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.

Japan's New Act on International Jurisdiction

Professor Koji Takahashi (Doshisha University Law School, Japan), has kindly informed us about the adoption of a new Act in Japan containing provisions on international jurisdiction of the Japanese courts in civil and commercial matters (the matters of personal status are excluded from the scope), which will be inserted into the existing *Code of Civil Procedure and Civil Interim Relief Act*. There is no doubt about the significance of this step: the rules of international jurisdiction, which have so far been inferred from the judicial precedents, will for the first time be prescribed by legislation.

Professor Takahashi has also written a paper on the Act (see here), where he sets out his English translation, comments of the key provisions and presents a brief overall evaluation of the Act. Comments are expected!

Diplomatic Immunity for Mr Strauss-Kahn?

See these posts here and here at *opiniojuris*.

Which Strategy for West Tankers?

As reported yesterday, West Tankers has now won its arbitration against the insurers of Erg Petroli and obtained a judgment in England in the terms of the award.

The purpose of this last move, it seems, was to create a defense against the enforcement in England of any forthcoming Italian judgment finding in favour of the insurers. This would create a conflict of judgments in England, and West Tankers hopes that pursuant to Article 34 of the Brussels I Regulation, the English judgment (in the terms of the award) would prevail.

If this strategy was to prevail, this would mean that the Italian judgment could not be enforced in England. But West Tankers may have assets in other European jurisdictions where the Italian judgment would be recognised almost automatically. In particular, it is likely that it owns vessels which could be attached in any European harbour where they stop. It might therefore be that the Italian judgment could be enforced in France, Greece, Spain, etc…

It seems, therefore, that West Tankers has two ways forward.

The most obvious one would be to seek recognition of the arbitral award in most jurisdictions of Europe, and hope that in each of these jurisdictions, a local judgment declaring the award enforceable would be considered as a judgment in the meaning of Article 34 of the Brussels I Regulation. The insurers would then be left with Italy, that West Tankers' vessels might find wise to avoid.

Alternatively, West Tankers might want to focus on the UK and try to rely on the

English judgment to obtain restitution of any payment it would be forced to make abroad on the basis of the Italian judgment (for a similar example, see here). I have no idea whether this could work as a matter of UK law. But it might be a theoretical question, as the Italian insurers of Erg Petroli might not have assets there.

West Tankers: Will the Future Italian Judgment Ever be Recognised in the UK?

On April 6th, 2011, the English High Court delivered a new judgment in *West Tankers*.

Most readers will recall the basic facts of the case. A dispute arose after a collision between a ship, the Front Comor, and a pier at a refinery in Italy. The charterparty provided for arbitration in London. The charterer first initiated arbitral proceedings against the owner of ship. It then sued the defendant before Italian courts. After an English Court issued an antisuit injunction restraining the claimant from continuing the Italian proceedings, the case was referred to the European Court of Justice which held that the English court was not authorised to issue such injunction.

But on November 12th, 2008, the arbitral tribunal delivered its arbitral award and held that the defendant was under no liability to the claimant and its insurer.

The issue before the English court was essentially one of English arbitration law: whether such award could be declared enforceable in the UK. An interesting issue was whether the Brussels I regulation was relevant here, as an English judgment declaring the award enforceable in the UK might be considered as a bar to the recognition/enforcement of any inconsistent judgment rendered in another member state. And an Italian judgment ruling in favor of the claimant would be hardly concilable with an English judgment given in the terms of the arbitral

award. But would such English judgment be a Regulation judgment in the first place?

In his judgment of April 6, Justice Field held that, as long as the Italian judgment had not been rendered, it was not necessary to decide the issue. In the meantime, however, he confirmed that judgment in the terms of the award could be entered into.

Tip-off: Sebastien Lootgieter

Cultural Legitimacy and Climate Change Policy Conference

The Surrey International Law Centre (SILC) invites you to a one-day international interdisciplinary seminar on cultural legitimacy and the international law and policy on climate change on 21 June 2011.

