CA on appeal from QBD (Mr Justice Aikens) before Phillips L MR; Pill LJ; Keene LJ. 15th May 2001.

JUDGMENT LORD PHILLIPS MR

1. This is an appeal by L G Caltex Gas Company ("L G Caltex") and Contigroup Companies Inc ("Conti"), from a judgment of Aikens J, dated 19 January 2001, in favour of the respondents, China National Petroleum Company ("CNPC") and China Petroleum Technology & Development Corporation ("CPTDC"). Permission to appeal was granted by Aikens J because this case raises new and important points in relation to section 67 and 73 of the Arbitration Act 1996 ("the 1996 Act").

2. The appeal relates to two sets of arbitration proceedings, which have been heard together and which raise identical issues. The sole arbitrator involved is Mr Bruce Harris, a commercial arbitrator of great experience. Each set of proceedings involves a claim by one of the appellants against both respondents for damages of breach of a contract containing an arbitration clause. In each case the respondents deny being party to the contract in question.

3. The issue of whether the respondents were parties to the contracts is the principal bone of contention between them and the appellant. That issue bears simultaneously on two questions, the first procedural and the second substantive:
   (1) Are the respondents party to arbitration agreements which give Mr Harris jurisdiction to determine the substance of the disputes?
   (2) Are the respondents liable in damages for breach of contract?

4. After a lengthy hearing Mr Harris has made two final awards dated 24 May 1999 in which he has held that the respondents are not party to the contracts in question.

5. The appellants contend that these awards are, in substance, rulings by Mr Harris that he has no jurisdiction and that these rulings are susceptible to challenge in the court by virtue of the provisions of the 1996 Act. The respondents contend that the awards determine the substantive issues of whether they are liable under the contracts. They further contend that Mr Harris had jurisdiction to make a final determination of these issues, not by reason of the arbitration clauses in the contracts, but because in the course of the arbitration proceedings they reached agreement with the appellants that Mr Harris should determine these central issues. These alleged agreements have been referred to as "ad hoc" agreements, although, as I shall explain in due course, that expression can have more than one meaning.

6. Aikens J has ruled that the respondents are correct and that it is not open to the appellants to challenge Mr Harris' findings that the respondents were not party to the contracts on which the appellants' claims are founded. The challenges to Mr Harris' awards came before Aikens J in the form of applications under section 67 of the 1996 Act to have the awards set aside. Aikens J skilfully case managed the applications by identifying four preliminary issues and directing argument upon them. This appeal requires a review of the analysis made by the judge of these issues.

7. At the heart of the dispute is the question of the impact of the 1996 Act on English procedure where the jurisdiction of an arbitrator is in issue. I propose to consider the position before 1996 before turning to the relevant provisions of the 1996 Act.

The position before 1996.

8. Nearly 50 years ago Devlin J, with characteristic clarity, described the position of arbitrators facing challenge to their jurisdiction in **Christopher Brown Ltd v Genossenschaft Osterreichischer** [1954] QB 8 at p 12-13: *"It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. 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. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example,*

it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own enquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties. That is plain, I think, from the burden that is put upon a plaintiff who is suing upon an award. He is obliged to prove not only the making of the award, but also that the arbitrators had jurisdiction to make the award. The principle omnia praesumuntur rite esse acta does not apply to proceedings of arbitration tribunals or, indeed, to the proceedings of inferior tribunals of any sort. There is no presumption that merely because an award has been made it is a valid award. It has to be proved by the party who sues upon it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively.

If the plaintiff takes upon himself the burden of proving the award, and fails to prove that the arbitrators had jurisdiction, his action fails, and it is irrelevant whether the arbitrators thought or did not think that they had jurisdiction. Their finding is of no value to him. But if he proves that the arbitrators did have jurisdiction then he succeeds, and his success is not destroyed because the arbitrators themselves went into the matter and came to the same conclusion which, ex hypothesi, was the right one. In short, any view which is expressed by the arbitrators expressly or impliedly in the award, any finding which can be called a finding that they had jurisdiction does not make the award any better, and likewise does not make it any worse."

9. An arbitration agreement is often contained in the contract that sets out the substantive rights and obligations of the parties. Where a respondent denies that he is party to such a contract, that challenge raises simultaneously (1) the procedural issue of whether the arbitrator has jurisdiction; and (2) the substantive issue of whether the respondent is liable for breach of contract.

10. Before 1996 if the arbitrator in an award in favour of a claimant held that the disputed contract bound the respondent, the respondent could challenge that finding in court, although it purported to resolve both the issue of jurisdiction and the issue of liability. Equally, if the arbitrator held that he had no jurisdiction because the respondent was not party to the contract, the claimant could challenge that finding in court. The editors of the second edition of Mustill & Boyd on The Law and Practice of Commercial Arbitration in England explained the position at page 108: *"....it has in the past always been accepted in England that an arbitrator cannot make a binding award as to the initial existenceof the contract, and that he cannot foreclose the question by making an award which takes it for granted. For if in truth no contract was ever made, then the arbitration provisions of the supposed contract never bound the parties; and an arbitrator appointed under those provisions could have no authority to act. So, although an arbitrator, faced with a dispute about whether a contract ever came into existence or if it did, whether a party to the arbitration was a party to the agreement, can and often should consider and rule upon it, his ruling does not bind the parties, and may always be reopened by the Court."*

11. **Heyman v Darwins Ltd** [1942] AC 356 is the principal authority which supports that text.

12. There was no need for the respondent to await the issue of the award before challenging the jurisdiction of the arbitrator. It was common practice for a respondent to apply to the commercial court for a declaration that he was not bound by the alleged arbitration agreement, which usually produced the result that the arbitration was stayed pending a decision of the court on the jurisdictional issue. The desirability of avoiding the delay caused to the arbitral process in such circumstances was one of the primary reasons for the changes made by the 1996 Act.

