OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 19 February 1991 *

Mr President,
Members of the Court,

1. The interpretation of the Brussels Convention (hereinafter referred to as 'the Convention') raises numerous difficulties since, as well as being inherently complex, it uses concepts which the various national laws define precisely but in a manner which often differs from one Member State to another, with the result that the Court has often felt it necessary to educe from it an independent meaning. For that purpose, the objectives of the Convention, which pursue the 'free movement of judgments', are reliable points of reference which may be used in order to reject solutions which might lead to a multiplicity of actions before different courts and the associated risk of irreconcilable decisions. [1]

2. However, these constant and justified concerns which are evident in the decisions of the Court are subject to an obvious limitation: the scope of the Convention itself. The present preliminary-ruling proceedings, which are concerned with the scope of Article 1(4) of the Convention, according to which the Convention is not to apply to arbitration, must serve as a reminder that, however constructive and specific it may be, the Court's interpretation of the Convention must not lead to a result which strays beyond the limits of its wording, its scheme and the coherence of its provisions.

3. Those preliminary remarks are prompted by some of the analyses made in the present case, which refer in a somewhat ritualistic manner to the objectives of the Convention and leave aside all other considerations, even those which stem from the logic of that instrument and the specific features of the problem before the Court: international arbitration. The issues raised in this case cannot be tackled without reference first being made to the fundamental importance of arbitration today within the 'international business community', to use the expression adopted by academic writers. [2] Contributing to the expansion of world trade, international arbitration has universally become the 'most frequently used method of resolving disputes in international trade'. [3] That pronounced trend [4] may be illustrated by the following quotation from the Final Act of the Helsinki Conference (ECSC) of 1 August 1975:

'The participating States, considering that the prompt and equitable settlement of any disputes which may arise from commercial transactions relating to goods and services and contracts for industrial cooperation

* Original language: French.

1 — See for example the judgment in Case 144/86 *Gubisch* v *Palumbo* [1987] ECR 4861, in which the Court adopted an independent and extensive definition of the term *lis pendens*; with respect to that judgment, see in particular Gaudemet-Tallon, H. *RCDIP*, 1988, p. 371; Huet, A. *Clunet*, 1988, p. 537; Linke, *RIW*, 1988, p. 818, particularly at p. 822.

2 — Fouchard, P. *L'arbitrage commercial international*, Dalloz, Paris 1965, particularly at p. 25.

3 — Mayer, P. 'L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence', *Recueil des cours de l'Académie de droit international de la Haye*, 1989, V, Volume 217, p. 321, Martinus Nijhof, 1990.

4 — With regard to worldwide recourse to international arbitration, see in particular Gaudet, M. in *L'arbitrage — travaux offerts au professeur Albert Fettweis*, Story-Scientia, 1989, p. 339 et seq.

would contribute to expanding and facilitating trade and cooperation; considering that arbitration is an appropriate means of settling such disputes, recommend, where appropriate, to organizations, enterprises and firms in their countries to include arbitration clauses in commercial contracts and industrial cooperation contracts or in special agreements; recommend that the provisions on arbitration should provide for arbitration under a mutually acceptable set of arbitration rules, and permit arbitration in a third country, taking into account existing intergovernmental and other agreements in this field.'

4. The author of a major work on the New York Convention of 1958 [5] — the main multilateral arbitration instrument — perfectly describes the deeply felt needs which are satisfied by international arbitration, which distinguish it very clearly from domestic arbitration:

'The foreign court can be an alien environment for a businessman because of his unfamiliarity with the procedure which may be followed, the laws to be applied, and even the mentality of the foreign judges. In contrast, with international commercial arbitration parties coming from different legal systems can provide for a procedure which is mutually acceptable. They can anticipate which law shall be applied: a particular law or even a *lex mercatoria* of a trade. They can also appoint a person of their choice having expert knowledge in the field.'

The author goes on to say:

'These and other advantages are only potential until the necessary legal framework can be internationally secured. This legal framework should at least provide that the commitment to arbitrate is enforceable and that the arbitral decision can be executed in many countries, precluding the possibility that a national court review the merits of the decision.'

5. The decision which the Court is called on to make in the present case is not without impact on the juridical stability which international arbitration enjoys within the territory of the Community. Indeed, certain of the views put to the Court might, if the Court were amenable to accepting them, be liable to call in question well-established principles, disturbing expectations in this area for an indefinite period. Moreover, as the Court cannot be unaware, the territory of the European Community includes major international arbitration centres, whose development has recently been favoured by intense activity in the areas of legal literature, legislation and case-law. As a result, the difficulty raised by the question submitted by the Court of Appeal for a preliminary ruling must be examined in detail.

6. Article 220 of the Treaty of Rome — the scope of Community law is certainly not

5 — Van den Berg, A. J. *The New York Arbitration Convention of 1958*, 1981, T. M. C. Asser Institute, The Hague, p. 1.

such that it bears no relation whatsoever to arbitration [6] — provides:

'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'.

7. Despite the wording of that provision, Article 1 of the Brussels Conventions — the text of which has not been changed in that respect by the accession conventions — provides:

'This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal.

The Convention shall not apply to:

1. The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and successions;

2. Bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. Social security;

4. *Arbitration.*' [7]

8. Without at this stage considering the scope to be attributed to that provision, I shall refer here to the statements made by the committee of experts which prepared the draft Convention:

'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 enforce of arbitral awards to an even greater extent than the New York Convention'. [8]

6 — For a comprehensive analysis of the relationship between Community law and arbitration, see in particular Kovar, R. 'Droit communautaire de la concurrence et arbitrage', in *Le droit des relations économiques internationales, Études offertes à Berthold Goldman*, 1982, p. 109; Goffin, L. 'Arbitrage et droit communautaire', in *L'arbitrage, travaux offerts au professeur Albert Fettweis*, Story-Scientia, 1989, p. 159; de Mello, X. 'Arbitrage et droit communautaire', *Rev. arb.*, 1982, p. 349; it will be remembered that, in its judgment in Case 102/81 *Nordsee* [1982] ECR 1095, the Court stated that an arbitrator may not seek a preliminary ruling from the Court under Article 177.

7 — Emphasis added.

8 — Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1979 C 59, p. 1, particularly at p. 13. See also the report by Professors D. Evrigenis and K. D. Kerameus on the accession of the Hellenic Republic to the Convention (OJ 1986 C 298, p. 1, particularly at p. 10):
'Arbitration, a form of proceedings encountered in civil and, in particular, commercial matters (Article 1, second paragraph, point 4), is excluded because of the existence of numerous multilateral international agreements in this area'.

9. Brief historical details of the drafting of the international conventions on international arbitration are called for here.[9] Until the end of the First World War, the law applicable to arbitration was almost exclusively[10] governed by national laws which, like the courts, were often hostile towards arbitration. The development of international arbitration following the First World War was to result in substantial international legislative activity under the auspices of the League of Nations.[11] The adoption of the Geneva Protocol of 1923[12] — upholding the validity of arbitration clauses which at that time were prohibited by many national laws, and imposing an obligation on national courts to refer to arbitration disputes in respect of which an arbitration agreement had been concluded — and then, in 1927,[13] the Geneva Convention on the enforcement of foreign judgments, brought about an improvement in the legal circumstances of international arbitration.

10. However, certain restrictive aspects of those conventions still limited the extent to which they promoted the satisfactory functioning of international arbitration.[14] In particular, the manner in which Article 1 of the Geneva Convention of 1927 was interpreted, whereby the award to be recognized or enforced was required to have become final in the country in which it was made, frequently made it necessary to obtain 'a double order for enforcement', the first by the courts of the place of arbitration and the second by the courts of the State of enforcement. Thus, further efforts at achieving an international solution were made following the Second World War. The proceedings of the Economic and Social Committee of the United Nations included preparation of the draft New York Convention of 10 June 1958. That instrument, which makes numerous significant amendments to the Geneva Conventions,[15] deals with two essential features of international commercial arbitration: the effectiveness of arbitration agreements[16] and the enforcement of arbitration awards. It must be noted in particular that the requirement of the 'double order for enforcement' was removed. More than 80 States, including 11 EEC Member States,[17] acceded to that Convention, which is now the principal basis for international arbitration.

'The modern tendency is for a coming together of the different systems of law which govern the procedural aspects of international commercial arbitration and the recognition and enforcement of international awards. This is partly because of the unifying effect of conventions on arbitration, most importantly the New York Convention'.[18]

'The New York Convention (...) is easily the most important international treaty relating to international commercial arbitration. The general level of success of the

9 — See in particular A. J. van den Berg, op. cit., particularly at p. 6 et seq.

10 — However, by lateral agreement had been concluded, in particular, between European states, since the second half of the nineteenth century.

11 — Legislation was also adopted on the initiative of the International Chamber of Commerce, which was particularly active in the preparation, being undertaken at the same time, of international conventions on arbitration.

12 — League of Nations, *Treaty Series* 158 (1924).

13 — League of Nations, *Treaty Series* 302 (1929-1930).

14 — See A. J. van den Berg, op. cit., particularly at p. 7.

15 — For a summary, see A. J. van den Berg, op. cit., p. 9.

