

6th CIVIL CHAMBER
INADMISSIBILITY

DISTRICT COURT OF BORDEAUX

6TH CIVIL CHAMBER

JUDGMENT OF March 19, 2014

60C
Roll no **10/02421**

Record no.

CASE:

THE FRENCH STATE – LEGAL
AFFAIRS DIRECTORATE V.
AMERICAN BUREAU
SHIPPING, ABSG CONSULTING
INC., ABS GROUP OF
COMPANIES

Original issued on:
To the following attorneys: SELARL
CABINET D 'AVOCATS RONAN LE
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COMPOSITION OF THE COURT:

During the hearing and deliberations phase

Ms. Sophie PETRIAT, Deputy Presiding Judge, Presiding Judge at
the hearing,

Drafted the judgment,

Ms. Marie-Aude DEL BOCA, Judge, Assessor,

Ms. Valerie COLLET, Judge, Assessor,

Clerk of the Court during the hearing and at the time of issuance of the
judgment, Ms. Elisabeth LAPORTE,

HEARING:

At the hearing in open court on January 8, 2014, the case was sent
for deliberation on March 5, 2014 and extended until the day
hereof,

JUDGMENT:

Adversarial proceedings

At first instance

Judgment made available at the Clerk's office

PLAINTIFF

THE FRENCH STATE – LEGAL AFFAIRS DIRECTORATE

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DEFENDANT

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Summary of the facts and proceedings

On November 19, 2002, the tanker PRESTIGE broke in two and sank off the coast of Galicia in Spain. It was transporting 77,000 tons of heavy fuel, which, between December 2002 and December 2003, contaminated the French shoreline from the Basque coast up to the Gironde estuary, and in a more widespread way, as far as the Channel coast.

In judicial and extra-judicial writs served in accordance with the Hague Convention of November 15, 1965, the French State, represented by the Legal Counsel to the Treasury, had AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc., and ABS GROUP OF COMPANIES summoned before the courts on February 26, 2010, in order to have them ordered to pay *in solidum*, under immediate enforcement measures, the Legal Counsel to the Treasury the sum of 67,500,905.92 Euros in damages, 50,000 Euros under Article 700 of the Civil Procedure Code and the legal costs. In support of its claims, the French State accused these companies of not having detected an important structural defect in the vessel whereas they had been mandated to inspect the vessel's compliance with the ship safety regulations in force and had allowed issue of a flag registration certificate without it being established that the ship complied with the required safety standards.

The companies summoned before the Court are all related and their activity consists of the classification and certification of vessels. They are mandated to monitor compliance with the rules applicable to design, construction and maintenance of ships, and to evaluate the resistance of the ship's structure and the viability of their engines. The classification of ships is established once the company's experts have approved the ship's drawings and inspected the vessel. These companies are mandated to classify, inspect and certify vessels.

The PRESTIGE was designed and built according to ABS standards in 1973. It underwent the periodical checks and inspections provided by the ABS standards to ensure its classification and maintenance in its class. The last inspection before it sank was carried out during May 2002 and the certifications were issued on May 25, 2002.

An investigation was carried out by an Examining Magistrate at the CORCUBION Court in Spain, it being specified that charges against persons unknown for pollution of territorial waters by way of recklessness, negligence and failure to abide by the law requested by the BREST Public Prosecutor were transmitted in full to the CORCUBION Examining Magistrate following a decision of the EUROJUST panel. The Spanish Examining Magistrate appointed an expert to determine the causes of potential liability of the various participants in the PRESTIGE disaster and this expert filed his report on October 28, 2008. The case was sent for trial before the Spanish Criminal Courts following the end of the investigation by the CORCUBION Court.

Furthermore, it should be mentioned that in a writ of November 10, 2005, the French State summoned before the Bordeaux District Court MARE SHIPPING INC., group, a Liberian law company and owner of the ship, the LONDON SHIP MUTUAL INSURANCE, insurer of the ship, and the FIPOL to obtain, following the sinking of the PRESTIGE and the subsequent pollution, payment of 67,500,905.92 Euros in damages. These proceedings were the subject of a suspension of proceedings which is still pending.

