Consequently, the abovementioned provision must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

REPORT FOR THE HEARING
in Case 190/89 *

I — Facts and procedure

By a telex message of 23 January 1987, Marc Rich & Co. AG, the plaintiff in the main proceedings (hereinafter referred to as 'the plaintiff'), made an offer to purchase, on fob terms, a quantity of Iranian crude oil from Società Italiana Impianti PA, the defendant in the main proceedings (hereinafter referred to as 'the defendant'). On 25 January the defendant accepted the plaintiff's offer, subject to certain further conditions. On 26 January the plaintiff confirmed its acceptance of those further conditions and then, on 28 January, sent another telex message setting out the terms of the contract and including the following clause:

'Law and arbitration

Construction validity and performance of this contract shall be construed in accordance with English law. Should any dispute arise between buyer and seller the matter in dispute shall be referred to three persons in London. One to be appointed by each of the parties hereto and the third by the two so chosen, their decision or that of any two of them should be final and binding on both parties.'

There was no reply to that telex. The vessel which the plaintiff then nominated completed loading by 6 February. On the same day the plaintiff complained that the cargo was seriously contaminated. It claimed to be entitled to compensation exceeding USD 7 000 000. The defendant denies any liability.

On 18 February 1988, the *defendant* issued a writ in *Italy* claiming a declaration that it was not liable to the plaintiff. That writ was served on 29 February 1988. On 4 October 1988 the plaintiff served a defence and counterclaim in which it relied on the arbitration clause, asserting that the Italian court had no jurisdiction.

* Language of the case: English.

Also on 29 February 1988 the *plaintiff* commenced arbitration proceedings in *London*, in which the defendant refused to take part. On 20 May 1988 the plaintiff issued an originating summons asking the High Court of Justice in London to appoint an arbitrator on the defendant's behalf pursuant to Section 10(3) of the Arbitration Act 1950. On 19 May 1988, the High Court had granted leave to serve the originating summons on the defendant in Italy.

On 8 July 1988 the defendant issued a summons seeking to set aside the order granting that leave.

It considered that the dispute must be resolved in Italy because it fell within the scope of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as 'the Convention').

On 5 November 1988, the High Court held that the Convention did not apply, that the putative proper law of the contract was English and that it was a proper case to give leave to serve out of the jurisdiction.

On appeal, the Court of Appeal decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does the exception in Article 1(4) of the Convention extend:

(a) to any litigation or judgments and, if so,

(b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?

2. If the present dispute falls within the Convention and not within the exception to the Convention, whether the buyers can nevertheless establish jurisdiction in England pursuant to:

(a) Article 5(1) of the Convention, and/or

(b) Article 17 of the Convention.

3. If the buyers are otherwise able to establish jurisdiction in England than under paragraph 2 above, whether:

(a) the Court must decline jurisdiction or should stay its proceedings under Article 21 of the Convention or, alternatively,

(b) whether the Court should stay its proceedings under Article 22 of the Convention, on the grounds that the Italian court was first seised.'

The order of the Court of Appeal was received at the Court Registry on 31 May 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of

Justice of the EEC, written observations have been submitted by Marc Rich & Co. AG, the plaintiff in the main proceedings, represented by Iain Milligan, Barrister, London; by Società Italiana Impianti PA, the defendant in the main proceedings, represented by Peter Gross, Barrister, London; by the United Kingdom, represented by J. E. Collins, acting as Agent; by the Government of the Federal Republic of Germany, represented by Christof Böhmer, acting as Agent; by the Government of the French Republic, represented by Edwige Belliard, acting as Agent, and Claude Chavance, acting as Deputy Agent; and by the Commission of the European Communities, represented by its Legal Adviser, John Forman, and Adam Blomefield, a member of its Legal Service, acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Legal background

Point 4 of the second paragraph of Article 1 of the Convention provides that arbitration is excluded from the scope of application of the Convention. The report drawn up by the committee of experts which drafted the text of the Convention — the 'Jenard Report' — (Official Journal 1979 C 59, p. 1), to which the parties refer for the purpose of interpreting that paragraph, states (Chapter III, Section IV, point D):

'There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration. The Brussels Convention does not apply to the recognition and enforcement of arbitral awards (see the definition in Article 25); it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration — for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings.'