16 — Ensured by Article II 3 of the Convention:
'The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

17 — Portugal, a signatory to the Geneva Conventions, has not to date acceded to the New York Convention.

18 — Redfern, A. and Hunter, M. *Law and practice of international commercial arbitration*, Sweet and Maxwell, London 1986, p. 43.

Convention may be seen as one of the factors responsible for the rapid development over recent decades of arbitration as a means of resolving international trade disputes'. [19]

11. Whilst the New York Convention thus constitutes a major instrument of international arbitration, mention must also be made of the potential impact of the recent Model Law (Uncitral) of 1985 on international commercial arbitration, [20] the provisions of which provide a pattern for national legislation [21] concerning the arbitration agreement, the composition of the arbitration tribunal, the arbitration procedure, the making of awards, appeals against awards and recognition and enforcement thereof. Reflecting the development of national laws, the Model Law adopts the principle of the 'competence/competence' [22] of arbitrators, according to which an arbitrator may himself, subject to subsequent judicial review, appraise his own jurisdiction.

'In adopting the concept of "competence/competence", the Model Law has recognized the general trend of modern national legal systems, and of international conventions, which allow an arbitral tribunal to determine its own jurisdiction. However, the Model Law does not give an arbitral tribunal the final word; there is provision for concurrent control by the court specified by Article 6'. [23]

12. Alongside those instruments, [24] there are numerous regional conventions on international arbitration. Within the confines of Europe, two treaties must be mentioned: the European Convention on International Commercial Arbitration of 21 April 1961 [25] and the European Convention providing a uniform law on arbitration of 20 January 1966 (the Strasbourg Convention). [26] The first of those instruments, supplementing the New York Convention, limits the grounds on which recognition and enforcement of arbitral awards may be refused. More precisely, annulment of an award by the courts of the State in which it was delivered can serve as a basis for withholding an order for enforcement only if made for certain specified reasons. [27] Moreover, the 1961 European Convention establishes in particular the principle of arbitrators' 'competence/competence' and provides for cases of *lis pendens* as between arbitration proceedings and proceedings subsequently instituted before national courts. The Convention is binding on twenty Member States, seven being Member States of the Community. [28] On the other hand, the Strasbourg Convention has not achieved the success initially expected of it, since only one State, Belgium, has so far ratified it.

13. At the same time, national laws have increasingly recognized the needs of international commercial arbitration by accepting the ramifications of the independence

19 — Ibid., p. 362.

20 — With respect thereto, see Jarvin, 'La loi — type de la CNUDCI', *Rev. arb.*, 1986, p. 509; Fouchard, 'La loi — type de la CNUDCI sur l'arbitrage commercial international', *Clunet*, 1987, p. 861; Redfern and Hunter, op. cit., p. 402 et seq.

21 — For an example of legislation adopting the model law, see Alvarez, A. 'La nouvelle législation canadienne sur l'arbitrage commercial international', *Rev. arb.*, 1986, p. 529.

22 — With regard thereto, see in particular Fouchard, op. cit., p. 135 et seq.; Mayer, op. cit.; Redfern and Hunter, op. cit., p. 213-215; Mustill and Boyd, *Commercial arbitration*, London, Butterworths, 1982, p. 516 et seq.

23 — Redfern and Hunter, op. cit., p. 395.

24 — Mention must also be made of the Convention on the settlement of investment disputes between States and nationals of other States, 1965, known as the Washington Convention (United Nations Organization, *Treaty Series*, 1966, Vol. 575, p. 160, 8359); the Convention applies to disputes between contracting States and nationals of another State concerning investments.

25 — See in particular Hascher, D. 'Commentary on the European Convention on Commercial Arbitration', *Yearbook Commercial Arbitration*, Vol. XV, 1990, p. 619.

26 — *European Treaty Series* 1966.

27 — Article IX of the Convention.

28 — Germany, Belgium, Denmark, Spain, France, Italy and Luxembourg; accession to the Convention is open to non-European States.

accorded to the wishes of parties in international arbitration. This trend is particularly pronounced in Europe and is apparent both in legislation [29] and in the attitudes of national courts which show no hostility to international arbitration.

14. 'It used occasionally to be suggested that the English courts were hostile to the process of arbitration. Whether this was ever true, in the distant past, is a matter of opinion. What must be clear, to anyone reading the judgments delivered during the past 60 years, is that this is now a complete misconception'. [30]

Although it refers to the United Kingdom courts, that opinion could no doubt be extended to most other national courts.

15. The foregoing general outline, which should be supplemented by a description of the essential role of the permanent arbitration institutions or the emergence of a new *lex mercatoria*, [31] gives a general picture of international arbitration which, having progressively fewer links with national legal systems, is tending, according to some commentators, to become 'denationalized' or indeed 'delocalized'. [32]

16. The present case, which marks the first occasion on which a United Kingdom court has made a reference to this Court on the Brussels Convention and also the first time that this Court is called on to give a decision on the scope of the exclusion of arbitration from the Convention, is of considerable importance in both respects. [33] It derives from circumstances which must be

29 — The last decade has seen a large number of national reforms which are favourable to international arbitration; thus, in the United Kingdom the Arbitration Act 1979 has considerably limited actions to have international arbitral awards set aside; the French legislative revision of 1981 is marked by a very liberal attitude concerning international arbitration, as is the Belgian Law of 1985 and the Portuguese Law of 1986; see also the Italian Law of 1983, the German and Netherlands laws of 1986 modernizing the arbitration process, and the Spanish law of 1988 display the same underlying wish to favour international arbitration; see also, outside the Community, the Federal Swiss law of 1987 on private international law.

30 — Mustill and Boyd, op. cit., p. 7; this quotation irresistibly evokes the terms of the extremely important decision in *Mitsubishi* v *Soler* (105 S Ct, 1985, p. 3346) of the Supreme Court of the United States in which it was conceded that it was possible to refer to arbitration claims based on the Sherman Act in the context of a dispute relating to an international commercial transaction: 'we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution'; with regard to that judgment, see in particular Robert, J. 'Une date dans l'extension de l'arbitrage international: l'arret Mitsubishi c/Soler', *Rev. arb.*, 1986, p. 173, and the references in Carbonneau, T. E. 'Le droit américain de l'arbitrage' (*L'arbitrage, travaux offerts au professeur Albert Fettweis*, above), particularly at p. 210, note 20.

31 — With regard to *lex mercatoria*, see in particular Goldman, B. 'Frontières du droit et lex mercatoria', *Archives de philosophie du droit*, 1964, p. 177; 'La lex mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives', *Clunet*, 1979, p. 475; Mustill, M. 'The New Lex Mercatoria', *Liber amicorum for Lord Wilberforce*, 1987, Bos and Brownlie editors; Paulsson, J. 'La lex mercatoria dans l'arbitrage C. C. I.', *Rev. arb.*, 1990, No 1, p. 55; for critical assessments, see in particular Lagarde, P. 'Approche critique de la lex mercatoria', 'Le droit des relations économique internationales', *Etudes offertes à Berthold Goldman*, 1982, p. 125, and the authors cited by Paulsson, op. cit., p. 57, Note 11.

32 — With regard to the 'de-localization' of international arbitration, see in particular Fouchard, op. cit., p. 22 et seq; Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 *ICLQ* 358; 'Delocalization of International Commercial Arbitration: When and Why it Matters' (1983) 32 *ICLQ* 53; Sanders, 'Trends in the Field of International Commercial Arbitration', *Recueil des Cours de l'Acadmémie de la Haye*, 1975, Vol. II, p. 207; for a critical analysis of that theory, see in particular Redfern and Hunter, op. cit., p. 55 et seq.; Park, 'The lex fori arbitri and International Commercial Arbitration' (1983) 32 *ICLQ*; A. J. van den Berg, op. cit., p. 29 et seq.

33 — See in that connection two articles written after the present reference for a preliminary ruling was made: Thomas, D. R. 'The Arbitration Exclusion in the Brussels Convention 1968: An English Perspective', *Journal of International Arbitration*, 1990, p. 44; the author favours a solution excluding the proceedings brought before the national court from the scope of the Convention; the opposite view is advocated by Bonell, M. J. 'Le Corte Inglesi e i contratti commerciali internazionali: English law and jurisdiction über alles?', *Diritto del commercio internazionale, Practica internazionale e diritto interno*, July-December 1989, p. 329.

described if the issues involved are to be properly understood.

17. By a telex message of 23 January 1987, Marc Rich and Co. AG (hereinafter referred to as 'Marc Rich') made an offer to purchase Iranian crude oil from Società Italiana Impianti PA (hereinafter referred to as 'SII'). On the 25th of the same month, the latter accepted the offer, subject to certain further conditions which appear to have been accepted by Marc Rich on 26 January, on which date SII considers that a contract was thus concluded. On 28 January, Marc Rich sent a further 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 message.

18. Some days later, the cargo of oil was loaded aboard the vessel *Atlantic Emperor*, the operation being completed on 6 February. It seems that, on the same day, Marc Rich complained that the cargo was seriously contaminated, giving rise to damage in excess of USD 7 000 000.

