12 July 1996 Appeal

NYC: UK

V. V. VEEDER QC
ESSEX COURT CHAMBERS
24 LINCOLN'S INN FIELDS

LONDON WC2A 3ED
Tel: (Int + 44) 71 813 8000
Fax: (Int + 44) 71 813 8080

Constitution
Leggatt L.J.
Morritt L.J.
Brooke L.J.

Phillip Alexander Securities and Futures Limited

v

Werner Bamberger and ors

JUDGMENT

Leggatt L.J.

This is the judgment of the Court to which all its members have contributed.

The proceedings so far

The appellants Phillip Alexander Securities and Futures Ltd are a company carrying on business as futures and options brokers. In the past they have carried out substantial business for a number of German customers. The respondents are six former customers of the appellants, all resident in Germany. Without intending any impoliteness we shall for convenience refer to them by their surnames: Bamberger, Theele, Kefer, Riedel, Franz and Gilhaus. Customer agreements between the appellants and each respondent contain different forms of arbitration agreement. Bamberger's arbitration clause provided for arbitration in London under the London Court of International Arbitration ('LCIA') rules. The agreements of Theele, Kefer, Riedel and Gilhaus contained an arbitration clause providing for arbitration in London under the LCIA rules, "subject only to SFA Rules in respect of claims under £50,000". Franz's arbitration clause provided for arbitration under the AFBD Scheme which has been superseded by the SFA Arbitration Scheme. Disputes having arisen between the parties, the respondents claimed against the appellants as a result of trading losses incurred. Instead of referring those disputes to arbitration each respondent commenced proceedings in German courts. In each case the appellants contested the proceedings on the basis that there was a binding arbitration agreement.

Interim injunctions were granted by the Commercial Court, and notice of them given to the respondents. The respondents have however continued to prosecute their claims, with the result that judgments in five of the cases have now been given by the Monchengladbach or Krefeld district courts. The appellants contend that three of those customers, Bamberger, Franz and Gilhaus, had notice of the interim injunctions by fax before the hearing in Germany took place. In relation to the five customers with German judgments the purpose of these proceedings now is to obtain declarations, so as to preclude enforcement of those judgments in this country; and in relation to Riedel to obtain in addition an injunction restraining the continuance of his pending claim in Germany. His case is due for hearing there on 19th September 1996. The appellants have appealed against these judgments in Germany. If the appeals fail and the judgments are not satisfied, the appellants must either seek to resist their enforcement in this country or alternatively, as a final resort, pursue a claim for damages for breach of the arbitration agreements.

In each of the judgments the German Court rejected the appellants' submission that the Court had no jurisdiction because of the binding arbitration agreement, and ruled, as a distinct ground of its decision, that the arbitration agreements were under German law either invalid or inapplicable. In *Gilhaus* as a matter of construction the Court decided that the agreement to arbitrate had no application to claims over £50,000. But in all the other cases the Court relied on one or more of five grounds all of which treated the English choice of law or the arbitration clause itself as overborne by mandatory rules of consumer protection.

The appellants now appeal against the judgment of Waller J. dismissing their claims for declarations that the arbitration agreements are valid and enforceable and that the German judgments are not entitled to recogniton or enforcement in the United Kingdom. As in the court below, Mr David Anderson and Ms

Helen Davies have appeared as amici curiae, and the Court is indebted to them.

It is convenient to present this judgment by reference to the issues formulated by the appellants, though not in quite the same order. References to sections are, unless otherwise stated, to sections of the Consumer Arbitration Agreements Act 1988.

Construction

As a matter of construction of the particular arbitration clauses, is there a binding agreement to arbitrate claims under £50,000 in the cases of Theele, Kefer and Riedel?

The arbitration clause in the Customer Agreements of Theele, Kefer and Riedel reads as follows:

> "The Company and the Customer agree, subject only to SFA Rules in respect of claims under £50,000 whereby SFA Consumer Arbitration procedures shall apply, that in the event of any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, such dispute shall be referred to and finally determined by non-domestic arbitration under the Rules of Arbitration of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause."

Clause 2(a) of the SFA Consumer Arbitration Scheme provides that -

> "Subject to paragraph (c) below, any dispute between a Member Firm and a private customer who is or has been a customer of a Member Firm ("a Claimant") arising out of or in connection with any investment business of a kind with which SFA is concerned (unless SFA and the parties otherwise agree) and in respect of which the principal amount in dispute does not exceed £50,000, (excluding interest and costs) shall, upon the election of the Claimant, be arbitrated in accordance with these provisions, and the Member Firm shall submit to the arbitration of such dispute in accordance herewith."