The scope of the exception in point 4 of the second paragraph of Article 1 of the Convention was re-examined during the negotiations for the accession of Denmark, Ireland and the United Kingdom to the European Economic Community. The experts' report drawn up on that occasion — the 'Schlosser Report' — comments, with regard to arbitration (Official Journal 1979 C 59, p. 71, Paragraph 61):

'The United Kingdom requested information on matters regarding the effect of the exclusion of "arbitration" from the scope of the 1968 Convention, which were not dealt with in the Jenard report. Two divergent basic positions which it was not possible to reconcile emerged from the discussion on the interpretation of the relevant provisions of Article 1, second paragraph, point (4). The point of view expressed principally on behalf of the United Kingdom was that this provision covers all disputes which the parties had effectively agreed should be settled by arbi-

tration, including any secondary disputes connected with the agreed arbitration. The other point of view, defended by the original Member States of the EEC, only regards proceedings before national courts as part of "arbitration" if they refer to arbitration proceedings, whether concluded, in progress or to be started. It was nevertheless agreed that no amendment should be made to the text. The new Member States can deal with this problem of interpretation in their implementing legislation. The Working Party was prepared to accept this conclusion, because all the Member States of the Community, with the exception of Luxembourg and Ireland, had in the meantime become parties to the United Nations Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards, and Ireland is willing to give sympathetic consideration to the question of her acceding to it. In any event, the differing basic positions lead to a different result in practice only in one particular instance' (decisions of national courts on the subject-matter of a dispute despite the existence of an arbitration agreement).

Paragraph 64 of that report states, further:

'The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law in the procedure known as "statement of a special case" (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or, because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention.'

III — Summary of the written observations submitted to the Court

The first question

1. The *German Government* makes the preliminary remark that Question 1(a) of the national court is worded too broadly. The case is concerned with a summons asking the court to appoint an arbitrator, and in particular with the question whether leave may be given to serve the summons on the defendant in Italy. In such a case the question referred to the Court should be restricted to the issue whether the Convention covers court proceedings for the appointment of an arbitrator. That question must unequivocally be answered in the negative (see paragraph 64 of the Schlosser Report).

2. The *plaintiff* submits that the Convention does not apply to litigation or judgments the subject-matter of which is, or is ancillary to, arbitration, whether or not the existence of an arbitration agreement is in issue, or at least if the existence of an arbitration agreement cannot summarily be dismissed. It refers in that regard to, *inter alia*, the European Convention providing a Uniform Law on Arbitration signed at Strasbourg on 20 January 1966 (European Treaty Series No 56, not yet in force), under which the judicial authority would be concerned with the validity of the arbitration agreement at one stage, and only one stage, namely an application to set aside an award. Before that stage the judicial authority can and must carry out its functions — for example to appoint arbitrators — without consideration of the validity of the arbitration agreement, leaving that question to the arbitrators themselves.

The *French Government* agrees with that argument. In its view, the concept of arbitration covers cases in which proceedings are instituted before a national court in breach of an arbitration agreement. As a result of developments in the field of arbitration law, arbitrators have become empowered to adjudicate on the validity of the arbitration clause as well as on the legality of their appointment. The jurisdiction of the national court in that respect is merely residual, and is restricted to situations in which the arbitration agreement is manifestly non-existent, invalid or lapsed.

In the opinion of the *United Kingdom* a dispute as to the initial existence of an arbitration agreement falls within the exception in point 4 of the second paragraph of Article 1 of the Convention and in consequence the Convention does not apply. The courts of the Contracting States should retain for all purposes their jurisdiction to enforce arbitration clauses, and proceedings in another Contracting State should not have the effect, by virtue of Article 21 of the Convention, of preventing the courts of the place of arbitration from enforcing an arbitration clause.

The *German Government* considers that the question whether court proceedings concerning the validity of an arbitration agreement fall within the scope of the Convention can be answered by the interpretation of point 4 of the second paragraph of Article 1 of the Convention only if that question constitutes the main issue in the dispute. If it does, the answer must be in the negative. In these proceedings, which are concerned with the appointment of an arbitrator by the court, the question was raised as a preliminary issue. Preliminary issues must in principle be decided by the court which has jurisdiction with regard to the main issue. The question whether a court which does not derive its jurisdiction from the Convention can adjudicate on the validity of an arbitration agreement by way of a preliminary issue is therefore a matter for the national procedural law of the court dealing with the main issue and not for point 4 of the second paragraph of Article 1 of the Convention.