Climate change poses fundamental and varied challenges to all communities across the globe. The adaptation and mitigation strategies proposed by governments and non-governmental organisations (NGOs) are likely to require radical and fundamental shifts in socio-political structures, technological and economic systems, organisational forms, and modes of regulation. The sheer volume of law and policy emanating from the international level makes it uncertain which type of regulatory or policy framework is likely to have a positive impact. The success or failure of proposed measures will depend on their acceptability within the local constituencies within which they are sought to be applied. Therefore there is an urgent need to better comprehend and theorise the role of cultural legitimacy in the choice and effectiveness of international legal and policy interventions aimed at tackling the impact of climate change.

The seminar will contribute to research on the international law and policy of

climate change by focusing on the issue of cultural legitimacy. Beginning from the premise that legitimacy critiques of international climate change regulation have the capacity to positively influence policy trends and legal choices, the seminar will showcase innovative ideas from across the disciplines and investigate the link between the efficacy of international legal and policy mechanisms on climate change and cultural legitimacy or local acceptance

As said, the seminar intends to be interdisciplinar. Some of the topics that may be of interest to Private International Law lawyers are: Dr M Burcu Silaydin Aydin "Land use planning as a tool of enhancing cultural legitimacy on climate change: The case study of Turkey"; Ms Denise Margaret Matias "Electric public transport in Puerto Princesa City: local government cooperation with NGOs, Germanwatch e.V"; Dr Xiao Recio-Blanco "Community collaboration and the improvement of fisheries' management and governance: the case of South Baja California"; or Dr Vincenzi de Agostinho "The dangers of the environmental advertising".

See the programme here.

AG's Conclusions in eDate Advertising

The Conclusions of Advocate General Pedro Cruz Villalon in the *eDate Advertising* (case C-509/09) and *Martinez* (case C-161/10) cases were presented on March 29th, 2011. They are not available in English as of yet.

The issue before the European Court of Justice in these cases is the application of private international law rules to internet websites, and more specifically in defamation cases.

The opinion of Advocate General Cruz Villalon can be summarized as follows:

Jurisdiction: Applying Art. 5.3 of the Brussels I Regulation to Internet

In *Fiona Shevill*, the ECJ ruled that the court of the place where the event giving

rise to the damage occurred has jurisdiction to compensate the entirety of the loss, while the courts of the places where losses were suffered each have jurisdiction to compensate for the loss suffered in the relevant jurisdiction.

The AG proposes to add a new head of jurisdiction for defamation cases. The court of the place of the "center of gravity of the conflict" would also have jurisdiction to compensate for the entirety of the loss. The conflict would be the conflict between the freedom of information and privacy. According to AG Cruz Villalon, this conflict would be located where the alleged victim would have the center of his life and activities, if the media could have predicted that the information would be relevant in that jurisdiction. For the purpose of determining whether information should be considered as relevant in a given jurisdiction, the AG offers to take into account a variety of factors such as the language used, the content of the information (allegations in respect of the life of an Austrian are relevant in Austria). The AG insists, however, that the point would not be to determine the intention of the media, which would not be directly relevant for the purpose of Art. 5.3 (as opposed to Art. 15) of the Regulation.

Choice of Law: on the Impact of the E-Commerce Directive

The German supreme court for civil matters has also interrogated the ECJ on the impact of the 2000 E-Commerce Directive on choice of law. Although Article 1-4 of the Directive provides that the Directive "does not establish additional rules on private international law", Article 3-2 provides:

> *2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.*

It has therefore long been wondered whether Art. 3-2 did in fact establish a choice of law rule providing for the application of the law of the service provider (ie in defamation cases the law of the publisher) or, at the very least, whether Article 3-2 imposes on Member states to amend their choice of law rules insofar as they would stand against the European freedom of service.

In the opinion of AG Cruz Villalon, the answer is no to each of these two questions. As Article 1-4 expressly provides, there is no hidden choice of law rule in the Directive. And Article 3-2 should not even be interpeted as imposing on

Member states to amend their own choice of law rules accordingly.