13. It was always possible for the parties to agree that the arbitrator should determine whether or not the contract containing the arbitration clause had been validly concluded. Such an agreement constituted an independent arbitration agreement conferring on the arbitrator jurisdiction to resolve the issue which he would not otherwise have had. Where a respondent took part in an arbitration raising issues which fell outside the jurisdiction of the arbitrator, the court would normally infer that the parties had agreed that the arbitrator had jurisdiction to resolve the issues that were in dispute: see for example **Westminster Chemicals & Produce Ltd v Eichholz & Loeser** [1954] 1 Lloyd's Rep 99 and **Almare Societa di Navigazione SpA v Derby & Co Ltd ("The Almare Prima")** [1989] 2 Lloyd's Rep 376.

The 1996 Act

14. As I have stated, some of the provisions of the 1996 Act were designed to prevent the process of the arbitration being delayed pending resolution of issues of jurisdiction by the court. The following provisions are relevant to this appeal:

"Section 1.

The provisions of this Part are founded on the following principles, and shall be construed accordingly-

(a) the object of arbitration is to obtain the fair resolution of disputes

Section 4:

"(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the 'non-mandatory provisions') allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement."

15. The sections which follow, save section 30, are all mandatory provisions.

Section 30:

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

31. (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may-

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

32. (1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless-

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied-

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the court."

Section 67:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73)."

Section 73:

"(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

The facts

16. This appeal turns largely on the implications of the conduct of the parties in the light of the provisions which I have just read. Accordingly, it is necessary to set out the facts in detail. Those facts have been carefully stated by Aikens J in his judgment and I shall gratefully incorporate them at this stage with some minor adaption:

The Parties to the Arbitrations and the Proceedings

17. L G Caltex was known in 1995 as Hoyu Energy Co Limited. It was concerned with projects for buying and selling liquid petroleum gas. The appellant, Conti (formerly Continental Grain Company), was, in 1995, the disponent owner of the LPG vessel "Al Berry".

18. The two Respondents are separate legal entities created under the laws of the Peoples' Republic of China. The relationship between them was one of many issues in the two arbitrations.

The alleged contracts

19. In 1995 negotiations took place in China between the Appellants, the Respondents and other companies, to promote a project to import and market LPG in southern China. As a result of these negotiations, on 6 September 1995 a "Memorandum of Understanding" was signed between LG Caltex and other companies. The Appellants say that the Respondents were signatories to that Memorandum. The Memorandum envisaged that an LPG terminal would be built at Maoming in Southern China. But whilst this was being done storage facilities for the imported LPG would be provided by ocean vessels. The LPG would then be transferred to coastal tankers. The Memorandum provided that LG Caltex would negotiate purchase contracts for 40,000 MT of LPG per month for carriage to and delivery at Maoming. LG Caltex was to be responsible for the carriage. LG Caltex was to pay for the purchases but was to be reimbursed by other parties to the Memorandum.

20. These provisions in the Memorandum gave rise to the two alleged contracts which were the subject of the two arbitrations before Mr Harris.

(1)The first alleged contract was a purported charterparty dated 17 October 1995, but allegedly entered into on 18 October 1995. By this charter Conti chartered the LPG vessel "Al Berry" to "China Petroleum Technology and Development Corporation, a subsidiary of China National Petroleum Corporation of Beijing", as charterers. The charter provided that the vessel was to act as a floating storage off Shuidong, Guadong province. The allegation of the Appellants was that this charter bound CPTDC and also CNPC as the principals of CPTDC.

(2)The second alleged contract was a purported Supply Contract dated 18 October 1995. This was between LG Caltex (called Hoyu Energy Co Ltd in the documents) as sellers of LPG and Asia Pacific Petrochemicals Co Ltd as buyers. The document envisaged the supply of a minimum of 40,000 MT of LPG per month for a 12 month period between October 1995 to September 1996, for delivery to one floating storage vessel off Suidong. Under this document CPTDC was to provide certain guarantee letters for each shipment of LPG. In the arbitrations the Appellants alleged that this contract bound both

CPTDC and CNPC as the principals of CPTDC and both were responsible for certain obligations under the contract.

21. Both these "contracts" contained a clause providing for English law. The "Supply Contract" provided for disputes to be settled by arbitration in London. The "charterparty" provided for disputes to be settled by arbitration in London if either party should elect it in place of the English Courts.

The History of the Arbitrations

22. On 26 September 1997 Holman Fenwick and Willan ("HFW"), solicitors for the Appellants, wrote to both Respondents asking them to concur in the appointment of an arbitrator to deal with disputes that HFW said had arisen under the "charterparty". Mr Harris and two other potential arbitrators were suggested. On the same date HFW also wrote to the two Respondents giving notice that there were disputes under the "Supply Agreement" and also seeking their concurrence in the appointment of a single arbitrator. The same three names were put forward. Linklaters initially responded on behalf of CPTDC only in relation to the "charterparty", but responded on behalf of both Respondents in relation to the "supply agreement". However, after some correspondence, by 28 November 1997 Linklaters had agreed, on behalf of both Respondents, to the appointment of Mr Harris as the sole arbitrator in relation to both the "charterparty" and the "supply contract" disputes. In each case this agreement was stated to be "without prejudice to our clients' rights as to jurisdiction which we reserve".

23. Mr Harris asked the two sides to give him "thumbnail sketches" of the disputes between them. HFW did so on behalf of the Appellants in a letter dated 20 November 1997. They indicated that it was the Appellants' case that CNPC were parties to both contracts, even though CNPC was not named in either of them. HFW asserted that CNPC were the principals of CPTDC. HFW indicated that "the precise relationships between [the two companies] may be issues in dispute."

24. Linklaters set out the Respondents' summary in a letter dated 28 November 1997. They indicated that CPTDC would dispute liability under the "charterparty", saying that the person who signed for CPTDC (Mr Ma) was drunk at the time and was induced to sign by representatives of LG Caltex. Linklaters' letter also denied that CPTDC was a party to any "Supply Contract" with Conti. Linklaters said that CNPC denied it was party to either of the two "contracts". They said that CNPC was not the principal of CPTDC.

25. On 8 December 1997 Linklaters paid the Respondents' share of Mr Harris' appointment fee. In a covering letter (not copied to HFW), Linklaters said that "this is without prejudice to CNPC's position regarding any challenge to jurisdiction". There was no mention of CPTDC's position.

26. On 6 March 1998 the Appellants served their Claim Submissions in each of the arbitrations. They submitted that both CNPC and CPTDC were parties to and bound by the alleged contracts.