In these proceedings, the case management judge, to whom the case was referred by the defendants, held in an order of October 25, 2011, that the immunity from jurisdiction

evoked by AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc., and ABS GROUP OF COMPANIES constituted a bar to proceedings which fell within the jurisdiction of the judges on the merits of this Court, suspended any decision on the claims of the three companies in relation to the motion for suspension while awaiting the outcome of the criminal proceedings before the Brest District Court and the criminal and civil proceedings before the Spanish Courts in CORCUBION, and the motion for application of the “*electa une via*” rule until the decision of the Court on the issue of immunity from jurisdiction, reserved the costs and claims made under Article 700 of the Civil Procedure Code in order to attach them to the case on the merits.

The Court must therefore decide on the procedural motion of immunity from jurisdiction raised by the defendants.

In a rejoinder notified by electronic means on June 25, 2013, AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES recalled the legal principles applicable to the international custom of immunity from jurisdiction which is solely governed in France by case law and, since the Société Levent Express ruling of February 25, 1969, have accorded benefit of immunity from jurisdiction to entities other than governmental or administrative bodies, including private companies when, on the one hand, they act “*for or on behalf of*” a foreign state, and, on the other hand, the acts are carried out in the exercise of public authority or are carried out in the interests of a public service. They argue that classification companies can, under French law, evoke immunity from jurisdiction for their certification and classification activity, explaining that classification is closely linked to the activity of certification, arising from sovereignty of signatory states of international conventions, particularly the SOLAS Convention. Finally, they emphasize that the French State’s submissions show a considerable overlap and interdependence of the certification and classification activities, and therefore the extent to which a distinction between both activities is impossible in practice because of their indivisibility.

AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES are therefore claiming the benefit of immunity from jurisdiction and dismissal of all of the French State’s claims; subsidiarily, if it were to be considered that AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES do not benefit from immunity from jurisdiction, they request that the case be referred back to the case management judge to decide on the procedural motions; in any case, they have requested that the French State be ordered to pay all the costs and the sum of 10,000 Euros *in solidum* to AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES on the basis of Article 700 of the Civil Procedure Code.

In the final submissions filed with the Clerk’s office on March 14, 2013, the French State, represented by the Legal Counsel to the Treasury, argued that the defendants (≡) do not constitute an extension of the State of the Bahamas, do not participate in the exercise of sovereignty by the State of the Bahamas, and their claims for eligibility for immunity from jurisdiction must therefore be dismissed. In effect, it argues that to benefit from immunity from jurisdiction, the entity in question must constitute a genuine extension of the State and the act in question must participate by its very nature and also its purpose, in the exercise of the sovereignty of such State; these conditions are not met by the three companies at issue, and it cannot be determined if they are an extension of the State of the Bahamas as these

three companies are independent of this State in terms of their organization, functioning and assets, and in addition, the classification activities of classification companies do not participate, either by their nature or their purpose, in the exercise of sovereignty by the State of the Bahamas, and constitute purely private activities which are not therefore subject to immunity from jurisdiction. It indicates that in the current context, immunity from jurisdiction applies to mandatory SOLAS and load line certificates, but does not cover AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES for issuing a classification certificate, a document which is only required for purely private purposes. The French State argues in effect that an absence of immunity for classification companies is in line with recent case law and the most recent European legislation in this area, such as the EU Directive of April 23, 2009 establishing common rules concerning bodies authorized to carry out inspections of vessels, which indicates in particular in paragraph 16 of its recitals that when an approved body issues the required certificates on behalf of the administration, it must benefit from jurisdictional protection which does not include immunity, which is a prerogative that only Member States may evoke as an indissociable sovereign right which cannot be delegated. However, the wrongdoing committed by ABS as specified in the expert's report of October 21, 2008 drafted in the context of the Spanish criminal proceedings, arises out of its classification activity for which it cannot benefit from immunity from jurisdiction.