Second Issue of 2011's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2011 was just released.

It includes five articles, one of which only explores a conflict issue. It is an article presenting the new Chinese law on private international law (*La nouvelle loi chinoise de droit international privé du 28 octobre 2010 : contexte législatif, principales nouveautés et critiques*). It is authored by Chen Weizuo, who is a professor of law at Tsinghua University School of Law, and Lydia Bertrand, who practices in Paris.

> *This article begins by briefly describing the legislative history of China's new private international law statute, i.e. the Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the People's Republic of China of 28 October 2010, which entered into force on 1 April 2011. It will then undertake a study on the main novelties of China's new private international law statute for the Chinese private international law system. Finally, it concludes with critical comments on this new statute.*

State Immunity in Australia

A recent decision of the Full Court of the Federal Court of Australia considers an unusual area of private international law, namely the applicability of foreign state immunity to government-owned airlines in the context of civil proceedings for

breach of competition laws. The case was brought by the Australian competition regulator against two airlines—Garuda Indonesia and Malaysian Airlines—in relation to a cartel for the fixing of air freight prices.

In Australia, the law of foreign state immunity is largely in statutory form by virtue of the *Foreign States Immunities Act 1985* (Cth). That act extends immunity in some circumstances to a 'separate entity' of foreign states, defined as being an agency or instrumentality of the foreign State which is not part of that State's executive government.

The Full Court considered that (contrary to the trial judge's ruling) Garuda was such an agency or instrumentality of Indonesia, but that (in accordance with the trial judge's ruling) Malaysian Airlines was
not such an agency or instrumentality of Malaysia. Nevertheless, because the conduct in question fell within the commercial transaction exception in s 11 of the Act, Garuda was not entitled to foreign state immunity.

Lander and Greenwood JJ considered that 'agency' and 'instrumentality' were two separate concepts. By contrast, Rares J declined to draw this distinction between the two terms. The joint judgment stated:

> *"We think the difference is in their constitution. An instrumentality is a body created by the State as an instrumentality for the purpose of performing a function for the State. … An instrumentality of the State cannot be created by an organ other than the State. A natural person or a corporation cannot create an instrumentality and certainly not an instrumentality of the State.*
>
> *"An instrumentality is created by the State for the purpose of carrying out functions on behalf of the State and is not available to carry out any functions for any other State, person or corporation. …*
>
> *"An agency may have the same characteristics as an instrumentality, but not necessarily so. An agency of the State, in our opinion, does not necessarily have to have been created by the State itself. It may be, but need not be. … [at [36]-[39]]*

This distinction had one important consequence for the test to determine whether an entity was the instrumentality or agency of a foreign state, namely that the

question of ownership and control was in their Honours' opinion less important than the trial judge may have assumed:

> *"Ownership cannot be determinative of the question whether a person or corporation is an agency or instrumentality of a foreign State. A natural person will not have an owner. Australian law does not countenance ownership of a person. An instrumentality will usually be created by legislation. It may have "an owner". In many cases it will not have "an owner" but will simply be a creation of statute. An agency may or may not be owned by the State. If it is then it is more likely to be found to be an agency of the State. But if it is not owned by the State that is not determinative of the question whether the person or corporation is an agency of the State. The agency might exist as a result of a contractual relationship between the State and the person or corporation. It follows that ownership cannot be the sole criteria in determining whether a natural person or a corporation is an agency or instrumentality of a foreign State. …*
>
> *"Like Rares J, we do not, with respect, agree with the primary judge that the test whether a natural person or a corporation of the kind referred to in the definition is to be determined by reference to whether the foreign State has the day-to-day management control of the agency or instrumentality. We think, as we have said, such a holding is inconsistent with s 3(2), which contemplates that a separate entity may be the agency of more than one foreign State and, indeed, numerous foreign States, not all of which presumably would have the actual day-to-day control of that foreign entity.*
>
> *"Ownership and control will be important in determining whether a natural person or a corporation is an agency or instrumentality of a foreign State. However neither, in our opinion, can be determinative factors. [at [44], [46]-[47]]*

