Pacta Sunt Servanda and Article 22.2 of the Brussels I Regulation

This post is written by Adrian Briggs, Professor of Private International Law at the University of Oxford.

One should note the decision of the European Court in C-144/10 *BVG v JP Morgan Chase* (12th May, 2011: Third Chamber), which held that where a bank sues to enforce the obligations of a swap contract which is valid according to its governing law, and the corporate defendant raises by way of defence the contention that its constitution or constitutional law deprived it of legal power to enter into the contract, the matter is not one to which Article 22.2 of the Brussels I Regulation applies, and it does not follow that the defence must be adjudicated, or the whole action prosecuted, in the court in which the corporate entity has its seat. This is because the point of company law or company validity is to be seen as no more than incidental or ancillary to the main issue, which is a contractual one. It followed that proceedings brought by the corporate German entity in Germany, by which it sought a declaration that it was not bound by a swaps contract which it had entered into with the bank, was not one which Article 22.2 allowed or required the German courts to hear, as Article 22.2 had no application to the proceedings.

The consequence was that the attempt of the corporate entity to derail earlier-commenced proceedings brought by the bank against the corporate entity in the English courts to enforce the obligations of the contract, by bringing counter-proceedings in Germany and seeking to use Article 22.2 as a mechanism to contend that the German courts were not bound by Article 27 to yield jurisdiction to the English courts – relying for this contention on the point left open after Overseas Union Insurance and never since settled – fell at the first fence. There being no jurisdiction in the German court in the first place, there was no need to go on to consider the Article 27 point, which is in one respect a pity.

Some will see in this a welcome piece of common sense, entirely in accord with the manner in which the English High Court and Court of Appeal had addressed (albeit in mirror image) the same issue in the proceedings which the bank had brought: *BVG v Morgan Chase Bank NA* [2010] EWCA Civ 390. It also means that

the reference made in the same proceedings by the Supreme Court of the United Kingdom at the end of last year, registered as Case C-54/11, is now practically redundant, and the reference should now be withdrawn. It also means that the way Art 22.2 operates, in that it is triggered only when the company law point is the principal issue in the proceedings, and which it will not be where the company law point is a mere defence to a contractual claim which has been or will be asserted, is different from the way Art 22.4 works. This is because the validity of a patent, as any fule kno, is always at the heart and core of an infringement action, in the way the validity of the decision of an organ of a company is not always at the heart of a contract claim against that company, even when the company takes the point of validity as the whole of its defence.