Accordingly, the French State requests that the three defendants' claims be dismissed, that the proceedings be continued, and in addition, that they be ordered to pay *in solidum* € 10,000 under Article 700 of the Civil procedure Code.

The order closing the submissions stage was rendered on December 3, 2013, and the hearing was fixed for January 8, 2014, following which, the deliberation stage began with March 5, 2014 being stated as the date for judgment, with the latter being made available at the Clerk's office. The deliberation phase was extended to the date hereof.

GROUNDS FOR THE DECISION

It must be recalled that immunities from jurisdiction and enforcement protect sovereign states from judgments issued by legal bodies and courts of their peers so that the power of jurisdiction of a State does not call into question the sovereignty of a foreign state. This constitutes an international custom which in some countries arises out of the law and in others, from case law, which is the case in France.

French case law has identified the following criteria for the application of immunity from jurisdiction: a foreign state or the bodies acting for or on its behalf must establish that the act which gave rise to the dispute constitutes an act in the exercise of public authority or is carried out in the interests of a public service (Sup. Court, 1st Civ. Div. February 25, 1969).

First of all, it transpires that there is no necessity for the perpetrator of the acts at issue to be a State, that is to say a government or administrative body, and it may be a private company, provided that it is acting for or on behalf of a foreign State and the acts in question are acts in the exercise of public authority, which would be the case when a State has delegated its powers of exercise of a public authority to a private company or the acts in question have been carried out in the interests of a public service. (Sup. Court, 1st Civ. Div.

May 19, 1976). It can not be concluded that the Supreme Court went back on this principle in its rulings of June 20, 2003, March 9, 2011, and January 19, 2010 as the entities concerned in each of these rulings were foreign States themselves in the first two rulings, and a Prime Minister and a Minister of the Armed Forces in the last ruling cited. Contrary to what is argued by the French State (II-1 of its submissions), arguments cannot be drawn from the ruling of the Criminal Division of the Supreme Court of November 23, 2004, issued in the Erika case, which simply stated that the MALTA MARITIME AUTHORITY was an extension of the State of Malta exercising its authority under the tight control of the Ministry responsible, and this ruling does not exclude benefit from immunity from jurisdiction for private companies not created by a government decision. This is also the case in the ruling of the Paris Court of Appeals January 31, 2013 in which the Court simply sought to discover whether the entity concerned, in this case the Russian Satellite Communications Company which was claiming to be an extension of a foreign State, that is to say the Russian State in this particular case, was indeed an extension of the State. Similarly, in another ruling of September 25, 2012 also rendered in the Erika case, the Supreme Court did not censure the ruling of the Paris Court of Appeals issued on March 30, 2010, which considered that the company Rina, authorized by the State of Malta to issue statutory certificates for vessels, was vested with a public authority prerogative and should benefit from immunity from jurisdiction with respect to such issuances, but also considered that this Italian law company had waived immunity by failing to evoke it at the investigation stage. In effect the Supreme Court considered that Rina had renounced asserting immunity from jurisdiction, which necessarily implied that it benefited therefrom.

It transpires from these elements that a private company which has acted for or on behalf of a foreign state and provided that the purpose criterion set out below is established, it can benefit from immunity from jurisdiction.

The defendants argue that the purpose criterion is aimed at two alternative, hypotheses and not cumulative hypotheses as argued by the French State. In effect, ABS argues that a private company can benefit from immunity from jurisdiction provided that the act which gave rise to the dispute is an act in the exercise of public authority or was carried out in the interest of public services, whereas on the contrary, the French State argues that the act at issue must necessarily participate by its nature and its purpose in the exercise of sovereignty of the State for or on behalf of which the entity evoking immunity acted.

In order to understand the interest of this debate, it is necessary to examine the role of the vessel classification and certification companies, and more particularly, the activity of the ABS companies, which are American law companies.

