CA on appeal from Commercial Court (Mr Michael Brindle QC sitting as a Deputy High Court judge) in an arbitration application before Lord Phillips MR; Rix LJ; Scott Baker LJ. 4th March 2003.

Lord Justice Rix: This is the judgment of the court.

1. Mr Ahmed Pharaon is a businessman in Saudi Arabia. On 5 January 1990 he made a contract with Hussmann Craig-Nicol Limited, the predecessor in title of Hussmann (Europe) Limited ("Hussmann", the appellant), to become its sole distributor in Saudi Arabia (the "contract"). At that time and for some time previously Mr Pharaon had traded under the name of "Al Ameen Development and Trade Establishment" (the "Establishment") and it was in that name that Mr Pharaon entered into his contract with Hussmann. That was a registered trading name on the Saudi Arabian commercial register, and it remained on the register until 16 February 1994, when it was deleted. Although his trading name was registered, that did not affect the fact that under Saudi Arabian law the Establishment had no legal personality separate from Mr Pharaon himself. The contract had therefore been made between Hussmann and Mr Pharaon personally.

2. In the meantime on 25 December 1992 Mr Pharaon incorporated a limited liability company in Saudi Arabia called "Al Ameen Development & Trade Co" (the "Company") and transferred the business which he had previously carried on under the name of the Establishment to it. Under Saudi Arabian law, however, that transfer did not operate as an automatic universal succession of the Company to the Establishment's assets and liabilities, and even an assignment of the Establishment's rights under the contract, let alone a novation of the contract's rights and liabilities, could only have taken place with Hussmann's consent, which was never obtained. The contract therefore continued to be one directly between Hussmann and Mr Pharaon.

3. When, however, relations between Hussmann and Mr Pharaon began to deteriorate, a deterioration leading on 23 April 1996 to the service of a notice by Hussmann under the contract for its termination with effect from 31 October 1996, and when on 7 February 1997 Hussmann invoked arbitration under the arbitration agreement contained in the contract, confusion was engendered by reason of Mr Pharaon's reorganisation of his business affairs and the succession of the Company to the business of the Establishment. This appeal is concerned with the consequences of that confusion.

4. Amongst those consequences was an arbitration award dated 11 June 1999 (the "first award") in favour of the Company. However, on 19 April 2000 Thomas J held that the arbitrators had had no jurisdiction to make an award in respect of the Company (the "first judgment"). Further, on 31 July 2000 Thomas J held that it followed that the first award should be set aside and could not be enforced by Mr Pharaon, qua the Establishment, in his own name (the "second judgment"). An order was subsequently drawn up that the first award "is of no effect". The arbitrators were then invited by Mr Pharaon to make a second award, which they did, this time in favour of Mr Pharaon formerly trading as the Establishment, with a publication date of 3 July 2001 (the "second award"). Hussmann returned to court with a new application, this time to declare the second award of no effect, and in a third judgment, handed down on 16 April 2002, Mr Michael Brindle QC, sitting as a deputy high court judge, dismissed Hussmann's application, ruling inter alia that Mr Pharaon had been a respondent to the arbitration all along, and that the arbitrators had not exhausted their jurisdiction by making their first award (the "third judgment"). This appeal is brought by Hussmann against that third judgment.

5. Two issues have therefore arisen, on each of which Mr Brindle himself gave permission to appeal. The first is whether Mr Pharaon is himself a respondent to the arbitration which Hussmann commenced, either alone or in addition to the Company. The second is whether the arbitration tribunal was *functus officio* with the result that it had no jurisdiction to make the second award.

6. With that introduction, it is necessary to set out the background to this appeal in further detail.

Section 67 of the Arbitration Act 1996 (the "Act")

7. Challenges to the substantive jurisdiction of the arbitrators are dealt with in section 67 of the Act, which provides as follows:

> *"(1) A party to arbitral proceedings may (upon notice to the 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) and the right to apply is subject to restrictions in section 70(2) and (3).*
>
> *(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.*
>
> *(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –*
>
> *(a) confirm the award;*
>
> *(b) vary the award, or*
>
> *(c) set aside the award in whole or in part.*
>
> *(4) The leave of the court is required for any appeal from a decision of the court under this section."*

The contract dispute

8. The contract, which was described as a *"Sales & Service Agreement*", appointed the Establishment as the "*General sole and Exclusive Distributor*" in Saudi Arabia for Hussmann's refrigerated display cases and cabinets. By clause 13 Hussmann reserved the right to sell its products directly to supermarkets within the territory which stipulated a direct purchasing policy with it, but such sales were to be discussed with the Distributor and to be subject to a commission in the latter's favour. The contract could be terminated on its anniversary date by either party giving six months' notice in writing. An arbitration clause provided for Saudi Arabian law and for any dispute to be settled in accordance with the arbitration rules of the Euro-Arab Chamber of Commerce.

9. In naming the Establishment ("*Al Ameen Development & Trade Establishment"*) as the Distributor, the contract also referred to its registration number: *"Commercial Registration no. 7415"*.

10. Hussmann sought by invoking arbitration to recover the value of certain invoices for goods supplied under its contract. Subject to a question as to the party properly invoiced for such goods, this claim was not the focus of the arbitration. The arbitrators found that it was to be quantified at $57,428. There was, however, a much larger counterclaim on the part of the respondent to the arbitration which assumed greater importance, not only because it outweighed the claim, but also because it was heavily disputed as to both liability and quantum. The counterclaim was premised on the allegation that Hussmann had been supplying its products to direct purchasers within Saudi Arabia and ought to have been paying a commission of 7.5%.

11. On this appeal, however, the merits of the claim and counterclaim are not in question. Rather, the significant issue for present purposes to arise at the arbitration was as to the identity of the respondent to the reference and thus claimant to the counterclaim: Was it the Establishment (ie Mr Pharaon) or the Company?

The reorganisation of Mr Pharaon's business

12. We have already mentioned that the Company was incorporated on 25 December 1992. On that day Mr Pharaon appears to have entered into a contract with other family members who had become shareholders in the new Company, under which all parties agreed "the transfer of all assets and liabilities" of the Establishment to the Company. However, it was not apparently until 23 August 1993 that this shareholders' agreement was formally witnessed by the Saudi Arabian ministry of commerce, not until 26 October 1993 that the Company was gazetted in the Saudi Arabian "Gazette" as having had transferred to it the business of the Establishment, and not until 14 February 1994 that the ministry of commerce formally approved the transfer. Finally, following the completion of these formalities, the Establishment was deleted from the commercial register on 16 February 1994. We take these dates from the documents before the court and from the findings of Thomas J.

