immunity will be assessed on the basis of the forum's internal procedural law. Only a positive determination will bring the issue into the sphere of European civil procedural law. The *Rina* case does not provide for a resolution of the priority-issue, because the court of a Member State had no doubt that it had jurisdiction, since the seat of the defendants was located in this state. Thus, in this case immunity was examined as a secondary concern. It is relevant to mention that in the later *SHAPE* case, the priority of examination was clearly given to jurisdiction.[66]

IV. Conclusion

The search for a legal basis for jurisdictional immunity and the assessment of its scope is carried out regardless of whether the concern is with the internal forum's procedural law or with European civil procedural law. In the latter, however, there are some differences, as evidenced by *Rina*.

First of all, the court of a Member State must first determine whether the rules of European civil procedural law apply to the case, which in the context of state immunity requires in particular an assessment of the scope of the regulation in question.

Second, the scope of application of the concept of 'civil and commercial matters' and the *acta iure imperii* exception have not been defined using state immunity. In classifying a case as 'civil and commercial', the court should identify the legal relationship existing between the parties to the dispute, the basis of the claim and the conditions under which it was brought, and take into account whether one of the parties exercises public authority. This means that the existence of state immunity does not lead *ipso iure* to the exclusion of a case from the scope of 'civil and commercial matters'.

Third, if it is established that the rules of European civil procedural law apply to the case, state immunity may constitute an obstacle to the exercise of the jurisdiction conferred by it. This will be the case even if the source of immunity from jurisdiction is international custom, since the rules that are the expression of customary international law are part of the EU legal order.

Fourth, the possible declining of jurisdiction must be in compliance with European fundamental procedural rights, including the right of access to a court as enshrined in Art 47 of the Charter of Fundamental Rights. How this is to be assessed remains to be further defined. It can only be postulated that, while making sure that claimants are entitled to an alternative forum, the court should take into account whether the proceedings before it will meet the

[66] n 49 above, para 74.

requirements set out in Art 47 of the CFR.

The above remarks prove that the considerations presented in *Rina* may provide the courts of Member States with a useful guideline in cases involving state immunity. This is not only because of the importance of the case for international law, including its method of identifying international custom in the field of state immunity, but also because of the position of state immunity in European civil procedural law. By providing an example of the interaction between international law and European civil procedural law, *Rina* contributes to the development of both areas.