The classification companies were created to respond to the need for speed and safety in maritime trade, with the shipping and maritime trade companies needing to ensure the quality of the vessels they used¹. This was how these companies came to be created in order to inspect vessels under contracts entered into with the ship owners, with the classification procedure making it possible to determine the degree of confidence that could be accorded to the ships in question with respect to their construction, their technical state and their maintenance. These companies were then used by shipping insurance companies

¹ Translator's note: there are words missing in the French version of the judgment and so this is the most plausible translation of this sentence.

that required classification of a vessel, such classification attesting to compliance with standards laid down by the classification companies. Subsequently, States responsible by their very nature for monitoring the general interest and therefore marine safety, mandated these bodies to inspect and check ships on behalf of their administrations. And then international organizations, in particular, the International Maritime Organization (IMO), drafted standards to prevent risks and in particular, marine accidents. That is how the International Shipping Safety and Prevention of Pollution Code (ISM Code) came to be adopted in 1993, which incorporated the SOLAS Convention, an International treaty aimed at defining various rules on safety, security and operation of ships. And then other conventions were signed, in particular the 1966 convention on load lines, it being specified that these conventions authorized the Flag State to delegate to recognized entities the power to issue certificates attesting to the compliance of the vessel inspected under the provisions of such conventions. That is how a number of countries came to have recourse to this option and authorize the principle classification companies to carry out statutory inspections in their name and to issue the corresponding certificates.

ABS, a company founded in 1862 and recognized in the marine sector, with 100 countries having recourse to its services, has consistently carried on various different activities:

- It draws up standards in terms of vessel design, techniques and safety, and continues to draw up standards as it has technological research program in this area;
- It carries out the classification of ships based on these standards and the technical inspections, audits and checks required by the international conventions and national laws and regulations;
- It makes periodical inspections of ships to check whether or not they should be maintained in their class in light of the standards applicable to their class and in accordance with the Regulations (standards established by ABS);
- During a ship's life, it checks for damage, repairs and modifications;
- It carries out inspections and issues certificates on behalf of States which delegate their statutory obligations to it, pursuant to the various national and international marine conventions and codes, such as the Load Lines, Safety of Life at Sea (SOLAS), Tonnage or Prevention of Pollution by Ships (MARPOL) Conventions.
- With respect to certificates of compliance with the SOLAS standards, it may be called on to issue safety construction certificates, loading equipment safety certificates, safety radio certificates, passenger ship safety certificates, and if the Flag State so authorizes, it can carry out a review of the documents and audits onshore and onboard in order to check whether the safety management system complies with the International Management Code for the Safe Operation of Ships and for Pollution Prevention or the International Ship and Port Facility Security Code;
- With respect to certificates of compliance with the MARPOL standards, it can

issue international certificates for the prevention of oil pollution, international certificates of fitness for carriage of liquefied gases in bulk, and certificates of fitness for the carriage of dangerous chemicals in bulk;

- On behalf of the Maritime Authorities of a State, load line certificates which certify that a ship meets the proper stability conditions for transporting its cargo;
- It can also issue national and international tonnage certificates, as well as special tonnage certificates for Panama and Suez.

It transpires from ABS exhibit no. 3 that the State of the Bahamas had delegated authority to it on many occasions to inspect the various elements of vessels, be it their structure, equipment, tonnage or cargo. The document entitled “State of the tanker PRESTIGE”, figuring as the French State’s exhibit no. 2 and ABS exhibits nos. 7 to 9, show that this tanker was built in 1976, that the classification inspections included the annual inspections of the hull, machine room, automation, inert gas systems, and boilers, the damage/repairs inspection, the inspection of the thickness and the statutory inspections including the annual inspection for renewal of the Load Line certificates, radio, safety equipment, construction, IOPP (International Oil Pollution), SOLAS inspections (rescue equipment) with the requirement of a class certificate prior to SOLAS-SLC accreditation, and inspection and tests of devices, these inspections being carried out by the same inspectors and concerning the same elements, the purpose of classification and issue of certificates being to maintain the safety of people and goods at sea, and protect the environment by drawing up and checking rules and standards in terms of design, construction and operational maintenance of vessels and by offering a reliable classifications service.