19. On 18 February 1988, the Italian company commenced legal proceedings in Italy for a declaration that it was not liable to Marc Rich. The writ was served on that company on 29 February 1988 and, on the same day, Marc Rich commenced arbitration proceedings in London, appointing its arbitrator, and on 4 October 1988 claimed that the Italian court had no jurisdiction as a result of the arbitration agreement. Moreover, Marc Rich subsequently commenced proceedings directly before the Italian Corte di Cassazione for a declaration that the Italian courts lacked jurisdiction, in view of the existence of the arbitration agreement. Since SII had not appointed an arbitrator, on 20 May 1988 Marc Rich commenced proceedings for an arbitrator to be appointed by the High Court under the Arbitration Act 1950. The English court gave leave for a notice of writ to be served on SII in Italy. On 8 July 1988 the Italian company applied for that leave to be withdrawn, contending that the real dispute between the parties turned on the question whether or not the contract at issue contained an arbitration clause. It claimed that a dispute of that kind fell within the scope of the Brussels Convention and should therefore be heard before the courts in Italy. According to Marc Rich, the dispute fell outside the scope of the Convention as a result of Article 1 thereof, which excludes arbitration.

20. Hirst J. held that the Convention did not apply to the dispute, also taking the view that the contract was subject to English law and granting leave for service out of the jurisdiction. An appeal was lodged against that decision. Although it appears that both parties to the main proceedings showed some reticence concerning a reference for a preliminary ruling and asked the Court of Appeal itself to decide on the interpretation of the Convention in this case, that court referred three questions to the Court of Justice:

'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.'

21. Two preliminary remarks are called for.

22. The first is prompted by the opinions of Messrs Jenard and Schlosser produced to the Court by SII. It is well known that they also prepared the reports of the Committees of Experts which drafted the initial Convention and the convention concerning the accession thereto of Denmark, Ireland and the United Kingdom. Accordingly, the Court has taken those reports into account.[34] It should also be remembered that the Civil Jurisdiction and Judgments Act 1982[35] expressly refers to those reports for the purpose of interpretation of the Convention by the United Kingdom courts. On the other hand, it is beyond doubt that the opinions submitted to the Court in these proceedings merely have the status of a statement of views to which, of course, there must be accorded only the weight which their intrinsic merits deserve. This clarification is particularly necessary since Mr Schlosser, for his part, puts forward a view which in every respect contradicts the official report signed by him concerning application of the Convention to disputes relating to arbitration before national courts.

34 — See for example Case 133/81 *Ivenel and Schwab* [1982] ECR 1891; and Case 288/82 *Dinjnstee* [1983] ECR 3663; Case 189/87 *Kalfelis* [1988] ECR 5565.

35 — Part I Section 3(3) is worded as follows:

3. Interpretation of the Conventions:

(1) Any question as to the meaning or effect of any provision of the Convention shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court.

(2) Judicial notice shall be taken of any decision of, or expression of opinion by, the European Court on any such question.

(3) Without prejudice to the generality of subsection (1), the following reports (which are reproduced in the OJ of the Communities), namely -

(a) the reports by Mr P Jenard on the 1968 Convention and the 1971 Protocol; and

(b) the report by Professor Peter Schlosser on the Accession Convention,

may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances.

23. The second remark relates to the scope of the answer to be given by the Court to the first question, which is formulated in very general terms by the Court of Appeal. Strictly on its wording, the Court might be prompted to consider a very wide range of hypotheses concerning the extent of the exclusion of arbitration from the scope of the Brussels Convention. I am thinking in particular of a delicate question which arose during the negotiations prior to the accession of the United Kingdom.[36] The United Kingdom delegation had, it seems, contended that the Convention did not apply to recognition and enforcement of a judgment on the subject-matter of a dispute delivered by a national court because it overlooked an arbitration agreement or considered it wholly invalid. Although that view does not appear to have been accepted by the original Member States, that difference of opinion did not lead to any change to the wording of the Convention. According to the Schlosser Report, 'the new Member States can deal with this problem of interpretation in their implementing legislation'.[37] Whatever the analysis which one may be inclined to adopt in that respect, it must be stated that that difficulty bears no relation to the dispute pending before the English court which made the reference. Consequently, contrary to the suggestion made by the French Government on that point, I suggest that this matter should not be dealt with in the Court's reply to the Court of Appeal. I share the view of the German Government that the Court's answer should be limited to the clarifications necessary for a decision to be given in the main proceedings.

24. Marc Rich's application is concerned with *the appointment of an arbitrator*, that is to say the constitution of the arbitral tribunal. Counsel for SII raises the initial question *whether an arbitration agreement exists at all.* These are undeniably the essential features of the dispute before the national court and provide the basis on which I propose that the Court give an interpretation of Article 1(4) of the Convention.

25. It also seems that some confusion has arisen in that connection owing to the fact that SII denies that the proceedings pending before the national court are concerned with the appointment of an arbitrator. The 'principal or real dispute between the parties', it contends, relates to the existence of an arbitration agreement. Without doubt, that question appears at the present stage of the proceedings to be the most important. From the procedural point of view, it is merely an incidental issue or, more precisely, a preliminary issue. SII itself stated at the hearing that the question of the existence of an arbitration agreement must be settled *before* the appointment of an arbitrator can be proceeded with. And its written observations clearly state: 'The buyers' application in the English court is for the appointment of an arbitrator. But, as held by Hirst, J., and not challenged by the buyers, the buyers are not in a position to obtain this relief unless or until they have established the existence of a valid arbitration agreement'.[38] No better description could be given of a preliminary issue.

36 — See the Schlosser Report, paragraphs 61 and 62 (OJ 1979 C 59, pp. 92 and 93).

37 — Schlosser Report, above, paragraph 61.

38 — P. 44 of the its observations.

26. I would also point out that that distinction between a preliminary issue and the main issue, which is familiar to continental lawyers, has already been made in this very area by Common Lawyers. In fact, in a decision of the High Court — concerning the powers of arbitrators whose jurisdiction is challenged — the question of jurisdiction, prior to an assessment of the substance of the dispute, was specifically described as a 'preliminary matter' in the following terms:

'They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties — because that they cannot do — but for the purpose of satisfying themselves as a *preliminary matter* whether they ought to go on with the arbitration or not'. [39]

27. Although that statement was made concerning the question of an arbitrator's jurisdiction raised before that arbitrator, the analysis — which is, moreover, logical and obvious — that the question is a preliminary matter does not differ in that respect where the proceedings are before a national court which has been asked to appoint an arbitrator.

28. According to the view put forward by SII, which is based largely on the views expressed by Messrs Jenard and Schlosser, the Convention applies to the proceedings instituted before the national court which referred the question. At first sight, that conclusion contradicts the solution which would be arrived at from the hitherto accepted principles regarding application of the exclusions provided for in the Convention, which I shall first describe. That solution was perfectly set out in the German Government's observations. It is clear and precise. The starting point of the analysis is the undeniable principle that 'matters falling outside the scope of the Convention do so only if they constitute the principal subject-matter of the proceedings'. [40]

29. As we have seen, in this case the principal subject-matter of the proceedings is the appointment of an arbitrator. Mr Schlosser's report is wholly unambiguous in that respect:

'The 1968 Convention does not cover court procedures which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators'. [41]

Similarly, all authors who have dealt with this point agree in excluding that particular

39 — *Christoper Brown* v *Genossenschaft Österreichischer Waldbesitzer und Holzwirtschaftsbetriebe, Registrierte Genossenschaft mit beschränkter Haftung* (1952 C 3851) 1 Q. B. 1954, p. 8, particularly at 12 and 13 — emphasis added.

40 — Jenard Report, *supra*, at p. 10; Bellet, P. 'L'elaboration d'une convention sur la reconnaissance des jugements dans le cadre du marché commun', *Clunet*, 1965, p. 833, and particularly at 851 and 852.

41 — Above, at paragraph 64(b).

type of proceedings from the scope of the Convention.[42]

30. Short of adopting the radical view contained in Mr Schlosser's updated opinion, according to which the Convention applies to all disputes concerning arbitration brought before the courts, a view which I shall consider in due course, there is no room for any hesitation: the Convention does not apply to the principal subject-matter of the proceedings pending before the national court. But the national court has before it the preliminary issue of whether or not an arbitration agreement exists.

31. At this point I must lay great emphasis on the fact that, under the scheme of the Convention, where a court is seised of a principal issue not falling within the scope of the Convention its jurisdiction to deal with a preliminary issue is in no case governed by the Convention but is a matter for the *lex fori*, and that is so even if the preliminary matter falls within the scope of the Convention.