On behalf of the appellants Mr Morris argues that the provision in the arbitration clause "subject only to SFA Rules in respect of claims under £50,000" is merely a derogation from the general right and obligation to refer to LCIA arbitration. The Rules give the customer the right to *elect* for SFA arbitration. The

arbitration clause preserves that right, but in the absence of its exercise, the general LCIA arbitration provision applies. This, Mr Morris submits, is the proper construction to be placed on the words "*subject only* to SFA Rules".

As a matter of construction this arbitration clause takes claims under £50,000 out of the reference to arbitration under LCIA Rules. Such claims are made the subject of SFA Consumer Arbitration procedures. They accord to the consumer an election whether or not to arbitrate. No such election has been exercised in any of the cases now before the Court. So there is no reference to arbitration, and the disputes can only be litigated. The jurisdictional limit of the County Court, which was extensively canvassed in argument, is a red herring. At best it might have explained why £50,000 was chosen by SFA as the amount up to which the consumer was to have an election. In any event the arbitration clause was couched as it was in order to match the SFA provision. No reason has been suggested why consumers might have wished to choose SFA rather than LCIA arbitration. Since in our judgment the alternative to SFA arbitration was litigation, Theele, Kefer and Riedel were not bound to refer their claims to arbitration.

Section 2(a) and EC law

Should the Court disapply section 2(a) in the present cases as constituting a restriction on the freedom to provide services contrary to Article 59 of the EC Treaty and/or unlawful discrimination contrary to Article 6 of the EC Treaty and thus apply section 1?

Section 1 provides (so far as material) -

> "(1) Where a person (referred to in section 4 below as "the consumer") enters into a contract as a consumer, an agreement that future differences arising between parties to the contract are to be referred to arbitration cannot be enforced against him in respect of any cause of action so arising to which this section applies except
>
> ....

(c) Where the court makes an order under section 4 below in respect of that cause of action.

(2) This section applies to a cause of action -

(a) if proceedings in respect of it would be within the jurisdiction of a County Court...."

Section 2(a) removes from the scope of section 1 agreements which are covered by section 1 of the Arbitration Act 1975, that is arbitration agreements other than domestic arbitration agreements. "Domestic arbitration agreement" is defined as -

"an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither -

(a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;

is a party at the time the proceedings are commenced."

The Customer Agreements are domestic arbitration agreements, because the relevant customers are German nationals and because they habitually reside in Germany. Prima facie therefore section 2(a) renders them amenable to arbitration, against which they would have been protected by section 1, had they been British.

It is common ground that the three Articles of the EC Treaty that may bear on this issue are Articles 6 (formerly 7), 59 and 220. They provide, so far as is material:

"6. Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality should be prohibited ...

59. Within the framework of the provision set out below restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the community

other than that of the person for whom the services are intended ...

220. Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

...

- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."

The 1968 Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention) was entered into by the Member States in pursuance of Article 220 of the Treaty.

So far as Article 59 is concerned, Mr Morris argues that this article by its terms prohibits restrictions on the freedom to provide services and covers discrimination in relation to the provision of services. On the other hand, he submits that it does not apply to a restriction on, or discrimination in relation to, the recipient of services except in two exceptional cases. The first of these is said to arise where the service recipient travels to another Member State in which it receives the services, and in that case the right is granted to the recipient in the context of Treaty provisions on the free movement of persons, and as a corollary of the right of free movement. The other is said to arise where the substance of the complaint is that there is a restriction on the provision of services.

In support of these propositions Mr Morris relies on three decisions of the European Court of Justice. In the first, Joined Cases 262/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377 two Italian nationals complained that Italian exchange control legislation prevented them from enjoying tourist facilities and, in one case, medical services, in another Member State. In paragraph 10 of its judgment the Court said that in order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided is established or the latter may go to the State in

which the person providing the service is established. Although the second of these cases is not expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the court said that it was the necessary corollary of the first case, "which fulfils the objective of liberalising all gainful activity not covered by the free movement of goods, persons and capital".

It was in this context, therefore, after describing the Directives introduced in pursuance of the General Programme for the Abolition of Restrictions on Freedom to Provide Services, that the Court held (in paragraph 16):

> "It follows—that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State, in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services."