27. In March the parties responded to questions that Mr Harris had raised in December 1997 about the relationship between the two arbitrations proceeding before him and a further ICC arbitration concerning other alleged agreements between the parties and others as well. HFW said, in a letter dated 26 March 1998, that jurisdictional challenges had been made in the ICC arbitration, but "no such challenge has yet been indicated in the two arbitrations before you". This was not strictly true as Linklaters had stated throughout that CNPC contended it was not a party to either contract; and in the "thumbnail sketch" Linklaters had indicated that CPTDC would submit that it was not a party to the "charterparty" because its signatory did not have authority to bind CPTDC as he was drunk at the time and had been induced to sign by representatives of LG Caltex.

28. In Linklaters' response they reiterated the reservation of CNPC. They also stated: "with respect to the two ad hoc arbitrations before you, we have indicated that our clients are willing for them to proceed and be heard concurrently".

In his judgment Aikens J emphasised the words "ad hoc".

29. On 15 May 1998 the Respondents served their Defence submissions in relation to both the "Supply Contract" and the "charterparty". In each of those submissions it is stated in paragraphs 1.1 and 1.2 that neither Respondent was a party to either "contract". Paragraph 1.2 of each submission denies that there is (in either case) a valid agreement to arbitrate.

30. In a letter to Mr Harris dated 15 May 1998 which accompanied the Defence Submissions, Linklaters invited Mr Harris to address "jurisdictional matters by way of a preliminary issue hearing". HFW responded to this suggestion in a long letter dated 9 June 1998. They said that if the jurisdictional issues were to be properly investigated, then it would entail a detailed examination of the facts concerning the original agreement of the parties (as alleged by the Appellants); the part played by the representative of CPTDC in this; the parties' subsequent conduct and the relationship between CPTDC and CNPC. HFW submitted that the jurisdictional issues were therefore not suitable for preliminary issues. They suggested that "the questions of jurisdiction are dealt with by the Tribunal in its award on the merits of each case: cf s 31(4) of the Arbitration Act 1996".

31. Linklaters replied to this on 18 June 1998. They recognised that the issue of whether CPTDC had entered into a "valid agreement to arbitrate" in relation to each "contract" was one that involved "exploration of facts which would duplicate evidence at a hearing on the merits of the claim". So that suggestion was not pursued. But the point on whether CNPC was bound by the contracts was still urged. However Mr Harris ruled that there should be no preliminary issues in his letter of 22 June 1998.

32. The parties therefore continued their preparations for full hearings in both arbitrations. On 29 October 1998 Linklaters' retainer on behalf of the Respondents was terminated. In a letter dated 29 October 1998 to Mr Harris (copied to HFW), Mr Wang Jiajie, counsel for CPTDC and CNPC, stated that CPTDC's view was that the arbitrator had no jurisdiction to decide the issue of whether the "charterparty" bound CPTDC. He also stated that because CNPC had not signed either "contract" then "there is not any arbitration clause between CNPC and any parties".

33. Zaiwalla & Co ("Zaiwalla") were instructed by the Respondents on 2 November 1998. They expressed concern over the issue of whether Mr Harris was properly able to continue as the sole arbitrator in both cases. Then on 9 November 1998 Zaiwalla wrote to Mr Harris (with a copy to HFW) stating that the Respondents were withdrawing their consent to him acting as a Sole Arbitrator. The reason given was "[Mr Harris'] failure to disclose that [he] did not possess any legal qualifications ...."

34. On 25 November 1998 the Respondents applied to the court for a declaration that the appointment of Mr Harris was void, because it had been vitiated by a mistake as to his qualifications. Mance J heard the applications on 1 December and gave judgment dismissing them on 4 December 1998.

35. Zaiwalla wrote to Mr Harris on 4 December, suggesting that he should still resign as the applications had put him in an embarrassing position. In the same letter Zaiwalla again raised the argument that CPTDC was not a party to the "charterparty contract", so that the first issue in that case was whether there was "ever a valid London Arbitration Clause". In a fax dated 7 December 1998 from Beijing, Zaiwalla also suggested that the issue of whether there were any valid agreements between the parties should be taken as a preliminary point in Court under section 32 of the Act.

36. HFW's response the same day was that these points had already been aired and the arbitrator had declined to order any preliminary issues. Their letter continued: *"By asking the arbitrator to determine the preliminary questions, your clients indicated that they were content for these matters to be dealt with subject to any rights of appeal or review under the Arbitration Act 1996, by the arbitrator".*

37. Mr Harris declined to give his consent to the Court hearing a preliminary issue on whether there were binding contracts between the parties. He pointed out that the hearings before him were due to take place in 5 weeks time.

38. Zaiwalla replied to Mr Harris on 8 December 1998, reporting that their clients had instructed them to take part in the arbitration hearings before him, but "under reserve and without prejudice to all their contentions in respect of which they expressly reserve their position". That fax was copied to HFW. In a further fax to HFW on the same date, Zaiwalla reiterated that they would participate in the arbitrations before Mr Harris "under reserve". Zaiwalla made a suggestion, clearly intended to be 'without prejudice', that if the tribunal were expanded, or a substitute for Mr Harris were found, then their reserves would be dropped. HFW rejected this suggestion. Thereafter all letters from Zaiwalla were marked "under reserve".

39. The hearings before Mr Harris started on 15 March 1999. Mr Mark Strachan QC, who appeared for the Respondents, stated at the very start of the hearing that the Respondents appeared "under reserve". He

continued: *"The Respondents say that they were not parties to either of the two agreements which are now being arbitrated for the reasons which are set out in detail in the defence submissions and I do not propose therefore to elaborate them but simply to state our position that we are here under reserve for those reasons."*

The hearings before Mr Harris took 15 days, on various dates between 15 March and 29 April. Mr Harris produced his two awards and detailed Reasons (running to 41 pages and 111 paragraphs) on 24 May 1999.