32. Messrs Gothot and Holleaux expressed that view very clearly:

'The Convention does not operate with respect to principal questions excluded from its scope even if they incidentally raise an issue covered by the Convention. The jurisdiction of the court concerning the principal subject-matter (social security, for example . . .), which is excluded from the scope of the Convention, *and the incidental issue* (concerning a contract for employment, for example), which falls within the scope of the Convention, depends on the national *lex fori* of that court and not on the Convention (the judgment delivered obviously cannot benefit from the conditions laid down in the Convention concerning recognition and enforcement)'.[43]

33. Two conclusions must be drawn from this. The first is that it is the *lex fori* alone, that is to say English law in this case, which must determine whether the court has jurisdiction to deal with the preliminary matter. The second is that the dispute, of which the principal subject-matter falls outside the scope of the Convention, clearly cannot be brought within the scope of the Convention by the effect of a preliminary matter, even if the latter falls within one of the subject areas covered by the Convention. In that connection, it is unnecessary, in my opinion, for the Court to express a view in this case as to whether or not the question of the existence of an arbitration agreement raised as a main issue before a court falls within the scope of the Convention. In my view, it would be sufficient to find that, where such a question is in the nature of a preliminary matter in a dispute whose principal subject-

42 — See in particular Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments*, Professional Books Limited, 1987, p. 148; Collins, L. *The Civil Jurisdiction and Judgments Act 1982*, London, Butterworths, 1983, p. 29; Lasok, D. and Stone, P. A. *Conflict of Laws in the European Community*, Professional Books Limited, 1987, p. 185; Hartley, T. C. *Civil Jurisdiction and Judgments*, Sweet and Maxwell, p. 22; Beraudo, 'Convention de Bruxelles du 27 septembre 1968', *Jurisclasseur Europe*, fasc. 3000, p. 10, No 34.

43 — *La Convention de Bruxelles du 27 Septembre 1968*, Jupiter 1985, p. 15, paragraph 29; see also Kaye, (op. cit., pp. 151-152, 'In spite of the absence of any express provision in Article 1 of the Convention to such effect, it is widely accepted that it is only the principal subject-matter of proceedings which is to be taken into account in determining whether the latter are within the Convention's scope and that, accordingly, excluded areas which merely arise as incidental issues in the course of main proceedings to which the Convention applies, are themselves subject to Convention jurisdiction and recognition and enforcement rules along with the main claim, while, equally, matters to which the Convention would be applicable if they had formed the principal subject-matter of proceedings, but which are raised incidentally in excluded main proceedings, also fall outside Convention jurisdiction and recognition and enforcement provisions') and Beraudo (op. cit., p. 12, No 40, '. . . an incidental issue, relating to the Convention, cannot cause to be brought within the scope of the Convention a matter excluded from it which is the principal subject-matter of the proceedings').

matter falls outside the Convention, the Convention does not apply and, consequently, the decision whether the court seised may dispose of the preliminary issue is a matter for the *lex fori*. That conclusion seems to me to follow naturally from the principles to which I have referred.

34. But if the Court declines to take that course, considering, regardless of any procedural analysis, that the main issue in this case relates to whether an arbitration agreement exists between the parties, the Court will not as a result decide that the dispute brought before the national court falls within the scope of the Convention. In my opinion, a dispute as to the existence of an arbitration agreement falls outside the scope of the Convention.

35. It is appropriate here to quote from the Schlosser Report:

'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'.[44]

That opinion is also expressed by an academic writer:

'Furthermore, it is considered, perhaps controversially, that legal proceedings concerning purely the contractual validity of the arbitration agreement should also be regarded as being excluded from the Convention as involving arbitration under Article 1, paragraph 2(4), through being more closely related to the arbitration process itself than, for example, are contractual questions in respect of matrimonial property rights — likewise excluded under Article 1, paragraph 2(1) — related thereto'.[45]

The United Kingdom correctly emphasized in that connection that there is no good reason for distinguishing between a non-existent arbitration agreement and an invalid agreement. The 1961 European Convention in fact draws no distinction between a challenge as to the existence of an arbitration agreement and a challenge as to its validity.[46] In both cases, it is the jurisdiction of the arbitrator which is referred to. Moreover, I do not see any reason for drawing a distinction, as Mr Jenard does in the opinion produced to this Court, between a challenge as to the existence or the validity of the arbitration agreement before the arbitration proceedings commence, which would fall within the scope of the Convention, and a challenge as to the arbitrator's jurisdiction brought before the Court in the course of the arbitration proceedings, which, for its part, would fall outside the scope of the Convention.

36. In certain legal systems, review by the courts of an arbitrator's jurisdiction is essen-

44 — OJ 1979 C 59, p. 93, paragraph 64.

45 — Kaye, op. cit., p. 150; Hirst, J. also referred to that opinion in his judgment.

46 — See Article V (3): 'Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence and validity of the arbitration agreement or of the contract of which the agreement forms part'; and Article VI (3): 'Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary'.

tially exercised *ex post facto*. That is the position under French law, for example, which, except in the case of a manifestly void arbitration agreement, requires courts to refer matters to arbitration, and the arbitrator's assessments concerning his own jurisdiction are subsequently reviewed by the Court if an action for annulment of the award is brought. The Jenard[47] and Schlosser reports[48] state that the Convention is not applicable to judgments setting aside an arbitration award. However, the ground of annulment may reside precisely in the fact that the arbitrator has no jurisdiction. It seems therefore that, according to Mr Jenard, the Convention does not apply to review of that kind whereas, on the other hand, it does govern initial challenges to the arbitrator's jurisdiction in systems of law which allow a review of that jurisdiction *ab initio*.

37. Such a solution would result in an arbitrary dividing line between proceedings which all lead to a ruling on the question of the arbitrator's jurisdiction: some would be subject to the Convention and others would be excluded from its scope.

38. Finally the following argument put forward by SII must be considered: 'Arbitration depends on consent. Absent consent, there is no "arbitration". The Sellers therefore submit that on its natural meaning "arbitration" does not extend to a dispute in which the initial existence of an agreement to arbitrate is in issue'. In other words, the subject-matter of a dispute does not concern arbitration if the very existence of an agreement to arbitrate is contested.

39. In the light of the previous decisions of this Court, that analysis is unconvincing. In the Court's judgment in *Effer*,[49] a claim for the payment of fees was countered by a defence argument that no contractual relations had been established between the parties. The question put to the Court was whether the challenge as to the very existence of a contract prevented the application of Article 5(1) of the Convention, within whose scope the claim for payment undoubtedly fell. The Court held that the plaintiff was entitled to invoke the jurisdiction of the courts of the place of performance of the contract 'even where the existence of the contract on which the claim is based is in dispute between the parties'. In other words, the Court considered that an allegation as to the non-existence of a contract whose performance was sought was not sufficient to take the matter out of the field of contract law. Applied to the present case, that reasoning must lead to the conclusion that the allegation that no arbitration agreement exists likewise cannot lead to the conclusion that the dispute brought before the national court — seeking the appointment of an arbitrator, in other words implementation of the said arbitration agreement — does not fall within the subject area of arbitration.

40. Consequently, whatever analysis is made of the question whether the existence of an arbitration agreement is a preliminary or principal issue, it seems that the principal subject-matter of the dispute before the national court relates to arbitration. It should also be noted that in his opinion Mr Jenard himself conceded that arbitration is the 'main issue' in the dispute before the English court, but he draws a conclusion — which I shall consider in due course — that the Convention applies to this dispute.

47 — OJ 1976 C 59, p. 13.

48 — Ibid., p. 93.

49 — Case 38/81 [1982] ECR 825.

41. That is not the result which would be arrived at by application of the traditional principles in this area, a result challenged by SII and by the Commission.

42. Before I consider the Italian company's argument, which relies principally on a radical interpretation according to which the Convention applies to all disputes concerning arbitration which are brought before the courts, I must first set out the Commission's view, which advocates application of the Convention in this case on the basis of an analysis which seems to me totally to disregard the principles to which I have just referred.

43. In the Commission's view, the key to the difficulty is provided by the following passage from the Evrigenis and Kerameus Report:

'However, the verification, as an incidental question, of validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the Court before which he is being sued pursuant to the Convention, must be considered as falling within its scope'. [50]

44. Let me say at the outset that I would have very serious doubts as to the correctness of that statement if it meant that it is the Convention which confers on a court seised of a main action within the scope of the Convention jurisdiction to deal with an incidental issue falling outside the Convention. That is a matter for the *lex fori* of the court seised and not a matter to be determined by the Convention. As Messrs Gothot and Holleaux state:

'In fact, the Convention does not operate in that respect: it is a matter for the general law of the court seised concerning jurisdiction and procedure to decide whether an incidental issue of that kind must be treated merely as a preliminary or pre-trial issue'. [51]

45. It therefore seems to me preferable to take the view that the authors of the report in fact intended to refer to the application of the Convention to recognition and enforcement of a judgment which disposes of a dispute within the scope of the Convention after giving a decision on the validity of an arbitration agreement. As we have seen, that question was raised during the negotiations prior to the accession of the United Kingdom. In my view, the question remains open and in any event is not pertinent to the dispute before the national court.

46. But even if it is assumed that the authors of the report considered that the Convention determined the jurisdiction of a court seised under the Convention to deal, as a preliminary issue, with the validity of an arbitration agreement, the passage quoted does not in any case lead to the conclusion drawn by the Commission.

47. In fact, the situation expressly referred to is that of a court seised *pursuant to the Convention* which is called on to review the incidental issue of the arbitration agreement. In other words, it is of decisive importance to determine whether the principal issue before the national court falls within the scope of the Convention. That is the first essential stage in the process of reasoning, which the Commission seems to me to have dispensed with.

50 — OJ 1986 C 298, p. 10.

51 — Op. cit., p. 15.