13. Mr Pharaon's evidence before the arbitrators was that he had sent a circular dated 4 April 1994 to all those with whom he did business, including Hussmann, in the following terms: *"We hereby inform that the name "Al-Ameen Establishment" is changed to read as "Al-Ameen Dev. & Trade Co.". A copy of the Gazette paper is enclosed herewith."*

14. The Gazette, which was in Arabic, spoke not of a change of name but, as stated above, of a transfer of business. The circular was under the heading of "Al-Ameen Dev & Trade Co", was signed by Mr Pharaon as "Owner and General manager", and contained at its foot amongst various printed information the words – "Limited Liability Company – Paid up Capital S:R. 500,000".

15. At the arbitration and again before Thomas J Hussmann's position was that it did not know whether it had received the circular, but that in any event it did not know of the transfer of business from the Establishment to the Company. Thomas J in his first judgment found that Hussmann probably received the circular and thus a copy of the Gazette too, but that all correspondence between the parties had been in English; and that as a whole this material did not give Hussmann notice that there had been a change from a sole proprietorship into a limited liability company. He said (*Hussmann (Europe) Ltd v. Al Ameen Development & Trade* Co [2000] 2 Lloyd's Rep 83 at para 17(2) – *"I hold that this letter did not set out the change in a way in which it could be argued that [Hussmann] had the necessary knowledge. It certainly did not seek their consent."*

16. It followed, as Thomas J also found (at para 20) that without the necessary knowledge Hussmann could not have consented to the assignment of Establishment's business to the Company. Hussmann did not learn the full facts of the reorganisation until the first main hearing of the arbitration in November 1998 (*ibid*). It was agreed before Thomas J that the effect of Saudi Arabian law was that without the knowledge and express or implied consent of third parties such as Hussmann the transfer to the Company, although otherwise valid between its immediate parties as an assignment of both rights and liabilities, did not affect such third parties (at para 15).

17. That judgment was formally in proceedings between Hussmann and the Company, arising out of the first award, although Mr Pharaon was no doubt active in that litigation on behalf of the Company.

The arbitration

18. In its application for arbitration dated 7 February 1998 and again in its statement of claim Hussmann named the respondent to its claim as the Establishment, whose full name was therefore set out in the documents' heading. However, para 1 of the statement of claim, headed "Definitions", contained the following:

> *"1.2 "Al Ameen" means Al Ameen Development & Trade Establishment (also known as Al Ameen Development & Trade Co.) a limited liability company incorporated under the laws of the Kingdom of Saudi Arabia (Commercial registration No. 7415)…"*

19. That definition was consistent with the respondent being named as the Establishment, and cited its registration number, but entered into confusion in saying that it was "also known" as the Company, and was a limited liability company.

20. The pleading went on to refer to the contract, to the appointment of *"Al Ameen"* as Distributor under it, to the supply of products to "*Al Ameen*" in the period from March 1988 to July 1990, to the raising of invoices in respect of such goods, and then (moving into the period after the Company's incorporation) to plead "Al Ameen's" failure to perform and its own notice of termination. It claimed an unpaid balance of £108,620.

21. The "*reply and counterclaim*" was dated 2 February 1998 and signed by London solicitors on behalf of the *"respondent*", who was identified in the heading as the Establishment. Paragraph 1 stated that the respondent *"will adopt the definitions in the Statement of Claim"*. The respondent denied that it had failed to perform the contract, stated that Hussmann had wrongfully refused to supply it since June 1990, and counterclaimed 7.5% on direct sales to supermarkets as well as damages for both past loss and, as a result of an alleged wrongful termination of the contract, future loss of profits as well. As for Hussmann's claim in respect of goods supplied, it stated that some of them had been supplied "*to another company Al Naerabyn Conditioning and Cooling and Tools Company ("Al Naerabyn")"*. At para 4.5 it added: *"Al Naerabyn and Al Ameen are separate and distinct entities – see Appendix 3 for copies of the separate and commercial registrations together with English translations."*

22. At appendix 3 it included the registration details of the Company, viz *"Al-Ameen Development and Trade Co Ltd…Limited Liability Co"* with its "*No. 1010122156*". That registration number was of course different from that of the Establishment which had been cited in para 1.2 of the statement of claim.

23. As at that stage, we would be inclined to say that the respondent was agreed to be the Establishment, who after all was the original party to the contract, but that there was confusion on both sides as to whether the Company was a change of name for the Establishment or had in some way superseded it.

24. On 30 August 1998 Mr Pharaon made a witness statement. He described himself in its opening paragraph as general manager of the Establishment and said he was authorised to make the statement on its behalf. He said that the reply and counterclaim had been drafted on his instructions and was true to the best of his knowledge and belief. An early passage described Al Ameen as "*a limited liability company…initially established in 1974. I was the sole owner until 25.12.92 when 4 new partners joined the company.*" He went on to list the current "*directors and shareholders of Al Ameen".*

25. It appears from this passage that Mr Pharaon did not differentiate between the Establishment and the Company. He may have simply regarded the latter as succeeding the former but without changing its legal identity. It is possible, but by no means certain, that such a view could be that of a businessman who was not versed in legal niceties. It is also possible, however, that that is to be over generous to Mr Pharaon, for in a later passage in his statement he criticised Hussmann for – *"some confusion in [its] mind as to its identity. "Hussmann Manufacturing" is the Applicant in this case, but does not appear to be a legal person in its own right."*

26. It was also in August 1998 that Hussmann obtained advice from a Saudi Arabian lawyer, Mr Yousef Al-Jadaan, relating to the status of the Establishment. He advised that the Company now existed as a separate entity from the Establishment and that the Establishment had been deleted from the commercial register on 16 February 1994 and that since that date it no longer existed as a legal entity and had no legal capacity. Thomas J in his first judgment (at para 17(6)) found – *"The advice was not accurate…because the Establishment had never had a separate legal personality; it was no different from Mr Pharaon. What obviously must have been meant in the advice was that Mr Pharaon could not trade as a commercial agent under the name of the Establishment as it was not registered in the Commercial Register."*

27. This advice obviously led to a desire by Hussmann to clarify the status of the respondent to the arbitration. Accordingly on the opening day of the substantive hearing, 2 November 1998, Mr Cyril Kinsky, then as now counsel for Hussmann, placed before the arbitrators a note of his opening in which he took the position that the respondent was the Establishment (commercial registration no 7415) and not the Company. Thus his note at footnote 1 clarified Hussmann's own statement of claim in this respect as follows: *"Paragraph 1.2 of the Statement of Claim fails to distinguish between two separate legal entities: Al Ameen (as defined above) which ceased to exist on 16/02/94 (see statement of Mr Al-Jadaan) and Al Ameen Development & Trade Co. Ltd. (Company registration number 1010122156), which came into existence at about the same time. The Statement of Claim is wrong not to make the distinction. The latter entity will be referred to by Hussmann as "Al Ameen Company Limited" to distinguish it from the unincorporated Al Ameen."*

28. At that stage it would appear that Mr Kinsky's analysis had not developed further than this distinction. Thus his opening note does not go on to submit, as it might have done, either that, having ceased to exist, the Establishment could not be the subject of legal proceedings (such a submission would not have assisted Hussmann on its claim, but it might have assisted in wrecking the counterclaim), or that the Establishment was none other than Mr Pharaon himself.