40. This concludes my adoption of the facts set out in the judgment below.

The Awards

41. Each award was headed "FINAL AWARD" and included the following recital: *"....the parties agreed that I, the undersigned Bruce Harris of 104 Ledbury Road, London W11 2AH should be appointed sole arbitrator. The agreement of CNPC and CPTDC was given without prejudice to their right to contend that I had no jurisdiction, since they argued that they had not signed and/or were not bound by the said contract. The arbitration was throughout conducted on the basis that CNPC and CPTDC's position as to my jurisdiction was reserved."*

The award in relation to the supply contract said:

"I award AND DECLARE that CNPC and CPTDC were not bound by the alleged contract and are accordingly under no liability to LG Caltex in respect of it or the claims advanced under it."

The award in relation to the charterparty said:

"I award AND DECLARE that CNPC and CPTDC were not bound by the alleged charter and are accordingly under no liability to Conti in respect of it or the claims advanced under it."

The joint reasons to the awards recorded: *"The respondents in both arbitrations appeared under reservations as to my jurisdiction in two respects. In the first place, they contended that they were not parties to the relevant contracts and thus not parties to any arbitration agreements."*

The reasons ended: *"For the reasons given in paragraphs 1 to 69 above, I declare that the respondents were not bound by the contracts relied upon in these references and are thus under no liability to the claimants."*

42. These lengthy reasons dealt and dealt exclusively with whether the respondents were party to the respective contracts.

The Four Preliminary Issues

43. The four preliminary issues that Aikens J directed should be tried before him were as follows:

"(1) Whether the tribunal's awards are awards as to its 'substantive jurisdiction' within the meaning of section 67(1)(a) of the Act;

(2) whether the Applicants, although contending that the tribunal had substantive jurisdiction on the basis that the parties had entered into contracts incorporating valid arbitration agreements (namely the Supply Contract and the Charterparty), may apply for an order pursuant to section 67(1(b) of the Act, declaring that the awards made by the tribunal are of no effect;

(3) whether the parties concluded an ad hoc arbitration agreement which was binding on all parties and which conferred jurisdiction on the tribunal to determine whether the Respondents were parties to the Supply Contract and Charterparty, and if so whether the Applicants are precluded from bringing any challenge under section 67 for that reason;

(4) whether in relation to the section 67 challenge, the Applicants have in any event lost the right to object pursuant to section 73 of the Act."

The Significance of the Third Issue

44. Aikens J took the view that if the parties had concluded what he described as an ad hoc agreement to arbitrate the issue of whether there were binding contracts, that agreement rendered Mr Harris' decision on that point one which fell within his jurisdiction under the ad hoc agreement. In that event, all questions of whether Mr Harris had jurisdiction would fall away and his award on the point would be binding and not susceptible to challenge under section 67. Thus, the question of whether or not an ad hoc agreement was concluded was of critical importance. The nature of the agreement that Aikens J intended to describe by the phrase "ad hoc" is apparent from the following paragraph of his judgment:

"48. The way to avoid any challenge to the jurisdiction of an arbitrator to make a binding award on the initial existence of a contract under the old law was to enter into an ad hoc agreement for him to do so. That agreement conferred

*authority to decide the issue and the result bound the parties, subject to any statutory rights to appeal on a point of law or otherwise to challenge the award. An ad hoc submission to an arbitrator was simply an agreement between two parties that an arbitrator would determine an existing dispute between them that was not already the subject of an existing arbitration agreement. An ad hoc agreement was often made without any formalities. It might be concluded from an exchange of letters or faxes or even be construed from the conduct of the parties in the course of an existing reference to an arbitration tribunal: see eg... **The Almare Prima**' .... In considering whether an ad hoc agreement was made, the court had to decide what was the objective intention of the parties, just as it does in relation to any other type of contract."*

45. The type of ad hoc agreement described by Aikens J is one whereby the parties confer jurisdiction on the arbitrator to resolve the substantive dispute between them. In the present case, the respondents contended that they had concluded an ad hoc agreement in relation to one issue only, albeit the central issue, namely, whether the respondents were party to the two contracts on which the appellants founded their claims for damages. An answer to that question, favourable to the appellants in respect of either claim, would not of itself entitle them to any relief. It would, however, determine the substantive issue in the substantive dispute in their favour. It would also establish that Mr Harris had jurisdiction to entertain their dispute for damages. Thus the ad hoc agreement alleged in each case was an agreement purporting to confer on Mr Harris jurisdiction to determine whether he had substantive jurisdiction.

46. Mr Angus Glennie QC, for the appellants, argued before Aikens J, and again before us, that:
(1) It was unlikely that the parties would conclude such an agreement when section 30 of the 1996 Act already recognised Mr Harris' competence to rule on his own jurisdiction.
(2) Such an agreement could not deprive the parties of their right to challenge before the court any finding Mr Harris made as to his jurisdiction. Section 67 of the 1996 Act was a mandatory provision which could not be excluded by agreement.

47. Aikens J's response to this submission appears from the following passage from the following paragraphs of his judgment:
"54. If there is a dispute about the jurisdiction of the arbitrator to decide an issue, then the arbitrator can rule upon the point (sections 30 and 31(4)(a)), or the court can do so as a preliminary issue in certain circumstances (section 32). The arbitrator's decision can then be challenged (section 67(1)(a), but subject to section 73). That regime may mean that parties would be less concerned to ensure that the arbitrator has jurisdiction at the outset, because he can rule on it and the matter can easily be reviewed by the Court. But the Act does not stop the parties from making an ad hoc submission on a particular issue (such as whether a contract was concluded) if it appears that the jurisdiction of the arbitrator to decide a particular point is in issue and the parties wish to ensure that his jurisdiction cannot be impugned. There is no prohibition in the Act. The fact that both sections 31 and 67 of the Act are 'mandatory' provisions, so cannot be excluded by agreement between the parties, does not prevent parties from enlarging the existing jurisdiction of an arbitrator by an ad hoc submission. The only issue in each case is whether, objectively construed, the communications of the parties have resulted in an ad hoc submission.
55. Therefore I have concluded that, under the regime of the Act, it is perfectly possible for parties to make an ad hoc submission to an arbitrator on an issue that is not covered by an existing arbitration agreement. In this case that means that an ad hoc submission would be found (if at all) in the relevant correspondence between the solicitors prior to the hearings before Mr Harris."

48. In this passage Aikens J did not focus on the point that the alleged ad hoc agreement was one under which Mr Harris was to rule on his own jurisdiction; nor did he explain why section 67(1)(a) had no application to a ruling on jurisdiction made pursuant to an ad hoc agreement. He simply spoke in general terms of enlarging the existing jurisdiction of the arbitrator by an ad hoc submission.