48. One can only guess as to the grounds for its view that arbitration is 'only an incidental matter' in this case. Does the Commission mean by that that, *before the English Court*, the appointment of an arbitrator is an incidental issue and the existence of an arbitration agreement the principal issue? If that is its analysis, it represents a spectacular challenge of fundamental procedural concepts. But even such a view can lead to application of the Convention to the dispute before the English court only if it is proved that the question as to the existence of an arbitration agreement falls within the Convention. I have found no answer to those questions in the observations submitted to the Court.

49. The particularly detailed arguments put forward by SII will require much longer consideration by the Court.

50. The view that the Convention is applicable to the present case is essentially based on two alternative propositions:

primarily — and this is a radical analysis in which the Italian company relies in particular on the observations of Mr Schlosser — the Convention *applies to all proceedings* before courts concerning arbitration; consequently, the Court is asked to make a ruling of considerable importance regarding the scope of Article 1(4);

in the alternative — and SII's view is based in particular on Mr Jenard's opinion here — the application of the Convention to the present case is justified by the true objectives of the Convention.

51. I shall consider those two arguments successively.

52. The view that the Brussels Convention applies to all court proceedings concerning arbitration has the apparent merit of simplicity. However, it is contradicted by the scheme of the Convention and involves serious difficulties which are not offset by any significant advantage whatsoever.

53. According to Mr Schlosser's opinion, Article 1(4) of the Convention is purely declaratory. In other words, the purpose of that provision is solely to make clear that the Convention does not apply to the recognition and enforcement of arbitration awards. On the other hand, both the jurisdiction of national courts to deal with disputes concerning arbitration and the recognition and enforcement of decisions made on conclusion of such proceedings are said to fall within the scope of the Convention.

54. Contrary to the various reports of the Committees of Experts, that analysis is vitiated in the first place by defective logic if the provision in question is examined. Let me quote an authoritative commentator:

'The Brussels Convention expressly excludes this subject area, by contrast with the Hague Convention on the enforcement of

judgments. It is true that conventions which are concerned with the recognition and enforcement of decisions given by national courts and tribunals do not apply, *ex hypothesi*, to the enforcement of arbitration awards. However, a doubt which did not worry the negotiators in The Hague persisted in the minds of those in Brussels and the latter sought, by means of a formal provision, to eliminate any attempt to provide for the recognition or enforcement of judicial decisions dealing with proceedings concerning arbitration, such as an action for annulment for example. *Moreover, since the Brussels Convention relates to international jurisdiction, it is expressly stated that it does not purport to determine the jurisdiction of courts and tribunals for proceedings concerning arbitration*'. [52]

55. It should also be observed that the very wording of the text supports that analysis. In fact, if Article 1 of the Convention enumerates in indents 1 (status of persons . . .), 2 (bankruptcy . . .), 3 (social security . . .) matters which, although subject to the jurisdiction of the courts, are excluded from the Convention, it is logical that the fourth and final indent of the same provision should have the same effect on matters brought before national courts. If the exclusion of arbitration was merely declaratory, as contended by SII and Mr Schlosser — in other words if its purpose were merely to recall what was self-evident, namely that the Convention on jurisdiction and recognition and enforcement of judgments does not apply to arbitration proceedings or to the recognition and enforcement of arbitration awards — then the scheme of the text would lack coherence.

52 — Droz, G. A. L. 'Compétence judiciaire et effets des jugements dans le marché commun (Etude de la Convention de Bruxelles du 27 September 1968)', *Bibliotheque de droit international privé*, Dalloz, 1972, pp. 27-28 — emphasis added.

56. SII's argument is clearly undermined by the various reports of the Committees of Experts. The Jenard Report in the first place: [53]

'The Brussels Convention does not apply to the recognition and enforcement of arbitral awards . . . ; 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'.

57. Then the Schlosser Report, [54] more clearly still:

'. . . 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 under English law in the procedure known as "statement of 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.

Nor does the 1968 Convention cover proceedings and decisions concerning applications for the revocation, amendment,

53 — OJ 1979 C 59, p. 13.

54 — Ibid., p. 93.

recognition and enforcement of arbitration awards'.

58. It should also be noted that, according to the latter report, it was clear to all the States that were parties to the Convention that the exclusion relates at least to 'proceedings before national courts . . . if they refer to arbitration proceedings, whether concluded, in progress or to be started'.[55] That indeed was the entirely unambiguous position of the original States, although it was regarded as more restrictive than the United Kingdom's position concerning the difficulty to which I have referred.

59. Finally, the Evrigenis and Kerameus Report:[56]

'Proceedings which are directly concerned with arbitration as the principal issue, for example cases where the court is instrumental in setting up the arbitration body, judicial annulment or recognition of the validity or the defectiveness of an arbitration award, are not covered by the Convention'.

60. Legal writers agree that the Convention does not apply to disputes relating to arbitration.[57] The only disputed point concerns the difficulty with which I have already dealt, concerning the recognition and enforcement under the Brussels Convention of a judgment which disposes of the substance of a dispute despite the existence of an arbitration agreement.[58] But even in the view of those authors who favour application of the Convention in such cases, all disputes concerning arbitration fall outside the scope of the Convention.[59]

61. Since the wording of the Convention is supported by a complete convergence of views in the reports of the Committees of Experts — giving rise, it must be emphasized, to legitimate expectations in the circles affected — there would, it seems to me, have to be solid substantive reasons for the radical solution now advocated by Mr Schlosser to be seriously considered. However, when reviewed, the reasons put forward to justify that view are highly debatable.

62. The thesis put to the Court invokes in particular the lack of continuity that would exist between the Brussels Convention and international conventions if the Brussels Convention were not applicable to disputes concerning arbitration brought before courts and tribunals.

63. In the first place, let me observe that, in the opinion of Professor Schlosser himself,

'Very often in practice arbitral awards have been enforced extra-territorially despite the

55 — Ibid., p. 92.

56 — OJ 1986 C 298, p. 10.

57 — See in particular Kaye, op. cit., particularly at p. 146 et seq.; Lasok and Stone, who state 'the effects of Article 1(2)(iv) seem largely clear and uncontroversial', op. cit., p. 185; T. C. Hartley, op. cit., p. 22; L. Collins, op. cit., p. 29; Droz, op. cit., p. 37; Beraudo, op. cit., p. 10, paragraph 34; moreover, the latter regrets that the Convention does not contain a uniform rule for situations where courts are seised despite the existence of an arbitration agreement and does not provide that an arbitral award may negate recognition and prevent enforcement of a judgment given in another Member State.

58 — For views favouring recognition and enforcement of the judgment in this specific case, see in particular Lasok and Stone, op. cit., p. 186; Kaye, op. cit., p. 147; Cheshire and North's *Private International Law*, 11th Edition, Butterworths, 1987, pp. 426-427; and for a view against recognition, Hartley, op. cit., p. 97.

59 — Lasok and Stone, op. cit., pp. 175-186; Kaye, op. cit., p. 146 et seq.

fact that some other court (namely the court of the place where the arbitration was conducted) had previously interfered in the arbitration proceedings by, for example, appointing an arbitrator. The courts in the country of enforcement often find it quite normal and self-evident that the courts at the place of arbitration have jurisdiction over the arbitration proceedings if the judicial measures at issue are familiar to other legal regimes. Problems of the integrity of such kind of judicial proceedings, such as the fair hearing to both parties involved in arbitration, apparently have never arisen. Therefore very often no attention has been paid to the issue whether judgments relating to arbitration must really be recognized in another country under the respective bilateral treaty'. [60]

64. However, Professor Schlosser does not seem satisfied by the apparently efficient pragmatic approach adopted by the various national courts. He goes on to say:

'A closer scrutiny of these treaties, however, reveals that this approach is superficial. A judgment relating to arbitration is a judgment like any other. It can be recognized in another country only if a legal basis exists for doing so. Such a legal basis may be found in the respective bilateral treaty'. [61]

The author goes on to draw attention to the deficiences which, in that respect, he perceives in those bilateral treaties.

60 — P. 3 of his opinion.

61 — Ibid.

65. I am far from convinced by that analysis.

66. Whereas the national courts, when recognizing arbitral awards, apparently see no disadvantage in the intervention of national courts at the place where the arbitration takes place, it is nevertheless proposed that the Court adopt a 'revised' reading of the Brussels Convention because close legal examination should prompt the courts to raise difficulties. It does not seem to me to be satisfactory to draw attention to a purely theoretical problem, since it is conceded that in practice the system operates normally, and then to claim that that problem militates in favour of a new interpretation of the Convention. The view expressed by Mr Schlosser and SII would be worthy of note if it constituted a response to indisputable practical preoccupations. However, it is clear that the needs referred to here do not add up to a convincing case.

67. On the one hand, Mr Schlosser refers to the recognition and enforcement of awards merged into judgments — a situation that, according to the author, arises frequently in the United Kingdom — which in his view makes it necessary for the Convention to apply to proceedings concerning arbitration, having regard to the United Kingdom's importance as an arbitration centre. The situation to which Mr Schlosser refers arises where the court or tribunal at the place of arbitration grants an order for enforcement in a special form: judgment is given 'in terms of the award'. [62]

62 — On this question, see A. J. van den Berg, op. cit., p. 346 et seq.; in the United Kingdom, that possibility derives from Section 26 of the Arbitration Act 1950: 'An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given judgment may be entered in terms of the award'.