29. It appears that there was then a process of (more or less) elucidation during the hearing as to the effect of the reorganisation of the Establishment's business. As part of that process Mr Pharaon faxed a number of letters dated 3 November 1998 to his solicitors, which were presented to the tribunal and subsequently annexed to its first award. In them he said that the Establishment had been "*subrogated and replaced*" by the Company but that since the Company had taken over all the assets and liabilities of the Establishment and since his other

shareholders in the Company were his minor children, who would be his successors in due course (under Sharia thinking), he had not thought it necessary to inform every one officially about the details of the reorganisation, "*and that only change was the word "establishment" to "Company"*."

30. As a result Mr Kinsky pleaded an amendment to Hussmann's pleadings which was presented to the tribunal in the course of his final submissions on 5 November 1998. The respondent, the Establishment, was now defined in this way: *""Al Ameen" means Mr Ahmed Pharaon trading as Al Ameen Development & Trade Establishment (Commercial Registration number 7415)…"*

31. Moreover, in an amendment to its defence to counterclaim Hussmann pleaded the reorganisation of Mr Pharaon's business and its understanding of Saudi Arabian law: to the effect that it had never consented and did not consent to the transfer of the Establishment's business to the Company, and that (as it believed on the basis of Mr Al-Jadaan's advice) the Establishment (Al Ameen), on its deletion from the register, had disabled itself from performing the contract as a Distributor. It also now pleaded that the respondent was Mr Pharaon, not the Company, and the person entitled to bring the counterclaim was similarly Mr Pharaon and not the Company.

32. However, Mr Kinsky's application to amend Hussmann's pleadings in these terms was opposed, and the tribunal ruled that the application was refused and that it would give its reasons in its award.

33. In his final submissions Mr Kinsky had submitted that in any event it would be wrong for the tribunal to allow losses suffered by the Company, now shown to be a different legal entity from that which had entered into the contract, to be recovered on the counterclaim. "*To purport to make an award in favour of an entity which the Tribunal knows is not a party to the arbitration would be a serious jurisdictional error.*" On the other hand, *"Mr Pharaon continues in existence, and is entitled to sue and be sued in this arbitration."*

34. Unfortunately, the tribunal did not accede to that submission and made its first award dated 11 June 1999 in favour of the Company. On the title page of its award it now described the respondent as the Establishment "converted to" the Company. It rejected the "attempt to remove the Company…and to add Mr Ahmed Pharaon trading as…Establishment" for two reasons. First, it was "much too late in the day to take the point at this stage". Hussmann had "obviously sued both", ie the Establishment and the Company. Secondly and more importantly, the point was without merit for *"the conversion of Al Ameen from Establishment to a limited liability company in February 1994, makes it [sc the Company] the correct party to this arbitration…We are satisfied…that there has been a proper succession of the rights and obligations to the Company from the Trade Establishment, by Saudi Law. The full explanation is given by Mr Pharaon in Faxes sent during the hearing to the Tribunal with enclosures annexed hereto as Annex 9."*

35. The arbitrators went on to award Hussmann $57,428 on its claim and the respondent $660,287.32 on its counterclaim, or a net $602,859.32 in favour of the respondent.

The first award declared to be without jurisdiction: the first judgment

36. The first judgment was given by Thomas J on 19 April 2000, pursuant to an application (1999 Folio No 1199) made under section 67 of the Arbitration Act 1996 by Hussmann against the Company (and the arbitrators) that the first award should be set aside as having been made without jurisdiction. Mr Pharaon (or the Establishment) was not, it seems, a party to those proceedings, but they were defended on behalf of the Company by the solicitors and counsel who had acted at the arbitration. In sum, Thomas J agreed that the arbitrators had no jurisdiction to make an award in favour of the Company. The Company raised two issues in defence of the first award. One was that the Company had become a party to the contract and thus to the arbitration agreement contained in it; the other was that Hussmann had left it too late to object to the tribunal's jurisdiction.

37. Thomas J rejected both of those submissions. He found, as stated above, that Hussmann had not known of and had never consented to the transfer of Establishment's business to the Company. Therefore the Company had never become a party to the contract or its arbitration agreement. He also rejected a subsidiary contention that, because of the definition of "Al Ameen" which both parties had adopted in their pleadings, there had been an ad hoc agreement between Hussmann and the Company to refer disputes to the tribunal. In his judgment that definition's reference to Al Ameen as a limited liability company was simply an error, based on the fact that Hussmann had at that time thought the Establishment to have had separate legal personality from Mr Pharaon. Thus – *"There is nothing to suggest that they knew of the transfer to the Company. They had simply made a mistake as to the legal status of the Establishment; it is clear from their reference to the correct number that they were referring to the original party to the agreement" (at para 17(4))*.

38. As for the contention that Hussmann had raised the jurisdictional point too late and had therefore lost the right to object (an invocation of the provisions of sections 31 and 73 of the Act which require an objection to substantive jurisdiction to be raised without delay), it likewise followed from Hussmann's ignorance of the transfer that it had not sat on its hands. Thomas J put the point in this way (at paras 23/24):

"It is clear from the facts which I have set out that until late August, 1998 [Hussmann] knew only of the Establishment and that the party against which they had commenced arbitration was the original party to the distributorship agreement – the Establishment…The suggestion that the respondents had made the position clear in their pleading is fanciful; at par. 4.5 of the defence served in the arbitration by the respondents, there was a reference to the commercial registration form of Al Ameen which was exhibited; however that was in the context of drawing a distinction between "Al Ameen" and "Al Naerabayn" in the context of a plea that Al Ameen was not responsible for payment of supplies made to Al Naerabayn