This decision was applied in the second case on which Mr Morris relies, Case 186/87 *Cowan v Tresor Public* [1989] ECR 195. In that case a British citizen had sustained serious injuries when he was assaulted outside a metro station in Paris, and he complained that French law, which limited its criminal injuries compensation scheme to French nationals, was discriminatory in that it prevented tourists from going freely to another Member State to receive services there. The Court upheld his complaint, saying (at paragraph 17):

> "When Community law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law when that risk materialises."

In Case C-45/93 *Commission v Spain* [1994] ECR I-911, the third case on which Mr Morris relies, the Court was concerned with a complaint by the European Commission that Spain had infringed Articles 7 (as it then was) and 59 of the Treaty by providing free admission to its national museums to Spanish citizens, foreigners resident in Spain and nationals of other Member States under the age of 21, while adult tourists from other Member States were charged an entrance fee. The Court applied its decision in *Cowan* and held that this practice constituted unlawful discrimination. Although it did not say in terms which of the Commission's specific arguments it accepted, Advocate-General Gulmann did (see p 915), and he upheld the Commission's arguments that access to museums is one of the decisive factors for a tourist's visit to the territory of a Member State, and is closely and indissolubly linked to the right to freedom of movement enjoyed by tourists (see p 914).

It will be seen that in each of these cases the Court was concerned with a factual situation in which the recipient of a service complained of unlawful discrimination when he or she went to the other Member State in which the service was provided. In C-384/93 *Alpine Investments BV* [1995] ECR I-1141 the European Court of Justice was concerned with a complaint that a Dutch law which prohibited the marketing practice known as "cold calling" in relation to Securities Transactions infringed Article 59 because it prohibited a firm established in the Netherlands from approaching prospective clients established in other Member States.

In his Opinion, Advocate-General Jacobs recognised (at paragraph 43) that most of the cases on the provision of services which had been decided by the Court so far concerned restrictions imposed by the Member State of destination. The Court had been asked: must Article 59 of the EEC Treaty be interpreted as meaning that it also covers services which the provider offers by telephone from the Member State of his establishment to (potential) clients established in another Member State and therefore also provides

from that Member State? The Court answered this question unequivocally in the affirmative: see paragraphs 21 and 22 of the judgment:

> "21. In this case, the offers of services are made by a provider established in one Member State to a potential recipient established in another Member State. It follows from the express terms of Article 59 that there is therefore a provision of services within the meaning of that provision.
>
> 22. The answer to the first question is therefore that, on a proper construction, Article 59 of the EEC Treaty covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established."

Although this judgment was delivered in May 1995, it was not referred to by the judge who reached the same conclusion by using a commonsense approach - namely that the disadvantage sustained by the recipient of services was the same whether he or she stayed at home or travelled to receive the services. If the services happened to be of a type where there was no necessity for travel, it seemed strange to the judge if this fact distinguished discrimination in relation to the provision of those services from one where travel was necessary to receive them.

Turning to Article 220, in *Mund & Foster v Hatrex Internationaal Transport* [1994] ECR I-467 the European Court of Justice was concerned with a complaint about that part of the German Code of Civil Procedure which provides different rules for deciding whether a party's assets may be seized before judgment depending on whether judgment is to be eventually enforced in Germany or in another Member State. The Court held that the provisions of the Brussels Convention are linked to the Treaty and therefore within the scope of its application within the meaning of what is now Article 6 because (see paragraph 12 of the judgment) it was on the basis of Article 220 and within the framework defined by it that the Member States had concluded the Convention. The

Court held that the national provision at issue entailed a covert form of discrimination on grounds of nationality within the field of application of the Treaty (see paragraphs 14-15) which could not be justified by objective circumstances.

The Court of Appeal applied this decision in *Fitzgerald v Williams* [1996] 2 WLR 447 when it set aside an order for security of costs made under Order 23 Rule 1(1)(a) against Irish plaintiffs. Sir Thomas Bingham MR held at p 460 that he could not think that a factual distinction between a rule relating to security for a future judgment and a rule relating to security for further costs of litigation could be held to support a difference of principle between them, since both provisions looked towards a future judgment, for compensation in one case and for reimbursement of the costs of litigation in the other.

Mr Morris submits that Section 2(a) of the 1988 Act has nothing to do with the assignment of jurisdiction or the enforcement of judgments under the Brussels Convention for two reasons. First, because the only situation treated more favourably under the Act is an agreement between two English parties, and this is a situation which does not fall within the scope of the Convention; and secondly, in any event, because questions as to the effect and validity of an arbitration agreement are expressly excluded from the Convention: see Article 1(4). Mr Anderson on the other hand submits that the enforceability of arbitration agreements is "linked to the Treaty" via the Brussels Convention and/or via the reference in Article 220 to arbitration.