The French State argues that the wrongdoing committed by ABS falls within its classification activity, which is a private activity not involving the prerogative of sovereignty and as a result, ABS cannot validly benefit from immunity from jurisdiction.

However, it transpires from the foregoing that classification activities and the activities delegated by the State of the Bahamas concerning inspection and certification of vessels or certain elements relating to vessels, constitute, in reality, one and the same activity, and at the very least, are very closely connected activities, as both fall within the scope of the state of ships in order to prevent vessels that present a risk for people, goods and the environment from being able to sail, and that the SOLAS certificate in particular cannot be issued if the hull and machine-room classification has not been effected (cf. ABS exhibit no. 9). It should also be noted that the classification inspections and checks are carried out by the same inspectors over the same period of time. In the first case, they are intended for the use and management of ships by private companies (ship owners, shipping companies, transport companies, and insurers), and in the second, for State controls over marine activity, and classification inspections can, in certain cases of certification, be a prerequisite to certification.

This was the meaning of the ruling of the Paris Court of Appeals of March 30, 2010, which indicated that given the close links between the certification and classification activities, the latter contributed to ensuring a public service activity, i.e., improving marine safety. This solution is perfectly consistent and applies to the case in hand in that it

transpires from the analysis of ABS' activities that the distinction between certification and classification activities is impossible in practice as both activities are indivisible in nature, the certification and classification activities arising out of the activity of inspecting vessels which after being checked, will either be maintained in their class or not and will either be issued with the certificates intended for the State requiring them or not.

It should also be noted that the French State cannot assert the EU Directive of April 23, 2009 as this Directive governs relations between European States. The case law it cites in support of its claim does not demonstrate, contrary to its assertions, that as a result of their classification activities, the companies in question are excluded from immunity from jurisdiction. However, it is the role of the Court to check whether or not the companies at issue acted for and on behalf of a foreign state, and whether the acts which gave rise to the dispute constitute acts in the exercise of public authority or have been carried out in the interests of a public service.

It transpires from the foregoing that **AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES:**

- Acted for or on behalf of the Bahamian State by way of a delegation to carry out its certification activity for ships registered in the Bahamas, particularly with respect to certification under the SOLAS Convention, which requires that vessels be designed, built and maintained in accordance with the structural, mechanical and electrical requirements of a classification company;
- Carried out acts exercising public authority or in the interests of a public service by issuing a statutory Cargo Ship Safety Construction Certificate in accordance with the SOLAS Convention issued after the 2001 GUANGZHOU inspections and the 2002 DUBAI inspections, which could not be issued until the classification inspection had been carried out, and such acts are not a matter of simple management as issue of a certificate conditions whether or not a vessel can sail.

Accordingly, it would appear that the companies in question satisfy all the conditions to be eligible to benefit from immunity from jurisdiction and the claims made by the French State are inadmissible.

It would be unfair to leave AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES to bear the unrecoverable costs and they shall therefore be awarded the sum of € 8,000 on the basis of Article 700 of the Civil Procedure Code.

Pursuant to Article 696 of the Civil Code, the French State shall be ordered to pay all the legal costs.

On these grounds,

The Court, after deliberating and deciding in open court by way of a judgment available at the office of the Clerk of the Court, with the parties being informed in accordance with the conditions provided for in Article 450 (2) of the Civil Procedure Code, at first

instance and after adversarial proceedings,

HOLDS that the claims made by the French State against AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES are inadmissible, as the latter benefit from immunity from jurisdiction.

ORDERS the French State to pay AMERICAN BUREAU SHIPPING, ABSG CONSULTING Inc. and ABS GROUP OF COMPANIES the sum of € 8,000 on the basis of Article 700 of the Civil Procedure Code.

ORDERS the French State to pay all the costs.

Thereby held and found on the date, and in the month and year indicated.

The Judgment was signed by S. PETRIAT, Presiding Judge, and the Clerk of the Court present.

THE CLERK

THE PRESIDING JUDGE