…It was only after the first day [of the hearing] that information was provided by the respondents and the law of Saudi Arabia elucidated; given all the preparation that had to take place for the arbitration, I do not think they were to be criticized for waiting until the first day of the hearing, particularly given the fact that the respondents had failed themselves to provide any information about the transfer or to plead it. Moreover, had they taken the point that they believed was correct that the Establishment did not exist, they would have in fact been wrong. The Establishment did exist and, in fact, they were right in their decision to continue with the arbitration. The tribunal did in fact have jurisdiction over its claim for the moneys claimed to be due from the Establishment and to decide on the termination of the distributorship agreement…"

39. We have cited these extracts at length because it is clear from them that Thomas J considered that the reference brought by Hussmann before the arbitrators was a reference against the original party to the contract, the Establishment viz Mr Pharaon, and that the true respondent to the reference was Mr Pharaon trading as the Establishment. It was not necessary, however, for him to decide in terms that Mr Pharaon was not only the intended and only proper respondent but had *actually responded* to the reference, for that was not in issue (and Mr Pharaon was not formally a party to Hussmann's application). Thomas J did, however, record in an early part of his judgment (at para 9) that – *"On July 22, 1997 Dr. Nader Gangi was nominated by Pearson Lowe solicitors instructed by Mr Pharaon and the Company as the arbitrator for the respondents to the arbitration…"*

40. Mr Kinsky has informed us that there never has been any evidence of who in fact instructed the solicitors. It is plain, however, that evidence was put before Thomas J for the purposes of his first judgment, and we would infer that amongst that evidence must have been the letter dated 22 July 1997 or some other material which has led the judge to make the finding that he did. As we have said, there did not at that time appear to have been any issue to the effect that Mr Pharaon was not a respondent, only to the effect that the Company was not, or could not properly be, a respondent.

41. Thomas J's decision left certain loose ends for subsequent argument, inter alia concerning the costs of the arbitration and the status of the first award.

Could the Establishment enforce the first award, or was the arbitration over? The second judgment

42. Following that first judgment, and at a time when those loose ends were still pending, the Establishment issued its own application on 17 May 2000 (2000 Folio No 551) to enforce the first award in its own name pursuant to section 66 of the Act. The matter came back before Thomas J on 23 June 2000 when he made an order that the tribunal "*had no jurisdiction to make an award*" in respect of the Company, but otherwise left open the status of that award. For instance section 67 of the Act, which Hussmann had invoked in its application, speaks in sub-section (1)(b) of 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"; and in sub-section (3)(c) of an order to "set aside the award in whole or in part". On 23 June 2000 both Hussmann's section 67 application and the Establishment's section 66 application were before Thomas J, and he gave directions for both to be heard together on 31 July 2000, following the filing of further evidence. It follows that the Establishment was a party to Thomas J's second judgment, even if not to his first.

43. On 31 July 2000 Mr Kinsky asked the judge to set aside the first award, and Mr Andrew Bird (who had appeared as counsel at the arbitration and again on Hussmann's section 67 application) asked the judge not to set it aside but to enforce it, declaring it to be an award in favour of the Establishment. He submitted that although the arbitrators thought that they were making an award between Hussmann and the Company, in fact it was made between Hussmann and the Establishment. The judge could not, however, accept that view of the matter: it was clear to him both from the terms of the award itself and from the arbitrators' refusal of Hussmann's application to amend its pleadings that the arbitrators intended to make their award against and in favour of the Company *only*. The judge said (at page 5E of the unreported transcript): *"The arbitrators refused that amendment on the basis that they considered the only person with whom Hussmann had continued to contract was the Company."*

44. Mr Bird alternatively submitted that the judge should vary the award (under the power given under section 67(3)(b)) so as to make it an award between Hussmann and the Establishment. The judge however considered that to do that would be unjust, since Hussmann had never had an opportunity before the arbitrators to pursue the defence to counterclaim which its amended pleading had sought to put before them, viz that the Establishment had ceased to be able to perform the contract after it had been deleted from the register. The judge was also unwilling to remit the award to the arbitrators, pointing out that section 67(3) contains no power of remission.

45. Mr Kinsky on the other hand, on behalf of Hussmann, asked the judge to say that the tribunal was *functus officio*, ie that its authority was spent; and that in any event, where *"the Establishment had taken their stand during the arbitration on the fact that the claim was made by the Company…it would not be right to allow them to reopen the whole matter after the arbitration, particularly having resisted the attempt to raise the point in the amendment"* (at 7H/8A).

46. Thomas J declined however to take that course, in part because Mr Kinsky was not prepared to argue the *functus* point in full, but principally because the judge felt that the decision whether or not it was right for the Establishment to be able to reopen the issues was *"preeminently a matter for the arbitrators…Those matters are for the arbitrators to consider entirely afresh and without any indication whatsoever of a view from me"* (at 8F/9A).

47. Thomas J therefore dismissed the Establishment's application to enforce the award, and said he would "in accordance with Section 67(3)…simply set aside the award made" (at 9E). He must there have been referring to

the court's power to set aside under section 67(3)(c). However, when his order (nominally dated 31 July 2000) came to be drawn up it did not set aside the award but declared that the award "is of no effect". We do not know why that change occurred, but we assume that, as is usual in the commercial court, the form of order was drawn up and agreed by the parties.

48. It is to be noted that there was no submission by Mr Kinsky that Mr Pharaon was not a respondent to the arbitration. On the contrary, the hearing on 31 July before Thomas J and his second judgment appear to have been premised on the understanding that Mr Pharaon was the respondent to the reference. Otherwise it was of course incoherent for the Establishment to claim to enforce the award or to be able to take a varied award in its own name. Moreover, we would refer to the submission by Mr Kinsky just cited from the second judgment that the Establishment had taken its stand during the arbitration on the fact that the claim was made by the Company. That submission accepted that the Establishment *was* a respondent, even while it put in issue that respondent's right to reopen the reference.

The second award

49. The parties, Hussmann and the Establishment (which we will maintain as a shorthand for Mr Pharaon trading as the Establishment), therefore returned to the arbitrators. There was a further hearing leading to a second award dated 3 July 2001. The second award restored the outcome of the first award, a net balance on claim and counterclaim of $602,859.32 but this time in favour of the Establishment. In addition they awarded against Hussmann the costs of all the proceedings embracing both awards.

50. In reaching their conclusions the arbitrators rejected Hussmann's preliminary submissions (1) that Mr Pharaon was not a party to the reference; (2) that the failure of the first award did not have the effect of restoring the dispute to the tribunal; and (3) that the tribunal lacked authority to make any further award. It is to be noted that this was the first time that the point made in preliminary submission (1) was raised on behalf of Hussmann. Moreover it does not appear from this recital of Mr Kinsky's submissions (taken from para 37 of the second award) that he developed before the arbitrators the alternative submission canvassed before Thomas J that by its opposition to Hussmann's draft amendments the Establishment, on the basis that it was a respondent to the arbitration, had prevented itself from pursuing the arbitration in its own name. There is in fact no sign of that submission in the second award, and the arbitrators used the incident of Hussmann's attempt to amend as proof that Hussmann recognised the Establishment as the proper respondent to the reference, without discussing at all whether the successful opposition to that attempt was in some way an impediment to the Establishment's ability to persevere with its counterclaim.