We will address the Article 59 point first. Mr Morris sought to distinguish the rather unpromising line of authority from the European Court by repeating that Article 59 is concerned with restrictions on the freedom to provide services, and all that the Court has done has been to ensure that the provider of services would not be disadvantaged by restrictions making it impossible or less easy for nationals of other Member States to receive his services, whether those restrictions were achieved by stopping

them, by exchange control regulations, from coming to his state with a capacity to pay for the services (*Luisi and Carbone*), or by charging them more when they arrived there (*Commission v Spain*), or simply by prohibiting the delivery of the services altogether (*Alpine Investments*). He said, correctly, that *Cowan* was not an Article 59 case, but a case concerned with freedom of movement.

He went on to submit that there is nothing in the 1988 Act to impede his clients as providers of services in any way, and that for this reason Article 59 is irrelevant and there is no unlawful discrimination within the meaning of Article 6.

In our judgment this submission is not well founded. A rule which disadvantages recipients of services in another Member State inevitably restricts the freedom of the service provider to provide services on equal terms to everyone in the Community and is inimical to the objective of the Treaty (see Article 3) of achieving an internal market characterised by the abolition of obstacles to the free movement of services. As the Court has made clear, whether the restriction is placed on the provider of the services or the recipient, the effect is the same, and it is inconsistent with the purposes of the Treaty. Nationals in Germany, Spain or Finland may be less inclined to avail themselves of the services of Mr Morris's clients because English law does not afford to them the same treatment as that which is available to English nationals, and in our judgment this is clearly discriminatory and impermissible pursuant to Articles 6 and 59 of the Treaty. We should make it clear that Mr Morris did not seek to rely on any objective justification for this discrimination. Before the judge there had been some discussion whether the United Kingdom's obligations under Article 2(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards might be capable of constituting such justification. Mr Morris accepted before us that under the Convention it was open to the Court of Contracting State to find

that an agreement was inoperative in a consumer context, and he did not pursue any argument on this issue.

Because of the clear view we have reached on the combined effect of Article 6 and Article 59 it is not necessary for us to express an opinion on the more difficult question that arises in relation to Article 220. The judge did not mention it in his judgment and we are happy to leave this point open to another day when it may be necessary to decide it.

Mr Morris invited us to refer the issues arising under Article 6 to the European Court pursuant to Article 177 of the Treaty. He accepted that the governing principle has been set out by Sir Thomas Bingham MR in *R v International Stock Exchange ex p Else (1982) Ltd* [1993] QB 534:

> "I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer unless the national court can with complete confidence resolve the issue itself."

Because we have reached a clear view on the issue, we do not consider it appropriate to take this course.

Section 2(b)

Is the effect of section 1 excluded because the disputes in question are differences arising under contracts relating to the creation or transfer of securities or of any right or interest in securities within section 2(b) ?

Section 2(b) excepts from the scope of section 1 -

> "the resolution of differences arising under any contract so far as it is, by virtue of section 1 (2) of, and Schedule 1 to the Unfair Contract Terms Act 1977 ("the Act of 1977"), excluded from the operation of section 2, 3, 4 or 7 of that Act."

S.1(2) Unfair Contract Terms Act 1977 provides that

> "..in relation to contracts, the operation of sections 2 to 4 and 7 is subject to the exceptions made in Schedule 1"

Schedule 1 provides, so far as relevant,

"1. Sections 2 to 4 do not extend to -
(e) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities."

The appellants' Customer Agreements offer the provision of -

"General investment advisory and dealing services and related research in the following investments, and the effecting of margined transactions thereon:

(a) futures on any commodity, security, interest rate instrument of other indices, precious metals or any currency and forward foreign exchange transactions;

(b) contracts for differences, e.g. contracts based on the FT-SE 100 or S & P 500 stock indices;

(c) options to acquire or dispose of any of the instruments specified in (a) and (b) above, any securities, any currency or gold, palladium, platinum or silver;

(d) securities where the transaction in question is ancillary to a transaction in any of the foregoing; and

(e) units in collective investment schemes which are not regulated."

Thus the appellants draw for themselves the distinction between securities on the one hand and futures and options on the other, and under paragraph (d) there is a power to deal in securities only when ancillary to futures and options. As appears from the affidavit of the appellants' compliance officer, it is in practice only in futures and options that the appellants deal.