49. It would be strange if section 67(1)(a) had the result that parties to a dispute could not by agreement confer on an arbitrator jurisdiction to make a final and binding award on the issue of whether they had concluded an earlier arbitration agreement, conferring on the arbitrator jurisdiction to adjudicate on the substantive dispute between them. Such a result would seem in conflict with the principle set out in section 1(b) of the 1996 Act. If the parties had appointed someone other than Mr Harris to resolve the issue of whether the respondents were party to the contracts, there would be no basis for challenging his ruling. Why should

the parties not be entitled to confer on Mr Harris the power to make a ruling that would be equally definitive?

50. The answer to the conundrum is, I suggest, as follows. Section 67(1)(a) entitles a party to challenge an award of an arbitrator as to his substantive jurisdiction. However, if it is shown that the award is made under a separate agreement that he should rule on that matter, the challenge will fail. Thus, in the instant case, there has been no bar to the appellants' right to challenge in court Mr Harris' awards. Before Aikens J that challenge has failed because of the finding of the ad hoc agreement.

Issue 3

Was there an ad hoc submission on the issue of whether the parties were bound by the two contracts?

51. Aikens J thought it logical to address this issue first. I agree and shall follow his example. It is not possible to analyse the judge's reasoning on this issue without first setting it out in full. It was as follows:

"63. The position up to the time the Respondents' Defence Submissions were served in May 1998 is as follows:

(1)The Applicants asserted (in correspondence and in their Claim Submissions) that CPTDC and CNPC were parties to two contracts with the Applicants. They also asserted that those two contracts contained arbitration clauses whose scope was wide enough to cover the claims on the contracts that the Applicants wished to make against the Respondents. The Applicants gave notice of arbitration in relation to disputes under both contracts in their letters of 26 September 1997. At all times after that HFW made it clear that they wished the arbitrator to decide the issue of which Respondent was bound by the two contracts. The Applicants therefore made a kind of 'offer' (in writing) to conclude an ad hoc submission to Mr Harris of this issue.

(2)On behalf of the Respondents Linklaters agreed to the appointment of Mr Harris in relation to disputes under both contracts, but expressly reserved the position of both the Respondents as to the jurisdiction of the arbitrator in their letters on 21 October and 10 November 1997.

(3)The Respondents' 'thumbnail sketch' letter of 28 November 1997 clearly stated their case that CNPC was not a party to either contract and that CPTDC was not a party to the charterparty contract. The paragraphs dealing with the Supply Contract are more equivocal but they certainly do not admit that CPTDC was a party to such a contract.

(4)That position was maintained until Linklaters received the Claim Submissions on 9 March 1998. Linklaters then wrote their letter of 19 March 1998 to HFW. This asked for six months (until 9 September 1998) in which to prepare the Respondents' defences. The letter states that it is 'without prejudice to CNPC's rights to challenge the jurisdiction of the tribunal which we fully reserve'. Nothing is stated about CPTDC's position.

(5)HFW responded in their letter of 26 March, stating that in the ICC arbitration there had been a challenge by CNPC and CPTDC to the validity of the underlying agreements 'and therefore the jurisdiction of the tribunal'. HFW also stated that in the ICC arbitration CNPC had said it was not a party to any agreement. But, HFW continued: 'no such challenge has yet been indicated in the two arbitrations before you'. As I have already pointed out, that is not the case, strictly speaking.... However the letter does go on to acknowledge that because the defences have not been pleaded the issues between the parties had not yet crystallised.

(6)In their response on 30 March, Linklaters reiterated the reservation of CNPC to the jurisdiction of the tribunal, fully reserving its position. later on the same page Linklaters make the contradictory remark that 'with respect to the two ad hoc arbitrations before you, we have indicated that our clients are willing for them to proceed and be heard concurrently'.

65. Mr Siberry submitted that by the time HFW received Linklaters' letter of 30 March 1998 there was an ad hoc submission. I cannot accept this contention. It seems clear that the parties had not fully analysed the issue of the jurisdiction of Mr Harris at this stage. Linklaters had clearly reserved the rights of CNPC to challenge the jurisdiction of Mr Harris and had denied that CNPC was party to either contract. As to CPTDC's position, Linklaters had made it clear in previous correspondence that CPTDC's case was that it was not bound by the charterparty. That stance was not withdrawn in the letter of 30 March. Indeed Linklaters make the point that they needed more time to see what the issues were. That leaves the position of CPTDC on the 'Supply Contract'. There again Linklaters said that they needed more time to find out what the issues were.

66. Linklaters did not have to make any formal objection to the substantive jurisdiction of Mr Harris until (at the latest) they took the first step in the proceedings to contest the merits of whether the Respondents were party to the two 'contracts'. That point would be when the Defence Submissions were served. Therefore it is unlikely that it

would be possible to construe from the correspondence an agreement that the issue of whether the Respondents were party to the two 'contracts' had been submitted ad hoc to Mr Harris. In my view the court cannot readily infer that the parties have agreed to make an ad hoc submission to an arbitrator by virtue of their correspondence and conduct if the issue which would be the subject of the ad hoc submission has not been squarely identified by the parties. That issue did not fully emerge until the Defence Submissions of the Respondents, served on 15 May.

67. What was the position after the Defence Submissions were served?

(1)At the same time as the Defence Submissions were served Linklaters sent a letter of 15 May inviting Mr Harris to address 'jurisdictional matters by way of a preliminary issue hearing'. The letter focused particularly on the position of CNPC, although in the pleading the jurisdiction point is made on behalf of both Respondents. In my view the letter and the pleadings together indicated that Linklaters were prepared that Mr Harris should have jurisdiction to decide the issue of whether the Respondents were party to the two contracts.

(2)HFW resisted the idea of preliminary issues, but in their letter of 9 June 1998 suggested that the questions of jurisdiction be dealt with in Mr Harris' awards on the merits. That indicates that HFW remained content that Mr Harris should have jurisdiction to decide the 'central issue' of whether the Respondents were bound by the two contracts.