51. As for their rejection of Mr Kinsky's first submission, apart from relying on the amendment episode the arbitrators also relied on Thomas J's first judgment, stating that they were bound by his findings of fact and law. It is we think clear from the first judgment that Thomas J did consider that Establishment was not only the proper respondent to Hussmann's reference to arbitration but did also actually respond to it (see paras 39/40 above), but whether his view was binding on the arbitrators we are not sure. At any rate they seem to have erred in citing and emphasising the following sentence from para 20 of the first judgment as being decisive: *"Therefore when the arbitration was commenced it follows that the parties to the arbitration agreement remained [Hussmann] and the Establishment and at no time thereafter did the position change."*

The arbitrators said (at para 41): *"[Thomas J] also held, in no uncertain terms, that because there had been no consent, express or implied to the assignment, the Establishment, ie Mr Pharaon, was the correct party to this reference and that "at no time thereafter did the position change"."*

52. However, Thomas J was there talking about the rights in the contract and in the arbitration *agreement* contained in it: he was not talking about the *reference*. We nevertheless agree that, because of Hussmann's general ignorance of the reorganisation, the inference that the intended respondent to the arbitration was the Establishment, the original party to the contract, is a strong one and that was also the view of Thomas J.

53. As for Mr Kinsky's second and third submissions, the arbitrators went on to state that the consequence of the first judgment and the declaration "of no effect" was to render the first award a nullity and otherwise to leave the reference where it had been, without discharging their duty to render an effective award. They concluded: *"We hold therefore that this Tribunal has jurisdiction, is not functus officio, remains seized of the reference and the position now is that the reference reverts to the position in which it stood immediately before we signed the Award on 11th June 1999."*

54. On the merits, Mr Kinsky did not ask the arbitrators to reopen them entirely, but only in so far as was necessary to take cognisance of his submissions, first that the Establishment's claim for commission on direct sales was time-barred to the extent that it was based on sales prior to six years before Establishment's written case (following the first judgment) to the tribunal of 14 November 2000; and secondly that the Establishment's claim was in any event undermined by its inability to perform the contract after its deletion from the register. The arbitrators rejected both submissions. The limitation point was merely another aspect of the preliminary objection, already rejected, that the Establishment had never been the respondent to the reference. The deletion from the register point was rejected on the basis that Mr Pharaon always remained able to perform the contract; that, as the tribunal had already determined in its first award, Hussmann had not required any performance; and that, as Hussmann itself accepted, the contract only terminated pursuant to its own notice as of 31 October 1996.

Hussmann's attack on the second award: the third judgment

55. Following the second award Hussmann applied, with the aim of nullifying or remedying its effect, under various sections of the Act (2001 Folio 879). Under section 67 it sought to have the second award declared of no effect. Under section 68 it sought to challenge the material paragraphs dealing with the merits of the Establishment's counterclaim on the basis of serious irregularity. Under section 69 (appeal on point of law) it sought to raise questions of law on interest and costs. And under section 28(2) it sought to have the court adjust the arbitrators' fees. The first respondent to these proceedings was named as Mr Pharaon "formerly trading" as the Establishment. The arbitration was named as one between Hussmann and the Company.

56. These applications came before Mr Brindle QC, the author of the third judgment. Mr Brindle adjourned the application under section 28(2) but rejected the rest. He granted permission to appeal but limited to the following two issues:

(1) whether Mr Pharaon was a party to the arbitration reference; and

(2) if so, was the tribunal *functus officio* with the result that it had no jurisdiction to make the second award in favour of Mr Pharaon.

57. Mr Brindle described the first issue as the central and most difficult point requiring resolution. He went through the history of the arbitration and the court proceedings. He agreed with Thomas J's view in the first judgment that Hussmann's definition of "*Al Ameen*" referred to the Establishment and therefore that there was no doubt that the Establishment was the intended respondent to Hussmann's reference to arbitration (para 11). He then raised the question of who in fact responded to Hussmann's reference. He said that on 22 July 1997 Dr Nadar Gangi was nominated by the solicitors "*instructed by Mr Pharaon and the Company*" as the arbitrator for the respondent or respondents. In so doing, he was repeating the finding made by Thomas J in his first judgment (see para 39 above). Mr Kinsky repeated his submission that there was no evidence before Thomas J or Mr Brindle as to who in fact instructed the solicitors. Apparently no disclosure was sought relating to that matter. The judge accepted that he could not be clear as to precisely what role Mr Pharaon had played in the instruction of the solicitors, but said that there was nothing to suggest that the nomination had not been made on behalf of the Establishment, ie Mr Pharaon. He therefore concluded (at para 12) that – *"The arbitration application was addressed to Establishment and Establishment responded, even if the Company was also involved in appointing the arbitrator."*

58. As for paragraph 4.5 of the reply and counterclaim, which referred to the separate commercial registration of Al Ameen as an entity distinct from Al Naerabyn and annexed the *Company's* registration document, he considered this demonstrated confusion in Mr Pharaon's mind but was insufficient to render the respondent to the arbitration anyone other than the Establishment. He adopted a similar response to Mr Pharaon's witness statement: what Mr Pharaon said was wrong, and may have misled, but there was no material to suggest a deliberate intention to mislead, and Mr Pharaon's errors could not change the parties to the reference.

59. When Mr Brindle arrived in his history of events at the opposed application to amend Hussmann's pleadings, he described this as giving him some cause for concern. Who, through counsel (Mr Bird), had opposed Hussmann's attempt to clarify the respondent as being none other than Mr Pharaon (trading as the Establishment) himself? Hussmann's submission was that it could only have been the Company. Despite his concern, Mr Brindle nevertheless disagreed (at para 19): *"It may be said that the Company was purporting to be a party, although it never properly was one. Alternatively it may be said that it was the Establishment, i.e. Mr Pharaon, who was arguing in favour of an award being made to the Company. The precise legal basis of the position of Mr Bird and his clients is unclear, but I conclude that these facts do not constitute or evidence the substitution of the Company as a party to the reference for Establishment, which had certainly been the party to the reference up to this point."*

60. Mr Brindle added that his conclusion was supported by Hussmann's closing submissions to the tribunal (see para 33 above) that in any event, even though the arbitrators had refused the application to amend, they had to recognise that it was Mr Pharaon rather than the Company who was entitled to sue and be sued in the arbitration. That had been Hussmann's own submission to Thomas J on its first application. Thomas J had himself regarded the Establishment as being the party sued and which had responded in the reference. The Company may have purported to behave as a party to the reference, but it was never a proper party.