68. That argument could be dismissed merely by pointing out that the recognition and enforcement of judgments into which an award has 'merged' have in fact not raised any difficulties in the circumstances referred to by Mr Schlosser. In any event, that is what appears from the judgments mentioned by him in which a decision had to be given on enforcement in such circumstances. [63]

69. But to that practical finding must be added a more fundamental legal observation. Under the New York Convention, there is no doubt that, where an award is merged into a judgment, the award can as such be recognized. Indeed,

'The fact that the leave for enforcement has the effect of absorbing the award in the country of origin is a technical aspect for the purposes of enforcement within that country. The award can therefore be deemed to remain a cause of action for enforcement in other countries'. [64]

Accordingly, the 'merger' of the award must be regarded as limited to the territory of the court which delivered the judgment and only the award must be taken into account for the purpose of recognition and enforcement in other States. [65] In any event, it is clear that the solution of limiting recognition only to the judgment in which the award is 'merged' must be rejected.

70. However, the prevailing trend in legal literature and case-law [66] is to grant the beneficiary of a 'merged' arbitral award an option between the possibility of enforcing the award itself under the New York Convention or of enforcing the judgment under bilateral conventions or domestic law. In those circumstances, the successful party always retains the possibility of securing recognition and enforcement of the arbitral award, under the New York Convention, even if the award has been 'merged'. The difficulty referred to by Mr Schlosser [67] does not in fact arise unless only the judgment can be recognized. That is not the solution adopted by the courts. The advantages claimed in that respect by Mr Schlosser are not therefore persuasive.

63 — Paris, 20 October 1959, *Rev. arb.*, 1960, p. 48; Corte di Cassazione, 27 February 1979, No 1273, *Yearbook Commercial Arbitration*, 1982, 333; Bundesgerichtshof, 10 May 1984, WM 1984, 1014 (on that judgment, see in particular Lüer, H. J. 'German Court Decisions Interpreting and Implementing the New York Convention', *Journal of International Arbitration*, March 1990, p. 127, particularly at 129, and Note 14).

64 — A. J. van den Berg, op. cit., p. 347.

65 — See in that connexion the judgment of the Oberlandesgericht Hamburg, considered by A. J. van den Berg, op. cit., p. 347.

66 — See for example the judgment of the Bundesgerichtshof, cited above, and the judgment of the Corte di Cassazione, cited above (see in particular *Yearbook Commercial Arbitration*, 1982, Vol. 7, p. 334: 'the Corte di Cassazione found that, therefore, the English awards, being final and binding on the parties, could be enforced under the New York Convention, regardless whether a High Court judgment had been entered on the awards'); see A. J. van den Berg, op. cit., p. 346-349; the judgment of the Cour d'Appel, Paris, 20 October 1959, referred to by Schlosser in support of his statement that the arbitral award 'merged into judgment' is no longer enforceable as a judgment, does not in any case provide a basis for such a principle; that decision, which, moreover was not given under the New York Convention, merely set aside a decision given at first instance which refused an order for enforcement of a judgment; furthermore, it is regarded as having specifically adopted the solution of granting an option; see Fouchard, op. cit., p. 540, particularly Note 26.

67 — A difficulty which, moreover, seems far from frequent; see on that subject the commentary by Professor G. Recchia on the judgment of the Corte di Cassazione, cited above: '... the recognition and enforcement of a foreign judgment entered upon an award rather than a foreign award without a judgment (according to the law of the place where it was handed down) is very unusual in Italy, particularly after Italy's adherence to the New York Convention of 1958.
... In fact, this is a unique case'.

71. Furthermore, Mr Schlosser refers to the interest in applying the Convention to recognition of judgments which annul an arbitral award. There again, the need referred to — somewhat laconically — by Mr Schlosser appears far from pressing. Article V(e) of the New York Convention specifically provides for the possibility of refusal of recognition and enforcement of the arbitral award where it 'has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made', and Article IX of 1961 European Convention, for its part, states that an order for enforcement of an arbitral award may be withheld on a limited number of specific grounds of annulment. Recognition of a judgment annulling an arbitral award appears therefore to be governed by those provisions.

72. I confess that I do not see therefore for what reason it would be 'desirable' to apply the Brussels Convention to judgments annulling arbitral awards. Perhaps Mr Schlosser has in mind those cases where an award has been annulled by the courts of a State other than that in whose territory the award was made? It remains to be shown that it is desirable for such judgments to enjoy 'transnational' recognition. It would be inappropriate not to mention here the analysis according to which the courts of the 'country of origin' have exclusive jurisdiction to annul the award.[68] Against that background, there can be no question therefore of invoking the need to recognize judgments annulling awards made in other States.

68 — See A. J. van den Berg, op. cit., p. 20, regarding the New York Convention.

73. But reference must be made above all to the clear trend obtaining at the present time, which inspires certain national legislation, to challenge the very need systematically to recognize judgments annulling arbitration awards. A feature of that trend is to recognise only review by the courts in whose territory enforcement is to be pursued, in order to ensure the maximum effectiveness of arbitral awards. It is obvious that the automatic transnational recognition of judgments annulling arbitral awards, referred to by Mr Schlosser, goes directly against those objectives.

'. . . those who consider that the international arbitrator makes awards in accordance with a specific legal order, the *lex mercatoria*, cannot think of making recognition and enforcement of the award in the territory of a State conditional on the view expressed by another State legal order: such a solution could only be accounted for by intrinsic inferiority of the *lex mercatoria* by comparison with national laws'.[69]

The positive law of certain European States is based on such views, for example where it excludes actions for the annulment of an international arbitral award delivered within national territory (Article 1717 of the Belgian Judicial Code[70]) or, again, by not providing that annulment of an arbitral award in its State 'of origin' is a ground for refusal of an order for enforcement (Article 1502 of the new French Code of Civil Procedure). The latter solution shows how

69 — Mayer, op. cit., pp. 360-361.

70 — With regard to this provision, see in particular Van Houtte, 'La loi belge du 27 mars 1985 sur l'arbitrage international', *Rev. arb.*, 1986, p. 29-41; Vanderelst, 'Increasing the Appeal of Belgium as an International Arbitration Forum, The Belgian Law of March 27, 1985, concerning the annulment of arbitral awards', *Journal of International Arbitration*, 1986, p. 77.

the view put forward by Mr Schlosser runs counter to such approaches. It is sufficient to bear in mind that the Brussels Convention would require the courts of every Member State to recognize judgments annulling an international arbitral award.[71]

74. Finally, according to SII, Article II(3) of the New York Convention 'says nothing at all about the recognition and enforcement' of a decision that there is no arbitration agreement. The provision at issue provides:

'The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

In that respect, SII concedes that clearly there is no difficulty if the court considers that an arbitration agreement exists. In such a case, the parties will be referred to arbitration.

75. On the other hand, if the Court concludes that no arbitration agreement exists, is there a need to recognize such a judgment which is so imperative as to justify application of the Brussels Convention to disputes concerning arbitration? In the first place, in the event of a national court's deciding, as an incidental issue, that an arbitration agreement exists or is invalid, thereupon concluding that it has jurisdiction and then adjudicating on a dispute falling within the scope of the Brussels Convention, the application of the latter to the recognition and enforcement of such a judgment again raises the question which was considered at the time of the United Kingdom's accession. But, even if it were assumed that it was appropriate to decide that such a judgment was covered by the Brussels Convention, that solution certainly does not make it necessary for the Convention to apply to all disputes concerning arbitration brought before the courts. As we have seen, the original States, which favoured such a solution, also clearly considered that the exclusion extended to proceedings before national courts relating to arbitration procedures which had been concluded, were pending or were yet to be started.

76. Finally, let us consider — although SII has not cited a case where this problem has arisen — the question of recognition or otherwise of a judgment dealing, as a principal issue, with the existence and validity of an arbitration agreement. The difficulty might be as follows. Before commencing any litigation, a party applies to a court in State A to give a decision on the validity of an arbitration agreement and obtains a judgment finding that it is invalid. A difference having arisen between the parties, that judgment is produced in State B where the arbitration proceedings are commenced. Is it desirable to apply to such a judgment the rules regarding recognition under the Convention? That judgment may have been delivered elsewhere than at the place of arbitration. The possibility that

71 — A solution which the New York Convention did not adopt since there is no obligation to refuse recognition and enforcement of an award annulled in the State where it was made; what is involved is an entitlement which does not, according to Article VII of the New York Convention, exclude the application of national laws allowing reliance on the award despite its annulment; thus, according to the French Cour de Cassation, 'the court may not withhold an order for enforcement where the national law thereof grants authority therefor' (Pabalk-Norsolor, 9 October 1984; *Rev. arb.*, 1985, p. 431, note by Goldenau; D. 1985, p. 101, note by Robert).

several national courts might give a decision on an arbitrator's jurisdiction has been dealt with by academic writers, whose conclusions on this point, it seems to me, very clearly favour assessments made by the courts of the place of arbitration by reason of their neutrality.