(3)Linklaters accepted HFW's suggestion in relation to CPTDC in their response on 18 June 1998. But they pursued the idea of a preliminary issue on whether CPTDC, as agent, could bind CNPC, as principal, to the two contracts. Mr Harris ruled against that idea in his fax of 22 June 1998.

(4)Thereafter, in the period 23 June to 27 July 1998, there was correspondence between Linklaters and HFW on the procedural steps and timetable that would lead to the two arbitration hearings before Mr Harris. Linklaters did not make any further reservations as to the jurisdiction of Mr Harris and neither did HFW.

(5)On 23 July 1998 there was a directions hearing before Mr Harris. On 27 July 1998 he sent a fax to the two solicitors to confirm the directions that had been agreed or determined at the hearing on 23 July 1998. The directions aimed at hearings which it was proposed would take place in January 1999.

68. It seems to me that, by the time of Mr Harris' fax of 27 July 1998 at the latest, the parties had, through their solicitors, made an ad hoc submission to Mr Harris of the issue of whether the Respondents were parties to and bound by the two 'contracts'. That submission was an arbitration agreement within section 5(2)(b) of the Act, because it was an agreement made 'by exchange of communications in writing' between Linklaters, HFW and Mr Harris. Viewed objectively the correspondence indicates that the parties had decided and agreed that Mr Harris should have jurisdiction to determine the issue of whether the Respondents were party to the two 'contracts'.

69. Thereafter until Linklaters' retainer was terminated, the parties continued with preparations for the full hearing before Mr Harris of the 'central issue' of whether the Respondents were party to and bound by the contracts. No question of any reservations concerning Mr Harris' jurisdiction was raised by either side.

70. After Zaiwalla were instructed there were challenges to Mr Harris' position as arbitrator. From early December 1998 Zaiwalla stated that the Respondents would only participate in the arbitrations before Mr Harris 'under reserve'.

71. But if, as I have concluded, the parties had already conferred jurisdiction on Mr Harris to consider the central question of whether the Respondents were party to the two 'contracts', then the Respondents could not thereafter unilaterally withdraw the authority of Mr Harris to determine that issue."

52. I agree with the judge that the parties had not concluded an ad hoc agreement prior to the service of the defence submissions on 15 May. But there are one or two aspects of his analysis of the negotiations prior to that date that indicate, I believe, that he was going off track.

53. In paragraph 63(1) of his judgment, the judge described the fact that HFW at all times: *".... made it clear that they wished the arbitrator to decide the issue of which the Respondent was bound by the two contracts...."* as the making of "a kind of 'offer' in writing" to conclude an ad hoc submission to Mr Harris of this issue. I do not agree. HFW's stance did no more than reflect the fact that HFW wished Mr Harris to deal with the jurisdiction issue in accordance with section 30 of the 1996 Act. That is not to say that HFW might not have been more than ready to conclude an ad hoc agreement had they believed this to be on the cards. But had they intended to suggest such a course, they would surely have done so in terms which made the nature of their proposal clear.

54. In paragraph 63(6) the judge described as "contradictory" to Linklaters' challenge to Mr Harris' jurisdiction their remark "with respect to the two ad hoc arbitrations before you, we have indicated that our clients are willing for them to proceed and be heard concurrently". The judge believed that this remark was contradictory because of the significance he attached to the words "ad hoc".

55. The authors of the 21st edition of Russell on Arbitration make the following comment on the meaning of these words at 2-024: *"The expression 'ad hoc', as in 'ad hoc arbitration' or 'ad hoc submission' is used in two quite different senses: an agreement to refer an existing dispute; and/or an agreement to refer either future or existing disputes to arbitration without an arbitration institution being specified to supervise the proceedings, or at least to supply the procedural rules for the arbitration. This second sense is more common in international arbitrations."*

56. The judge clearly thought that Linklaters intended the words to have the former meaning; ie that they were contemplating separate submissions to Mr Harris in relation to the disputes about jurisdiction. It is clear from the second reference that Linklaters made in their letter to the ad hoc proceedings that they were giving the phrase its latter meaning. I quote: *"...with respect to the question raised in your fax of 1 December 1997 regarding the concurrent ICC and ad hoc proceedings...."*

57. So it seems to me that the judge approached the negotiations after 15 May on the false premise that both parties were toying with the possibility of a special agreement under which Mr Harris would be given jurisdiction to determine conclusively the issue of his own jurisdiction.

58. The judge concluded that the terms of the defence submissions, coupled with Linklaters' letter of 15 May, indicated that Linklaters were prepared to agree that Mr Harris should have jurisdiction to decide the issue of whether the respondents were party to the two contracts. I do not agree with this conclusion.

59. If Linklaters had been content that Mr Harris should rule definitively on the question of whether the respondents were party to the contracts, there would have been no point in their preserving any challenge to his jurisdiction at all. They could simply have agreed "ad hoc" that Mr Harris should have jurisdiction to determine all issues between the parties. In the event, however, the defence submissions challenged specifically both the contracts and the agreements to arbitrate. Linklaters' invitation to Mr Harris in their letter of 15 May to address jurisdictional matters by way of preliminary hearing, was at odds with the suggestion that they were prepared to agree that Mr Harris should have jurisdiction to determine the central issue between the parties. Linklaters' stance from their letter of 28 November 1987, agreeing to the appointment of Mr Harris down to the termination of their retainer on 29 October 1998, was entirely consistent with the procedure that would ordinarily follow from the provisions of the 1996 Act. Absent agreement to the contrary, Mr Harris was bound to rule on his own jurisdiction pursuant to section 30. But it would be open to either party to challenge his ruling pursuant to section 67. Linklaters reserved their right to make such a challenge and, up to 18 June 1998, made it quite plain that jurisdiction was a live issue.

60. Mr Michael Collins QC, for the respondents, referred to a suggestion by Linklaters in their 18 June letter, that the issue of whether CNPC was a party to the contracts could be determined as a preliminary issue and thus conclude major issues on both arbitrations "once and for all". He suggested that that indicated that Linklaters were expecting Mr Harris' ruling on the jurisdiction issue to be determinative.