61. On the second issue, Mr Brindle considered Mr Kinsky's submission that the absence of the power to remit in section 67 meant that the reference was over and the tribunal therefore *functus officio*. He considered leading text-books and some authority, which he regarded as inconclusive. Ultimately, he accepted the competing submission that an award which had been declared to be of no effect was a nullity and that the position reverts to where it was before it was uttered, and added (at para 33): *"It is hard to see how the Tribunal can be functus officio where its award is declared a nullity. The considerations adverted to by Mustill and Boyd and by Thomas to the effect that in cases amounting to effective misconduct it is undesirable for matters to be referred back to the same arbitrators have no relevance at all in respect of section 67, which deals with jurisdictional problems only."*

Hussmann's submissions on this appeal

62. On the first issue (Was Mr Pharaon a party to the reference?), Mr Kinsky on behalf of Hussmann submitted as follows. He said that in its first award the tribunal had found that the Company was the correct party to the arbitration and that remained binding despite the award's invalidity. He disputed that Thomas J in the first judgment had found that the Establishment was respondent to the reference, only that it was the only proper party to it. In any event the critical question was not so much as to the intended respondent to Hussmann's claim but as to the maker of the reply and counterclaim. On that question the most compelling evidence was that of the

behaviour of the opposing party to the reference, and that party had represented that it was the Company and not the Establishment. In particular it had accepted a definition of itself as a limited company, served as annex 3 to its pleading the Company's certificate of registration as proof of its identity, claimed damages that arose after the deregistration of the Establishment, served a witness statement from Mr Pharaon stating that "Al Ameen" was a limited liability company, sent faxes for placing before the tribunal as to how the Establishment had been *"subrogated and replaced by the Company*", opposed Hussmann's amendment to clarify the respondent as Mr Pharaon trading as the Establishment, and asked the tribunal for an award in favour of the Company.

63. On the second issue (Was the tribunal *functus officio*?), Mr Kinsky submitted that once the arbitrators had published their first award as a final award on both their jurisdiction and the merits, they had exhausted their authority. If Mr Pharaon was a party to the reference (if he was not, the second issue did not matter), he had had his opportunity to obtain an award in his favour but had deliberately sought an award in the name of the Company and not of himself. For whatever tactical advantages, he had played and lost. As a result, the arbitration was over and he could not have "a second bite at the cherry".

Mr Pharaon's submissions on this appeal

64. On the first issue, Mr Siberry QC on behalf of Mr Pharaon submitted that Hussmann clearly intended to commence and thus did commence the arbitration against its contract partner, the Establishment. Thus the reference to it as a limited company was an error as to its status not its identity. Once Mr Pharaon became a party to the reference, he remained a party, even if he sought to suggest that the Company was also a party. There was no mechanism by which he ceased to be a party. Although reference was made to the Company in the reply and counterclaim, this was principally to distinguish it from Al Naerabyn, and in any event there was never any pleaded reliance on the assignment to the Company or on Hussmann's consent to such assignment. And even if the counterclaim is to be treated as being made on behalf of the Company, that would not have resulted in Mr Pharaon ceasing to be a party. Opposition to Hussmann's amended pleading, even though successful, could not bar Mr Pharaon revisiting the question of the correct respondent. Hussmann continued to assert that Mr Pharaon was the respondent down to the time of the first award. Thomas J as well as Mr Brindle found that Mr Pharaon was the respondent to the arbitration, and were right to do so.

65. On the second issue, Mr Siberry submitted that on a pure question of law Mr Brindle was right for the reasons which he gave. A tribunal cannot be deprived of jurisdiction by making an award which is declared by the court to be of no effect. On the contrary, such a tribunal remains under a duty, both statutory (see section 33 of the Act) and contractual to proceed to a valid award. The same may be said of a situation where an award has been set aside. It is only a valid final award, and not a mere nullity, which deprives a tribunal of its jurisdiction.

66. Finally, submissions as to second bites at the cherry were beside the mark. They amounted to an argument of irrevocable election, something raised neither before the tribunal nor Mr Brindle, and which in any event went to procedure or merits, either of which remained in the exclusive province of the arbitrators, but did not go to jurisdiction. Such a submission was not open to Hussmann and was in any event bad, because a false point as to who was respondent to the reference does not amount to a withdrawal from or abandonment of the reference.

Discussion: the first issue – Who was respondent to the arbitration?

67. The richness of the material made for a wealth of argument, illustrated by a document submitted by Mr Kinsky during the hearing of the appeal. This document sought to list factors on both sides of this issue and was deployed by Mr Kinsky as a powerful forensic tool. Nevertheless, in our judgment the judge was right to conclude that the Establishment (Mr Pharaon) started as the respondent to the reference and never ceased to be such. We would in particular draw attention to the following matters.

68. (1) The Establishment was Hussmann's contract partner and thus, subject to a process of novation whether by consent or statutory process under Saudi law, could be the only party against whom Hussmann could validly or sensibly invoke arbitration. There is therefore a strong inference that Hussmann intended to make the Establishment the respondent to its application for arbitration and to the reference.

69. (2) Despite the confusion introduced by Hussmann's statement that "*Al Ameen*" was also know as *"Al Ameen Development & Trade Co"* and was a limited company, we agree with both Thomas J and Mr Brindle that the better way to read the definition of Hussmann's respondent is as a reference to the Establishment. The person primarily identified as respondent and named in the title to the document is the Establishment: the fact that the Establishment is said to be "also known" as the Company is a mere error; the description of the respondent as a "*limited liability company"* is another error, for it is true only of the Company and not of the Establishment, although Hussmann may not have known that; and the identification of the respondent with the person having "Commercial Registration No, 7415" (ie the Establishment) is telling, particularly as that number is also cited in the contract itself. Thus Hussmann's definition of its respondent both begins and ends with the Establishment. If Hussmann's contract had been with the Company, or if Hussmann had known of and consented to the transfer of its contractual relationship from the Establishment to the Company (see below), then it may well be that the inconsistencies of its definition of *"Al Ameen*" would need to be interpreted in another way. As it is, we agree with Mr Siberry that Hussmann's errors are mistakes as to status, not as to identity.