'A. International recognition of the first judgment given by a national court

...

Judgments given in response to an objection of lack of jurisdiction raised in order to resist a substantive claim likewise hardly qualify for international recognition, since their direct purpose is to give a decision as to the jurisdiction of the national court which delivers them. By contrast, it seems legitimate for a judgment which is given at the place where the arbitral tribunal is sitting and which gives a decision, as a main issue, on the arbitrator's jurisdiction (either as a declaratory judgment or in the context of an action for annulment) to be recognized, on certain conditions, in other countries. Admittedly, the place of arbitration is often accidental and unrelated to the substance of the dispute. But that in itself ensures the all-important neutrality. In any event there is no alternative if the aim is to endeavour to centralize control in order to harmonize decisions at international level'.[72]

It must be stated that that solution will not be promoted by application of the Brussels Convention, which would allow recognition of any judgment given by any court in a contracting State without any special attention being paid to the courts of the place of arbitration. Harmonization of the solutions adopted by national courts does not constitute an aim in itself, at the expense of the specific features of the area concerned.

77. If the Brussels Convention is applied to disputes concerning arbitration, there is a great risk that solutions will be arrived at which, although doubtless in harmony with each other, would be wholly inappropriate to the specific needs of international arbitration. The unsuitability of the Brussels Convention in that respect casts doubt on the advantages attributed to it by SII. Moreover, that unsuitability is illustrated by a major disadvantage. By virtue of a well-established practice, courts at the place of arbitration give their support and assistance to the arbitration process: appointment of an arbitrator, protective measures, interim measures and measures for the obtaining of evidence.

'For example, the assistance of a national court may be needed for the appointment, replacement or challenge of an arbitrator. It is a generally accepted principle of the international division of judicial competence that the court of the country under the arbitration law of which the arbitration is to take, is taking, or took place, is the competent authority in relation to arbitration'.[73]

Such collaboration between national courts at the place where the arbitration is taking place could be severely undermined if the Brussels Convention were to be applied to arbitration. Indeed, it would then be necessary to determine what provision of

72 — Mayer, op. cit., p. 358-359.

73 — A. J. van den Berg, op. cit., p. 30.

the Convention conferred jurisdiction on the court at the place of arbitration. This difficulty has been perfectly described by one author:

'it is right and proper that judicial proceedings connected with the prosecution of an arbitration agreement, such as are mentioned above, should be held to be excluded from the Convention's scope under Article 1, paragraph 2(4), and accordingly be subject to national jurisdiction rules: for, just as the law of the place of arbitration will normally govern the latter proceedings in the absence of a different choice, so too it is believed should courts of the same country be regarded as being particularly appropriate and well-placed to control arbitration activities within its territory at national law; thus, if Convention grounds were to apply to any such court proceedings, the English courts might find themselves unable to adjudicate in respect of English arbitration proceedings where the defendant was domiciled in a foreign contracting state (unless, perhaps, Article 5(1) were able to be construed as affording local jurisdiction)'.[74]

78. Although it denies that the purpose of the exclusion under Article 1(4) is to recognize the jurisdiction of courts at the place of arbitration, SII itself acknowledges that looking for a head of jurisdiction in the Convention is a 'legitimate concern' and in Mr Schlosser's opinion efforts are made to 'construct' jurisdiction for the benefit of the courts at the seat of arbitration on the basis of Articles 5(1) or 17 of the Convention.

74 — Kaye, op. cit., p. 149-150.

79. With respect, first, to Article 5(1), Mr Schlosser states that the parties to an arbitration agreement are required to cooperate to ensure the proper conduct of the arbitration proceedings. The penalty for failure to fulfil those obligations, envisaged by certain authors,[75] implies that there is a place of enforcement for those obligations. According to the opinion, that place must be regarded as being the place of arbitration as a result of the agreement of the parties as to the place of arbitration. Consequently, Article 5(1) confers jurisdiction on the courts at the seat of the arbitration.

80. Strong objections must be made to that proposition. In the first place, an arbitration agreement is an agreement of a procedural nature whose purpose differs fundamentally from that of substantive contracts creating obligations for the parties.

'It is, however, of a different nature from the other provisions of the contract: not merely because the rights which it creates are procedural rather than substantive'.[76]

Moreover, many actions commenced before the courts at the seat of arbitration can hardly be regarded as seeking enforcement of an obligation deriving from the arbitration agreement: for example, applications for protective measures and applications for more time to be allowed for the arbitrator to complete his task.

75 — Mustill and Boyd, op. cit., p. 409.

76 — Ibid.

81. Finally, and most importantly, Mr Schlosser himself concedes that the jurisdiction of the court at the seat of arbitration under Article 5(1) cannot be exclusive. Accordingly, he envisages that the courts of a contracting State other than that at the seat of the arbitration may 'give support to arbitration conducted or to be conducted pursuant to the rules of a foreign legal order'. Such an eventuality is not realistic. Could it be imagined, for example, that an English court would agree to take action to support arbitration being conducted in Paris? Mr Schlosser also concedes in that respect that the national courts have almost invariably refused to intervene in arbitration proceedings which are not governed by their own law.

82. As regards the efforts to found jurisdiction on Article 17, they likewise appear open to criticism. It would indeed be dangerous to suggest that an arbitration agreement must be seen as implying a submission to the jurisdiction of the courts at the seat of the arbitration. That solution, advocated by Mr Schlosser, would result in a requirement that arbitration agreements should satisfy the conditions laid down in Article 17 in order to found the jurisdiction of the courts at the seat of the arbitration. It is easy to see what insoluble problems might arise, if Mr Schlosser's thesis were adopted, when measures were sought from courts at the seat of the arbitration. In particular, considerable reservations might be expressed concerning the author's suggestion that Article II(2) of the New York Convention, regarding the *form of the arbitration agreement*, contains the form customarily accepted in international trade, referred to in Article 17 of the Brussels Convention for *agreements conferring jurisdiction.*

83. The complexities which would be associated with the 'discovery' in the arbitration agreement of an implied clause conferring jurisdiction on the courts at the place of arbitration render unacceptable that solution, which is put forward in an attempt to palliate the disadvantages of the 'revised' reading of the Convention suggested to the Court.

84. If Articles 5(1) and 17 of the Convention must be interpreted as boldly as Mr Schlosser suggests, it is precisely because the Convention made no provision for any jurisdiction for the courts at the place of arbitration, and the absence thereof is accounted for precisely by the exclusion of arbitration from the scope of the Convention.

'Had it been decided expressly to include such legal proceedings within the Convention's scope, it may have required an additional exclusive jurisdiction ground of courts of place of arbitration in Section 5 of Title II'.[77]

85. The negotiations preceding the United Kingdom's accession to the Brussels Convention clearly showed that for all the contracting States court proceedings relating to arbitration were excluded from the scope of the Convention. The Report on the Accession Convention of 1978 is unequivocal on this point. In the absence of any convincing justification, SII's thesis must, in view of its inherent disadvantages, be firmly rejected.

77 — Kaye, op. cit., p. 189, note 412.

86. In his opinion, Mr Jenard proposes an apparently less radical solution than Mr Schlosser's since he does not expressly challenge the principle whereby disputes relating to arbitration are excluded from the scope of the Convention. He nevertheless reaches the conclusion that the Convention governs the proceedings before the national court in this case. According to Mr Jenard, the Convention applies to a case where a court with jurisdiction under the Convention has to dispose of the incidental issue of the existence or the validity of an arbitration agreement. He also refers to the judgment of the Court in *Effer*.[78] In the latter case, as we have seen, the Court held that Article 5(1) of the Convention did not cease to apply to proceedings in which a main claim covered by the Convention — for the payment of fees — was contested on the ground that the contract whose performance was sought did not exist. It is unclear how this prompted Mr Jenard to form the view that the proceedings before the national court in this case are nevertheless governed by the Convention. He concedes, in fact, that the arbitration is 'a main issue' before the English courts. However, the existence of the proceedings pending before the Italian court, in his opinion, renders the Convention applicable to the proceedings brought before the English court. That result, he says, follows from the objectives and the spirit of that instrument.

87. That view gives rise to very strong objections.

88. The question whether or not an action comes within the scope of the Convention is determined by its subject-matter. That is an objective criterion. In order to decide that the Convention is applicable, it is necessary to establish that, *ratione materiae*, a dispute is, by virtue of its particular features, covered by the provisions of the Convention. But in no circumstances can the existence of another action pending before another court entail the result that application of the Convention is extended to the dispute concerned if it was not already covered by the Convention by virtue of its subject-matter. Nevertheless, that is the view advanced by Mr Jenard. That view might in fact lead to the conclusion that the *same* dispute would come within the scope of the Convention if another action were pending before a court in another contracting State, but on the other hand would not be governed by the Convention if the other proceedings did not exist. The applicability of the Convention to a particular dispute cannot be made subject to variable geometry in that way.

89. According to Mr Jenard's opinion, the scope of the Convention may be shaped to suit different situations in a purely opportunistic manner. For that purpose, it is only necessary to refer to its objectives in order to render it applicable to any dispute, whether or not the latter falls within its purview.