61. While I follow the argument, I do not consider that the use of this phrase demonstrates that Linklaters were proposing an ad hoc agreement which would result in Mr Harris making a final determination of the central issue. Linklaters' letter of 18 June repeatedly made the point that the respondents were maintaining their challenge to Mr Harris' jurisdiction. Their attitude is not consistent with the suggestion that the respondents were prepared to agree to Mr Harris making a binding ruling on the central issue.

62. Mr Collins did not suggest that the correspondence that followed the 18 June letter up to the time that Linklaters' retainer was withdrawn, contained anything of relevance. On instructions he submitted, however, that significance could be attached to correspondence from Zaiwalla, once they had replaced Linklaters. I reject that suggestion. The issue is whether or not an ad hoc agreement had been concluded before Zaiwalla came on the scene. Nothing written by Zaiwalla bears on that issue.

63. So far as HFW were concerned, Aikens J held that their letter of 9 June 1998 suggesting that Mr Harris rule on jurisdiction in an award dealing with the merits, indicated that, "....HFW remained content that Mr Harris should have jurisdiction to decide the 'central issue' of whether the respondents were bound by the

two contracts". I do not find that HFW's letter contained any suggestion of an ad hoc agreement that Mr Harris should make a binding ruling on jurisdiction. On the contrary, HFW referred expressly to the provisions of section 31(4) of the 1996 Act when discussing the manner in which Mr Harris should deal with the jurisdiction issue.

64. While it is not strictly relevant to the objective determination of what the parties agreed, it is quite plain that it never occurred to HFW that they had concluded an ad hoc agreement with Linklaters that Mr Harris should have jurisdiction to decide the jurisdiction issue. Thus, when Zaiwalla sought at a late stage to get the jurisdiction issue referred to the court pursuant to section 32 of the 1996 Act, HFW wrote on 7 December 1998: *"In a letter dated 18 June 1998 Linklaters raised a number of jurisdictional matters which they thought appropriate for the termination as preliminary issues by the Arbitrator. That relating to CPTDC was: 'Was CPTDC a party to a valid Agreement to Arbitrate?'*

The other preliminary questions identified by Linklaters in that letter is not relevant to the matters you have now raised.

The question was considered by Mr Harris and by fax message dated 22 June he concluded that there were insufficient grounds for a hearing of any preliminary issues. By asking the Arbitrator to determine the preliminary questions, your clients indicated that they were content for these matters to be decided, subject to any rights of appeal or review under the Arbitration Act 1996, by the Arbitrator. The Arbitrator determined that the issues should be heard as part of the main hearing. Your clients appeared until now to have accepted this. Pleadings and preparation have proceeded on that basis."

65. Nor is there any hint in Mr Harris' awards or reasons that he derived any part of his jurisdiction from an ad hoc agreement concluded between the solicitors after the statement of defence had been served, or indeed at any time. He recorded in each award the respondents' contention that he had no jurisdiction, adding that the arbitration was, throughout, conducted on the basis that the respondents' position as to his jurisdiction was reserved.

66. Had Mr Harris understood that the parties had concluded an ad hoc agreement enlarging the scope of his jurisdiction, I have no doubt that he would have referred to this in his awards. This conclusion is reinforced by a letter dated 30 October 1998, from Mr Harris to the respondents, which Zaiwalla placed before us after the hearing. In this, Mr Harris wrote: *"Under the 1996 Arbitration Act, which applies to this case, I have power to rule on my own jurisdiction, and the parties have agreed that I should do so."*

67. This demonstrates Mr Harris' understanding that he was proceeding, with the agreement of the parties, to exercise the power conferred by section 30.

68. Sometimes parties proceed to conduct an arbitration without appreciating that the dispute falls outside the arbitration clause under which the arbitrator has been appointed. In such circumstances, the courts have in the past held that their conduct evidenced the conclusion of an ad hoc agreement. That is not this case. The parties have been represented by experienced commercial solicitors conversant with the provisions of the 1996 Act. The issue of jurisdiction has been appreciated from the outset. Had the solicitors wished to conclude an ad hoc agreement to address that issue, they would have done so expressly. In the event, their conduct accorded with that which one would expect of solicitors paying due regard to the provisions of the 1996 Act. Aikens J erred in concluding that this conduct gave rise to an ad hoc agreement.

Issue 1

Are Mr Harris' awards ones as to his "substantive jurisdiction" within section 67(1)(a)?

69. I am deviating from the course taken by the judge in considering this question next. The issue here is whether Mr Harris' awards were awards as to his substantive jurisdiction to which section 67(1)(a) applies, or awards on the merits to which section 67(1)(b) applies. Aikens J held that they were the latter. His reasons were principally those set out in the following passage from his judgment:

"78. In my view they are not such awards. My reasons, briefly, are as follows:

(1)Section 67(1) draws a distinction between an award as to the substantive jurisdiction of a tribunal and an award on the merits. This reflects the distinction made in section 31(4) of the Act. That section provides that where a party has taken an objection to the jurisdiction of an arbitral tribunal, then the tribunal can deal with the matter in one of

two ways. Either it rules on the matter in an award on jurisdiction or it deals with the jurisdiction challenge in its award on the merits.

(2)Therefore the Act contemplates that an award of a tribunal 'as to its substantive jurisdiction' will specifically address that point and will not go on to deal with the merits of the underlying dispute between the parties. If the award goes on to deal with the merits, then it ceases to be an award as to the tribunal's substantive jurisdiction for the purposes of sections 31 and 67; it becomes an award on the merits instead.

(3)Whether an award is one as to the substantive jurisdiction of the tribunal must depend on the correct construction of the wording of the award itself. If the award contains reasons then those should also be considered in order to decide whether the award itself is 'as to [the] substantive jurisdiction' of the tribunal.

(4)In this case the recitals of the two awards note that the Respondents contended that the arbitrator did not have jurisdiction to determine the issue of whether they were bound by the two 'contracts'. But in the body of the two awards there is no reference to any jurisdictional issue. Mr Harris' awards both state that he awards and declares that the Respondents were not bound by the alleged contracts and so are under no liability to LG Caltex in respect of the contracts or claims made under them. The awards therefore deal with 'the merits'. To my mind that simply precludes them from being awards as to the substantive jurisdiction of Mr Harris."

Here again I differ from the conclusion of the judge. My reasons are as follows.