70. (3) Hussmann did not know of or consent to the Establishment's reorganisation. That was the essential bone of contention before Thomas J and the subject of the critical series of findings of his first judgment. If Hussmann had known of this, then it may be that Hussmann's pleadings should be re-interpreted as identifying the

Company or possibly as referring to both the Establishment and the Company. As it is, the most that can be ascribed to Hussmann is that it had read about the Company and considered that it was the new name of the Establishment.

71. (4) The fact that the respondent in para 4.5 of its reply and counterclaim identifies "Al Ameen" with the Company via annex 3 (see paras 21/22 above) is not compelling. The identification with the Company is not expressly pleaded and arises only as an inference from the reference to annex 3. The real point being made in para 4.5 is that "Al Ameen" and "Al Naerabyn" are different entities, and that is true on any view.

72. (5) Mr Pharaon's witness statement, like his reply and counterclaim, shows only that he is confused about the whole matter of the relationship between the Establishment and the Company. Thus Mr Pharaon refers to the "limited liability company" as having been founded in 1974, when he ought properly to refer to the Establishment (see paras 24/25 above). A case might perhaps have been made that such confusion was deliberate, but has not. Mr Pharaon's faxes to the tribunal (see para 29 above) take the matter no further forward.

73. (6) Hussmann maintained at all times from November 1998, when the distinction between the Establishment and the Company was elucidated during the hearing before the arbitrators, until the return to the arbitrators following the second judgment, that Mr Pharaon was a respondent and indeed the only possible respondent to the arbitration. In adopting that position, Hussmann was making an argument which Thomas J and subsequently Mr Brindle were to adopt as correct.

74. (7) Although the respondent to the arbitration argued that the Company rather than the Establishment was a party to the reference, the arbitrators, in rejecting Hussmann's amendment that the Establishment was the *only* respondent, found that *both* entities had been made respondent, but that the only proper respondent, given their understanding of the evidence about the reorganisation, was the Company (see para 34 above). In that they were mistaken, and their first award has in any event been nullified by Thomas J's order. For both those reasons Mr Kinsky's reliance on the findings of the first Award is misplaced. We refer to their finding, however, because it indicates that the arbitrators accepted the full submission of neither side to the reference. In this connection Mr Kinsky's submission, that the respondent's contention before the arbitrators as to its own identity should be given special weight, is nevertheless a powerful one. The fact remains, however, that a contention may not be valid: parties to litigation often adopt even contradictory submissions as it suits them to do so. The present arbitration and litigation show that this is true of all parties to them. The weight of Mr Kinsky's submission, as it seems to me, goes on proper analysis not to the question of who the proper respondent to the reference really was, but to the question of whether Mr Pharaon should now be allowed to be heard to say that it was he, trading as the Establishment, and not the Company; as to which see below.

75. (8) We accept the submission, as Mr Brindle did below, that if the reference began life with Mr Pharaon as a respondent to it, that position never changed. Hussmann always pursued an award against its contract party. It never submitted that Mr Pharaon, if he had become a respondent to the reference, abandoned his role in the arbitration, or resigned from it (if indeed he could do so unilaterally), or abandoned or withdrew his counterclaim. There was no such submission before the tribunal at the time of the submissions leading to its second award (see para 47 above). Nor is there any sign in the third judgment that such an argument was raised before Mr Brindle.

76. (9) Finally, as to the question of who instructed the respondent's solicitors in appointing an arbitrator: this could only properly be investigated by obtaining disclosure of the solicitors' instructions or through evidence from Mr Pharaon. The disclosure was not sought, nor it seems was the evidence provided. However, the point had not been challenged before Thomas J and may not have been pin-pointed in the lead-up to the hearing before Mr Brindle. In those circumstances we consider that Mr Brindle was entitled to make inferences from the surrounding circumstances that the instructions came from Mr Pharaon (even if perhaps they also came from his Company). In essence there is nothing in this absence of further material to detract from the conclusions otherwise arrived at.

77. We would agree therefore with Mr Brindle before whom it was in dispute, and with Thomas J before whom it was not in dispute, that Mr Pharaon trading as the Establishment was the respondent who answered Hussmann's claim and was party to the reply and counterclaim. The separate submission that Mr Pharaon is taking a second bite at the cherry will be dealt with below, in the context of discussion of the second issue.

The second issue: Was the tribunal functus officio?

78. This issue assumes that Mr Pharaon was a respondent to the reference, for if he was not, this issue is not reached.

79. Neither party has cited any prior authority as being determinative of this issue. Both *Mustill and Boyd, The Law and Practice of Commercial Arbitration in England*, 2nd ed, 1989, and *Thomas, Appeals from Arbitration Awards*, 1994 contemplate that in principle a setting aside means that the arbitration reverts to the position it was in before the arbitrator published his award so that the arbitrator is not *functus officio*; but both also seem to allow that there is some authority to suggest that the setting aside of an award may bring the arbitrator's jurisdiction to an end. Thus *Mustill and Boyd* at 565 say this:

"As regards setting-aside, it is clear that the effect of an order is to deprive the award of all legal effect, so that the position is the same as if the award had never been made. It is much less clear what happens to the arbitration after the award has been set aside. Logically, the consequence should be that the arbitration reverts to the position in which

it stood immediately before the arbitrator published his award; i.e. that he is not yet functus officio and remains seized of the reference…

"Another possible view is that the setting-aside of the award frustrates the entire arbitral process, and that the dispute falls back on the inherent jurisdiction of the Court. This proposition is not theoretically sound…

"It appears that so far as the courts have given any consideration to the consequences of setting aside, they have assumed that the Order not only annuls the award, but also desseizes the arbitrator of the reference, so that the whole of the arbitral process has to be recommenced. The dispute is, however, still susceptible of arbitration, albeit with a freshly constituted tribunal…"

80. *Thomas* at 8.11.2/4 is to similar effect. Both text-books refer to ***Stockport Metropolitan Borough Council v. O'Reilly*** [1983] 2 Lloyd's Rep 70, but in our judgment this decision is not inconsistent with the logical principle preferred by the authors of those text-books. In that case an interim award made in November 1976 was set aside in December 1977. The dispute then returned to the arbitral tribunal. There were desultory interlocutory proceedings until May 1979, and in September 1981, nearly four years after the setting aside, the arbitrator sought to resume the reference against the protests of one of the parties. Neill J held that it was an exceptional case in which leave under section 1 of the Arbitration Act 1950 was appropriate to revoke the authority of the arbitrator. Apart from this decision, reference is made in the foot-notes of *Mustill and Boyd* to cases where the setting aside of arbitral appeal awards revives the award of the original first instance arbitrator, which again does not seem inconsistent with the preferred principle. Similarly cases where, because of the misconduct of the arbitrators, the court has decided to set aside and not to remit their award, are not inconsistent with the principle. The courts thereby indicate their intention that the parties should pursue their dispute before new arbitrators. In such circumstances there is usually no need for a formal revocation of the arbitrators' powers. But if there is such need, then, as Mr Brindle remarked, there is the power to remove an arbitrator, now contained in section 24 of the Act.