90. Without doubt, the objectives of the Brussels Convention are of decisive importance for the interpretation of those provisions. But a mere reference to those objectives cannot justify neglect of the requirements of legal consistency or total disregard for the consequences which necessarily follow from the logic of the instrument but which are regarded as inconvenient.

91. By saying purely and simply that if two actions, one being concerned principally with arbitration and the other being merely incidental thereto, are pending before the

78 — Above.

courts of two contracting States, the Convention applies to the first, Mr Jenard seeks, in his Opinion, to evade the conclusion which inevitably follows from the exclusion of arbitration, which, moreover, he does not challenge as a matter of principle.

92. To arrive at the conclusion that the Convention is applicable, it must, as already stated, be established that proceedings fall within its purview. The reliance placed solely on the objectives of the Convention in order to circumvent the impossibility of establishing that fact shows the legal weakness of a position which cannot accept the obvious, namely that the proceedings before the referring court fall outside the scope of the Convention.

93. In view of the answer which I think must be given to the first question, I shall not consider in detail the second and third questions from the Court of Appeal but will merely make a number of brief observations.

94. My analysis of Mr Schlosser's opinion has enabled me to show how the creation of a jurisdiction based on Articles 5(1) or 17 for courts at the seat of the arbitration appears artificial and inappropriate. In my opinion therefore, if the Court were to uphold the thesis that all disputes relating to arbitration fell within the scope of the Convention, it would ineluctably be compelled to create such a jurisdiction in a praetorian manner.

95. Finally, the Court will not have to answer the question concerning Articles 21 and 22 of the Convention unless it should consider that the Convention governs the proceedings before the referring court and the latter has jurisdiction on the basis of Article 5(1) or Article 17.

96. I would point out in the first place that a situation where an action is pending for the appointment of an arbitrator and another is pending concerning the actual substance of the dispute cannot be described as one of *lis pendens*. The Commission itself, although favouring the Italian company's view, also admits that there is no *lis pendens* in the present case.

97. With respect to Article 22, I shall not go into the question whether the various conditions imposed by it are satisfied in this case. I shall merely say that, even if that is the case, that provision 'imposes no obligation on the court before which one of the related actions is brought in the second place'.[79] That court is merely *entitled* to stay the proceedings or, if the requirements laid down in the second paragraph of Article 22 are fulfilled, to decline jurisdiction. In other words, in no case can the interpretation of the Convention suggested by SII have the result of *compelling* the referring court to stay the proceedings. To put it another way, the exercise of that entitlement by that court is liable to be influenced by its conviction concerning the correctness of the solution rendering the Convention applicable to the proceedings before it.

98. In other words, a solution which is clearly illogical and contrary to legal certainty, adopted in the name of the objectives of the Convention, would not necessarily lead to the result pursued by

79 — Gothot and Holleaux, op. cit., p. 127, paragraph 225.

those objectives: a decision only by the Italian court as to the existence or otherwise of an arbitration agreement. It would be necessary to find indisputable reasons militating in favour of application of the Convention to the proceedings before the national court. As far as I am concerned, the attempts to do so have been totally unsuccessful.

99. I shall now conclude with a number of general observations. In the first place, there is nothing exceptional about the proceedings before the English court. It often happens that there is a dispute as to whether or not an arbitration agreement exists, a situation which is accounted for particularly by the fact that the enforcement of arbitral awards is today a well-established procedure in the international community.

100. It is recognized that dilatory tactics by a recalcitrant party to arbitration seriously jeopardize the effectiveness of international arbitration.[80] Of course, this is a general observation and I certainly do not intend it to indicate that the attitude of either of the parties to the main proceedings in this case is inspired by such motives. But it must be stated that the application of the Convention to such proceedings would in certain circumstances make available an additional means of 'forum shopping', in breach of the agreement to refer the matter to arbitration.

101. In that connection, a clarification is called for. By deciding that the Brussels Convention does not apply to proceedings concerning arbitration, the Court will not thereby decide that arbitrators should be left to decide as to their own jurisdiction. It seems that in the present case it may well be the English courts which themselves decide that question. But it must not be forgotten that national laws[81] and the international conventions generally tend to grant arbitrators the right to rule as to their own jurisdiction,[82] although their assessment is always subject to judicial review. That is a trend which the Brussels Convention of course cannot go against. However, application of the Convention to proceedings concerning arbitration might favour certain dilatory manoeuvres where the reluctant party commences proceedings before the court of a contracting State in order to avoid the application of laws of other contracting States which are more favourable to the arbitration process. The place of arbitration is fortuitous. It would be paradoxical if the choice of a seat of arbitration within the Community, where one of the parties is domiciled within the territory of the Community, could slow down the arbitration procedure by operation of the Brussels Convention — which, on the other hand, would not be applicable in any event

80 — See in particular Gaillard, E. 'Les manoeuvres dilatoires des parties et des arbitres dan l'arbitrage commercial international', *Rev. arb.*, 1990, No 4, p. 759.

81 — At least the 'civil law' legal systems; English laws shows considerable reticence regarding 'competence/competence' of the kind embodied in the continental systems; on this point, see in particular E. Gaillard, op. cit., particularly at p. 776.

82 — With respect to the extent to which a national court called on to appoint an arbitrator may verify the existence or otherwise of an arbitration agreement, details are given of the different national approaches in Gaillard, op. cit., particularly at pp. 778-779; that author appears to consider that the approach adopted in Netherlands law (Article 1027(4) of the Code of Civil Procedure), according to which 'the President or the third party shall appoint the arbitrator or arbitrators without regard to the validity of the arbitration agreement', is too rigorously favourable to 'competence/competence'; he expresses his preference for the compromise solutions adopted in the new Swiss law (the court 'shall comply with the request for appointment made to it unless a summary examination shows that no arbitration agreement exists between the parties'); compare Article 12.5 of the Portuguese Law of 1986 and Article 1444(3) of the new French Code of Civil Procedure, which provides that the judge called on to appoint the arbitrator or arbitrators may determine that the arbitration clause is manifestly void and may declare that no appointment should be made.

if the arbitration were to be conducted outside the Community.

102. Finally, SII emphasized the risks of irreconcilability if the application were not applied to the proceedings before the English court. For my part, I am fully convinced that as far as possible it is necessary to arrive at solutions which prevent such risks, but at the same time it is necessary to describe correctly and precisely the context in which this difficulty arises. In the first place, let me say again, the machinery provided by Articles 21 and 22 can be put into operation only within the scope of the Convention. In so far as the Convention does not apply to certain matters, the risk inevitably arises that there may be irreconcilable decisions in some cases. That inevitably follows from the fact that the authors of the Convention excluded certain matters from its scope. The fact that two courts, one dealing with a case covered by the Convention and the other with a case not so covered, may arrive at a different decision on the same preliminary matter may, in the abstract, appear regrettable. Situations of that type are the result of the exclusions contained in the Convention. The Court has already had occasion to consider cases of irreconcilability between a judgment covered by the Convention and a judgment falling outside its scope.[83] Clearly, in this case, if the Italian court and the English court take differing views as to the existence of an arbitration agreement, the possibility cannot be excluded that in due course, for example, an arbitral award may be made which is irreconcilable with the judgment on the substance of the case delivered in Italy.[84] That possibility must be accepted by the Court.

103. Moreover, irreconcilability between an arbitral award and a national judgment, although obviously not desirable, is susceptible of remedy. The ways of remedying the problem have been set out in a paper dealing with conflicts between judgments and arbitral awards.[85] And its author considered in particular the situation where a judgment protected by the Brussels Convention and an arbitral award conflict and the solutions which would be applicable in such circumstances. In any event, it is clear from that paper that the applicable principles make it possible to say, according to the conflicting situations, whether the judgment or the award should prevail.

104. Finally, let me say that I was not at all concerned by the Commission's observation at the hearing that the solution advocated by it is of a 'Community' character by contrast with the views of the three inter-

83 — Case 145/86 *Hoffman* v *Krief* [1988] ECR 645 (conflict between a judgment granting alimony, covered by the Convention, and a judgment decreeing divorce, not covered by the Convention).

84 — The recognition and enforcement of that judgment might, moreover, lead to a decision on the question, which I have considered on several occasions in this opinion, whether the Convention is applicable to a judgment on the substance of the case given despite the existence of an arbitration agreement which the court in the State where enforcement was sought considered to be valid.

85 — Schlosser, P. 'Conflits entre jugement judiciare et arbitrage', *Rev. arb.*, 1981, No 3, p. 371.

vening Member States, according to which the Convention does not apply to the proceedings before the English court. For my part, I see no advantage for the Community in ignoring the specific legal requirements of international arbitration, a universal method of resolving disputes in international trade. Those needs, as I hope I have shown, are not necessarily identifiable with those set out in the Brussels Convention, an instrument which is designed to ensure the proper administration of justice by the State within the Community.

105. Consequently, I propose that the Court give a clear reminder of the scope of the Convention and rule as follows:

The question of the existence of an arbitration agreement raised before a court called upon to appoint an arbitrator is covered by the exclusion laid down in Article 1(4) of the Convention of 27 September 1968 concerning jurisdiction and the enforcement of judgments in civil and commercial matters.