The appellants argue that all the financial instruments in which they deal are "securities" within Schedule 1 of the Act of 1977. Alternatively they contend that if commodities and currency-based transactions are not "securities", a substantial part of the transactions such as stocks bonds and treasury certificates, were clearly transactions in securities. They argue that each Customer Agreement "related to" the transfer of securities or at the least a right or interest in securities.

Mr Morris, on their behalf, submits that although in the Prevention of Fraud Investments Act 1958 'securities' includes gilts, they are one of the classes expressly excluded for listing purposes by the Financial Services Act 1986. Because futures and options are relatively recent products, 'securities' should be defined as investments which fall within the Schedule of the 1986 Act. Mr Morris further argued that when construing the Unfair Contracts Terms Act 1977, which contains no definition of securities, it is proper to do so as at 1986, by which time it would have included those wider categories.

We do not accept these submissions. First we see no basis on which it could be right to construe the provisions of the Unfair Contract Terms Act 1977 by reference to the Financial Services Act 1986 or the scheme of regulation which existed in 1988 when Consumer Arbitration Agreements Act 1988 came into force. In the latter Act Parliament decided that the exclusion should be that which applied in relation to the 1977 Act. The 1977 Act cannot be construed by reference to these subsequent events. In any event the effect of the Financial Services Act 1986 section 142 and Schedule 1 is to define securities for listing purposes in terms which specifically exclude futures and options.

Second we see no reason to give the word "securities" in the 1977 Act any wider meaning than it would ordinarily have borne in 1977. The purpose of the exclusion was to remove from the protection of the 1977 Act a contract of the relevant type entered into by a consumer. There is no reason to think that Parliament wished to remove that protection from consumers entering into futures or options contracts. We doubt whether it is possible to give an exhaustive definition of "securities". For present purposes it is in our view sufficient to indicate that it refers to the financial assets represented by certificates attesting ownership of stocks and shares and the like. Futures and options, even when concerned with securities so defined, are to be distinguished from securities themselves. Mr Morris has been unable to bring to our attention a single

example of the term 'securities' being used so as to embrace futures or options. The exclusion from the scope of section 1 of the 1988 Act of contracts relating to securities is understandable: different considerations apply to contracts relating to futures and options.

Mr Morris argued that the Customer Agreements "related to" the transfer of securities or at the least a right or interest in securities. We have already held that it could not have related to securities. In our view it would not normally relate to rights or interests in securities either. The usual option or futures contract would be one which if exercised or matured would lead to a contract for sale by description. Such a contract would not confer any right or interest in specific securities until securities answering the description had been appropriated to the contract.

In any event the words "relate to" could not cover the contracts in this case. They do not relate to the creation or transfer of the securities or of any right or interest in such securities. The performance of the contract may lead to such a contract but is not a contract of that description itself. Accordingly in our judgment the Judge was right on this issue and the provisions of s.2(b) do not exclude the application of s.1 to the contracts with which this appeal is concerned.

Section 4 and disapplication

In the case of Riedel, if the arbitration agreement would otherwise be rendered unenforceable, should the Court disapply section 1 by an order under section 4?

Section 4 gives the Court power to disapply section 1 where there is no detriment to the consumer. Since the argument based on section 4 applies only to Riedel, it is in the light of the answer to the first issue immaterial. The appellants would have argued that the bringing of a claim in LCIA arbitration would not necessarily be disadvantageous to Riedel. In the exercise of his discretion the judge, however, concluded that, having regard to the previous decisions of the German Courts and to the cost of

conducting an arbitration in a foreign country, he "could not be satisfied that it would not be detrimental to Riedel for the claim which he is pursuing in Germany to be referred to Arbitration." That conclusion is unimpeachable.

Judgments in face of interlocutory injunctions granted by Commercial Court

In the cases of Bamberger, Gilhaus and Franz, does the fact that notice of interlocutory injunctions was given before the respective hearings in Germany provide grounds under Article 27(1) of the Brussels Convention for not recognising the German judgments which would otherwise preclude a finding of a binding arbitration agreement?

For the reasons set out above none of the arbitration agreements was enforceable; in those circumstances the question of recognition of German judgments does not arise. It follows that it is unnecessary to resolve any of the other issues, except as to declarations relating to recognition and enforcement of German judgments on the merits.