3. The *defendant* maintains that the purposes of the fourth indent of Article 220 of the EEC Treaty and of the Convention are best satisfied by treating the exception in point 4 of the second paragraph of Article 1 as confined to 'arbitration', that is to say as not extending to any litigation or judgments. It refers in that regard to a 'revised' opinion of Professor Schlosser, drawn up in January 1989 at the defendant's request, in which the Professor contradicts certain of the conclusions of the Schlosser Report as published in the Official Journal, in particular with regard to paragraph 64 of that Report. In the new interpretation, point 4 of the second paragraph of Article 1 is declaratory only.

In the alternative, the defendant considers that the exception in point 4 of the second paragraph of Article 1 of the Convention does not extend to any litigation or judgments where the initial existence of an arbitration agreement is in issue. It refers in that regard to an opinion of Mr Jenard of October 1989, in which he takes the view that it follows from the judgment of the Court of Justice of 4 March 1982 in Case 38/81 (*Effer* v *Kantner* [1982] ECR 825) that a court seised of a dispute which falls under the Convention subject only to the argument that there is an arbitration clause in existence must decide the issue as to the existence of the arbitration clause.

In the further alternative, the defendant claims that the exception in point 4 of the second paragraph of Article 1 of the Convention does not apply where arbitration is not the principal subject-matter of the court proceedings but is only a subsidiary or incidental matter in those proceedings. The real issue here is what the parties have agreed; the plea of binding arbitration is only incidental thereto.

Finally, and in the further alternative, the defendant maintains that the exception in point 4 of the second paragraph of Article 1 of the Convention does not apply where arbitration, although the principal subject-matter of court proceedings in one Convention jurisdiction, is a subsidiary or incidental matter in court proceedings involving the same cause of action and the same parties or related actions in another Convention jurisdiction.

The alternative submissions are based on a 'revised' opinion expressed by Mr Jenard at the defendant's request in October 1989, interpreting certain of the passages relating to arbitration in the Jenard Report as published in the Official Journal.

The *Commission* considers that the exception in point 4 of the second paragraph of Article 1 of the Convention cannot prevent the application of the Convention to litigation where the validity of an arbitration clause is in issue.

The second question

The *plaintiff* maintains that it was entitled, by virtue of Article 5(1) of the Convention, to found jurisdiction in respect of its claim against the defendant in England. The 'obligation in question' is arbitration, being the obligation on which the plaintiff's action in England — an action under Section 10(3) of the Arbitration Act 1950 for the appointment of an arbitrator — is founded. In that regard, it refers to the Court's judgment of 15 January 1987 in Case 266/85 (*Shenavai* v *Kreischer* [1987] ECR 239). Under English law, as the putative proper law (see the Court's judgment of 26 May 1982 in Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891), or indeed under any other system of law, that obligation is to be performed in England. Such a choice of place of performance is effective for that purpose (see the Court's judgment of 17 January 1980 in Case 56/79 *Zelger* v *Salinitri* [1980] ECR 89). It does not matter whether there is a dispute as to the existence of the arbitration agreement (see the judgment in *Effer* v *Kantner*, cited above).

With regard to the application of Article 17 of the Convention, the plaintiff considers that it is implicit in any arbitration agreement that the courts of the seat of the arbitration agreed should have jurisdiction to settle disputes in connexion with the arbitration. If there is a dispute as to the existence of such an agreement, then the same approach should be adopted as that under Article 5(1), that is to say the courts of the putative seat of arbitration should have exclusive jurisdiction under Article 17, provided that there is at least some indication of the existence of an arbitration agreement.

The *defendant* denies that a case can be made out under Article 5(1). In its view, the Community case-law indicates that where a number of contractual obligations are in issue, then the 'obligation in question' is the principal obligation (see the judgment in *Shenavai* v *Kreischer*, cited above). By analogy — and even if the underlying and arbitration contracts are to be regarded as distinct contracts — the defendant contends that the obligation in question relates to the principal or main or underlying sale contract. The question fundamentally in issue here relates to ascertaining with finality the terms of that contract. The defendant denies that any obligations under that contract call for performance in England.

It considers, moreover, that the existence and validity of the arbitration agreement are conditions of the exercise of jurisdiction under Article 5(1) of the Convention. In the light of the judgments in *Effer* v *Kantner* on the one hand and *Zelger* v *Salinitri* on the other, the law on this topic cannot be taken as settled. In any event, unless and until a valid arbitration agreement is established, no performance is or is yet due thereunder in England.