81. In the present case, there has been no order of setting aside, but instead a declaration of no effect. It does not seem to us, however, that there is any difference of principle in those remedies. Certainly section 67(3)(c) contemplates that setting aside, in whole or in part, is a possible remedy for a successful challenge to the tribunal's substantive jurisdiction. It may be that where the whole of an award has been declared to be "of no effect" (section 67(1)(b)), there is no need for any setting aside, but we do not think that the one is inconsistent with the other. We note that it is an award "*on the merits*" which may be ordered to be of no effect, which suggests that an award which goes only to jurisdiction is simply to be set aside. While the declaration *"of no effect"* may usefully emphasise the retrospective aspect of such an order, we remain unconvinced of any difference in principle in either order so far as concerns its effect on the continuing status of an arbitration where there has been a final award on the merits which has lacked substantive jurisdiction.

82. It is true that there is no express power to remit under section 67(3) (compare section 68(3)(a)). However, on the basis of the principle which we have preferred, there would appear to be no need of such a power: the arbitration merely carries on or revives as necessary.

83. If, in the present case, the arbitrators had merely made an award as to their jurisdiction (to make an award against or in favour of the Company), but had not entered on the merits, we do not see how it could possibly be argued that the setting aside of that award, or its being declared to be of no effect, could deprive the arbitrators of jurisdiction to make a final award on the merits, if they were in a position to do so. We do not consider that the present situation, where they have gone on to make an award on the merits in favour of the Company alters the principle. A valid final award on the merits will of course exhaust the arbitrators' jurisdiction, subject to any remission from the courts: but we can see no good reason in principle why an *invalid* final award, in excess of jurisdiction, should lead to the same result, when once that award has been declared to be of no effect by the courts.

84. Ultimately, we are uncertain whether Mr Kinsky was minded fully to maintain a submission to the contrary. Rather he placed his emphasis on what he said were the exceptional facts arising out of Mr Pharaon's opposition to Hussmann's attempt to amend and the insistence on an award for or against the Company. This came to be referred to as the "*narrow submission*" on this issue. (It is not separately treated in Mr Brindle's judgment nor is it to be found within Mr Kinsky's written skeleton argument before Mr Brindle, but Mr Kinsky assured the court that it had been made orally in reply. Certainly the underlying facts had been relied on.) Thus Mr Kinsky says that an arbitration in which the respondent in a situation of conflict seeks to name its true identity will come to an end with a final award which adopts that submission. Such an award will either survive attack or may be nullified as a result of a challenge to substantive jurisdiction, but in either event the arbitration will be at an end.

85. The trouble with this submission, however, as with the more homespun argument that Mr Pharaon was trying to have "*two bites at the cherry*", is that, properly analysed, it constitutes a submission that Mr Pharaon had irrevocably elected to have his rights in the arbitration determined solely on the basis that the respondent was the Company; or that he had waived the right to an award in the name of himself or the Establishment; or that the attempt to seek a second award in the name of himself or the Establishment would amount to an abuse of process (see **Henderson v. Henderson** (1843) 3 Hare 100, **Johnson v. Gore Wood & Co** [2002] 2 AC 1). We are far from saying that such a submission could not succeed: but it goes either to matters of substantive law (election, waiver) which are for the arbitrators to decide, or to matters of procedure which are equally for the arbitrators. The rule in *Henderson v. Henderson* used to be regarded as a branch of the law of *res judicata* or issue estoppel;

now it is recognised as being a broader merit-based rule designed to prevent abuse of process (*Johnson* ***v. Gore Wood***): in either event, and however it should be categorised, it is a rule, like any rule of *res judicata* or abuse of process, which is for the tribunal itself to determine and does not go to the tribunal's substantive jurisdiction but to its willingness to act. It follows that it cannot be challenged under section 67.

86. In this connection we note that when this submission was canvassed before Thomas J on the occasion of his second judgment, he opined that whether it was right or not for the Establishment to be able to reopen these issues was preeminently a matter for the arbitrators (see at para 46 above). We agree with that. In the event, Hussmann does not appear to have pursued these issues before the tribunal (para 50 above).

87. There are other difficulties with the submission, which we mention to illustrate some of the matters which would need to be addressed if it were open for determination. Thus, it is difficult to suppose that any conduct of a respondent to an arbitration could prevent a claimant from obtaining an award against that respondent as the right party to the reference just because the tribunal had been erroneously persuaded by that respondent to make a first award against the wrong party. Therefore, while the submission might prevent Mr Pharaon pursuing a counterclaim against Hussmann, we do not see why it would prevent Hussmann from obtaining an award against Mr Pharaon. But if that is right, it demonstrates in a very practical way that the submission does not go to a question of *functus officio* at all. Similarly, the relevance of Hussmann's opposition to an award against or for the Company would have to be considered. That would itself bear on the question of Hussmann's continuing right to an award against Mr Pharaon and thus of the tribunal's jurisdiction. Thirdly, even if the pleaded counterclaim were to be regarded by the arbitrators as irrelevant, on the ground that it had been made by the Company and not by Mr Pharaon, the question would arise whether the tribunal would permit Mr Pharaon to bring that counterclaim anew in his own name. That appears prima facie to be entirely a matter for the tribunal's own discretion, and it is at that point that an argument about election, waiver or abuse of process might begin. Again, there is no sign that such an argument was addressed to the tribunal. Even if, contrary to our view, such an argument could go to substantive jurisdiction, it is hard to see how a challenge could properly be taken to the court on a ground not raised before the arbitrators. In these circumstances, it is perhaps unsurprising that the "narrow submission" did not figure in Mr Kinsky's written submissions before Mr Brindle and, albeit mentioned orally in his reply, was not treated separately in the third judgment.

Conclusion

88. For all these reasons, we conclude that Hussmann fails on both issues, and that its appeal should be dismissed.

Order: Appeal dismissed with costs summarily assessed in the sum of £24,694.

Leave to appeal to the House of Lords refused.

Mr Cyril Kinsky (instructed by Messrs McClure Naismith (Scotland)) for the Appellant
Mr Richard Siberry QC and Mr Paul Key (instructed by Messrs Zaiwalla & Co) for the Respondent