About the issue relating to interlocutory injunctions we say no more than that we agree with the judge and both counsel that in the cases of Bamberger, Franz and Gilhaus, who had notice of the interlocutory injunctions before obtaining judgment in their German actions, the German judgments should by force of Article 27(1) of the Brussels Convention not be recognised. At page 53 of the transcript of his judgment the judge said -

> "It would seem to me prima facie that if someone proceeds in breach of, and with notice of, an injunction granted by the English Court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the United Kingdom."

Unless, therefore, the apparent breaches of those respondents could be excused, their German judgments would not be enforceable.

Judgments in face of binding agreements

In the cases of Theele and Kefer are the respective judgments in Germany, holding that the arbitration agreement is not binding, required to be recognised in this Court under the Brussels

Convention, thus precluding this Court from finding that there is a binding arbitration agreement?

If it had been material, it would have been appropriate to refer this issue to the European Court of Justice, since it raises the very point that the Court itself refrained from answering when it had the opportunity of doing so in C190/89 *Atlantic Emperor* No 1 [1991] ECR I-3855. But in the circumstances it does not arise.

Declarations as to recognition and enforcement of German Judgments

In the case of all the respondents except Riedel should the Court now grant declarations that the German judgments are not to be recognised and/or enforced -
(a) In so far as those judgments decide that the arbitration agreements are invalid or unenforceable, or
(b) In so far as those judgments determine on the merits the substantive claims of the respondents for restitution and/or compensation?

As to (a), obviously the Court should not make any declaration on this ground, since the judgments are not wrong in their effect. As to (b), save for notice of interlocutory injunctions, there is no ground for challenging the judgments. The appellants submit that having concluded that any of the German judgments are not to be recognised, there is no reason why declarations to that effect, which would be of substantial benefit to the appellants, should not be granted. It would provide protection in the event of applications for enforcement of German judgments in this country. Mr Anderson, on the other hand, pointed to the judge's uncertainty whether the German customers would actually seek to enforce their judgments, and to the appellants' own idea that they might be content to claim damages for breach of the arbitration agreement, although Mr Morris told us, on instructions, that his clients would only consider pursuing this course as a last resort if their resistance to the enforcement of the German judgments proved ultimately unsuccessful. Mr Anderson added that if the appellants' appeals in Germany were successful, the perceived need for a declaration would fall away completely. He also submits that the modern approach of the

courts is to dismiss claims for declarations on hypothetical facts (meaning that they may not happen).

In our judgment the judge's discretion not to grant declarations was exercised on correct principles. He was entitled to refrain from rendering the issue res judicata, and so to leave it open to the respondents to attempt enforcement, even though they have not so far resisted the appellants' proceedings here. Although the judge was to some extent influenced by his uncertainty concerning service of notice of the injunction (which has been resolved in this Court so far as Bamberger, Franz and Gilhaus are concerned), there were other sound reasons, which are not affected by this consideration, for him to have exercised his discretion in the way that he did. Since we do not consider that the judge was plainly wrong, we would not interfere with his decision.

Injunction

In the case of Riedel should the Court grant a final injunction restraining the continuation of the proceedings in Germany?

The judge's refusal to grant an injunction constituted an alternative ground for rejecting the appeal in respect of Riedel. It constituted an exercise of discretion with which this Court would in any event have been reluctant to interfere. But in the absence of an enforceable arbitration clause the basis for granting an injunction goes.

The practice of the courts in England to grant injunctions to restrain a defendant from prosecuting proceedings in another country may require reconsideration in the light of the facts of this case. The conventional view is that such an injunction only operates in personam with the consequence that the English courts do not and never have regarded themselves as interfering with the exercise by the foreign court of its jurisdiction. In cases where the defendant lives or has assets of substance in England that view may have some reality for there is reason to think that the injunction may be enforced so as to prevent proceedings taken

in breach of it from reaching the foreign court. But in cases in which the defendant does not live in England and does not have assets here the injunction is unlikely to be enforceable except by the foreign court recognising and giving effect to the injunction or, where it refuses to do so, by this court refusing to recognise the order of the foreign court made without such recognition. In the present case the German courts regarded the injunctions as an infringement of their sovereignty and refused to permit them to be served in Germany. In addition they proceeded to give judgments on the merits. It was for that reason that the amici curiae were appointed in this case. In practice that point has not been developed in these proceedings. But in future cases it may assume greater importance. In cases concerning the European Union what would best meet the predicament is a Directive defining the extent of the recognition which the orders of the courts of each Member State are entitled to receive from the courts of other Member States.

Conclusion

This appeal is dismissed.