Furthermore, the defendant contends that there is no agreement at all, alternatively no agreement within the meaning of Article 17, alternatively no agreement on the present facts, between the parties to the main proceedings conferring jurisdiction on the English court.

In the *Commission's* view, it is difficult to argue at one and the same time that the arbitration clause excludes application of the Convention and that by virtue of the same Convention the same clause can be relied upon to confer jurisdiction on an English court, particularly as the clause in question makes no mention of any 'court'.

The *German, French and United Kingdom Governments* consider that, in the light of their position with regard to the first question, there is no need for them to submit observations on the second and third questions.

The third question

The *plaintiff* considers that, for the purposes of Article 21 of the Convention, the causes of action before the English and Italian courts differ, even though the parties are the same. In the English court, the cause of action is founded on the existence of an arbitration agreement which is distinct and severable from the underlying contract relating to the sale of the crude oil. In that action, the plaintiff seeks the appointment of an arbitrator to enable an arbitral tribunal to determine the merits of its claims under the underlying contract. In the Italian action, the cause of action is founded on the underlying contract. In that action, the defendant seeks a declaration of non-liability and delivery of certain documents under the underlying contract. That cause of action does not depend in any way on the existence or non-existence of the arbitration agreement: only the jurisdiction of the Italian court depends on that.

Alternatively, the plaintiff maintains that even if the causes of action in this instance were the same, the English court was seised of that cause of action first. In order for the causes of action to be the same, they must include the dispute as to the existence of the arbitration agreement. In the English action that issue was raised by the defendant's summons disputing the jurisdiction dated 8 July 1988. In the Italian action, the issue was raised by the plaintiff's defence disputing the jurisdiction served on 4 October 1988. Unless and until jurisdiction was disputed in the Italian action, there was no cause of action founded on the existence or non-existence of the arbitration agreement. Thus the second paragraph of Article 21 does not apply unless and until the jurisdiction of the first court is disputed: it is only at that moment that the first court becomes seised of such a dispute.

For the same reasons, the plaintiff considers that the actions were not related within the meaning of Article 22 of the Convention until service of the defence in the Italian action on 4 October 1988. Before that stage, there was no risk of irreconcilable judgments resulting from the English and Italian actions. The English court was first seised of the issue in respect of which any risk of an irreconcilable judgment could arise, namely the question whether or not an arbitration agreement existed. Consequently, it is the Italian court which has the power to stay the action before it under Article 22 and should now do so in order to avoid the risk of an irreconcilable judgment.

The *defendant* maintains that this case falls within the scope of Article 21 of the Convention. It states that the plaintiff asserts an agreement to arbitration in London, the existence of which the defendant denies. Precisely the same point arises in both the Italian proceedings and the English proceedings. Moreover, according to the Court's recent case-law (judgment of 8 December 1987 in Case 144/86 *Gubisch Maschinenfabrik* v *Palumbo* [1987] ECR 4861), the concept in Article 21 is not restricted to two claims which are entirely identical.

In the defendant's view, the question of which court is 'first seised' depends on the municipal laws of the States involved. In the present case, the English court was not seised until proceedings were commenced by the plaintiff's originating summons on 20 May 1988. By then, however, the Italian court had already been seised of the matter (on 29 February 1988).

Finally, the defendant considers that if the case does not fall within the scope of Article 21 of the Convention, then it does fall within the scope of Article 22, since the Italian and English proceedings are clearly related. The English court ought therefore to stay its proceedings.

The *Commission* considers that Article 21 of the Convention does not apply to this case, since the nature of the two proceedings is fundamentally different. The English court is required to decide on a procedural aspect, namely whether the arbitration procedure should be set in motion, whereas the Italian court is faced with an application directly

concerned with the principal obligation under the contract, namely liability under an express or implied warranty covering the crude oil supplied by Italiana Impianti to Marc Rich.

The Commission considers that, for the purposes of Article 22 of the Convention, the actions in England and in Italy are related. The two actions 'are so closely connected that it is expedient to hear and determine them together' in order to avoid precisely the danger that the Convention is designed to avoid, namely that divergent and unenforceable judgments be handed down in actions brought by the same parties and based on the same fundamental dispute, that is to say a disagreement about the quality and value of certain goods.

M. Zuleeg
Judge-Rapporteur