

By excluding arbitration from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by virtue of Article 1(4) thereof, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

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

Judgment of the Court

25 July 1989

In Case C-190/89,

REFERENCE to the Court, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by the Court of Appeal of England and Wales for a preliminary ruling in the proceedings pending before that court between

Marc Rich and Co. A.G.

and

Società Italiana Impianti P.A.

on the interpretation of Article 1(4) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT,

composed of: O. Due, President, G.F. Mancini, T.F. O' Higgins and G.C. Rodríguez Iglesias (Presidents of Chambers), Sir Gordon Slynn, R. Joliet, F.A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: M. Darmon,

Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of:

- Marc Rich and Co. A.G., by Iain Milligan, Barrister,
- Società Italiana Impianti P.A., by Peter Gross, QC,
- the United Kingdom Government, by John E. Collins, acting as Agent,
- the German Government, by Professor Christof Boehmer,
- the French Government, by Edwige Belliard and Claude Chavance, acting as Agents,
- the Commission of the European Communities, by John Forman and Adam Blomefield, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument presented by the plaintiff in the main proceedings, the defendants in the main proceedings, the United Kingdom Government, represented by John E. Collins and Van Vechten Veeder, QC, and the Commission at the sitting on 17 October 1990,

after hearing the Opinion of the Advocate General at the sitting on 19 February 1991,

gives the following

Judgment

1. By order of 26 January 1989, which was received at the Court Registry on 31 May 1989, the Court of Appeal of England and Wales referred to the Court for a preliminary ruling

under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention") three questions on the interpretation of certain provisions of the Convention.

2. The questions were raised in proceedings pending before that court between Marc Rich and Co. A.G. (hereinafter referred to as "Marc Rich"), whose registered office is in Zug, Switzerland, and Società Italiana Impianti P.A. (hereinafter referred to as "Impianti"), whose registered office is in Genoa, Italy.

3. It appears from the documents forwarded to the Court that, by telex message of 23 January 1987, Marc Rich made an offer to purchase a quantity of Iranian crude oil on f.o.b. terms from Impianti. On 25 January 1987, Impianti accepted the offer subject to certain further conditions. On 26 January, Marc Rich confirmed acceptance of those further conditions and on 28 January 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 shall be final and binding on both parties."

4. The vessel which Marc Rich then nominated completed loading by 6 February. On the same day Marc Rich complained that the cargo was seriously contaminated, causing it to incur a loss in excess of US (7) 000 000.

5. On 18 February 1988, Impianti summoned Marc Rich to appear before the Tribunale (Regional Court), Genoa, Italy, in an action for a declaration that it was not liable to Marc Rich. The summons was served on Marc Rich on 29 February 1988, and on 4 October 1988 the latter, relying on the existence of the arbitration clause, lodged submissions to the effect that the Italian court had no jurisdiction.

6. Also on 29 February 1988, Marc Rich commenced arbitration proceedings in London, in which Impianti refused to take part. On 20 May 1988, Marc Rich commenced

proceedings before the High Court of Justice, London, for the appointment of an arbitrator pursuant to section 10(3) of the Arbitration Act 1950. By decision of 19 May 1988, the High Court had granted leave to serve an originating summons on Impianti in Italy.

7. On 8 July 1988, Impianti requested that the order granting leave be set aside, contending that the real dispute between the parties was linked to the question whether or not the contract in question contained an arbitration clause. It considered that such a dispute fell within the scope of the Convention and should therefore be adjudicated on in Italy. Marc Rich, on the other hand, took the view that the dispute fell outside the scope of the Convention by virtue of Article 1 thereof.

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

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

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

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

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

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

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

(b) Article 17 of the Convention.

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

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

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

10. Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

11. The first question submitted by the national court seeks, in substance, to determine whether Article 1(4) of the Convention must be interpreted in such a manner that the exclusion provided for therein extends to proceedings pending before a national court concerning the appointment of an arbitrator and, if so, whether that exclusion also applies where in those proceedings a preliminary issue is raised as to whether an arbitration agreement exists or is valid. These two points will be considered successively.

12. The first paragraph of Article 1 of the Convention provides that it is to apply in civil and commercial matters whatever the nature of the court or tribunal. According to the second paragraph of that article, the Convention shall not apply to:

"1.