70. Section 31(4) provides that a tribunal, when faced with an objection to his jurisdiction, may, (a) rule on the matter in an award as to jurisdiction, or, (b) deal with the objection in its award on the merits. The latter option is, however, only one that will be open to the tribunal where it concludes that it has jurisdiction. In that event it will be open to the tribunal to exercise that jurisdiction and deal with the merits. Where, however, the tribunal rules that it has no jurisdiction, it is axiomatic that it cannot then make an award on the merits. The position is correctly stated by Mr Veeder QC in the International Handbook on Commercial Arbitration at page 50: *"If the tribunal rules that it has jurisdiction, it will proceed to resolve the merits of the parties' dispute. If the tribunal rules that it has no jurisdiction, it cannot of course proceed to an award on the merits."*

71. This position is reflected by the provisions of section 67(1). Where an arbitrator makes an award holding that he has no jurisdiction, that award will be open to challenge under section 67(1)(a). Section 67(1)(b) can have no application to an award in which the arbitrator holds that he has no substantive jurisdiction, for it provides for a challenge on the ground that the tribunal did not have substantive jurisdiction. Section 67(1)(b) can only apply to the situation where the arbitrator holds that he has substantive jurisdiction and proceeds to make an award on the merits. The nature of Mr Harris' awards must be determined in the light of the above considerations.

72. Mr Harris' awards have, as Aikens J found, the form of awards on the merits. This is because they declare in each case, after the finding that the respondents are not bound by the alleged contract, that they are accordingly under no liability. Implicitly, each award determined that the respondents were not party to any arbitration agreement and that Mr Harris had no substantive jurisdiction.

73. The correct form of awards ruling on jurisdiction should have ended, "are accordingly not party to any arbitration agreement so that I have no substantive jurisdiction in this matter", or words to like effect. Such awards would have carried the implication that the respondents were under no liability to the claimants.

74. The issue of jurisdiction was before Mr Harris. His correct course was to rule on it pursuant to section 30 of the 1996 Act. He ruled on it implicitly. The entirety of his reasons were relevant to the issue of jurisdiction; they did not address any matter which extended beyond the issue of jurisdiction. Mr Harris' awards purported to make a finding as to liability. He had no jurisdiction to make that finding.

75. In these circumstances, I consider the appropriate course is to treat Mr Harris' awards as awards in relation to his substantive jurisdiction which he was competent to make under section 30 rather than as awards on the merits which he had no jurisdiction to make. That approach has regard to the substance of the awards in that it reflects their legal effect.

76. For these reasons, I hold that the provisions of section 67(1)(a) apply to Mr Harris' awards. It follows that Issue 2 does not arise, and it remains to deal with issue 4.

Issue 4

Have the appellants lost the right to challenge Mr Harris' lack of jurisdiction by virtue of section 73?

77. Aikens J held that the provisions of section 73 did indeed preclude the appellants from challenging Mr Harris' lack of jurisdiction, assuming, contrary to his finding, that there was no ad hoc agreement. The essence of his reasoning is in the following passages of his judgment:

> *"74. (1) Once the Respondents had pleaded in their Defence Submissions that they were not party to or bound by the two contracts and that there were no valid arbitration agreements, then in the absence of any subsequent ad hoc submission to Mr Harris of the issue of whether the Respondents were a party to the two 'contracts', Mr Harris could not have had jurisdiction to determine that issue.*
>
> *(2) If the Applicants had wished to object that Mr Harris had no jurisdiction to decide the issue of whether the Respondents were a party to the two 'contracts' they could have done so at that point. Under section 31(1) of the Act, the Applicants could have objected at any time up to the point at which they took the first step in the proceedings to contest the merits of the matter in relation to which the Applicants challenged (or could have challenged) the tribunal's jurisdiction. In the context of this case that must mean up [to] the point when the Applicants served their Points of Reply, which is when they challenged the merits of the Respondents' submission that were not a party to the two 'contracts'.*
>
> *(3) But the Applicants and HFW did not take the point, either then or at any later stage during the arbitration proceedings before Mr Harris, that he lacked substantive jurisdiction to determine the issue of whether the Respondents were party to the two 'contracts'. This is hardly surprising as the applicants' argument was that the contracts were binding on the Respondents and they contained valid arbitration clauses.*
>
> *(4)But the effect of this lack of protest means that the Applicants must lose their right to assert now that Mr Harris lacked jurisdiction to decide the issue."*

78. It seems to me that this reasoning is founded on a false premise. The premise is that Mr Harris made awards on the merits which the appellants are now seeking to challenge on the grounds of want of jurisdiction. On my analysis the position is much more simple.

79. Mr Harris has ruled that he has no substantive jurisdiction. The appellants seek to challenge that ruling pursuant to section 67(1)(a). In these circumstances section 73 has no application. The appellants are not making any of the objections to which that section applies. For these reasons, I differ from the Judge's conclusion that section 73 is a bar to the relief that the appellants seek.

80. The issue of whether the respondents were party to the two contracts was a central issue in the dispute as to liability. The appellants were urging that Mr Harris had jurisdiction to determine liability. Mr Harris, after a hearing that lasted three weeks, has decided the central issue against them. Because that issue was also the issue that determines jurisdiction, the appellants are now able to reopen it. The judge considered this result unjust. I am not persuaded that it is. Where an issue on which jurisdiction turns is also an issue relevant to liability, each party will be in a position, subject to making any necessary reservations, to reopen that issue before the court if the arbitrator's ruling on jurisdiction goes against them. In this instance it is the appellants who have profited from this situation.

81. For the reasons I have given, I would allow this appeal.

82. **LORD JUSTICE PILL**: I agree.

83. **LORD JUSTICE KEENE**: I also agree.

Order: Appeal allowed with costs to be agreed, failing which submissions to be put in writing. (Question 1, yes; question 2 does not arise; questions 3 and 4, no). Leave to appeal to the House of Lords refused.

MR ANGUS GLENNIE QC with MR LAWRENCE AKKA and MR TOBY LANDAU (Instructed by Messrs Holman Fenwick & Willan, London, EC3N 3A2) appeared on behalf of the Appellant

MR COLLINS QC (Instructed by Messrs Zaiwalla & Co, London, WC2 12Z) appeared on behalf of the Respondent