Rares J reached the same conclusion, but without the need to distinguish between 'agencies' and 'instrumentalities', since both connoted a 'means to achieve some purpose or end of [the foreign] State'. For that reason,

> *"the primary judge erred in construing the definition of "separate entity" as containing requirements that the foreign State own and control a corporation to the point where it exerted a real or tangible level of day-to-day management*

control over it. Those requirements are not contained in express or implied terms in the Act. They are not necessary to give the Act effect. They are inconsistent with the express provision that an individual, who cannot be owned, can be a separate entity. They assimilate the position of a corporation to an organ of the foreign State, contrary to the exclusion of such a body in the express words of the definition. …

"The correct approach is to consider, on the whole of the evidence, whether the person is acting for, or being used by, the foreign State as its means to achieve some purpose or end of that State in the relevant circumstances." [at [124], [128]]

Significantly, the Court held that a dealing did not cease to be a 'commercial transaction' simply because it was unlawful. This was relevant because the 'transaction' in question was the formation of an anti-competitive cartel. As the joint judgment remarked:

"It would be curious if the effect of s 11 is to except from the general claim for immunity a lawful transaction for the provisions of services but provides an immunity for a contract, arrangement or understanding which is unlawful" [at [63]]

Or, as Rares J expanded:

"The exception provided in s 11(1) is not for a commercial transaction, as that expression is defined in s 11(3). Rather, the subject-matter of the exception from immunity is the proceeding "in so far as [it] … concerns a commercial transaction". The airlines were carrying on business, offering for sale and selling air freight services. The proceedings concerned the allegation that the cartel conduct was an activity that affected the ordinary market price setting mechanisms. That allegation concerned what was inherently an activity of a commercial, trading or business kind." [at [205]]

PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2011] FCAFC 52 (19 April 2011)

Spanish Draft Law on Mediation

The Spanish Draft Law on Mediation in Civil and Commercial Matters was published on the BOCG OF APRIL 29, 2011 (see here). The future Act would incorporate into Spanish law Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (just for the record, the deadline for bringing into force the laws, regulations, and administrative provisions necessary to comply with the Directive is May 21, 2011, so we will be late). However, the proposed regulation goes beyond the content of the Directive, in line with the third additional provision of Law 15/2005 of 8 July, amending the Civil Code and Civil Procedure Act relating to separation and divorce. While Directive 2008/52/EC lays down only minimum standards to encourage mediation in cross-border civil and commercial matters, the Spanish regulation sets a general scheme that takes into account the provisions of the UNCITRAL Model Law on International Commercial Conciliation, and would be applicable to any mediation (limited to the field of civil and commercial matters) that takes place in Spain and intends to be legally binding.

Some interesting provisions of the draft read as follows:

Article 2. In the absence of express or tacit submission to this law, it shall apply when at least one of the parties is domiciled in Spain and the mediation is to be conducted in Spanish territory.

Article 3. Cross border conflicts mediation.

1. For the purposes of mediation governed by this law, “cross-border conflict” means a conflict in which at least one party is domiciled or habitually resident in a State other than that in which any of the other affected parties is domiciles or has habitually residence at the time they agree to use mediation (or they have to use it in accordance with the applicable law).

2. In cross border disputes between parties residing in different Member States of the European Union, domicile will be determined in accordance with Articles 59

and 60 of Regulation (EC) no. 44/2001 of 22 December 2000 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

Article 28. Enforcement of cross border mediation agreements.

1. Without prejudice to the rules of the European Union and international conventions in force in Spain, a mediation agreement that has already become enforceable in another State shall only be executed in Spain where such enforceability results from the intervention of an authority competent to perform functions equivalent to those played by Spanish authorities.

2. A mediation agreement that has not been declared enforceable by a foreign authority will only be executed in Spain after having been notarized by a Spanish notary public at the request of the parties, or of one of them with the express consent of the other.

3. The foreign document will not be executed if it is manifestly contrary to the Spanish ordre public.