...

4. arbitration".

Exclusion of proceedings for the appointment of an arbitrator from the scope of the Convention

13. Impianti considers that the exclusion in Article 1(4) of the Convention does not apply to proceedings before national courts or to decisions given by them. It contends that "arbitration" in the strict sense concerns proceedings before private individuals on whom the parties have conferred the authority to settle the dispute between them. Impianti bases that view essentially on the purpose of Article 220 of the Treaty which, it argues, is to establish a complete system for the free movement of decisions determining a dispute. Consequently, it

is legitimate to interpret Article 1(4) of the Convention in such a way as to avoid lacunae in the legal system for ensuring the free movement of decisions terminating a dispute.

14. Marc Rich and the governments which have submitted observations support a wide interpretation of the concept of arbitration, which would exclude completely from the scope of the Convention any disputes relating to the appointment of an arbitrator.

15. The purpose of the Convention, according to the preamble thereto, is to implement the provisions of Article 220 of the EEC Treaty concerning the reciprocal recognition and enforcement of judgments of courts or tribunals. Pursuant to the fourth paragraph of Article 220, the 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.

16. In referring to decisions of courts and tribunals and to arbitration awards, Article 220 of the Treaty thus relates both to proceedings brought before national courts and tribunals which culminate in a judicial decision and to those commenced before private arbitrators which culminate in arbitral awards. However, it does not follow that the Convention, whose purpose is in particular the reciprocal recognition and enforcement of judicial decisions, must necessarily have attributed to it a wide field of application. In so far as the Member States are called upon, by virtue of Article 220, to enter into negotiations "so far as necessary", it is incumbent on them to determine the scope of any agreement concluded between them.

17. With respect to the exclusion of arbitration from the scope of the Convention, the report by the group of experts set up in connection with the drafting of the Convention (Official Journal 1979 C 59, p. 1) explains that

"There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration".

18. The international agreements, and in particular the abovementioned New York Convention on the recognition and enforcement of foreign arbitral awards (New York, 10 June 1958, United Nations Treaty Series, Vol. 330, p. 3), lay down rules which must be respected not by the arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

19. More particularly, it must be pointed out that the appointment of an arbitrator by a national court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion. Such a measure therefore comes within the sphere of arbitration and is thus covered by the exclusion contained in Article 1(4) of the Convention.

20. That interpretation is not affected by the fact that the international agreements in question have not been signed by all the Member States and do not cover all aspects of arbitration, in particular the procedure for the appointment of arbitrators.

21. That conclusion is also corroborated by the opinion expressed by the experts in the report drawn up by them at the time of the accession of Denmark, Ireland and the United Kingdom to the Convention, according to which the Convention does not apply to court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators (Official Journal 1979 C 59, p. 93). Similarly, in the report drawn up at the time of the accession of the Hellenic Republic to the Convention, the experts considered that cases where a court is instrumental in setting up the arbitration body are not covered by the Convention (Official Journal 1986 C 298, p. 1).

Whether a preliminary issue concerning the existence or validity of an arbitration agreement affects the application of the Convention to the dispute in question

22. Impianti contends that the exclusion in Article 1(4) of the Convention does not extend to disputes or judicial decisions concerning the existence or validity of an arbitration agreement. In its view, that exclusion likewise does not apply where arbitration is not the principal issue in the proceedings but is merely a subsidiary or incidental issue.

23. Impianti argues that, if that were not so, a party could avoid the application of the Convention merely by alleging the existence of an arbitration agreement.

24. Impianti contends that, in any event, the exception in Article 1(4) of the Convention does not apply where the existence or validity of an arbitration agreement is being disputed before different courts to which the Convention applies, regardless of whether that issue has been raised as a main issue or as a preliminary issue.

25. The Commission shares Impianti's opinion in so far as the question of the existence or validity of an arbitration agreement is raised as a preliminary issue.

26. Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

27. It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81 Effer v Kantner [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.

28. It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.

29. Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

The second and third questions

30. In view of the answer given to the first question, the second and third questions do not call for a reply.

Costs

31. The costs incurred by the Governments of the Federal Republic of Germany, the French Republic and the United Kingdom of Great Britain and Northern Ireland and also by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Court of Appeal, London, by order of 26 January 1989, hereby rules:

Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

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